WORLD TRADE ORGANIZATION

WT/DS27/RW/USA
19 May 2008

(08-2182)

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

Report of the Panel

TABLE OF CONTENTS

LIST OF ANNEXES

ANNEX A

ANNEX B

ANNEX C

ANNEX D

**SECTION VIII (CONCLUSIONS AND RECOMMENDATIONS)
OF THE PANEL REPORT ON *EC – BANANAS III (ARTICLE 21.5 – ECUADOR II)***

TABLE OF CASES CITED IN THIS REPORT

Short Title	Full Case Title and Citation
Argentina – Hides and Leather	Panel Report, *Argentina – Measures Affecting the Export of Bovine Hides and Import of Finished Leather*, WT/DS155/R and Corr.1, adopted 16 February 2001, DSR 2001:V, 1779
Argentina – Poultry Anti-Dumping Duties	Panel Report, *Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil*, WT/DS241/R, adopted 19 May 2003, DSR 2003:V, 1727
Australia – Automotive Leather II (Article 21.5 – US)	Panel Report, *Australia – Subsidies Provided to Producers and Exporters of Automotive Leather – Recourse to Article 21.5 of the DSU by the United States*, WT/DS126/RW and Corr.1, adopted 11 February 2000, DSR 2000:III, 1189
Australia – Salmon (Article 21.5 – Canada)	Panel Report, *Australia – Measures Affecting Importation of Salmon – Recourse to Article 21.5 of the DSU by Canada*, WT/DS18/RW, adopted 20 March 2000, DSR 2000:IV, 2031
Brazil – Aircraft	Panel Report, *Brazil – Export Financing Programme for Aircraft*, WT/DS46/R, adopted 20 August 1999, as modified by Appellate Body Report, WT/DS46/AB/R, DSR 1999:III, 1221
Brazil – Aircraft (Article 21.5 – Canada)	Appellate Body Report, *Brazil – Export Financing Programme for Aircraft – Recourse by Canada to Article 21.5 of the DSU*, WT/DS46/AB/RW, adopted 4 August 2000, DSR 2000:VIII, 4067
Canada – Aircraft (Article 21.5 – Brazil)	Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft – Recourse by Brazil to Article 21.5 of the DSU*, WT/DS70/AB/RW, adopted 4 August 2000, DSR 2000:IX, 4299
Canada – Autos	Appellate Body Report, *Canada – Certain Measures Affecting the Automotive Industry*, WT/DS139/AB/R, WT/DS142/AB/R, adopted 19 June 2000, DSR 2000:VI, 2985
Canada – Provincial Liquor Boards (EEC)	GATT Panel Report, *Canada – Import, Distribution and Sale of Alcoholic Drinks by Canadian Provincial Marketing Agencies*, adopted 22 March 1988, BISD 35S/37
Chile – Price Band System (Article 21.5 – Argentina)	Appellate Body Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products – Recourse to Article 21.5 of the DSU by Argentina*, WT/DS207/AB/RW, adopted 22 May 2007
EC – The ACP-EC Partnership Agreement	Award of the Arbitrator, *European Communities – The ACP-EC Partnership Agreement – Recourse to Arbitration Pursuant to the Decision of 14 November 2001*, WT/L/616, 1 August 2005
EC – The ACP-EC Partnership Agreement II	Award of the Arbitrator, *European Communities – The ACP-EC Partnership Agreement – Second Recourse to Arbitration Pursuant to the Decision of 14 November 2001*, WT/L/625, 27 October 2005
EC – Approval and Marketing of Biotech Products	Panel Report, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R, Corr.1 and Add.1, 2, 3, 4, 5, 6, 7, 8 and 9, adopted 21 November 2006
EC – Bananas III	Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted 25 September 1997, DSR 1997:II, 591
EC – Bananas III (Ecuador)	Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas, Complaint by Ecuador*, WT/DS27/R/ECU, adopted 25 September 1997, as modified by Appellate Body Report, WT/DS27/AB/R, DSR 1997:III, 1085
EC – Bananas III (Guatemala and Honduras)	Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas, Complaint by Guatemala and Honduras*, WT/DS27/R/GTM, WT/DS27/R/HND, adopted 25 September 1997, as modified by Appellate Body Report, WT/DS27/AB/R, DSR 1997:II, 695

Short Title	Full Case Title and Citation
EC – Bananas III (Mexico)	Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas, Complaint by Mexico*, WT/DS27/R/MEX, adopted 25 September 1997, as modified by Appellate Body Report, WT/DS27/AB/R, DSR 1997:II, 803
EC – Bananas III (US)	Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas, Complaint by the United States*, WT/DS27/R/USA, adopted 25 September 1997, as modified by Appellate Body Report, WT/DS27/AB/R, DSR 1997:II, 943
EC – Bananas III	Award of the Arbitrator, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Arbitration under Article 21.3(c) of the DSU*, WT/DS27/15, 7 January 1998, DSR 1998:I, 3
EC – Bananas III (Article 21.5 – EC)	Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS27/RW/EEC and Corr.1, 12 April 1999, unadopted, DSR 1999:II, 783
EC – Bananas III (Article 21.5 – Ecuador)	Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 of the DSU by Ecuador*, WT/DS27/RW/ECU, adopted 6 May 1999, DSR 1999:II, 803
EC – Bananas III (Article 21.5 – Ecuador II)	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 (not circulated to WTO Members yet)
EC – Bananas III (Ecuador) (Article 22.6 – EC)	Decision by the Arbitrators, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Arbitration by the European Communities under Article 22.6 of the DSU*, WT/DS27/ARB/ECU, 24 March 2000, DSR 2000:V, 2237
EC – Bananas III (US) (Article 22.6 – EC)	Decision by the Arbitrators, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Arbitration by the European Communities under Article 22.6 of the DSU*, WT/DS27/ARB, 9 April 1999, DSR 1999:II, 725
EC – Bed Linen	Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/AB/R, adopted 12 March 2001, DSR 2001:V, 2049
EC – Bed Linen (Article 21.5 – India)	Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India*, WT/DS141/AB/RW, adopted 24 April 2003, DSR 2003:III, 965
EC – Export Subsidies on Sugar	Appellate Body Report, *European Communities – Export Subsidies on Sugar*, WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R, adopted 19 May 2005, DSR 2005:XIII, 6365
EC – Hormones	Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, 135
EC – Poultry	Appellate Body Report, *European Communities – Measures Affecting the Importation of Certain Poultry Products*, WT/DS69/AB/R, adopted 23 July 1998, DSR 1998:V, 2031
EEC – Apples I (Chile)	GATT Panel Report, *EEC Restrictions on Imports of Apples from Chile*, adopted 10 November 1980, BISD 27S/98
EEC – Import Restrictions	GATT Panel Report, *EEC – Quantitative Restrictions Against Imports of Certain Products from Hong Kong*, adopted 12 July 1983, BISD 30S/129
EEC – Newsprint	GATT Panel Report, *Panel on Newsprint*, adopted 20 November 1984, BISD 31S/114

Short Title	Full Case Title and Citation
India – Autos	Panel Report, *India – Measures Affecting the Automotive Sector*, WT/DS146/R, WT/DS175/R and Corr.1, adopted 5 April 2002, DSR 2002:V, 1827
India – Quantitative Restrictions	Panel Report, *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, WT/DS90/R, adopted 22 September 1999, upheld by Appellate Body Report, WT/DS90/AB/R, DSR 1999:V, 1799
Indonesia – Autos	Panel Report, *Indonesia – Certain Measures Affecting the Automobile Industry*, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R and Corr.1, 2, 3 and 4, adopted 23 July 1998, DSR 1998:VI, 2201
Japan – Alcoholic Beverages II	Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, 97
Japan – Alcoholic Beverages II	Panel Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/R, WT/DS10/R, WT/DS11/R, adopted 1 November 1996, as modified by Appellate Body Report, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, DSR 1996:I, 125
Korea – Alcoholic Beverages	Appellate Body Report, *Korea – Taxes on Alcoholic Beverages*, WT/DS75/AB/R, WT/DS84/AB/R, adopted 17 February 1999, DSR 1999:I, 3
Mexico – Anti-Dumping Measures on Rice	Panel Report, *Mexico – Definitive Anti-Dumping Measures on Beef and Rice, Complaint with Respect to Rice*, WT/DS295/R, adopted 20 December 2005, as modified by Appellate Body Report, WT/DS295/AB/R, DSR 2005:XXIII, 11007
Mexico – Corn Syrup (Article 21.5 – US)	Appellate Body Report, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States – Recourse to Article 21.5 of the DSU by the United States*, WT/DS132/AB/RW, adopted 21 November 2001, DSR 2001:XIII, 6675
Turkey – Textiles	Panel Report, *Turkey – Restrictions on Imports of Textile and Clothing Products*, WT/DS34/R, adopted 19 November 1999, as modified by Appellate Body Report, WT/DS34/AB/R, DSR 1999:VI, 2363
US – 1916 Act (EC) (Article 22.6 – US)	Decision by the Arbitrators, *United States – Anti-Dumping Act of 1916, Original Complaint by the European Communities – Recourse to Arbitration by the United States under Article 22.6 of the DSU*, WT/DS136/ARB, 24 February 2004, DSR 2004:IX, 4269
US – Customs User Fee	GATT Panel Report, *United States – Customs User Fee*, adopted 2 February 1988, BISD 35S/245
US – FSC (Article 21.5 – EC II)	Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations" – Second Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS108/AB/RW2, adopted 14 March 2006
US – Line Pipe	Panel Report, *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/R, adopted 8 March 2002, as modified by Appellate Body Report, WT/DS202/AB/, DSR 2002:IV, 1473
US – Malt Beverages	GATT Panel Report, *United States – Measures Affecting Alcoholic and Malt Beverages*, adopted 19 June 1992, BISD 39S/206
US – Non-Rubber Footwear	GATT Panel Report, *United States – Countervailing Duties on Non-Rubber Footwear from Brazil*, adopted 13 June 1995, BISD 42S/208
US – Offset Act (Byrd Amendment)	Appellate Body Report, *United States – Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/AB/R, WT/DS234/AB/R, adopted 27 January 2003, DSR 2003:I, 375
US – Offset Act (Byrd Amendment) (EC) (Article 22.6 – US)	Decision by the Arbitrator, *United States – Continued Dumping and Subsidy Offset Act of 2000, Original Complaint by the European Communities – Recourse to Arbitration by the United States under Article 22.6 of the DSU*, WT/DS217/ARB/EEC, 31 August 2004, DSR 2004:IX, 4591

Short Title	Full Case Title and Citation
US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)	Appellate Body Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina – Recourse to Article 21.5 of the DSU by Argentina*, WT/DS268/AB/RW, adopted 11 May 2007
US – Shrimp (Article 21.5 – Malaysia)	Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia*, WT/DS58/AB/RW, adopted 21 November 2001, DSR 2001:XIII, 6481
US – Softwood Lumber IV	Appellate Body Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/AB/R, adopted 17 February 2004, DSR 2004:II, 571
US – Softwood Lumber IV (Article 21.5 – Canada)	Appellate Body Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada – Recourse by Canada to Article 21.5 of the DSU*, WT/DS257/AB/RW, adopted 20 December 2005, DSR 2005:XXIII, 11357
US – Softwood Lumber VI (Article 21.5 – Canada)	Appellate Body Report, *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada*, WT/DS277/AB/RW and Corr.1, adopted 9 May 2006
US – Sugar Waiver	GATT Panel Report, *United States – Restrictions on the Importation of Sugar and Sugar-Containing Products Applied under the 1955 Waiver and under the Headnote to the Schedule of Tariff Concessions*, adopted 7 November 1990, BISD 37S/228
US – Superfund	GATT Panel Report, *United States – Taxes on Petroleum and Certain Imported Substances*, adopted 17 June 1987, BISD 34S/136
US – Wool Shirts and Blouses	Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R and Corr.1, adopted 23 May 1997, DSR 1997:I, 323

TABLE OF ABBREVIATIONS AND SYMBOLS USED IN THIS REPORT

ACP	Africa, Caribbean and Pacific countries, signatories of the Cotonou Agreement
Bananas Annex	Annex to the Doha Waiver Decision approved in November 2001 by the WTO Ministerial Conference
BFA	Bananas Framework Agreement originally negotiated in 1994 by the European Communities with Colombia, Costa Rica, Nicaragua and Venezuela
Bananas Understanding	Understanding on Bananas, signed between the European Communities and Ecuador in April 2001
DSB	Dispute Settlement Body
DSU	Dispute Settlement Understanding
EC	European Communities
FAO	Food and Agriculture Organization of the United Nations
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GATT 1947	General Agreement on Tariffs and Trade 1947
GATT 1994	General Agreement on Tariffs and Trade 1994
HS	Harmonised Commodity Description and Coding System
MFN	Most-Favoured Nation
MFN banana suppliers	WTO Members that are not signatories of the Cotonou Agreement
mt	Metric Ton
TRQ	Tariff-rate Quota
WCO	World Customs Organization
WTO	World Trade Organization
WTO Agreement	Marrakesh Agreement establishing the World Trade Organization

I. INTRODUCTION

1.1 On 29 June 2007, the United States requested the establishment of a panel pursuant to Article 21.5 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) concerning the alleged inconsistency with the WTO agreements of measures adopted by the European Communities to comply with the rulings and recommendations of the Dispute Settlement Body (DSB) in the dispute *EC – Bananas III* and subsequent related rulings.[1] The request made by the United States followed a request made by Ecuador, on 23 February 2007, for the establishment of a panel pursuant to Article 21.5 of the DSU also concerning the alleged inconsistency of measures adopted by the European Communities to comply with the rulings and recommendations of the DSB in the *EC – Bananas III* dispute and subsequent related rulings.[2]

1.2 On 6 July 2007, in a communication addressed to the compliance panel requested by Ecuador, the European Communities asked for a modification of the timetable in those proceedings, in order to take into account the timetable of the proceedings of the compliance panel that had been requested by the United States. The European Communities asked that the deadline for its first written submission to the compliance panel requested by Ecuador be postponed until after the United States had filed its own first written submission in the compliance panel proceedings initiated by the United States. The European Communities cited its concern that, were the United States to file its first written submission after the European Communities had filed its own, this would amount "to a de facto reversal of the order in which first written submissions should be submitted" and "create "very serious due process problems".[3] When asked by the compliance panel requested by Ecuador to comment on the European Communities' request, in a communication dated 9 July 2007, Ecuador strongly objected to any delay in the proceedings. In Ecuador's view, the timetable in the proceedings was "already much more protracted than the 90 days called for in Article 21.5" and "Ecuador would be prejudiced by a further delay, which [would] only [favour] the interests of the EC as the defending Party".[4] Ecuador additionally noted that the European Communities had only filed its request "after Ecuador had submitted its first submission" and more than a week after the European Communities had received copy of the United States' request for the establishment of a compliance panel.[5] Also on 9 July 2007, the United States sent a communication to the compliance panel requested by Ecuador, providing comments for the Panel's consideration on the European Communities' request. The United States noted that the European Communities had received a copy of the United States' request for the establishment of a compliance panel on 29 June 2007. In the view of the United States, the European Communities did "not appear to have identified any 'very serious due process problems' that would arise if the current timetable were maintained in the present proceeding".[6] On 10 July 2007, the compliance panel requested by Ecuador notified the parties in those proceedings that it did "not find it necessary, at this point, to amend the timetable ... fixed on 29 June". The compliance panel requested by Ecuador informed the parties in those proceedings that it would "follow closely developments relating to the US request for the establishment of an Article 21.5 panel regarding the EC's compliance in the *EC – Bananas III* case [and in] the eventuality of a DSB decision to establish such

[1] *EC – Bananas III (Article 21.5 – US)*, Request for the Establishment of a Panel (WT/DS27/83) 2 July 2007.

[2] *EC – Bananas III (Article 21.5 – Ecuador II)*, Request for the Establishment of a Panel (WT/DS27/80) 26 February 2007.

[3] Communication by the European Communities to the Panel, dated 6 July 2007. See Panel Report on *EC – Bananas III (Article 21.5 – Ecuador II)*, para. 1.8.

[4] Communication by Ecuador to the Panel, dated 9 July 2007. See Panel Report on *EC – Bananas III (Article 21.5 – Ecuador II)*, para. 1.8.

[5] Ibid.

[6] Communication by the United States to the Panel, dated 9 July 2007. See Panel Report on *EC – Bananas III (Article 21.5 – Ecuador II)*, para. 1.8.

an Article 21.5 panel, [it would] promptly consult with the parties in order to decide whether the new developments should affect the timetable in the current proceedings."[7]

1.3 At its meeting on 12 July 2007, the DSB decided, in accordance with Article 21.5 of the DSU, to refer to the original Panel, if possible, the matter raised by the United States in document WT/DS27/83.[8] The Panel's terms of reference were the following:

> "To examine, in the light of the relevant provisions of the covered agreements cited by the United States in document WT/DS27/83, the matter referred to the DSB by the United States in that document, and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements."[9]

1.4 On 3 August 2007, the United States requested the Director-General to determine the composition of the Panel, pursuant to paragraph 7 of Article 8 of the DSU.[10] On 13 August 2007, the Director-General composed the Panel as follows:

Chairperson: Mr Christian Häberli

Members: Mr Kym Anderson
Mr Yuqing Zhang[11]

1.5 Belize, Brazil, Cameroon, Colombia, Côte d'Ivoire, Dominica, the Dominican Republic, Ecuador, Jamaica, Japan, Mexico, Nicaragua, Panama, Saint Lucia, Saint Vincent and the Grenadines, and Suriname reserved their third-party rights to participate in the Panel's proceedings.[12] At the request of some third parties, the Panel decided that third parties would have, in addition to the rights provided for under the DSU, the following additional rights: (i) the right to be present during the entirety of the substantive meeting of the Panel with the parties and the third parties; (ii) the right to receive copies of the Parties' first written submissions and rebuttals, as well as copies of the questions posed by the Panel to the parties and to the other third parties and copies of parties' and third parties' responses to such questions; and, (iii) the right to ask oral questions to the parties during the course of the substantive meeting, although the parties would be under no obligation to respond to those questions.

1.6 On 15 August 2007, the Panel addressed a communication to the parties (the United States and the European Communities), submitting draft Working Procedures and the timetable that the Panel proposed to follow in these proceedings and inviting them to an organizational meeting in order to receive the views of the parties.[13] On the same date, the compliance panel requested by Ecuador also invited the parties to those proceedings (Ecuador and the European Communities) to a separate meeting to discuss the possibility of harmonizing the timetable in those proceedings with that of the Panel requested by the United States. The compliance panel requested by Ecuador also consulted

---

[7] Communication by Panel to the parties, dated 10 July 2007.

[8] *EC – Bananas III (Article 21.5 – US)*, Constitution of the Panel (WT/DS27/84/Rev.1), 5 September 2007, para. 1.

[9] Ibid., para. 2.

[10] Ibid., para. 3.

[11] Ibid., para. 4. Members of the Panel are the same as those who were appointed on 15 June 2007 by the Director-General to the compliance panel requested by Ecuador. See *EC – Bananas III (Article 21.5 – Ecuador II)*, Constitution of the Panel (WT/DS27/82), 18 June 2007, para. 4.

[12] *EC – Bananas III (Article 21.5 – US)*, Constitution of the Panel (WT/DS27/84/Rev.1), 5 September 2007, para. 5.

[13] Communication by the Panel to the United States and the European Communities, dated 15 August 2007.

Ecuador and the European Communities on the possibility of introducing adjustments to the Working Procedures that had been approved for those proceedings.[14]

1.7 The organizational meeting was held with the parties (the United States and the European Communities) on 20 August 2007. On the same date, the compliance panel requested by Ecuador held a separate meeting with the parties to those proceedings (Ecuador and the European Communities). On 22 August 2007, the Panel notified the parties (the United States and the European Communities) and the third parties of the adopted Working Procedures and timetable.[15]

1.8 On 23 August 2007, the compliance panel requested by Ecuador notified the parties to those proceedings (Ecuador and the European Communities) that, after consideration of the comments received from both parties, the timetable originally established remained unchanged. The compliance panel requested by Ecuador also notified the parties of the amendments incorporated into the Working Procedures, in order to allow for the possibility of holding panel meetings in joint sessions of both the proceedings requested by Ecuador and those requested by the United States and to allow the panels to copy their communications to the parties in both cases.[16]

1.9 In accordance with the timetable approved by the Panel, the United States filed its first written submission on 3 September 2007 and the European Communities on 14 September 2007. The United States filed its rebuttal on 27 September 2007 and the European Communities on 10 October 2007. The Panel received third party submissions from Colombia and Japan, a joint third party submission from Belize, Cameroon, Côte d'Ivoire, Dominica, the Dominican Republic, Jamaica, Saint Lucia, Saint Vincent and the Grenadines and Suriname and another joint third party submission from Nicaragua and Panama.

1.10 On occasion of the meeting of the compliance panel requested by Ecuador with the parties and third parties on 18 September 2007, the European Communities asked in its oral statement for a modification of the timetable of those proceedings. At the end of that meeting the compliance panel requested by Ecuador communicated to the parties that it had looked into the matter and decided that, notwithstanding that panel's initial intention to either harmonize the timetable of those proceedings with that of the Panel requested by the United States or totally separate both cases, it could not at that point in time find a better alternative for the timetable of proceedings. This despite the fact that the compliance panel requested by Ecuador 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.[17]

1.11 The Panel met with the parties and third parties on 6 and 7 November 2007. The meeting with the parties and third parties was held as an open hearing, allowing for the presence of interested public in the same room as the parties and third parties. This decision was adopted by the Panel in response to a request from both parties, and in light of the circumstances of the case. Noting that WTO Members have not reached definitive agreement regarding the possibility of opening WTO panel meetings to the public, the Panel emphasized that its decision in this case was not intended to set a precedent for future cases and proceedings. As two third parties expressed concern about the presence of the public during the meeting and their preference to make their statements in a closed session, the Panel allowed for such session to take place during the course of the meeting for the purpose of hearing the statements of these two third parties.

[14] Communication by the Panel to Ecuador and the European Communities, dated 15 August 2007.

[15] Communication by the Panel to the United States and the European Communities, dated 22 August 2007.

[16] Communication by the Panel to Ecuador and the European Communities, dated 23 August 2007.

[17] See Panel Report on *EC – Bananas III (Article 21.5 – Ecuador II)*, para. 1.16.

1.12 On 21 November 2007, parties and third parties submitted replies to questions posed by the Panel. On 26 November 2007, the United States and the European Communities submitted comments on the replies to questions.

1.13 The compliance panel requested by Ecuador submitted its interim report to the parties in those proceedings on 27 November 2007. Issuance of the interim report in that case had been originally scheduled for 23 November, but was delayed in order to ensure that replies to questions and comments on replies in the proceedings requested by the United States had been received by this Panel, before the interim report in the proceedings requested by Ecuador was issued. The compliance panel requested by Ecuador issued its final report to the parties in those proceedings on 10 December 2007. The final report was circulated to Members on ... [18]

1.14 The Panel issued the descriptive sections of the draft report to the parties to the compliance dispute initiated by the United States on 11 January 2008. On the same date, the Panel issued the relevant sections with their respective arguments to each of the third parties. On 16 January 2008, the Panel received comments from the United States regarding the descriptive sections of the draft report, as well as from Brazil and Japan regarding the relevant sections with their own respective arguments. On the same date, the European Communities and Mexico stated that they had no comments.

1.15 The Panel submitted its interim report to the parties on 6 February 2008. On 14 February 2008, the Panel received written requests for review of precise aspects of the interim report from the United States and the European Communities. The Panel held a meeting with both parties on 25 February 2008 to receive their arguments and comments regarding the requests of review of the interim report. On 26 February 2008, the parties submitted written versions of the statements they had made at the 25 February 2008 meeting with the Panel. The Panel issued its final report to the parties on 29 February 2008.

II. FACTUAL ASPECTS

A. BACKGROUND

1. Object of the current dispute

2.1 This dispute concerns measures adopted by the European Communities (EC) with the alleged purpose of complying with the rulings and recommendations of the Dispute Settlement Body (DSB) in the case *European Communities – Regime for the Importation, Sale and Distribution of Bananas* (*EC – Bananas III*) and with subsequent related rulings and recommendations. Parties disagree as to whether these measures are in conformity with the European Communities' obligations under the WTO covered agreements.

2. Basic chronology

2.2 At its meeting on 25 September 1997, the DSB adopted the Appellate Body Report on *EC – Bananas III* (WT/DS27/AB/R) and the four panel reports on the same case (WT/DS27/R/ECU, WT/DS27/R/GTM-WT/DS27/R/HND, WT/DS27/R/MEX and WT/DS27/R/USA), as modified by the Appellate Body's Report.[19] Pursuant to these reports, the DSB requested the European Communities to bring its banana regime, as found to be inconsistent with the General Agreement on Tariffs and Trade 1994 (GATT 1994), the General Agreement on Trade in Services (GATS) and the Agreement

[18] See Panel Report on *EC – Bananas III (Article 21.5 – Ecuador II)*, para. 1.19.

[19] *EC – Bananas III*, Appellate Body Report and Panel Reports, Action by the Dispute Settlement Body (WT/DS27/12), 10 October 1997.

on Import Licensing Procedures (Import Licensing Agreement), into conformity with its obligations under those Agreements.

2.3 On 7 January 1998, the arbitral award requested by Ecuador, Guatemala, Honduras, Mexico and the United States (US), pursuant to Article 21.3(c) of the DSU, was circulated. The Arbitrator concluded that the "reasonable period of time" for the European Communities to implement the rulings and recommendations of the DSB adopted on 25 September 1997 in EC – Bananas III, would be the period from 25 September 1997 to 1 January 1999.[20]

2.4 On 18 December 1998, Ecuador requested the DSB to re-establish the original panel in order to examine the consistency of the measures adopted by the European Communities to implement the rulings and recommendations adopted by the DSB in September 1997.[21] On 12 January 1999, the DSB decided, in accordance with Article 21.5 of the DSU, to refer to the original panel the matter raised by Ecuador in document WT/DS27/41.[22] The report issued by the compliance Panel requested by Ecuador was adopted by the DSB on 6 May 1999.

2.5 On 14 January 1999, the United States requested authorization from the DSB to suspend the application to the European Communities, and its member States, of tariff concessions and related obligations under the GATT 1994, covering trade in an amount of US$520 million.[23] On 29 January 1999, the European Communities objected to the level of suspension proposed by the United States and requested that the matter of whether the level of suspension proposed was equivalent to the level of nullification or impairment of benefits suffered by the United States be submitted to arbitration.[24] On 18 February 1999, the United States therefore requested authorization from the DSB to suspend concessions to the European Communities and its member States consistent with the decision to be issued by the arbitrators.[25] On 6 April 1999, the arbitrators determined that the level of nullification or impairment suffered by the United States in the EC – Bananas III dispute was US$191.4 million per year and decided that a suspension by the United States of the application to the European Communities and its member States of tariff concessions and related obligations under the GATT 1994 covering trade for that maximum amount per year would be consistent with Article 22.4 of the DSU.[26] On 9 April 1999, the United States requested that the DSB authorize it to suspend concessions to the European Communities and its member States in an amount up to $191.4 million per year.[27]

2.6 On 23 June 2000, the European Communities and certain developing countries concluded a partnership agreement in Cotonou of Benin (the "Cotonou Agreement"). The Cotonou Agreement provided that the European Communities would allow the importation of products originating from beneficiary developing countries free of customs duties and charges having equivalent effect (or, at

---

[20] *EC – Bananas III*, Arbitration under Article 21.3(c) of the Understanding on Rules and Procedures Governing the Settlement of Disputes, Award of the Arbitrator (WT/DS27/15), 7 January 1998. See also *EC – Bananas III*, Arbitration under Article 21.3(c) of the Understanding on Rules and Procedures Governing the Settlement of Disputes (WT/DS27/16), 7 January 1998.

[21] *EC – Bananas III (Article 21.5 – Ecuador)*, (WT/DS27/41), 18 December 1998.

[22] *EC – Bananas III (Article 21.5 – Ecuador)*, Constitution of the Panel, Note by the Secretariat (WT/DS27/44), 18 January 1999.

[23] *EC – Bananas III*, Recourse by the United States to Article 22.2 of the DSU (WT/DS27/43), 14 January 1999.

[24] *EC – Bananas III*, Request by the European Communities for Arbitration under Article 22.6 of the DSU (WT/DS27/46), 3 February 1999.

[25] *EC – Bananas III*, Recourse by the United States to Article 22.7 of the DSU (WT/DS27/47), 18 February 1999.

[26] *EC – Bananas III*, Decision by the Arbitrators (WT/DS27/ARB), 9 April 1999.

[27] *EC – Bananas III*, Recourse by the United States to Article 22.7 of the DSU (WT/DS27/49), 9 April 1999.

least, at preferential terms), until 31 December 2007. In the sector of bananas, this trade preference is applied in the form of an annual importation into the European Communities of up to 775,000 mt of bananas subject to zero duty.[28]

2.7 Through a communication dated 22 June 2001, the European Communities notified the DSB that it had:

> "[R]eached, with the United States of America and Ecuador, a mutually satisfactory solution within the meaning of Article 3.6 of the DSU regarding the implementation by the EC of the conclusions and recommendations adopted by the DSB in the dispute 'Regime for the importation, sale and distribution of bananas' (WT/DS27)."[29]

2.8 Through a communication dated 26 June 2001 and addressed to the DSB, the United States referred to the Understanding reached with the European Communities on 11 April 2001.[30] In its communication, the United States stated that the Understanding:

> "[I]dentifies the means by which the long-standing dispute over the EC's banana import regime can be resolved, but, as is obvious from its own text, it does not in itself constitute a mutually agreed solution pursuant to Article 3.6 of the DSU. In addition, in view of the steps yet to be taken by all parties, it would also be premature to take this item off the DSB agenda."[31]

2.9 Through a communication dated 3 July 2001 and addressed to the DSB, Ecuador referred to the Understanding reached with the European Communities on 30 April 2001.[32] In its communication, Ecuador stated that the Understanding:

> "[I]dentifies means by which a long-standing dispute can be resolved. However, the Understanding also comprises of the execution of two phases and requires the implementation of several key features, which demands the collective action of the WTO membership ... [T]he Understanding reached with the EC refers to the current banana import regime in force as of 1 July 2001 as one of a transitory nature since, beginning at the latest on 1 January 2006, a new and definitive Tariff Only regime will be in force ... Since the new EC banana import regime which is currently in force still requires that several steps be taken in the context of the DSB and other WTO bodies, it would be premature to take this item off the DSB agenda which considers this issue at every regular meeting pursuant to Article 21.6 of the DSU ... In light of the above and although Ecuador sees the Understanding as an agreed solution which can contribute to an overall, definite and universally accepted solution, it must be made clear that the provisions of Article 3.6 of the DSU are not applicable in this case."[33]

2.10 On 14 November 2001, the WTO Ministerial Conference decided to waive Article I:1 of the GATT 1994:

> "[U]ntil 31 December 2007, to the extent necessary to permit the [EC] to provide preferential tariff treatment for products originating in ACP States as required by

---

[28] European Communities' first written submission paras. 4-6.
[29] *EC – Bananas III*, Notification of Mutually Agreed Solution (WT/DS27/58), 2 July 2001.
[30] *EC – Bananas III*, Communication from the United States (WT/DS27/59), 2 July 2001.
[31] Ibid.
[32] *EC – Bananas III*, Understanding on Bananas between Ecuador and the EC (WT/DS27/60), 9 July 2001.
[33] Ibid.

> Article 36.3, Annex V and its Protocols of the ACP-EC Partnership Agreement,[34] without being required to extend the same preferential treatment to like products of any other member".[35]

2.11 While in principle this waiver was to be valid until 31 December 2007[36], in regard to bananas this was subject to the terms and conditions set out in the text of the Decision, which include the additional provisions contained in the Annex to the Doha Waiver Decision (Bananas Annex).[37]

2.12 Also on 14 November 2001, the WTO Ministerial Conference decided to waive Article XIII:1 and XIII:2 of the GATT 1994:

> "With respect to the EC's imports of bananas, as of 1 January 2002, and until 31 December 2005 ... with respect to the EC's separate tariff quota of 750,000 tonnes for bananas of ACP origin."[38]

2.13 On 21 January 2002, the European Communities addressed a communication to the DSB, concerning its progress in the implementation of the DSB's recommendations and rulings in the *EC – Bananas III* dispute. The European Communities informed the DSB that Regulation (EC) No. 2587/2001 had been adopted by the Council on 19 December 2001 and published in the Official Journal of the European Communities L 345 of 29 December 2001.[39] It stated that:

> "By this Regulation, the EC has implemented Phase 2 of the Understandings with the United States and Ecuador (circulated as document WT/DS27/58 of 2 July 2001)."[40]

2.14 In its session of 1 February 2002, the DSB considered a report submitted by the European Communities concerning its progress in the implementation of the DSB's recommendations regarding its bananas import regime. At the meeting, the European Communities expressed its view that "this matter should now be withdrawn from the DSB agenda".[41] The European Communities stated that it had implemented on schedule the second phase of the Understandings on Bananas concluded with the United States and Ecuador in April 2001, and had complied with its international obligations. The European Communities added that the regime set out in Regulation (EC) No. 2587/2001, adopted on 19 December 2001, would be applicable until the time the European Communities' banana import regime would become a tariff-only regime. This would take place by 1 January 2006 at the latest, following the negotiations under Article XXVIII, which in principle would begin in 2004. In response, at the same meeting, Ecuador stated that "like other countries, [it] also considered that this item should no longer appear on the agenda of future DSB meetings". Ecuador added that the bilateral understanding signed with the European Communities on 30 April 2001:

---

[34] (*footnote original*) Any 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.

[35] Ministerial Conference, European Communities, The ACP – EC Partnership Agreement, Decision of 14 November 2001 (WT/MIN(01)/15), 14 November 2001.

[36] Ibid., p. 2, para. 1.

[37] Ibid., p. 3, para. 3bis.

[38] Ministerial Conference, European Communities, Transitional Regime for the EC Autonomous Tariff Rate Quotas on Imports of Bananas, Decision of 14 November 2001 (WT/MIN(01)/16), 14 November 2001.

[39] *EC – Bananas III*, Status Report by the European Communities, Addendum (WT/DS27/51/Add.25), 21 January 2002.

[40] Ibid.

[41] Dispute Settlement Body, Minutes of Meeting held in the Centre William Rappard on 1 February 2002 (WT/DSB/M/119), 6 March 2002, para. 3.

> "[C]onstituted 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. The transitional regime contained various phases, stages and elements to be implemented. One element was to obtain waivers from Articles I and XIII of the GATT 1994. However, the decision to grant these waivers included new stages which would have to be carried out in order to ensure a proper transition to a tariff-only banana import regime, as from 1 January 2006. Accordingly, insofar as the EC continued to implement the DSB's recommendations by meeting its commitments, Ecuador wished to reserve its rights under Article 21 of the DSU. Therefore if there was any disagreement concerning the measures applied by the EC, the matter could be referred to the original Panel pursuant to Article 21.5 of the DSU."[42]

2.15 At the same DSB meeting, the United States stated that it was:

> "[P]leased to note that the EC had increased the quota for Latin American banana exporting countries by 100,000 tonnes effective from 1 January 2002. The 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."[43]

2.16 On 19 January 2004, the European Communities, in view of the enlargement of the European Union, resulting from the accession of Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, the Slovak Republic and Slovenia, notified, within the framework of procedures laid down in Article XXIV GATT 1994, and in particular Article XXIV:6, the withdrawal on 1 May 2004 of the commitments in Schedules CXL of the EC-15, and in the Schedules of Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, the Slovak Republic and Slovenia. The European Communities added that it was ready to enter into Article XXIV and Article XXVIII GATT 1994 procedures, including tariff negotiations or consultations, to address compensatory adjustments provided for under Article XXIV:6 of the GATT 1994. The European Communities also stated that, pending the completion of the procedures under Article XXIV and Article XXVIII of the GATT 1994, and the creation of a new schedule valid for the EC-25, the commitments in Schedule CXL would be fully respected and that the new member States of the European Communities intended to align their Schedules with those of the European Communities on 1 May 2004.[44]

2.17 On 15 July 2004, the European Communities announced, in a communication to WTO Members, that it intended to modify, in accordance with the provisions and procedures of Article XXVIII:5 of the GATT 1994, its concessions with respect to tariff item 0803 00 19 (bananas) included in the EC Schedule CXL.[45]

---

[42] Dispute Settlement Body, Minutes of Meeting held in the Centre William Rappard on 1 February 2002 (WT/DSB/M/119), 6 March 2002, paras. 4-5.

[43] Ibid., para. 8.

[44] Article XXIV:6 Negotiations, Enlargement of the European Union: Communication from the European Communities (G/SECRET/20), 30 January 2004.

[45] Article XXVIII:5 Negotiations, Schedule CXL – European Communities (G/SECRET/22), 2 August 2004.

2.18 On 31 January 2005, the European Communities notified the WTO Members that it intended to replace its concessions on tariff item 0803 00 19 (bananas) included in the EC Schedule CXL with a bound duty of €230/mt.[46] It also indicated that the communication constituted:

> "[T]he announcement under the terms of the Annex to the Decision of the WTO Ministerial Conference of 14 November 2001 concerning the ACP-EC Partnership Agreement (WT/MIN(01)/15)."[47]

2.19 On 30 March 2005, Colombia, Costa Rica, Ecuador, Guatemala, Honduras and Panama, followed by Venezuela and Nicaragua on 31 March 2005 and Brazil on 1 April 2005, notified the WTO that they were requesting arbitration pursuant to the procedures contained in the Annex to the Doha Waiver, in order to determine whether the envisaged rebinding on the European Communities' tariff on bananas (at €230/mt), announced under the Annex to the Waiver, fulfilled the requirements of the Waiver Decision.[48] The Arbitrator's award was circulated on 1 August 2005.[49] The Arbitrator concluded that:

> "[T]he European Communities' envisaged rebinding on bananas would not result in at least maintaining total market access for MFN banana suppliers, taking into account all EC WTO market-access commitments relating to bananas."[50]

2.20 On 13 September 2005, the European Communities notified the interested parties that it had revised its proposal to provide as from 1 January 2006 for an MFN tariff for bananas at €187/mt and a tariff quota for ACP countries of 775,000 mt per year at zero duty.[51]

2.21 In a communication dated 26 September 2005, the European Communities notified the Arbitrator that, after consultations with the interested parties, there was at that point no basis for even seeking a mutually satisfactory solution within a timeframe that would allow for implementation of the new European Communities' banana regime by 1 January 2006. The European Communities therefore requested that the matter be referred back to the same Arbitrator, in accordance with the Annex to the Doha Waiver.[52] The Arbitrator's award was circulated on 27 October 2005.[53] The Arbitrator concluded that:

---

[46] Article XXVIII:5 Negotiations, Schedule CXL – European Communities (G/SECRET/22/Add.1), 1 February 2005.

[47] Ibid.

[48] European Communities, The ACP – EC Partnership Agreement, Recourse to Arbitration Pursuant to the Annex to the Decision of 14 November 2001 (WT/L/607), 1 April 2005. See also, European Communities, The ACP – EC Partnership Agreement, Recourse to Arbitration Pursuant to the Annex to the Decision of 14 November 2001, *Communication from Colombia*, Addendum (WT/L/607/Add.1), 1 April 2005; *Communication from Costa Rica*, Addendum (WT/L/607/Add.2), 1 April 2005; *Communication from Ecuador*, Addendum (WT/L/607/Add.3), 1 April 2005; *Communication from Guatemala*, Addendum (WT/L/607/Add.4), 1 April 2005; *Communication from Honduras*, Addendum (WT/L/607/Add.5), 1 April 2005; *Communication from Panama*, Addendum (WT/L/607/Add.6), 1 April 2005; *Communication from Nicaragua*, Addendum (WT/L/607/Add.7), 4 April 2005; *Communication from Venezuela*, Addendum (WT/L/607/Add.8), 4 April 2005; and, *Communication from Brazil*, Addendum (WT/L/607/Add.9), 4 April 2005.

[49] European Communities, The ACP – EC Partnership Agreement, Recourse to Arbitration Pursuant to the Decision of 14 November 2001, Award of the Arbitrator (WT/L/616), 1 August 2005. See also, European Communities, The ACP – EC Partnership Agreement, Recourse to Arbitration Pursuant to the Annex to the Decision of 14 November 2001, *Communication from the Secretariat* (WT/L/607/Add.13), 5 September 2005.

[50] Award of the Arbitrator, *EC – The ACP-EC Partnership Agreement*, para. 94.

[51] See Award of the Arbitrator, *EC – The ACP-EC Partnership Agreement II*, para. 7.

[52] European Communities, The ACP – EC Partnership Agreement, Recourse to Arbitration Pursuant to the Annex to the Decision of 14 November 2001, Addendum, *Communication from the European Communities* (WT/L/607/Add.14), 28 September 2005.

> "[T]he European Communities' proposed rectification, consisting of a new MFN tariff rate on bananas of €187 per metric ton and a 775,000 mt tariff quota on imports of bananas of ACP origin, would not result 'in at least maintaining total market access for MFN banana suppliers', taking into account 'all EC WTO market-access commitments relating to bananas'. Consequently... the European Communities has failed to rectify the matter, in accordance with the fifth tiret of the Annex to the Doha Waiver."[54]

2.22 On 27 September 2006, the European Communities, noting the enlargement of the European Union, resulting from the accession of Bulgaria and Romania that would take place from 1 January 2007, notified, within the framework of procedures laid down in Article XXIV GATT 1994, and in particular Article XXIV:6, the modification of the EC Schedule, as well as the fact that the two new members of the European Union would be subject to the EC Schedules from 1 January 2007 and, consequently the commitments in the Schedules of Bulgaria and Romania would be withdrawn from that date.[55]

2.23 On 28 March 2007, the United States Trade Representative (USTR) addressed a letter to the European Communities Commissioner for Trade. In this letter, the United States Trade Representative referred to discussions between both parties relating to the European Communities' new banana import regime. The USTR proposed that "our discussions to that point would fulfil any consultation requirement and the EU would not object to a US request for the establishment of a Panel at the first DSB meeting at which a US request is considered". In his reply to the USTR dated 4 April 2007, the European Communities Commissioner for Trade stated that the "EU would be ready not to object to a US request for the establishment of a panel in July".[56]

B. PRODUCT DESCRIPTION

2.24 The European Communities classifies bananas under the following tariff lines[57]: 0803 00 11 for Fresh- Plantains; 0803 00 19 for Fresh- Other (bananas); 0803 00 90 for Dried (bananas, including plantains).[58] The Panel notes, however that, in some documents, including in its WTO Schedules LXXX and CXL, the European Communities refers to fresh bananas under tariff item 0803 00 12.[59]

2.25 Parties and a number of third parties have emphasized the importance of bananas production and trade for many WTO Members, especially developing and least developed country Members.[60]

---

[53] Award of the Arbitrator, *EC – The ACP-EC Partnership Agreement II*. See also, European Communities, The ACP – EC Partnership Agreement, Recourse to Arbitration Pursuant to the Annex to the Decision of 14 November 2001, *Communication from the Chairman of the General Council* (WT/L/607/Add.15), 28 October 2005.

[54] Award of the Arbitrator, *EC – The ACP-EC Partnership Agreement II*, para. 127.

[55] Article XXIV:6 Negotiations, Enlargement of the European Union: Communication from the European Communities (G/SECRET/26), 28 September 2006.

[56] United States' second written submission, para. 4. See also, European Communities' second written submission, para. 6.

[57] Commission Regulation (EC) No. 1549/2006 of 17 October 2006 amending Annex I to Council Regulation (EEC) 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff, Official Journal of the European Union, 31 October 2006, p. 87.

[58] Ibid.

[59] Schedules LXXX European Communities, Legal Instruments Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations Done at Marrakech on 15 April 1994, Vol. 19, page 16241.

[60] See, for example, United States' first written submission, para. 2; European Communities' first written submission, para. 2. See also joint third party written submission by Belize, Cameroon, Côte d'Ivoire, Dominica, the Dominican Republic, Jamaica, St. Lucia, St. Vincent and the Grenadines, and Suriname (ACP Countries' third party written submission), paras. 3, 9 and 21-27; joint third party written submission by

The Food and Agriculture Organization of the United Nations (FAO) considers bananas to be the world's most exported fruit in terms of volume and second in terms of value. According to the FAO, bananas represent a substantial source of income and employment for several tropical countries.[61] Figures relating to the European Communities' bananas market, including domestic bananas production, consumption and imports, as well as on the United States' domestic bananas production, are discussed below.[62]

C. EUROPEAN COMMUNITIES' LEGAL FRAMEWORK FOR BANANAS IMPORTS

1. European Communities' bananas import regime

2.26 The European Communities' Council Regulation (EEC) No. 404/93 of 13 February 1993[63] established the common organization of the banana market. This regulation established the free circulation of bananas within the common market, it regulated the domestic production of bananas, and established the regime for the importation of bananas into the European Communities. Council Regulation (EEC) No. 404/93 accorded different treatment to bananas depending on their origin. It divided the system into community bananas, which were the bananas produced within the European Communities; traditional ACP bananas, which were bananas originated in any of 12 ACP countries within the quantities established in the annex;[64] non-traditional ACP imports, which referred to the quantities of imported bananas in any of the ACP countries that exceeded the quantity established in the Annex; and bananas imported from non-ACP third countries.[65] Council Regulation (EEC) No. 404/93 established a quota of 854,000 mt for Community bananas[66] and of 857,700 mt for traditional ACP bananas as established in the annex. A tariff quota of two million mt was opened each year for imports of third country bananas and non-traditional ACP bananas.[67] Within this tariff quota, third country bananas were subject to an in-quota tariff of 100 ECU/mt, while imports from non-traditional ACP countries were subject to zero duty.[68] The out-of-quota tariff was 750 ECU/mt for non-traditional ACP-bananas and 850 ECU/mt for out-of-quota third country bananas.[69] Imports from both the non-ACP third country bananas and non-traditional ACP countries were subject to import licences granted in the following proportions: (a) 66.5 per cent to operators established in third country and non traditional ACP bananas; (b) 30 per cent to operators established in the European Communities or traditional ACP bananas; and, (c) 3.5 per cent to operators established in the European Communities that marketed bananas other than community and traditional ACP bananas

---

Nicaragua and Panama, paras. 3, 9 and 21-27; written version of Cameroon's oral statement at the Panel's substantive meeting with the parties and third parties, paras. 3-6; written version of the Dominican Republic's oral statement at the Panel's substantive meeting with the parties and third parties, pp. 1-2; written version of Jamaica's oral statement at the Panel's substantive meeting with the parties and third parties, para. 9; written version of Nicaragua and Panama's joint oral statement at the Panel's substantive meeting with the parties and third parties, paras. 8 and 20-21; written version of St. Lucia's oral statement at the Panel's substantive meeting with the parties and third parties, para. 5; written version of St. Vincent and the Grenadines' oral statement at the Panel's substantive meeting with the parties and third parties, para. 1.

[61] Available at: http://www.fao.org/DOCREP/006/Y4343E/y4343e06.htm (as of 6 November 2007).

[62] See paras. 2.47 to 2.63 below.

[63] Council Regulation (EEC) No. 404/93 of 13 February 1993 on the common organization of the market in bananas, Official Journal of the European Community L 047, 25 February 1993, pp. 0001-0011. See also Exhibit US-1.

[64] The Annex of the Council Regulation (EEC) No. 404/93 established the following traditional quantities of bananas from ACP states: Cote d'Ivoire 155 000, Cameroon 155 000, Suriname 38 000, Somalia 60 000, Jamaica 105 000, St Lucia 127 000, St Vincent and the Grenadine 82 000, Dominica 71 000, Belize 40 000, Cape Verde 4 800, Grenada 14 000, Madagascar 5 900 for a total of 857 700 tonnes.

[65] Council Regulation (EEC) No. 404/93 of 13 February 1993, Article 15.

[66] Ibid., Article 12.

[67] Ibid., Article 18.1.

[68] Ibid., Article 18.1.

[69] Ibid., Article 18.2.

from 1992.[70] The Regulation also provided that, no later than the end of the third year after the entry into force of this Regulation, the Commission had to submit a report to the European Parliament and the Council on the operation of the Regulation. The report had to contain among other things "an analysis of the development of Community, third-country and ACP banana marketing flows since the implementation of these arrangements." The same provision also established that the "Commission shall again report to the European Parliament and the Council by 31 December 2001 on the operation of this Regulation and make appropriate proposals concerning new arrangements to apply after 31 December 2002."[71]

2.27 Commission Regulation (EEC) No. 1442/93 of 10 June 1993[72] complemented Council Regulation (EEC) No. 404/93 by laying down detailed rules for the application of the arrangements for importing bananas into the European Communities. Regulation 1442/93 established the licensing procedures for imports from traditional ACP and non traditional ACP and third country bananas. Applications for traditional ACP imports were required to be accompanied by a certificate of origin testifying the status as traditional ACP bananas.[73] Import licences for non traditional bananas and third country bananas were subject to several cumulatively procedures. These applicable procedures included: "(i) allocation of licences based on three operator categories; (ii) allocation of licences according to three activity functions; (iii) export certificate requirements for imports from Costa Rica, Colombia and Nicaragua; and (iv) a two-round quarterly procedure to administer licence applications."[74]

2.28 Council Regulation (EC) No. 3290/94 of 22 December 1994 on the Adjustments and Transitional Arrangements Required in the Agricultural Sector in order to Implement the Agreements Concluded during the Uruguay Round of Multilateral Trade Negotiations,[75] modified Council Regulation (EEC) No. 404/93 and incorporated into EC Law the European Communities' banana import commitments established in Schedule LXXX and the Bananas Framework Agreement. In this regard, a tariff quota of 2.2 million mt was opened to third country bananas and non traditional ACP bananas. Within the framework of this quota, imports of third country bananas were subject to a duty of 75 ECU/mt and imports of non-traditional ACP bananas were subject to a zero duty. Non-traditional ACP bananas imported outside this quota were subject to the custom duty specified in the European Communities' Common Customs Tariff, less 100 ECU/mt.

2.29 Commission Regulation (EC) No. 478/95 of 1 March 1995[76] established additional rules for the application of Regulation 404/93 as regards the tariff quotas arrangements for imports of bananas. Regulation 478/95 incorporated country-specific shares allocated to the countries mentioned in the Bananas Framework Agreement, as well as the other provisions established in this agreement. Therefore, tariff quotas for imports of bananas from third countries and non-traditional ACP bananas were subject to the following distribution: Costa Rica 23.4 per cent; Colombia 21 per cent;

---

[70] Council Regulation (EEC) No. 404/93 of 13 February 1993, Articles 17 and 19.1.

[71] Ibid., Article 32.

[72] Commission 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 Community L142, 12 June 1993, pp. 0006-0015.

[73] Panel Report on *EC – Bananas III*, para. 3.18.

[74] Ibid., para. 3.20.

[75] Council Regulation (EC) No. 3290/94 of 22 December 1994 on the adjustments and transitional arrangements required in the agricultural sector in order to implement the agreements concluded during the Uruguay Round of multilateral trade negotiations, Official Journal of the European Community L 349, 31 December 1994, pp. 0105-0200.

[76] Commission Regulation (EC) No. 478/95 of 1 March 1995 on additional rules for the application of Council Regulation (EEC) 404/93 as regards the tariff quotas arrangements for imports of bananas into the Community and amending Regulation (EEC) No. 1442/93, Official Journal of the European Community L 049, 4 March 1995, pp. 0013-0017.

Nicaragua 3 per cent; Venezuela 2 per cent; non-traditional ACP countries and other ACP countries and others were allocated up to 90,000 mt.

2.30 Council Regulation (EEC) No. 404/93 and its subsequent EC rules were reviewed in the *EC – Bananas III* case. The Panel and Appellate Body Report found that certain aspects of these regulations were inconsistent with Articles I:1, III:4, X:3 and XIII:1 of the GATT 1994, Article 1.2 of the Licensing Agreement and Articles II and XVII of the GATS.[77]

2.31 Council Regulation (EC) No. 1637/98 of 20 July 1998 amended Council Regulation (EEC) No. 404/93.[78] Council Regulation (EC) No. 1637/98 maintained the tariff quota for imports of third countries and non-traditional ACP bananas at 2.2 million mt.[79] The in-quota tariff imports from third country bananas were subject to a duty of 75 ECU/mt, while imports from non-traditional ACP countries were free of duty.[80] As a result of the European Communities' enlargement in 1995, an additional tariff quota of 353,000 mt was opened for imports of third countries and non-traditional ACP bananas. Under this quota, imports of bananas from third countries were subject to 75 ECU/mt, while imports of non-traditional ACP bananas were free of duty. [81] No import duty was charged on banana imports from traditional ACP origin.[82] All bananas imports to the European Communities were subject to import licences.[83] Regulation 1637/98 also established that, if there was no reasonable possibility of securing the agreement of all WTO Members with a substantial interest in the supply of bananas, the European Communities' Commission could proceed to allocate the tariff quotas for traditional and non-traditional ACP bananas and for third country bananas.[84] The out-of-quota tariff for non-traditional ACP bananas was reduced by ECU200.[85] Council Regulation (EC) No. 1637/98 also abolished the operator categories.

2.32 Commission Regulation (EC) No. 2362/98 of 28 October 1998[86] repealed Commission Regulation (EEC) No. 1442/93 as amended by Regulation (EC) No. 702/95 and it laid down detailed rules for the implementation of Council Regulation (EEC) No. 404/93 regarding imports of bananas into the European Communities. According to Regulation 2362/98, the tariff quotas and the traditional ACP quantities were to be allocated taking into account traditional trade flows, in the following way: 92 per cent to traditional operators and 8 per cent to newcomers.[87] Annex I of Regulation 2362/98 established the distribution of the tariff quota for third country imports in the following way: Ecuador 26.17 per cent; Costa Rica 25.61 per cent; Colombia 23.03 per cent; Panama 15.76 per cent; and, "Other" 9.43 per cent. The quantity for traditional ACP bananas remained at 857,700 mt.

2.33 Council Regulation (EC) No. 1637/98 and Commission Regulation (EC) No. 2362/98 were challenged by Ecuador in its first recourse to a compliance proceeding under Article 21.5 of the DSU

---

[77] Panel Report on *EC – Bananas III*, para. 9.1, as modified by the Appellate Body Report on *EC – Bananas III*, paras. 255-256.

[78] Council Regulation (EC) No. 1637/98 of 20 July 1998 amending Regulation (EEC) No. 404/93 on the common organization of the market in bananas, Official Journal of the European Community L210/28, 28 July 1998.

[79] Ibid., Article 18.1.

[80] Ibid., Article 18.1.

[81] Ibid., Article 18.2.

[82] Ibid., Article 18.3.

[83] Ibid., Article 17.

[84] Ibid., Article 18.4.

[85] Ibid., Article 18.5.

[86] Commission 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 Community L 293/32, 31 October 1998.

[87] Ibid., Article 2.1.

in the *EC – Bananas III* dispute. The compliance Panel found certain aspects of these Regulations inconsistent with the European Communities' obligations under Article I:1 and XIII:1 and 2 of the GATT 1994 and under Articles II and XVII of the GATS.[88]

2.34 Council Regulation (EC) No. 216/2001 of 29 January 2001[89] further amended Regulation (EEC) No. 404/93 on the common organization of the European Communities' market in bananas. Regulation 216/2001 opened a third autonomous tariff quota of 850,000 mt for bananas of all origins (quota C) subject to a customs duty of €300/mt.[90] This quota was in addition to the first tariff quota of 2.2 million mt at a rate of €75/mt bound in the WTO (or quota A) and a second tariff quota of 353,000 mt due to the enlargement of the European Communities in 1995 (or quota B).[91] All of these tariff quotas were opened for imports of products originating in all third countries. ACP bananas under and outside the tariff quotas were subject to a tariff preference of €300/mt.[92] 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. According to Regulation 216/2001, imports under tariff quota A and B were subject to a custom duty of €75/mt, while imports under the tariff quota C were subject to a duty of €300/mt.[93] Regulation 216/2001 also established that the tariff quotas would be administered by taking into account the traditional trade flows ("traditionals"/"newcomers") or through other methods.[94]

2.35 Council Regulation (EC) No. 2587/2001 of 19 December 2001[95] further amended Regulation (EEC) No. 404/93 on the common organization of the European Communities' market in bananas. Regulation 2587/2001 changed the quotas in the following way: Quota A of 2.2 million mt for imports from third countries subject to a customs duty of €75/mt; Quota B of 453,000 mt for imports from third countries subject to a tariff duty of €75/mt; Quota C of 750,000 mt open to imports from ACP countries subject to a zero duty.[96] A tariff preference of €300/mt was established for imports originating in ACP countries.[97]

2. European Communities' current bananas import regime

2.36 For the purpose of this dispute, the current regime for imports of bananas to the European Communities is that established in Council Regulation (EC) No. 1964/2005 of 24 November 2005.[98] Regulation 1964/2005 entered into force on 1 January 2006 and established a tariff rate of €176/mt for bananas (tariff item 0803 00 19).[99] Regulation 1964/2005 also established a tariff quota for bananas originating in ACP countries pursuant to the European Communities' commitments under the ACP-EC Partnership Agreement, also known as the Cotonou Agreement.[100] The trade preferences granted

[88] Panel Report on *EC – Bananas III (Article 21.5 – Ecuador)*, para. 7.1.
[89] Council Regulation (EC) No. 216/2001 of 29 January 2001 amending Regulation (EEC) No. 404/93 on the common organization of the market in bananas, Official Journal of the European Community L31/2, 2 February 2001.
[90] Ibid., Article 18.1.
[91] Ibid.
[92] Ibid., Article 18.4.
[93] Ibid., Article 18.2 and 18.3.
[94] Ibid., Article 19.1.
[95] Council Regulation (EC) No. 2587/2001 of 19 December 2001 amending Regulation (EEC) No. 404/93 on the common organization of the markets in bananas, Official Journal of the European Community L345/13, 29 December 2001.
[96] Ibid., Article 18.1, 18.2, 18.3.
[97] Ibid., Article 18.4.
[98] Exhibit US-1.
[99] Exhibit US-1, Council Regulation (EC) No. 1964/2005, Article 1.1.
[100] Ibid., Article 1.2. See also ibid., para (6).

to ACP countries by the European Communities under the Cotonou Agreement were scheduled to expire at the end of 2007.[101]

2.37 Under the Cotonou Agreement, the European Communities has engaged to allow the importation of products "originating from Cotonou beneficiary developing countries free of custom duties and charges having equivalent effect or, at least at preferential terms, until December 31, 2007."[102] The European Communities has accorded that ACP origin bananas enter the European Communities' market at 775,000 tons per year. All bananas imported beyond this amount are subject to the €176/mt MFN tariff rate.[103] The European Communities has stated that the Cotonou Agreement is applied in a non-discriminatory way and its potential signatories are not limited to any geographic area.[104] According to information provided by the European Communities, the Cotonou Agreement in its Article 94, paragraph 1 states that any "independent State whose structural characteristics and economic and social situation are comparable" to those of the already participating developing countries can accede to the Cotonou Agreement.[105]

2.38 In addition to the preferences under the Cotonou Agreement, bananas originating in least developed countries (LDCs) also enjoy duty-free access to the European Communities' market from a generalized tariff preferences scheme known as the Everything But Arms (EBA) arrangement, which is laid down in Council Regulation (EC) No. 980/2005 of 27 June 2005.[106]

2.39 Implementing regulations have been adopted by the European Communities subsequent to Regulation 1964/2005. According to both parties[107], these regulations include: Commission Regulation (EC) No. 2014/2005 of 9 December 2005[108]; Commission Regulation (EC) No. 2015/2005 of 9 December 2005[109]; Commission Regulation (EC) No. 2149/2005 of 23 December 2005[110]; Commission Regulation (EC) No. 219/2006 of 8 February 2006[111]; Commission Regulation (EC) No. 325/2006 of 23 February 2006[112]; Commission Regulation (EC) No. 566/2006 of 6 April

[101] European Communities' first written submission, para. 25. See also, European Communities' response to question 28, para. 55. But see paragraphs 6.5 to 6.18below.

[102] European Communities' first written submission, para. 4.

[103] Ibid., para. 4.

[104] Ibid., footnote 4.

[105] European Communities' response to question 70, para. 105.

[106] Council Regulation (EC) No. 980/2005 of 27 June 2005. Regulation 980/2005 establishes that the common customs tariff duties on tariff item 0803 00 19 (bananas) would be reduced by 20 per cent annually from 1 January 2002 and would be entirely suspended as from 1 January 2006. European Communities' response to question 66, para. 98.

[107] United States' first written submission, footnote 32; United States' response to question 38, para. 71; and European Communities' response to question 73, para. 122.

[108] Commission Regulation (EC) No. 2014/2005 of 9 December 2005, on licences under the arrangements for importing bananas into the Community in respect of bananas released into free circulation at the common customs tariff rate of duty, Official Journal of the European Union L 324/5, 10 December 2005.

[109] Commission Regulation (EC) No. 2015/2005 of 9 December 2005, on imports during January and February 2006 of bananas originating in ACP countries under the tariff quota opened by Council Regulation (EC) No 1964/2005 on the tariff rates for bananas, Official Journal of the European Union L 324/5, 10 December 2005.

[110] Commission Regulation (EC) No. 2149/2005 of 23 December 2005, fixing the reduction coefficients to be applied to applications for import licences for bananas originating in the ACP countries for the months of January and February 2006, Official Journal of the European Union L 342/19, 24 December 2005.

[111] Commission Regulation (EC) No. 219/2006 of 8 February 2006, on imports of bananas from ACP countries for the period 1 March to 31 December 2006, Official Journal of the European Union L 38/22, 9 February 2006.

[112] Commission Regulation (EC) No. 325/2006 of 23 February 2006, fixing the reduction coefficient to be applied to applications for import licences for bananas originating in the ACP countries for the period 1 March to 31 December 2006, Official Journal of the European Union L 54/8, 24 February 2006.

2006[113]; Commission Regulation (EC) No. 966/2006 of 29 June 2006[114]; Commission Regulation (EC) No. 1261/2006 of 23 August 2006[115]; Commission Regulation (EC) No. 1789/2006 of 5 December 2006, on imports of bananas from ACP countries for the period 1 January to 31 December 2007[116]; Commission Regulation (EC) No. 34/2007 of 16 January 2007[117]; and Commission Regulation (EC) No. 47/2007 of 19 January 2007[118].

2.40 In addition to these regulations, Commission Regulation (EC) No. 1549/2006 of 17 October 2006[119] amending Annex I to Council Regulation (EEC) No. 2658/87 on the tariff and statistical nomenclature and the Common Customs Tariff, shows under tariff item 0803 00 19 (bananas) a conventional rate duty of €176/mt subject to footnote 1 which indicates a WTO tariff quota explained in Annex 7.[120] This annex refers to the "WTO Tariff quotas to be opened by the competent Community authorities – qualifications for these quotas is subject to conditions laid down in the relevant Community provisions." According to this annex, tariff item 0803 00 19 (bananas) appears with a quota quantity of 2.2 million mt to a rate of duty €75/mt.[121] The general rules concerning duties laid down in this regulation provide that when autonomous rates of duty are lower than conventional rates of duty, the autonomous duties (shown by means of a footnote) would be applicable. On 9 June 2007, a corrigendum to Regulation 1549/2006 was published, deleting the reference to the tariff quota for tariff item 0803 00 19 (bananas).[122]

[113] Commission Regulation (EC) No. 566/2006 of 6 April 2006, amending and derogating from Regulation (EC) 2014/2005 on licences under the arrangements for importing bananas into the Community in respect of bananas released into free circulation at the common customs tariff rate of duty and amending Regulation (EC) No. 219/2006 opening and providing for the administration of the tariff quota for bananas falling under CN code 0803 00 19 originating in ACP countries for the period 1 March to 31 December 2006, , Official Journal of the European Union L 99/6, 7 April 2006.

[114] Commission Regulation (EC) No. 966/2006 of 29 June 2006, amending Regulation (EC) No. 219/2006 opening and providing for the administration of the tariff quota for bananas falling under CN code 0803 00 19 originating in ACP countries for the period 1 March to 31 December 2006, Official Journal of the European Union L 176/21, 30 June 2006.

[115] Commission Regulation (EC) No. 1261/2006 of 23 August 2006, amending Regulation (EC) No. 219/2006 opening and providing for the administration of the tariff quota for bananas falling under CN code 0803 00 19 originating in ACP countries for the period 1 March to 31 December 2006, Official Journal of the European Union L 230/3, 24 August 2006.

[116] Commission Regulation (EC) No. 1789/2006 of 5 December 2006, on imports of bananas from ACP countries for the period 1 January to 31 December 2007, Official Journal of the European Union L 339/3, 6 December 2006.

[117] Commission Regulation (EC) No. 34/2007 of 16 January 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, Official Journal of the European Union L 10/9, 17 January 2007.

[118] 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, Official Journal of the European Union L14/4, 20 January 2007.

[119] Commission Regulation (EC) No. 1549/2006 of 17 October 2006 amending Annex I to Council Regulation (EEC) No. 2658/87 on the tariff and statistical nomenclature and the Common Customs Tariff, Official Journal of the European Union, 31 October 2006.

[120] Ibid., page 87.

[121] Ibid., page 853.

[122] Corrigendum to Commission Regulation (EC) No. 1549/2006 of 17 October 2006 amending Annex I to Council Regulation (EEC) No. 2658/87 on the tariff and statistical nomenclature and the Common Customs Tariff, Official Journal of the European Union, 9 June 2007.

2.41 The following table summarizes the main aspects of the different import regimes for bananas.

EC's Different Banana Import Regimes

EC Regulation (applicable from)	Beneficiaries	Quotas (tonnes net weight)	Tariff (ECU/€ per metric tonne)	
			in-quota	out-of quota
Council Regulation (EEC) No 404/93 (1 July 1993)	▪Traditional ACP (country specific allocations)	857 700	zero duty	
	▪Non- traditional ACP	2 000 000	zero duty	ECU750
	▪Third Country		ECU100	ECU850
Council Regulation (EC) No 3290/94 (1 July 1995)	▪Traditional ACP (country specific allocations)	857 700	zero duty	
	▪Non- traditional ACP	2 200 000*	zero duty	ECU100 tariff preference**
	▪Third Country		ECU75	
Commission Regulation (EC) No 478/95 (5 March 1995)	▪Traditional ACP (country specific allocations)	857 700	zero duty	
	▪Non- traditional ACP (country specific allocation)	90 000	zero duty	
	▪Third Country (country specific allocation)	2 200 000	ECU75	
Council Regulation (EC) No 1637/98 (1 January 1999)	▪Traditional ACP (elimination country specific allocations)	857 700	zero duty	
	▪Non-traditional ACP (elimination country specific allocations)	2 200 000	zero duty	ECU200 tariff preference**
	▪Third Country (country specific allocations)		ECU75	ECU737
	▪Non-traditional ACP (elimination country specific allocations)	353 000	zero duty	ECU200 tariff preference**
	▪Third Country (country specific allocations)		ECU75	ECU737

Council Regulation (EC) No 216/2001 (1 April 2001)	▪Quota A ACP Third Country	2 200 000	zero duty €75	€300 tariff preference**
	▪Quota B ACP Third Country	353 000	zero duty €75	€300 tariff preference**
	▪Quota C ACP Third Country	850 000	€300 with a €300 tariff preference €300	€300 tariff preference**
Council Regulation (EC) No 2587/2001 (1 January 2002)	▪Quota A ACP Third Country	2 200 000	zero duty €75	€300 tariff preference €680
	▪Quota B ACP Third Country	453 000	zero duty €75	€300 tariff preference €680
	▪Quota C ACP	750 000	zero duty	€300 tariff preference
Council Regulation (EC) No 1964/05 (1 January 2006)	Bananas of all origin		€176	€176
	ACP	775 000	zero duty	€176

* In 1994 this tariff quota was 2 100 000t. In 1 January 1995 it was increased to 2 200 000t.
** This tariff preference is deducted from the rate of duty established in the Common Customs Tariff that was in force at that time. Council Regulation (EC) No 3290/94, Articles 15.1 and 18.2.

3. Impact of the different European Communities enlargements in its bananas import regime

2.42 During the period between 1993 to 2007, the membership of the European Communities has been enlarged three times. This has changed the market and regulatory conditions for the import of bananas to the European Communities.

2.43 In 1995, with the accession of Austria, Finland and Sweden to the European Communities, an autonomous tariff quota of 353,000 mt was opened to MFN bananas.[123]

2.44 In 2004, with the accession of ten new member States to the European Communities, an autonomous tariff quota of 300,000 mt with an in-quota tariff of €75/mt was opened for the period 1 May 2004 until 31 December 2004.[124] For the year 2005, this autonomous tariff quota was

[123] United States' response to question 2.
[124] United States' and European Communities' responses to question 2.

increased to 460,000 mt. According to the United States, prior to the enlargement most of the ten acceding countries charged zero-duty with unlimited access to MFN bananas.[125]

2.45 In 2007, Romania and Bulgaria became members of the European Communities. Before the accession, Romanian banana imports were subject to an ad valorem tariff of 16 per cent, while Bulgaria applied a tariff of 11.2 per cent. In 2005, Romania and Bulgaria imported 143,000 mt and 55,000 mt bananas respectively. After the accession, bananas exports to both countries are subject to the €176/mt MFN tariff.

2.46 As stated by the United States, the European Communities has not provided Article XXIV or XXVIII compensation to MFN suppliers for any of these accessions.[126]

D. EUROPEAN COMMUNITIES' BANANAS MARKET

1. European Communities' bananas production

2.47 The European Communities' domestic banana production comes from Greece (Crete), Spain (Canary Islands), Cyprus, Portugal (continental Portugal, Madeira, and the Azores) and France (overseas territories of Martinique and Guadeloupe). In 2006, the European Communities' domestic banana production amounted to 641,754 mt.[127] According to information provided by the European Communities, domestic production for 2007 is expected to have been lower than the previous year, since banana plantations were damaged by the passage of Hurricane Dean through the territories of Martinique and Guadeloupe in August 2007.[128]

2.48 There are no exports of bananas from the European Communities, as all production is destined for domestic consumption.[129]

2. European Communities' bananas consumption

2.49 The European Communities does not have data on consumption volumes for each of its member States. Once bananas have legally been imported into the European Communities' common market, they may freely circulate within the territory of the European Communities. The data collected refers only to banana imports.[130] However, the following table shows the total domestic sales of bananas in the European Communities.

[125] United States' response to question 2.
[126] Ibid.
[127] Exhibit EC-7, Table 14.
[128] European Communities' response to question 64, para. 89.
[129] Ibid., para. 91.
[130] Information provided by the United States shows that the consumption of bananas in the EC-25 for 2005 was of 4.3 millions mt. However, the European Communities considers that this information is not accurate since the data provided by the United States refers to imports made by each of the member States which does not mean that the bananas are consumed in that country. See Exhibit US-7 and European Communities' response to question 65, para. 94.

Total Sales of Bananas in the EU (mt)
(figures provided by the European Communities in Exhibit EC-7 Table 15)

Origin	1999	2000	2001	2002	2003	2004	2005	2006
EU	742,804	790,675	777,068	801,122	765,416	758,206	648,375	641,754
(share of total)	18.8%	16.9%	17.1%	17.4%	16.3%	16.4%	14.8%	13.3%
ACP Countries	688,707	771,857	748,779	739,825	799,896	784,427	763,675	891,218
(share of total)	17.4%	16.5%	16.5%	16.0%	17.0%	17.0%	17.5%	18.5%
non-LDC	688,158	771,451	748,181	739,483	798,538	783,810	763,675	891,133
LDC-other	549	406	598	342	1,358	617	0	85
Non-ACP LDCs	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
MFN	2,521,823	3,119,605	3,015,474	3,073,124	3,143,631	3,078,430	2,963,745	3,293,679
(share of total)	63.8 %	66.6%	66.4%	66.6%	66.8%	66.6%	67.7	68.2%
of which Ecuador								
(Eurostat)	696,789*****	1,042,350	1,043,306	1,089,019	1,081,787	993,825	1,062,735	1,027,209
(share of total)	17.6%	22.3%	23.0%	23.6%	23.0%	21.5%	24.3%	21.3%
Total	**3,953,334**	**4,683,137**	**4,541,321**	**4,614,071**	**4,708,943**	**4,621,063**	**4,375,795**	**4,826,651**

***** For the amount of Ecuador's exports to the European Communities in 1999 there is a difference between the figures provided by the European Communities and those provided by Ecuador. Ecuador's response to question 115 shows that the amount of MFN bananas exported to the European Communities in 1999 was of 3,208,943 mt. This would represent an increase in the share of total for MFN countries of 74 per cent and an increase in the EU total amount of sales for 1999 to 4,330,952 mt.

Source: Figures provided by the European Communities in Exhibit EC-7 Table 15. Imports from non-ACP LDCs provided by Eurostat (2007) "Intra- and extra- EU trade data, CD-ROM," ISSN: 1725-3365. Figures from Eurostat refer to EC25.

3. European Communities' bananas imports

2.50 The European Communities is the world's biggest export market for bananas, followed by the United States. The majority of bananas exported to the European Communities are from MFN or so-called "Dollar Zone" origin and to a smaller amount from ACP origin. Throughout this report, the term MFN bananas is used to indicate bananas originating in WTO Members that are not signatories of the Cotonou Agreement. MFN banana suppliers are WTO those Members that are not signatories of the Cotonou Agreement.

2.51 In 2006, the total amount of MFN banana imports in the European Communities amounted to 3.2 million mt. The main exporting MFN countries in that year were: Ecuador, Colombia, Costa Rica, Panama, Brazil, Guatemala, Peru, Honduras, Venezuela, and Mexico.[131] For that same year, the total amount of ACP banana imports to the European Communities was of 891.218 mt. These imports came from ACP countries such as: Cameroon, Côte d'Ivoire, the Dominican Republic, Belize, Suriname, Saint Lucia, Jamaica, Ghana, Saint Vincent and the Grenadines, and Dominica.[132]

2.52 With respect to imports under the European Communities' EBA preference scheme, the European Communities stated that the scheme does not have an impact on the imports of bananas from least-developed countries (LDCs) since all LDCs that are exporting bananas to the European Communities are also Cotonou beneficiary countries, with the exception of Yemen and Bangladesh, but they have no banana exports towards the EC.[133] The European Communities additionally stated that since 1999 only four LDCs (Rwanda, Uganda, Somalia and Cape Verde) have exported bananas to the European Communities and in very limited quantities.[134]

[131] Exhibit EC-7, Table 14 and Table 16.
[132] Ibid.
[133] European Communities' first written submission, footnote 3.
[134] European Communities' response to question 62, para. 83.

4. European Communities' banana imports under Council Regulation 1964/2005

2.53 Since 1 January 2006, the European Communities has been applying, under Regulation 1964/2005, a tariff of €176/mt to all bananas of MFN origin and to ACP origin bananas in excess of the 775,000 mt duty free quota.[135]

2.54 Regulation 1964/2005 increased the ACP duty free quota from 750,000 mt to 775,000 mt. According to the European Communities, this increase was based on average ACP exports to the EC-10 prior to the accession of new member States. However, the United States has responded that ACP imports into the ten acceding countries from 2001 to 2003 amounted only to 15,413 mt.[136]

2.55 According to information provided by the European Communities, in 2006 the tariff of €176/mt was applied to 3,409,897 mt bananas. From this amount, 3,293,678 mt corresponded to Latin American origin bananas and 116,219 mt corresponded to out-of-quota ACP origin bananas.[137] In 2006, the share of total imports subject to the tariff of €176/mt was of 81.5 per cent of the total imports of bananas.[138] The remaining 18.5 per cent of the total import of bananas corresponded to zero duty ACP imports under the 775,000 mt quota.

2.56 In 2006, the European Communities' tariff revenue for the importation of bananas amounted to €600,141,907, from which €579,687,363 was levied on Latin American origin bananas, while €20,454,544 was levied on out-of-quota ACP origin bananas.[139]

2.57 The United States argues that the €176/mt tariff imposed on bananas of MFN origin under Regulation 1964/2005, which would be equivalent to $4.33/box, or to 33 per cent ad valorem, is 135 per cent higher than the €75/mt tariff rate previously imposed on MFN bananas.[140] According to the European Communities, this statement ignores the cost for the acquisition of import licenses under the old system; the effect of the out-of-quota tariff of €680/mt; the significant increase of MFN imports to the European Communities; the increase in the prices paid by trading companies to MFN banana farmers; and the new market access allowed to MFN countries that had no, or very little, access to the European Communities market under the old system.[141]

2.58 The European Communities considers that, based on market data and statistics comparing the situation in the banana market before and after 1 January 2006, Regulation 1964/2005 has had a positive effect for the world trade of bananas.[142] According to the European Communities, there has been a significant increase in the volume of bananas imported into the European Communities from

---

[135] European Communities' response to question 60. See also, United States' first written submission, para. 25.

[136] United States' first written submission, footnote 33. Also, see Exhibit US-7.

[137] European Communities' response to question 60.

[138] Ibid.

[139] Exhibit EC-5, Table 10.

[140] United States' first written submission, para. 24.

[141] See European Communities' response to question 69, para. 104.

[142] European Communities' first written submission, para. 7. Although the European Communities adds that "the individual export performance of a particular country is influenced by various factors and cannot be taken as a proxy for the market access afforded by the European Communities to the relevant group of countries." European Communities' first written submission, para. 17. In response to a question from the Panel, Colombia states that the European Communities "analysis of trade flows reflect a flaw understanding of causality." Colombia adds that an increase in the total quantities of banana imports to the European Communities cannot be exclusively explained by the bananas import regime implemented through Council Regulation (EC) 1964/2005 and disregard any other supply and demand elements involved in this business. As an example, Colombia mentions the appreciation of the Euro with respect to the US dollar, which would have increased "the real disposable income of Europeans to purchase foreign products". Colombia's response to question 113.

all groups of developing exporting countries (both MFN and ACP). In 2006, the total volume of bananas imported into the European Communities from MFN countries was approximately 3.28 million mt, which was the highest volume of imports registered since 1999.[143] According to the European Communities, this represents an increase of 10.7 per cent from 2005 to 2006, which is above the total growth of the market of bananas in the European Communities (10.3 per cent from 2005 to 2006).[144]

2.59 The European Communities also claims that developing countries like Guatemala and Peru, which had no or very little exports of bananas into the European Communities have now started to increase their exports to the Communities.[145] Moreover, countries such as Bolivia, Sri Lanka and Thailand have started to export bananas to the European Communities market.[146]

2.60 The European Communities additionally argues that Regulation 1964/2005 has had a positive effect on the price paid to banana producers. According to data provided by the European Communities, FOB prices in US dollars paid to Ecuadorian and Colombian bananas in 2006 were higher than the price paid in 2004 and 2005.[147] The European Communities states that:

> "[T]he average annual FOB prices in Ecuador (based on information published by the Central Bank of Ecuador) were US$217 per ton in 2004, US$224 per ton in 2005, US$239 per ton in 2006 and US$232 per ton for the first six months of 2007. Likewise, the average annual FOB prices in Colombia were US$285 per ton in 2005, US$306 per ton in 2006 and US$321 per ton for the first six months of 2007".[148]

Ecuador and Colombia have both contested these figures. Ecuador states that the statistics presented by the European Communities "are not disaggregated by markets to assess the real scope of the EC's affirmations."[149] In turn, Colombia states that, according to Eurostat, the CIF prices for bananas of Colombian origin were on average €658/mt in 2005 and €611/mt in 2006.[150]

5. United States' banana production

2.61 United States bananas are produced in Hawaii and Puerto Rico. Information provided by the United States shows that its domestic production in Hawaii in 2006 was 10,000 mt, while the bananas produced in Puerto Rico in 2006 amounted to 21,900 mt.[151]

2.62 Information provided by Côte d'Ivoire indicates that in 2005 there were 190 farms dedicated to the production of bananas in Hawaii that produced 9,500 mt bananas in that year.[152] Côte d'Ivoire

---

[143] European Communities' first written submission, para. 9.

[144] Ibid. Third parties, such as Ecuador, Nicaragua and Panama, disagree with these assertions. According to them, for the period between 1999 to 2006, the EC imports from ACP countries increased 30 per cent, while MFN imports remained generally the same. See Ecuador's response to question 115 and Nicaragua and Panama's response to question 108 and 115, Exhibit P/N-3.

[145] European Communities' first written submission, para. 13, Exhibit ACP-5. However, Ecuador said in its response to question 155 that, while MFN exporters like Brazil and Peru recorded a significant increase in exports in 2006, in that same year other countries like Venezuela, Mexico and Honduras suffered a similarly important loss in their sales to the European Communities market. See Ecuador's response to question 155.

[146] European Communities' first written submission, para. 14.

[147] Ibid., para. 11.

[148] Ibid.

[149] Ecuador's response to question 114.

[150] Colombia's response to question 114.

[151] Exhibit US-13. However, the European Communities claimed that there are some inconsistencies in the figures contained in this exhibit. See European Communities' response to question 61 and the United States comments to this response, page 14, para. 26.

also states that during the past three years between 3 and 20 tonnes of bananas produced in Hawaii have been exported to the European Communities.[153]

2.63 The United States is a net banana importer. The United States represents the second world's largest export market for bananas, after the European Communities. Most bananas exported to the United States are from Latin American origin.[154]

E. PANEL AND APPELLATE BODY FINDINGS IN PREVIOUS PROCEEDINGS

1. Measures subject to the original proceedings

2.64 The original panel and Appellate Body proceedings concerned the European Communities' common market organization for bananas, as established through Council Regulation (EEC) No. 404/93 (Regulation 404/93), introduced on 1 July 1993, and implemented, supplemented and amended through subsequent European Communities' legislation, regulations and administrative measures.[155]

2. Panel and Appellate Body main findings in the original proceedings

2.65 With regard to the challenged European Communities' measures, the original panel made the following main substantive findings:

(a) The European Communities' allocation of tariff quota shares by agreement and by assignment to some Members not having a substantial interest in supplying bananas to the European Communities (including Nicaragua, Venezuela and certain ACP countries in respect of traditional and non-traditional exports) but not to other Members (such as Guatemala) and the tariff quota reallocation rules of the Bananas Framework Agreement, were inconsistent with the requirements of Article XIII:1 of the GATT 1994.[156]

(b) To the extent that the Panel had found that the European Communities had acted inconsistently with the requirements of Article XIII:1 of the GATT 1994, the Lomé waiver waived that inconsistency with Article XIII:1, to the extent necessary to permit the European Communities to allocate shares of its banana tariff quota to specific traditional ACP banana supplying countries in an amount not exceeding their pre-1991 best-ever exports to the European Communities.[157]

(c) Neither the negotiation of the Bananas Framework Agreement and its inclusion in the European Communities' Schedule, including the Bananas Framework Agreement tariff quota shares, nor the Agreement on Agriculture permitted the European

---

[152] Written version of Côte d'Ivoire's oral statement at the Panel's substantive meeting with the parties and third parties, para. 3 and Annex.

[153] Ibid, para. 3.

[154] Joint written submission by ACP Members (Belize, Cameroon, Côte d'Ivoire, Dominica, the Dominican Republic, Jamaica, Saint Lucia, Saint Vincent and the Grenadines, and Suriname), para. 24.

[155] Panel Report on *EC – Bananas III (Ecuador)*, paras. 3.1 and 3.4.

[156] Ibid., paras. 7.90 and 7.399; Panel Report on *EC – Bananas III (Guatemala and Honduras)*, paras. 7.90 and 7.399; Panel Report on *EC – Bananas III (Mexico)*, paras. 7.90 and 7.399; Panel Report on *EC – Bananas III (US)*, paras. 7.90 and 7.399.

[157] Panel Report on *EC – Bananas III (Ecuador)*, paras. 7.110 and 7.399; Panel Report on *EC – Bananas III (Guatemala and Honduras)*, paras. 7.110 and 7.399; Panel Report on *EC – Bananas III (Mexico)*, paras. 7.110 and 7.399; Panel Report on *EC – Bananas III (US)*, paras. 7.110 and 7.399.

Communities to act inconsistently with the requirements of Article XIII of the GATT 1994.[158]

(d) To the extent that the European Communities' preferential tariff treatment of non-traditional ACP bananas was inconsistent with its obligations under Article I:1 of the GATT 1994, those obligations had been waived by the Lomé waiver.[159]

(e) The allocation to Category B operators of 30 per cent of the licences allowing the importation of third-country and non-traditional ACP bananas at in-quota tariff rates was inconsistent with the requirements of Article III:4 of the GATT 1994.[160]

(f) The application in general of operator category rules in respect of the importation of third-country and non-traditional ACP bananas at in-quota tariff rates, in the absence of the application of such rules to traditional ACP imports, and in particular the allocation to Category B operators of 30 per cent of the licences allowing the importation of third-country and non-traditional ACP bananas at in-quota tariff rates, were inconsistent with the requirements of Article I:1 of the GATT 1994.[161]

(g) The Lomé waiver did not waive the European Communities' obligations under Article I:1 of the GATT 1994 in respect of licensing procedures applied to third-country and non-traditional ACP imports, including those related to operator category rules.[162]

(h) The application of operator category rules in respect of the importation of third-country and non-traditional ACP bananas at in-quota tariff rates, in the absence of the application of such rules to traditional ACP imports, was inconsistent with the requirements of Article X:3(a) of the GATT 1994.[163]

(i) The use of activity functions in connection with the allocation of licences allowing the importation of third-country and non-traditional ACP bananas at in-quota tariff rates was not inconsistent with the requirements of Article III:4 of the GATT 1994.[164]

(j) The application of activity function rules in respect of the importation of third-country and non-traditional ACP bananas at in-quota tariff rates, in the absence of the

---

[158] Panel Report on *EC – Bananas III (Ecuador)*, paras. 7.118, 7.127 and 7.399; Panel Report on *EC – Bananas III (Guatemala and Honduras)*, paras. 7.118, 7.127 and 7.399; Panel Report on *EC – Bananas III (Mexico)*, paras. 7.118, 7.127 and 7.399; Panel Report on *EC – Bananas III (US)*, paras. 7.118, 7.127 and 7.399.

[159] Panel Report on *EC – Bananas III (Ecuador)*, paras. 7.136 and 7.399; Panel Report on *EC – Bananas III (Guatemala and Honduras)*, paras. 7.136 and 7.399; Panel Report on *EC – Bananas III (Mexico)*, paras. 7.136 and 7.399; Panel Report on *EC – Bananas III (US)*, paras. 7.136 and 7.399.

[160] Panel Report on *EC – Bananas III (Ecuador)*, paras. 7.182 and 7.399; Panel Report on *EC – Bananas III (Guatemala and Honduras)*, paras. 7.182 and 7.399; Panel Report on *EC – Bananas III (Mexico)*, paras. 7.182 and 7.399; Panel Report on *EC – Bananas III (US)*, paras. 7.182 and 7.399.

[161] Panel Report on *EC – Bananas III (Ecuador)*, paras. 7.195 and 7.399; Panel Report on *EC – Bananas III (Guatemala and Honduras)*, paras. 7.195 and 7.399; Panel Report on *EC – Bananas III (Mexico)*, paras. 7.195 and 7.399; Panel Report on *EC – Bananas III (US)*, paras. 7.195 and 7.399.

[162] Panel Report on *EC – Bananas III (Ecuador)*, paras. 7.204 and 7.399; Panel Report on *EC – Bananas III (Guatemala and Honduras)*, paras. 7.204 and 7.399; Panel Report on *EC – Bananas III (Mexico)*, paras. 7.204 and 7.399; Panel Report on *EC – Bananas III (US)*, paras. 7.204 and 7.399.

[163] Panel Report on *EC – Bananas III (Guatemala and Honduras)*, paras. 7.212 and 7.399; Panel Report on *EC – Bananas III (Mexico)*, paras. 7.212 and 7.399; Panel Report on *EC – Bananas III (US)*, paras. 7.212 and 7.399.

[164] Panel Report on *EC – Bananas III (Guatemala and Honduras)*, paras. 7.219 and 7.399; Panel Report on *EC – Bananas III (Mexico)*, paras. 7.212 and 7.399.

application of such rules to traditional ACP imports, was inconsistent with the requirements of Article I:1 of the GATT 1994.[165]

(k) The application of activity function rules in respect of the importation of third-country and non-traditional ACP bananas at in-quota tariff rates, in the absence of the application of such rules to traditional ACP imports, was inconsistent with the requirements of Article X:3(a) of the GATT 1994.[166]

(l) The requirement to match European Communities import licences with Bananas Framework Agreement export certificates was inconsistent with the requirements of Article I:1 of the GATT 1994.[167]

(m) The issuance of hurricane licences exclusively to European Communities producers and producer organizations or operators including or directly representing them was inconsistent with the requirements of Article III:4 of the GATT 1994.[168]

(n) The issuance of hurricane licences exclusively to traditional ACP producers and producer organizations or operators including or directly representing them was inconsistent with the requirements of Article I:1 of the GATT 1994.[169]

(o) The issuance of hurricane licences exclusively to ACP and European Communities producers and producer organizations or operators including or directly representing them was inconsistent with the requirements of Article 1.3 of the Import Licensing Agreement.[170]

(p) To the extent that specific aspects of the European Communities licensing procedures were found not to be in conformity with Articles I, III or X of the GATT 1994, an inconsistency was necessarily also found with the requirements of Article 1.2 of the Import Licensing Agreement.[171]

(q) The allocation to Category B operators of 30 per cent of the licences allowing the importation of third-country and non-traditional ACP bananas at in-quota tariff rates created less favourable conditions of competition for like service suppliers of Complainants' origin and was therefore inconsistent with the requirements of

---

[165] Panel Report on *EC – Bananas III (Ecuador)*, paras. 7.223 and 7.399; Panel Report on *EC – Bananas III (Guatemala and Honduras)*, paras. 7.223 and 7.399; Panel Report on *EC – Bananas III (US)*, paras. 7.223 and 7.399.

[166] Panel Report on *EC – Bananas III (Ecuador)*, paras. 7.231 and 7.399; Panel Report on *EC – Bananas III (Guatemala and Honduras)*, paras. 7.231 and 7.399; Panel Report on *EC – Bananas III (Mexico)*, paras. 7.231 and 7.399.

[167] Panel Report on *EC – Bananas III (Ecuador)*, paras. 7.241 and 7.399; Panel Report on *EC – Bananas III (Guatemala and Honduras)*, paras. 7.241 and 7.399; Panel Report on *EC – Bananas III (Mexico)*, paras. 7.241 and 7.399; Panel Report on *EC – Bananas III (US)*, paras. 7.241 and 7.399.

[168] Panel Report on *EC – Bananas III (Guatemala and Honduras)*, paras. 7.250 and 7.399; Panel Report on *EC – Bananas III (Mexico)*, paras. 7.250 and 7.399.

[169] Panel Report on *EC – Bananas III (Guatemala and Honduras)*, paras. 7.256 and 7.399.

[170] Panel Report on *EC – Bananas III (Guatemala and Honduras)*, paras. 7.263 and 7.399; Panel Report on *EC – Bananas III (Mexico)*, paras. 7.263 and 7.399; Panel Report on *EC – Bananas III (US)*, paras. 7.263 and 7.399.

[171] Panel Report on *EC – Bananas III (Ecuador)*, paras. 7.271 and 7.399; Panel Report on *EC – Bananas III (Mexico)*, paras. 7.271 and 7.399.

Articles II and XVII of the General Agreement on Trade in Services (hereinafter "GATS").[172]

(r) The allocation to ripeners of 28 per cent of the Category A and B licences allowing the importation of third-country and non-traditional ACP bananas at in-quota tariff rates created less favourable conditions of competition for like service suppliers of Complainants' origin and was therefore inconsistent with the requirements of Article XVII of the GATS.[173]

(s) The exemption of Category B operators of European Communities origin from the requirement to match European Communities import licences with Bananas Framework Agreement export certificates created less favourable conditions of competition for like service suppliers of Complainants' origin and was therefore inconsistent with the requirements of Article XVII of the GATS.[174]

(t) The exemption of Category B operators of ACP origin from the requirement to match European Communities import licences with Bananas Framework Agreement export certificates created less favourable conditions of competition for like service suppliers of Complainants' origin and was therefore inconsistent with the requirements of Article II of the GATS.[175]

(u) The allocation of hurricane licences exclusively to operators who include or directly represent European Communities producers created less favourable conditions of competition for like service suppliers of Complainants' origin and was therefore inconsistent with the requirements of Article XVII of the GATS.[176]

(v) The allocation of hurricane licences exclusively to operators who include or directly represent ACP producers created less favourable conditions of competition for like service suppliers of Complainants' origin and was therefore inconsistent with the requirements of Article II of the GATS.[177]

2.66 In summary, the original panel found that the challenged measures were inconsistent with the European Communities' obligations under Articles I:1, III:4, X:3 and XIII:1 of the GATT 1994, Articles 1.2 and 1.3 of the Import Licensing Agreement and Articles II and XVII of the GATS.

[172] Panel Report on *EC – Bananas III (Ecuador)*, paras. 7.341, 7.353 and 7.399; Panel Report on *EC – Bananas III (Mexico)*, paras. 7.341, 7.353 and 7.399; Panel Report on *EC – Bananas III (US)*, paras. 7.341, 7.353 and 7.399.

[173] Panel Report on *EC – Bananas III (Ecuador)*, paras. 7.368 and 7.399; Panel Report on *EC – Bananas III (US)*, paras. 7.368 and 7.399.

[174] Panel Report on *EC – Bananas III (Ecuador)*, paras. 7.380 and 7.399; Panel Report on *EC – Bananas III (US)*, paras. 7.380 and 7.399.

[175] Panel Report on *EC – Bananas III (Ecuador)*, paras. 7.385 and 7.399; Panel Report on *EC – Bananas III (Mexico)*, paras. 7.385 and 7.399; Panel Report on *EC – Bananas III (US)*, paras. 7.385 and 7.399.

[176] Panel Report on *EC – Bananas III (Ecuador)*, paras. 7.393 and 7.399; Panel Report on *EC – Bananas III (US)*, paras. 7.393 and 7.399.

[177] Panel Report on *EC – Bananas III (Ecuador)*, paras. 7.397 and 7.399; Panel Report on *EC – Bananas III (Mexico)*, paras. 7.397 and 7.399; Panel Report on *EC – Bananas III (US)*, paras. 7.397 and 7.399.

2.67 In turn, the Appellate Body decided to:

(a) Uphold the Panel's conclusion that the Agreement on Agriculture did not permit the European Communities to act inconsistently with the requirements of Article XIII of the GATT 1994;[178]

(b) Uphold the Panel's finding that the allocation of tariff quota shares, whether by agreement or by assignment, to some, but not to other, Members not having a substantial interest in supplying bananas to the European Communities was inconsistent with Article XIII:1 of the GATT 1994;[179]

(c) Uphold the Panel's finding that the tariff quota reallocation rules of the Bananas Framework Agreement were inconsistent with Article XIII:1 of the GATT 1994, and to modify the Panel's finding by concluding that the Bananas Framework Agreement tariff quota reallocation rules were also inconsistent with the chapeau of Article XIII:2 of the GATT 1994;[180]

(d) Reverse the Panel's finding that the Lomé Waiver waived any inconsistency with Article XIII:1 of the GATT 1994 to the extent necessary to permit the European Communities to allocate tariff quota shares to traditional ACP States;[181]

(e) Uphold the Panel's conclusions that the European Communities activity function rules and the Bananas Framework Agreement export certificate requirement were inconsistent with Article I:1 of the GATT 1994;[182]

(f) Uphold the Panel's finding that the European Communities practice with respect to hurricane licences was inconsistent with Article III:4 of the GATT 1994;[183]

(g) Uphold the Panel's conclusions that the allocation to Category B operators of 30 per cent of the licences allowing the importation of third-country and non-traditional ACP bananas at in-quota tariff rates was inconsistent with Articles II and XVII of the GATS;[184]

(h) Uphold the Panel's conclusions that the allocation to ripeners of a certain portion of the Category A and B licences allowing the importation of third-country and non-traditional ACP bananas at in-quota tariff rates was inconsistent with Article XVII of the GATS; and,[185]

(i) Uphold the Panel's conclusions that the European Communities practice with respect to hurricane licences was inconsistent with Articles II and XVII of the GATS.[186]

---

[178] Appellate Body Report on *EC – Bananas III*, para. 158.
[179] Ibid., para. 162.
[180] Ibid., para. 163.
[181] Ibid., para. 188.
[182] Ibid., paras. 206-207.
[183] Ibid., para. 214.
[184] Ibid., para. 244.
[185] Ibid., para. 246.
[186] Ibid., para. 248.

3. Panel findings in the first compliance proceedings

2.68 The compliance panel requested in December 1998 by Ecuador made the following main substantive findings:

(a) Imports from different *non-substantial* supplier countries were not similarly restricted in the meaning of Article XIII:1 of the GATT 1994. Moreover, the allocation of a collective tariff quota for traditional ACP States did not approach as closely as possible the share which these countries might be expected to obtain in the absence of the restrictions as required by the chapeau to Article XIII:2 of the GATT 1994. Therefore, the reservation of the quantity of 857,700 mt for traditional ACP imports under the revised regime is inconsistent with paragraphs 1 and 2 of Article XIII of the GATT 1994.[187]

(b) While Members have a degree of discretion in choosing a previous representative period, the period 1994-1996 was not a "representative period". Accordingly, the country-specific allocations assigned by the European Communities to Ecuador, as well as to the other substantial suppliers, were not consistent with the requirements of Article XIII:2 of the GATT 1994.[188]

(c) On the basis of the data offered by the European Communities, it was not unreasonable for the European Communities to conclude that the level of 857,700 mt for duty-free traditional ACP exports could be considered to be required by the Lomé Convention because it appeared to be based on pre-1991 best-ever exports and not on allowances for investments.[189]

(d) It was not reasonable for the European Communities to conclude that Protocol 5 of the Lomé Convention required a collective allocation for traditional ACP suppliers. Therefore, duty-free treatment of imports in excess of an individual ACP State's pre-1991 best-ever export volumes was not required by Protocol 5 of the Lomé Convention. Absent any other applicable requirement of the Lomé Convention, those excess volumes were not covered by the Lomé waiver and the preferential tariff thereon was therefore inconsistent with Article I:1 of the GATT 1994.[190]

(e) It was not unreasonable for the European Communities to conclude that non-traditional ACP imports at zero tariff within the "other" category of the MFN tariff quota was required by Article 168 of the Lomé Convention. Therefore, the violation of Article I:1 of the GATT 1994, as alleged by Ecuador, was waived by the Lomé waiver.[191]

(f) It was not unreasonable for the European Communities to conclude that including the tariff preference of 200 Euro per mt for out-of-quota imports of non-traditional ACP bananas was within the scope of what the European Communities was required to accord to non-traditional ACP supplies by virtue of the Lomé Convention. Therefore,

[187] Panel Report on *EC – Bananas III (Article 21.5 – Ecuador)*, para. 6.29.
[188] Ibid., para. 6.50.
[189] Ibid., para. 6.65.
[190] Ibid., para. 6.69.
[191] Ibid., para. 6.78.

the violation of Article I:1 of the GATT 1994, as alleged by Ecuador, was covered by the Lomé waiver.[192]

(g) Under the revised regime, Ecuador's suppliers of wholesale services were accorded *de facto* less favourable treatment than European Communities/ACP suppliers of those services in violation of Articles II and XVII of the GATS.[193]

(h) The criteria for acquiring "newcomer" status under the revised licensing procedures accorded *de facto* less favourable conditions of competition, in the meaning of Article XVII of the GATS, to Ecuador's service suppliers than to like European Communities service suppliers.[194]

2.69 The compliance panel requested by Ecuador concluded that:

(a) The reservation of the quantity of 857,700 mt for traditional ACP imports under the revised regime was inconsistent with paragraphs 1 and 2 of Article XIII of the GATT 1994. Additionally, the country-specific allocations to Ecuador, as well as to the other substantial suppliers, were not consistent with the requirements of Article XIII:2 of the GATT 1994.[195]

(b) The level of 857,700 mt for duty-free traditional ACP imports could be considered to be required by the Lomé Convention because it appeared to be based on pre-1991 best-ever exports and not on allowances for investments. However, it was not reasonable for the European Communities to conclude that Protocol 5 of the Lomé Convention required a collective allocation for traditional ACP suppliers. Therefore, duty-free treatment of imports in excess of an individual ACP State's pre-1991 best-ever export volumes was not required by Protocol 5 of the Lomé Convention. Accordingly, absent any other applicable requirement of the Lomé Convention, those excess volumes were not covered by the Lomé waiver and the preferential tariff thereon was therefore inconsistent with Article I:1 of the GATT 1994.[196]

(c) In respect of preferences for non-traditional ACP imports, it was not unreasonable for the European Communities to conclude that (i) non-traditional ACP imports at zero tariff within the "other" category of the tariff quota and (ii) the tariff preference of 200 €/mt for out-of-quota imports, were required by Article 168 of the Lomé Convention. Therefore, the violations of Article I:1 of the GATT 1994, as alleged by Ecuador in respect of preferences for non-traditional ACP imports, were covered by the Lomé waiver.[197]

(d) Under the revised regime, Ecuador's suppliers of wholesale services were accorded *de facto* less favourable treatment in respect of licence allocation than European Communities/ACP suppliers of those services in violation of Articles II and XVII of the GATS.[198]

(e) The criteria for acquiring "newcomer" status under the revised licensing procedures accorded to Ecuador's service suppliers *de facto* less favourable conditions of

[192] Panel Report on *EC – Bananas III (Article 21.5 – Ecuador)*, para. 6.80.
[193] Ibid., para. 6.134.
[194] Ibid., para. 6.149.
[195] Ibid., para. 6.160.
[196] Ibid., para. 6.161.
[197] Ibid., para. 6.162.
[198] Ibid., para. 6.163.

> competition than to like European Communities service suppliers in violation of Article XVII of the GATS.[199]

2.70 In its report, pursuant to the request made by Ecuador, the compliance panel found appropriate to make suggestions on how the European Communities could bring its banana import regime into conformity with WTO rules. In the panel's view, the European Communities had at least the following options:

> "First, the European Communities could choose to implement a tariff-only system for bananas, without a tariff quota. This could include a tariff preference (at zero or another preferential rate) for ACP bananas. If so, a waiver for the tariff preference may be necessary unless the need for a waiver is obviated, for example, by the creation of a free-trade area consistent with Article XXIV of GATT. This option would avoid the need to seek agreement on tariff quota shares.
>
> Second, the European Communities could choose to implement a tariff-only system for bananas, with a tariff quota for ACP bananas covered by a suitable waiver.
>
> Third, the European Communities could maintain its current bound and autonomous MFN tariff quotas, either without allocating any country-specific shares or allocating such shares by agreement with all substantial suppliers consistently with the requirements of the chapeau to Article XIII:2. The MFN tariff quota could be combined with the extension of duty-free treatment (or preferential duties) to ACP imports. In respect of such duty-free treatment, the European Communities could consider with the ACP States whether the Lomé Convention can be read to "require" such treatment within the meaning of the Lomé waiver. We recall that some important preferences found by the original panel and Appellate Body reports to be required by the Lomé Convention cannot be implemented consistently with WTO rules (the most important being the quantitative protections foreseen in Protocol 5). If such a view of the Lomé Convention is challenged, a waiver covering such duty-free treatment could be sought. The MFN tariff quota could also be combined with a tariff quota for ACP imports, whether traditional or not, provided an appropriate waiver of Article XIII is obtained. We note that waivers for duty-free treatment for developing country exports have been granted on several occasions by Members.[200] In this context, some action may be required soon in respect of the Lomé waiver since it expires on 29 February 2000."[201]

4. Award of the Arbitrators in the proceedings requested by the European Communities under Article 22.6 of the DSU

2.71 On 6 April 1999, in the proceedings requested by the European Communities under Article 22.6 of the DSU, the Arbitrators concluded that the level of nullification or impairment suffered by the United States in the *EC – Bananas III* matter was US$191.4 million per year. Accordingly, the Arbitrators decided that the suspension by the United States of the application to the European Communities and its member States of tariff concessions and related obligations under GATT 1994 covering trade in a maximum amount of US$191.4 million per year would be consistent with

---

[199] Panel Report on *EC – Bananas III (Article 21.5 – Ecuador)*, para. 6.163.

[200] (original footnote) See WT/L/104 (United States – Caribbean Basin Economic Recovery Act); WT/L/183 (United States – Former Trust Territory of the Pacific Islands); WT/L/184 (United States – Andean Trade Preferences Act); WT/L/185 (Canada – CARICAN).

[201] Panel Report on *EC – Bananas III (Article 21.5 – Ecuador)*, paras. 6.156-6.158.

Article 22.4 of the DSU.[202] In the same report, the Arbitrators determined that the reservation of a quantity of 857,700 mt for traditional ACP imports under the European Communities' revised bananas import regime was inconsistent with paragraphs 1 and 2 of Article XIII of the GATT 1994. The Arbitrators also found that, under the revised regime, service suppliers of the United States were being granted discriminatory treatment in violation of Articles II and XVII of the GATS. The Arbitrators therefore concluded that there was a continuation of nullification or impairment of benefits for the United States under the revised regime.[203]

5. Panel findings in the second compliance proceedings requested by Ecuador

2.72 The compliance panel requested in February 2007 by Ecuador made the main substantive findings that are found in Annex D of this report.

F. MEASURES CHALLENGED BY THE UNITED STATES IN THIS DISPUTE

2.73 The measure challenged by the United States through this recourse to Article 21.5 of the DSU is the European Communities' current banana import regime implemented through the European Communities' Council Regulation (EC) No. 1964/2005, which establishes a zero-duty tariff rate quota available only to bananas originating in ACP countries in an amount up to 775,000 mt. Bananas of other origins have no access to this 775,000 ton tariff rate quota and instead are subject to a duty of €176/mt.[204]

2.74 These measures are contained in the European Communities' Council Regulation (EEC) No. 404/93 of 13 February 1993, as amended by Council Regulation (EC) No. 216/2001 of 29 January 2001; in Council Regulation (EC) No. 1964/2005 of 29 November 2005; and, in any amendments, implementing measures, and other related measures.[205]

III. PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

3.1 The United States requests that the Panel find that the European Communities has failed to implement the rulings and recommendations of the DSB in the original dispute and continues to be in breach of its obligations as a WTO Member. More specifically, the United States requests that the Panel find that the EC measures are inconsistent with the following obligations contained in the WTO agreements:

(a) Article I of the GATT 1994, because the European Communities applies a zero tariff rate to imports of bananas originating in ACP countries in a quantity up to 775,000 mt, but does not accord the same duty-free treatment to imports of bananas originating in all other WTO Members; and,

(b) Article XIII of the GATT 1994, including Article XIII:1 and XIII:2, because the European Communities reserves the 775,000 mt zero-duty tariff quota for imports of bananas originating in ACP countries and provides no access to this preferential tariff quota to imports of bananas originating in non-ACP substantial or non-substantial supplying countries.

---

[202] *EC – Bananas III*, Decision by the Arbitrators (WT/DS27/ARB), 9 April 1999.
[203] Ibid., paras. 5.96 to 5.98.
[204] *EC – Bananas III (Article 21.5 – US)*, Request for the Establishment of a Panel (WT/DS27/83) 2 July 2007, p. 2.
[205] Ibid., pp. 2-3.

3.2 The European Communities raises three preliminary issues. First, the European Communities argues that the Panel must assess "whether the United States has 'standing' to commence these proceedings".[206]

3.3 As a second preliminary issue, the European Communities argues that the United States should not be allowed to challenge the European Communities' current import regime for bananas, including the preference for ACP countries. The European Communities contends that the Understanding on Bananas, signed by the United States and the European Communities in April 2001 (Bananas Understanding)[207], is a mutually agreed solution to the banana dispute.[208] The European Communities adds that, even if it was to be assumed that the Bananas Understanding is not a "mutually agreed solution" for purposes of the DSU, it would still constitute "an international agreement between the United States and the European Communities and, therefore, its terms must be taken into consideration in order to determine the rights and obligations of the parties towards each other under the GATT and the DSU".[209] The European Communities further adds that

> "[E]ven if it were to be assumed that the provisions of the [Bananas] Understanding itself cannot be taken into consideration in determining the rights and obligations of the parties to this dispute, the application of the principle of good faith on the facts of this case would bar the United States from challenging the Cotonou Preference."[210]

3.4 As a third preliminary issue, the European Communities argues that the United States' complaints should be rejected, as they fall outside of the scope of Article 21.5 of the DSU. In the European Communities' view, its current bananas import regime is not "a measure taken to comply" with the recommendations and rulings of the DSB.[211]

3.5 In its first submission, the European Communities had raised an additional preliminary issue, that the United States' complaint should be rejected by the Panel "outright on the grounds that the United States did not submit a request for consultations before requesting the establishment of the Panel".[212] This objection was later withdrawn by the European Communities.[213]

3.6 The European Communities has not made any specific arguments to rebut the United States' claim that the preference granted to bananas of ACP origin would be inconsistent with Article I of the GATT 1994.[214] The European Communities argues, however, that this preference is covered by a waiver from Article I:1 of the GATT 1994, the Doha Waiver.[215] According to the European

---

[206] European Communities' first written submission, para. 74. Ibid., para. 73.

[207] See Understanding on Bananas between the European Communities and the United States of 11 April 2001, in *EC – Bananas III*, Notification of Mutually Agreed Solution (WT/DS27/58), 2 July 2001; and *EC – Bananas III*, Communication from the United States (WT/DS27/59), 2 July 2001.

[208] European Communities' first written submission, paras. 39-42. See also European Communities' second written submission, paras. 8-9.

[209] European Communities' second written submission, para. 9. See also European Communities' first written submission, paras. 43-44, and final written version of the European Communities' opening oral statement at the substantive meeting of the Panel with the parties and third parties, paras. 1-4.

[210] European Communities' second written submission, para. 9.

[211] See European Communities' first written submission, paras. 46-52. See also European Communities' second written submission, paras. 40-52.

[212] See European Communities' first written submission, para. 38. See also, ibid., paras. 33-38.

[213] European Communities' second written submission, paras. 4-7. See also, United States' second written submission, paras. 4-20.

[214] European Communities' response to panel question No. 89, para. 163. See also, United States' second written submission, para. 66; and written version of United States' opening statement during substantive meeting with the parties and third parties, para. 27.

[215] Ministerial Conference, European Communities, The ACP – EC Partnership Agreement, Decision of 14 November 2001 (WT/MIN(01)/15), 14 November 2001.

Communities, the duration of that waiver is not linked to the number of arbitrations lost by the European Communities, but rather depends on whether the new import regime for bananas it introduced on 1 January 2006 at least maintains total market access for MFN suppliers.[216] The European Communities also argues that its current bananas import regime cannot be considered as the "new EC tariff regime" in the terms of the language contained in the Doha Waiver.[217]

3.7 The European Communities asks the Panel to reject the United States' claim under Article XIII of the GATT 1994. The European Communities argues that "the conditions for the application of GATT Article XIII are not satisfied", because "banana imports from Latin American and other MFN suppliers are not subject to any quantitative restriction [but] simply subject to a tariff"[218] The European Communities also argues that the United States' claim falls outside of the scope of Article XIII of the GATT 1994, which "does not cover cases of tariff discrimination".[219]

3.8 Finally, the European Communities argues that, if the Panel were to conclude "that the United States has standing and that the Cotonou Preference does not comply with the GATT"[220], the Panel should nevertheless find that:

> "[T]he existence of the Cotonou Preference between the end of 2005 and the end of 2007 does not cause any 'nullification or impairment' of any benefit accruing to the United States."[221]

IV. ARGUMENTS OF THE PARTIES

4.1 The arguments presented by the parties in their written submissions and oral statements are reflected below.[222]

A. UNITED STATES

1. First written submission of the United States

(a) Introduction

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

---

[216] European Communities' first written submission, para. 54. See also European Communities' second written submission, para. 56.

[217] European Communities' first written submission, para. 55.

[218] Ibid., para. 64.

[219] Ibid., para. 65.

[220] Ibid, para. 74.

[221] European Communities' second written submission, para. 103. See also written version of European Communities' opening statement during substantive meeting with the parties and third parties, para. 30

[222] The summaries of the parties' arguments are based on the executive summaries submitted to the Panel by the parties. All footnotes in this section are original, unless otherwise specified.

Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) is warranted. The United States hopes that this will be the last proceeding necessary to secure compliance by the European Communities with its WTO obligations in this dispute.

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

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

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

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

(b) Procedural history

4.5 The original WTO panel proceeding in this dispute (*EC – Bananas III*) was initiated more than ten years ago – on 8 May 1996 – by Ecuador, Guatemala, Honduras, Mexico, and the United States. The panel in that proceeding found over a dozen breaches of the GATT 1994 and the *General Agreement on Trade in Services* (GATS), which were overwhelmingly confirmed by the Appellate Body. On 25 September 1997, the DSB adopted the original panel and Appellate Body reports and recommended that the European Communities bring its banana import regime into conformity with its obligations under those agreements. Pursuant to arbitration under Article 21.3 of the DSU, the European Communities was given a "reasonable period of time" of more than 15 months (from 25 September 1997 to 1 January 1999) to implement the DSB's recommendations and rulings. The European Communities did not, however, implement the *EC – Bananas III* recommendations and rulings by the end of that "reasonable period of time".

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

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

(i) Understanding on Bananas

4.8 In April 2001, after more than two years of non-compliance, the United States and the European Communities reached an "*Understanding on Bananas*", which established a phased series of steps to be taken by the European Communities over several years, in combination with certain waivers, for the purpose of bringing itself into compliance with its WTO obligations.

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

(ii) GATT Article I waiver and arbitrations

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

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

4.12 On 27 October 2004, the European Communities announced its intention to implement an MFN tariff of €230/mt, a rate over three times higher than the €75/mt MFN rate applicable at the time. The Commission formally notified that rate to the WTO on 1 February 2005, pursuant to the Annex to the Article I Waiver.

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

4.14 The first Arbitration Award (*AAI*), issued on 1August 2005, carefully defined the European Communities' market access commitment under the Annex to require that any "envisaged rebinding" must, at a minimum, preserve into the future "the totality of [MFN] opportunities afforded by the existing conditions of entry", both as between MFN and preferred suppliers, and MFN and domestic EC producers. The Arbitrator determined that because the European Communities' proposed €230/mt rate wrongly increased the ACP and Everything But Arms margin of preference, creating the opportunity for a positive ACP and EBA supply response, and overstated the level of price-gap protection for EC producers, the European Communities had not fulfilled its Annex commitments.

4.15 On 12 September 2005, the European Communities proposed a revised banana "tariff only" rate of €187/mt for MFN suppliers, coupled with an enlarged ACP tariff rate quota of 775,000 mt (reflecting a 25,000 mt increase in the then existing ACP tariff rate quota volume), at zero duty.

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

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

(iii) Article XIII Waiver

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

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

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

4.20 On 7 October 2005, as the termination date of the Article XIII Waiver approached, the European Communities requested an extension "until 31 December 2007 [for] the existing waiver from paragraphs 1 and 2 of Article XIII of the GATT 1994, for a quantity of 775,000 mt of imports of bananas originating in ACP countries". The European Communities' request for a waiver extension was made in conjunction with a 12 September 2005 proposal to replace its "interim" tariff-quota regime with a "tariff only" rate of €187/mt for MFN suppliers and an enlarged ACP tariff rate quota of 775,000 mt (reflecting a 25,000 mt increase over the then existing ACP tariff rate quota volume). WTO Members did not agree to the European Communities' proposed extension.

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

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

(c) The European Communities' revised measures

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

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

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

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

(d) Legal arguments

4.27 The fact that this Panel has been established under Article 21.5 of the DSU carries with it certain consequences. Of most immediate relevance to the legal arguments of the parties is the consequence that, as the Appellate Body has made clear, an Article 21.5 panel "conduct[s] its work against the background of the original proceedings, and with full cognizance of the reasons provided by the original panel. The original determination and original panel proceedings, as well as the redetermination and the panel proceedings under Article 21.5, form part of a continuum of events." It is well established that adopted panel and Appellate Body reports "are treated as a final resolution to a dispute between the parties to that dispute".

4.28 As discussed in detail below, the European Communities' revised measures are in breach of GATT Article I and GATT Article XIII.

(i) The European Communities' revised measures are inconsistent with Article I of the GATT 1994

4.29 GATT Article I:1 provides, in relevant part, that:

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

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

4.31 First, the European Communities is providing an "advantage, favour, privilege or immunity" to ACP Members by according ACP bananas duty-free access within the 775,000 mt tariff rate quota, while subjecting all MFN bananas to a €176/mt duty. The duty-free treatment, amounting to a tariff savings of US$4.33/box, is only available to bananas of ACP origin.

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

4.33 Third, the European Communities is failing to accord the ACP tariff advantage "immediately and unconditionally" to the "like product" of other WTO Members. Although MFN bananas and ACP origin bananas are "like product" imports, MFN bananas are being denied the same duty-free tariff rate quota treatment as bananas of ACP origin.

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

Termination of GATT Article I Waiver

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

4.36 Whether the European Communities "rectified the matter" the third time around is irrelevant with respect to the continued validity of the GATT Article I Waiver. Under the express terms of the Annex, the European Communities had two opportunities to propose a regime that met the conditions set out in the waiver. In 2005, pursuant to the Annex arbitration mechanism, two WTO arbitrators determined that the two proposals made by the European Communities did not "result in at least maintaining total market access for MFN suppliers". Therefore, as required by the fifth sentence in tiret 5 of the Annex to the Article I Waiver, the waiver "cease[d] to apply upon entry into force of the

new EC tariff regime". The "new EC tariff regime" is the measure that is the subject of these proceedings, Regulation 1964, which entered into force on 1 January 2006.

(ii) The European Communities' revised measures are inconsistent with Article XIII of the GATT 1994

4.37 GATT Article XIII provides, in relevant part, that:

> "1. No prohibition or restriction shall be applied by any Member on the importation of any product of the territory of any other Member or on the exportation of any product destined for the territory of any other Member, unless the importation of the like product of all third countries or the exportation of the like product to all third countries is similarly prohibited or restricted.
>
> 2. In applying import restrictions to any product, Members shall aim at a distribution of trade in such product approaching as closely as possible the shares which the various Members might be expected to obtain in the absence of such restrictions and to this end shall observe the following provisions:
>
> …
>
> (d) In cases in which a quota is allocated among supplying countries the Member applying the restrictions may seek agreement with respect to the allocation of shares in the quota with all other Members having a substantial interest in supplying the product concerned. In cases in which this method is not reasonably practicable, the Member concerned shall allot to Members having a substantial interest in supplying the product shares based upon the proportions, supplied by such Members during a previous representative period, of the total quantity or value of imports of the product, due account being taken of any special factors which may have affected or may be affecting the trade in the product. No conditions or formalities shall be imposed which would prevent any Member from utilizing fully the share of any such total quantity or value which has been allotted to it, subject to importation being made within any prescribed period to which the quota may relate.
>
> ...
>
> 5. The provisions of this Article shall apply to any tariff quota instituted or maintained by any Member, and, in so far as applicable, the principles of this Article shall also extend to export restrictions."

4.38 Under the terms of the EC-US Understanding, the EC- Ecuador Understanding and the Article I Waiver, the European Communities was supposed to introduce a tariff only regime for bananas by 1 January 2006. Instead, the European Communities introduced a regime containing an exclusive tariff rate quota for bananas of ACP origin. The *EC – Bananas III* panel, Appellate Body and compliance panels found the European Communities' use of an exclusive ACP tariff rate quota for bananas inconsistent with GATT Article XIII:1 and XIII:2. While the current regime may be a simplified version of earlier ones, the nonconformity with GATT Article XIII remains.

4.39 There can be no doubt that Article XIII applies with respect to the current tariff rate quota regime, just as it did with respect to the European Communities' prior banana import regimes. In *EC – Bananas III (Article 21.5 – Ecuador)*, the panel explained:

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

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

> The European Communities' import regime for bananas is inconsistent with GATT Article XIII:1

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

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

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

4.43 In disregard of GATT Article XIII:1 and the *EC – Bananas III* findings, the European Communities has chosen to maintain a tariff rate quota under which MFN-origin bananas are neither "treated equally" nor restricted "similarly" to "like" ACP-origin bananas. ACP bananas receive preferential, protected access under the European Communities' banana regime, entering the EC market duty-free up to a quantity of 775,000 mt. No MFN supplier receives any such tariff rate quota treatment. By using a tariff rate quota on ACP imports, and an entirely different means to restrict MFN imports, the European Communities is preventing "like" imports from being "treated equally, irrespective of origin" in violation of GATT Article XIII:1.

> The European Communities' import regime for bananas is inconsistent with GATT Article XIII:2

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

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

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

4.46 The *EC – Bananas III* panel further explained that Article XIII:2(d) provides for the possibility to allocate tariff rate quota shares to supplying countries and the treatment that must be given to Members with a "substantial interest" in supplying the product. The Member allocating shares of a tariff rate quota may seek agreement with all Members having a substantial interest in supplying the product, or, if that is not reasonably practicable, allot to Members having a substantial interest in supplying the product based on criteria specified in Article XIII:2(d), second sentence. The *EC – Bananas III* panel determined that if a Member allocates tariff rate quota shares to Members not having a substantial interest in supplying the product, then shares must be allocated to *all* suppliers. This is because "[o]therwise, imports from Members would not be similarly restricted as required by Article XIII:1".

4.47 The European Communities' exclusive 775,000 mt ACP tariff rate quota fails to distribute *any* share whatsoever to MFN suppliers, let alone a share they would have expected to obtain in the absence of restrictions. This is so even though many of the excluded MFN suppliers are principal or substantial suppliers of bananas to the European Communities, and leading exporters of bananas to the world market. Therefore, the ACP tariff rate quota established through Regulation 1964, like prior ACP tariff rate quotas, is inconsistent with Article XIII:2.

4.48 The European Communities has no Article XIII waiver currently in force – its last waiver having expired on its own terms on 31 December 2005.

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

(e) Conclusion

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

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

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

(3) The European Communities has failed to comply with the recommendations and ruling of the DSB.

2. Second written submission of the United States

(a) The European Communities' preliminary objections should be rejected

(i) The United States was not required to request consultations with the EC

4.51 First, the United States was surprised that the European Communities raised lack of consultations as a procedural objection given that the United States and the European Communities had agreed, at the highest levels, that this objection would not be raised. The United States

understands that this objection may have been lodged without an understanding of the commitment the European Communities had undertaken. Inasmuch as the European Communities has raised this objection, the United States responds as follows.

4.52 Formal consultations are not a prerequisite to the establishment of a panel under Article 21.5. The Appellate Body's analysis in *Mexico – Corn Syrup (Article 21.5 – US)* amply supports the United States' view. In *Mexico – Corn Syrup (Article 21.5 – US)*, the Appellate Body observed that while, as a general matter, "consultations are a pre-requisite to panel proceedings", the requirement that parties engage in consultations "is subject to certain limitations". After reviewing the requirements of DSU Articles 4.3, 4.7 and 6.2, the Appellate Body concluded that "the lack of prior consultations is not a defect that, by its very nature, deprives a panel of its authority to deal with and dispose of a matter". While the Appellate Body did not decide whether this general rule was applicable to Article 21.5, it stated that "even if the general obligations in the DSU regarding prior consultations were applicable" to Article 21.5 proceedings, "non-compliance would not have the effect of depriving the panel of its authority to deal with and dispose of the matter".

4.53 The only prerequisite explicitly set forth in Article 21.5 is that there be a "disagreement" as to whether a Member has implemented the recommendations and rulings of the DSB. Such a disagreement clearly exists in this case.

4.54 The European Communities suggests that the phrase "through recourse to these dispute settlement procedures" in Article 21.5 could not refer to something "less than all" the procedures contained in the DSU, including consultations. There are several difficulties with the EC position. First, nothing in the phrase "these dispute settlement procedures" supports the proposition that that phrase extends to every aspect of the DSU. Second, the phrase is different from the broader phrase found in DSU Article 23: "the rules and procedures of this Understanding". This difference makes clear that the European Communities is wrong to suggest that Article 21.5 cannot refer to "less than all" of the DSU. Third, the phrase is part of the larger phrase "such dispute shall be *decided* through recourse to these dispute settlement procedures" (emphasis added). Consultations are not a means of "deciding" a dispute. It is the panel procedures that serve the function of "deciding" – and thus it is the panel procedures to which "these dispute settlement procedures" must refer.

4.55 To interpret Article 21.5 to require another round of consultations would only serve to delay the resolution of disputes, in contradiction to DSU Article 21.1 which provides that prompt compliance is "essential in order to ensure effective resolution of disputes to the benefit of all Members".

4.56 Fifth, the United States notes that in an earlier related proceeding, the European Communities requested the establishment of Article 21.5 panel to determine that measures taken by the European Communities were in conformity with its WTO obligations, without first seeking consultations with any of the original complaining parties.

4.57 Aside from the European Communities' flawed legal theory, the Panel should not sustain the European Communities' objection. First, as permitted by Article 4.3 of the DSU, the United States and the European Communities had an agreement that formal consultations would not be necessary. Second, the European Communities explicitly withdrew any procedural objection based on the lack of a formal consultation request in its DSB statement at the 12 July 2007 meeting. Finally, even if it were appropriate for the Panel to take the considerations raised by the European Communities into account, they should not lead to the conclusion that the European Communities seeks. The DSU does not guarantee a role for third parties in consultations. Throughout the long history of this dispute, the European Communities has had plenty of opportunities to negotiate a solution. This dispute has been the subject of countless discussions at the DSB, and third parties have been given every possible opportunity to participate, above and beyond what is provided for in the DSU. It is hard to imagine

what formal consultations would have achieved that over ten years of litigation, discussions, and negotiations have not been able to achieve.

4.58 The United States request that the Panel reject the European Communities' request to dismiss for lack of consultations.

(ii) The EC-US Understanding on Bananas does not preclude this proceeding

4.59 The European Communities' objection that the EC-US Understanding bars this proceeding is equally groundless. The lynchpin of the European Communities' argumentation appears to be the assertion that the United States has "accepted... the principle that the Cotonou Preference would continue to exist until the end of 2007" and therefore "the United States is now barred from challenging" its existence.

4.60 Nothing in the EC-US Understanding says that the United States was agreeing to a reduction in its rights to challenge the WTO-consistency of any EC measure. The European Communities points to the paragraph in the EC-US Understanding providing that the United States would lift its reserve concerning the Article I waiver. This provision did not itself change the legal situation with respect to the European Communities' tariff preferences. The United States' willingness to lift its reserve regarding the waiver did not itself make the European Communities' tariff preferences WTO-consistent, nor did it insulate those tariff preferences from challenge under the DSU. Nothing in Articles IX:3 and IX:4 of the WTO Agreement suggests that a Member's willingness to support a waiver request has independent legal consequences. If the European Communities' position were adopted by this Panel, it is hard to see how any Member would ever agree to support an EC waiver request in the future, when the legal consequence of such a commitment would be that it – but not other Members who had not yet agreed to support the waiver – were barred from challenging the measure for which the waiver had been requested.

4.61 As contemplated by the EC-US Understanding, the United States did support the adoption of the waiver, and the waiver was ultimately approved at Doha. Article 3*bis* of the waiver states that "[w]ith respect to bananas, the additional provisions in the Annex shall apply." These additional provisions, set out conditions which the new EC regime on bananas would have to meet. The United States believes that the Article I waiver ceased to apply with respect to bananas on 1 January 2006.

4.62 Though not necessary, the United States wishes to make some additional comments. *First*, the United States disagrees with the European Communities' contention that the EC-US Understanding represented a "mutually agreed solution" as that term is used in the DSU. A fair reading of the EC-US Understanding can lead to only one conclusion: that it would have been impossible in June of 2001 to say that the dispute had been "solved". It is clear from its text that the EC-US Understanding was a document that identified the "means" to resolve the dispute, but that no solution acceptable to both parties had yet been put in place on the date of the EC-US Understanding and that the Understanding was not itself the end of the dispute. Indeed, the final step to consummate the "solution" would not be taken until almost five years after the date of the Understanding.

4.63 *Second*, in a communication to the DSB on 26 June 2001, after the unilateral notification of the EC-US Understanding as a "mutually agreed solution" by the European Communities, the United States corrected the record by explaining that the Understanding was <u>not</u> a mutually agreed solution notified pursuant to DSU Article 3.6. At the February 2002 DSB meeting, the United States again made clear that there were still compliance steps to be taken by the European Communities, namely the introduction of a WTO-consistent "tariff only" regime by 1 January 2006.

4.64 *Third*, the United States disagrees with the European Communities' assertion that, pursuant to Article 31(3)(c) of the *Vienna Convention on the Law of Treaties* (Vienna Convention), the EC-US

Understanding must be taken into consideration to determine the parties' rights and obligations under the GATT 1994 and the DSU. Nothing in Article 31(3)(c) of the Vienna Convention supports the European Communities' assertion that the EC-US Understanding acts as a procedural defence for the European Communities. Article 31(3)(c) of the Vienna Convention deals with interpretation of the covered agreements. The European Communities is not arguing that the EC-US Understanding indicates a particular interpretation of any term in any covered agreement; the European Communities appears to be arguing that the Understanding has altered the covered agreements. Article 31(3)(c) does not deal with this issue.

4.65 Article 31(3)(c) of the Vienna Convention provides for the taking into account, in the interpretation of a treaty, "any relevant rules of international law applicable in the relations between the parties". The *EC – Approval and Marketing of Biotech Products* panel found that "the rules of international law" that are to be "taken into account" in the interpretation of the WTO Agreements "are those which are applicable in the relations between the WTO Members", not those applicable only to the disputing parties. Since the EC-US Understanding is a bilateral agreement, it cannot be considered part of any "applicable rules of law" that could inform the panel's interpretation of the covered agreements.

4.66 Article 1.1 of the DSU provides that the DSU applies to the "covered agreements" listed in Appendix 1 to the DSU. The EC-US Understanding is not a "covered agreement". Accordingly, the DSU cannot be used to settle a dispute as to the meaning or effect of the EC-US Understanding, and the DSU cannot enforce the Understanding by blocking a party to the Understanding from recourse to the DSU.

(iii) The United States' complaint falls within the scope of Article 21.5

4.67 The European Communities' objection that the European Communities' 1 January 2006 banana measures are not "measures taken to comply" ignores the plain text of the EC-US Understanding, EC Regulation 1964, and the long history of this dispute, and should therefore be rejected.

4.68 The European Communities first argues that it took its "*final* 'measure taken to comply'" with the EC-US Understanding in January 2002, "when the EC introduced a new tariff-based quota regime with the characteristics agreed in Annex II of the Understanding" and the United States' "right to suspend concessions terminated" (emphasis added).

4.69 The EC-US Understanding contemplated a series of steps that would culminate with the introduction of a "tariff only" regime by 1 January 2006. As required by the terms of the Understanding, the United States terminated its increased duties upon the European Communities' implementation of the steps provided for in Annex II. This only means that the two interim phases contemplated in the paragraph C of the Understanding were completed. The final step was not scheduled to happen until four years later. To argue that the European Communities did not need to take that final step with respect to the EC-US Understanding would read paragraph B out of the Understanding.

4.70 The European Communities also argues that the United States never challenged the measures taken by the European Communities in 2002 that it considers to be the "measures taken to comply" with the recommendations and rulings of the DSB. As explained above, it was not until the introduction of the new EC regime for bananas on 1 January 2006 that the European Communities took the final, and unfortunately flawed, step required by the Understanding. Ever since, the issue of non-compliance has been the subject of discussions at the DSB, culminating with Ecuador's and the United States' requests under Article 21.5.

4.71 The fifth clause in the preamble to EC Regulation 1964 itself states that the measures are being taken in an effort to rectify the matter which the two Article I waiver Annex arbitrations found inconsistent with that Annex. The Article I waiver and Annex are inextricably linked to the Understandings, which are in turn inextricably linked to the recommendations and rulings of the DSB in *EC – Bananas III*.

4.72 The status of the European Communities' measures is further confirmed by numerous EC statements made from 1999 through 2006. In particular, EC statements made *after 2002*, when the European Communities argues, for purposes of this proceeding, that it implemented its "measure taken to comply", confirm that the European Communities itself did not believe it had taken a "measure taken to comply" at that time.

(b) The European Communities' arguments about "standing" and nullification or impairment have been rejected before and should be rejected once again

(i) The United States has standing to challenge the EC's banana regime

4.73 In *EC – Bananas III*, as here, the European Communities argued that, because the United States "ha[d] never exported a single banana to the European Community", it "could not possibly suffer any trade damage". According to the European Communities, this lack of trade effect or damage meant that the United States could not, as a threshold matter, challenge the European Communities' measures under the GATT. The Appellate Body upheld the panel's finding that the United States "had standing" to bring claims under the GATT 1994 against the European Communities' banana measures.

4.74 In reaching its conclusion, the Appellate Body made the general observations that "a Member has broad discretion in deciding whether to bring a case against another Member under the DSU" and that Members are "expected to be largely self-regulating in deciding whether any such action would be 'fruitful'" within the meaning of DSU Article 3.7. The Appellate Body also observed that: "the United States is a producer of bananas, and a potential export interest by the United States cannot be excluded"; and "[t]he internal market of the United States for bananas could be affected by the EC banana regime, in particular, by the effects of that regime on world supplies and world prices of bananas". Quoting from the panel report, the Appellate Body also stated that "with the increased interdependence of the global economy... Members have a greater stake in enforcing WTO rules than in the past *since any deviation from the negotiated balance of rights and obligations is more likely to affect them*, directly or indirectly".

4.75 In light of this guidance, the stake the United States holds in making sure that the European Communities complies with its WTO obligations, and the fact that the United States continues to be a producer of bananas, it is clear that the United States may challenge the European Communities' banana measures in this compliance proceeding.

(ii) The United States is not required to demonstrate nullification or impairment of benefits to advance claims of an EC breach of GATT Articles I and XIII

4.76 To prevail on its claims of an EC breach of GATT Articles I and XIII, the United States is not required to demonstrate that the European Communities' banana measures nullify or impair benefits accruing to it.

4.77 Article 3.7 of the DSU specifies three potential means by which a dispute can be resolved: a mutually agreed solution consistent with the covered agreements; withdrawal of WTO-inconsistent measures; or, as a "last resort", suspension of concessions. Neither of the first two requires calculation of the level of nullification or impairment suffered by the complaining Member. The

second of these makes clear that withdrawal of a WTO inconsistency is a preferred outcome, without regard to the impact of the inconsistency on the complaining Member. It is only when a WTO challenge has reached arbitration under DSU Article 22 that the level of nullification or impairment suffered by the complaining party becomes relevant.

4.78 The European Communities made a similar argument to the original panel and Appellate Body, but its argument was rejected. In determining that the United States did in fact suffer nullification or impairment of benefits at the hands of the European Communities' banana measures, the Appellate Body made clear that a showing of trade effects is unnecessary for purposes of demonstrating that there has been a breach of a provision of the GATT, quoting from the GATT panel in *US – Superfund*. The *US – Superfund* GATT panel decided that it was unnecessary to examine the parties' submissions regarding trade effects in order to determine that benefits accruing to the complaining Member had been nullified or impaired, linking its decision to the breach of the legal provision, Article III:2, alone. The same reasoning should apply here. The Panel should dismiss the European Communities' arguments.

(c) The European Communities' Article I waiver has expired, and it therefore maintains its banana measures in breach of GATT Article I

4.79 The European Communities does not contest that its banana regime is in breach of GATT Article I, but argues that the Article I Waiver is still in effect. The European Communities' arguments ignore the plain text of the waiver and its Annex. Pursuant to the terms of the Annex, following two negative arbitration determinations, the waiver "cease[d] to apply to bananas upon entry into force of the new EC tariff regime".

4.80 An analysis of the European Communities' Article I Waiver begins with the chapeau of the Annex, which states that, "[i]n the case of bananas, the waiver will also apply until 31 December 2007, *subject to the following*, which is without prejudice to the rights and obligations under Article XXVIII". The continuation of the waiver until 31 December 2007, is therefore entirely dependent on the European Communities' fulfilment of the several conditions laid out in the body of the Annex.

4.81 Tirets one and two of the Annex define the steps to be taken by the European Communities prior to arbitration. These tirets further require the European Communities, during that consultation period, to demonstrate that MFN "WTO market-access commitments relating to bananas" will be protected. Tirets three through five establish a centrepiece of the Annex – the special arbitration controls under which the EC waiver automatically lapses in the event it implements a tariff regime after two negative arbitration reviews.

4.82 Tiret four sets forth the terms of the first arbitration proceeding, including a 90-day review timetable and a mandate to determine "whether the envisaged rebinding of the EC tariff on bananas would result in at least maintaining total market access for MFN banana suppliers, taking into account ... all EC WTO market-access commitments relating to bananas". Tiret four underscores the imperative of multilateral review and approval before implementation of an EC "tariff only" regime. Latin American banana suppliers initiated arbitration in 2005. The Arbitrator concluded that the European Communities' "envisaged rebinding" of €230/mt would not fulfil the European Communities' MFN market access commitment.

4.83 Tiret five describes how the European Communities must "rectify the matter" following a negative determination in the first arbitration. The ordinary meaning of the word "rectify" is "to put or set right" or "to remedy (a bad or faulty condition or state of things)". The term "matter" in this case refers to the European Communities' failure to satisfy the mandated standard of tiret four. The second and third sentences of tiret five lay out the first of two avenues by which the European

Communities can set right, or remedy, its failed "envisaged rebinding". First, the European Communities must consult with the interested parties within 10 days to determine whether a "mutually satisfactory solution" can be found. Second, in the absence of a mutually agreed solution, within 30 days of a new arbitration request, the same arbitrator will be asked to determine if the European Communities has "rectified" the matter. The fifth sentence of tiret five specifies the automatic consequence of a second, negative arbitration determination against the EC: "[i]f the EC *has failed to rectify the matter, this waiver shall cease to apply to bananas upon entry into force of the new EC tariff regime*". The mandatory consequence, the expiration of the waiver, takes effect "*upon entry into force* of the new EC tariff regime", meaning that the waiver terminates automatically upon entry into force of the new EC regime, not at some later point in time.

4.84 The Annex clearly sets out a mechanism whereby once an arbitrator found twice that the European Communities had presented a tariff proposal that did not meet the conditions of the Annex, the waiver would automatically expire once the new EC tariff regime went into effect. The European Communities argues that "the new EC tariff regime" could only refer to the regime that was found to be inconsistent with the conditions of the Annex by the arbitrator and that as long as it introduced a different regime and that regime "did indeed" maintain the total market access of the MFN suppliers, the waiver would apply until the end of 2007. The text of the Annex does not support that interpretation.

4.85 Recital 11 to the Article I waiver provides context supporting the above reading of the Annex. Recital 11 states: "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*". The reference to "*multilateral control*" refers to the Annex arbitration procedures and argues against any EC interpretation that would allow the waiver to continue in effect in the face of the two negative arbitral determinations and a subsequent unilateral determination of "compliance" by the European Communities. The European Communities' interpretation, which would allow it, at the end of the day, to apply any regime it chose, cannot be reconciled with the intent of the drafters to impose multilateral controls over the banana regime.

4.86 While the text of the Annex is clear, supplementary means of interpretation, however, confirm that the waiver expired upon implementation of the European Communities' new banana measures. The waiver history demonstrate that the parties negotiated the special procedures embodied in the Annex with the purpose of preventing the European Communities from installing an unacceptable banana tariff as of 2006. The original EC draft of the Annex failed to state a consequence for EC choices after negative arbitration rulings. Members insisted that the language of the fifth and sixth sentences of tiret five be inserted into the Annex. Absent this, the waiver would not have been approved.

4.87 For all these reasons, the European Communities' Article I waiver expired on 1 January 2006, upon the implementation of the new EC banana measures. In the absence of this waiver, the European Communities' banana measures are maintained in violation of GATT Article I.

(d) The European Communities maintains its exclusive tariff rate quota for ACP bananas in violation of GATT Article XIII

(i) The European Communities' tariff rate quota is a quantitative restriction within the meaning of Article XIII

4.88 First, the European Communities argues that the measures contained in EC Regulation 1964 are not subject to the requirements of GATT Article XIII because the ACP tariff quota is not a "quantitative restriction", but rather a "cap" on a tariff preference. The European Communities goes

so far as to declare that it "subjects all banana imports to a single tariff of 176 euro per ton. There are no other tariffs and there are no quantitative restrictions imposed on the importation of bananas".

4.89 The European Communities' description of its measure defies reality. In the sixth whereas clause EC Regulation 1964 states that "a tariff rate quota for bananas originating in ACP countries should also be opened". In addition, Article 1.2 states that "an autonomous tariff quota of 775,000 tonnes per net weight subject to a zero-duty rate shall be opened for imports of bananas ... originating in ACP countries".

4.90 There is nothing new in the European Communities' attempt to cast its discriminatory ACP tariff rate quota as a "cap" on a tariff preference. The Arbitrators in *EC – Bananas III (US) (Article 22.6 – EC)* rejected this exact same argument nearly eight years ago, concluding that "in our view, the 857,700 tonne limit on traditional ACP imports is a tariff quota and therefore Article XIII applies to it". The same conclusion applies here. The European Communities' 775,000 mt limit on duty-free access for ACP bananas is also a tariff quota within the meaning of Article XIII and subject to the non-discrimination requirements of Article XIII.

(ii) Article XIII applies even where the entire EC banana market is not controlled by quotas

4.91 The European Communities argues that Article XIII only applies to "different tariff quotas ... imposed to different groups of countries" but not where "MFN Members are not subject to any quantitative restriction". The European Communities offers no support for this proposition. That is because both the text of Article XIII as well as numerous panel or Appellate Body reports that have examined the application of Article XIII dictate the opposite result – that Article XIII does in fact apply to the European Communities' ACP-exclusive tariff rate quota.

4.92 The Arbitrator in *EC – Bananas III (US) (Article 22.6 – EC)* confirmed that the European Communities' exclusive ACP quota is by definition a tariff rate quota, since it "is a quantitative limit on the availability of a specific tariff rate". Because all tariff rate quotas are subject to the requirements of GATT Article XIII by virtue of Article XIII:5, the requirements of Article XIII apply to the European Communities' ACP duty-free tariff quota.

4.93 The *EC – Bananas III* Panel Report affirmed that Article XIII:1's non-discrimination principle requires that like products of all Members must be similarly restricted: "a Member may not limit the quantity of imports from some Members but not from others ... A Member may not restrict imports from some Members using one means and restrict them from another using another means".

4.94 Article XIII's non-discrimination requirements therefore govern any tariff quota or other quantitative restriction that is applied to imports entering a Member's territory. This is the case whether or not the entire EC market for bananas is regulated by tariff quotas.

4.95 To interpret Article XIII's application otherwise would ignore the guidance of the Appellate Body in *EC – Bananas III*, in which it concluded that "the essence of the non-discrimination obligations [of GATT Articles I and XIII] is that like products should be treated equally, irrespective of their origin". The Appellate Body stated that:

> "If, by choosing a different legal basis for imposing import restrictions, or by applying different tariff rates, a Member could avoid the application of non-discrimination provisions to the imports of like products from different Members, the object and purpose of the non-discrimination provisions would be defeated. It would be very easy for a Member to circumvent the non-discrimination provisions of the GATT 1994 and the other Annex 1A agreements, if these provisions apply only within regulatory regimes established by that Member."

4.96 Thus, Article XIII prohibits the European Communities from establishing a duty-free tariff rate quota for some Members, but not others, and from denying equal treatment to banana imports of all origins. This interpretation of Article XIII prevents Members from circumventing their basic GATT non-discrimination obligations, and is equally as applicable in this instance as it was ten years ago. Just as it did in the original *EC – Bananas III* proceeding, the European Communities again attempts to elude Article XIII coverage by arguing that the separation of its market into two separate regimes – one covered by a tariff, the other by a tariff quota – absolves it of its non-discrimination obligations. As then, the European Communities' arguments should be rejected.

4.97 In essence, the European Communities seeks to "eviscerate" its non-discrimination obligations by interpreting Article XIII such that it would permit the European Communities unfettered discretion to carve-out a portion of its market for preferential access without any multilateral controls over how that carve-out was determined and without any consideration of how the carve-out affects access into the same market for other "like" products. The European Communities' interpretation turns Article XIII on its head by distorting a restriction on discriminatory measures into a *carte blanche* for discriminatory measures, as long as a Member's entire market is not subject to a quantitative restriction.

4.98 The European Communities' own prior statements also call into question its arguments. The European Communities' 2001 request for a waiver from Article XIII:1 and XIII:2 stated that its ACP-exclusive tariff quota "*requires* a waiver from the obligations established under Article XIII GATT". In October 2005, the European Communities sought to extend that very same Article XIII waiver for its new proposed regime that consisted of the same ACP tariff quota reserve (increased to 775,000 mt), in combination with a €187/mt MFN tariff. That proposed regime, which the European Communities said needed an Article XIII waiver, was structured exactly like the European Communities' current banana measures, with ACP bananas subject to a tariff quota and MFN bananas subject to a tariff and no quota.

(iii) The European Communities maintains its ACP tariff rate quota in breach of GATT Article XIII

4.99 It is clear that the European Communities' ACP-exclusive tariff quota is subject to the requirements of GATT Article XIII. It is also undisputed that the European Communities' waiver from its obligations under Article XIII expired on 31 December 2005. Thus, as demonstrated in the United States' first written submission, because the European Communities uses a tariff rate quota on ACP imports and an entirely different means to restrict MFN imports, the European Communities is preventing "like" imports from being "treated equally, irrespective of origin" in breach of GATT Article XIII:1.

4.100 Moreover, because the European Communities fails to distribute any share whatsoever of its ACP tariff quota to MFN suppliers, let alone a share they would have expected to obtain in the absence of restrictions, it maintains its tariff quota in breach of GATT Article XIII:2. In particular, Article XIII:2(d) required the European Communities, once it opted to impose a tariff quota on banana imports entering its market, to ensure, on failure to reach agreement on quota shares among suppliers, that it "allot[ed] to Members having a substantial interest in supplying the product shares based upon the proportions, supplied by such Members during a previous representative period". Only having done so could the European Communities avoid discriminating against the imports of non-ACP banana suppliers. It failed to do so. Instead, the European Communities chose to allot no share whatsoever to non-ACP suppliers with a substantial interest and no share to non-ACP suppliers with no substantial interest. Thus, the European Communities breaches its obligations under GATT Article XIII:2 because it failed to "similarly prohibit or restrict" those non-ACP bananas.

(e) Conclusion

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

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

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

3. Oral statement of the United States

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

(a) The European Communities' bananas import regime is a measure taken to comply

4.103 On 1 January 2006, the European Communities implemented a revised regime for the importation of bananas through Council Regulation (EC) No. 1964 of 2005. Article 1 of Regulation 1964 contains two elements. Paragraph 1 establishes that from 1 January 2006, the most-favoured-nation, or MFN, tariff rate for bananas will be set at €176/mt. Paragraph 2 creates an exception to this MFN rate by establishing a duty-free tariff rate quota of up to 775,000 mt per year available exclusively to bananas originating in the African, Caribbean and Pacific countries or ACP countries. MFN-origin bananas have no right to enter under the zero-duty ACP tariff rate quota.

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

4.105 On 25 September 1997, the DSB adopted the panel and Appellate Body reports in *EC – Bananas III* and recommended that the European Communities bring its measures into compliance.

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

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

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

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

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

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

4.111 Paragraph D then deals with steps the United States would take, in response to the successful completion of interim steps by the European Communities, with respect to the US suspension of concessions against EC exports.

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

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

4.114 The European Communities argues that the fact that the United States agreed to terminate its application of the authorized suspension of concessions and related obligations upon the completion of Phase II "confirms" that the implementation of that import regime was the agreed "measure taken to comply". As already explained, the Understanding sets out a series of steps. Two significant steps were to be achieved by 1 July 2001 and 1 January 2002. As incentive to ensure that the European Communities took those steps, the United States agreed to first provisionally suspend its imposition of increased duties and then terminate the imposition of increased duties that the DSB had authorized the United States to apply. This only proves that both the United States and the European Communities complied with what is set out in paragraphs C and D of the Understanding. Up to that point, there had yet to be full compliance by the European Communities. Per the terms of the Understanding, there was an additional step to be taken.

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

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

(b) The European Communities' regime is in breach of GATT 1994 Articles XIII and I

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

(i) The European Communities' regime is in breach of GATT 1994 Article XIII

4.118 We begin with Article XIII of the GATT 1994. Article XIII:5 provides that Article XIII applies to "tariff quotas". The European Communities claims that Article XIII does not apply in this instance because MFN suppliers are "simply subject to a tariff" and, therefore, there is no quantitative restriction imposed on them. The European Communities made the same argument in the first Article 21.5 proceeding brought by Ecuador and in the Article 22.6 proceeding with the United States with respect to the then 857,700 mt tariff rate quota for ACP origin bananas. The panel and arbitrator each rejected the European Communities' argument, explaining that "a tariff quota is a quantitative limit on the availability of a specific tariff rate" and therefore, Article XIII applied to the 857,700 mt limit. The 775,000 mt limit on the duty-free rate reserved for ACP countries is likewise a tariff rate quota subject to Article XIII. The United States notes that there is no support in the text of Article XIII or in any WTO dispute settlement report that the Member making the claim has to be the one *subject* to the tariff rate quota, as the European Communities suggests.

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

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

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

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

4.123 Article XIII:2(d) provides rules on the allocation of quota shares among Members supplying the product. First, the Member allocating a quota or tariff rate quota must try to reach agreement with the Members having a substantial interest. If that fails, the allocating Member must allocate shares to supplying Members having a substantial interest based on criteria specified in Article XIII:2(d),

second sentence. Furthermore, the *EC – Bananas III* panel determined that if a Member allocates tariff rate quota shares to Members *not* having a substantial interest in supplying the product, then shares must be allocated to all suppliers not having a substantial interest. Otherwise, "imports from Members would not be similarly restricted as required by Article XIII:1".

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

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

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

(ii) The European Communities' regime is in breach of Article I, and the Article I waiver has ceased to apply

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

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

4.129 Tiret one requires the initiation of Article XXVIII negotiations with respect to the rebinding of the EC tariff on bananas with enough time to finalize the process before the entry into force of the tariff only regime. Tiret two requires that interested parties be informed of the European Communities' intentions regarding the rebinding and sets out other conditions for the negotiations.

4.130 Tirets three through five set out the arbitration mechanism which is the focus of US discussions. Tiret three provided that interested parties could invoke the arbitration mechanism within 60 days of the announcement regarding the proposed rebinding. Tiret four sets forth the terms

of the first arbitration proceeding, with a mandate to determine "whether the envisaged rebinding of the EC tariff on bananas would result in at least maintaining total market access for MFN banana suppliers, taking into account ... all EC WTO market-access commitments relating to bananas". The Arbitrator in the first arbitration concluded that the European Communities' "envisaged rebinding" of €230/mt would not fulfill the European Communities' MFN market access commitment.

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

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

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

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

(c) The Panel should reject the European Communities' preliminary objections regarding the Understanding and nullification or impairment

4.135 The United States has set out in detail in its rebuttal submission the reasons the Panel should reject the European Communities' preliminary objections. It would now like to address further two issues raised by the EC.

(i) The EC-US Understanding was not a "mutually agreed solution" and even if it were it would not preclude this proceeding

4.136 We begin with the Understanding. The United States acknowledges that the Understanding is an important document in the long history of this dispute. It sets out what the United States and the European Communities, back in 2001, considered to be means to resolve the bananas dispute. As part of the procedural history of this dispute, it provides evidence that there was a continuum of actions that the European Communities would take to bring itself into compliance, culminating in the adoption, it was hoped, of a tariff only regime on 1 January 2006. Nonetheless, as a matter of fact and law, the Understanding does not have the legal effect that the European Communities argues.

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

4.138 Second, the European Communities argues that the Understanding is a "mutually agreed solution" and that as a result the United States is barred from bringing this proceeding. As explained in written submissions, the United States did not and does not consider that the Understanding was a "mutually agreed solution" for purposes of Article 3.6. The United States made this clear immediately after the European Communities unilaterally notified the Understanding to the DSB as a "mutually agreed solution" in June of 2001. It would have been impossible in 2001 to say that the dispute was "solved". As the United States made clear to the European Communities and all Members in 2001, the Understanding identified "the means by which the long-standing dispute... can be resolved, but, as is obvious from its own text, it does not in itself constitute a mutually agreed solution pursuant to Article 3.6 of the DSU".

4.139 Even if the Understanding were a "mutually agreed solution", nothing in the DSU permits the legal consequence that the European Communities proposes. The DSU provides three limited consequences for "mutually agreed solutions". Article 3.6 requires that mutually agreed solutions be notified to the DSB and the relevant Councils and Committees. Article 12.7 provides that the existence of a mutually satisfactory solution reached prior to the conclusion of a panel proceeding affects the form and content of the panel's report. And Article 22.8 provides that the suspension of concessions or other obligations shall only be applied until, *inter alia*, a mutually satisfactory solution is reached. The fact that the legal consequences of a "mutually agreed solution" are spelled out in these three provisions is significant because it stands in stark contrast to the lack of any provision that assigns the legal consequences that the European Communities would now attribute to such solutions.

4.140 In particular, there is no basis in Article 22.8 of the DSU, elsewhere in the DSU, or elsewhere in the covered agreements for the EC argument that parties to a "mutually agreed solution" are precluded from having recourse to Article 21.5 proceedings. As noted in the United States' second written submission, the European Communities took this very same position in the *India – Autos* proceeding. There, the European Communities argued that "[e]ven if the [1997 Agreement] had settled the matter in dispute ..., that would still not preclude the European Communities from bringing this dispute".

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

4.142 Nothing in the customary rules of interpretation of public international law, as reflected in Article 31(3)(c) of the Vienna Convention, supports the European Communities' assertion that the Understanding acts as a procedural defence for the European Communities. Article 31(3)(c) of the Vienna Convention deals with interpretation of the covered agreements. The European Communities is not arguing that the Understanding indicates a particular interpretation of any term in any covered agreement; the European Communities appears to be arguing that the Understanding has altered the covered agreements. Article 31(3)(c) does not deal with this issue. The United States refers the Panel to a discussion of this issue in its second written submission.

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

(ii) The Panel must reject the European Communities' arguments regarding nullification or impairment

4.144 Finally, the Panel must reject the EC arguments that in order to resolve this dispute the Panel must determine whether the United States has standing and what is the level of nullification or impairment suffered by the United States. Both these issues were settled by the Appellate Body in *EC – Bananas III*.

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

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

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

4.148 In that regard, the United States found troubling the European Communities' assertion in its rebuttal submission that a finding by this Panel of WTO-inconsistency would prolong the dispute and

would likely lead to the suspension of concessions by the United States. The United States disagrees. Rather, once this Panel finds the European Communities' current regime to be WTO-inconsistent, and the WTO adopts the report, the United States expects the European Communities to fully respect its WTO obligations and to reach a mutually agreed solution consistent with the covered agreements or withdraw its current bananas regime.

4. Closing statement of the United States

4.149 The United States wishes to note that it regrets very much some of the comments made by certain ACP speakers, and endorsed by other ACP speakers, that attack the integrity and motivations of the United States in bringing this proceeding.

4.150 The United States disagrees profoundly with those comments and statements. The United States was a party to the original *Bananas III* proceeding. It therefore has full rights to ensure that the European Communities complies with the recommendations and rulings of the DSB.

4.151 The Chairman recalled at the beginning of this panel meeting that the GATT recently celebrated its 60th anniversary. A bedrock principle of the GATT, and now the WTO agreements, is non-discrimination.

4.152 This is a dispute about this very principle of non-discrimination. The regime implemented by the European Communities on 1 January 2006, continues the long-standing discrimination against non-ACP banana suppliers that was found WTO-inconsistent over a decade ago, and more going back to the earlier GATT cases.

4.153 One of the speakers this morning stated trade should not be used to the detriment of the poorest countries. The United States agrees with that, and believes that the regime implemented by the European Communities on 1 January 2006, does precisely that by picking winners and losers among similarly situated Members of the WTO.

4.154 None other than EC Trade Commissioner Mandelson recently wrote that the European Communities' "current arrangements discriminate in favour of some developing countries – the ... ACP[] – and against others, often equally needy." He added: "That is not right morally nor compatible with international trade rules."[223] The United States agrees.

B. EUROPEAN COMMUNITIES

1. First written submission of the European Communities

(a) Preliminary objections

(i) The United States did not request consultations

4.155 A complaining party is not entitled to request the establishment of a panel unless it has first submitted a *request* for consultations. If no request for consultations has been made, the defending party may raise a preliminary objection before the panel (given that, pursuant to the DSU, a panel request is not subjected to scrutiny by the DSB) and the panel is obliged to sustain the objection and dismiss the case outright. This Panel should find that the well established importance of the request for consultations for the proper operation of the WTO dispute settlement system, recognized not only in the text of the DSU but also in the text of the GATT, means that a complaining party must submit a

[223] Peter Mandelson & Louis Michel, "This is not a poker game", *The Guardian*, 31 October 2007.

request for consultations before the submission of a request for the establishment of a panel pursuant to Article 21.5 of the DSU.

4.156 The United States never submitted a request for consultations before submitting its request for the establishment of this Panel. The European Communities hereby raises a preliminary objection and requests the Panel to dismiss the United States' complaint outright on the grounds that the United States did not submit a request for consultations before requesting the establishment of the Panel.

(ii) The United States is barred from challenging the Cotonou Preference

4.157 The Understanding between the United States and the European Communities and the Letters exchanged between them confirm that the parties had reached a mutually agreed solution to their dispute. The Understanding (i) describes in great detail the characteristics of the two banana import regimes that the European Communities should implement by 1 July 2001 and by 1 January 2002 respectively and (ii) expressly provides that the United States' retaliation measures will be initially suspended and then terminated upon the implementation by the European Communities of the second import regime on 1 January 2002. The Letters provide even further detail on the allocation of the licences to certain operators and the mutual rights and obligations of the United States and the European Communities if various events occur. Importantly, the Letters confirm that this is indeed a mutually agreed solution. In light of the content of the Understanding and the Letters and the rights and obligations mutually accepted by both parties, the European Communities respectfully submits that the Understanding is indeed a "mutually agreed solution" to the banana dispute between the United States and the European Communities. In any event, even if it is assumed *arguendo* that the Understanding is not a "mutually agreed solution", it is a bilateral agreement between the United States and the European Communities and forms part of the "applicable rules of law" governing the relations between them. Its terms must be taken into consideration in order to determine the parties' mutual rights and obligations under the GATT and the DSU.

4.158 Through the Understanding, the United States accepted the principle that the European Communities would offer a trade preference to bananas coming from the ACP countries until the end of 2007. Given that the United States has accepted in the Understanding the principle that the Cotonou Preference would continue to exist until the end of 2007, the United States is now barred from challenging the existence of the Cotonou Preference in the period between the end of 2005 and the end of 2007, irrespective of the reasons that the United States may claim in its complaint.

(iii) The complaint of the United States falls outside the scope of Article 21.5 of the DSU

4.159 Article 21.5 proceedings can be used only to challenge the legality of the "*measures taken to comply*" with the recommendations and rulings of the DSB and not "*any*" measure taken by the defending party, even if that measure relates to products that have been the subject of dispute resolution procedures in the past. A complaining party that wishes to challenge such measures must follow the procedures outlined in Article 6 of the DSU.

4.160 The dispute between the United States and the European Communities, which had culminated with the Appellate Body's report in 1997 and the United States' retaliation measures, ended when the parties reached their "mutually agreed solution" in 2001 and signed the Understanding and exchanged the Letters attached as an Exhibit to this submission. In compliance with the mutually agreed solution, the European Communities introduced on 1 January 2002 the final "measure taken to comply" with the 1997 Appellate Body report. This was the tariff-quota based import regime with the characteristics agreed in Annex II of the Understanding. This was the "measure taken to comply" that was agreed with the United States. The United States' retaliation rights terminated upon the European Communities' implementation of this tariff-quota based regime and the United States never requested from the DSB the right to reinstate those rights with relation to that import regime.

4.161 Therefore, the current European Communities' banana import regime is not a "measure taken to comply" with the 1997 rulings and recommendations. If the United States does indeed consider that the current banana import regime violates the GATT, it should commence new proceedings on the basis of Article 6 of the DSU. The Panel should find that the United States has erroneously brought this complaint under the procedures of Article 21.5 of the DSU and reject the complaint in its entirety.

(b) GATT Article I: The Doha Waiver covers the Cotonou Preference until the end of 2007

4.162 The correct interpretation of the Doha Waiver is that it would expire only upon the entry into force of a European Communities' banana import regime that would not satisfy the standard of "maintaining total market access for MFN countries". Therefore, the continued application of the Doha Waiver until the end of 2007 depends on whether the European Communities' import regime *actually* maintains total market access for MFN suppliers and not on the number of arbitrations lost for the European Communities before the new import regime was ever introduced.

4.163 The text of the Doha Waiver provides that the waiver would cease to cover the Cotonou Preference if the European Communities "*failed to rectify the matter*". This means that the Doha Waiver would continue to apply to the end of 2007, if the European Communities' new import regime indeed maintained total market access for MFN suppliers. Moreover, the Doha Waiver provides that "this waiver shall cease to apply to bananas upon *entry into force of the new EC tariff regime*". The phrase "*the new EC tariff regime*" refers to the tariff regime that was presented to the Arbitrator and on which the Arbitrator made a pronouncement in its Award. In other words, the Doha Waiver would cease to apply only if the European Communities implemented the import regime analysed by the Arbitrator and found not to satisfy the standard of the Doha Waiver. If the European Communities introduced a *different* import regime than the one analysed by the Arbitrator *and* that import regime did indeed maintain the total market access of the MFN suppliers, then the Doha Waiver would continue to apply until the end of 2007. The European Communities has fully satisfied the condition for the continued application of the Doha Waiver.

4.164 The current import regime maintains total market access for MFN suppliers. First, it has been established that the volume of total imports of bananas from MFN countries has increased significantly since the introduction of the European Communities' new import regime. Its growth exceeds the growth of the aggregate banana market in the European Communities, as well as the growth of the imports of ACP bananas.

4.165 Second, "maintaining total market access for MFN suppliers" does not mean guaranteeing a particular level of trade to any individual MFN country. Consequently, the fact that the volume of exports of some countries may have decreased in recent years does not mean that the total market access for the group to which these countries belong has not been maintained. The reduction in the exports of certain countries is the result of a number of factors (e.g., weather conditions, natural disasters, local administrative measures affecting the decisions of banana trading companies, etc.) that have nothing to do with the import regime of the European Communities.

4.166 Third, the average FOB prices paid to banana producers in 2006 and 2007 are much higher than those paid in 2005 and 2004.

(c) There is no violation of GATT Article XIII

4.167 The Cotonou Preference does not violate GATT Article XIII. First, banana imports from Latin American and other MFN suppliers are not subject to any quantitative restriction. Therefore, the conditions for the application of GATT Article XIII are not satisfied, i.e., there is no quantitative restriction imposed on one WTO Member that it is not imposed on all other countries.

4.168 Second, GATT Article XIII cannot be used as a substitute for GATT Article I:1 wherever a tariff quota exists. GATT Article XIII does not oblige the European Communities to extend to Latin American countries the tariff preference it grants to the ACP countries simply because this tariff preference is subject to a "cap". Article XIII does not cover cases of tariff discrimination: this is the role of GATT Article I:1.

4.169 Third, the facts in the current proceedings are not the same as those that faced the Panel and Appellate Body in 1997. It is noteworthy that the United States does not make any attempt to explain what are the restrictions on imports from MFN exporters that are not similar to those it says are affecting imports from ACP countries.

4.170 Fourth, the United States' invocation of Article XIII:2 suffers from similar defects. It fails to provide any explanation of how the extension of Article XIII to tariff quotas is to apply in the case of paragraph 2. Moreover, the European Communities' regime for bananas that is the subject of the present proceedings is significantly different from that examined in the original dispute. In the present case the MFN Members are not subject to any quantitative restriction. As there are no "restrictions" applicable to their exports, there are no restrictions on their exports that can be compared with those, if they can be called such, that are applied to ACP exports.

(d) Absence of nullification or impairment of a benefit accruing to the United States

4.171 The existence between the end of 2005 and the end of 2007 of the Cotonou Preference has not caused the United States a nullification or impairment of any benefit accruing to it. There can be only one notion of "nullification or impairment" for purposes of the DSU and, therefore, this term has the same meaning both in the context of Article 3.8 of the DSU and of Article 22 of the DSU. The European Communities draws support for this conclusion from the decision of the Arbitrators (pursuant to Article 22.6 of the DSU) in *US – 1916 Act (EC)*, paragraph 5.50.

4.172 Moreover, the Arbitrators' decision in the *EC – Bananas III* arbitration in 1999 confirms that the Panel must use different standards to determine (a) whether the alleged violation of a WTO rule sufficiently "touches" upon the interests of the complaining party so as to justify the complaining party's "standing" to commence dispute settlement proceedings, and (b) whether the complaining party suffers a "nullification or impairment". Moreover, it confirms that the standard that needs to be satisfied for a finding of "nullification or impairment" should be based on facts and is more difficult to satisfy than the standard that needs to be satisfied for a finding of "standing" to bring a complaint. The Panel needs to examine what is the nullification or impairment suffered by the United States in order to comply with its obligations under Articles 3.2, 3.3 and 11 of the DSU. The Panel can offer legal certainty to the parties and help them avoid future disputes, for example, under Article 22 of the DSU only if it resolves in the present proceedings the question of whether there is nullification or impairment of a benefit accruing to the United States for which the European Communities can face suspension of concessions.

4.173 The Cotonou Preference does not deprive the United States from any opportunity to export bananas towards the market of the European Communities. The United States cannot claim a nullification or impairment neither on the basis of any potential effect on the trade in bananas between the United States and third countries, nor on the basis of any potential effect on "US content incorporated in Latin American bananas". In the *EC – Bananas III* case, the United States' nullification or impairment was based on violations of the GATS. This is confirmed both in the report of the Appellate Body in 1997 and in the decision of the Arbitrators in 1999.

4.174 None of the bases on which the nullification or impairment of the United States' benefits was found in 1997 and 1999 exists today. In the current proceedings, the United States has not brought any claim under the GATS and bases its complaint exclusively the GATT. The current import regime

does not give rise to any "inextricably interwoven" relation between the GATT and the GATS (which the Appellate Body had found to be the case in 1997). The Panel should confirm the conclusions it had reached as Arbitrators in 1999 and find that, even if the Cotonou Preference were to violate the GATT, such violation does not cause any nullification or impairment of a benefit accruing to the United States for which the European Communities can face suspension of concessions.

2. Second written submission of the European Communities

(a) Preliminary objections

(i) The United States did not request consultations

4.175 In light of the agreement to dispense with consultations in this case, which was reached between the European Communities and the United States prior to the United States' request for the establishment of the Panel, the European Communities withdraws the objection raised in its first written submission.

(ii) The Understanding bars the United States from challenging the Cotonou Preference

4.176 The United States argues that it never accepted a reduction of its rights to challenge the Cotonou Preference pursuant to the DSU and that the Understanding does not include an express statement of the United States according to which it renounces the right to challenge the Cotonou Preference at a later time. The European Communities considers that such an express statement by the United States in the Understanding is not necessary in light of the other provisions of the Understanding and the context within which it was signed. The United States does not dispute the fact that the Understanding provides that the United States would help the European Communities to obtain the "waiver requested". The United States also does not dispute the fact that the duration of the "waiver requested" by the European Communities was until the end of 2007. The logical consequence of the United States' accepting to support the grant of a waiver with duration until the end of 2007 is that the United States also accepted that the Cotonou Preference (which the request for the waiver referred to) would continue to exist until the end of 2007. The Understanding does not include any language that might indicate that the United States' acceptance of the Cotonou Preference until the end of 2007 was subject to any conditions relating to the characteristics of the Cotonou Preference. The only characteristic of the Cotonou Preference that was accepted by the parties was that banana imports from ACP countries would be assured "*more favourable treatment than that granted to third countries benefiting from the most favoured nation clause for the same products*". Moreover, the deal between the parties would have been completely one-sided and unbalanced if the United States were allowed first to reap all the benefits of the Understanding and then were allowed to avoid complying with its obligations towards the European Communities.

4.177 The United States argues that its agreement to the grant of the "waiver requested" by the European Communities "*did not itself change the legal situation with respect to the EC's tariff preferences*". The European Communities has not argued that the Understanding has changed the "legal situation" of the Cotonou Preference, but that, irrespective of the "legal situation" of the Cotonou Preference, the United States has accepted its existence until the end of 2007 and is therefore is now barred from challenging it. The United States also argues that the European Communities' interpretation could lead to a situation where WTO Members would be very hesitant to accept the grant of waivers in the future. However, the United States has done *more* than simply voting in favour of the Cotonou Preference waiver: it has entered into an international agreement accepting its existence until the end of 2007 and has received specific consideration for doing so. This differentiates the United States from virtually all other WTO Members present in Doha. It is actually the United States' arguments that, if accepted, would create important "systemic" problems for the WTO legal order. Granting to WTO Members the right to renege on the agreements with which they

reach mutually agreed solutions to their disputes would seriously compromise the effectiveness of these mutually agreed solutions and would foster the "contentious" character of the dispute resolution system.

4.178 The United States argues that the Understanding is not a legally binding agreement that can be taken into consideration by the Panel in determining the parties' rights and obligations under the GATT and the DSU. The position taken by the United States in this part of its second written submission is in full contradiction with the position it takes in the next section of its submission. The United States also argues that the Understanding was not a mutually agreed solution because it was merely a "*document that identified the 'means' to resolve the dispute and set out a path forward, but that no solution acceptable to both parties had yet been put in place on the date of the EC-US Understanding and that the Understanding was not itself the end of the dispute*". The European Communities cannot see why such a document should not qualify as a mutually agreed solution for purposes of the DSU. A "mutually agreed solution" can be nothing else than a document that sets the terms of the solution mutually agreed between the parties. A "mutually agreed solution" will describe the actions that the parties have undertaken to perform (or refrain from) in the future. The United States also attempts to argue that the side letters exchanged between the parties shortly after the signing of the Understanding do not mean what they expressly say, i.e., that the Understanding was a "mutually agreed solution". The European Communities considers that the points raised by the United States in this paragraph actually support the interpretation of the European Communities: both conditions mentioned by the United States for the parties' adherence to the Understanding have been satisfied. Therefore, the United States does not have any excuse not to adhere to the Understanding and comply with its terms. Moreover, the express reference to the Understanding as a mutually agreed solution in the side letters confirms the legal effect that the parties intended to give to the Understanding from the very beginning.

4.179 The United States accepts that the Understanding is an international agreement between the United States and the European Communities, but argues that its terms cannot be taken into consideration in determining the rights and obligations of the parties under the WTO rules. The United States asserts that the Understanding has no relevance for these proceedings because it is not a "covered agreement" listed in Appendix 1 to the DSU. The European Communities notes that there are many bilateral agreements between WTO Members which are not listed in Appendix 1, but are given legal effect and are taken into account by the WTO dispute settlement system. A good example is the bilateral agreement of the parties in this case with which they have agreed to dispense with the DSU's requirement to hold consultations. This agreement is not listed in Appendix 1 to the DSU, but the United States considers it binding upon the parties. It would be odd to find that the bilateral agreement to dispense with consultations is covered by the DSU and is binding for the parties, but that the Understanding is not, although the parties' undertakings in the Understanding are so important for the determination of their rights and obligations under the GATT and the DSU.

4.180 The United States attempts to draw some support from the report of the panel in *EC – Approval and Marketing of Biotech Products*, which, according to the United States, "rejected the notion that the rules of international law could be those applicable only to the disputing parties". The European Communities considers that the United States' reading of the panel report is not accurate. The European Communities notes that paragraph 7.71 and paragraph 7.72 of the panel's report in *EC – Approval and Marketing of Biotech Products* states that, in determining the rights and obligations of the parties to a dispute under the GATT and the DSU, it is possible for a panel to take into consideration the terms of any international agreement to which all parties to the dispute participate. Therefore, the assertion that the United States attempts to base on the report of the panel in *EC – Approval and Marketing of Biotech Products* is not correct. The United States also tries to draw some support for its position from the report of the panel in *India – Autos* and the views expressed by the European Communities in that case. The European Communities invites the United States to read the report of the panel in paragraph 7.113 and paragraph 7.115 which confirm that the panel considered it

possible that a mutually agreed solution could bar a party from commencing dispute settlement proceedings.

4.181 The European Communities also considers that the principle of good faith, which runs through the entire DSU and defines the outer limits of the application of all rights recognized by the DSU to WTO Members, bars the United States from challenging the Cotonou Preference. The United States has already drawn the benefits from the Understanding and was from the very beginning aware of the legal status of the Understanding and of the obligations it undertook with it. Moreover, the European Communities has fully complied with its obligations under the Understanding in good faith and relying on the expectation that the United States would also comply with its own obligations. The application of the principle of good faith on these facts requires the United States to perform its part of the deal and refrain from challenging the existence of the Cotonou Preference until the end of 2007.

(iii) The United States' complaint falls outside the scope of Article 21.5 of the DSU

4.182 The Understanding does not contain any express provision imposing the obligation to implement a tariff only regime on the European Communities. Paragraph B makes a simple reference to a provision of the European Communities' secondary legislation, which reflected the political decision of the European Communities to change its banana import regime. This political decision had already been taken *before* the signing of the Understanding. The United States wrongly asserts that the parties agreed in the Understanding that the tariff only regime would be a part of the "measure taken to comply".

4.183 It was agreed in the Understanding that the United States' right to retaliate would terminate upon the European Communities' implementation of the tariff-quota-based regime described in paragraph C-2 of the Understanding. A complaining party's right to retaliate terminates upon the implementation by the defending party of the appropriate "measure taken to comply". Therefore, the fact that the United States accepted to have their retaliation rights terminated upon such implementation confirms that the implementation of that import regime was the agreed "measure taken to comply".

4.184 Article 21.5 establishes a link between the "measures taken to comply" and the recommendations and rulings of the DSB and the determination of the scope of the "measures taken to comply" should involve an examination of the recommendations and rulings contained in the original report adopted by the DSB. The findings and recommendations of the Appellate Body report in the *EC – Bananas III* case do not oblige the European Communities to move into a tariff only regime in order to bring itself into compliance with the covered agreements. If one looks at the general trend of modernisation and liberalisation of the European Communities' common agricultural policy, one may conclude that the tariff-only banana import regime would have been introduced even in the absence of any dispute resolution proceedings in the banana sector.

4.185 The United States argues that the Preamble of Regulation 1964/2005 refers to the arbitrations held in 2005 and it must be considered as a measure taken to comply with the recommendations and rulings adopted by the DSB in 1997. The European Communities notes that the arbitrations were part of the waiver granted by the WTO to the Cotonou Agreement, which was signed three years *after* the adoption of the DSB's recommendations and rulings. It is difficult to see how a Regulation adopted to conform to the terms of a waiver relating to an international agreement reached in 2000 can be said to be a "measure taken to comply" with a DSB ruling adopted in 1997. In addition, the subject matter of the 2005 arbitrations has no relation to the 1997 DSB recommendations and rulings. The two procedures can be said to have conflicting subject matters. Moreover, the arbitration arrangement supports the proposition that the tariff-quota-based import regime that was in place between 1 January 2002 and 31 December 2005 was the "measure taken to comply" with the DSB recommendations and rulings of 1997. The aim of the arbitrations was to "maintain the total market access of the MFN

suppliers" at its 2002 to 2005 level. This strongly suggests that the level of MFN market access between 2002 and 2005 was satisfactory for the MFN suppliers and that whatever market access problems the MFN suppliers had in 1997 were corrected by 2002-2005. This supports the conclusion that the import regime implemented by the European Communities between 2002 and 2005 was the "measure taken to comply" with the DSB recommendations and rulings of 1997.

4.186 The United States relies on various statements mostly found in press releases issued by the European Communities in the past. The European Communities would like to note that none of these statements refer to the tariff-only system introduced in 2006 as a "measure taken to comply". Moreover, the European Communities considers that such press statements cannot contain authoritative interpretations of complex legal issues. Their content cannot be used to replace proper legal analysis under the DSU. The same is true for the invitation to public consultation annexed in the second written submission of the United States. One of the documents relied upon by the United States actually supports the European Communities' position and confirms that the "measure taken to comply" that was agreed with the United States was the tariff-quota-based system implemented by the European Communities until the end of 2005 and that the European Communities' political decision to change its banana import regime preceded the Understanding and was not part of the agreement with the United States.

(b) The Cotonou Preference does not violate the GATT

(i) The Doha Waiver covers the Cotonou Preference until the end of 2007

4.187 The text of the Doha Waiver provides that the "standard" is to "maintain total market access for MFN suppliers". This means that whether the new import regime *actually has maintained* total market access has an important legal significance. This is confirmed by the Doha Waiver providing that the waiver shall cease to apply "if the EC has failed to rectify the matter" and not "*if the Arbitrator considers* that the EC has failed to rectify the matter". It is uncontested that the current import regime more than maintains the total market access of the MFN suppliers and, therefore, this condition for the termination of the Doha Waiver has not been satisfied. The waiver would terminate upon the entry into force of a "new EC tariff regime" that would fail to maintain the total market access of the MFN suppliers. If the regime that the Arbitrators had analysed and found not to satisfy that standard was introduced there would be a strong presumption that this regime is the "new EC tariff regime" that fails to maintain the total market access of the MFN suppliers. If the new import regime was different it would not be possible to characterise it as the "new EC tariff regime" that fails to maintain the total market access. Given that the current import regime is different from the regime analysed by the Arbitrators and satisfies the standard of the Doha Waiver this condition for the termination of the Doha Waiver has not been satisfied. If the continued existence of the waiver was solely linked to the perceptions of the Arbitrators prior to the introduction of the regime, then the Doha Waiver would continue to apply even if the new import regime was not the regime presented to the Arbitrators, or was a regime eventually proven not to maintain the market access of the MFN suppliers. It is not very likely that the drafters of the Doha Waiver would have set up a mechanism that produces such absurd results.

4.188 The Recital relied upon by the United States states that the new import regime would maintain total market access and not that *the Arbitrators would consider* that the new import regime would satisfy that standard. Therefore, the Recital confirms that the "test" that had to be satisfied was whether the new import regime *actually* satisfies the standard and not whether the Arbitrators *considered* that this would be the case in the future. The reference to "multilateral control on the implementation of this commitment" does not support the United States' position. The "commitment" that had to be "implemented" was that the new import regime should maintain the total market access of the MFN suppliers. The European Communities accepted that if it failed to satisfy the standard the

Doha Waiver would terminate. This is not a consequence that Article XXVIII normally imposes and this is the "multilateral control over the implementation of the commitment" referred to in the Recital.

4.189 The negotiating history of the Doha Waiver supports the European Communities' position. An earlier draft provided that the waiver would be terminated automatically within two months from the notification of the arbitration award to the General Council. This provision was not included in the final version of the Doha Waiver. This shows that the parties agreed that the termination of the waiver would not be linked to the outcome of the arbitration awards, but on whether the European Communities would actually "rectify the matter".

(ii) There is no violation of GATT Article XIII

4.190 There is extensive GATT and WTO practice showing that Members do not regard exclusion from a tariff quota as a matter governed by Article XIII. Under the Generalized System of Preferences (GSP), first adopted as a policy by UNCTAD II in 1968, the waivers were from Article I:1 only, and they explicitly authorized the use of tariff quotas. There was no reference to Article XIII. It was the evident understanding of the parties that the favourable treatment for developing countries in the form of tariff quotas required a waiver of Article I:1 but not of Article XIII. A general waiver from the provisions of Article I for GSP schemes was adopted in 1971. The decision did not mention tariff quotas specifically, but they were common in the most significant of the national schemes submitted to the GATT Secretariat. The GSP schemes of WTO Members are now authorized by the Enabling Clause. The operative words of this document say "Notwithstanding the provisions of Article I of the General Agreement, contracting parties may accord differential and more favourable treatment to developing countries". There is no provision in the text that specifically authorizes the use of tariff quotas but several GATT members had used them and that fact was generally known. The 1979 decision was adopted against this background, and tariff quotas continued to be used in the schemes applied after this date. As reported to the WTO, the present United States GSP scheme contains provision for the use of tariff quotas. As decisions of the CONTRACTING PARTIES, those instruments, such as the Enabling Clause, that remained operational in 1994 formed part of GATT 1994 (under Annex 1A of the WTO Agreement). In accordance with GATT and WTO practice they were adopted by consensus. This shows that there is "subsequent practice" which is "concordant", "common" and consistent, which has involved taking a particular stance on the interpretation of the GATT and which confirms that Members assume that the grant of a tariff quota for the benefit of certain countries to the exclusion of other Members would be an infringement of Article I, but not of other GATT obligations, such as Article XIII.

4.191 The objective of Article XIII:2 is to achieve particular quantitative distributions of trade. When these rules are applied to tariff quotas a corresponding distribution can be achieved by allocating specific quantities of the tariff quota. The notion that such a distribution could be achieved by setting different tariff levels for the various exporting countries is economic nonsense. Consequently it is not plausible that the drafters of Article XIII would have envisaged using paragraph 2 to achieve such a goal. Moreover, the US' interpretation would lead to non-Members of the WTO being accorded rights under the GATT. Such an outcome is contrary to the object and purpose of GATT. In *EC – Bananas III*, the panel's proposition does not imply that paragraph 5 of Article XIII has the effect of extending the obligations of that Article into situations of tariff discrimination and thereby of overthrowing the basic distinction between tariffs and quantitative measures. Nor was the panel in *EC – Bananas III* concerned with such a situation since the tariff quotas that it was examining extended to all of the Members that were affected by the dispute. The statements of the Appellate Body in *EC – Bananas III* referred to both Articles I and XIII.

(c) Absence of "nullification or impairment"

4.192 The United States asserts that the European Communities "*confuses the function of dispute settlement proceedings under DSU Article 6 and 21.5 with arbitration proceedings under DSU Article 22*", but does not deny that the notion of "nullification or impairment" is the same under both Article 3.8 and Article 22 of the DSU, or that the "nullification or impairment" of Article 3.8 is different from the "interest" that must be present in order to justify "standing". Therefore, these two principles are uncontested in this case.

4.193 The United States does not deny the facts establishing that the Cotonou Preference does not cause it any "nullification or impairment", but simply requests the Panel to repeat its findings of 1997. However, the facts of the current proceedings are completely different. At that time, the basic if not the only source of nullification or impairment for the United States was the license allocation system of the European Communities, which was found to be in violation of the GATS. In contrast, no nullification or impairment was found to stem from the measures violating the GATT. Therefore, the relevant findings of this Panel in the 1990s are completely irrelevant for the current proceedings where there is no violation of the GATS. Moreover, the United States invites the Panel to avoid examining the facts establishing that the United States does not suffer any "nullification or impairment" in these proceedings. Accepting this suggestion of the United States would raise important systemic issues. First, this would result in an unnecessary prolongation of the dispute and would continue to shed legal uncertainty in the parties' trade relationships. The requirements of Articles 3.3 and 11 of the DSU give the Panel sufficient guidance as to the course of action that it should follow in this case. Second, accepting the United States' suggestion would create confusion as to the facts that a defending party should bring to the attention of a panel in order to rebut the presumption of Article 3.8 of the DSU.

3. Oral statement of the European Communities

(a) Preliminary issues

4.194 This case raises a number of interesting points on the interpretation of the DSU. The first point, which was discussed in paragraphs 8 to 39 of the European Communities' second written submission, is the legal effect of agreements to which all parties to a dispute participate and with which all parties to the dispute undertake certain rights and obligations within the context of the DSU and the GATT. The European Communities considers that the Panel should take into consideration the terms of these agreements in determining the rights and obligations of the parties towards each other. It is not contested today that the Panel should enforce the agreement between the parties to dispense with formal consultations prior to requesting the establishment of the Panel. Equally, the Panel must also enforce the agreement between the parties that allows the European Communities to follow a certain course of action in exchange for the United States' receiving specific consideration.

4.195 This agreement is the Understanding, with which the United States accepted that the European Communities would continue to offer the Cotonou Preference to the ACP countries until the end of 2007. The United States cannot now renege on its obligations and challenge the existence of the Cotonou Preference until the end of 2007, because the United States has already received specific consideration for entering into the Understanding and was aware of the legal nature of the Understanding from the very beginning. This is a result which is dictated (i) by the DSU itself, in Articles 3.6 and 3.10, (ii) by the general principles of customary international law, as codified in Article 31(3)(c) of the Vienna Convention and (iii) by the principle of good faith, which exists both under international law and under WTO law.

4.196 The United States and certain third parties have expressed their disagreement with these principles. The European Communities considers that accepting their position would create very

significant obstacles for trade negotiations, because it would create uncertainty as to the legal effects of the agreements reached between WTO Members. For example, what would be the legal value of agreements reached following negotiations such as the ongoing banana negotiations between the European Communities and its principal banana suppliers? If signing such an agreement does not offer the legal certainty that the dispute is closed once and for all why would the European Communities, or any other WTO Member, agree to offer trade concessions in exchange for its counterparts' signature?

4.197 What the complainants are asking the Panel to do is to remove from the WTO system the legal certainty covering agreements signed between WTO Members. But the whole WTO system is based on agreements between its members. The European Communities respectfully submits that accepting the complainants' arguments will bring prejudice to the very essence of the system that the Panel and the European Communities are here to defend.

4.198 The second point raised by these proceedings, which was discussed in paragraphs 40 to 52 of the second written submission of the European Communities, relates to the notion of "measures taken to comply" with the recommendations and rulings of the DSB. Following a negative panel or Appellate Body report, a defending party may take a number of initiatives that may affect the product market that was the subject of the dispute. The mere fact that these policy initiatives relate to a product market that has been the subject of a dispute in the past does not suffice to characterize all of these policy initiatives as "measures taken to comply" with the recommendations and rulings of the DSB.

4.199 In this case, the European Communities has shown that there is nothing in the recommendations and rulings of the DSB adopted in 1997 following the United States' complaint, which obliged the European Communities to introduce a tariff-only banana import regime such as the current one. Moreover, the United States accepts that the Understanding sets out the "means" by which the banana dispute was resolved. The European Communities has shown that the decision for the introduction of the tariff-only import regime was a policy decision taken years before the negotiation of the Understanding between the European Communities and the United States. Therefore, it cannot be argued that the United States and the European Communities ever agreed that the introduction of a tariff-only import regime would be a "measure taken to comply". Most importantly, it is undisputed that the United States accepted to terminate its retaliation rights upon the European Communities' implementation of a different banana import regime than the current one. Finally, the importance assigned by the Doha Waiver to the maintenance under the current import regime of the market access enjoyed by the MFN suppliers under the 2002-2005 regime further supports the conclusion that the 2002-2005 import regime was indeed the "measure taken to comply". All these facts taken together establish that, as far as the United States is concerned, the current banana import regime of the European Communities is not a "measure taken to comply" with the 1997 recommendations and rulings of the DSB in the case brought by the United States.

4.200 There is also a third point raised in this case. The United States and certain third parties supporting them have included in their submissions excerpts from various statements made by various bodies of the European Communities in different contexts and circumstances in the past. This practice of the complainants probably shows that they have reached their limits in coming up with credible legal arguments against the European Communities and have resorted to the tactic of "look what you have said in the past" which is used in high school debating. It is also rather odd for the complainants to refuse to recognize the binding nature of international agreements signed by both parties to this dispute, but at the same time plead for the binding nature of statements included in press releases or in pleadings submitted to unrelated cases or even to cases heard outside the DSU.

4.201 However, this otherwise amusing practice of the complainants, if accepted, may give rise to significant problems for the future credibility and operation of the DSU. The credibility of the DSU

can only be preserved if panels and the Appellate Body base their findings on a solid analysis of the law and the facts and not on an analysis of unrelated statements made by the parties in a completely different context. For this reason, the European Communities respectfully requests the Panel to disregard the relevant assertions of the United States and the Third Parties supporting them.

(b) The United States' claims under Article I

4.202 The European Communities considers that it has been established in this case that the banana import regime introduced on 1 January 2006 more than maintains the total market access that the MFN banana suppliers enjoyed until that day. The United States did not deny this reality in its written submissions.

4.203 The European Communities considers that the provisions of the Doha Waiver should be interpreted in accordance with the principle of good faith. An interpretation of the Doha Waiver that would sever completely the link between the continuation of the waiver until the end of 2007 and the fact that the MFN suppliers have maintained their total market access would, in the view of the United States, not be in accordance with the principles of good faith.

4.204 Some third parties have asked the Panel to ignore the reality of the market as evidenced by the performance of the market during the last two years and, instead, base its findings on assumptions and estimates of how things might develop in the future. The European Communities considers that the Panel does not need to resort to assumptions and predictions about the future. The Panel has before it sufficient market evidence to reach a conclusion as to whether the market access enjoyed by the MFN suppliers under the old regime, that is between 1 January 2002 and 31 December 2005 has been maintained during the period which is relevant for the Doha Waiver, that is between 1 January 2006 and the end of 2007.

4.205 Some other third parties have suggested that they would have not approved the Doha Waiver, unless it is to be given their interpretation. This is an assertion that works both ways and could also be used by the European Communities. As evidenced by the negotiating history of the Doha Waiver, the European Communities would have not and did not make the existence of the Cotonou Preference, which is so crucial for so many ACP countries, dependent on the conclusions reached by the arbitrator about future events and based on assumptions. The European Communities might have accepted such a link if the arbitration was to examine the verifiable market situation *ex post*. But not where the arbitration was based on predictions about the uncertain future.

4.206 Certain third parties have also argued that the European Communities is using a "volumes-based-analysis", as opposed to focusing on whether the MFN suppliers have maintained their "competitive opportunities". This argument is not correct. The European Communities has stated throughout these proceedings that it does not consider that "maintaining market access" should be interpreted as a guarantee of any particular volume of trade to any group of countries or to any specific country. This is why the fact that an individual country may export fewer bananas into the European Communities after 2006 does not necessarily mean that this country's market access opportunities have not been maintained. However, it would not be logical to assume that a country may be deprived of its competitive opportunities and market access, but still be able to increase the quantity of its exports towards the European Communities. A decrease in exports does not necessarily mean that market access has been denied. But an increase in exports can only take place if market access has been maintained. This is why the European Communities considers that the export performance of the MFN countries is evidence that the Panel should take into consideration in order to establish that their market access has been maintained.

(c) The United States' claims under Article XIII

4.207 Turning to the discussion of Article XIII of the GATT, the point that the European Communities has made is that the anti-discrimination rules of Article XIII are aimed at quantitative discrimination, while tariff discrimination is the exclusive preserve of Article I. Offering a tariff preference to some countries subject to a quantitative "cap" may be an issue that needs to be analysed under Article I, but not under Article XIII.

4.208 In support of its claim, the European Communities has invoked the consistent GATT and WTO practice of granting waivers from Article I to cover this type of tariff quotas. This practice is concordant, common and consistent and, therefore it falls within the notion of "state practice" referred to in Article 31(3)(b) of the Vienna Convention. It can also be said that, as formal decisions of the GATT and now the WTO, these waiver decisions approximate to the "subsequent agreements" referred to in Article 31(3)(a) of the Vienna Convention. Moreover, some of the waiver decisions made under GATT 1947 have a special status in WTO law since they form part of "GATT 1994". This is defined in the Uruguay Round Agreements as consisting of the General Agreement plus various other instruments, including "decisions on waivers granted under Article XXV of GATT 1947 and still in force on the date of entry into force of the WTO Agreement". The relevant waivers were defined by the General Council in 1995.[224] The waivers referred to by the European Communities include several that are on this list.

4.209 Certain third parties have argued that they are not aware of this consistent GATT and WTO practice. In response, the European Communities would like to provide the Panel with several examples.

4.210 First, there is the 1948 waiver from Article I:1 that was granted to the United States in respect of the Trust Territories of the Pacific.[225] There was no separate waiver from Article XIII. However, the working party report on which the waiver was based explained that it would be applied to the sugar quotas which were operated by the US.[226] The waiver became part of GATT 1994. In 1996 the United States obtained an extension of the waiver for what were now the "former Trust Territories".[227] The United States has reported on the operation of this waiver, stating that, while enjoying duty-free status, "Watches and watch movements, and certain fishery products are subject to quantity limitations".[228] Do the United States and the Third Party supporting them consider that these preferences violate the GATT?

4.211 Second, there is the 1952 waiver from Article I:1 that was granted to Italy in respect of preferences for Libyan products. There was no separate waiver from Article XIII. However, the waiver authorized Italy "to grant the special, treatment as set out in the Annex" and the Annex contained a table listing products, annual tariff quotas, and legal rates of duty.[229]

4.212 Third, there is the 1960 waiver from Article I:1 granted to France "to the extent necessary to permit the Government of France to apply the above-mentioned tariff quotas to goods originating in any part of the territory of the Kingdom of Morocco".[230] The waiver became part of GATT 1994. In

[224] WT/L/3, 1995.
[225] Decision of 8 September 1948, BISD II/9.
[226] Report of Working Party, GATT/CP.2/36, 1948.
[227] Decision of 14 October 1996, WT/L/183.
[228] Report of the Government of the United States under the Decision of 14 October 1996, WT/L/667.
[229] Decision of 9 October 1952, BISD I/14; Draft L/43, SR.7/5.
[230] Decision of 19 November 1960, BISD 9S/39.

2000 the WTO General Council extended its application, repeating the reference to tariff quotas.[231] Nobody ever thought that there was a need for an Article XIII waiver.

4.213 Fourth, there is the 1966 waiver granted to Australia, which explicitly authorized the use of tariff quotas.[232] This waiver has become part of GATT 1994. Again nobody thought that there was a need for an Article XIII waiver.

4.214 Fifth, there is the 1973 waiver granted to New Zealand, which explicitly authorised the use of "tariff-free quotas" to handicraft products from South Pacific Islands.[233]

4.215 Sixth, there is the 1985 waiver from Article I:1 granted to the United States regarding duty-free treatment for imports from Caribbean countries as part of the Caribbean Basin Economic Recovery Act (CBERA).[234] In the case of sugar, the waiver overlapped with a system of quotas. The effect was that certain countries accorded sugar quotas were benefiting from zero tariff rates while other countries with such quotas continued to be subject to the normal tariff rate. The waiver became part of GATT 1994. Again nobody thought that there was a need for an Article XIII waiver.

4.216 Seventh, there is the 1994 waiver regarding European Communities' transitional measures to take account of the external economic impact of German unification.[235] It waived Article I:1 only, but nevertheless referred to duty-free treatment "within the limits of the maximum quantities and values foreseen in the relevant agreements of the former German Democratic Republic". In other words, it explicitly envisaged the use of tariff quotas.

4.217 Eighth, there is 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.[236] The scheme included tariff quotas on several products. A further waiver for preferences for these countries was given in 2006.[237]

4.218 The European Communities considers that this consistent practice establishes the common understanding on the part of GATT contracting parties and WTO Members that exclusion from a tariff quota does not constitute an infringement of Article XIII. The European Communities also considers that its current banana import regime is very similar to the import regimes covered by these waivers. As already explained in the written submissions of the European Communities, its current banana import regime is very different to the one that was in place between 2002 and 2005 and for which a specific waiver from the application of Article XIII was granted.

(d) The United States does not suffer any "nullification or impairment"

4.219 The present case raises one more interesting point. It is probably the only case ever heard in this room where the contested measure does not affect at all the complaining party. Indeed, the existence or non-existence of the Cotonou Preference will not bring any change to the "benefits accruing" to the United States under the GATT. The European Communities has provided sufficient evidence establishing this fact. Interestingly, the United States has not provided in its written submissions any legal or factual arguments contesting this market reality. Instead, the United States and certain third parties invite the Panel simply not to proceed with a detailed analysis of whether the United States suffers any "nullification or impairment".

[231] Decision of 17 July 2000, WT/L/361.
[232] European Communities' second written submission, para. 76.
[233] Decision of 13 November 1973, BISD 20S/29.
[234] Decision of 15 February 1985, BISD 33S/97.
[235] Decision of 9 December 1994, L/7605.
[236] Decision of 8 December 2000, WT/L/380.
[237] Decision of 28 July 2006, WT/L/654.

4.220 What the United States and these third parties ask the Panel to do is basically to delete Article 3.8 from the DSU. Accepting their position would mean that a panel should never bother with an analysis of whether the complaining party indeed suffers any "nullification or impairment". This analysis would be left for later, most usually within the context of an Article 22.6 arbitration.

4.221 The European Communities considers that this is the wrong solution. Articles 3.8, 3.3 and 11 of the DSU require the Panel to perform a detailed analysis of whether the complaining party indeed suffers any "nullification or impairment". And this analysis cannot use different criteria than those that would be used in the context of an Article 22.6 arbitration, because the notion of "nullification and impairment" is the same under both Articles 3.8 and 22 of the DSU.

4.222 Moreover, the two proceedings are not independent from each other. As shown in the example cited in the first written submission of the European Communities, Article 22.6 arbitrators generally consider that they are bound to find some level of "nullification or impairment" where the panel has already found that the breach causes "nullification or impairment" in the original proceedings. However, in the present case it has been established that the Cotonou Preference does not cause any nullification or impairment to the United States. If the Panel accepts the arguments of the United States and certain third parties and finds that there is "by default" a nullification or impairment, it will put the future arbitrators in a very awkward position.

4.223 For these reasons, the European Communities respectfully requests the Panel to repeat the findings it had reached in 1999 as Arbitrator in the Article 22.6 arbitration on the United States' retaliation measures against the European Communities in this case and conclude that the Cotonou Preference does not cause the nullification or impairment of any benefit accruing to the United States under the GATT.

4.224 In concluding its statement, the European Communities would like to invite the Panel to contribute to a definitive solution to this dispute by confirming that the Cotonou Preference can be maintained until its normal contractual expiration at the end of 2007.

4. Closing statement of the European Communities

4.225 In this closing statement the European Communities will make some brief comments on certain of the points raised by the United States and the third parties supporting them during the substantive meeting. To facilitate the presentation of the issues the European Communities will follow the structure already used in its written submissions.

4.226 The first point relates to the impact of the Understanding on the rights and obligations of the United States and the European Communities in this case. The United States stated yesterday that the European Communities has not adequately explained how the United States accepted in the Understanding that the Cotonou Preference's duration would be until the end of 2007. The European Communities would like to refer to paragraphs 10 to 13 of the second written submission of the European Communities. The United States accepted through the Understanding to help the European Communities obtain the "waiver requested" at that time for the Cotonou Agreement. It is undisputed that the duration of the trade preferences in the Cotonou Agreement and the Cotonou Preference for bananas was until the end of 2007. It is also undisputed that the "waiver requested" by the European Communities at that time also had a duration until the end of 2007. Therefore, it is difficult to see how the United States could argue that, when it signed the Understanding, it did not acknowledge and accept that the Cotonou Preference's duration was until the end of 2007. Moreover, the Understanding does not provide that this waiver would have any particular conditions, nor were any such conditions discussed between the United States and the European Communities prior to the conclusion of the Understanding.

4.227 As the ACP countries pointed out this morning, the United States obtained the benefits it pursued with the Understanding: mainly an increase of the MFN tariff quota and of the number of licences allocated to certain US-based banana trading companies. The European Communities complied with its obligations under the Understanding and expected the United States to do the same. The case before the Panel shows that the United States does not consider itself bound by the agreement it signed. As it is said in French, the United States "*veut le beurre et l'argent du beurre*". This is contrary to the long standing rule of "*pacta sunt servanda*".

4.228 The second point is also related to the Understanding. The United States stated yesterday that even if the Understanding is indeed considered to be a "mutually agreed solution" for purposes of Article 3.6 and even if the United States had accepted that the Cotonou Preference would have a duration until the end of 2007, then still the United States would have the right to request the termination of the Cotonou Preference before the end of 2007, because there is no provision in the DSU that would grant to "mutually agreed solutions" that legal power. The European Communities does not agree with this interpretation of the United States. If accepted, it would remove all legal certainty from "mutually agreed solutions" and would in essence delete their existence from the DSU.

4.229 Our third point relates to the notion of a "measure taken to comply". The United States and the Third Parties supporting them asserted in the substantive meeting that the current banana import regime of the European Communities is a measure taken to comply with the 1997 recommendations and rulings of the DSB in the case brought by the United States. The European Communities disagrees. The United States repeated yesterday with a lot of conviction that the "means" through which that dispute would be resolved were agreed with the European Communities in the Understanding. The introduction of the tariff-only import regime was decided by the European Communities at least 2 years before the signing of the Understanding. This fact, together with the other points raised by the European Communities in its written submissions and its oral statement yesterday, confirms that, as far as the United States and the proceedings that it has initiated against the banana import regime of the European Communities are concerned, the current banana import regime is not a measure taken to comply. It must also be noted that the current banana import regime is radically different in design and effect from the 2002-2005 system, which the United States yesterday admitted was a "measure taken to comply". This further confirms that the current import regime does not constitute a measure taken to comply with the 1997 recommendations and rulings of the DSB in the case brought by the United States.

4.230 Our fourth point relates to the United States' interpretation of the Doha Waiver. The European Communities considers that the text of the Doha Waiver supports its own interpretation of the conditions that could bring the early termination of the waiver. The European Communities also considers that a proper interpretation of the terms of the Doha Waiver cannot be based solely on the "dictionary meaning" of words. Under the current import regime the MFN suppliers have managed to increase the quantities of their exports towards the European Communities more than the ACP countries and indeed above the growth of the total banana market in the European Communities. Moreover, new countries have managed to enter the European banana market. This is evidence establishing that the European Communities has complied with its obligations under the Doha Waiver.

4.231 Our fifth point relates to the interpretation of Article XIII of the GATT. The European Communities believes that the debate of these two days has helped to clarify the proper interpretation of Article XIII and its application on tariff quotas. It also believes that finding that an import regime, with the characteristics of the new European Communities' banana import regime, breaches Article XIII would be against the concordant, common and consistent practice under the GATT and the WTO and would create significant problems for many WTO Members and not simply for the European Communities.

4.232 Finally, there is the point on "nullification or impairment". The United States and the third parties supporting them have asked the Panel to simply assume automatically that there is always "nullification or impairment" once a GATT violation is established, without offering the defending party the opportunity to rebut this presumption. However, eliminating the possibility of defending parties to rebut the presumption of "nullification or impairment" after a violation of the GATT is established, requires the amendment or deletion of Article 3.8 of the DSU. This is not an issue that may be decided in the context of a dispute settlement proceeding. For as long as the WTO Members have not decided to amend the DSU and remove Article 3.8, the defending party's right to rebut this presumption must be enforced in dispute settlement proceedings like those being held today. And the European Communities has shown that the Cotonou Preference, a trade preference supporting the development efforts of vulnerable developing countries, does not cause and cannot cause the United States any "nullification or impairment" of any benefit accruing to it under the GATT. Therefore, the European Communities has rebutted the presumption of "nullification or impairment" in accordance with Article 3.8 of the DSU.

V. ARGUMENTS OF THE THIRD PARTIES

A. BELIZE, CAMEROON, CÔTE D'IVOIRE, DOMINICA, DOMINICAN REPUBLIC, JAMAICA, SAINT LUCIA, SAINT VINCENT AND THE GRENADINES, AND SURINAME

1. Written submission of the ACP third parties

5.1 In their written submission, Belize, Cameroon, Côte d'Ivoire, Dominica, Dominican Republic, Jamaica, Saint Lucia, Saint Vincent and the Grenadines, and Suriname, referred to as "the ACP third parties", respectfully request the Panel to reject as inadmissible and unfounded the United States' claims against the new EC banana import regime which entered into force on 1 January 2006.

5.2 By way of introduction, the ACP third parties question the United States' interests in bringing a compliance panel targeting the new EC banana import regime as the United States is not a banana exporter and its trade is in no way affected by this new regime. Through this claim, the United States is attacking the preference on bananas granted by the European Communities to the ACP countries. In so doing, the United States disregards the development goal pursued by that preference and has chosen to become the advocate of a few large US-controlled multinational companies having substantial interests in bananas in the MFN countries. To achieve this goal, the United States is trying to build an artificial case on the basis of formalistic arguments which purposely ignore the fact that the new regime against which its complaint is directed has actually more than maintained total market access for MFN banana suppliers. The United States also purposely disregards the delicate balance which this new regime seeks to achieve between the interests of the MFN and the ACP suppliers.

(a) The United States cannot challenge the new EC banana import regime pursuant to Article 21.5 of the DSU

5.3 First, the ACP third parties submit that the United States' claim should be dismissed because the United States failed to request consultations prior to requesting the establishment of the Panel while it is a prerequisite to all dispute settlement proceedings pursuant to the DSU. The Panel should not give effect to an agreement reached between the parties to dispense with consultations. Indeed, consultations play an important due process role not only with respect to the parties but also to the third parties, who are explicitly granted the right to request to join consultations pursuant to Article 4.11 of the DSU if they have a substantial trade interest in consultations being held. The ACP third parties have a specific interest in the present case given that they are the beneficiaries of the preference which is challenged by the United States and will therefore be directly affected by the findings of the Panel. The lack of consultations is therefore particularly detrimental to the ACP.

5.4 Second, the United States cannot have recourse to Article 21.5 proceedings to challenge the new EC banana import regime as a compliance issue of the *Bananas III* case due to the fact that the mutually agreed solution between the United States and the European Communities in the form of an "Understanding on Bananas" has resolved that dispute and therefore constitutes a bar to Article 21.5 proceedings. In addition, the Understanding is a binding international agreement. Its parties in good faith cannot put its terms into question thereafter. Consequently, the existence of the Understanding constitutes a bar to Article 21.5 proceedings. If the United States considers that the new EC banana import regime is inconsistent with the WTO obligations, it should start new dispute settlement proceedings.

5.5 Third, the new EC banana import regime is not a "measure taken to comply" with the recommendations and rulings of the DSB in the original *Bananas III* dispute within the meaning of Article 21.5. Indeed, the measure being challenged in this case is not clearly connected to the Panel and Appellate Body reports in the original case, both in time and with respect to the subject-matter. There are two main reasons why it is not clearly connected with respect to the subject-matter. First, the new EC banana import regime which is challenged is a completely new regime for the importation of bananas: being a tariff-only regime it has nothing to do with the quota regime examined in the original *Bananas III* dispute. Second, the new regime is not a measure taken to comply with the DSB recommendations and rulings but to implement the commitments undertaken by the European Communities under the Doha Waiver and the Understandings on Bananas with the United States and Ecuador. These legal instruments came into existence after the original *Bananas III* dispute and they have modified the balance of rights and obligations for the WTO Members. The legality of the new EC banana import regime can therefore only be examined in new dispute settlement proceedings taking into account these new legal instruments.

(b) There is no violation of GATT Article I because the Doha Waiver still applies

5.6 The United States' argument that the Doha Waiver is no longer valid is based on the view that the existence of two arbitration awards concluding that the EC rebinding proposals were not such as to maintain total market access to MFN suppliers has automatically led to the waiver ceasing to apply upon entry into force of the new EC tariff regime. The proposed interpretation is purely procedural and formalistic, and it fails to take account of the object and purpose of the Doha Waiver and the factual situation in the present case.

5.7 The purpose of the Doha Waiver is to allow the implementation of the Cotonou Agreement and, in particular, the preferential tariff treatment granted by the European Communities to products originating in the ACP countries until 31 December 2007. The Annex to the Doha Waiver expressly indicates that with respect to bananas, the waiver will apply until 31 December 2007. Only if the European Communities fails to implement a new banana import regime which at least maintains total market access for MFN suppliers, will the waiver cease to apply prior to 31 December 2007.

5.8 This is not the case. The new EC banana import regime which entered into force on 1 January 2006 maintains and even improves the market access for MFN suppliers. Indeed, all available market data indisputably demonstrate that the competitive position of MFN bananas on the EC market has improved both in terms of volume and price since the introduction of the new EC banana import regime. The import volume of MFN bananas significantly increased in 2006 and this has been reinforced in 2007. The abolition of the quota licensing system has resulted in cost savings which more than compensate for the perceived increase in import duty arising from the introduction of the new flat tariff of €176 per ton. In addition, the new regime has opened the EC market for new entrants, and higher prices have been paid to producers in the MFN countries even though wholesale prices in the European Communities remained stable or even decreased.

5.9 As a result, the new EC regime has indisputably not just maintained but indeed improved total market access for MFN suppliers. It is thus not possible to cogently argue that the waiver has ceased to apply on purely procedural grounds as submitted by the US.

5.10 In addition, it must be taken into consideration that the ACP third parties were not allowed to fully participate in the arbitration proceedings. This significantly reduced their opportunities to defend their positions. The fact that in the first arbitration the Arbitrator ignored crucial ACP arguments had an unfortunate effect on the way the issues were addressed in the second arbitration and hence may have had a decisive impact on its final outcome. The finding in the second arbitration that the European Communities had not rectified the matter should not override the undeniable fact that the new implemented banana import regime effectively improves total MFN market access.

(c) There is no violation of GATT Article XIII

5.11 The United States argues that the new EC banana import regime violates GATT Article XIII because the ACP countries are granted a preferential tariff quota which the MFN countries cannot benefit from. This argument must be discarded.

5.12 There cannot be any violation of GATT Article XIII:1 and Article XIII:2 since the new EC banana import regime does not contain any prohibition or quantitative restriction within the meaning of GATT Article XIII:1. *A fortiori*, no such measure is imposed on MFN suppliers.

5.13 What the United States is challenging is not the limitation placed on the quantity of duty-free bananas imported from the ACP countries but the preferential duty which is granted to these countries. The absence of restrictions on MFN suppliers distinguishes the present case from the *Bananas III* case. As this issue is a tariff issue only, it is not the object of GATT Article XIII but of GATT Article I.

5.14 The United States makes much of the alleged acknowledgment by the European Communities of the need for an article XIII waiver. This argument is misguided as the European Communities has demonstrated, for instance through the implementation of the "Everything But Arms", that it does not consider such a waiver necessary where the restriction is on the tariff preference. The United States actually also applies limits to some of its GSP concessions.

5.15 In addition, the fact that the European Communities applied for an Article XIII waiver should not be taken as showing that they believe that one was actually needed. It is evident from a reading of the two awards of the arbitrator that the European Communities' application for an Article XIII waiver was made purely for procedural reasons. Had the application not been made, the Arbitrator would have been unable to take account of the tariff rate quota in his second award without stepping outside the narrow remit he had been given and adjudicating on the question of whether preferential tariff rate quotas require Article XIII waivers.

5.16 In addition, the cap on the quantity of bananas which can be imported duty-free from the ACP countries to the European Communities has been introduced in order to address the MFN concerns with respect to an unlimited preferential access granted to the ACP countries.

5.17 In conclusion, on the basis of the above arguments, the ACP third parties respectfully request the Panel to reject Ecuador's challenge to the European Communities' new banana import regime.

B. BELIZE

1. Oral statement of Belize

5.18 I want to add Belize's voice in full support of the statement made by the Ministers of Cameroon and Suriname who spoke on behalf of the ACP third parties. I want to also support the statements made by the Ministers for St. Lucia and for St Vincent. Belize also associates itself with the presentations made by the European Communities in its oral and written submissions in this case.

5.19 Allow me to add the following. The United States, as indeed MFN countries, fully supported the waiver granted for the European Communities to provide preferential tariff treatment to ACP countries as required by the Cotonou Agreement. Especially relevant to this case is Protocol 5 on Bananas, also known as the Second Banana Protocol, in which the European Communities undertakes to "take measures aimed at ensuring the continued viability of their banana export industries and the continuing outlet for their bananas on the Community market". How else could this commitment be fulfilled other than the granting of a trade preference? And as current market trends eloquently demonstrate, the preference would need to be at least its current level.

5.20 The statistics already show that MFN countries are now enjoying better market access than they did in the past.

5.21 Belize also wants to express its grave disappointment. One cannot help but be dismayed to witness the United States – whose people through history have been known to fight injustice – initiating this case against the smallest and most vulnerable economies of the world.

5.22 It is regrettable, because the United States is not seeking to export bananas to the European Communities. In the previous US challenge they were protecting the interests of their service suppliers who they felt were suffering discrimination in the allocation of licenses. Belize regretted that attack but at least could understand it. But now the issue of licences for the import of MFN bananas within a tariff quota has disappeared. No violation of GATS has even been alleged in this case and still the United States is attacking the European Communities' efforts through its banana regime to meet its commitments to vulnerable ACP suppliers.

5.23 The Chairman yesterday asked whether Panama, Nicaragua and the United States believe that the European Communities as a net importer of bananas have standing to bring a similar case. The Chairman questioned whether a threshold was necessary for a member of the WTO to participate in dispute settlement proceedings. There is such a provision as regards third party participation – which is having a substantial trade interest. Surely it would be anomalous to apply a lesser test to a country wishing to be a complainant.

5.24 Belize has never been a complainant in any WTO dispute settlement proceeding principally because it does not have the resources to pursue its trade interests through such direct and costly means. It has, however, participated as a third party in cases which significantly impact the livelihood of thousands of its people. How could it explain to its citizens that the way the dispute settlement system works is that rich and powerful countries can initiate dispute settlement proceedings in cases where their interests are not directly affected, whilst it may only participate as third parties only where it has a major trading interest.

5.25 This delegation must stress that a US victory in this Panel will not hurt the European Communities. No, the direct impact will be the damage to economies of ACP third parties, where employment and livelihoods would suffer yet another blow, as they always have, after every amendment to the European market regime for bananas to attempt to appease the United States and other complainants.

5.26 How else should Belize interpret the complainant's motive, other than a conscious attempt to champion the cause of multinational companies over the interest of poor people in the ACP countries? This is all the more dismaying when in other contexts the United States has made clear that it recognizes the need for targeted preferences to address the needs of vulnerable countries.

5.27 The United States obtained what it wanted from their Understanding with the European Communities. Part of the ACP quota was transferred to the MFN quota which, together with other detailed changes in the regime, increased the number of licenses allocated to US related service suppliers. This was at the cost of the ACP. Now, having extracted their pound of flesh, they want another pound. Belize trusts that the panelists will prove to be Daniels come to judgment.

C. CAMEROON

1. Oral statement of Cameroon

(a) This dispute is of primary importance for the ACP countries

5.28 Cameroon wishes to underline the primary importance of this dispute for the ACP countries. The latter are the beneficiaries of the European Communities' preference granted within the framework of the Cotonou Agreement. This preference applies to a number of products originating in the ACP countries, including bananas. It is this preference for bananas which the United States is challenging today. Consequently, it is clear that the decision to be taken by this Panel will have a direct impact on the ACP countries. If the Panel were to agree with the United States, the consequences for the ACP countries would be disastrous.

5.29 As the Panel is aware, the banana sector is essential for the ACP countries and its continuity depends on maintaining preferential access to the Community's market.

5.30 Indeed, the banana sector is essential for ACP countries' social and economic development and it helps to protect the environment. Bananas account for a large share of the ACP countries' agricultural exports. Hundreds of thousands of jobs have been created thanks to this sector. The introduction of regular shipping lines for the transport of bananas each week has made a significant contribution towards opening up the economies of these countries. The existence of these regular shipping lines has allowed the ACP countries to export other goods to Europe and, in return, to import goods essential for development and the daily lives of their populations. The banana sector therefore plays a key role in the fight against poverty and destitution.

5.31 Preferential access to the European Communities' market is essential to ensure the vitality of the banana sector in the ACP countries. It is in fact well known that the ACP banana producers are less competitive than the MFN producers. In comparison with the latter, the ACP producers have higher production costs. For geographical and historical reasons, they do not have the same economies of scale as the MFN producers. Furthermore, the ACP producers can only compete with them in markets to which they have preferential access. Proof of this is that even the Caribbean ACP countries, which are situated on the doorstep of the United States, are unable to compete with MFN producers on the North American market. The absence of preferential access and higher cost structures prevent ACP producers from entering the United States market. As the European Communities constitute the only major banana market to offer preferential access, the ACP countries are entirely dependent on it.

5.32 It is easy to see what is at stake for the ACP countries in this dispute. If preferential access to the Communities' market for ACP bananas should be further eroded, or even disappear, this would have disastrous consequences for countries where bananas are the principal economic resource.

(b) United States trade is not affected by the Community's new regime for the importation of bananas

5.33 Cameroon wishes to draw the Panel's attention to the absence of any harm to United States trade caused by the contested Community regime for the importation of bananas.

5.34 It is surprising that the United States has embarked upon this action in the present case against the new Community's regime for the importation of bananas when its trade is in no way affected by this new import regime. Indeed, the United States has not been deprived of any opportunities to export bananas because of this regime as it does not produce more than a tiny fraction of its consumption of bananas and only has token exports of bananas to the European Communities.

(c) The United States is attacking a preference granted to developing countries even though it is not suffering any negative consequences from it and it had accepted the principle of the preference

5.35 Thirdly, it is a matter of concern and even of dismay for ACP countries to note that one of the richest countries on the planet, namely the United States, does not hesitate to attack an import regime because it grants preferential access to developing countries even though the United States is not suffering any negative consequences because of this import regime, as previously emphasized.

5.36 It should be recalled that on a number of occasions the United States has accepted the principle that it was justified to give a preference for ACP bananas. First of all, it accepted this principle in the Memorandum of Understanding on Bananas concluded with the European Communities in April 2001. At Doha, the United States also supported the European Communities' request for a waiver from Article 1 of the GATT to cover the ACP preference.

5.37 More generally, the legitimacy of the preference as a development tool has been recognized at the World Trade Organization. It is hardly necessary to recall, in this regard, the preamble to the Agreement Establishing the World Trade Organization, which provides that the parties to this Agreement have recognized "that there is a need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development". In fact, many WTO Members, including the United States itself, use preferential tariffs to encourage development objectives. Thus, the MFN countries benefit from improved preferential access in sectors where they are not the dominant producers under the European Communities' Generalized System of Preferences (GSP). The Cotonou Agreement, and in particular, the regime for the importation of bananas, were and should be considered in this spirit, that is to say with the aim of providing trade opportunities for the weaker actors in the market such as the ACP banana producers. The Doha decision granting a waiver for the implementation of the Cotonou Agreement recognized this, underlining the following in its preambular paragraphs: "the [Cotonou] Agreement is aimed at improving the standard of living and economic development of the ACP States, including the least developed among them".

(d) The United States cannot question a preference which it accepted in the Memorandum of Understanding

5.38 Fourthly, Cameroon would like to underline the fact that the United States cannot question a preference when it has accepted it in the Memorandum of Understanding signed with the European Communities.

5.39 The United States attacks this new EC regime for the importation of bananas, established and implemented in accordance with the agreement concluded between the United States and the European Communities in April 2001. In this agreement, in order to resolve the initial *Bananas III*

case, each of the parties accepted a certain number of concessions. Thus, the United States accepted that it would support the request to maintain the Doha Waiver until 31 December 2007 and would terminate its suspension of concessions and, in return, the European Communities undertook to introduce a tariff-only regime as of 1 January 2006 at the latest and to increase the tariff quota for the MFN bananas in transitional stages. Thus, the B tariff quota open to MFN producers was increased by 100,000 tonnes, from 353,000 tonnes to 453,000 tonnes. This increase was carried out at the expense of the ACP countries, whose tariff rate quota was reduced by an equivalent amount, from 850,000 tonnes to 750,000 tonnes. Moreover, the ACP quota, which was originally restricted to traditional ACP suppliers, now had to be shared with non-traditional suppliers, bearing in mind that imports from non-traditional ACP suppliers had previously been included under the MFN quota. This had the effect of increasing the quota available to MFN countries by a further 100,000 tonnes, also at the expense of the ACP countries.

5.40 The European Communities and the ACP countries, as beneficiaries of the preferential access, have therefore had to pay a high price in order to maintain the Doha Waiver until the end of this year. Because of this, a certain number of banana producers and exporters in the ACP countries have disappeared following these changes, which have seen the preferential access eroded.

5.41 The United States operators have benefited from the concessions granted and implemented by the European Communities in conformity with the Memorandum of Understanding on bananas concluded with the United States and have taken advantage of it. The United States cannot today question the tariff preference envisaged in this agreement when it has benefited from the agreement. The United States current action, which challenges the preference, is thus abusive and illegitimate. Furthermore, it is illegal, in the sense that the United States expressly accepted the preference in this agreement binding the parties.

(e) The United States cannot challenge the Community import regime for bananas pursuant to Article 21.5 of the DSU

5.42 Cameroon would like to stress a fifth reason, which will be developed in more detail by the Distinguished Minister of Agriculture of Suriname, Mr Raghoebarsing, in his oral statement. It concerns the inadmissibility of the action initiated by the United States.

5.43 First of all, the failure to request consultations and the absence of consultations constitute a cause of inadmissibility as these are a prerequisite prior to any request for establishment of a panel.

5.44 Then, raising this matter under Article 21.5, the United States deliberately ignores the scope of the Memorandum of Understanding concluded with the European Communities, a Memorandum that brought the initial dispute to an end and, accordingly, prevents any recourse to a Panel set up Article 21.5.

5.45 Finally, the measure contested, that is to say the new Community regime for the importation of bananas, is not a measure taken in order to comply with the recommendations and decisions of the DSB pursuant to Article 21.5. Accordingly, the United States cannot use these grounds to claim recourse to a Panel constituted pursuant to Article 21.5.

(f) The United States completely ignores the way the market has developed

5.46 Lastly, Cameroon would like to underline the fact that the United States fails to take into account the way the market has developed. It has ignored the fact that the new Community banana import regime it is challenging has not only maintained but even significantly improved market access for MFN bananas.

5.47 In its written submissions, the United States ignores, or feigns to ignore the delicate balance that the new Community regime for the importation of bananas has attempted to establish between the legitimate interests of both the ACP and MFN countries, that is to say a tariff-only system that maintains total market access for MFN bananas while at the same time offering viable preferential access to ACP producers. Indeed, the United States remains silent regarding the fact that the European Communities' new import regime for bananas has not only maintained but also significantly improved market access for MFN bananas, going beyond the European Communities' commitments in the Doha Waiver.

5.48 Indeed, the statistics available show that since the introduction of the new Community regime for the importation of bananas the competitive position of MFN bananas on the Community market has improved both in terms of export volume and the prices paid to MFN producers.

5.49 Firstly, the application of the new tariff regime has led to a substantial and continuing upward trend in imports from the MFN countries. Imports from MFN countries rose by 325,270 tonnes in 2006 compared with 2005. And they rose by a further 201,435 tonnes during the first eight months of 2007 compared to the same period in 2006, and by 366,389 tonnes compared to the same period in 2005. This increase in 2007 thus shows not only that the increase in the volume of bananas imported from MFN countries continued but that it even accelerated.

5.50 This rapid increase in 2006, which accelerated in 2007, shows that the European Communities has amply met the objective of maintaining market access for MFN suppliers and even improved it. In other words, these market data show that the flat tariff of €176 per tonne in the current banana import regime is too low and that the MFN market access could have been maintained by imposing a higher tariff rate than that currently imposed by the EC.

5.51 It is interesting to note from a detailed analysis of the statistics that most of the MFN suppliers have decreased their exports to the United States while increasing them to the European Communities.

5.52 Secondly, the wholesale prices of MFN bananas remained the same or even decreased following the introduction of the new regime, thus showing that the introduction of €176 per tonne duty, without any volume restriction, has not had the effect of deteriorating the conditions for access to the Community market for MFN suppliers. Moreover, the price fluctuations over the year are fairly similar to those for previous years, showing that the new tariff has not upset price trends in the market.

5.53 It is interesting to note that the main beneficiaries of the new Community regime are the small producers in the MFN exporting countries, who have repeatedly expressed their satisfaction at the new opportunities afforded by the new regime. For the first time, they no longer depend on a few intermediaries which control import licences. The opening of the market to new importers and the increased competition among buyers for the bananas available have also made it possible for local producers to charge higher prices.

5.54 Finally, the liberalization brought about by the abolition of the import licensing system has created new opportunities for MFN exporters. For instance, Guatemala, Peru and Brazil, which in recent years had only been supplying small quantities increased their exports to the European Communities sharply following the entry into force of the new regime.

5.55 The above market data can only lead to one conclusion: the new EC import regime has significantly improved MFN access to the EC market thanks to the elimination of the tariff quota and, hence, the quota rent. How could one otherwise explain that the introduction of an allegedly higher import duty has resulted in increased import volumes while wholesale prices have remained stable

and the prices paid to local banana producers have increased? Obviously, the apparent tariff increase resulting from the replacement of the €75 per tonne duty applicable to a limited quota by an €176 per tonne duty on unlimited volumes has been more than absorbed by the cost savings resulting from the abolition of the licensing system.

5.56 The substantive conditions for maintaining in force the Doha Waiver covering the ACP preference concerning bananas until 31 December 2007 have consequently been met.

(g) Conclusion

5.57 To conclude the United States is seeking, through its action, to bring into question the European Communities' preference granted to the ACP countries in accordance with the Memorandum of Understanding which they concluded with the United States and the Doha Waiver.

5.58 As Cameroon has shown, this action is first of all abusive inasmuch as the United States did not hesitate to present the problem brought before the Panel as a question of conformity with the initial *Bananas III* dispute, which it is not.

5.59 This action by the United States, one of the richest countries in the world, is also disputable inasmuch as it does not hesitate to bring into question the preference granted by the European Communities to the ACP countries a preference which has development aims, even though the United States itself does not suffer any harm as a result of that preference. It is clear that there is a certain illegitimacy in the United States' action and the ACP countries would like to underline this.

5.60 This action is also abusive to the extent that the United States does not acknowledge that the European Communities have rectified their proposal following the arbitration in November 2005, by lowering the tariff rate.

5.61 Finally, the United States is attacking the new Community regime for the importation of bananas on the basis of purely formalistic arguments and completely ignores the way the market has developed, which shows the beneficial effect that the new regime has had and continues to have for MFN countries.

5.62 In 2006 alone, imports of MFN bananas increased by over 10 per cent. Many new and smaller producers are no longer hampered by a licensing system that was the monopoly of a few large companies and were therefore able to enter the Community market, thereby diversifying its sources of supply. Moreover, they have seen their income increase as the prices paid to the MFN producers are higher. European consumers have also benefited from the new regime. Prices have remained stable, or even decreased, making bananas the cheapest fruit available to European consumers. All this shows that the European Communities fully met their obligations when they introduced the new import regime for bananas in 2006 inasmuch as the new regime has more than maintained market access for MFN banana suppliers. The United States case should therefore be dismissed.

D. CÔTE D'IVOIRE

1. Oral statement of Côte d'Ivoire

5.63 Côte d'Ivoire enjoys friendly relations with the United States, as with the rest of the community of nations, as well as many forms of cooperation that are mutually beneficial but even more so for Côte d'Ivoire. Côte d'Ivoire intends to intensify and consolidate its cooperation with the United States in order to benefit still further from its economic and commercial strength and its status as an exemplary democracy.

5.64 However, in the *EC – Bananas III* dispute, on behalf of Côte d'Ivoire and a number of other countries concerned by this case, I would like to question the legitimacy of the involvement and interest of the United States in this dispute.

5.65 Does the United States have a substantial economic interest? The answer is clearly no. In 2005, the United States reported production[238] of barely 9,500 tonnes of bananas in the State of Hawaii and over the past three years had exported between 3 and 20 tonnes to the European Union.

5.66 The banana trees to be seen here and there on American territory are simply ornamental plants and are in no way intended to produce bananas.

5.67 Obviously, the United States' motive is to protect the interests of its companies engaged in the industry or, at least, to protect the interests of a multinational known to the actors in the international banana trade.

5.68 This motive is not recent as, in a letter dated May 2001 addressed to Mr Pascal Lamy, then European Commissioner for Trade, Mr Robert Zoellick was concerned, above all, to check whether the new regime for distributing import licences would satisfy the operators concerned.[239]

5.69 Echoing this concern, thus expressed by the American Trade Representative, a statement from the company Chiquita welcomed the new regime for distributing import licences.[240] This provides the basis for an answer to the two questions which asked yesterday by the Chairman, namely "why there was a delay between signing the Agreement of April 2001 and its notification?" and "regarding the nature of the USA's interest in this matter?"

5.70 Had the European Communities disregarded a legal text that was so important that the United States, even though it has not suffered damage, finds it necessary to champion its defence? In other words, in attacking the basis of the validity of the waiver from which the ACP countries benefit, the United States is presenting itself as the standard bearer of the law.

5.71 How to explain therefore that the United States, which is anxious to help African countries on the road to growth and development, introduced the mechanisms under the *African Growth and Opportunity Act* (AGOA) from 2000 without requesting a waiver from the WTO at the time of their adoption, which might have been the subject of a dispute?

5.72 Indeed, in February 2005, the United States did formally request a waiver from the WTO, a request which was not granted. However, this preferential treatment decided on by the United States without the agreement of the WTO continues to be applied.

5.73 Therefore, why is the United States applying this system of double standards?

5.74 In fact, the United States is prioritizing the interests of Latin American countries whereas it has been shown, in statistics from the USDA, that some of these countries were having difficulty in entering the American market, even with zero tariffs.

---

[238] USDA Agricultural Statistics 2005, attached, http://www.usda.gov/nass/pubs/agstats.htm

[239] Annex 3 in the first submission of the European Communities.

[240] See attached (http://phx.corporate-ir.net/phoenix.zhtml?c=119836&p=irol-newsArticle_print&ID=165631&highlight=).

5.75 One therefore questions the under-performance of these Latin American countries on the United States market[241], even their failure, while at the same time they are developing their market share in the EU, paying the customs duty which is being criticized.

5.76 Indeed, the multinationals control the major share of the American market so it does not offer any opportunities for independent Latin American producers. On the other hand, the European market is still profitable for these MFN producers. There are two different concepts of trade here which clash. On the one hand, a laissez-faire attitude which benefits a few, i.e. the American market, and on the other, a market structured to benefit as many as possible, without distorting competition, i.e., the European market.

5.77 Observing the market ultimately remains the only viable way of validating the customs duty applied by the European Communities. The 2005 arbitrations showed the difficulty of agreeing international statistics or economic models. It is surely not by chance that the term "*guidelines*" was used in the Attachment to Annex 5 to the GATT Agreement on Agriculture in the context of the delicate process of "*tariff agreements*". Today, monitoring the European market shows that a duty of €176 does not allow the past equilibrium to be maintained. Since 1 January 2006 and up to the end of August this year, i.e. in 20 months, half a dozen MFN countries will have put an additional 520,000 tonnes on the European market, while the ACP countries are labouring to maintain past levels of exports to the European Union.

5.78 To be even more precise, it can be noted on the basis of the most recent Eurostat statistics[242], that in 2007, there was an increase of almost 25 per cent in imports from MFN countries. Over the first eight months of 2006, these countries exported 165,000 tonnes more than over the same period in 2005. In 2007, over the same period, the figure was 201,000 tonnes more than in 2006, i.e., an increase of 366,000 tonnes in two years. So who is fooled when it is stated that the new European import regime for bananas does not allow MFN producers continued access to the European Union's market? Côte d'Ivoire notes that the ACP countries have only seen an increase of 92 tonnes, that is right 92, in their exports compared with last year, and this was before the impact of the climate disasters which affected certain ACP countries was felt.

5.79 Côte d'Ivoire hereby solemnly reaffirms that the level of duty that the ACP countries, Members of the World Trade Organization, were denied the right to challenge during the 2005 arbitration, this duty of €176, is too low to maintain market access for ACP bananas.

5.80 The ACP country banana producers are going to be slowly squeezed out of the European market if this situation endures or will be brutally cut out if the situation is made worse as a result of the current negotiations, which aim to reduce still further the customs tariff. The attacks from this organized competition mean that the precarious balance in this economic sector is condemned. This situation will not even benefit consumers, as bananas are still the cheapest fruit available to consumers. Is this not in fact an anomaly? As for the Latin American producers, if the Community customs tariff is lowered still further they will be the first to lose out, selling to the highest bidder in a market which is oversupplied and controlled by a few big groups.

5.81 Finally, can it be concluded from the foregoing that, as far as trade in bananas is concerned, the United States is hostile towards the ACP countries? Surely not! Does it want to prevent them from trading with the European Union and thus upset their trade-based development? I refuse to reach such an extremely grave conclusion although one is tempted to do so even if it is clearly outside the competence of this Panel.

---

[241] See Annex on USDA Statistics, end of August 2007.
[242] Eurostat end of August 2007.

E. DOMINICAN REPUBLIC

1. Oral statement of the Dominican Republic

5.82 The Dominican Republic feels more than ever the need to stress how essential this case is for it, and in particular for the survival of the thousands of banana producers and growers that are fighting hard for the survival of the sector. It is increasingly aware of how difficult it is for poor and vulnerable island countries like the Dominican Republic to maintain and develop infant agricultural sectors, such as the banana sector, when year after year it is faced with natural disasters, for example the hurricanes and tropical storms that regularly ravage its islands.

5.83 At this very moment the Dominican Republic is having to face the devastation left by the passage of Tropical Storm Noel, which among other things has caused floods, death, infrastructural damage, and destruction of a large portion of the country's agricultural production, seriously damaging banana production. Once again, the Dominican Republic has witnessed the vulnerability and fragility of the Dominican economy and of the banana sector, which depends entirely on the preferential access granted by the European Union to the ACP countries, and which provides sustenance to thousands of Dominican families that are currently suffering from the damage caused by Noel.

5.84 It is unfortunate that the passage of Tropical Storm Noel through the Dominican Republic coincides with this Panel. Unfortunate because as the Dominican Republic confronts this tragic event, it is obliged to participate in a process in which it feels that it stands to lose most in case of an unfavourable ruling. This Panel was requested by a developed country, whose right to do so the Dominican Republic does not question; but its purpose is to eliminate tariff preferences that have been granted to a group of poor countries, the ACP countries, whose banana production has developed thanks to those very preferences granted by the EU under the Cotonou Agreement, without which the sector could neither compete nor indeed survive.

5.85 This situation is a source of considerable surprise and concern, particularly since these preferences area not directly causing the United States any adverse trade effects. On the other hand, any panel recommendation in favour of the United States would cause irreparable damage to the Dominican Republic and the other ACP countries.

5.86 Nor does the Dominican Republic understand what the United States is trying to gain by its recourse to Article 21.5 of the WTO DSU for alleged lack of compliance by the European Communities with the Banana III Panel Recommendations. This dispute was settled in April 2001 through the Understanding on Bananas between the United States and the European Communities, a mutually agreed solution involving commitments that have been met in full by the European Communities.

5.87 At the same time, the figures show that the European Communities has not only maintained access to its market for MFN exporters, but that that access has in fact substantially improved since the implementation of the new banana importation regime. For example, during 2006 and 2007 thus far, there has been a sustainable growth in the volume of MFN exports, showing that the new regime is consistent with the EU's WTO commitments.

5.88 Finally, like other ACP delegations, the Dominican Republic considers that these complaints should be rejected, and hopes that the Panel will take account of its arguments to ensure that the system of preferential access is not undermined, as this would be to the detriment of the ACP countries which are highly dependent on those preferences.

F. JAMAICA

1. Oral statement of Jamaica

5.89 In many ways this case conveys a strong feeling of *deja vu* for Jamaica, as bananas have had the dubious honour of featuring in far too many DSB proceedings. ACP banana exporters in particular, have borne the brunt of the negative rulings that have been made against the EC banana import regime.

5.90 On this occasion, however, there is a poignant difference in the nature of one of the principal elements surrounding this case. Indeed, Jamaica is unable to reconcile itself to the fact that the United States, the pre-eminent leader in the industrialized world, is seeking to challenge the new EC banana import regime that is meant to contribute to the sustainable economic growth and development of Jamaica and its sister developing States in the ACP. This is indeed a historic occasion, the first where a developed country has filed a complaint based purely on the preferential terms of access provided by the European Communities to vulnerable, developing ACP countries, which account for less than 20 per cent of the EU market.

5.91 Jamaica recognizes the right of any Member to have recourse to dispute settlement proceedings in pursuit of its genuine national interests. The rules of the DSU must be observed by all Members and the way in which they are interpreted must be such that due process is available to all – even ACP countries with their very limited resources.

5.92 Jamaica strongly objects to the clear manipulation of DSU procedures in this case. It will not restate what has already been said by other ACP third parties in their statements - on the need for consultations before having recourse to Article 21.5 proceedings and the improper nature of the recourse to such proceedings in the present circumstances – but would underscore the importance of the matters before the Panel, in light of the systemic issues raised and the implications thereof, which go beyond the present proceedings. Jamaica is also duly reminded of the interests of certain major multinational corporations which dominate the market.

5.93 One of the significant issues before this panel – with implications far beyond the immediate proceedings - which Jamaica feels compelled to address, is the argument relating to GATT Article XIII that has been advanced by the United States. It raises an important systemic issue, namely, whether the limitation or cap placed on a preferential tariff granted to some WTO Members, requires an Article XIII waiver, as well as a further Article I waiver.

5.94 Under the new EC Banana regime which provides for unlimited MFN supplies at a flat tariff, the limits placed on ACP duty-free access were clearly designed not to benefit but rather to constrain the ACP, and have been demonstrated to provide considerable benefit to the MFN countries. They have been introduced by the European Communities specifically to address MFN suppliers' concerns with regard to the prospect of an unlimited duty-free tariff access for ACP countries. How can the limits placed on ACP preferential access covered by Article I of the GATT be considered as a restriction on the MFN banana exports to the EC? The cap of 775, 000 tons is simply a limit placed on the tariff preference granted to ACP countries in the context of an MFN regime providing for unlimited access at the basic flat tariff.

5.95 What is being argued is that a Member that has an Article I waiver and is hence entitled to grant an unlimited tariff preference, is in breach of Article XIII if it limits that preference. It is clear from *Bananas III* that if that member limits both MFN and preferential suppliers by TRQs, this can give rise to a violation of Article XIII if the sharing of the market between MFN and preferential suppliers does not conform to the normal pattern of trade. That was the situation during the first and second phases of the implementation of the EC/US Understanding, which was why the European

Communities needed an Article XIII waiver. But since 1 January 2006, MFN access has been unlimited. Only ACP preferential access has been limited and the TRQ that imposes that limitation is not shared between individual ACP suppliers. So there is no question of the TRQ being applied in a way that distorts the normal pattern of trade as between the individual preferential suppliers. There is also no distortion in the pattern of trade between ACP and MFN supplies beyond that which arises from the granting of the tariff preference.

5.96 It has also been clearly demonstrated throughout these proceedings that the new EC Banana Regime has not only maintained, but has actually improved total market access for MFN exporters. The trade statistics for 2006 and the first eight (8) months of 2007 are undeniable; MFN banana exporters have never before experienced such an enabling environment for the sale and distribution of their produce in the European market. Indeed, they have repeatedly acknowledged this at various levels and in different fora. In the face of this, what considerations could give rise to the United States invoking dispute settlement proceedings against a regime which is obviously beneficial to all interested Parties and is in full conformity with WTO rules?

5.97 For many countries, particularly the small producers in the Caribbean, bananas have been extremely important to agricultural and overall economic development. In Jamaica's case, bananas fall within its top five (5) export items and in 2006 accounted for US$13.4 million in export revenue. Jamaica is therefore deeply distressed and disappointed that the United States, contrary to its support for special and differential treatment for developing countries in the WTO, should now bring an action that would seek to nullify the benefit of such treatment, in the context of the EC banana import regime.

5.98 The case before us has many parallels to the biblical story of David and Goliath. Like David, the vulnerable ACP banana exporting economies are called upon to defend a fundamental element of their existence against the vastly superior resources of the United States, in the challenging environment of the WTO dispute settlement process. Jamaica is satisfied that in these proceedings, ACP third parties and EC partners have delivered compelling arguments regarding the inadmissible basis for the United States' challenge to the new EC banana import regime. Jamaica therefore urges the Panel, to adopt a position that will demonstrate that developing countries can continue to have confidence in a process that upholds equity and transparency.

G. SAINT LUCIA

1. Oral statement of Saint Lucia

5.99 The initiation of WTO dispute settlement proceedings challenging the preferential access given to vulnerable ACP countries, must cause some concern as to whether the US Government simply engages in the pursuance of what it perceives to be its interests, at any cost, with no thought given to the consequences of its action, especially on those with whom it claims, "there is a commonness of interest and purpose".

5.100 Sadly, even while sympathetic words were being uttered by these officials at the highest level, action that would result in the erosion of production stability and the capacity to export Saint Lucian bananas, were being pursued. Bananas are the lifeblood of Saint Lucia's small economy, providing its most important export, a key source of employment and facilitates the regular arrival of ships that bring essential supplies as well as transporting Saint Lucia's bananas to Europe.

5.101 When the European Communities first established a common regime for bananas in 1993, it had as one of its key objectives, the integration of traditional ACP banana suppliers to specific EC countries into the single European market. The regime that was established in 1993 was based on a TRQ for MFN suppliers and specific TRQs for each of the traditional ACP suppliers. Saint Lucia's

TRQ was set at 127,000 tonnes, the level of its traditional trade. TRQs create quota rent and, at the time of the conclusion of the Uruguay Round, the MFN banana suppliers obtained, through the bananas framework agreement, specific shares of the MFN quota, so that they could share in that quota rent. But the banana regime and the framework agreement were not acceptable to Ecuador and Panama, two banana supplying countries who joined the WTO after the framework agreement was concluded. Banana importing companies who were established in the European Communities but had headquarters in the United States, were upset by the transfer to the supplying countries, of some of the quota rent from which they had been benefiting as holders of licences based on their historic performance. The United States therefore joined forces with the discontented MFN suppliers and brought the case now known as *Bananas III*.

5.102 As a result of losing *Bananas III*, the European Communities made a number of changes to its bananas regime, the most important of which, from the perspective of St Lucia, was that it abandoned the individual TRQs for individual ACP supplying countries and opened instead a TRQ for all the traditional ACP suppliers together. The European Communities was also forced by *Bananas III* to give up the allocation of parts of the MFN TRQ to members of the bananas framework agreement. However, the changes were not sufficient to satisfy the United States and Ecuador, and Ecuador won a compliance panel that ruled that the European Communities' new regime was still not in conformity with its WTO obligations.

5.103 The United States had already decided that the European Communities was not in conformity and introduced sanctions against the European Communities. All remember the crisis that this caused in the WTO. The European Communities challenged the level of the sanctions and the arbitrators decided that the European Communities was still not in conformity and also the level of the sanctions the United States could apply. Under pressure from these sanctions, the European Communities was forced to exact a price from the ACP in concluding agreements with the United States and with Ecuador.

5.104 The main purpose and effect of the agreement with the United States, which served as a model for the subsequent agreement with Ecuador, was to increase the number of licences allocated to importers linked to two US multinational companies. This was achieved by reducing the quantity of licences reserved for newcomers and transferring 100,000 tonnes of quota from the ACP to the MFN TRQ. Licences are the key to quota rent, so the effect of the agreement was to transfer additional sums of money to the companies concerned until 1 January 2006, when, under the agreements, the European Communities was to replace the TRQ system with a flat tariff.

5.105 The level of the flat tariff has never been seen as a matter in which the United States have any legitimate interest. The MFN countries succeeded in negotiating a safeguard on the level of the flat tariff in return for their acceptance of the waivers needed to implement the banana regime in the way that was envisaged in the Agreements with the United States and Ecuador. This included a provision allowing any interested party – meaning by this a country that exported bananas to the European Communities – to demand arbitration on whether the envisaged level of the tariff would at least maintain total MFN access. The United States had no right to take part in that arbitration and did not do so. The question the arbitrator was to determine was whether the envisaged tariff would at least maintain MFN access. It should be noted, that a tariff that met that test, would not necessarily be damaging to the ACP, as it could be one that also maintained ACP access and this is certainly the goal Saint Lucia expected the European Communities to aim at when it set the level of the flat tariff.

5.106 In the end, the European Communities failed to persuade the arbitrator that either of the tariffs it proposed, in two successive arbitrations, would maintain total MFN access. The European Communities therefore introduced a tariff of €176/tonne, somewhat lower than the €187/tonne that it had proposed in the second arbitration. With that tariff, MFN imports rose by about 10 per cent in 2006, and they have continued to rise in 2007.

5.107 I cannot believe that if the arbitrator had been able to foresee this, he would have ruled against the second, or even perhaps the first of the European Communities' proposals. Had he accepted either of these proposals, the present case would never have arisen. But some would say that this is just the consequence of the rules based system. The job of an advocate is to defend his client's case, and the mark of an excellent advocate is that he can make the weaker case seem to be the stronger. The judge or arbitrator can only judge on the basis of the arguments he or she hears. It's a fair game. But the people who stood to lose the most in this game were not allowed to play in it. The farmers of Saint Lucia cannot come to Geneva to defend their livelihoods. They have to rely on their representatives, and, in the case of the arbitration, even their representatives were not allowed to take part, other than through their contribution to a short joint statement made on behalf of the ACP as a whole. The case was lost essentially on two points. First, the arbitrator paid no attention to what the ACP said in the first arbitration about the erroneous way the European Communities had measured the external price. And then, when in its second proposal the European Communities corrected the mistake it had made over the external price, it was too late. Second, the arbitrator did not recognize the importance of the quota rent, nor see that the quota rent within the ACP quota could be different from that within the MFN quota. So he attached undue importance to the difference between the €75/tonne in quota tariff and the ACP preferential rate of zero, and neglected the protection afforded by the out-of-quota tariff of €680/tonne, which was the source of the quota rent.

5.108 The result of these various changes that the European Communities has been forced to make in its banana regime has been disastrous for Saint Lucia. Compared with its traditional quantity, as set out in the initial regime of 127,000 tonnes, the amount Saint Lucia exported to the European Communities last year was only 37,000 tonnes. It will be far lower this year, as a result of an exceptionally violent hurricane. Hurricanes are, however something Saint Lucia expects to suffer from time to time. Saint Lucia recognizes that it has had to accept the changes the European Communities has been forced to make as a result of the various cases referred to above. What Saint Lucia never expected was the current case brought by the United States. *When the elephants fight, the grass gets trampled.* Saint Lucia has been suffering and continues to suffer from the results of this elephant fight between the European Communities and the United States. In this case the preference provided to vulnerable ACP countries are not merely collateral damage but unbelievably the principal complaint of the United States against the EC.

5.109 For the very first time, the United States, a developed country, is doing something that, to the best of Saint Lucia's knowledge no other developed country has ever done and is challenging a preference given by another developed country. They are doing this not in order to defend US exports, but in the interests of multinational companies who, as the United States accept, are not in any way discriminated against by the current EC regime. If they were subject to discrimination, no doubt, the United States would have brought a case under the GATS.

5.110 Of course, the companies concerned, in their capacity as importers, have to pay the tariff. But economic theory predicts that the cost of the tariff will ultimately be passed on to the EC consumers and to a lesser extent on MFN suppliers. What these companies have lost is the quota rent. But this is not the result of the particular level of tariff that is being applied. It is the inevitable result of the switch from a TRQ system to a flat tariff. This is something that was specifically provided for in the agreement the United States signed with the European Communities.

5.111 Saint Lucia recognizes that these same companies have investments in MFN countries and thus may share in the objective of the MFN countries. This ambition appears to be, to move from an 80 per cent share of the EC import market to 100 per cent. Even if this may be the ambition of the multinational companies, it is not one that the United States can take up, because, under the rules of the WTO, tariff concessions are granted by importing members to exporting members. It is not granted to Members in whose territory multinationals, who have export or production businesses in other member countries are registered.

5.112 Therefore, Saint Lucia is deeply shocked that the United States is claiming that the European Communities is in breach of Article I of the GATT and hence challenging the preference granted by the European Communities. Saint Lucia strongly supports the arguments that have been advanced both by the European Communities and by Cameroon which demonstrate that the European Communities has amply satisfied the substantive condition of the waiver, that its tariff regime should at least maintain total MFN access and hence that the waiver granted at Doha still exists.

5.113 Even more shocking and surprising is the United States' claim that the European Communities is in breach of Article XIII. In making this claim, the United States has apparently been prepared not only to espouse the interests of the multinational banana companies, but also to employ their legal arguments, even where these conflict with those that the US Government holds in other contexts. What the United States is claiming in this case, is that even if the European Communities does have an Article I waiver, it is still in conflict with its WTO obligations, because it limits the preference it grants to the preferential suppliers.

5.114 In other words, any WTO Member that has an Article I waiver that permits it to grant an unlimited preference, is in breach of its WTO obligations, if it does less than it is entitled and subjects that preference to a limit. If the United States believes this, then on what basis does it set limits to some of its GSP concessions, whose WTO legitimacy rests only on the Enabling Clause? If any WTO Member really believes this, why did WTO Members unanimously adopt paragraph 42 of the Fourth WTO Ministerial Conference, which included the sentence "We commit ourselves to the objective of duty free **and quota free** market access for products originating in the least developed countries".

5.115 The objective of duty free access had already been adopted at the First WTO Ministerial Conference. The Fourth Conference plainly intended to offer more. But the only waiver that underpins special preferential access for the least developed countries is the Enabling Clause and this only covers Article I.

5.116 So if the arguments the United States has advanced before this panel are correct, the addition of "**and quota free**" was a cruel joke that purported to offer the least developed countries more than what they were offered at the first Ministerial Conference, but in fact meant the same thing. Saint Lucia believes that the cruel joke began at Seattle, the WTO Ministerial that the United States themselves chaired. Because it was there that the words that were later adopted at Doha were first envisaged – at the suggestion of no lesser authority than the then Director-General of the WTO.

5.117 Of course, Saint Lucia is not suggesting that the United States participated in a cruel joke. They genuinely did not think that tariff quotas require Article XIII waivers in this context. And they still do not think this. Contrary to what the United States' spokesperson told this meeting yesterday – speaking off the cuff – the United States in their very latest request for an extension of their Pacific waiver made in May this year, requested only a waiver from Article I, although several of the preferences concerned are given within tariff quotas.[243]

5.118 It is just about understandable how a lawyer, who specialises in bananas and who hence may read the banana cases outside the broader context, could misread the *Bananas III* report and the report of the Article 21.5 Panel later introduced by Ecuador, and believe that they were intended to mean that preferences cannot be granted on a limited volume without an Article XIII waiver. Highly experienced Saint Lucian lawyers on reading these reports, have remarked that they were not intended to say more than, that all Members whose access to a particular market is governed by TRQs must be treated equally. Nor should a layman see them as suggesting that any difference in tariff treatment

[243] G/C/W/570/Rev.1.

constitutes a restriction. But to be charitable, it may be granted that a high-priced banana lawyer could be tempted to be misled.

5.119 The United States itself by the actions it takes in other contexts, shows that it is confident that differences in tariff treatment require only an Article I waiver, whether the preference concerned is granted on a limited or an unlimited basis. It is therefore hard to understand why it believes that the rules should be different when it comes to bananas.

5.120 As the European Communities and the Cameroon have demonstrated, the United States have brought this case on the basis of the wrong article of the DSU. Furthermore the United States has, in collusion with the European Communities, breached the proper procedure for bringing it, by failing to ask for consultations, and hence infringed the rights of third parties. These points alone would justify the Panel in dismissing it. But the substantive arguments they have used are also fallacious, and, in the case of Article XIII, contrary to the policies the United States itself follows in other contexts.

5.121 Saint Lucia trusts that the Panel will have no difficulty in dismissing the case in its entirety. While the multilateral banana trading companies and major producers may continue to lobby for complete dismantling of the EU banana import regime, the resulting dislocation and destabilisation of the communities and economies of small and vulnerable island States like Saint Lucia and the other Windward Islands, who are close neighbours of the United States, cannot be in the best interest of the United States.

H. SAINT VINCENT AND THE GRENADINES

1. Oral statement of Saint Vincent and the Grenadines

5.122 The situation of Saint Vincent and the Grenadines and the other Windward islands closely parallels that of Saint Lucia. Like Saint Lucia and the Commonwealth of Dominica, Saint Vincent is a traditional supplier of bananas to the EC market and its dependence on bananas goes well beyond the income derived from exports of bananas, vital though this is. The trade in bananas and the shipping link that arises from it is the mainspring of Saint Vincent and the Grenadines development.

5.123 The successive changes in the EC banana regime, and particularly the application of the EC/US Understanding on bananas has cost us dearly. Following *Bananas III* Saint Vincent and the Grenadines lost the security of the system of country specific tariff quotas, which of course exposed it to greater competition from other ACP banana producers. That competition became much more intense when the ACP quota was cut, in effect by 200,000 tonnes, as a result of the application of the initial stages of the EC/US understanding. Finally the change in the provisions for access for the MFN suppliers from a TRQ with a prohibitive out-of-quota tariff of €680/tonne to a flat tariff of €176/tonne made for a much more uncertain market situation. Saint Vincent and the Grenadines is bewildered that the MFN claim that its preference increased as a result. Saint Vincent, would have been happy to have seen the MFN tariff quota with an in quota rate of €75/tonne continue, provided that MFN access at that rate had been limited to the TRQ with out-of-quota imports continuing to attract the full bound rate (€680/tonne). This would have provided Saint Vincent and the Grenadines with the security that would ensure that its modest imports would be able to find a place on the EC market.

5.124 Saint Vincent and the Grenadines was surprised and dismayed to find that the MFN were not content when the flat tariff that they had been clamouring for over the years was finally applied at the rate of €176/tonne and even more so when Ecuador decided to take panel proceedings, even though it was already apparent that the new regime had permitted the MFN, taken as a whole, to export increasing quantities of bananas to the EC market. But the present case taken by the United States is even more bewildering. Saint Vincent and the Grenadines cannot understand why the United States

would want to take a case at all. In the past, their concern was that they felt that the share of the TRQ licences allocated to their banana companies was too small. These companies obtained additional quantities of licences during the first two phases of the EC/US Understanding and no doubt derived significant additional revenue as a result, because the licences were the key to the quota rent. But, with the application of the flat tariff, MFN imports are not limited, the licence issue is now behind us. Instead the United States is now challenging the very existence of the preference that the European Communities grants us which permits us to trade internationally.

5.125 Saint Vincent and the Grenadines cannot understand why the United States would want to do this or how do they justify setting aside their Understanding with the European Communities after their companies have gained significantly from the faithful application by the European Communities of phases 1 and 2 of that Understanding, the very phases to which, as can be seen from the letter from Mr Zoellick, the United States attached prime importance? And why do they argue that, when it comes to bananas, a WTO Member may not apply a limit to a preference without a waiver from Article XIII of the GATT when they limit some of the preferences they themselves grant on some other products under the Generalized System of Preferences, even though the enabling clause that legitimises the GSP only provides a derogation from Article I? How unreasonable and selective and self-serving in its reasoning can a Member be?

5.126 The European Communities and the United States decided between themselves that there was no need for consultations before this case could be launched. If this is allowed to stand, it will mean that rights as third countries to know the reason for the action will have been violated. The United States feels able to bring the case under Article 21.5, although the main material point they raise is about the interpretation of special conditions of the Article I waiver granted at Doha, conditions that did not exist when the United States took the previous case. They argue that MFN access has not been maintained when it has been increased. And they ask the Panel to make a ruling on Article XIII with regard to the preferential TRQ that the European Communities accords to the ACP that would conflict with the way they apply other preferential TRQs themselves. They should not prevail.

I. SURINAME

1. Oral statement of Suriname

5.127 The United States is seeking to present this case as a compliance case which would address the "continued inconsistency of the EC import regime for bananas with its WTO obligations". This is, Suriname believes, incorrect and has important legal consequences. First of all, the *Bananas III* dispute has been settled through the Understanding on Bananas concluded between the European Communities and the United States. Secondly, the new EC banana import regime which the United States is challenging is not a "measure taken to comply" with the recommendations and rulings of the DSB, within the meaning of Article 21.5 of the DSU. As a result, and for both reasons, the United States is precluded from bringing this case under Article 21.5 of the DSU.

(a) Preliminary issue: the United States failed to request consultations

5.128 As a preliminary issue, Suriname would like to express its strong concerns that no consultations were requested and held in this case while consultations are a prerequisite to a request for establishment of a Panel not only in the framework of *de novo* panel proceedings but also in the framework of compliance proceedings.

5.129 Suriname understands from the written submissions of both parties that the absence of consultations would be based on a bilateral agreement reached between the parties to dispense with consultations. As explained in detail in the ACP third party written submission, Suriname believes that the obligation to request and hold consultations cannot be waived bilaterally by the parties to a

WTO dispute through a bilateral agreement. This would be contrary to the terms of the DSU which does not provide for such a possibility. This would also be inconsistent with the object and purpose of Article 4 of the DSU. Indeed, the consultation phase has been introduced as a necessary preliminary step before requesting the establishment of a panel because these consultations can be a way to try to find a mutually acceptable solution which is the preferred alternative in order to settle disputes, as expressed by Article 3.7 of DSU, and for due process reasons, i.e. since during such consultations parties and third parties are given notice of the complainant's concerns before any possible Panel phase. The consultation phase appears thus essential not only for the parties but also for the third parties.

5.130 This is particularly important in this case where the ACP are in fact more than third parties since they are the beneficiaries of the preference which is challenged by the United States and will therefore be directly affected by the findings of the Panel in the present case.

5.131 In addition, by depriving the ACP third parties from having the possibility to join consultations since no such consultations were held, the United States manifestly breaches the requirement of Article 4.10 of the DSU according to which "[d]uring consultations Members should give special attention to the particular problems and interests of developing country Members." It is unacceptable that in the first dispute settlement case ever brought by a developed country against a preference given to developing countries by another developed country, the United States deprives those developing countries which will be severely harmed in case the United States' challenge succeeds, from their right to participate in prior consultations.

5.132 We therefore respectfully request the Panel to declare the present proceeding brought by the United States inadmissible on the sole ground that it failed to request consultations in accordance with the requirements laid down in the DSU.

(b) The *Bananas III* dispute has been settled through the Understanding on Bananas

5.133 The United States cannot have recourse to a compliance Panel to challenge the new EC banana import regime since the *Bananas III* dispute has been settled through the Understanding on Bananas reached by the European Communities and the United States.

5.134 On 11 April 2001, the United States and the European Communities concluded an Understanding on Bananas to solve their dispute over the European Communities' banana import regime. The Understanding on Bananas constitutes a mutually agreed solution, as demonstrated by its content as well as by the confirmations contained in the Letters exchanged between the parties on 29 May 2001 and 30 May 2001. Indeed, it is clear from its content that the Understanding on Bananas was reached to resolve the dispute as it lists the various actions or steps which must be undertaken by both parties and which constitute the elements of the solution. The fact that it constitutes a mutually agreed solution has been confirmed by the US Trade Representative Zoellick in his Letter of 29 May 2001 where he stated that the Understanding constituted the "mutually agreed solution to our dispute in the WTO as notified to the WTO Dispute Settlement Body."

5.135 The first important legal effect of this Understanding being concluded is that it is not admissible to challenge the consistency of subsequent measures pursuant to Article 21.5 of the DSU. Article 21.5 of the DSU provides for a mechanism for dispute resolution "where there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings." In this case where there is a mutually agreed solution, there cannot be any disagreement in the sense of Article 21.5 of the DSU.

5.136 The fact that a mutually agreed solution puts an end to the dispute for which it has been agreed flows not only from the content of the mutually agreed solution but also from the DSU and in particular Article 3.7 of the DSU.

5.137 Other elements further support the fact that the agreed solution existing between the European Communities and the United States prevents the United States from referring the issue of the WTO consistency of the new EC banana import regime under Article 21.5 proceedings: first, the fact that the DSB took the *Bananas III* case off its agenda as an issue which has been resolved in accordance with Article 21.6 of the DSU, after the Understanding was agreed; and second, the fact that the United States terminated its suspension of concessions in accordance with Article 22.8 of the DSU, confirming that it considered that the dispute had been resolved through the mutually agreed solution.

5.138 The United States cannot simply ignore the above. The original *Bananas III* case has been resolved by means of the Understanding. The fact that the Understanding has resolved the case is clear from the text of the Understanding itself, the confirmation letters exchanged between the parties thereafter and from the fact that the DSB took this issue off its agenda and that the United States terminated its suspension of concessions. Once a dispute has been resolved, such as in the present case, by an Understanding constituting a mutually agreed solution, any further regulatory development cannot be considered as measures taken to comply with DSB recommendations. New disputes concerning the same sector or products should therefore be addressed in the framework of new dispute settlement proceedings instead of compliance proceedings.

5.139 It does not appear relevant to us to determine whether the Understanding is or not a "covered agreement" pursuant to Article 1 of the DSU since the issue in the present case is not to determine whether the measures being challenged are consistent with the Understanding on Bananas, but about the legal effects which such an Understanding has in procedural terms in subsequent proceedings.

5.140 The arguments drawn by the United States from the *India – Autos* dispute are misconceived. Indeed, the Panel in that proceeding was only requested to rule on the question whether a party to a mutually agreed solution could initiate new dispute settlement proceedings covering the same matter as was covered by a mutually agreed solution. The argument raised by the ACP third parties is different, namely that once a mutually agreed solution has been agreed, parties to this agreed solution are prevented from having recourse to Article 21.5 proceedings. In other words, the ACP third parties do not argue that the existence of a mutually agreed solution would prevent the United States from starting new dispute settlement proceedings. However, it constitutes a bar to the initiation of compliance proceedings.

5.141 In the light of the foregoing, this Panel must examine the legal effects of the Understanding on Bananas and in particular its procedural consequences. It is submitted that the fact that the original dispute has been settled through the Understanding on Bananas constituting a mutually agreed solution prevents the United States from challenging the new EC banana import regime in the framework of compliance proceedings.

5.142 The second legal effect of the Understanding on Bananas is that being an international agreement, it is legally binding upon the parties. The binding nature of this Understanding is confirmed by the fact that each party implemented its content.

5.143 Being an agreement upon the parties, both parties have to comply with its terms in good faith and cannot put its terms into question thereafter. This obligation to implement international agreements in good faith constitutes a bar on the US' ability to challenge now under Article 21.5 of the DSU the legality of the Cotonou preference.

5.144 If the United States were now allowed to call into question the Understanding, this would manifestly contradict the Understanding which is a binding international agreement. In addition, it would also be totally unfair since it has already reaped the benefits from that agreement.

(c) The new EC banana import regime is not a *measure taken to comply* with the recommendations and rulings in the original Banana III dispute

5.145 There is a further reason why the United States should not be allowed to bring this case before a compliance panel. Namely, the measures now being challenged are not "measures taken to comply" with the recommendations and rulings of the original Panel within the meaning of Article 21.5 of the DSU. As noted by the Appellate Body in *EC – Bed Linen*, "if a claim challenges a measure which is not a 'measure taken to comply', that claim cannot properly be raised in Article 21.5 proceedings" (para. 78).

5.146 From the existing case-law, it appears that, in order to be considered as being "measures taken to comply", the challenged measures must be clearly connected to the panel and Appellate Body report of the original case, both in time and in respect of the subject-matter. This criterion is clearly not satisfied in the present case.

5.147 Regarding the time-frame, it seems difficult to consider that more than eight years between the recommendations and rulings of the DSB in the original case and the adoption of the measures being challenged show a clear connection.

5.148 As regards the subject-matter, there also appears to be no clear connection for at least two reasons. First, the regime which is challenged is a tariff-only regime which has nothing to do with the quota regime which was examined by the panel and the Appellate Body in the original *Bananas III* dispute. Second, the legal background against which the new EC banana import regime needs to be examined has changed radically. Indeed, with the adoption of the Understanding on Bananas and the Doha Waiver, new rights and obligations have arisen for WTO members. The Understanding on Bananas has been agreed by the European Communities and the United States to solve their original Banana dispute. It contains a certain number of rights and obligations that both parties must implement in good faith. The Doha Waiver is a decision which has been taken by all WTO Members to grant a waiver of the GATT Article I requirement of non-discrimination in order to enable the European Communities to implement the Cotonou preference.

5.149 Since these two new legal instruments contain new rights and obligations, they must necessarily be taken into account to decide on the WTO compatibility of the new EC banana import regime. Actually, the new EC banana import regime has been adopted to implement the commitments undertaken in these instruments. The measures being challenged by the United States cannot therefore be regarded as measures taken to comply with the recommendations and rulings in the original dispute. The legality of the new EC banana import regime can therefore only be examined in new dispute settlement proceedings taking into account these new legal instruments.

5.150 This was actually suggested by the Arbitrator in the first Arbitration, noting that disputes may arise specifically from the Doha Waiver and its implementation. To the extent that the dispute challenges measures which have been adopted pursuant to the Doha Waiver and other legal instruments which came into existence only after an earlier dispute, such measures cannot be regarded as being measures taken to comply with recommendations and rulings of the DSB adopted in the pre-existing earlier dispute.

J. BRAZIL

1. Oral statement of Brazil

5.151 In its statement, Brazil focused on the two preliminary objections made by the European Communities, namely the binding nature of the Understanding signed by both Parties in 2001 and whether the European Communities' current import regime is a "measure taken to comply" within the meaning of Article 21.5 of the DSU.

(a) The Understanding

5.152 The European Communities claims that by having signed the Understanding in 2001 the United States would have agreed on a number of issues that today would prevent it from resorting to an Article 21.5 proceeding. First, the European Communities affirms that by having signed the Understanding, the United States would have accepted until the end of 2007 the banana import regime irrespective of the legal situation of some of its elements.[244] Second, the European Communities claims that the United States in that same Understanding would have presumably renounced its right under Article 21.5 of the DSU to challenge the mutually satisfactory solution.

5.153 In Brazil's opinion, both conclusions are erroneous. On the first point, it notes that in affirming that the United States would have concurred with a regime regardless of its legal situation, the European Communities is imprudently suggesting that Members can agree on a solution irrespective of its consistency with the covered agreements.

5.154 Article 3.2 of the DSU reflects the Members' recognition that the dispute settlement mechanism serves to *preserve* the rights and *obligations* of Members under the covered agreements. Thus, a mutually agreed solution should not add or diminish Members' rights and obligations.

5.155 Moreover, while recognizing that a solution mutually acceptable to the parties to a dispute is clearly preferable to dispute resolution procedures, Article 3.7 also provides that such a solution has to be consistent with the covered agreements. The fact that the DSU favours negotiated solutions over the litigation avenue does not allow concluding that *any* negotiated solution is preferred by the DSU. The negotiated solution must be compatible with the covered agreements.

5.156 In no provision does the DSU grant Members certainty as to the "lawfulness" of a measure taken to comply just because such measure derives from a mutually satisfactory solution. To the contrary, Article 21.5 sets forth the Members' right to resort to a panel where there is disagreement as to the consistency with covered agreements of the measures taken to comply.

5.157 Whether or not this solution is the one referred to by Article 3.6, any solution intended to implement DSB recommendations and rulings, by virtue of Article 21.5, is subject to analysis by a panel.[245]

5.158 In fact, the Appellate Body has stated that:

> "Article 21 sets out a number of mechanisms to ensure collective oversight of [a] Member's implementation. … [W]ithin Article 21 as a whole, the declarations of the implementing Member form an integral part of the surveillance of implementation,

[244] See European Communities' second written submission, para. 14.

[245] See Appellate Body Reports in *US – FSC (Article 21.5 – EC II)*, para. 60; *US – Softwood Lumber* IV*(Article 21.5 – Canada)*, para. 70; *EC – Bed Linen (Article 21.5 – India)*, para. 79; and *Canada – Aircraft (Article 21.5 – Brazil)*, para. 36.

but they do not stand alone. Rather, they are complemented by, and subject to, multilateral review within the WTO".[246]

5.159 In Brazil's view, the Panel should not endorse the European Communities' argument. If accepted, it would significantly undermine the effectiveness of Article 21.5, because parties to an agreed solution would be authorized to rewrite their multilateral commitments. Any measure based on an agreed solution would automatically escape the test of consistency with the covered agreements. Thereby it would give Members a blanket waiver to override their obligations, with serious implications on the predictability and security of the multilateral trading system.

5.160 On the second issue, the European Communities states that the provisions of the Understanding and the context within which it was signed would permit to infer that the United States renounced its rights to challenge some elements of the Understanding.[247] To Brazil's knowledge, there is nothing in that bilateral Understanding that allows for such a conclusion. Nor is there a provision in the DSU that precludes a Member from challenging under Article 21.5 any kind of measure taken by the defending party to comply with the recommendations and rulings of the DSB.

5.161 In light of the Understanding and considering that Article 21.5 contains no clause on the preclusion of the rights established therein, the United States should not be presumed to have tacitly renounced its rights to seek multilateral review of the measures taken by the European Communities.

(b) Whether the European Communities' 2006 import regime is a "measure taken to comply"

5.162 Considering the European Communities' second preliminary claim, related to the nature of the European Communities' banana import regime, the United States asserts that what the European Communities tries to characterize as an "autonomous political decision"[248] - *i.e.* the tariff only regime – is in fact the "measure taken to comply" for the purposes of the current proceedings.

5.163 According to the United States, the European Communities would have committed in the Understanding of 2001 to take "a ***series*** of steps that would culminate with the introduction of a tariff only regime by January 1, 2006"[249], the tariff-quota regime implemented in 2002 being one of those steps. From the United States' perspective, such a tariff-quota system would constitute an interim and transitional phase towards the tariff-only regime. The single-tariff-based system would be the ultimate point of such a series and effectively took place five years after the Understanding was signed.

5.164 On the other hand, the European Communities claims that the United States' complaint does not fall within the scope of Article 21.5. In the European Communities' view, Council Regulation 1964/2005, which establishes the present banana import regime, would not be a measure taken to comply for the purposes of Article 21.5. The "final measure taken to comply"[250] agreed with the United States back in 2001, the European Communities purports, would be the tariff-quota-based system implemented by the Communities from 2002 to the end of 2005.[251] Consequently, the European Communities would have implemented in 2002 the recommendations and rulings adopted by the DSB in 1997, and, therefore, the United States would be prevented from challenging the ongoing regime, unless it resorted to a *de novo* panel.[252]

---

[246] See Appellate Body Report in *US – Softwood Lumber IV (Article 21.5 – Canada)*, at para. 70.
[247] See European Communities' second written submission, para. 11.
[248] See ibid., para. 51.
[249] See United States' second written submission, para. 46 (emphasis added).
[250] See European Communities' first written submission, para. 49.
[251] See European Communities' second written submission, para. 50.
[252] See European Communities' first written submission, para. 51.

5.165 In Brazil's opinion, it is for the panel to assess whether or not the EC Council Regulation 1964/2005 is a measure taken to comply. The Appellate Body has cautioned that "characterizing an act by a Member as a measure taken to comply when that Member maintains otherwise is not something that should be done lightly by a panel"[253]. Nonetheless, it has unequivocally stated that "it is, ultimately, for an Article 21.5 panel – and not for the complainant or the respondent – to determine which of the measures listed in the request for its establishment are 'measures taken to comply'".[254]

(c) Final remarks

5.166 Brazil also made some comments on the topic of transparency and open hearings. Ever since its beginning, this dispute has given rise to a number of important systemic issues, among them cross-retaliation; the sequencing between Articles 21.5 and 22.6 of the DSU; and the original Panel's decision to make use of its discretion set out in Article 19.1 to suggest ways of implementation.

5.167 Another issue of great systemic importance was presented to Members. As a result of a bilateral agreement between the Parties, some third parties faced a situation in which two Members were about to decide what the rights of other Members should be, on a subject that should be dealt with by the Membership as a whole within the DSU review process. Brazil recalled that it had made its position clear in an earlier communication to the Panel[255], and, for this reason, it would not go into the details of this topic.

5.168 As far as Brazil is concerned, however, transparency is not only a matter that concerned the confidentiality of proceedings. While many Members who advocate open hearings do not publicize their documents, Brazil usually discloses all its dispute related papers to the general public, including written and oral submissions. To a considerable degree, the disclosure of submissions promotes much greater transparency than making hearings open to the public but keeping documentation confidential. Transparency in WTO dispute settlement proceedings is an element of the delicate balance between rights and obligations within the DSU, one on which Members should negotiate collectively and in the adequate *forum*.

(d) Conclusion

5.169 For the reasons explained above, the Panel should reject the European Communities' preliminary objections and find that the United States is entitled to resort to Article 21.5 procedures.

K. COLOMBIA

1. Written submission of Colombia

(a) The preferential tariff treatment accorded to ACP bananas is not justified under the Article I Doha Waiver

(i) The Article I Doha Waiver has ceased to apply to bananas as of 1 January 2006, and the EC was no longer entitled to "rectify the matter"

5.170 The Waiver Annex contemplates that the determination at the Second Arbitration that the European Communities "has failed to rectify the matter" would have definite legal consequences. These consequences are that following a negative determination, the Article I Doha Waiver ceases to

[253] See Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, at para. 74.
[254] See Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, at para. 78.
[255] See Brazil's letter on the subject sent on 19 October 2007.

apply to bananas upon the entry into force of the new EC tariff regime, and the European Communities has no additional legal opportunity to "rectify the matter".

5.171 In the light of the fifth *tiret* of the Waiver Annex, and based on the determination "that the European Communities ha[d] failed to rectify the matter", Colombia submits that the Article I Doha Waiver ceased to apply to bananas as of 1 January 2006. Colombia agrees with Ecuador that the Arbitrator's determination in this regard is a matter of the record that no party has disputed.

5.172 Thus, following the adverse finding in the Second Award, the European Communities was not entitled to any additional opportunity to "rectify the matter", and the Article I Doha Waiver ceased to apply to bananas as of 1 January 2006.

(ii) Assuming, arguendo, that the EC had the opportunity to "rectify the matter", the tariff level of €176/tonne does not comply with the Tariff Level Standard.

The European Communities has not discharged its burden of showing compliance with the elements required under the Waiver Annex

5.173 To prove compliance with all the terms and conditions of the Waiver Annex, the European Communities should have addressed the three elements referred to by the Arbitrator, against which that compliance must be assessed: (i) whether there is a rebinding of the EC tariff on bananas; (ii) whether any such rebound tariff would result in at least maintaining total market access for MFN suppliers; and (iii) whether the rebound tariff takes into account all EC WTO market-access commitments relating to bananas. However, the European Communities has failed to address the first and the third elements and has not been able to demonstrate compliance with the second element.

5.174 With respect to the first element, while the European Communities submits that the introduction of "a different import regime than the one analyzed by the Arbitrator "… maintain[s] the total market access of the MFN suppliers", the European Communities has failed to indicate what is the "envisaged rebinding of the EC tariff on bananas" within the meaning of the Waiver Annex. An *applied* tariff of €176/tonne does not constitute a "rebinding". With respect to the third element, the European Communities has failed to explain how it has taken into account all its WTO market-access commitments relating to bananas in designing its current import regime. The European Communities has referred in its submissions only to the second element, on which it confines itself to a conclusion of law – that the second element contemplates a quantity- or volume- based standard – and has not even presented arguments to substantiate that conclusion of law.

The European Communities' quantity- or volumes-based analysis is contrary to the Tariff Level Standard

5.175 According to the European Communities, "the volume of total imports of bananas from MFN countries has increased significantly since the introduction of the new import regime … This shows that MFN suppliers have maintained the market access opportunities they had before the introduction of the new system." In effect, the European Communities asserts that the determination of compliance with the Tariff Level Standard requires a volumes-based (or quantity-based) assessment. In other words, the European Communities argues that the Tariff Level Standard contemplates a tariff level that would result in at least maintaining the export *volumes* of MFN banana suppliers.

5.176 Agreeing with the European Communities, the Arbitrator rejected the contention that "market access" should be assessed in terms of trade volumes. In its Rebuttal Submission at the first arbitration the European Communities asserted that "market access in the WTO is a legal concept which enshrines the level of protection or liberalization. The extent to which trade flows, or one Member has a particular market share, has never been part of the WTO understanding of market access". Then

the European Communities added: "In the WTO the phrase "market access" is not to be understood as a measurement of the volume of imports or of market share (between either MFN suppliers or between MFN and other suppliers)". Thus, the notion of *volumes* as the benchmark for purposes of compliance with the Tariff Level Standard was thoroughly discussed and squarely rejected in the First Arbitration.

5.177 Accordingly, there is no legal basis for a volumes-based assessment for purposes of determining compliance with the Tariff Level Standard. It is irrelevant that MFN export volumes have increased

> The applied tariff of €176/tonne does not result in at least maintaining total market access for MFN banana suppliers

5.178 In its First Arbitration, the Arbitrator noted that a determination of the conditions of competition between MFN bananas and both EC bananas and ACP bananas was necessary to determine compliance with the Tariff Level Standard.

5.179 Colombia submits that, even if bound, a tariff of €176/tonne does not maintain the conditions of competition between either (i) MFN bananas and EC bananas or (ii) MFN bananas and ACP bananas. Using the methodology, reference period and figures endorsed by the Arbitrator a tariff of €176/tonne does not maintain conditions of competition between either (i) MFN bananas and EC bananas or (ii) MFN bananas and ACP bananas.

5.180 With respect to conditions of competition between *MFN bananas and EC bananas*, the Arbitrator found that the price-gap methodology "would accurately reflect the level of protection accorded to domestic or EC growers from foreign competitors."

5.181 Regarding the appropriate reference period, the Arbitrator found that "the use of the most recent representative period minimizes the need for ad hoc adjustments to be made to the data and corresponds as closely as possible to the trade regime as applied." The Arbitrator determined that the appropriate reference period was the period 2002-2004.

5.182 With respect to the figures for the *internal* price for bananas, at the Second Arbitration, the European Communities presented and relied on figures based on data derived from Sopisco News. The Arbitrator found that it "does not consider that the European Communities' use of Sopisco News data to estimate the internal price of bananas on the EC market was inappropriate."

5.183 With respect to the figures for the *external* price for MFN bananas, at the First Arbitration, the European Communities relied on Eurostat c.i.f. price data. The appropriateness of the European Communities' use of Eurostat data to establish the external price was not disputed by any of the interested parties.

5.184 Thus, using the methodology that was used by the European Communities, endorsed by the Arbitrator, and based on statistics from sources relied upon by the European Communities (Sopisco News) or generated by the European Communities' agencies (Eurostat), and which were also endorsed by the Arbitrator, it is evident that a tariff of €176/tonne does not maintain conditions of competition between *MFN bananas and EC bananas*.

5.185 Based on the figures provided by the European Communities, the Sopisco-based weighted average *internal* price for bananas in the EC-25 during the reference period 2002-2004 was €702/tonne. Based on Eurostat statistics, the weighted average *external* price for MFN bananas in the EC-25 during the reference period 2002-2004 was €605/tonne. The price gap for MFN bananas during the reference period was, therefore, €97/tonne. In short, the tariff level that would result in at

least maintaining the conditions of competition between *MFN bananas and EC bananas* cannot be more than €97/tonne.

5.186 In the course of the First Arbitration, the Arbitrator emphasised that a tariff meeting the Tariff Level Standard also needed to take into account conditions of competition between *MFN and ACP bananas*. Based on Eurostat statistics, the weighted average external price for ACP bananas in the EC-25 during the reference period 2002-2004 was €616/tonne. Deducting this external price from the Sopisco-based weighted average internal price in the EC-25 during the same period, as provided by the European Communities of €702/tonne, the price gap for ACP bananas during the reference period was €86/tonne.

5.187 Accordingly, the tariff level that would result in at least maintaining the conditions of competition between *MFN bananas and ACP bananas* is the difference between the price gap for MFN bananas (€97/tonne) and the price gap for ACP bananas (€86/tonne), or €11/tonne.

5.188 Hence, a tariff of 176€/tonne in no way maintains the conditions of competition between *MFN bananas and ACP bananas* and, just as it does with respect to the conditions of competition between *MFN bananas and EC bananas*, fails the Tariff Level Standard.

(b) The Preferential Tariff Rate Quota accorded to ACP bananas is inconsistent with Article XIII of the GATT 1994

5.189 Colombia recalls that the Appellate Body in *EC – Poultry* stated that: "In applying import restrictions to any product, Members shall aim at a distribution of trade in such product approaching as closely as possible the shares with the various Members might be expected to obtain in the absence of such restrictions".

5.190 The TRQ granted by the European Communities to ACP bananas clearly does not conform to this standard. While MFN bananas must always bear a tariff, ACP bananas do not, because of the preferential intra-quota zero tariff. It can hardly be argued that such a distribution of trade complies with the standard set out in Article XIII:2 of aiming "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".

5.191 Likewise, Colombia believes that the TRQ granted by the European Communities to the ACP countries excludes all MFN bananas from the zero-duty quota, and in doing so, violates Article XIII:1 of the GATT 1994. This discriminatory treatment denies other WTO Members the right to participate in the European Communities' TRQ, and thereby to improve their access to the EC banana market.

(c) Conclusion

5.192 In light of the foregoing, Colombia respectfully requests the Panel to find that the measures at issue is inconsistent with Article I of the GATT 1994, or alternatively, does not comply with the terms and conditions of the Article I Doha Waiver, and is inconsistent with Article XIII of the GATT 1994.

2. Oral statement of Colombia

5.193 The dispute on bananas is the longest dispute in the history of the GATT and the WTO. Regrettably, this Panel proceeding is the eleventh since 1992 examining the EC banana import regime. Fifteen years on, in 2007, that regime is still not in conformity with WTO law.

5.194 Bananas are a product of paramount importance for the Colombian economy. They are the main source of employment in rural areas crucial for national security, and are also one of Colombia's main export products

5.195 In its third-party written submission, Colombia establishes why the EC banana import regime is inconsistent with Articles I and XIII of the GATT. Rather than repeat those submissions, this statement will focus on certain critical issues.

5.196 It is evident that the preferential tariff treatment granted to ACP bananas is inconsistent with the MFN obligation in Article I:1 of the GATT. The Article I Doha Waiver temporarily justifying this treatment was granted *subject to* an EC obligation to rebind the EC MFN tariff on bananas at a level that results in at least maintaining total market access for MFN banana suppliers, taking into account all EC WTO market-access commitments relating to bananas. The process of rebinding the EC tariff contemplated a two-stage arbitration procedure and a waiver-termination provision.

5.197 The European Communities argues that the Doha Waiver "would cease to apply only if the European Communities implemented the import regime analysed by the Arbitrator and found not to satisfy the standard of the Doha Waiver. If the European Communities introduced a different regime than the one analysed by the Arbitrator and that import regime did indeed maintain the total market access of the MFN suppliers, then the Doha Waiver would continue to apply until the end of 2007".[256] Colombia cannot agree with this interpretation.

5.198 The structure of fifth tiret of the Annex clearly indicates that the European Communities had only one opportunity to rectify. If the first arbitration award resulted in a determination that the rebinding would not result in at least maintaining total market access, an opportunity was given for the parties to reach a mutually satisfactory solution. Thereafter, a *last* opportunity to rectify the matter was contemplated. This created a powerful incentive for the parties to seek a negotiated solution. An additional opportunity to rectify the matter would nullify this incentive to negotiate.

5.199 Furthermore, had the European Communities an additional opportunity to rectify the matter, and unilateral authority to judge whether or not that import regime maintained the total market access of MFN suppliers, as they are claiming now, the purpose and rationale of the banana-specific multilateral dispute settlement mechanism in the waiver would be defeated. As the United States submitted in yesterday's oral statement, such an interpretation would "read the role of the Arbitrators out of the Annex".[257] MFN suppliers would have never granted the Article I Doha Waiver for bananas were this the case.

5.200 In any event, assuming *arguendo* that the European Communities had an additional opportunity to "rectify the matter", the applied tariff of €176/ton does not meet the terms and conditions of the Article I Doha Waiver.

5.201 First, an applied tariff of €176/ton does not constitute a "rebinding". Second, the European Communities has failed to take into account all its WTO market-access commitments relating to bananas. Third, and of greatest concern to Colombia, the applied tariff of €176/ton does not meet the tariff level standard of "at least maintaining total market access for MFN banana suppliers".

5.202 Colombia has provided detailed argument paragraphs 20 to 26 of its third-party written submission for why compliance with the tariff level standard ought to be assessed in the same manner

[256] European Communities' first written submission, para. 55.

[257] United States' opening statement at the Panel's substantive meeting with the parties and third parties, para. 32.

as the Arbitrator and therefore in terms of conditions of competition between MFN bananas and both EC and ACP bananas.

5.203 In this statement, Colombia simply highlights that a volumes-based assessment is *contrary* to the position put forward by the European Communities in the banana tariff arbitrations where it argued that the "legal notion of market access can only guarantee the legal conditions of imports, not the actual imports" and the "EC therefore urges the Arbitrators to reject the argument that market access should be measured in trade volumes or market shares". The European Communities confirmed this view yesterday, stating that the tariff level standard should "not … be interpreted as a guarantee of any particular volume of trade" and should be based on "competitive opportunities" not a "volumes-based-analysis".[258]

5.204 The European Communities' repeated rejection of a volumes-based-analysis accords with the rulings of the Arbitrator. The Arbitrator squarely rejected the contention that "market access" should be assessed in terms of trade volumes. It noted that "total market access for MFN banana suppliers" is "not a guarantee of any particular level or volume of trade or price. Rather, it relates to the opportunity for MFN suppliers to enter and compete on the EC banana market". Instead, the Arbitrator endorsed a tariff level standard based on conditions of competition.

5.205 A test based on conditions of competition rather than actual trade flows is consistent with a long line of GATT and WTO jurisprudence and reflects the practical reality that it is impossible to isolate the impact of a measure from the myriad of other factors in the real world that constantly affect fluctuations in international trade.

5.206 In light of the above, it was with alarm that Colombia noted that the European Communities is now contradicting itself and attempting to reintroduce a linkage between trade volumes and competitive opportunities. In the hearing yesterday, the European Communities expressed that "it would not be logical to assume that a country may be deprived of its competitive opportunities and market access, but still be able to increase the quantity of its exports towards the European Communities". To reinforce this statement they also expressed that "an increase in exports can only take place if market access has been maintained".[259] In Colombia's view the economic reasoning of the European Communities is over-simplified and wrong. International trade flows are explained by a number of factors related to supply and demand. It is possible to explain, for instance, why an increase in a tariff rate could be associated with a statistic that shows an export increase. Does this mean that the increased tariff rate maintained competitive opportunities? Obviously not. The self-serving nature of the European Communities' changed position is highlighted by its view that the relevance of trade volumes can only work against MFN banana suppliers as "[a] decrease in exports does not necessarily mean that market access has been denied".[260]

5.207 Colombia also submits that, even if bound, a tariff of €176/ton does not maintain the conditions of competition between either (i) MFN bananas and EC bananas or (ii) MFN bananas and ACP bananas.

5.208 The Arbitrator endorsed the price gap methodology which, using correct prices would produce an estimate of the tariff equivalent that would confer the same level of protection to domestic producers as the border measures being replaced by the tariff equivalent. The Arbitrator also endorsed the following elements of the price gap methodology:

---

[258] European Communities' opening statement at the Panel's substantive meeting with the parties and third parties, para. 13.

[259] Ibid.

[260] Ibid.

- The period 2002-2004 as the appropriate reference period;
- The Sopisco-based weighted average internal price of €702/ton in the EC-25;
- The Eurostat weighted average external price of €605/ton for MFN bananas in the EC-25; and
- The Eurostat weighted average external price of €616/ton for ACP bananas in the EC-25.

5.209 Therefore, the price gap for MFN bananas during the reference period was €97/ton. In short, the tariff level that would result in at least maintaining the conditions of competition between MFN bananas and EC bananas cannot be more than €97/ton. A tariff-level of €97/ton does not even take into account the conditions of competition between MFN bananas and ACP bananas which are elaborated upon in Colombia's written submission.

5.210 Hence, a tariff of €176/ton – even if bound – in no way maintains the conditions of competition between MFN bananas and EC bananas or between MFN bananas and ACP bananas and, therefore, fails to comply with the tariff level standard.

5.211 For all the above reasons, Colombia submits that the Article I Doha Waiver cannot justify the preferences granted by the European Communities.

5.212 Colombia has provided argumentation in its written submission for why the preferential tariff-rate quota accorded to ACP bananas is inconsistent with Article XIII:1 and XIII:2 of the GATT. Rather than elaborate upon those arguments, Colombia wishes to use the time available to address the European Communities' argument that selected prior waiver decisions constitute "subsequent practice" and "subsequent agreements" within the meaning of Article 31 of the Vienna Convention on the Law of Treaties that, in essence, allow for an interpretation that an Article I waiver covers an Article XIII violation.

5.213 "Subsequent practice" within the meaning of Article 31(3)(b) needs to be "concordant" and "common". Colombia notes the comments of the United States yesterday that it has, on at least three occasions, requested waivers of both Article I and Article XIII of the GATT. These examples illustrate that the practice is not concordant and common but inconsistent. Furthermore, the extent to which the practice of a few Members can be relevant to the interpretation of a multilateral treaty such as the GATT is highly controversial.

5.214 A "subsequent agreement" within the meaning of Article 31(3)(a) must be distinguished from "subsequent practice" in Article 31(3)(b). The European Communities fails to make that distinction by elevating inconsistent practice regarding waivers to a status approximating an "agreement" regarding the interpretation of Articles I and XIII of the GATT. "Subsequent agreements" within the meaning of Article 31(3)(a) are extremely rare in practice. In the context of the WTO, the type of agreement contemplated is specifically regulated by Article IX:2 of the WTO Agreement on authoritative interpretations. The European Communities' liberal interpretation would render the disciplines of Article IX:2 of the WTO Agreement largely meaningless.

5.215 In light of the foregoing, Colombia respectfully requests the Panel to find that the measures at issue are inconsistent with Articles I and XIII of the GATT.

L. ECUADOR

1. Oral statement of Ecuador

5.216 As the Panel is well aware, Ecuador is the complaining Party in its own challenge to the European Communities' measures. In the other proceeding, Ecuador has challenged the conformity of

the European Communities' measures with Article I and Article XIII, as well as with obligations not at issue in the US complaint.

5.217 Having had the opportunity to explain its position in the other proceeding and also to respond to most of the defences that the European Communities has presented in this proceeding, Ecuador will not repeat all of those points again here.

5.218 Ecuador has also taken due note of the submissions of third countries, including those of the ACP. Ecuador is itself a developing country and in fact has a lower per capita GDP than many of the ACP beneficiary countries. Ecuador does not object to assistance that the European Communities, a Community of many of the world's wealthiest countries, wishes to accord to the ACP countries. However, Ecuador strongly objects to the European Communities granting this assistance in violation of the European Communities' WTO obligations and at the expense of Ecuador and other developing countries. The European Communities tries to impugn the good faith of those who challenge its measures, but the reality is that if the European Communities had honoured first its GATT and then its WTO obligations in good faith, there would be no challenge here. After losing every single challenge to its regime since 1993, it is time for the European Communities to stop blaming those who challenge the European Communities' banana measures and to start complying with its WTO obligations. EC assistance to the ACPs cannot be built on discrimination against other developing country suppliers.

5.219 On the legal issues, Ecuador agrees with the United States, but would like to add a few observations.

5.220 First, Ecuador observes that the European Communities argues in this challenge that its measures were not taken to comply with the DSB recommendations and rulings in *Bananas III*. Ecuador obviously agrees with the United States that that defence has no merit, as it is apparent that the EC measures represent the failed final step of the European Communities to comply with its WTO obligations in accordance with the Understandings on Bananas. No one will ever again enter into an agreement calling for phased compliance with WTO obligations if this panel finds that implementing the first phase automatically terminates the right to invoke Article 21.5 if there is a failure to carry out subsequent phases.

5.221 Ecuador must also point out the hypocrisy of the European Communities claiming in this proceeding that its measures were not taken to comply with *Bananas III* after the European Communities, in trying to defend against Ecuador's challenge, argued quite the opposite that its measures were justified because they were suggested by the *Bananas III* Panel. Both defences are wrong.

5.222 Second, the European Communities argues that the United States' claims should be dismissed on grounds that under the EC-US Understanding, the United States is barred from challenging the EC preferences until 2008. The European Communities argues that it has such immunity from challenge by the United States, regardless of the legality of those EC preferences and regardless of the European Communities failure to comply with the waiver or any other condition of the Understanding. The European Communities made a similar argument against Ecuador's claims. This EC defence is without factual or legal foundation. First, in its Understanding with the European Communities, the United States, like Ecuador, made no commitment to give the European Communities "carte blanche" on preferences. The EC-US Understanding provides for the same multi-stage, multi year phased commitments as the Ecuador Understanding. While the European Communities was carrying out those commitments, there was no challenge. However, the European Communities ceased to comply with the Understanding. Whether a WTO panel ever could or should enforce a bilateral commitment not to challenge the conformity of a measure with WTO obligations, the Understanding is not such a commitment and is no basis for granting the European Communities the immunity from challenge that

the European Communities asserts in this dispute. The European Communities' efforts to escape substantive scrutiny of the consistency of its regime with WTO rules must therefore be rejected.

5.223 Turning to the merits, Ecuador supports the United States' claims under both Article I and Article XIII. The EC tariff preferences for ACP bananas lost the protection of the Doha Waiver of Article I on January 2006, when the European Communities unilaterally imposed the so-called "tariff-only" regime of its choosing, after twice failing to propose a system satisfactory to the Arbitrator under the waiver. As in the Ecuador-EC proceeding, this Panel should reject the European Communities' effort to rewrite the waiver to cover the European Communities' illegal behaviour.

5.224 Finally, the European Communities also violates its obligations under Article XIII of the GATT by imposing a tariff quota under which only ACP bananas are allowed entry under the duty-free quota, while all other bananas are relegated to the high duty treatment. The EC defence is sophistry, effectively asking the panel to hold that although article XIII says expressly that it applies to any tariff quota, that really means any tariff quota except one that excludes countries outright from participating in the low duty tariff quota. It is absurd to think that Article XIII bans an inadequate share of a low duty quota, but permits denial of any share at all. The European Communities professes to find a consistent practice in its favour based entirely on the absence of challenges to some tariff quota measures under Article XIII. However, it is not a legal defence to the EC measures in this dispute whether or not there are or have been other tariff quotas that might be similarly inconsistent with Article XIII. Certainly there can be no claim of consistent practice given the clear rulings of the Appellate Body and the Panel in *Bananas III* that the tariff quota for ACP bananas is subject to Article XIII. Finally, by seeking and obtaining a waiver of Article XIII for its tariff quota for ACP bananas, the European Communities itself and the WTO Members as a whole further recognized that the EC tariff quota restricted to ACP countries is contrary to Article XIII. It is only because that waiver of Article XIII expired and no renewal was granted that the European Communities now argues to rewrite the provisions of Article XIII and to ignore the recommendations and rulings of the DSB in *Bananas III*. The Panel should reject these EC arguments.

M. JAPAN

1. Written submission of Japan

(a) The Understanding does not preclude the United States from challenging the European Communities' tariff only regime even if the Understanding is a "mutually agreed solution"

5.225 The European Communities argues that the United States' challenge to the European Communities' banana import regime at issue (the "European Communities' 2006 regime") should be dismissed entirely because bringing such a challenge is precluded by the Understanding, a "mutually agreed solution" between the parties. Indeed, the panel in *India – Autos* indicates that "[mutually] agreed solutions are intended to reflect a settlement of the dispute in question, which both parties expect will bring a *final conclusion* to the relevant proceedings"[261], and Japan agrees with this observation. However, in the present case, even assuming that the Understanding is a "mutually agreed solution", it does not affect the United States' right to challenge the European Communities' 2006 regime.

5.226 As Article 3.5 of the DSU provides, "[a]ll solutions to matters formally raised under the consultation and dispute settlement provisions of the covered agreements … shall be consistent with those agreements." Therefore, if the Understanding is a "mutually agreed solution", the arrangements agreed between the parties in the Understanding, including the European Communities' 2006 regime, also need to be consistent with relevant WTO rules. The European Communities' 2006 regime

[261] *India – Autos*, para. 7.113 (emphasis added).

explicitly grants a preference to bananas imported from the ACP countries over those imported from non-ACP countries, and thus, the implementation of the measure would plainly violate Article I:1 of the GATT without a valid waiver from the European Communities' obligation under the provision. In fact, the Understanding expressly refers to the GATT Article I waiver in Paragraph E. Therefore, in order for the European Communities to claim that it is implementing the tariff preference as the measure to which the United States accepted in the Understanding, it is indispensable for the European Communities to maintain a valid waiver from its obligation under the GATT. The United States now challenges the European Communities' 2006 regime, asserting that the European Communities' necessary waiver is no longer valid. Thus, even if the Understanding is a "mutually agreed solution", the United States is not barred from referring the matter to a panel proceeding.

(b) The complaint of the United States is considered to fall under the scope of Article 21.5 of the DSU

5.227 The European Communities argues that the United States' complaint falls outside the scope of Article 21.5 of the DSU. The European Communities' 2006 regime is, however, considered to be within the scope of this 21.5 proceeding in light of the Appellate Body's findings in previous cases. For example, the Appellate Body in *US – Softwood Lumber IV (Article 21.5 – Canada)* addresses that, a 21.5 panel's mandate should include "some measures with a particularly *close relationship* to the declared 'measure taken to comply', and to the recommendations and rulings of the DSB" and indicates that, in order to find such a "close relationship", a 21.5 panel may need to examine not only "the timing, nature, and effects of the various measures," but also "the factual and legal background against which a declared 'measure taken to comply' is adopted."[262]

5.228 The European Communities' 2006 regime was implemented subsequent to the adoption of the recommendations and rulings of the DSB in *EC – Bananas III* and, it is explicitly identified in the Understanding, Paragraph B, as a measure "by which the long-standing dispute over the EC's banana import regime can be resolved".[263] It also grants a preferential treatment to the imports of bananas from the ACP countries. In light of these, the argument that the European Communities' 2006 regime does not have a relationship with the recommendations and rulings of the DSB in *EC – Bananas III* dispute seems hardly convincing.

(c) Issues relating to nullification or impairment of a benefit accruing to the United States

(i) The United States has "standing" to challenge the European Communities' 2006 regime

5.229 The Appellate Body in *EC – Bananas III* describes that, taking into account of Article XXIII of the GATT and Article 3.7 of the DSU, a party has "broad discretion in deciding whether to bring a case against another Member under the DSU", and "is expected to be largely self-regulating in deciding whether any such action would be 'fruitful'."[264] Thus, the right of a party to pursue the claims under the DSU will be justified when the complaining party *considers* that there is a "nullification or impairment of a benefit" accruing to it, and that, in good faith, its initiation of the proceeding will be "fruitful". In this dispute, the United States claims that the European Communities' 2006 regime is inconsistent with GATT Articles, which constitutes prima facie nullification or impairment of a benefit under Article 3.8 of the DSU. Moreover, the Appellate Body in the original proceeding found that the United States was allowed to raise its claim against the European Communities. Since there is no change in the facts pointed out by the Appellate Body as reasons for the United States to have had standing in the original proceeding, it is reasonable to assume that the United States is justified to challenge the European Communities' banana import regime.

---

[262] *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 77 (emphasis added).
[263] The Understanding, Paragraph A.
[264] *EC – Bananas III*, para. 135. See also *Mexico – Corn Syrup (Article 21.5 – US)*, para. 73.

(ii) Whether there is any nullification or impairment of a benefit accruing to the United States

The United States is not required to affirmatively demonstrate that there is a "nullification or impairment of a benefit" in advancing its claim on GATT Articles

5.230 Article 3.8 of the DSU provides that a benefit accruing to a Member is presumed to be "nullified or impaired" when a violation of the measure of another Member is demonstrated. Therefore, as the United States asserts, the complainant is not required to affirmatively provide evidence regarding the nullification or impairment of a benefit accruing to it, in advancing its claim under particular WTO provisions, in addition to evidence of the disputed measure's violation of those provisions.

Whether there is no "nullification or impairment of a benefit" for the purpose of Article 3.8 when the "level of nullification or impairment of a benefit" for the purpose of Article 22 is "zero"

5.231 As a rebuttal to the presumption of "nullification or impairment of a benefit" under Article 3.8 of the DSU, the European Communities asserts that there is no nullification or impairment of a benefit accruing to the United States because the "level of nullification or impairment" suffered by the United States to justify the suspension of concessions under Article 22.6 of the DSU is "zero". Japan considers that the fact that the level of nullification or impairment of a benefit is found to be zero in an arbitration proceeding does not necessarily mean that there is no "nullification or impairment of a benefit" at all for the purpose of Article 3.8.

5.232 The WTO jurisprudence indicates that the concept of "nullification or impairment of a benefit" is not limited to trade losses of the complaining party but also include broader interests accruing under the WTO rules.[265]

5.233 However, the "level of nullification or impairment of a benefit" in the context of the authorization of suspension of concessions or other obligations is rather determined based on trade effects. Indeed, the Arbitrators in *EC – Bananas III (US) (Article 22.6 – EC)* have indicated that "[t]he review of the level of the nullification or impairment by Arbitrators from the *objective benchmark* foreseen by Article 22 of the DSU, is a separate process that is independent from the finding of infringements of WTO rules by a panel or the Appellate Body."[266] Further, the Arbitrators rejected to include the lost exports of the United States in goods or services between the United States and third countries in calculating nullification or impairment, in order to avoid "double-counting" of nullification or impairment in terms of trade effects.[267] Moreover, the Arbitrators in *US – Offset Act (Byrd Amendment) (EC) (Article 22.6 – US)* recalls that past arbitrators under Article 22.6, including the Arbitrators in *Bananas – III (US) (Article 22.6 – EC)*, "have deemed [a] benefit [nullified or impaired] to correspond to the trade directly affected by the maintenance of the illegal measure."[268]

5.234 Thus, in the Article 22.6 arbitration proceedings, whether the proposed level of suspension is equivalent to the "level of nullification or impairment of a benefit" is usually monetarily quantified in terms of trade effects based on the objective elements presented by the parties.

---

[265] *US – Superfund*, para. 5.1.9
[266] *EC – Bananas III (US) (Article 22.6 – EC)*, para. 6.10 (emphasis added).
[267] Ibid., paras. 6.15-6.19.
[268] *US – Offset Act (Byrd Amendment) (EC) (Article 22.6 – US)*, para. 3.55.

Whether this Panel should find in the course of its proceeding that the "level of nullification or impairment of a benefit" for the purpose of Article 22 is zero or not

5.235 Despite the European Communities' requests, Japan is of the view that this Panel should refrain from finding that the European Communities' measure does not cause any nullification or impairment of a benefit accruing to the United States for which the [EC] can face suspension of concessions in this proceeding.

5.236 According to the DSU, the "*level* of nullification or impairment of a benefit" is generally examined under a 22.6 arbitration procedure. Also, the Arbitrators in previous cases have characterized the Article 22.6 arbitration proceeding as a "separate process that is independent from the finding of infringements of WTO rules by a panel or the Appellate Body."[269] In addition, with respect to the procedural aspect in the present proceeding, particularly at this point where the Second Written Submissions have been submitted by both parties, the parties are not considered to have been provided ample opportunities to present arguments as to whether "nullification or impairment of a benefit", based on which the European Communities can face the suspension of concessions, is "zero".

2. Oral statement of Japan

5.237 This compliance dispute has raised a number of perhaps procedural, but important and systemic issues that matter to Japan. Since Japan has already put forward its arguments in detail in its third party submission, it will limit its statement to the brief observation on three points.

(a) Does the EC-US Understanding bar the United States from challenging the Cotonu Preference?

5.238 First, the European Communities argues that the United States is precluded from challenging the current European Communities' banana regime because it accepted in the Understanding that the Cotonou Preference would continue until the end of 2007 as a part of a mutual agreed solution[270].

5.239 Japan agrees with the observation of the panel in *India – Autos* that "[i]t is certainly reasonable to assume … that [mutually] agreed solutions are intended to reflect a settlement of the dispute in questions, which both parties expect will bring a final conclusion to the relevant proceedings"[271]. Japan notes, in this respect, that Article 3.7 of the DSU declares that "[t]he aim of the dispute settlement mechanism is to secure a positive solution to a dispute." The ordinary meaning of the word "positive" includes, among others, "with no possibility of doubt; definite", "certain" and "not speculative or theoretical". Article 3.7 further states that a mutually agreed solution that is consistent with the covered agreements is clearly a "preferred" mean to achieve this goal. Given the DSU's emphasis on the security and predictability in the multilateral trading system and the prompt settlement of disputes as reflected in Articles 3.2 and 3.3, Japan considers that any mutually agreed solution that would lead to a positive or final resolution of disputes should have an effect of ending these particular disputes. In this respect, Japan would agree with the observation by the Appellate Body that "[a]t some point, disputes must be viewed as definitively *settled* by the WTO dispute settlement system."[272]

5.240 However, as observed by the panel in *India – Autos*, the contents of mutually agreed solutions may differ significantly from case to case, "which may also make it difficult to draw general

[269] *EC – Bananas III (US) (Article 22.6 – EC)*, para. 6.10.
[270] European Communities' second written submission, paras. 9, 36-37.
[271] Panel Report, *India – Autos*, para. 7.113.
[272] Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 98 (emphasis original).

conclusions as to the relevance of such solution to subsequent proceedings other than on a case by case basis."[273] The European Communities recognizes in its Second Written Submission that a mutually agreed solution tends to be "a document that sets the term of the solution mutually agreed between the parties" and often "will describe the actions that the parties have undertaken to perform … in the future."[274] Obviously, the final settlement of a dispute would require proper implementation of the agreed future actions, but there is a possibility of disagreement between the parties as to the WTO consistency of actions allegedly taken under the mutually agreed solution. Therefore, in Japan's view, at least where "there is disagreement as to the existence or consistency with a covered agreement of measure taken to comply" such dispute can be resolved through recourse to the DSU.

5.241 Japan finds support in Article 3.6 of the DSU which provides for a possible multilateral review of the notified mutually agreed solution for its proposition that such solution may not always resolve the disputes definitely. Japan also considers that Article 3.5 of the DSU which prescribes that "all solutions … shall be consistent with [the] covered agreement" indicates that any solution to the matter, including a mutually agreed solution, cannot modify the rights and obligations under the covered agreement.

(b) Is the current EC banana regime the "measure taken to comply"?

5.242 Second, the European Communities argues that the measure taken to comply in this case was "the tariff-quota based import regime with the characteristics agreed in Annex II of the Understanding"[275] and the current regime cannot be the "measure taken to comply" because nothing in the Understanding or the DSB recommendations adopted in 1997 obliged the European Communities to introduce a tariff only regime.[276] The European Communities appears to have the view that the "measure taken to comply" is limited to the one that it is obliged to take under the Understanding or specifically mandated by the DSB.

5.243 However, it is well established by the Appellate Body that the compliance panel's mandate is not confined to the review of self-declared "measure taken to comply" but may also include the measures "with a particular close relationship to the declared 'measure taken to comply', and to the recommendations and rulings of the DSB".[277] To determine "whether there are [such] sufficiently close link", the panel is required to examine "the timing, nature, and effects of the various measures".

5.244 Japan understands that there is no disagreement between the parties as to whether "the tariff-quota based import regime with the characteristic agreed in Annex II of the Understanding" is the measure taken to comply in this dispute. The question before the panel is, therefore, whether the current EC regime has "a particular close relationship" to this declared "measure taken to comply" which it has replaced and the DSB recommendations and rulings adopted in 1997 so as to be susceptible to the review by this compliance panel.

5.245 In this respect, Japan notes that the Appellate Body in *US – Softwood Lumber IV (Article 21.5 – Canada)* examined a number of elements to determine whether there were such "close link" between the declared measure taken to comply and the other measure at issue in that case. Such elements include: common features or components shared by the various measures at issue and how such common components relate to the DSB recommendations; subject matter of measures at issue,

---

[273] Panel Report, *India – Autos*, para. 7.115.

[274] European Communities' second written submission, para. 23.

[275] European Communities' first written submission, para.49; European Communities' second written submission, para. 41.

[276] European Communities' second written submission, paras.43 and 45; European Communities' opening statement at the Panel's substantive meeting with the parties and third parties, para. 6.

[277] Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 77.

such as their product coverage, administrative agencies involved, affected interested parties, legal relations among the measures; timing of the measures and whether the DSB recommendations were considered in adopting the measures; and whether the measure at issue has direct effect on the declared measure taken to comply.[278] Japan considers that these aspects are also relevant in the present case.

5.246 As referenced to by the European Communities in its second written submission[279], the Appellate Body also explained that the determination of the scope of the "measure taken to comply" requires the examination of "the recommendations and rulings of the DSB in the original proceedings", "what they (i.e. the recommendations and rulings) required of" the defending party, and the specific steps taken by [that party].[280] Japan considers that it may be useful to examine what are actually required in the original DSB recommendations and how and whether such requirements relate to, or were addressed by, the current banana regime in order to establish the existence or non-existence of "express link" between them.

5.247 In this regard, Japan recalls that while the European Communities noted in its second written submission that the current regime entered into force 6 years after the relevant DSB rulings[281], in its oral statement the European Communities also stated that "the decision for introduction of the tariff-only import regime was a policy decision *taken years before* the negotiation of the Understanding"[282]. Japan wonders whether there is any correspondence in timing between this policy decision and the adoption of the various DSB recommendations and rulings in this dispute.[283]

(c) Does any nullification or impairment of benefits exist for the United States in this dispute?

5.248 Third, the European Communities argues that there is no nullification or impairment of benefits accruing to the United States.[284] The European Communities appears to base this argument at least partly on the findings of the arbitrator under Article 22.6 of the DSU in this dispute.[285]

5.249 Japan considers that the existence of nullification or impairment can be reviewed by the panel subject to the proper allocation of the burden of proof. However, Japan agrees with the United States' view that "the European Communities confuses the function of dispute settlement proceedings under DSU Articles 6 and 21.5 with arbitration proceedings under DSU Article 22."[286] As approvingly quoted by the Appellate Body in *EC - Bananas III*, the GATT panel in *US – Superfund* concluded that "[a] change in the competitive relationship … must consequently be regarded ipso facto as a nullification or impairment of benefits" and that a demonstration of "no or insignificant effects" of violating measure does not prove sufficiently the existence of nullification or impairment.[287]

---

[278] Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, paras. 80-86.

[279] European Communities' second written submission, para. 45.

[280] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, para. 142.

[281] European Communities' second written submission, para. 43.

[282] European Communities' opening statement at the Panel's substantive meeting with the parties and third parties, para. 6 (emphasis added).

[283] Council Regulation(EC) No 216/2001, which is referred to in paragraph B of the Understanding, states in preamble (1) that "… to take account of the conclusions of the specific group set up under the dispute settlement system of the World Trade Organization (WTO)."

[284] European Communities' first written submission, paras. 70-83; European Communities' second written submission, para. 96.

[285] WT/DS27/ARB.

[286] United States' second written submission, para. 59.

[287] GATT Panel Report, *US – Superfund*, para 5.1.9, quoted in Appellate Body Report in *EC – Bananas III*, paras. 252-253.

5.250 In contrast, the role of arbitrator under Article 22.6 is not to determine the existence of nullification or impairment, but is to estimate, or quantify, the level of suspension considered to be equivalent to the level of nullification or impairment, as repeatedly stated by the previous arbitrators.[288] In order to determine the level of nullification or impairment, the Arbitrator in *US – 1916 Act (EC) (Article 22.6 – US)* explained that "we need to rely, as much as possible, on credible, factual, and verifiable information" and "cannot base any such estimate on speculation".[289] It further cautioned against the calculation approach "that are 'too remote', 'too speculative', or 'not meaningfully quantified'".[290] Based on this "prudent approach"[291], the arbitrator declined to include a "chilling effect" of the measure at issue because it cannot "be meaningfully quantified for the purposes of determining the level of nullification or impairment".[292] Furthermore, the arbitrator agreed that the settlement awards entered between private parties under the 1916 Act can be included in the level of nullification or impairment, but only to the extent that disclosure of such settlement awards can be obtained; however such disclosure would be often difficult to obtain due to confidentiality requirements.[293] Thus because the level of nullification or impairment established by the arbitrator is only limited to the quantum that can be calculated using "credible, factual, or verifiable information" available, the Article 22.6 arbitrator's finding that the nullification or impairment at certain point in time is "zero" may mean that there is no "credible, factual, or verifiable information" available to quantify the level of nullification or impairment, regardless of its existence.

5.251 Finally, the Appellate Body in the original proceeding in this dispute found that two points are "relevant to the question whether the European Communities has rebutted the presumption of nullification or impairment". There two points are: (i) "the United States is a producer of banana and that a potential export interest by the United States cannot be excluded; and (ii) 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".[294] In this regard, Japan recalls that the Appellate Body concluded in several disputes that "an adopted Appellate Body report must be treated as a final resolution to a dispute between the parties to that dispute".[295] Japan considers that if these factual points are still relevant today, they are equally applicable to the present dispute.

N. MEXICO

1. Oral statement of Mexico

(a) Importance of the preliminary claims

5.252 Mexico was among the complaining parties in the original *Bananas III* case, and although it has not so far requested authorization to suspend benefits or initiated proceedings before a "compliance panel" pursuant to Article 21.5 of the DSU, Mexico does not rule out the possibility of exercising its rights under the DSU. Mexico has nonetheless been active, along with other Members, in seeking a negotiated settlement with the European Communities (EC) in this long standing dispute, and will continue working to that end.

5.253 Since Mexico does not rule out any possible means of resolving this dispute, the comments, recommendations and conclusions of this Panel on the preliminary claims brought by the European

[288] See, e.g. *US – 1916 Act (EC) (Article 22.6 – US)*, paras. 4.5-4.9.
[289] Ibid, para. 5.54.
[290] Ibid, para. 5.57.
[291] Ibid, para. 5.57.
[292] Ibid, para. 5.69.
[293] Ibid., paras. 6.7-6.13.
[294] Appellate Body Report, *EC – Bananas III*, para. 251.
[295] Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 91. See also Appellate Body Report, *US – Shrimp (Article 21.5 – Malaysia)*, para. 97.

Communities, which will undoubtedly be of equal if not of greater importance to Mexico than any findings of the Panel regarding the substantive claims in this dispute, will be especially relevant, as they will give Mexico a much clearer idea of the options and strategies that it needs to adopt in order to compel the European Communities to fulfil its obligations.

5.254 For instance, any findings by this Panel pertaining to issues on which the parties in dispute have taken contradictory positions, such as those below, will be critical to the exercise of Mexico's rights:

- The absence, or existence and identification, of "measures taken to comply with the recommendations and rulings", adopted by the European Communities in order to comply with the *Bananas III* Panel report, in accordance with the DSU;

- the moment as of which the European Communities' measures may "validly" be contested in the light of the Ministerial Decision of 14 November 2001, and so forth.

(b) Issues of systemic interest

5.255 Although Mexico has a systemic interest in a number of issues discussed in this dispute, it considers it appropriate to give a brief opinion on one of the above points, which relates to the need to demonstrate whether or not there is impairment and nullification for the purposes of bringing an Article 21.5 claim, as interpreted from the European Communities' arguments.

5.256 Mexico considers that the precedents established by the *Bananas III* Panel should be sufficient to set aside the European Communities' arguments (see para. 252 of the *Bananas III* Panel report, for example). It must nonetheless express concern with the European Communities' arguments, as they impose "legal standing" requirements where there are none.

5.257 There is no provision in the DSU requiring that there be nullification and impairment as a pre requisite for initiating proceedings. Article 3.8 to which the European Communities so frequently refers speaks of matters that have nothing to do with a Member being able to initiate proceedings under the DSU, and even less with a panel being precluded from ruling on the measures at issue on the presumption that there is no nullification and impairment. The provisions of Article 3.8 cannot be interpreted as a "legal standing" requirement, and Mexico fails to see how the burden of proof requirements or the presumption of nullification or impairment referred to in that Article can mean what the European Communities now contends.

5.258 Mexico has a problem with its reading of the European Communities argument, for it tends to simplify recourse to the dispute settlement mechanism to securing the right to suspend concessions or other obligations, which would appear to imply that if such is not the purpose of the party initiating a dispute under the DSU, the party's claim should be rejected. The European Communities seems to forget that the principal aim of the dispute settlement mechanism is to "secure a positive solution to a dispute" and that 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" (Article 3.7 of the DSU).

5.259 Notwithstanding the above, even if the Panel were to confirm that there was no nullification and impairment and it was therefore impossible to quantify the financial impact of a suspension of benefits, this does not mean that the European Communities is released from the obligation to bring its measures into conformity with a panel's recommendations or that a panel is precluded from suggesting a way in which "the Member concerned could implement the recommendations" (Article 19.1 of the DSU). It should be recalled that "neither compensation nor the suspension of

concessions or other obligations is preferred to full implementation of a recommendation to bring a measure into conformity with the covered agreements" (Article 22.1 of the DSU).

5.260 In connection with this dispute, the European Communities contends that since the United States suffers no "nullification and impairment", "it is probably the only case ever heard in this room where the contested measure does not affect at all the complaining party" (EC – Oral Statement, para. 26). However, it seems to us that this is not the first time that something of this sort has happened and will probably not be the last; therefore the possibility should not be ruled out. In this connection, Mexico would point out that in this dispute the European Communities brought an Article 21.5 claim in the past (undoubtedly without any consultations being held either) without, as far as Mexico can judge, itself suffering any "nullification and impairment" quantifiable to any degree higher than zero, and that this did not prevent a panel from being convened (WT/DS27/RW/EEC). To uphold the European Communities' argument would close the door to any respondent Member initiated Article 21.5 proceedings.

5.261 One last point worthy of mention is the provision in Article 22.5 of the DSU that the "[t]he DSB shall not authorize suspension of concessions or other obligations if a covered agreement prohibits such suspension". The negotiators appear to have left the door open for disputes to be initiated under the DSU irrespective of a possible prohibition of suspension of concessions or other obligations.

5.262 Contrary to the foregoing, if the European Communities' line of reasoning is followed and applied to the above paragraph, the proper reading would be that Members would be precluded from bringing before panels claims relating to Agreements prohibiting the suspension of concessions or other obligations, given that since concessions or obligations cannot be suspended, the notions of nullification and impairment would be meaningless if they could not lead to suspension of concessions or other obligations. In other words, there would be no point in quantifying the level of nullification and impairment as there would be no suspension of concessions or other obligations. Mexico believes that if the negotiators of the DSU had been thinking along those lines they would have made it clear in Article 22.5 and would not have left the door open to disputes in which concessions and other obligations could not be suspended, irrespective of nullification or impairment.

(c) Comments on the substantive claims

5.263 As regards the analysis of the measures at issue that is incumbent upon this Panel, Mexico considers that most of the analysis was already conducted by the *Bananas III* Panel, the work done by the Arbitrators in *Bananas III (US) (Article 22.6 – EC)*, and the two arbitral awards deriving from the Annex to the Ministerial Declaration of 14 November 2001. Accordingly, it should not be difficult for this Panel to reach the relevant conclusions.

5.264 As regards the substantive claims (i.e. violations of Articles I and XIII:1 and XIII:2 of the GATT 1994), Mexico concurs with those third parties which, together with the United States, have taken positions consistent with the above precedents and which contend that the European Communities' regime for the importation of bananas violates Article I of the GATT 1994 in establishing duty-free treatment for ACP imports in quantities up to 775,000 tonnes, which the European Communities does not grant the other WTO Members, and is in breach of GATT Article XIII in reserving the 775,000 tonnes free of duty for bananas originating in ACP countries while excluding the other WTO Members from this preferential tariff quota.

5.265 As a third party to these proceedings and a party to the original *Bananas III* proceedings, Mexico considers that this dispute has not been settled, and that it will in any event be very interesting to know whether the European Communities has actually taken any action to comply with its obligations, or whether the European Communities has failed to take the opportunity of bringing its

measures into conformity by adopting compliance measures, in which case there would be no need to establish an Article 21.5 panel and authorization to suspend benefits could be requested without delay.

(d) Conclusion

5.266 Mexico respectfully request that this Panel set aside the European Communities' preliminary objections and, specifically, those arguments which impose legal standing requirements for initiating dispute settlement proceedings, and that the Panel find that the measures at issue are inconsistent with Article I of the GATT 1994 and in particular, given the expiry of the extension granted to the European Communities by the Ministerial Conference in paragraph 1 of the Decision of 14 November 2001, that the measures complained of are inconsistent with the text of Article XIII of the GATT 1994.

O. NICARAGUA AND PANAMA

1. Combined written submission of Nicaragua and Panama

(a) Introduction

5.267 Panama and Nicaragua have been denied the security of lasting, compliant access to the EC banana market for a great many years. By reverting once again to non-compliance, the European Communities has continued to deny that access, and has made the intolerable burden of this dispute that much larger for the developing-country banana suppliers of Latin America and the WTO system itself. In the proceeding now before the Panel, the violations of GATT Articles I and XIII at issue are unmistakably similar to those already reviewed in the past. While the European Communities has tried to cloud those straight-forward violations with a host of "preliminary objections" and other extraneous claims, its non-compliant measures are too obvious to obscure. Like the United States, Panama and Nicaragua consider that the measures introduced by the European Communities on 1 January 2006 are fully reviewable under Article 21.5, and constitute prima facie violations of GATT Article I:1, and Articles XIII:1 and 2.

(b) The European Communities' preliminary objections have no basis in law or fact

5.268 With its first objection – that the United States is barred from contesting any ACP treatment from "the period between the end of 2005 and the end of 2007" – the European Communities has stitched together five individually indefensible allegations: (i) that the United States "unconditionally" accepted whatever "more favourable treatment" the European Communities wanted to accord ACP suppliers from 2006 through 2007; (ii) that the "unconditional acceptance" established by the Understanding formed part of a "mutually agreed solution" in the sense of DSU Article 3.6; (iii) that a mutually agreed solution under DSU Article 3.6 precludes the United States from seeking recourse to Article 21.5; (iv) that, even if the Understanding was not a "mutually agreed solution," it was an international agreement that must be taken into account in determining the United States' rights under the DSU; and (v) that the "principle of good faith" in any case precludes the US complaint.

5.269 The European Communities' first allegation relies on a flawed factual premise to try to read into the Understanding a renunciation of future DSU rights not otherwise specified in its text. At the time the Understanding was reached in April 2001, *no* interested MFN Member, the United States included, was willing to accept waiver authority for whatever "more favourable" ACP banana treatment the European Communities wished to accord. The only real "characteristic" understood by all interested Members in April 2001 was that absent acceptable, narrowly-drawn banana conditions, which would still have to be negotiated, the European Communities' waiver would not be approved.

5.270 Contrary to the European Communities' second allegation, the Understanding was not a "mutually agreed solution," but rather only a "means" to such a solution. The text of the Understanding, US statements at the DSB, EC statements in dispute settlement, and the letter exchange between Ambassador Zoellick and then-Commissioner Lamy confirm this interpretation. Clearly, a well-documented unilateral view of one signatory (the United States), at odds with the unilateral view of another signatory (the EC) precludes a mutuality of agreement over whether the Understanding was a solution. If there is no mutuality of agreement, there is no *mutually agreed* solution. Even if an Article 3.6 agreement had been reached, it would still not constitute a "solution" to the dispute in the sense of DSU Articles 3.5 and 3.7 unless the agreement was "consistent with the covered agreements." The European Communities' banana measures are not WTO-consistent and therefore are not a "mutually agreed solution" to the *Bananas* dispute.

5.271 The European Communities' third allegation fails because the Understanding is neither a renunciation of rights nor a mutually agreed solution. Even if the Understanding were a mutually agreed solution, the DSU has no rule disallowing parties to a "mutually agreed solution" from seeking recourse to Article 21.5. As for the European Communities' fourth allegation – the alleged jurisdictional "bar" – not a single rule in the DSU nor provision in the Understanding substantiates such a bar. There can hardly be a "legal effect" as between the Understanding and the DSU if there is not even a specific DSU rule, much less a specific bilateral provision that invokes that rule, to which that legal effect can be ascribed. The European Communities' fifth and last assertion – that "the principle of good faith, which runs through the entire DSU," requires the United States "to refrain" from disavowing "the existence of the Cotonou Preferences until the end of 2007" – is one that works against the European Communities' "preliminary objection," not the US complaint.

5.272 In its second "preliminary objection," the European Communities erroneously claims that the "tariff only" provision of the Understanding was not a "measure taken to comply" in the sense of Article 21.5 The European Communities concedes in its submissions in the Ecuador proceeding that Regulation 1964 was intended to implement the "second" compliance suggestion of the *Bananas III* Article 21.5 panel and, thus, falls within the jurisdiction of Article 21.5. Moreover, paragraph B of the Understanding unambiguously frames "Tariff Only" as a mandate. The tariff only provisions of the "secondary legislation" cited in paragraph B (Regulation 404, as amended by Regulation 216) simply confirm that tariff only was intended for the purpose of bringing the European Communities into compliance with *Bananas III*. Never once between 1999 through the end of 2005 did the European Communities suggest that tariff only was not a requirement of the Understanding.

5.273 Prior cases have established that measures having a "particularly close" or "inextricably linked" relationship to the DSB ruling at issue are deemed to be "measures taken to comply." The factual and legal circumstances leading up to Regulation 1964 establish an explicit, unbroken European Communities effort since 1999 to comply with *Bananas III* by way of a "flat-tariff" regime to be installed no later than January 2006.

(c) The European Communities' ACP tariff preference is inconsistent with GATT Article I:1 and is not covered by its Article I waiver

5.274 The European Communities does not contest the underlying violation of GATT Article I:1, but argues instead that the GATT Article I waiver excuses its current tariff discrimination. The European Communities mistakenly alleges continued coverage under the waiver, on the grounds that its regime: is "*different* ... than the one analysed by the Arbitrator;" is still entitled to be assessed under the original Annex requirement that an "envisaged rebinding ... would result in at least maintaining total market access for MFN banana suppliers, taking into account ... all EC WTO market access commitments;" and fulfils the European Communities' own volume-based assessment of that Annex standard.

5.275 Prior WTO findings have made clear that when a Member invokes an exception to a WTO obligation, it is asserting an affirmative defence and bears the burden of proving that exception. As the Member invoking the affirmative waiver defence, the EC, not the United States, bears the burden of demonstrating that its WTO-inconsistent tariff arrangement meets every condition of that waiver defence. The European Communities has not met its burden.

5.276 The European Communities acknowledged that if the Arbitrator issued a second negative determination, the waiver would automatically lapse upon implementation of its new regime. It now walks away from that view, arguing that the Annex allows it to install any regime of its choosing, so long as the regime differs from the ones invalidated in Arbitration. The submissions of the United States, Panama and Nicaragua have shown in careful detail that this new EC reading would require the Panel to ignore the ordinary meaning and narrow conditionality of tiret five, the waiver's mandate that any rebinding be subject to the arbitration "controls" under the Annex, and the waiver's negotiating history. Moreover, the European Communities has sought to introduce undue confusion by asserting that its regime fulfils the waiver standard. As confirmed by an analysis by the Centre for International Economics, the European Communities' assertion is incorrect.

(d) The European Communities' ACP tariff quota is inconsistent with GATT Article XIII:1 and XIII:2

5.277 The European Communities seeks to defend its ACP-exclusive tariff-rate quota by proposing a "Vienna Convention" analysis of Article XIII under which its exclusive ACP tariff quota would be allowed to escape the strict obligations of Article XIII and be addressed only by GATT Article I. This defence has already been rejected in prior *Bananas III* proceedings, has no textual support, and has untenable implications for Article XIII if it were ever adopted.

5.278 The text of Article XIII:1 requires that when a Member chooses to restrict, or limit, imports of a product from one Member, it *shall*, in a similar or like manner, restrict or limit imports from *all* other Members who import the same product. The equally clear text of paragraph 5 of Article XIII extends the requirements of Article XIII:1 (and XIII:2) to tariff quotas. As the European Communities is quantitatively "restricting" imports of ACP bananas under a tariff quota within the meaning of Article XIII:1 and XIII:5, and is failing to "similarly restrict" MFN-origin bananas, a violation of Article XIII:1 has been established.

5.279 Further, pursuant to the chapeau of Article XIII:2, any application of a tariff quota must approximate "shares" that "might be expected ... in the absence of restrictions." Here, the European Communities has allotted a tariff quota to ACP non-substantial suppliers, but has failed to distribute *any* share to MFN suppliers. Insofar as Panama, Nicaragua, and all other MFN suppliers are excluded from the European Communities' tariff quota, the European Communities' exclusive tariff quota cannot be said to reflect shares that would otherwise be present in an unrestricted market, in breach of Article XIII:2.

5.280 The parties' subsequent practice implies agreement on the fact that any tariff quota is subject to the non-discrimination obligations of Article XIII. The European Communities' argument that "extensive GATT and WTO practice" supports the opposite view is premised on its mischaracterization of the Enabling Clause and a thirty-year-old waiver obtained by certain South Pacific islands.

(e) The United States is not required to demonstrate nullification or impairment

5.281 The European Communities closes with the contention that even if its tariff and tariff-quota measures are out of compliance with *Bananas III*, the Panel should find that those measures have not caused nullification or impairment of US benefits. The Appellate Body in *Bananas III* already

rejected an earlier identical suggestion made by the EC. The United States is a producer of bananas, with annual volumes of nearly 32,000 metric tons, more than in some of the ACP countries. The European Communities effectively acknowledged a US export interest by proposing a withdrawal of concessions on US bananas in the *Foreign Sales Corporation* dispute. Moreover, because imports displaced by the European Communities' discrimination could be diverted into the US market, the United States has a legitimate trading interest in ensuring that the European Communities' discrimination does not disrupt its internal market, global supplies, or market pricing.

5.282 Through this argument, the European Communities appears to be improperly trying to convert this compliance proceeding into a DSU Article 22 arbitration, in which the *level* of nullification or impairment would be examined. Article 3.7 specifies, in hierarchical order, three potential means by which a dispute can be resolved: a mutually agreed solution consistent with the covered agreements; a withdrawal of the WTO-inconsistent measures; or, as a "last resort", a suspension of concessions. When, and if, a dispute reaches the "last resort" phase where the precise level of nullification and impairment must be determined, that level is to be determined by a specialized proceeding developed for that very purpose, *i.e.*, arbitration under DSU Article 22.

(f) Conclusion

5.283 Panama and Nicaragua respectfully urge the Panel to find, on the promptest and clearest possible basis, that the European Communities' tariff preference for ACP suppliers is inconsistent with GATT Article I:1, and that its 775,000 mt ACP reserve is separately inconsistent with GATT Article XIII:1 and 2.

2. Combined oral statement by Nicaragua and Panama

(a) Nicaragua's role in this dispute

5.284 The European Communities argues that through participation in world trade, the developing countries can achieve "their emancipation from the dependence on development financing and international donations". The development aims of the WTO system are not being served, however, by an EC policy that inflicts huge costs on one set of developing countries (Latin American suppliers) for the benefit of subsidized EC producers and a select group of other developing countries (ACP suppliers).

5.285 For the past 15 years, Nicaragua has helped lead the fight for fair banana access into the European Communities for the most basic economic reason: to promote growth and relieve poverty among its people. Bananas are one of its major agricultural crops, employing thousands of Nicaraguans within the country and another 30,000 on banana farms throughout the region. Its GNI is less than $1,000 per capita. Nearly all of the European Communities' preferred ACP suppliers have GNIs well above this.

5.286 Even after repeated losses in *Bananas I*, *Bananas II*¸ multiple *Bananas III* proceedings, and two Arbitrations, the European Communities still elected in 2006 to erect an illegal 135 per cent increase in its bound €75 tariff, combined with an exclusive duty-free ACP tariff quota – an insurmountable burden for Nicaragua's industry. Nicaragua has not accepted defeat because it believes in the principle that Members must foster development in all countries, not just some. As EC Commissioner Mandelson himself observed, the European Communities' preferences "discriminate against some developing countries ... often equally needy ... [which] is not right morally nor compatible with international trade rules."

(b) Panama's role in this dispute

5.287 Panama has participated in the dispute since its WTO accession in 1997. Like Nicaragua, Panama depends on banana exports for economic and social stability, and is one of two "principal supplying" banana interests to the EC.

5.288 Although the European Communities has argued that the purpose of its current arrangement is to "balance" the developing-country interests involved, the European Communities' large banana subsidies have governed the design of the European Communities' common banana regime since its origin in 1993. To stabilize internal prices, ensure EC grower profits, and promote subsidy predictability, the European Communities has imposed strict restrictions on Latin American access, regardless of MFN trading rights. Panama and the other developing countries of Latin America are now contributing nearly $1 billion into EC customs under a €176 tariff, primarily to help sustain this subsidized EC production.

5.289 Like the alleged purpose of its regime, the purpose of the Doha waiver is nothing as the European Communities describes it. Given the European Communities' non-compliance in the banana dispute, Panama and other Latin American countries opposed the European Communities' waiver request for nearly two years until the European Communities inscribed a clear commitment into the Annex that vested control over its 2006 regime in a WTO Arbitrator. For the European Communities to argue that Panama lifted its waiver reserve in exchange for EC unilateralism would write Panama's entire two-year reserve and negotiating efforts out of existence.

(c) The WTO inconsistencies

5.290 At the heart of this case rest two basic violations: the application of a €176 duty on MFN bananas and a zero duty on ACP bananas, in violation of GATT Article I; and the application of a 775,000 metric ton tariff quota exclusively to ACP suppliers in violation of GATT Article XIII.

(i) The European Communities' failed objections

5.291 The European Communities' "mutually agreed solution" objection begins by presuming a US commitment under the Understanding to forego all rights as to any "Cotonou Preference". Had the United States committed to accept any tariff preference as of 2006, it would have agreed in the Understanding to much more than simply a "lift[ed] ... reserve," which did nothing but signal its willingness to negotiate, alongside MFN suppliers, the necessary Article I banana conditions.

5.292 The European Communities claims next that the Understanding is a "mutually agreed solution" under DSU Article 3.6. A "mutually agreed solution", by its very words, requires two things: a solution and a mutual agreement that there is a solution. Here there was neither. The Understanding, on its face, was not an immediate solution; it was only a "means" to what the parties hoped would be an ultimate solution. By failing to implement the last required step, a compliant tariff-only regime, the European Communities chose to prevent the Understanding from maturing into a positive solution. Equally absent here was any mutuality of agreement that a DSU Article 3.6 solution had been reached. When the European Communities unilaterally notified the Understanding as a mutually agreed solution, the United States expressly rejected that EC attempt.

5.293 The European Communities' next objection – that Regulation 1964 is not a "measure taken to comply" with *Bananas III*, removing it from Article 21.5 coverage – strains logic to its breaking point. It makes no sense for the European Communities to have conceded in Ecuador's proceeding that Regulation 1964 *is* a "measure taken to comply," while arguing here that the very same regulation *is not* a "measure taken to comply." If the European Communities was correct that its compliance obligations ended only eight months into the Understanding, not only its 2006 tariff requirement, but

also its 2002-2005 tariff, volume, and licensing requirements would become a nullity. There is nothing in the text of the Understanding, nor in the DSU itself, that would eradicate the European Communities' tariff-only obligation simply because the United States, to help induce compliance, agreed to terminate the imposition of retaliation in early 2002, while retaining the underlying authority for those measures.

5.294 As an alternative to claiming Article 21.5 inadmissibility, the European Communities argues that the case should fail because the United States will allegedly be found to have "zero" nullification or impairment under Article 22. The European Communities tried this "no nullification or impairment" argument, and a related "no standing" argument, once before in *Bananas III*, and was already told it was wrong on both counts. Indeed, the European Communities itself, a net importer of bananas, requested an Article 21.5 panel on bananas in 1999.

(ii) The European Communities' breach of GATT Article I

5.295 The European Communities makes no attempt to deny that its discriminatory tariff is intrinsically inconsistent with Article I. What it tries to argue, instead, is that even with the waiver's strict arbitration controls, and the two negative Arbitration rulings, the European Communities was allowed to install virtually any regime it wanted to as of 2006. If this is what the Annex meant, no Latin American supplier would have bothered establishing a prospective, expedited review procedure with an automatically lapsed waiver if the Arbitrator determined that the European Communities "has failed to rectify the matter."

5.296 In any case, the applicable waiver standard was "whether the *envisaged* rebinding *would* result in ... at least maintaining total market access for MFN suppliers, taking into account ... all EC WTO market access commitments relating to bananas." As confirmed by the Arbitrator, the opening words, "envisaged" and "would," required a *prospective* analysis. A prospective analysis is not possible today, nearly two years after the regime took effect. Furthermore, even if that standard were still operative, it would require several elements: (i) a "rebinding;" (ii) a fulfilment of the European Communities' Article XXVIII commitments attaching to that rebinding; (iii) a fulfilment of the European Communities' Article XXIV commitments that still attach to several of its prior enlargements; and (iv) a demonstration that total MFN conditions of competition fulfil the Arbitrator's price-gap results, adjusted to take into account the 135% increase in ACP and EBA preferences as of 2006. None of these elements is satisfied by the European Communities' current measures. The European Communities has lost its waiver for bananas, making its tariff discrimination illegal under Article I.

(iii) The European Communities' breach of GATT Article XIII

5.297 Contrary to the European Communities' assertions, there is nothing permissive in the non-discrimination provisions of GATT Article XIII. The words employed in paragraphs 1, 2, and 5 – "no," "shall," "all," "similarly," and "any" – are absolute in character, requiring the similar-treatment rule of paragraph 1 and the equitable-share rules of paragraph 2 to apply to all tariff quotas, not just some. A tariff quota reserved exclusively for non-substantial ACP suppliers, under which no bananas from Panama and Nicaragua are allowed entry, does not fulfil these terms.

5.298 The European Communities argues that because the challenging Member's trade is not covered by the ACP tariff quota, this measure should be considered a separate regime, and that because the tariff quota "caps" ACP tariff-quota "benefits," it is a measure regulated solely by Article I. These are the European Communities' old *Bananas III* Article XIII defences, which have already been rejected as textually unsupportable and dangerous to the principles of Article XIII. It is no defence to cite various waivers going back to 1948 for the alleged principle that exclusive tariff quotas are only regulated by Article I. *Bananas III* was the first case in which a broad challenge to

tariff quotas was made. Relevant "subsequent practice" can therefore only be gauged from that point forward. The United States has cited three post-*Bananas III* examples of waivers for tariff-quotas that referenced *both* Articles I and XIII. This authentic "subsequent practice" is further supported by the European Communities' own practices following *Bananas III*, including its prior acknowledgements that an exclusive ACP tariff quota under "tariff only" would need to be covered by a waiver not just of Article I, but of Article XIII as well. With the termination of its prior Article XIII waiver as of December 31, 2005, the European Communities' reserved tariff quota for ACP suppliers has become a patent violation of Article XIII.

5.299 To help put an end to the European Communities' decade-long non-compliance, and finally enable the "effective resolution" of this dispute consistent with the objectives of the DSU, Panama and Nicaragua urge that the United States' case be upheld on both claims.

VI. INTERIM REVIEW

6.1 On 6 February 2008, the Panel issued its interim report to the parties. On 14 February 2008, the Panel received written requests for review of precise aspects of the interim report from the United States and the European Communities. The Panel subsequently received additional communications on 15 and 21 February 2008 from the United States and on 20 and 21 February 2008 from the European Communities. The Panel held a meeting with both parties on 25 February 2008 to receive their arguments and comments regarding the requests of review of the interim report. On 26 February 2008, the parties submitted written versions of the statements they had made at the 25 February 2008 meeting with the Panel. The Panel issued its final report to the parties on 29 February 2008.

6.2 The Panel has modified aspects of its report in light of the comments from the parties where it considered that appropriate, as explained below. The Panel has also made some minor editorial adjustments to the text and footnotes, as explained below. References to paragraph numbers and footnotes in this Section refer to those in the interim report, except as otherwise noted.

A. PRODUCT DESCRIPTION

6.3 The United States requested the Panel to delete paragraphs 2.24 and 2.25 of the interim report, which contained a description of the product at issue in the current proceedings (bananas).[296] The United States argued that it has been unable to identify the source of information contained in these paragraphs based on the parties' submissions in this dispute. The United States further noted that the footnotes to these paragraphs do not identify any of the submissions as the source.

6.4 In the light of the United States' request, the Panel has introduced some changes to paragraphs 2.24 and 2.25 of the interim report. The Panel has, however, decided to maintain sections of those paragraphs with the appropriate indication of their source. The Panel has also maintained the section in those paragraphs that refers to the importance that bananas production and trade has for many WTO Members, especially developing and least-developed country Members, which was emphasized by the parties and by a number of third parties.

B. EUROPEAN COMMUNITIES' COUNCIL REGULATION (EC) NO. 1528/2007 OF 20 DECEMBER 2007

6.5 The European Communities requested the Panel to introduce in paragraph 2.36 of the interim report, a reference to the European Communities' Council Regulation (EC) No. 1528/2007 adopted on

[296] United States' letter to the Panel dated 14 February 2008 (request for review of precise aspects of the Interim Report), para. 1.

20 December 2007. In the European Communities' view, without such reference, the Panel's factual description of "the current regime for imports of bananas to the European Communities" for the purposes of the current proceedings is incomplete.[297] The European Communities requested the Panel to further note that, with the adoption of this new Regulation, "the tariff quota for the 775,000 tons of bananas [opened for imports of bananas originating in ACP countries] does not exist any more".[298] According to the European Communities:

> "As a result [of the changes made through Regulation 1528/2007,] Regulation 1964/2005, which is the Regulation setting forth the European Communities' banana import regime, now provides simply that all imports of bananas into the European Communities are subject to a single tariff of €176 per tonne."[299]

6.6 The European Communities added that:

> "[T]he subject matter of these proceedings was precisely the tariff quota [for 775,000 mt of bananas originating in ACP countries]... [T]he terms of reference of the Panel included solely an examination of whether this tariff rate quota was compatible with Articles I and XIII of the GATT. This tariff rate quota does not exist anymore.
>
> The United States' Request for the Establishment of the Panel also listed the 'measures through which the European Communities maintains its current import regime': Regulation 404/93 and Regulation 1964/2005. The relevant provision of Regulation 1964/2005 was deleted and ... Regulation 404/93 was repealed on December 31, 2007. Therefore, the measures that were the subject matter of these proceedings do not exist anymore."[300]

6.7 In the European Communities' view, there are a number of legal grounds supporting the conclusion that the Panel is under an:

> "[O]bligation to take into consideration the undisputable fact that the measure that was the subject of these proceedings does not exist any more and to reflect fully this fact in its Final Report ...
>
> [T]his obligation stems from the Panel's duty to make an objective assessment of the facts, as provided for in Article 11 of the DSU and to secure a positive solution to the dispute, as provided for in Articles 3.4 and 3.7 of the DSU".[301]

6.8 The European Communities also requested the Panel to modify the language of paragraph 2.41 of the interim report accordingly.

6.9 In response, the United States argued that the European Communities was seeking "to introduce new facts to the record that would alter the description of the measure that was the subject of this proceeding".[302] In the United States' view:

---

[297] European Communities' letter to the Panel dated 14 February 2008 (request for review of precise aspects of the Interim Report), para. 1.

[298] Ibid.

[299] Written version of the European Communities' opening statement during the interim review meeting with the parties, para. 2.

[300] Ibid., paras. 3-4.

[301] Ibid., paras. 7-8.

> "Contrary to what the European Communities argues in its comments, the description in paragraph 2.36 of the EC's bananas regime 'for purposes of this dispute' is not incomplete. The measure that was challenged by the United States and is the subject of this proceeding is the EC's bananas import regime implemented through EC Council Regulation No. 1964/2005 as it existed at the time that this Panel was established – that is, with a zero-duty tariff rate quota available only to ACP origin bananas. This is the measure that is within the Panel's terms of reference, and indeed the measure upon which the Panel has based its findings... Council Regulation 1528/2007 did not exist at the time the Panel was established or even at the time that the Panel held its substantive meeting with the Parties on November 6 and 7, 2007. It is therefore incorrect to suggest that such an amendment is relevant for purposes of this dispute."[303]

6.10 The United States added that "the EC's attempt to introduce this material at this stage of the proceeding is contrary to both the DSU and the *Working Procedures for the Panel* ..."[304]

6.11 In accordance with the terms of reference approved by the DSB on 12 July 2007, this Panel is limited to examining the matter referred to the DSB by the United States in document WT/DS27/83, and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the agreements cited by the United States in the same document.[305] The measure challenged by the United States through this recourse to Article 21.5 of the DSU is the European Communities' "current import regime for bananas" implemented through Council Regulation (EC) No. 1964/2005 and Council Regulation (EEC) 404/93 of 13 February 1993, as amended by Regulation (EC) 216/2001 of 29 January 2001.[306] In its request for the establishment of the Panel, the United States also identified, as part of the "measures through which the EC maintains its current import regime for bananas" "any amendments, implementing measures, and other related measures".[307] As noted by the Appellate Body in its report on *Chile – Price Band System*:

> "If the terms of reference in a dispute are broad enough to include amendments to a measure – as they are in this case – and if it is necessary to consider an amendment in order to secure a positive solution to the dispute – as it is here – then it is appropriate to consider the measure *as amended* in coming to a decision in a dispute."[308]

6.12 In the same report, the Appellate Body also noted that:

> "[G]enerally speaking, the demands of due process are such that a complaining party should not have to adjust its pleadings throughout dispute settlement proceedings in order to deal with a disputed measure as a 'moving target'."[309]

6.13 According to the European Communities, Regulation No. 1528/2007 was adopted by the European Communities' Council on 20 December 2007 and entered into force on 31 December 2007, when it was published in the Official Journal of the European Union.[310]

---

[302] Written version of the United States' opening statement during the interim review meeting with the parties, para. 5.

[303] Ibid., paras. 6-7.

[304] Ibid., para. 8.

[305] *EC – Bananas III (Article 21.5 – US)*, Constitution of the Panel (WT/DS27/84/Rev.1), 5 September 2007, para. 2.

[306] *EC – Bananas III (Article 21.5 – US)*, Request for the Establishment of a Panel (WT/DS27/83) 2 July 2007, p. 2.

[307] Ibid., p. 3.

[308] Appellate Body Report on *Chile – Price Band System*, para. 144.

[309] Ibid.

6.14 On 16 January 2008, the European Communities stated in writing that it had no comments on the descriptive (factual and argument) sections of the Panel's draft report that had been circulated to the parties on 11 January 2008. These descriptive sections included paragraphs 2.43 and 2.48, equivalent to paragraphs 2.36 and 2.41 of the interim report. Subsequently, in its interim review request of 14 February 2008, the European Communities informed the Panel of the introduction of amendments to its banana import regime, made through Regulation No. 1528/2007. The European Communities submitted a copy of Regulation No. 1528/2007 to the Panel for the first time during the interim review meeting of the Panel with the parties on 25 February 2008.

6.15 According to the Working Procedures adopted by the Panel in the current proceedings:

> "Parties shall submit all factual evidence to the Panel as early as possible and no later than during the substantive meeting, except with respect to evidence necessary for the answering of questions. Exceptions will be granted by the Panel upon a showing of good cause. In such cases, the other Party shall be accorded a period of time for commenting, as appropriate."[311]

6.16 The Appellate Body has explicitly held that the interim review stage is not the appropriate time to introduce new evidence:

> "The interim review stage is not an appropriate time to introduce new evidence. We recall that Article 15 of the DSU governs the interim review. Article 15 permits parties, during that stage of the proceedings, to submit comments on the draft report issued by the panel, and to make requests 'for the panel to review precise aspects of the interim report'. At that time, the panel process is all but completed; it is only—in the words of Article 15—'precise aspects' of the report that must be verified during the interim review. And this, in our view, cannot properly include an assessment of new and unanswered evidence ..."[312]

6.17 As noted above, in the current case, the European Communities did not introduce evidence of the new Regulation with its written request for reviewing precise aspects of the interim report made on 14 February 2008, but only at the interim review meeting of the Panel held on 25 February 2008.

6.18 For the reasons stated above, the Panel considers that the evidence submitted by the European Communities regarding the adoption of EC Regulation No. 1528/2007 is inadmissible at this late stage in the process. Accordingly, the Panel has not modified the language contained in paragraphs 2.36 and 2.41 of the interim report.

C. AWARD OF THE ARBITRATORS IN THE PROCEEDINGS REQUESTED BY THE EUROPEAN COMMUNITIES UNDER ARTICLE 22.6 OF THE DSU

6.19 The United States requested the Panel to modify paragraph 2.71 of the interim report, in order to include a reference to the findings contained in paragraphs 5.96-5.98 of the Decision by the Arbitrators in the Article 22.6 proceeding in the *EC – Bananas III* dispute, regarding the WTO consistency of the earlier EC bananas import regime.[313]

---

[310] During the interim review meeting, and in response to a question from the Panel, the European Communities stated that the official proposal for Regulation No. 1528/2007 was presented by the European Commission on 13 November 2007.

[311] Working Procedures adopted by the Panel, dated 22 August 2007, see Annex A-2.

[312] Appellate Body Report on *EC – Sardines*, para. 301 (footnotes omitted).

[313] United States' letter to the Panel dated 14 February 2008 (request by the United States for review of precise aspects of the Interim Report), para. 2.

6.20 In response to the United States' request, the European Communities argued that it does "not see the relevance for the current proceedings of the findings of the 1999 Article 22.6 Arbitrators on the WTO consistency of the measures that the European Communities had in place at that time".[314]

6.21 In the European Communities' view:

> "First, the subject matter of that Arbitration was to determine the level of nullification or impairment suffered by the United States at that time. Any statements included in the Arbitration Award on the compatibility of those measures with the WTO rules can only be considered as simple *dicta* that have no legal effects. Second, the measures in place at that time were completely different from the measure that constituted the subject matter of the current proceedings. And, third, incorporating into this Report the Arbitrator's findings on the old measures' WTO compatibility, but refusing to incorporate the Arbitrators' findings on nullification and impairment in the paragraphs of the Report that follow paragraph 8.5 would seriously compromise the consistency of the Panel's reasoning in this Report."[315]

6.22 The Panel has modified paragraph 2.71 of the interim report in order to include a reference to the findings contained in the Decision by the Arbitrators in the Article 22.6 proceeding in the *EC – Bananas III* dispute, regarding the WTO consistency of the earlier EC bananas import regime.

D. DESCRIPTION OF THE MEASURES CHALLENGED BY THE UNITED STATES

6.23 Both parties requested the Panel to modify paragraph 7.3 of the interim report in order to better reflect the description of the challenged measures as contained in the United States' request for the establishment of the Panel.[316] The Panel has modified paragraph 7.3 of the interim report accordingly.

E. TERMS AND MAIN ELEMENTS OF THE BANANAS UNDERSTANDING

6.24 The United States requested the Panel to modify paragraph 7.100 of the interim report in order to clarify the meaning of the last sentence in that paragraph.[317] The Panel has modified paragraph 7.100 of the interim report accordingly.

F. ADOPTION OF THE BANANAS UNDERSTANDING SUBSEQUENT TO RECOMMENDATIONS AND SUGGESTIONS BY THE DSB

1. Related first compliance proceeding brought by Ecuador

6.25 The United States requested the Panel to modify paragraph 7.122 of the interim report, to either delete the reference to the report of the panel in the first compliance panel brought by Ecuador or, alternatively, clarify that the suggestions in that report were "made in the related first compliance proceeding brought by Ecuador".[318] The United States also requested the Panel to modify footnote 419 to paragraph 7.122 of the interim report, in order to delete the reference to the minutes of the meeting at which the DSB adopted the report of the first compliance panel requested by Ecuador. The

[314] Written version of the European Communities' opening statement during the interim review meeting with the parties, para. 15.
[315] Ibid.
[316] Ibid., para. 3, and European Communities' letter to the Panel dated 14 February 2008 (request for review of precise aspects of the Interim Report), para. 2.
[317] United States' letter to the Panel dated 14 February 2008 (request for review of precise aspects of the Interim Report), para. 4.
[318] Ibid., para. 6.

United States also requested the Panel to add a reference in the footnote to the minutes of the meeting at which the DSB authorized the United States to suspend the application of concessions to the European Communities.[319]

6.26 In response, the European Communities argued that it:

> "[D]oes not consider that a reference to the DSB meeting authorizing the United States' retaliation measures should be added to [footnote 419 to paragraph 7.122 of the interim report]."[320]

6.27 The Panel has modified paragraph 7.122 and footnote 419 of the interim report. The language in paragraph 7.122 now clarifies that the suggestions were "made in the related first compliance proceeding brought by Ecuador". A reference was added in the footnote to the minutes of the meeting at which the DSB authorized the United States to suspend the application to the European Communities and its member States of tariff concessions and related obligations under GATT 1994, consistent with the decision of the Arbitrators contained in document WT/DS27/ARB.

2. Further adjustment of language

6.28 For the same reasons explained in the previous section, the United States requested the Panel to modify paragraphs 7.127 and 7.128 of the interim report, to replace the expression "and suggestions" with the expression "and the related suggestions".[321] The Panel has modified paragraphs 7.127 and 7.128 of the interim report accordingly.

G. BANANAS UNDERSTANDING: ARGUMENTS BY THE EUROPEAN COMMUNITIES CONCERNING GOOD FAITH

6.29 The United States requested the Panel to modify paragraph 7.162 of the interim report, in order to avoid any confusion regarding the Panel's reasoning.[322] The Panel has modified paragraph 7.162 of the interim report accordingly.

H. PRELIMINARY OBJECTION OF THE EUROPEAN COMMUNITIES CONCERNING WHETHER THE COMPLAINT BY THE UNITED STATES FALLS WITHIN THE SCOPE OF ARTICLE 21.5 OF THE DSU

1. Arguments made by Japan

6.30 The United States requested the Panel to modify paragraphs 7.285 and 7.313 of the interim report. The United States declared that it agreed with Japan's conclusion that the European Communities' arguments to support its contention that the measures at issue in this proceeding were not "measures taken to comply" were "hardly convincing". However, the United States added that this did not imply an endorsement of the particular argumentation used by Japan.[323] The Panel has modified paragraphs 7.285, 7.286, 7.313 and 7.314 of the interim report accordingly. The Panel has also added a footnote to paragraph 7.286, referring to the present discussion in the interim review section.

---

[319] United States' letter to the Panel dated 14 February 2008 (request for review of precise aspects of the Interim Report), para. 5.

[320] Written version of the European Communities' opening statement during the interim review meeting with the parties, para. 16.

[321] United States' letter to the Panel dated 14 February 2008 (request for review of precise aspects of the Interim Report), para. 7.

[322] Ibid., para. 8.

[323] Ibid., para. 9.

2. Whether the current bananas import regime is closely related to the original recommendations and rulings adopted by the DSB in 1997

6.31 The United States requested the Panel to delete the second sentence in paragraph 7.334 of the interim report, concerning the repeal of EC Regulation 404/1993, as amended. The United States argued that this information was not put into evidence by either party, it concerns an alleged modification of the measures at issue occurred after the date of establishment of this Panel and so would not be within the terms of reference of the Panel and, even if correct, it is not clear what has replaced EC Regulation 404/1993, and why this statement is necessary for the Panel's analysis.[324]

6.32 In response, the European Communities rejected the deletion of the reference to the repeal of Regulation 404/93. In the European Communities' view:

> "Given the extensive reliance of the Panel on the allegedly close connection between Regulation 404/93 and the challenged measure, we cannot see how this reference could be deleted without seriously compromising the reasoning of the Panel in the relevant parts of its Report."[325]

6.33 Under Article 13 of the DSU the Panel has a broad right to seek information and may take into account evidence even if not provided by any of the parties. In the present case, however, the Panel considers that noting the exact date of the repeal of Regulation 404/1993, and identifying the instrument repealing such Regulation, is not strictly necessary for its analysis. The Panel has modified the second sentence of paragraph 7.334 of the interim report accordingly.

3. Whether the current bananas import regime constitutes a measure taken by the European Communities in the direction of, or for the purpose of achieving, compliance

(a) Termination of US suspension of concessions

6.34 The United States requested the Panel to modify paragraphs 7.400, 7.402, 7.404 and 7.430 of the interim report, to replace the expressions "terminates retaliation", "termination of US retaliation" and "terminated its retaliation", with the expressions "terminates the imposition of increased duties", "termination of US imposition of increased duties" and "terminated its imposition of increased duties".[326] The Panel has modified paragraphs 7.400, 7.402, 7.404 and 7.430 of the interim report. The expression used in the minutes of the DSB meeting held on 1 February 2002 is that the United States had "terminated the suspension of concessions". Accordingly, the expressions "terminates retaliation", "termination of US retaliation" and "terminated its retaliation" have been replaced with the expressions "terminates the suspension of concessions", "termination of US suspension of concessions" and "terminated its suspension of concessions".

(b) Clarification of language

6.35 The United States requested the Panel to delete paragraph 7.477 of the interim report, which addresses the relevance of any time-limit on the possibility of bringing compliance complaints. In the United States' view, the discussion in paragraph 7.477 "does not appear to be necessary to the Panel's

---

[324] United States' letter to the Panel dated 14 February 2008 (request for review of precise aspects of the Interim Report), para. 10.

[325] Written version of the European Communities' opening statement during the interim review meeting with the parties, para. 6.

[326] United States' letter to the Panel dated 14 February 2008 (request for review of precise aspects of the Interim Report), para. 11.

reasoning in this section and may potentially be confusing".[327] The Panel has modified the language in paragraph 7.477 of the interim report in order to clarify its meaning.

(c) Licensing system

6.36 The United States requested the Panel to delete the last sentence of paragraph 7.501 of the interim report. In the United States' view, this sentence "does not appear to be factually correct as far as stating that the current [EC bananas import regime] does not involve a licensing system".[328]

6.37 In response to the United States' request, the European Communities argues that:

> "[T]he United States suggested deletion would... be misleading. The correct statement, and what we believe the Panel meant, is: 'Conversely, the current EC bananas import regime does not involve a licensing system *for MFN countries*'."[329]

6.38 In light of the parties' comments, the Panel has modified the language in paragraphs 7.501 and 7.502 of the interim report in order to clarify their meaning. The Panel has, however, used the expression "for MFN bananas", rather than "for MFN countries".

I. THE RELEVANT LANGUAGE OF ARTICLE XIII:1 OF THE GATT 1994 FOR THIS DISPUTE

6.39 The United States requested the Panel to modify the language in paragraph 7.671 of the interim report, in order to clarify that, in its submissions, the United States "did not argue that the MFN bananas were treated 'worse' than ACP bananas ... [but rather] argued that MFN bananas and ACP bananas were not treated 'equally' or 'similarly restricted'."[330] The Panel has modified paragraph 7.671 of the interim report accordingly.

J. THE UNITED STATES' CLAIM UNDER ARTICLE XIII:2 OF THE GATT 1994: PANEL'S ANALYSIS

6.40 The United States requested the Panel to correct the references made in footnote 1168 to paragraph 7.704 of the interim report.[331] The Panel has corrected footnote 1168 to paragraph 7.704 of the interim report accordingly.

K. GENERAL CONCLUSIONS

1. Panel's Conclusions

6.41 The European Communities requested the Panel to amend the language in paragraphs 8.3(a) and 8.3(c) of the interim report. In the European Communities' view, the statements made in those paragraphs are not correct. First, because "the preferential tariff quota [granted by the European Communities to bananas originating in ACP countries] does not exist any more". Second, because the language in paragraph 8.3(c):

> "[C]reates the impression that the Panel has found that there are more aspects of the 'European Communities' current import regime' that are inconsistent with GATT

[327] United States' letter to the Panel dated 14 February 2008 (request for review of precise aspects of the Interim Report), para. 12.
[328] Ibid., para. 13.
[329] Written version of the European Communities' opening statement during the interim review meeting with the parties, para. 17 (emphasis in original).
[330] United States' letter to the Panel dated 14 February 2008 (request for review of precise aspects of the Interim Report), para. 14.
[331] Ibid., para. 15.

> Article XIII, other than the preferential tariff quota. This is not correct. The terms of reference of the Panel allowed it to examine only the compatibility with GATT Article XIII of the preferential tariff quota granted to the ACP countries."[332]

6.42 The Panel has decided to maintain the language in paragraphs 8.3(a) and 8.3(c) of the interim report. As noted above[333], the Panel considers that the evidence 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.

2. Implementation of recommendations and rulings of the DSB

6.43 The European Communities requested the Panel to amend the language in paragraph 8.4 of the interim report. In the European Communities' view, the language in this paragraph:

> "[C]reates the impression that there are more elements of the European Communities' 'current regime for the importation of bananas' [other than the preferential tariff quota reserved for ACP bananas] that have fallen within the terms of reference of the Panel, other than the preferential tariff quota. In particular, it creates the impression that an examination of the 'MFN tariff currently set at €176/mt' was within the terms of reference of the Panel. This is not correct ..."[334]

6.44 The Panel has modified paragraph 8.4 of the interim report accordingly.

L. NULLIFICATION OR IMPAIRMENT OF BENEFITS

6.45 The United States requested the Panel to delete the last part of paragraph 8.11 of the interim report. In the United States' view:

> "[T]he explanation contained in the text that we request be deleted is not relevant in the context of this proceeding. Furthermore, the first part of paragraph 8.11 is sufficient to make the general point that a determination of the existence of nullification or impairment arising from a breach of an obligation is different from that of a determination of the level for purposes of Article 22".[335]

6.46 The Panel has modified paragraph 8.11 of the interim report accordingly.

M. RECOMMENDATION

6.47 Albeit for different reasons, both parties requested the Panel to delete paragraph 8.13 of the interim report.

---

[332] European Communities' letter to the Panel dated 14 February 2008 (request for review of precise aspects of the Interim Report), para. 3.

[333] See para. 6.18 above.

[334] European Communities' letter to the Panel dated 14 February 2008 (request for review of precise aspects of the Interim Report), para. 4.

[335] United States' letter to the Panel dated 14 February 2008 (request for review of precise aspects of the Interim Report), para. 16.