6.48 In the United States' view:

> "As this is a compliance proceeding, there is no need for the Panel to recommend that the DSB request the European Communities to bring its measures into conformity. It suffices for the Panel to conclude that the European Communities has failed to implement the recommendations and rulings of the DSB, as it does in paragraph 8.4."[336]

6.49 The European Communities argued instead that:

> "Panels generally have the obligation to take account of changes made to the measure that is the subject of the dispute, where these changes have taken place during the course of the proceedings ... [T]he measure that the Panel is in the process of analysing in accordance with its terms of reference has already been repealed during the course of these proceedings ... It is settled law that a Panel report may not contain any recommendation to the DSB with regard to measures that are no longer in existence (see, for example, the report of the Appellate Body in *United States – Import Measures on Certain Products from the European Communities*). Therefore, the Panel may not include any recommendation in its report, because the measure that is the subject of the current proceedings is no longer in existence."[337]

6.50 As noted above[338], 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. Nevertheless, since the original DSB recommendations and rulings in this dispute remain operative through the results of the current compliance proceedings, the Panel has modified the language in paragraph 8.13 of the interim report to reflect that it makes no new recommendation to the DSB.

N. ADDITIONAL REVISIONS AND CORRECTIONS

6.51 The Panel has also made some minor and editorial changes in paragraphs 2.5, 2.36, 2.58, 2.61, 2.72, 7.4, 7.9, 7.93, 7.100, 7.381, 7.478, 7.523, and 7.660 and in several footnotes of the report.

VII. FINDINGS

A. ATTEMPTS AT HARMONIZING THE TIMETABLES

7.1 The present proceedings, as well as those of the compliance panel requested by Ecuador in a similar matter, have created an unprecedented situation. The matter before this compliance Panel, requested by the United States on 29 June 2007, is closely related to the matter that was raised by Ecuador in its own request for the establishment of a panel made on 23 February 2007. However, despite its intention, the Panel was unable to harmonize the timetable of the current proceedings with the timetable of the compliance panel requested by Ecuador.

7.2 Both disputes concern measures adopted by the European Communities with the alleged purpose of complying with the rulings and recommendations of the DSB in the dispute *European Communities – Regime for the Importation, Sale and Distribution of Bananas* (*EC – Bananas III*). In

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[336] United States' letter to the Panel dated 14 February 2008 (request for review of precise aspects of the Interim Report), para. 17.

[337] European Communities' letter to the Panel dated 14 February 2008 (request for review of precise aspects of the Interim Report), para. 5.

[338] See para. 6.18 above.

both disputes, the parties disagree whether these measures are in conformity with the European Communities' obligations under the WTO covered agreements.

7.3 In their respective complaints, Ecuador and the United States each challenge the European Communities' current bananas 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.[339]

7.4 The claims in both cases are very similar. Both Ecuador and the United States claim that the challenged measures are inconsistent with Article I:1 and Article XIII, paragraphs 1 and 2, of the GATT 1994. In its own request, Ecuador advanced the additional claim that these measures are inconsistent with Article II of the GATT 1994.

7.5 The Panel is aware that, according to Article 9.3 of the DSU:

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

7.6 During the course of the proceedings, the Panel received a number of requests from the European Communities to extend the deadlines and to harmonize the timetable for this case with that of the panel requested by Ecuador. These requests were made through a written communication on 20 August 2007 with occasion of the organizational meeting of the Panel with the parties, as well as orally, during the substantive meeting of the Panel with the parties and third parties, on 6 and 7 November 2007.

7.7 In all instances, the Panel considered, both the European Communities' request and the views expressed by the United States, the complaining party. In practice, however, since the proceedings of the compliance panel requested by Ecuador began almost two months earlier than those of the compliance Panel requested by the United States, any harmonization would not necessarily have involved modifying the timetable of the proceedings of the latter compliance Panel. Rather, harmonization would have most likely involved a delay in the proceedings requested by Ecuador in order to harmonize the timetable of that case to that of the proceedings requested by the United States.

7.8 Harmonization of the timetable in both cases was made particularly difficult because of the two-month period that elapsed between the dates on which the two panels began their respective work. The Panel requested by Ecuador was composed by the WTO Director-General on 18 June. In turn, the panel requested by the United States, which was established on 12 July 2007, was composed on 13 August by the WTO Director-General. This two-month difference between the disputes was particularly significant, since compliance proceedings, by their very nature, are intended to be brief.

7.9 In any event, the panel in the proceedings requested by Ecuador decided not to modify the timetable originally adopted in those proceedings. Among other considerations, that panel took into account the fact that, when asked, Ecuador as the complaining party in those proceedings, strongly objected to any changes in the timetable that would result in extending the proceedings further beyond the 90-day period envisaged in Article 21.5 of the DSU. Ecuador's status as a developing country

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

Member, and its interest in a prompt decision of the matter, were additional factors taken into account by that panel when preparing and revising the timetable for its proceedings.[340]

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

7.11 However, in the Panel's view, the timetable in the current proceedings, adopted after having consulted the parties, respects the requirement of due process and accords equal treatment to all parties. In the circumstances of this case, the timetable adopted by the Panel prevented the arguments of the parties being influenced by advance knowledge by one party of the findings of the panel in the proceedings requested by Ecuador.

7.12 The Panel has also attempted to ensure to the greatest extent possible consistency between the findings issued in this report and those issued by the panel in the report requested by Ecuador. This is notwithstanding the fact that these two proceedings were formally different, and that neither the claims advanced by the complainants, nor the arguments advanced by the respective parties, were exactly the same in each of the cases.[341]

B. ORDER OF THE PANEL'S ANALYSIS

7.13 As noted in the descriptive section of this report, the United States makes two main substantive claims, namely that the European Communities' bananas import regime is inconsistent with Article I of the GATT 1994 and that it is also inconsistent with Article XIII of the GATT 1994, including Article XIII:1 and XIII:2.

7.14 The European Communities in turn raises three preliminary issues. First, the European Communities argues that the Panel must assess whether the United States has "standing" to commence these proceedings. Second, the European Communities argues that the United States should not be allowed to challenge the European Communities' measures because of the Understanding on Bananas, signed by the United States and the European Communities in April 2001 (Bananas Understanding).[342] Third, the European Communities argues that the United States' complaints fall outside of the scope of Article 21.5 of the DSU, because the European Communities' current bananas import regime is not "a measure taken to comply" with the recommendations and rulings of the DSB. As noted below[343], a fourth preliminary objection concerning the lack of formal consultations was initially raised by the European Communities, and later withdrawn.

7.15 Finally, the European Communities argues that, if the Panel were to conclude that the United States has standing and that the European Communities' bananas import regime does not comply with the GATT, the Panel should nevertheless find that the existence of the European Communities' bananas import regime has not caused the "nullification or impairment" of any benefit accruing to the United States.

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[340] See Panel Report on *EC – Bananas III (Article 21.5 – Ecuador II)*, paras. 7.9-7.10.

[341] See United States' response to Panel question No. 97, paras. 101-102, and European Communities' response to Panel question No. 97, paras. 175-177. See also European Communities' response to Panel question No. 78, paras. 130-131.

[342] 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.

[343] See paras. 7.533 to 7.542 below.

7.16 The Panel will begin by looking into the preliminary issues raised by the European Communities. Indeed, if the Panel was to find that any of these issues prevent the United States from bringing this complaint, there would be no need for the Panel to examine the substantive claims raised in these proceedings. If, on the contrary, after having disposed of the preliminary issues raised by the European Communities the Panel then finds that the European Communities' bananas import regime is inconsistent with Article I of the GATT 1994 or with Article XIII, or both, the Panel will finally deal with the issue of whether such regime has nullified or impaired any benefit accruing to the United States.

C. PRELIMINARY OBJECTION OF THE EUROPEAN COMMUNITIES CONCERNING THE ALLEGED LACK OF STANDING AND ARGUMENT REGARDING THE ALLEGED LACK OF NULLIFICATION OR IMPAIRMENT OF BENEFITS TO THE UNITED STATES

1. The European Communities' arguments

7.17 The European Communities argues that:

> "[E]ven assuming arguendo that the Cotonou Preference has not been in compliance with the GATT since the end of 2005 … its existence between the end of 2005 and the end of 2007 has not caused the United States a nullification or impairment of any benefit accruing to it."[344]

7.18 In the European Communities' view, the Panel must first assess, "in order to determine whether the United States has 'standing' to commence these proceedings"[345]:

> "[W]hether the alleged violation of a WTO rule sufficiently 'touches' upon the interests of the complaining party so as to justify the complaining party's [such] 'standing' to commence dispute settlement proceedings."[346]

7.19 The European Communities adds that the Panel's determination of whether the United States has standing in this dispute "is an issue of jurisdiction and the Panel has the obligation to examine it on its own initiative".[347]

7.20 The European Communities further states that, should the Panel conclude "that the United States has standing and that the Cotonou Preference does not comply with the GATT", the Panel should then:

> "[E]xamine what is the nullification or impairment suffered by the United States in order to discharge its obligation to 'make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements'[348]. The Panel also needs to determine whether there is 'nullification or impairment' in order to offer the parties the legal 'security and predictability' required by Article 3.2 of the DSU and help them reach a 'prompt settlement' of their dispute, as required by Article 3.3 of the DSU."[349]

7.21 The European Communities considers that the term "nullification or impairment" "has the same meaning both in the context of Article 3.8 of the DSU and of Article 22 of the DSU", since

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[344] European Communities' first written submission, para. 70.
[345] Ibid., para 74.
[346] Ibid., para 73.
[347] European Communities' response to Panel question No. 82, para. 145.
[348] (*footnote original*) See Article 11 of the DSU.
[349] European Communities' first written submission, para. 74.

"there can be only one notion of 'nullification or impairment' for purposes of the DSU".[350] In this respect, the European Communities argues that "Article 3.8 of the DSU allows the defending party to rebut the presumption that the challenged measure causes a nullification or impairment of a benefit accruing to the complaining party, even where it is established that the measure itself is not in compliance with the WTO rules".[351] In the European Communities' view:

> "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."[352]

7.22 The European Communities adds that since "the Cotonou Preference has no 'impact on the value of relevant EC imports from the United States'"[353], it therefore "does not cause the United States any nullification or impairment of a benefit for which the European Communities can face suspension of concessions"[354], under Article 22 of the DSU. Accordingly, the European Communities requests the Panel to 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."[355]

2. The United States' response

7.23 In response, the United States considers that "the Panel should dismiss the [European Communities'] arguments".[356] In the United States' view, the arguments relating to both the United States' alleged lack of standing and the alleged lack of nullification or impairment:

> "[I]gnore the clear guidance of the Appellate Body in the underlying *EC – Bananas III* proceedings, in which it addressed these very same issues and rejected very similar reasoning by the [European Communities]."[357]

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[350] European Communities' first written submission, para. 71. European Communities' second written submission, paras. 96 and 97. See also written version of European Communities' opening statement during substantive meeting with the parties and third parties, paras. 28.

[351] European Communities' first written submission, para. 70. See also written version of European Communities' opening statement during substantive meeting with the parties and third parties, paras. 27.

[352] Written version of European Communities' closing statement during substantive meeting with the parties and third parties, para. 9.

[353] European Communities' second written submission, para. 98. See also written version of European Communities' opening statement during substantive meeting with the parties and third parties, paras. 26, and 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. 1, 2 and 158.

[354] European Communities' first written submission, para. 75.

[355] 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.

[356] United States' second written submission, para. 64.

[357] Ibid., para. 53.

7.24 The United States adds that, in the original *EC – Bananas III* proceedings, "the Appellate Body upheld the panel's finding that the United States 'had standing' to bring claims under the GATT 1994[358] against the EC's banana measures."[359]

7.25 Regarding the alleged lack of nullification or impairment, the United States considers that:

> "[T]o prevail on its claims of an EC breach of GATT Articles I and XIII, the United States is not required to demonstrate that the EC's banana measures nullify or impair benefits accruing to it. In arguing to the contrary, the EC confuses the function of dispute settlement proceedings under DSU Articles 6 and 21.5 with arbitration proceedings under DSU Article 22."[360]

7.26 In the United States' view:

> "By focusing on nullification or impairment, the EC's argument seems to presume that the ultimate outcome of dispute settlement is the suspension of concessions by the complaining Member in order to achieve compliance by the responding Member. There are, of course, two other preferred outcomes set out in Article 3.7 of the DSU: a mutually agreed solution consistent with the covered agreements and withdrawal of WTO-inconsistent measures. In addition, there is resort to compensation. Indeed, Article 3.7 of the DSU characterizes suspension of concessions as a 'last resort'."[361]

7.27 The United States further adds that:

> "[T]he EC made a similar argument to the original panel and Appellate Body, but its argument was rejected. The reasoning of the Appellate Body remains applicable here. In determining that the United States did in fact suffer nullification or impairment of benefits at the hands of the EC's 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."[362]

7.28 The United States concludes that:

> "[T]he clear EC breaches of GATT Articles I and XIII obviate the need for the United States to affirmatively demonstrate the trade effects caused by the EC's banana measures. As noted by the Appellate Body, 'the United States is a producer of bananas and ... a potential export interest by the United States cannot be excluded.'[363] In addition, 'the internal market of the United States for bananas could be affected by the EC banana regime and by its effects on world supplies and world prices of bananas.'[364] Thus, the Panel should dismiss the EC's arguments."[365]

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[358] (*footnote original*) Appellate Body Report, *European Communities - Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted 25 September 1997, ("*Bananas III (AB)*"), para. 138.

[359] United States' second written submission, para. 54. See also, ibid., para. 58.

[360] Ibid., para. 59.

[361] Written version of United States' opening statement during substantive meeting with the parties and third parties, para. 47. See also joint third party written submission by Nicaragua and Panama, para. 127.

[362] United States' second written submission, para. 62. See also joint third party written submission by Nicaragua and Panama, para. 118.

[363] (*footnote original*) *See Bananas III (AB)*, para. 251.

[364] (*footnote original*) *Id.*

3. Panel's analysis

(a) Verification of the United States' standing to commence these proceedings

7.29 As noted above, the European Communities requests the Panel to determine as an initial matter whether the United States "has 'standing' to commence these proceedings".[366]

7.30 Article 3.7 of the DSU reads in part:

> "Before bringing a case, a Member shall exercise its judgement as to whether action under these procedures would be fruitful. The aim of the dispute settlement mechanism is to secure a positive solution to a dispute. A solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred…"

7.31 The Appellate Body has indicated that the first sentence of this paragraph:

> "[R]eflects a basic principle that Members should have recourse to WTO dispute settlement in good faith, and not frivolously set in motion the procedures contemplated in the DSU …"[367]

7.32 In the same report, the Appellate Body went on to point out the self-regulating nature of the mechanism contained in that sentence:

> "Given the 'largely self-regulating' nature of the requirement in the first sentence of Article 3.7, panels and the Appellate Body must presume, whenever a Member submits a request for establishment of a panel, that such Member does so in good faith, having duly exercised its judgement as to whether recourse to that panel would be 'fruitful'. Article 3.7 neither requires nor authorizes a panel to look behind that Member's decision and to question its exercise of judgement ..."[368]

7.33 The Panel starts by noting that the current proceedings involve what is termed a "compliance" case, under Article 21.5 of the DSU, regarding whether certain measures allegedly taken to comply with the recommendations and rulings of the DSB in an original dispute conducted under the WTO's dispute settlement procedures are consistent with the WTO covered agreements. By their nature, compliance cases are linked with the original proceedings in the dispute. As noted by the Appellate Body:

> "Article 21.5 proceedings do not occur in isolation from the original proceedings, but … both proceedings form part of a continuum of events."[369]

7.34 The Panel does not need to make a general determination regarding whether panels may be required to assess when a Member has "standing" to initiate dispute settlement proceedings under the DSU. Rather, we note that the United States was a complaining party in the original proceedings of the present case. In that case, the European Communities' bananas regime was found to be inconsistent with the WTO covered agreements and to have resulted in the nullification or impairment of trade benefits that should have accrued to the United States under such agreements. Accordingly,

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[365] United States' second written submission, para. 64. See also joint third party written submission by Nicaragua and Panama, para. 132.

[366] European Communities' first written submission, para. 73.

[367] Appellate Body Report on *Mexico – Corn Syrup (Article 21.5 – US)*, para. 73.

[368] Ibid., para. 74.

[369] Appellate Body Report on *Chile – Price Band System (Article 21.5 – Argentina)*, para. 136.

in the circumstances of the present case, the United States, as an original complainant, holds a particular interest in ensuring that the measure in question is brought into conformity with the WTO agreements. The European Communities has failed to rebut the existence of that particular interest. Accordingly, the Panel does not need to conduct, under the current compliance proceedings, a separate analysis of whether, in the words of the European Communities, "the alleged violation of a WTO rule sufficiently 'touches' upon the interests of the [United States] so as to justify [that] party's 'standing' to commence dispute settlement proceedings".[370]

7.35 For the reasons indicated above, and especially in view of the particular interest of the United States in the current compliance proceedings, the Panel finds that the United States had, under the DSU, the right to request the initiation of such proceedings.

(b) Verification of the nullification or impairment of trade benefits accruing to the United States

7.36 As noted above, the European Communities has asked the Panel that, should it conclude that the United States has standing and that the preference granted by the European Communities to an annual duty-free tariff quota of imported bananas originating in ACP countries (the Cotonou Preference) is inconsistent with the GATT, the Panel should then "examine what is the nullification or impairment suffered by the United States."[371]

7.37 The European Communities' request regarding the alleged lack of nullification or impairment of trade benefits accruing to the United States is contingent upon the Panel having found that the preference granted by the European Communities to an annual duty-free tariff quota of imported bananas originating in ACP countries is inconsistent with the GATT. Accordingly, the Panel shall turn to this issue after having considered the substantive claims made, under Articles I and XIII of the GATT 1994, by the United States against the preferences granted by the European Communities.

4. Conclusion

7.38 For the reasons indicated in this section, the Panel preliminarily finds that the United States had, under the DSU, the right to request the initiation of the current compliance proceedings.

D. PRELIMINARY OBJECTION OF THE EUROPEAN COMMUNITIES CONCERNING WHETHER THE UNITED STATES IS BARRED FROM CHALLENGING THE EUROPEAN COMMUNITIES' BANANAS IMPORT REGIME AS A RESULT OF THE BANANAS UNDERSTANDING SIGNED IN APRIL 2001

1. Arguments of the parties

(a) The European Communities' arguments

7.39 The European Communities argues that the complaint brought by the United States:

> "[S]hould be dismissed in its entirety because ... the United States has already accepted the continuation of the Doha waiver until the end of 2007 in the [Bananas] Understanding [it signed with the European Communities in April 2001]."[372]

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[370] European Communities' first written submission, para. 73.

[371] Ibid., para. 74.

[372] European Communities' second written submission, para. 104. See Understanding on Bananas between the European Communities and the United States. See *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. See also, European Communities' first written submission, para. 39.

7.40 The European Communities adds that:

> "On May 29, 2001 and May 30, 2001, the United States and the European Communities exchanged Letters confirming their 'common understanding' of their 'April 11 agreement'."[373]

7.41 The European Communities argues that:

> "In light of the content of the [Bananas] Understanding and the Letters and the rights and obligations mutually accepted by both parties ... the Understanding is indeed a 'mutually agreed solution' to the banana dispute between the United States and the European Communities".[374]

7.42 Regarding the content of the Bananas Understanding, the European Communities asserts that:

> "[T]he Understanding (i) describes in great detail the characteristics of the two banana import regimes that the European Communities should implement by July 1, 2001 and by January 1, 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 January 1, 2002. Moreover, 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 ...
>
> [T]he Understanding [also] provides that the United States should support the grant of the 'waiver of Article I of the GATT that the EC has requested for preferential access to the EC of goods originating in ACP states signatory to the Cotonou Agreement'."[375]

7.43 According to the European Communities, the Bananas Understanding is "a mutually agreed solution, as this term is defined in the DSU and, therefore, it is binding upon the United States".[376] In the European Communities' view, pursuant to the Bananas Understanding:

> "The United States has done *more* than simply voting in favour of the Cotonou Preference waiver. The United States has entered into an international agreement with the European Communities accepting the existence of the Cotonou Preference until the end of 2007 and, most importantly, it has received specific consideration for doing so."[377]

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[373] European Communities' first written submission, para. 39. See also, European Communities' second written submission, para. 8.

[374] European Communities' first written submission, para. 42. See also, European Communities' response to Panel question No. 80, para. 138, and European Communities' response to Panel question No. 106, para. 181.

[375] European Communities' first written submission, paras. 42-44.

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

[377] Ibid., para. 16.

7.44 In particular, the European Communities argues that it:

> "[H]as fully complied with its obligations under the [Bananas] Understanding in good faith and relying on the expectation that the United States would also comply with its own obligations."[378]

7.45 According to the European Communities, the obligations of both parties, as provided in the Bananas Understanding, were the following:

> "[A]s of July 1, 2001, the European Communities would implement an import regime on the basis of historical licensing and with certain characteristics defined in Annex 1 of the Understanding. Upon the European Communities' implementation of this regime, the United States would provisionally suspend its retaliation measures.
>
> As soon as possible thereafter, the European Communities would implement another import regime on the basis of historical licensing with certain other characteristics defined in Annex 2 of the Understanding. Upon the European Communities' implementation of that regime, the United States' right to suspend its concessions would be terminated. The deadline for the implementation of that regime was January 1, 2002. If the European Communities failed to implement the new regime by that date, the United States would have the right to re-impose their retaliation measures."[379]

7.46 The European Communities adds that it "implemented the new import regime within the agreed deadline and the United States' right to suspend concessions was terminated" and that "[t]his was the end of the banana dispute between the United States and the European Communities".[380]

7.47 As regards the United States' compliance with the Bananas Understanding, the European Communities states that the United States agreed "to have [its] retaliation rights terminated"[381] and voted in favour of approving the Doha waiver, exempting the Cotonou Agreement's trade preferences from the application of Article I of the GATT until the end of 2007.[382]

7.48 The European Communities argues that:

> "[T]he points raised by the United States ... do not suffice to rebut the European Communities' argument that the Understanding is indeed a 'mutually agreed solution' for purposes of the DSU, as evidenced by its content, the rights and obligations that the parties undertook with it, the termination of the United States' retaliation measures agreed therein and the side letters exchanged between the parties soon after the signing of the Understanding."[383]

7.49 Concerning the 26 June 2001 communication on the Bananas Understanding to the DSB in which the United States stated that the "[Bananas] Understanding identifies the means by which the long-standing dispute over the EC's banana import regime can be resolved, but ... does not in itself

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[378] Ibid., para. 39.
[379] European Communities' first written submission, paras. 22-23 (footnotes ommitted).
[380] Ibid., para. 24.
[381] Ibid., para. 24.
[382] European Communities' second written submission, paras. 8-16. See also, European Communities' first written submission, para. 44.
[383] European Communities' second written submission, para. 26.

constitute a mutually agreed solution pursuant to Article 3.6 of the DSU"[384], the European Communities claims that:

> "The Panel should not take into consideration the unilateral statement issued by the United States after the signing of the Understanding and the Letters."[385]

7.50 According to the European Communities:

> "[T]he analysis of the legal status and effect of the [Bananas] Understanding should be based on its content and on the confirmations contained in the Letters exchanged between the parties, where their true common intentions and mutual understandings and undertakings are expressed."[386]

7.51 The European Communities points out that:

> "[T]he [Bananas] Understanding (i) describes in great detail the characteristics of the two banana import regimes that the European Communities should implement by July 1, 2001 and by January 1, 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 January 1, 2002. Moreover, 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."[387]

7.52 Furthermore, the European Communities argues that it:

> "[C]annot see why a document that 'sets out a path' with the 'means to resolve a dispute' should not qualify as a mutually agreed solution for purposes of the DSU. Indeed, by definition, a 'mutually agreed solution' can be nothing else than a document that sets the terms of the solution mutually agreed between the parties. More often than not, a 'mutually agreed solution' will describe the actions that the parties have undertaken to perform (or refrain from) in the future".[388]

7.53 The European Communities also supports the argument made by a number of ACP third parties (namely Belize, Cameroon, Côte d'Ivoire, Dominica, the Dominican Republic, Jamaica, Madagascar, St. Lucia, St. Vincent and the Grenadines, and Suriname) that:

> "The fact that the agreed solution between the EC and the US necessarily prevents the US from referring the issue of the WTO consistency of the new EC banana import regime under Article 21.5 proceedings is supported by the fact that [with the agreement of all WTO Members, in February 2002,] pursuant to the Understandings reached with Ecuador and the US, the banana dispute was taken off the agenda of the Dispute Settlement Body in accordance with Article 21.6 of the DSU[389]."[390]

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[384] *EC – Bananas III*, Communication from the United States (WT/DS27/59), 2 July 2001. See, United States' second written submission, para. 34.

[385] European Communities' first written submission, para. 41.

[386] European Communities' first written submission, para. 41.

[387] Ibid., para. 42.

[388] European Communities' second written submission, para. 23.

[389] (*footnote original*) See Minutes of the DSB Meeting held on 1 February 2002, WT/DSB/M/119, 6 March 2002.

[390] See ACP Countries' third party written submission, para. 60.

7.54 In this regard, the European Communities argues that, under the DSU:

> "[R]ecourse to a compliance panel [is only allowed] when there is disagreement in the sense of Article 21.5 of the DSU. On the contrary, a compliance panel is excluded when a dispute has been settled. In fact, such a dispute is considered resolved once and for all. This is evidenced by the wording of Article 21.6 of the DSU, which specifies that the issue of implementation of the recommendations or rulings of the DSB stays on its agenda 'until the issue is resolved'. This obviously means that a dispute taken off the [DSB's] agenda is considered resolved.
>
> This is precisely what happened in the present case. In fact, the *Bananas III* dispute between the European Communities and the Unites States has been settled through a mutually agreed solution (namely, the [Bananas] Understanding). This is evidenced by the fact that – after the conclusion of the Understanding - the United States agreed, first, to suspend its retaliatory measures and, ultimately, to terminate those measures. Further, the issue of the implementation of the *EC-Bananas III* DSB recommendations and rulings was withdrawn from the DSB's agenda with the consent of all WTO members (including the United States), in accordance with Article 21.6 of the DSU."[391]

7.55 The European Communities also contends that:

> "[E]ven if it is assumed *arguendo* that the [Bananas] Understanding is not a 'mutually agreed solution' for purposes of Article 3.6 of the DSU, it cannot be denied that it is a bilateral agreement between the United States and the European Communities with which both parties undertook certain obligations and acquired certain rights. As such, the Understanding forms part of the 'applicable rules of law' between the parties to the dispute, as this term is defined in customary international law and codified in Article 31, paragraph 3(c) of the Vienna Convention on the Law of the Treaties. Therefore, its terms must be taken into consideration in order to determine the parties' mutual rights and obligations under the GATT and the DSU."[392]

7.56 In particular, the European Communities maintains that:

> "[G]iven that the United States has accepted in the [Bananas] 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."[393]

7.57 In response to the United States' argument that "Article 31(3)(c) of the Vienna Convention deals with *interpretation* of the covered agreements"[394] and that, "[s]ince the EC-US Understanding is a bilateral agreement between only the parties to this dispute, not all Members of the WTO, it cannot be considered part of any 'applicable rules of law' that could inform the panel's interpretation of the covered agreements"[395], the European Communities responds that:

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[391] European Communities' response to Panel question No. 20, paras. 48-49. See also, European Communities' response to Panel question No. 21, para. 51.

[392] European Communities' first written submission, para. 43. See also, European Communities' response to Panel question No. 80, paras. 139-142.

[393] European Communities' first written submission, para. 45.

[394] United States' second written submission, para. 38 (emphasis original).

[395] Ibid., para. 39.

> "There is a very large number of 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."[396]

7.58 The European Communities further asserts that:

> "[T]he report of the panel in *EC – Approval and Marketing of Biotech Products* [makes] clear 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. In the view of the European Communities, in interpreting the WTO obligations and rights of two WTO Members in relation to each other, it is necessary to take into consideration any relevant international agreement to which those two Members are a party. This is precisely the case with the [Bananas] Understanding, which has been signed by both parties to the present dispute. Therefore, the European Communities respectfully requests the Panel to reject the assertion that the United States attempts to base on *EC – Approval and Marketing of Biotech Products*".[397]

7.59 In response to the United States' argument that "during the *India – Autos* proceeding (which, like the negotiation of the EC-US Understanding, took place in the spring of 2001), the EC ... held the view that a mutually agreed solution could not prevent recourse to the DSU"[398], the European Communities responds that:

> "In analysing the legal effects of mutually agreed solutions, the [*India – Autos*] panel stated in paragraph 7.113 of its report:
>
> > ... such agreements are expressly referred to and supported by the DSU. It is certainly reasonable to assume, particularly on the basis of Article 3 of the DSU ... that these 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.[399]
>
> The panel also found in paragraph 7.115 of its report that 'it may also be the case that it cannot be lightly assumed that those drafters intended mutually agreed solutions, expressly promoted by the DSU, to have no meaningful legal effect in subsequent proceedings'. These statements confirm that the panel in *India – Autos* considered it possible that a mutually agreed solution could bar a party from commencing dispute settlement proceedings. Therefore, the United States cannot rely on that panel's report to support an assertion that a mutually agreed solution like the [Bananas] Understanding cannot constitute a bar on the United States' right to challenge the Cotonou Preference."[400]

7.60 The European Communities finally adds that:

> "[E]ven if it were to be assumed that the provisions of the Understanding itself cannot be taken into consideration in determining the rights and obligations of the parties to

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[396] European Communities' second written submission, para. 29.
[397] European Communities' second written submission, para. 34.
[398] United States' second written submission, para. 41.
[399] (*footnote original*) See the report of the panel in *India – Measures affecting the automotive sector*, dated December 21, 2001, ("*India – Autos*"), para 7.113.
[400] United States' second written submission, paras. 36-37.

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."[401]

7.61 In the European Communities' opinion:

"[T]he principle of good faith, which runs through the entire DSU[402] 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. As already mentioned, 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 now its part of the deal and refrain from challenging the existence of the Cotonou Preference until the end of 2007."[403]

7.62 Thus, the European Communities concludes that:

"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. This would be inconsistent with the purpose of the DSU as reflected in Article 3.10 and with the principles enshrined in Article 3.7 (where it is stated that mutually agreed solutions are to be preferred)."[404]

7.63 For the reasons explained above, the European Communities requests the Panel to dismiss "the complaint of the United States ... in its entirety".[405]

(b) The United States' response

7.64 The United States confirms that in April 2001 it reached with the European Communities "an *Understanding on Bananas*".[406] The United States also:

"[A]cknowledges that the [Bananas] Understanding is an important document in the long history of this dispute. It sets out what the United States and the EC, back in 2001, considered to be means to resolve the bananas dispute."[407]

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[401] Ibid., para. 9.

[402] (*footnote original*) See, for example, the report of the Appellate Body in *European Communities – Export Subsidies on Sugar*, dated April 28, 2005 ("*EC – Export Subsidies on Sugar*"), at para. 312, where it is stated that "... WTO members ... must engage in dispute settlement procedures in good faith, by virtue of Article 3.10 of the DSU. This latter obligation covers, in our view, the entire spectrum of dispute settlement, from the point of initiation of a case through implementation".

[403] European Communities' second written submission, para. 39. See also, ibid., para. 13.

[404] Ibid., para. 17.

[405] Ibid., para. 104.

[406] United States' first written submission, para. 7.

[407] Written version of United States' opening statement during substantive meeting with the parties and third parties, para. 36.

7.65 The United States, however, argues that:

> "[T]he [European Communities'] assertion that because the United States has 'accepted in the EC-US 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' ... is incorrect".[408]

7.66 The United States asserts that:

> "[N]othing in the EC-US [Bananas] Understanding says that the United States was agreeing to a reduction in its rights to challenge the WTO-consistency of any EC measure. [The Bananas Understanding] contains no clause or provision in which the United States 'accepted' that it would be 'barred' from recourse to the Dispute Settlement Understanding."[409]

7.67 The United States adds that:

> "[A]s contemplated by the EC-US [Bananas] Understanding, the United States did support the adoption of a waiver of the EC's Article I obligations, and a 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.'[410] These additional provisions ... set out conditions which the new EC regime on bananas would have to meet. The provisions also set out a special arbitration mechanism whereby if an arbitrator found twice that the EC regime did not meet the conditions set out in the Annex, the Article I waiver would cease to apply with respect to bananas before the end of 2007 ... [T]he United States believes that the EC's Article I waiver ceased to apply upon entry into force of the new EC regime for bananas on January 1, 2006."[411]

7.68 The United States disagrees "with the EC's contention that the EC-US [Bananas] Understanding represented a 'mutually agreed solution' as that term is used in the DSU."[412] In the United States' view:

> "[I]t is clear from its text that the EC-US [Bananas] Understanding was 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 [Bananas] Understanding and that the Understanding was not itself the end of the dispute."[413]

7.69 The United States further states that it:

> "[D]id not and does not consider that the Understanding was a 'mutually agreed solution' for purposes of Article 3.6. The United States made this clear immediately after the EC unilaterally notified the Understanding to the DSB as a 'mutually agreed solution' in June of 2001 ... As the United States made clear to the EC and all

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[408] United States' second written submission, para. 23.

[409] Ibid., para. 24. See also written version of United States' opening statement during substantive meeting with the parties and third parties, para. 37.

[410] (*footnote original*) See Exhibit US-3.

[411] United States' second written submission, para. 27. See also written version of United States' opening statement during substantive meeting with the parties and third parties, para. 37.

[412] United States' second written submission, para. 29.

[413] Ibid., para. 32.

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'.[414]"[415]

7.70 The United States adds that:

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

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."[416]

7.71 The United States also disagrees:

"[W]ith the EC's assertion that, pursuant to Article 31(3)(c) of the *Vienna Convention on the Law of Treaties* ('Vienna Convention'), the EC-US [Bananas] Understanding must be taken into consideration to determine the parties' rights and obligations under the GATT 1994 and the DSU."[417]

7.72 In the United States' opinion:

"Since the EC-US [Bananas] Understanding is a bilateral agreement between only the parties to this dispute, not all Members of the WTO, it cannot be considered part of any 'applicable rules of law' that could inform the panel's interpretation of the covered agreements ...

[T]he DSU cannot be used to settle a dispute as to the meaning or effect of the EC-US [Bananas] Understanding, and the DSU cannot enforce the Understanding by blocking a party to the Understanding from recourse to the DSU."[418]

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[414] (*footnote original*) WT/DS27/59, G/C/W/270, 2 July 2001, second paragraph.

[415] Written version of United States' opening statement during substantive meeting with the parties and third parties, para. 38. See also, United States' response to Panel question No. 47, paras. 84-85, question No. 105, paras. 106-107, and question No. 106, paras. 108-109.

[416] Written version of United States' opening statement during substantive meeting with the parties and third parties, paras. 39-40. See also, United States' response to Panel question No. 19, para. 32, and question No. 20, paras. 33-34.

[417] United States' second written submission, para. 36. See also written version of United States' opening statement during substantive meeting with the parties and third parties, para. 41.

[418] United States' second written submission, paras. 39-40.

7.73 The United States further adds that:

> "[I]t is telling that [in a previous case] the EC, as a complaining party, has taken the opposite view of the one it advances in this dispute ... [I]n *India – Autos*, 'the European Communities argued that, not being a "covered agreement" under the DSU, the [mutually agreed solution] cannot be invoked by India "in order to justify the violation of its obligations under the GATT and the TRIMs Agreement."'[419] For the same reason, the EC-[Bananas] US Understanding – whether or not it is a 'mutually agreed solution' – cannot 'be invoked by [the EC] 'in order to justify the violation of its obligations under the GATT'."[420]

7.74 The United States disagrees with the argument advanced by some third parties that "the fact that the agreed solution between the EC and the US necessarily prevents the US from referring the issue of the WTO consistency of the new EC banana import regime under Article 21.5 proceedings is supported by the fact that pursuant to the Understandings reached with Ecuador and the US, the banana dispute was taken off the agenda of the Dispute Settlement Body in accordance with Article 21.6 of the DSU"[421].[422] In the United States' view:

> "It is incorrect to say that the issue was 'withdrawn' from the [DSB's] agenda. Instead, as is apparent from the DSB minutes for the February 1, 2002[423] meeting all that happened was that the EC declared its view that 'this matter should now be withdrawn from the agenda' (presumably meaning that despite Article 21.6, the EC need no longer put a status report on the agenda of future DSB meetings). A review of the minutes confirms that Ecuador agreed there was no need for the EC to put the issue on the agenda of future DSB meetings in light of the fact that the EC had taken the step set out in paragraph D of the Understanding and the next step that would need to be taken by the EC was implementation of a tariff only regime by January 1, 2006. The DSB simply 'took note' of the statements and did not take a decision on this issue. The fact that other Members did not request that this matter be on the agenda of subsequent meetings presumably reflects that little would have been gained by keeping this matter on the DSB agenda until the EC took the next step on January 1, 2006.
>
> It is also clear from the statements made at the meeting that the dispute was not considered 'resolved'."[424]

7.75 The United States concludes that "[t]he EC's ... preliminary objection - that the EC-US [Bananas] Understanding bars this proceeding – is ... groundless".[425]

2. Panel's analysis

7.76 In order to decide this preliminary issue, the Panel will analyse first the nature and scope of this preliminary objection of the European Communities, in particular in regard to Article 21.5 of the DSU. The Panel will then assess the European Communities' preliminary objection.

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[419] (*footnote original*) *India – Autos*, para. 7.109 (footnote omitted).
[420] United States' second written submission, para. 43.
[421] ACP Countries' third party written submission, para. 24.
[422] United States' response to Panel question No. 19, para. 32, and question No. 21, para. 38.
[423] (*footnote original*) WT/DSB/M/119, 6 March 2002.
[424] United States' response to Panel question No. 19, para. 32, and question No. 21, paras. 38-39.
[425] United States' second written submission, para. 21 (footnotes omitted).

7.77 The Panel recalls that in *US – Wool Shirts and Blouses* the Appellate Body noted that:

> "[I]t is a generally-accepted canon of evidence in civil law, common law and, in fact, most jurisdictions, that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence. If that party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption."[426] (footnote omitted)

7.78 The Appellate Body concluded in the same dispute that, on the one hand, "a party claiming a violation of a provision of the WTO Agreement by another Member must assert and prove its claim"[427] and, on the other hand, "[i]t is only reasonable that the burden of establishing ... a defence should rest on the party asserting it."[428][429] This general approach to the burden of proof has been confirmed in a number of reports since then, including more recently in regard to compliance proceedings pursuant to Article 21.5 of the DSU.[430]

7.79 Accordingly, the Panel needs to assess first whether the European Communities has made a prima facie case supporting its preliminary objection. If such a prima facie case was found to exist, the Panel would turn to assessing whether the United States has succeeded in rebutting this preliminary objection by the European Communities.

(a) The nature and scope of this preliminary issue under Article 21.5 of the DSU

7.80 In addition to other objections that are addressed in specific sections of this report[431], the European Communities questions the United States' right to contest the ACP preference because of the Bananas Understanding signed with the European Communities in April 2001, both in general in the context of WTO dispute settlement[432] and particularly in a compliance dispute.[433] The Panel recalls that under its terms of reference its task is to examine the matter raised by the United States in its request for the establishment of a panel made under Article 21.5 of the DSU and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the WTO agreements.[434] Accordingly, the Panel will limit its consideration of the preliminary issue raised by the European Communities to whether the United States is prevented, as a result of the Bananas Understanding, from bringing a *compliance* dispute pursuant to Article 21.5 of the DSU.

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[426] Appellate Body Report on *US – Wool Shirts and Blouses*, p. 14.

[427] Ibid., p. 16.

[428] *(footnote original)* Furthermore, there are a few cases that are similar in that the defending party invoked, as a defence, certain provisions and the panel explicitly required the defending party to demonstrate the applicability of the provision it was asserting. See, for example, *United States – Customs User Fee*, adopted 2 February 1988, BISD 35S/245, para. 98, concerning Article II:2 of the GATT 1947; *Canada – Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies*, adopted 22 March 1988, BISD 35S/37, para 4.34, concerning Article XXIV:12 of the GATT 1947; and *United States – Measures Affecting Alcoholic and Malt Beverages*, adopted 19 June 1992, BISD 39S/206, para. 5.44, concerning the Protocol of Provisional Application.

[429] Appellate Body Report on *US – Wool Shirts and Blouses*, p. 16.

[430] See Appellate Body Report on *Brazil – Aircraft (Article 21.5 – Canada)*, para. 66 and Appellate Body Report on *Chile – Price Band System (Article 21.5 – Argentina)*, para. 136.

[431] See sections VII.C, VII.E and VII.F of this report.

[432] See European Communities' first written submission, para. 45; and European Communities' second written submission, paras. 9 and 14. See also written version of European Communities' opening statement during substantive meeting with the parties and third parties, para. 2.

[433] European Communities' response to Panel question No. 8, para. 15, question No. 20, para. 50, and question No. 30, para. 58.

[434] See *EC – Bananas III (Article 21.5 – US)*, Constitution of the Panel (WT/DS27/84/Rev.1), 5 September 2007, paras. 1-2.

7.81 In order to address the issue of whether the Bananas Understanding can prevent the United States from bringing a compliance dispute, the Panel will start by considering the scope of compliance disputes. In relevant part, Article 21.5 of the DSU provides that:

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

7.82 The United States has brought this dispute under Article 21.5 of the DSU, by making the following request:

> "As there is 'disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings' of the DSB between the United States and the EC, the United States respectfully seeks recourse to Article 21.5 of the DSU in this matter. The United States requests that the DSB refer the matter to the original panel, if possible, pursuant to Article 21.5 of the DSU."[435]

7.83 As a different preliminary objection, the European Communities has argued 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.[436] The Panel will deal with this different preliminary issue separately. Instead, in this section the Panel will focus on the more narrow issue of whether the Bananas Understanding signed between the European Communities and the United States in April 2001 bars the United States from bringing this compliance challenge.

(b) Is the United States barred by the Bananas Understanding from bringing this compliance challenge?

(i) Panel's approach

7.84 The Panel notes that the European Communities makes the following suggestion to the Panel:

> "[T]he Panel should take into consideration the terms of these agreements [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; i.e.,] 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.
>
> This agreement is the [Bananas] 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

[435] See *EC – Bananas III (Article 21.5 – US)*, Request for the Establishment of a Panel (WT/DS27/83) 2 July 2007, p. 3.

[436] See para. 3.4 above.

> for entering into the Understanding and was aware of the legal nature of the Understanding from the very beginning."[437]

7.85 As indicated above, the European Communities appears to be making a sequential argument under its first preliminary objection.[438] First, the European Communities argues that the Bananas Understanding constitutes a mutually agreed solution providing for the ACP preference, and therefore the United States is prevented from contesting the conformity of the European Communities' current banana import regime in a compliance dispute. Second, the European Communities makes a similar, residual argument "even if it is assumed *arguendo* that the [Bananas] Understanding is not a 'mutually agreed solution' for purposes of Article 3.6 of the DSU."[439] If that were the case, the European Communities argues that the Bananas Understanding is "a bilateral agreement between the United States and the European Communities with which both parties undertook certain obligations and acquired certain rights [and, as such,] its terms must be taken into consideration in order to determine the parties' mutual rights and obligations under the GATT and the DSU."[440] Third, the European Communities adds that, "even if it were to be assumed that the provisions of the 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."[441]

7.86 In any event, the European Communities argues that:

> "[G]iven that the United States has accepted in the [Bananas] 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."[442]

7.87 Accordingly, there are two common elements in the European Communities' arguments under this preliminary issue:

(a) The alleged legally binding nature of the Bananas Understanding on the United States, whether or not such Understanding qualifies as a mutually agreed solution; and,

(b) That, as the European Communities puts it, "the United States has accepted in the [Bananas] Understanding the principle that the Cotonou Preference would continue to exist until the end of 2007."[443]

7.88 These two questions are potentially relevant for addressing this preliminary objection by the European Communities. The Panel will first assess whether the Bananas Understanding bars the United States from bringing this compliance challenge, by first looking at the language of the Understanding. Only if the Panel was to find that the Bananas Understanding bars the United States from bringing this dispute, would the Panel then turn to assessing, as suggested by the European Communities, whether the Understanding indeed qualifies as a mutually agreed solution,

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[437] Final written version of the European Communities' opening statement at the substantive meeting of the Panel with parties and third parties, paras. 1-2.

[438] See summary of the European Communities' main arguments under this preliminary issue, in paras. 7.39 to 7.62 above.

[439] European Communities' first written submission, para. 43.

[440] Ibid.

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

[442] European Communities' first written submission, para. 45.

[443] Ibid.

whether it qualifies as an agreement binding on the United States for the purposes of WTO dispute settlement, or whether the application of the principle of good faith on the facts of this case would otherwise bar the United States from challenging the Cotonou Preference.

7.89 The Panel will follow the approach of the panel in *India – Autos*: it will conduct a case-specific analysis of the preliminary issue raised by the European Communities. Indeed, in the *India – Autos* dispute, in which the question of whether a mutually agreed solution can prevent a party from bringing a dispute was raised, the panel noted that:

> "Without clear guidance in the DSU, this question raises an important systemic issue. ... There may be significant differences between the provisions of mutually agreed solutions from case to case, which may ... make it difficult to draw general conclusions as to the relevance of [mutually agreed] solutions to subsequent proceedings other than on a case by case basis."[444]

7.90 Further, the panel in *India – Autos* found that it "need[ed] to consider … the terms of the MAS"[445] because "[u]ltimately, it is the terms of the MAS that are the only possible source of any restriction on our jurisdiction."[446] The Panel agrees with the European Communities' argument in these proceedings that "the analysis of the legal status and effect of the Understanding should be based on its content and on the confirmations contained in the Letters exchanged between the parties, where their true common intentions and mutual understandings and undertakings are expressed."[447]

7.91 The Panel intends to address this preliminary issue raised by the European Communities. At the same time, however, the Panel does not consider it necessary for the resolution of this dispute to address the more general issue of whether or not mutually agreed solutions or legally binding agreements between parties to a dispute may prevent parties to such instruments from bringing compliance disputes. The Panel agrees with the panel in *India – Autos* that this general issue "is not expressly addressed in the DSU".[448] The Panel also recalls that, under Article 3.2 of the DSU, the WTO dispute settlement system "serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law." Further, under the same provision, "[r]ecommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements."

7.92 With regard to the method of assessment, the panel in *India – Autos* recognized that "[a]s [an] MAS is not a covered agreement, it is not expressly subject to the DSU requirement to utilise customary rules of interpretation of international law." [449] Nevertheless, that panel also stated that:

> "[S]ince [the MAS in question] is an agreement among States, the Panel finds it appropriate to address the terms of this agreement in accordance with the customary rules of interpretation of international law. It will therefore consider the ordinary meaning of the terms of the MAS in light of their context and taking into account their object and purpose."[450]

7.93 In the light of that statement by the panel in *India – Autos* and given the argument of the European Communities that the Bananas Understanding would qualify as a mutually agreed solution,

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[444] Panel Report on *India – Autos*, para. 7.116 (footnote omitted).
[445] Ibid., para. 7.117.
[446] Ibid.
[447] European Communities' first written submission, para. 41.
[448] Panel Report on *India – Autos*, para. 7.114.
[449] Ibid., para. 7.118.
[450] Ibid.

this Panel will analyse the terms of the Bananas Understanding in accordance with the customary rules of interpretation of international law, as expressed in Articles 31 and 32 of the Vienna Convention on the Law of Treaties to establish whether the Bananas Understanding prevents the United States from bringing this compliance dispute. This is without prejudice to the actual legal status of the Bananas Understanding, which the Panel will not address at this stage.

(ii) The terms and main elements of the Bananas Understanding

7.94 Turning to the analysis of the terms of the Bananas Understanding, the Panel notes that the Understanding provides that "[t]he European Commission and the United States have identified the means by which the long-standing dispute over the EC's banana import regime can be resolved."[451]

7.95 The Bananas Understanding sets out various future steps to be taken by its parties, who are also the parties to the dispute before this Panel. The Understanding first addresses the three distinct steps to be taken by the European Communities following the adoption of the Understanding. First, the Understanding identifies the last, third step:

> "In accordance with Article 16(1) of Regulation No. (EC) 404/93 (as amended by Regulation No. (EC) 216/2001), *the European Communities (EC) will introduce a Tariff Only regime for imports of bananas no later than 1 January 2006.*"[452] (emphasis added).

7.96 Subsequently, the Bananas Understanding identifies the two initial steps to be implemented by the European Communities in the following terms:

> "In the interim, the EC will implement an import regime on the basis of historical licensing as follows:
>
> 1. Effective 1 July 2001, the EC will implement an import regime on the basis of historical licensing as set out in Annex 1.
>
> 2. Effective as soon as possible thereafter, subject to Council and European Parliament approval and to adoption of the Article XIII waiver referred to in paragraph E, the EC will implement an import regime on the basis of historical licensing as set out in Annex 2. The Commission will seek to obtain the implementation of such an import regime as soon as possible."[453]

7.97 As for the United States, the Bananas Understanding prescribes two main steps. First:

> "The United States will lift its reserve concerning the waiver of Article I of the GATT 1994 that the EC has requested for preferential access to the EC of goods originating in ACP states signatory to the Cotonou Agreement; and will actively work towards promoting the acceptance of an EC request for a waiver of Article XIII of the GATT 1994 needed for the management of quota C under the import regime described in paragraph C(2) until 31 December 2005."[454]

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[451] See Bananas Understanding, para. A, 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.

[452] Ibid., para. B.

[453] Ibid., para. C.

[454] Ibid., para. E.

7.98 Second:

> "With respect to the United States' imposition of increased duties applied to certain EC products as of 19 April 1999 covering trade in an amount of US$191.4 million per year (the "increased duties"):
>
> 1. Upon implementation of the import regime described in paragraph C(1), the United States will provisionally suspend its imposition of the increased duties.
>
> 2. Upon implementation of the import regime described in paragraph C(2), the United States will terminate its imposition of the increased duties."[455]

7.99 The Bananas Understanding adds that "[t]he United States may reimpose the increased duties if the import regime described in paragraph C(2) does not enter into force by 1 January 2002."[456]

7.100 Without addressing the legal status of the Bananas Understanding, the Panel agrees with the European Communities that, as Article 3.7 of the DSU provides, mutually agreed solutions constitute the "clearly preferred" solution to WTO disputes. Also, the Panel recognizes the systemic importance of mutually agreed solutions for WTO dispute settlement, and the importance of parties complying with the terms of such a mutually agreed solution.

7.101 Nevertheless, the Panel reaches a different conclusion on Article 3.7 of the DSU than the European Communities on whether the Bananas Understanding can bar the United States from bringing this compliance challenge. Indeed, Article 3.7 of the DSU also provides that "[t]he aim of the [WTO] dispute settlement mechanism is to secure a *positive solution* to a dispute" (emphasis added).

7.102 Further, under Article 3.2 of the DSU, "the dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system", and one of the objectives of the WTO dispute settlement system is "to preserve the rights and obligations of Members under the covered agreements".

7.103 Also, under Article 3.3 of the DSU:

> "The *prompt settlement* of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member *is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members*" (emphasis added).

7.104 Finally, pursuant to Article 3.4 of the DSU, "[r]ecommendations or rulings made by the DSB shall be aimed at achieving a *satisfactory settlement* of the matter in accordance with the rights and obligations under [the DSU]" (emphasis added).

7.105 Accordingly, the Panel considers that any alleged solution to WTO disputes, including a mutually agreed solution, must "secure a positive solution" to the dispute in the sense of Article 3.7 of the DSU. This requirement also applies to a solution that is alleged to be a "clearly preferred" or a

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[455] See Bananas Understanding, paras. D.1 and D.2, 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.

[456] Ibid., para. D.3.

legally binding one, as the European Communities argues in regard to the Bananas Understanding. The Panel has already noted the emphasis in the DSU on the prompt settlement of disputes and on the "central" role of WTO dispute settlement in providing security and predictability to the multilateral trading system. Given such emphasis, any solution to a WTO dispute can lead to a positive resolution of a dispute only if the solution provides an overall satisfactory and effective settlement to the dispute in question in the sense of Article 3.4 of the DSU.

7.106 The Panel notes that the parties do not contest the fact that both parties complied with intermediate steps identified in the Bananas Understanding. Indeed, the United States recognizes that the European Communities complied with its obligations for the first two interim phases set out in the Understanding (i.e., implementing an interim import regime for bananas on the basis of historical licensing as set out in the annexes of the Understanding). In turn, the European Communities recognizes that the United States has complied with its main obligations under the Understanding (i.e., provisionally suspending, and later terminating, its imposition of increased duties to certain EC products, as well as lifting its reserve concerning the adoption of the waivers requested by the European Communities).

7.107 Nevertheless, the Panel considers that ultimately the Bananas Understanding did not constitute a positive solution and an effective settlement to the dispute in question.[457] The Panel reaches this view for the following three reasons *taken together*:

(a) The Bananas Understanding provides only for a means, i.e. a series of future steps, for resolving and settling the dispute;

(b) The adoption of the Bananas Understanding was subsequent to recommendations, rulings and suggestions by the DSB; and,

(c) Parties have made conflicting communications to the WTO concerning the Bananas Understanding.

7.108 Before turning to these three issues, the Panel recalls that one of the main arguments of the European Communities under this preliminary issue is that the Bananas Understanding is a mutually agreed solution or a legally binding agreement for the purposes of WTO dispute settlement. The Panel does not address that argument at this point; however, the Panel does note that, assuming that the Bananas Understanding qualifies as a mutually agreed solution or a legally binding agreement for the purposes of WTO dispute settlement, there is a clear requirement for it to be consistent with the covered agreements.

7.109 Article 3.7 of the DSU not only expresses a "clear preference" for mutually agreed solutions, it also provides that "[a] solution mutually acceptable to the parties to a dispute *and consistent with the covered agreements* is clearly to be preferred." (emphasis added) Article 3.5 of the DSU confirms this requirement of conformity in regard to all solutions, not only mutually agreed solutions, by stipulating that:

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

[457] Cfr. United States' response to Panel question No. 47, para. 84.

7.110 This obligation of conformity is closely related to the requirement that an alleged mutually agreed solution or legally binding agreement can prevent the United States from bringing this compliance challenge *only* if such alleged mutually agreed solution or legally binding agreement provides a positive solution and effective settlement of the dispute. An alleged mutually agreed solution or legally binding agreement could hardly provide a positive solution or effective settlement for the purposes of WTO dispute settlement without being in conformity with the covered agreements.

(iii) The Bananas Understanding provides only for a means for resolving and settling the dispute

7.111 As the analysis of the terms and main elements of the Bananas Understanding shows, the essence of the Understanding is a series of staged future steps that both sides agreed to take over a period of several years following the adoption of the Understanding.

7.112 The Panel notes that, by its own terms, the Bananas Understanding "identified the *means by which* the long-standing dispute over the [European Communities'] banana import regime *can be resolved*"[458] (emphasis added). In the light of that language and the various subsequent steps set out in the Bananas Understanding, it is difficult to see how the Bananas Understanding, even if it were an alleged mutually agreed solution or a binding agreement, could be an effective *solution* to a dispute in the absence of parties' full compliance with all the steps set out therein.

7.113 Also, as indicated earlier, the Panel considers that one of the main functions of the Bananas Understanding, if it were a mutually agreed solution or a binding agreement, as the European Communities argues, would be to provide an effective settlement to the dispute in question. The Panel agrees with the panel in *India – Autos*, which was considering a mutually agreed solution providing for future steps by its parties, that:

> "It is certainly reasonable to assume, particularly on the basis of Article 3 of the DSU, ... 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."[459]

7.114 The Panel has not been called upon to assess, for the purposes of resolving the current dispute, whether the steps set out in an alleged mutually agreed solution or other legally binding agreement between the parties to a dispute may be enforced under the DSU.

7.115 In any event, one of the reasons for the "clear preference" for mutually agreed solutions under Article 3.7 of the DSU, would seem to be that, by virtue of the mutual agreement of the parties that they involve, such solutions are supposed to provide the most effective solution and settlement to the dispute in question.

7.116 In this respect, an alleged mutually agreed solution or binding agreement that essentially serves to provide for future steps by its parties, like the Bananas Understanding, can only "secure a positive solution" in the sense of Article 3.7 of the DSU after implementation, because it is inseparably linked to those future steps and to full compliance by the parties with each of those steps. In other words, for the purposes of providing a positive solution and effective settlement to the dispute in question, the full effect of the Bananas Understanding would be realized only after parties' compliance with all the steps set out in the Understanding.

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[458] Bananas Understanding, para. A, 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.

[459] Panel Report on *India – Autos*, para. 7.113.

7.117 The Panel recalls the importance of the requirement of consistency with the covered agreements of all solutions to WTO disputes. Without assessing the legal status of the Bananas Understanding, the Panel considers that that requirement also applies to an alleged mutually agreed solution or legally binding solution that, like the Bananas Understanding, provides for a series of staged future steps by its parties.

7.118 Pursuant to Articles 3.7 and 3.5 of the DSU, any mutually agreed solution shall be consistent with the covered agreements. By virtue of Article 3.5 of the DSU, the same requirement of consistency with the covered agreements applies to an alleged legally binding agreement that is intended to provide an effective solution to a particular dispute.

7.119 This link between on the one hand, alleged mutually agreed solutions or legally binding agreements and, on the other hand, the steps set out in such solutions or agreements, in the context of compliance with the covered agreements, is perhaps more obvious for alleged mutually agreed solutions or legally binding agreements recording the implementation of past steps agreed upon by the parties. However, despite the different time perspective, the same link is equally valid in the context of alleged mutually agreed solutions or legally binding agreements setting out future steps.

7.120 In the light of that requirement of conformity with the covered agreements, the Panel remains convinced that a complainant must have the right of having recourse to WTO dispute settlement, under the DSU, in order to review the conformity with the covered agreements of a measure purportedly taken to implement a step set out in an alleged mutually agreed solution or other legally binding agreement.

(iv) The adoption of the Bananas Understanding subsequent to recommendations and suggestions by the DSB

7.121 The fact that the parties adopted the Bananas Understanding subsequent to a series of reports in this dispute by panels and the Appellate Body establishing inconsistency with the covered agreements constitutes relevant context for assessing the European Communities' preliminary objection.[460]

7.122 The Dispute Settlement Body adopted the relevant reports with recommendations that the European Communities bring its measures into compliance, and suggestions how the European Communities might do that made in the related first compliance proceeding brought by Ecuador.[461] Through these recommendations and suggestions, the DSB repeatedly tried to promote a resolution of this dispute.

7.123 The European Communities argues that "[a]s consideration for entering into the [Bananas] Understanding, the United States obtained a new EC banana import regime that would be in place from July 1, 2001 and until January 1, 2006".[462] The European Communities adds that:

> "[T]he [Bananas] Understanding does not contain any express provision imposing on the European Communities the obligation to implement a tariff only regime. Paragraph B [of the Understanding] makes a simple reference to a provision of the European Communities' secondary legislation, which reflected the political decision

[460] But see European Communities' response to Panel question No. 11, para. 20.

[461] See Minutes of the Meeting of the Dispute Settlement Body Held in the Centre William Rappard on 25 September 1997, WT/DSB/M/37 of 4 November 1997, p. 27; Minutes of the Meeting of the Dispute Settlement Body Held in the Centre William Rappard on 6 May 1999, WT/DSB/M/61 of 30 June 1999; and Minutes of the Meeting of the Dispute Settlement Body Held in the Centre William Rappard on 19 April 1999, WT/DSB/M/59 of 3 June 1999.

[462] European Communities' second written submission, para. 8.

> of the European Communities to change its banana import regime. This political decision had already been taken *before* the signing of the Understanding between the United States and the European Communities and their reaching an agreement on the appropriate 'measures taken to comply'. This is confirmed by the fact that paragraph B refers to an already existing piece of European Communities' legislation."[463]

7.124 To this argument, the United States has responded that:

> "Paragraph B [of the Bananas Understanding] states that the EC 'will introduce a Tariff Only regime for imports of bananas no later than 1 January 2006.' [A]lthough chronologically this would have been the last step to be taken, it is the first step outlined in the Understanding. The EC's argument that this paragraph is just a 'simple reference' to secondary legislation 'which reflected the political decision of the European Communities to change its banana import regime'[464] 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."[465]

7.125 The European Communities further adds that:

> "[T]he [Bananas] 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. At the time the Understanding was signed the only characteristic of the Cotonou Preference that was known to the parties and, therefore, was accepted by both of them 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*', as provided in Article 1 of Annex V to the Cotonou Agreement. Therefore, as far as the United States is concerned, its acceptance of the Cotonou Preference is not qualified in any way."[466]

7.126 The European Communities notified the Bananas Understanding with the following communication:

> "The European Communities (EC) wish to notify the Dispute Settlement Body (DSB) that they have reached, 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)*"[467] (emphasis added).

7.127 Notwithstanding the European Communities' arguments, the Panel notes a close link between each of the following: (i) the DSB recommendations and related suggestions made previously in this

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[463] European Communities' second written submission, para. 43. See also European Communities' response to Panel question No. 14, paras. 30-33, and question No. 72, para. 121.

[464] (*footnote original*) Second Written Submission by the European Communities, para. 43.

[465] Written version of United States' opening statement during substantive meeting with the parties and third parties, para. 9.

[466] European Communities' second written submission, para. 12.

[467] *EC – Bananas III*, Notification of Mutually Agreed Solution (WT/DS27/58), 2 July 2001, p. 1.

dispute; (ii) the third, final step foreseen by the Bananas Understanding (i.e., the introduction by the European Communities of "a Tariff Only regime for imports of bananas no later than 1 January 2006"); and, (iii) the measures contested by the United States before this Panel.

7.128 As mentioned earlier, the Panel has not been called upon to assess whether, beyond the possibility of having alleged implementation steps reviewed under the DSU, the steps to be taken by parties under an alleged mutually agreed solution or legally binding agreement may be enforced under the DSU. In any event, the close link between the Bananas Understanding and the recommendations and related suggestions of the DSB underscores the relevance of the Bananas Understanding for the resolution and settlement of this dispute. At the same time, the link between the DSB recommendations and suggestions made previously in this dispute, the third, final step, foreseen by the Bananas Understanding, and the measures contested by the United States before this Panel confirms that the Bananas Understanding in itself cannot prevent the United States from bringing this compliance dispute.

7.129 Given those links, parties' compliance with all future steps set out in the Bananas Understanding is an even more important precondition of a positive solution and an effective settlement of the dispute. However, while the United States recognizes the European Communities' compliance with the first two steps under the Bananas Understanding, the United States contests whether the European Communities has complied with the third step: "to introduce a Tariff Only regime for imports of bananas no later than 1 January 2006"[468]:[469]

> "[T]he [Bananas] Understanding sets out a series of steps. Two significant steps were to be achieved by July 1, 2001, and January 1, 2002. As incentive to ensure that the EC took those steps, the United States agreed to first provisionally suspend its imposition of increased duties and then terminate the imposition of increased duties that the DSB had authorized the United States to apply. This only proves that both the United States and the EC complied with what is set out in paragraphs C and D of the Understanding. Up to that point, there had yet to be full compliance by the EC. Per the terms of the Understanding, there was an additional step to be taken."[470]

7.130 Further, in its compliance challenge, the United States challenges whether the current European Communities' bananas import regime is in conformity with the covered agreements.

(v) Parties' conflicting communications to the WTO concerning the Bananas Understanding

7.131 Article 3.6 of the DSU provides that:

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

7.132 In addition to conformity with the covered agreements, notification is the other main requirement with regard to mutually agreed solutions under the DSU. The Panel notes that Article 3.6 of the DSU uses the passive voice, and it does not specify whether the parties shall notify a mutually

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[468] Bananas Understanding, para. B, 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.

[469] Written version of United States' opening statement during substantive meeting with the parties and third parties, para. 14.

[470] Ibid.

agreed solution separately or jointly, or whether notification by one of the parties to a mutually agreed solution is sufficient, and if so, whether the complainant or the respondent shall make the notification.

7.133 Accordingly, the Panel does not address whether the Bananas Understanding was notified properly under Article 3.6 of the DSU or whether, as a result, this notification would affect whether it could qualify as a mutually agreed solution. At the same time, the Panel considers that the explicit notification requirement under Article 3.6 of the DSU is evidence of the importance that the DSU attaches to the notification of mutually agreed solutions to the WTO. Thus, for the purposes of WTO dispute settlement, the reaching of an alleged mutually agreed solution between parties to a dispute needs to be complemented with notifying such agreement to all WTO Members. The indispensability of this latter, multilateral element of mutually agreed solutions is underscored by the requirement, under Article 3.6 of the DSU, of notifying mutually agreed solutions not only to one WTO body or to the WTO in general but to the "DSB and the relevant Councils and Committees", and also by the explicit provision in Article 3.6 that in those bodies "any Member may raise any point relating thereto."

7.134 Article 3.5 of the DSU, the provision immediately preceding Article 3.6, sets out two basic requirements for "[a]ll solutions to matters formally raised under the consultation and dispute settlement provisions of the covered agreements": (i) they "shall be consistent with [the covered] agreements"; and, (ii) they "shall not nullify or impair benefits accruing to any Member under [the covered] agreements, nor impede the attainment of any objective of those agreements."

7.135 The fulfilment of these two basic requirements of Article 3.5 of the DSU is an indispensable multilateral element of "[a]ll solutions to matters formally raised under the consultation and dispute settlement provisions of the covered agreements", including any alleged mutually agreed solution or legally binding agreement that is intended to provide a positive solution and effective settlement to a dispute. Notification to the WTO membership is an additional multilateral element specific to mutually agreed solutions because, unlike other solutions to disputes, mutually agreed solutions are usually not developed multilaterally.

7.136 It is a matter of fact that in this dispute the European Communities sent to the DSB a communication, dated 22 June 2001 entitled "Notification of a Mutually Agreed Solution".[471] That communication stated that "[t]he European Communities (EC) wish to notify the Dispute Settlement Body (DSB) that they have reached, with the United States of America and Ecuador, a mutually satisfactory solution within the meaning of Article 3.6 of the DSU"[472], and it reproduced the text of the Bananas Understanding. This communication by the respondent was closely followed by a separate communication from the complainant, dated 26 June 2001, stating that the United States:

> "[Had] received and reviewed the EC's separate notification of 22 June 2001, to the Dispute Settlement Body (DSB) of our Understanding on bananas. As we have explained to the EC during bilateral discussions last week and indicated at meetings of the DSB, the Understanding identifies 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"[473] (emphasis added).

7.137 This latter communication by the United States also reproduced the text of the Bananas Understanding, with the same language as the Bananas Understanding annexed to the

[471] See *EC – Bananas III*, Notification of Mutually Agreed Solution (WT/DS27/58), 2 July 2001, p. 1.
[472] See ibid.
[473] *EC – Bananas III*, Communication from the United States (WT/DS27/59), 2 July 2001, p. 1.

European Communities' communication. Also, the United States acknowledges that it signed the Bananas Understanding.[474] Without assessing whether the Bananas Understanding is a mutually agreed solution or legally binding agreement, the Panel notes that these circumstances show that the Bananas Understanding created an important bilateral link between the United States and the European Communities. At the same time, these circumstances also show that almost immediately after the European Communities' attempt to accord a potential multilateral element to the Bananas Understanding, the United States called into question the multilateral status of that Understanding and its role in definitively resolving the dispute.

7.138 As noted above, the Panel does not need to assess whether the Bananas Understanding was notified properly under Article 3.6 of the DSU or whether, as a result, the Understanding could qualify as a mutually agreed solution. However, the Panel notes that, under Article 3.6 of the DSU, so far nearly all mutually agreed solutions have been notified by the respondent and the complainant (whether jointly or separately), with two exceptions where the mutually agreed solution was notified by the complainant only.[475] The Panel interprets this practice as illustrating the importance of the complainant's involvement in, or at least its consent to, not only the bilateral but also the multilateral element, i.e. the notification to the DSB and relevant Councils and Committees, of any alleged mutually agreed solution.

7.139 As mentioned earlier, under Article 3.5 of the DSU, "[a]ll solutions to matters formally raised under the consultation and dispute settlement provisions of the covered agreements ... shall not nullify or impair benefits accruing to any Member under [the covered] agreements". If a solution to a dispute potentially affects the benefits accruing to WTO Members, it is first and foremost the benefits accruing to the complainant in the dispute that might be affected. This is particularly true for an alleged mutually agreed solution or legally binding agreement that the respondent argues would bar the complainant from bringing a challenge against a measure allegedly implementing a step set out in such alleged mutually agreed solution or legally binding agreement.

7.140 The Panel notes that, immediately following the respondent's communication of the Bananas Understanding to the WTO, the complainant in the dispute contested the multilateral status of the Understanding and its role in definitively resolving the dispute. Accordingly, in the light of this fact and of the requirement set out in Article 3.5 of the DSU for all solutions, it is difficult for the Panel to see how the Bananas Understanding could provide a positive solution and an effective settlement to the dispute.

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

(vi) Remaining key arguments raised under this preliminary issue

7.142 The Panel will now turn to the remaining key arguments raised under this preliminary issue, namely: first, whether, through the Bananas Understanding, the United States accepted the existence of the ACP preference beyond 2005; and, second, the European Communities' arguments on good faith.

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[474] See, for example, United States' first written submission, para. 7.

[475] See *Mexico – Certain Pricing Measures for Customs Valuation and Other Purposes*, Communication from Guatemala (WT/DS298/2), 1 September 2005; and *Colombia – Customs Measures on Importation of Certain Goods from Panama*, Notification of a Mutually Agreed Solution (WT/DS348/10), 7 December 2006.

Did the United States accept, through the Bananas Understanding, the existence of the ACP preference beyond 2005?

7.143 As noted earlier, one of the key arguments of the European Communities under this preliminary issue is that, through the Bananas Understanding:

> "The United States has entered into an international agreement with the European Communities accepting the existence of the Cotonou Preference until the end of 2007."[476]

7.144 For the purposes of this compliance dispute, the relevant period is the one starting on 1 January 2006, when the European Communities introduced its current banana import regime, contested by the United States. Accordingly, the question is whether the European Communities makes a prima facie case that, through the Bananas Understanding, the United States has accepted the extension of the ACP preference beyond 2005.

7.145 The Bananas Understanding does not specify its period of applicability. While the Understanding prescribes a step to be taken by the European Communities, the introduction of a tariff only regime for imports of bananas, "no later than 1 January 2006"[477], it does not explicitly prescribe any steps to be taken by the United States with effect beyond 2005.

7.146 In arguing that, through the Bananas Understanding, the United States has accepted the ACP preference, the European Communities must be making reference to the following step prescribed in the Understanding for the United States:

> "The United States will lift its reserve concerning the waiver of Article I of the GATT 1994 that the EC has requested for preferential access to the EC of goods originating in ACP States signatory to the Cotonou Agreement; and will actively work towards promoting the acceptance of an EC request for a waiver of Article XIII of the GATT 1994 needed for the management of quota C under the import regime described in paragraph C(2) until 31 December 2005."[478]

7.147 While this language in the Bananas Understanding might reflect an indirect acceptance of the ACP preference until the end of 2005, it does not appear to mention any acceptance of the ACP preference by the United States beyond 2005. Indeed, the second element in the Understanding with the United States referred to in the preceding paragraph, relating to the waiver under Article XIII of the GATT 1994 is explicitly limited to the end of 2005. In other words, it cannot extend to the period after 2005. Further, the first element of the step to be taken by the United States, relating to the waiver under Article I of the GATT 1994, requires the United States to lift its reserve in the context of a waiver requested by the European Communities.

7.148 The acceptance of that waiver request, like any waiver request, does not depend only on one Member, the United States, but on all WTO Members. The Bananas Understanding also comprises the execution of phases and requires the implementation of several key features, which demand the collective action of WTO Members.

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[476] European Communities' first written submission, para. 16.

[477] Bananas Understanding, para. B, 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.

[478] Ibid., para. E.

7.149 Since the United States could have accepted the ACP preference only indirectly through committing to lifting its reserve concerning a waiver request, the period for which the United States might have indirectly accepted the ACP preference depends ultimately on the waiver being adopted partly as a result of the United States' step under the Bananas Understanding.

7.150 The waivers ultimately adopted, namely the Doha waivers from Article I:1 and Articles XIII:1 and XIII:2 of the GATT 1994[479], do not provide that it would unconditionally apply beyond 2005 in regard to bananas. Even the European Communities accepts that the Doha Waiver from Article I:1 of the GATT 1994 sets out conditions for its applicability to bananas in the period between 1 January 2006 and the overall expiration of the waiver on 31 December 2007. In turn, the Doha Waiver from Articles XIII:1 and XIII:2 of the GATT 1994 expired by its own terms on 31 December 2005.

7.151 In the light of the above, the Panel finds that the European Communities has not made a prima facie case for one of its central arguments under this preliminary issue, namely that the United States would have accepted, through the Bananas Understanding, the extension of the ACP preference beyond 2005. As a consequence, the Panel fails to see how, as argued by the European Communities, the United States would be prevented from bringing this compliance dispute against the ACP preference for the period starting on 1 January 2006.

7.152 This is underscored by the fact that one of the main points of contention between the parties to this compliance dispute concerns the conditions of the validity of the Doha Waiver from Article I:1 of the GATT 1994 to bananas in 2006-2007, and in particular the question whether the European Communities effectively complied with the final step envisaged in the Bananas Understanding and what implications that might have for the validity of the waiver for bananas in 2006-2007.

Arguments by the European Communities concerning good faith

7.153 As mentioned earlier, the European Communities argues that "the principle of good faith ... bars the United States from challenging the Cotonou Preference".[480] In the European Communities' view:

> "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 (i.e., an EC import regime favourable to the US-based banana trading companies between July 1, 2001 and December 31, 2005) and, after it had reaped all benefits, the United States were allowed to avoid complying with its obligations towards the European Communities (i.e., to allow the existence of the Cotonou Preference until the end of 2007)."[481]

7.154 Further, the European Communities argues that:

> "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'

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

[480] European Communities' second written submission, para. 39.

[481] Ibid., para. 13.

> character of the dispute resolution system. This would be inconsistent with the purpose of the DSU as reflected in Article 3.10 and with the principles enshrined in Article 3.7 (where it is stated that mutually agreed solutions are to be preferred)."[482]

7.155 The Panel starts by noting that the United States recognizes that the European Communities has complied with its obligations for the first two interim phases set out in the Understanding (i.e., implementing an interim import regime for bananas on the basis of historical licensing as set out in the annexes of the Understanding), and the European Communities recognizes that the United States has complied with its main obligations under the Understanding (i.e., provisionally suspending its imposition of increased duties to certain EC products and lifting its reserve concerning the adoption of the waivers requested by the European Communities).

7.156 At the same time, both parties suggest that compliance with Bananas Understanding remained partial. The United States contests whether the European Communities has complied with the third phase set out in the Understanding (i.e., introducing a tariff only regime for imports of bananas). In turn, the European Communities requests the Panel to enforce the Bananas Understanding, because in its view the United States must now comply with "its obligations towards the European Communities (i.e., to allow the existence of the Cotonou Preference until the end of 2007)".[483]

7.157 In view of the above, the European Communities' argument about an alleged parties' one-sided compliance with the Bananas Understanding has limited relevance for assessing whether the Bananas Understanding prevents the United States from bringing this compliance dispute.

7.158 Finally, as to the arguments of the European Communities on good faith, the Panel notes that the United States is not challenging or questioning the Bananas Understanding itself, but rather is challenging the conformity of the European Communities' bananas import regime with the European Communities' obligations under the WTO agreements.

7.159 As mentioned above, the Panel attaches great importance to the conformity of an alleged mutually agreed solution or legally binding agreement, including the future steps set out therein, with the covered agreements, as well as to the possibility of the complainant to have recourse to WTO dispute settlement to review the issue of conformity. Nowhere in the Bananas Understanding has the United States accepted that it would forego its right to challenge the conformity with the covered agreements of any measure that the European Communities might take to implement a step set out in the Bananas Understanding.

7.160 The Panel notes that in *US – Offset Act (Byrd Amendment)* the Appellate Body stated that "there is a basis for a dispute settlement panel to determine, in an appropriate case, whether a Member has not acted in good faith"[484]. However, the Appellate Body added that:

> "Nothing ... in the covered agreements supports the conclusion that simply because a WTO Member is found to have violated a substantive treaty provision, it has therefore not acted in good faith. In our view, it would be necessary to prove more than mere violation to support such a conclusion."[485]

7.161 Interpreting those considerations by the Appellate Body, the panel in *Argentina – Poultry Anti-Dumping Duties* stated that:

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[482] European Communities' second written submission, para. 18.
[483] Ibid., para. 13.
[484] Appellate Body Report on *US – Offset Act (Byrd Amendment)*, para. 297.
[485] Ibid., para. 298.

> "[T]wo conditions must be satisfied before a Member may be found to have failed to act in good faith. First, the Member must have violated a substantive provision of the WTO agreements. Second, there must be something 'more than mere violation'."[486]

7.162 Article 3.10 of the DSU provides in relevant part that "if a dispute arises, all Members will engage in these procedures in good faith in an effort to resolve the dispute." The European Communities has not succeeded in making a prima facie case for the alleged violation of that provision, let alone also for something "more than mere violation".

7.163 In the light of the above, the Panel rejects the European Communities' arguments concerning good faith.

(vii) Conclusion

7.164 In the light of the foregoing analysis of the terms and context of the Bananas Understanding, the Panel concludes that, even if the Bananas Understanding qualified as a mutually agreed solution or a legally binding bilateral agreement at the time of its signature, it does not prevent the United States from bringing this compliance dispute. The Panel therefore does not assess whether the Bananas Understanding qualifies as a mutually agreed solution or a legally binding bilateral agreement, as argued by the European Communities. Nor does the Panel assess the arguments by the European Communities that the Bananas Understanding would constitute applicable rules of law for WTO dispute settlement.

7.165 In conclusion, the Panel considers that the European Communities has not succeeded in making a prima facie case in favour of its preliminary objection that the United States is barred from challenging the ACP preference because of the Bananas Understanding signed between the United States and the European Communities in April 2001. Accordingly, the Panel rejects this European Communities' preliminary objection.

E. 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. Summary of Parties' arguments

(a) The European Communities' arguments

7.166 The European Communities "requests the Panel ... to reject the [United States'] complaint in its entirety"[487] because "the United States has erroneously brought this complaint under the procedures of Article 21.5 of the DSU."[488] According to the European Communities, "[i]t is true that the United States' challenge relates to a product (i.e., bananas) that was the subject of dispute resolution between the United States and the European Communities in the past, culminating with the report of the Appellate Body in 1997."[489]

7.167 However, the European Communities contends in its first written submission of September 2007, "the import regime that [it] has in place today, and which the United States challenges with the current proceedings, is not a 'measure taken to comply' with the recommendations and rulings of the DSB in 1997."[490] The European Communities argues that, since its "current ...

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[486] Panel Report on *Argentina – Poultry Anti-Dumping Duties*, para. 7.36.
[487] European Communities' first written submission, para. 52.
[488] Ibid., para. 52.
[489] Ibid., para. 47.
[490] Ibid., para. 47.

banana import regime is not a 'measure taken to comply' with the 1997 rulings and recommendations"[491], "[i]f 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."[492] According to the European Communities:

> "To hold otherwise would amount to allowing the use of Article 21.5 of the DSU in order to challenge *any* measure relating to a product that has been the subject matter of dispute resolution in the past. Such an abuse of Article 21.5 (and its expedited procedures) would run against the nature and the object of Article 21.5 and the findings of the Appellate Body in the *Canada – Aircraft* case."[493]

7.168 According to the European Communities:

> "It is settled law that the 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. They cannot be used to challenge the legality of '*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.[494],[495]

7.169 The European Communities concedes that "[f]ollowing 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."[496] However, "[t]he 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."[497]

7.170 Referring the report of the Appellate Body in *US – Softwood Lumber IV (Article 21.5 - Canada)*, the European Communities notes that:

> "[T]he Appellate Body had found in its report ... that it is not 'up to the complaining Member alone to determine what constitutes the measure taken to comply. It is rather for the Panel itself to determine the ambit of its jurisdiction'. The Appellate Body also found ... that 'to be sure, characterizing an act by a Member as a measure taken to comply when the Member maintains otherwise is not something that should be done lightly by a panel'."[498]

7.171 According to the European Communities:

> "[A] determination of whether a particular measure constitutes a 'measure taken to comply' should be based on (i) the agreement reached between the parties (in our case the [Bananas] Understanding) and the rights and obligations undertaken in it (e.g., the measures that bring the termination of the retaliation rights); (ii) the timing of the

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[491] European Communities' first written submission, para. 51.
[492] Ibid.
[493] Ibid.
[494] *(footnote original)* See, for example, the Appellate Body report in *Canada – Measures affecting the export of civilian aircraft, Recourse by Brazil to Article 21.5 of the DSU*, WT/DS70/AB/RW, dated July 21, 2000 ("*Canada – Aircraft*"), at paragraph 36.
[495] European Communities' first written submission, para. 46.
[496] Final written version of the European Communities' opening oral statement at the substantive meeting of the Panel with the parties and third parties, para. 5.
[497] Ibid.
[498] European Communities' response to Panel question No. 12.

> various measures (e.g., was the decision to introduce the measure taken before the negotiation of the [Bananas] Understanding or after); and (iii) on whether there is a link between the DSB recommendations and rulings on the one hand and the measures taken on the other."[499]

7.172 On the one hand, the European Communities identifies specific measures it has taken since 1997 as measures taken to comply with the recommendations and rulings of the DSB in the *EC - Bananas III* dispute in 1997. On the other hand, the European Communities advances various arguments contending that its current banana import regime, introduced on 1 January 2006, is not a measure taken to comply.

(i) Alleged measures taken to comply identified by the European Communities

7.173 As to the measures allegedly taken to comply, the European Communities argues that it "had already taken measures to comply with the 1997 Appellate Body report in 1998, when it introduced a different banana import regime than the one found by the Appellate Body not to be in compliance with the WTO rules."[500] The European Communities adds that "as far as the banana dispute with the United States is concerned, the 'measures taken to comply' with the findings and recommendations of the Appellate Body in 1997 and the rulings and recommendations of the DSB in 1997 were taken by the European Communities in 2002."[501] In particular:

> "In compliance with the [Bananas Understanding], the European Communities introduced on January 1, 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 [Bananas] Understanding. This was the 'measure taken to comply' that was agreed with the United States."[502]

7.174 In response to the arguments of the United States about the relevance of paragraph B of the Bananas Understanding[503], the European Communities argues that:

> "[T]he Understanding between the European Communities and the United States is particularly relevant in determining whether the current banana import regime is a 'measure taken to comply'. In particular, the rights and obligations undertaken by both parties in the Understanding, the detailed description of the import regime to be implemented between 2002 and 2005 and the fact that the retaliation rights of the United States would be terminated upon the European Communities' implementation of the 2002-2005 import regime, taken together, establish that the 2002-2005 import regime was the 'measure taken to comply' that was agreed between the parties."[504]

7.175 Further, comparing its various bananas import regimes addressed in the Bananas Understanding, the European Communities points out that, in regard to the tariff-only regime to be introduced on 1 January 2006, the Understanding:

> "[M]akes simply a reference to that legislation and does not impose any relevant obligation on either party (e.g., the Understanding does not provide for any particular consequences for either party, if the tariff only import regime is not introduced by

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[499] European Communities' response to Panel question No. 7.
[500] European Communities' first written submission, para. 48.
[501] Ibid., para. 50.
[502] Ibid., para. 49.
[503] See United States' response to Panel question No. 44.
[504] European Communities' response to Panel question No. 4.

> January 1, 2006). This is in stark contrast with the 2002-2005 import regime, which (i) is described in great detail in the Understanding's two Annexes, (ii) its implementation brings the termination of the United States' retaliatory measures, and (iii) a potential non-implementation gave to the United States the right not to adhere to the Understanding."[505]

(ii) The current EC bananas import regime is not a measure taken to comply

7.176 The European Communities argues that its current bananas import regime, introduced on 1 January 2006, is not a measure taken to comply because the *EC – Bananas III* dispute ended before 2006 and its current bananas import regime does not have the necessary linkage to the 1997 recommendations and rulings adopted by the DSB in the *EC – Bananas III* dispute.

The *EC – Bananas III* dispute ended before 2006

7.177 According to the European Communities, its dispute with the United States, "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 [Bananas] Understanding and exchanged the Letters attached as an Exhibit to [the European Communities' first written] submission."[506] Also, "the tariff-quota based import regime with the characteristics agreed in Annex II of the [Bananas] Understanding [and introduced by the EC on 1 January 2002] ... was the 'measure taken to comply' that was agreed with the United States and this was the end of the banana dispute between the parties."[507]

7.178 The European Communities notes that the preamble of:

> "Council Regulation 2587/2001, adopted by the European Communities on December 19, 2001, which introduced the 2002-2005 banana import regime[,] ... states that the Regulation introduces the measures resulting from:
>
> > '... numerous close contacts with supplier countries and other interested parties to settle the disputes ... and to take into account of the conclusions of the panel set up under the dispute settlement system of the World Trade Organisation (WTO).'
>
> The European Communities notified this Regulation to the WTO on January 21, 2002 under the heading 'Status Report on the Implementation of the Recommendations and Rulings in the Dispute regarding EC-Regime for the importation, sale and distribution of bananas'. The notification states that 'by this Regulation the EC has implemented Phase 2 of the Understandings with the United States and Ecuador'."[508]

7.179 The European Communities adds that "the 'measures taken to comply' with the findings and recommendations of the Appellate Body in 1997 and the rulings and recommendations of the DSB in 1997 ... taken by the European Communities in 2002 ... were never challenged by the United States."[509] In particular, the European Communities argues that:

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[505] European Communities' response to Panel question No. 14.
[506] European Communities' first written submission, para. 48.
[507] Ibid., para. 49.
[508] European Communities' response to Panel question No. 13.
[509] European Communities' first written submission, para. 50.

> "The United States and the European Communities agreed in the Understanding in 2001 that the 'measure taken to comply' with the 1997 DSB recommendations and rulings would be the 2002-2005 banana import regime. If the United States had considered that the European Communities had failed to implement that 'measure taken to comply', the United States should have brought an Article 21.5 proceeding against that import regime at that time. However, the United States never challenged the 2002-2005 banana import regime. This means that the dispute that had led to the 1997 DSB recommendations and rulings was terminated upon the European Communities' implementation of the measure agreed with the United States."[510]

7.180 Further, according to the European Communities, "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."[511] In particular, the European Communities points out that:

> "The Understanding on Bananas provided that, as of July 1, 2001, the European Communities would implement an import regime on the basis of historical licensing and with certain characteristics defined in Annex 1 of the Understanding.[512] Upon the European Communities' implementation of this regime, the United States would provisionally suspend its retaliation measures."[513]

7.181 Furthermore:

> "[According to the Bananas Understanding, a]s soon as possible thereafter, the European Communities would implement another import regime on the basis of historical licensing with certain other characteristics defined in Annex 2 of the Understanding.[514] Upon the European Communities' implementation of that regime, the United States' right to suspend its concessions would be terminated.[515] The deadline for the implementation of that regime was January 1, 2002. If the European Communities failed to implement the new regime by that date, the United States would have the right to re-impose their retaliation measures.[516]
>
> The European Communities implemented the new import regime within the agreed deadline and the United States' right to suspend concessions was terminated. This was the end of the banana dispute between the United States and the European Communities.[517] The United States' agreement to have their retaliation rights terminated confirms this point: the right to suspend concessions must be

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[510] European Communities' response to Panel question No. 16. See also European Communities' first written submission, paras. 21 and 49.

[511] European Communities' first written submission, para. 49.

[512] *(footnote original)* See the Understanding, at paragraph C-1.

[513] European Communities' first written submission, para. 22.

[514] *(footnote original)* See the Understanding, at paragraph C-2.

[515] *(footnote original)* See the Understanding, at paragraph D-2.

[516] *(footnote original)* See the Understanding, at paragraph D-3.

[517] *(footnote original)* See the Status Report on the Implementation of the Recommendations and Rulings in the Dispute regarding European Communities – Regime for the Importation, Sale and Distribution of Bananas, WT/DS27/51/Add.25, distributed to the WTO on January 21, 2002.

> revoked once the defending WTO Member has fully complied with the DSB's recommendations and rulings.[518],[519]

7.182 According to the European Communities, under the Bananas Understanding:

> "The only case in which the United States would re-impose retaliatory measures was if the Phase II regime [set out in paragraph C-2 of the Bananas Understanding] '(did) not enter into force by 1 January 2002'. [T]he fact that the United States accepted to have their retaliation rights terminated upon the implementation of the tariff-quota-based import regime described in paragraph C-2 of the [Bananas] Understanding confirms that the implementation of that import regime was the agreed 'measure taken to comply'."[520]

7.183 Further, "[t]he fact that the Understanding provided for the *termination* and not for the continuation of the *suspension* of the retaliation rights of the United States after January 1, 2002 confirms that there was no dispute between the United States and the European Communities after that date."[521]

7.184 The European Communities adds that:

> "Article 22.8 of the DSU provides that retaliation measures must be terminated 'when a mutually agreed solution is reached'. In the present case, the United States agreed to terminate its retaliation measures upon implementation of phase 2 of the [Bananas] Understanding, i.e., the introduction of the 2002-2005 import regime. This is further evidence that the tariff only regime to be introduced in 2006 was not 'a measure taken to comply'."[522]

7.185 The European Communities also argues that "the issue of the implementation of the EC-Bananas III DSB recommendations and rulings was withdrawn from the DSB's agenda with the consent of all WTO members (including the United States), in accordance with Article 21.6 of the DSU."[523] Accordingly, the European Communities contends:

> "[A] compliance panel is excluded when a dispute has been settled. In fact, such a dispute is considered resolved once and for all. This is evidenced by the wording of Article 21.6 of the DSU, which specifies that the issue of implementation of the recommendations or rulings of the DSB stays on its agenda 'until the issue is resolved'. This obviously means that a dispute taken off the agenda is considered resolved."[524]

> <u>No linkage to the DSB recommendations and rulings of 1997</u>

7.186 The European Communities points out that "it is generally accepted that Article 21.5 establishes a link between the 'measures taken to comply' and the recommendations and rulings of the DSB and that the determination of the scope of the 'measures taken to comply' should involve an

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[518] *(footnote original)* See the Handbook on the WTO Dispute Settlement System, A WTO Secretariat Publication prepared for publication by the Legal Affairs Division and the Appellate Body, Cambridge University Press, at page 81.

[519] European Communities' first written submission, paras. 23-24.

[520] European Communities' second written submission, para. 44.

[521] European Communities' comments on United States' response to Panel question No. 22.

[522] European Communities' response to Panel question No. 8.

[523] European Communities' response to Panel question No. 20.

[524] Ibid.

examination of the recommendations and rulings contained in the original report adopted by the DSB.[525],[526] However, the European Communities contends, "there is no link between the recommendations and rulings of the DSB [adopted in 1997] and the political decision of the European Communities to introduce a tariff-only import regime by January 1, 2006."[527]

7.187 Invoking the report of the Appellate Body in *US – Softwood Lumber IV (Article 21.5 - Canada)*, the European Communities argues that "in determining whether a challenged measure is indeed a 'measure taken to comply', a panel must 'scrutinize the relationships' between the challenged measure and the DSB recommendations and rulings."[528] Further, the European Communities notes that "[t]he Appellate Body found ... that the determination 'may, depending on the particular facts, call for an examination of the timing, nature and effects of the various measures', as well as 'the factual and legal background against which a declared "measure taken to comply" is adopted'."[529]

7.188 According to the European Communities:

> "In the 1990s, the European Communities had in place a completely different banana import regime. That regime was based on the allocation of tariff quotas to various groups of banana exporting countries, coupled with a licensing system for the banana traders."[530]

7.189 Further, "the current banana import regime is radically different in design and effect from the 2002-2005 system, which ... was a 'measure taken to comply'."[531]

7.190 The European Communities also argues that:

> "A careful analysis of the findings and recommendations of the Appellate Body report in the *EC–Bananas III* case does not reveal any element that could support a conclusion that the European Communities was obliged to move into a tariff only regime in order to bring itself into compliance with the covered agreements. Quite to the contrary, the findings and recommendations of the Appellate Body allowed the European Communities to bring itself into compliance through the adoption of a revised, tariff-quota-based import regime with a different allocation of quotas and import licenses. There is no single finding or recommendation of the Appellate Body that could be complied with only through the introduction of a tariff only import regime."[532]

7.191 Likewise, in response to the argument of the United States that the Bananas Understanding "contemplated a series of steps that would culminate with the introduction of a 'tariff only' regime by January 1, 2006"[533], the European Communities argues that "the [Bananas] Understanding does not

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[525] *(footnote original)* See, for example, the report of the Appellate Body in *United States – Sunset reviews of anti-dumping measures on oil country tubular goods from Argentina, Recourse to Article 21.5 by Argentina*, dated April 12, 2007 ("*US – OCTG (Article 21.5) AB*"), at paragraph 142.

[526] European Communities' second written submission, para. 45.

[527] Ibid.

[528] European Communities' response to Panel question No. 12.

[529] Ibid.

[530] European Communities' first written submission, para. 18.

[531] Final written version of the European Communities' closing oral statement at the substantive meeting of the Panel with the parties and third parties, para. 6.

[532] European Communities' second written submission, para. 45.

[533] United States' second written submission, para. 46.

contain any express provision imposing on the European Communities the obligation to implement a tariff only regime."[534] The European Communities adds that:

> "Paragraph B [of the Bananas Understanding], to which the United States refers, 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 between the United States and the European Communities and their reaching an agreement on the appropriate 'measures taken to comply'. This is confirmed by the fact that paragraph B refers to an already existing piece of European Communities' legislation. Therefore, the United States wrongly asserts in ... its [second] written submission that the parties agreed in the [Bananas] Understanding that the tariff only regime would be a part of the 'measure taken to comply'. In light of the difficulties faced with the administration of the TRQ regime, the European Communities had indeed taken the decision to move to a more simplified tariff-only system over time."[535]

7.192 According to the European Communities:

> "The first piece of legislation providing for the introduction of a tariff-only banana import regime was Council Regulation 216/2001. However, the services of the European Communities had started discussing the introduction of a tariff only banana import regime even earlier. It is reminded that the Council Regulation establishing the common market in bananas required the European Commission to submit by 2001 proposals about the organisation of the common market after the end of 2002."[536]

7.193 Further:

> "[T]he fact that the European Communities introduced a tariff-only regime on January 1, 2006, in accordance with the provisions of Regulation 216/2001, does not have any legal significance for the European Communities' relations with the United States. The European Communities simply implemented its own legislation in accordance with its provisions."[537]

7.194 According to the European Communities "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, as it has been done in other product sectors."[538]

7.195 In response to a question by the Panel, the European Communities states that it agrees[539] with the argument raised by the ACP third parties that:

> "Article 21.5 proceedings must necessarily be initiated within a reasonable period of time from the date the recommendations and rulings to bring the matter into

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[534] European Communities' second written submission, para. 43.

[535] Ibid. The European Communities also argues that "[t]he introduction of the tariff-only import regime was decided by the European Communities at least 2 years before the signing of the [Bananas] Understanding." Final written version of the European Communities' closing oral statement at the substantive meeting of the Panel with the parties and third parties, para. 6.

[536] European Communities' response to Panel question No. 72.

[537] European Communities' response to Panel question No. 14.

[538] European Communities' second written submission, para. 45.

[539] See European Communities' response to Panel question No. 10.

> conformity with WTO obligations were adopted. In the present case, the recommendations and rulings of the Panel and the Appellate Body in the original dispute were adopted by the DSB in September 1997. Ten years can hardly be regarded as a reasonable period of time."[540]

7.196 Also, in response to the argument of the United States summarized by the European Communities as "an assertion that the Preamble of Regulation 1964/2005 refers to the arbitrations held in 2005 within the context of the Doha waiver and, hence, Regulation 1964/2005 must be considered as a measure taken to comply with the recommendations and rulings adopted by the DSB in 1997"[541], the European Communities contends that "this point [does not] suffice ... to establish a link between the tariff only regime and the recommendations and rulings of the DSB in 1997."[542] First:

> "[T]he arbitrations were part of the waiver granted by the WTO to the Cotonou Agreement. The Cotonou Agreement was only signed in 2000, i.e., 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."[543]

7.197 Second, the European Communities maintains that "the subject matter of the 2005 arbitrations has no relation to the 1997 DSB recommendations and rulings."[544] According to the European Communities:

> "[T]he Appellate Body had found in 1997 that certain aspects of the then applicable import regime of the European Communities violated certain WTO rules and, therefore, nullified or impaired certain benefits accruing to the complaining WTO Members. In contrast, the 2005 arbitrations sought to determine whether the new import regime of the European Communities would at least maintain the total market access that the MFN banana exporting countries enjoyed under the old regime. In a sense, the two subject matters can be said to be conflicting: the 1997 dispute aimed at preserving the WTO rights of the complainants, while the 2005 arbitrations aimed at simply preserving the conditions of access to the EC market which the complainants and all other MFN suppliers were enjoying under the former TRQ regime. Therefore, a Regulation adopted to conform to the aims of the 2005 arbitration cannot be a 'measure to comply' with the findings of the 1997 dispute."[545]

7.198 Third, the European Communities argues that "the arbitration arrangement supports the proposition that the tariff-quota-based import regime that was in place between January 1, 2002 and

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[540] ACP Countries' third party written submission, para. 65. See also European Communities' second written submission, para. 43.

[541] European Communities' second written submission, para. 46. The United States originally formulates that argument in the following way: "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 *Bananas III*." United States' second written submission, para. 48.

[542] European Communities' second written submission, para. 47.

[543] Ibid.

[544] Ibid., para. 48.

[545] Ibid.

December 31, 2005 was the 'measure taken to comply' with the DSB recommendations and rulings of 1997."[546] According to the European Communities,

> "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. This also strongly suggests that whatever market access problems the MFN suppliers had at the time the DSB adopted its recommendations and rulings in 1997, had already been corrected by 2002–2005. Indeed, if the MFN suppliers were not satisfied with their market access of 2002–2005 (as they were not satisfied with their market access in 1997), why would they insist that the level of their 2002–2005 market access be preserved? The fact that the import regime implemented by the European Communities between 2002 and 2005 satisfied the MFN suppliers' market access interests 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."[547]

7.199 In response to the United States invoking various EC statements and press releases[548], the European Communities points out that "none of these statements refer to the tariff-only system introduced in 2006 as a 'measure taken to comply' with the DSB's recommendations and rulings in *Bananas III*."[549] Rather, "[t]hose statements use terms such as 'to resolve this long-standing dispute', 'settling the longstanding WTO dispute', 'to put an end to the longstanding bananas dispute', and the like."[550] However, the European Communities sees a "difference in meaning [between] 'settling a dispute' and 'compliance' with DSB's recommendations and rulings"[551] because "[a] WTO Member might well be ready to go 'beyond' what is necessary for compliance, in order to avoid future disputes on a particular subject matter."[552] Referring to the Bananas Understanding, the European Communities argues that:

> "[I]t is undisputed that a mutually agreed solution may contain elements beyond those necessary for compliance with the recommendations and rulings of the DSB. It is also possible that a complaining party may demand less that full compliance or be satisfied with some other measure than compliance. The European Communities considers that once a complaining party has settled a dispute, through any measures it has agreed to, such party may not bring Article 21.5 proceedings."[553]

7.200 Further:

> "In any case, the European Communities does not consider that the Panel can take into consideration excerpts of public relations statements, prepared by the press service of the European Communities in different contexts and addressed to the general public. The European Communities considers that such press statements, by their very nature, cannot contain authoritative interpretations of complex legal issues. They are usually prepared by non-lawyers and aim to present to the general public a short and simplified version of a situation that is difficult to grasp and analyse,

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[546] European Communities' second written submission, para. 49.
[547] Ibid.
[548] See United States' second written submission, para. 49; and Exhibit US-8.
[549] European Communities' second written submission, para. 50.
[550] Ibid.
[551] Ibid.
[552] Ibid.
[553] European Communities' response to Panel question No. 8.

> sometimes even by legal specialists of the field. Therefore, their content cannot be used to replace proper legal analysis under the DSU."[554]

7.201 According to the European Communities, "[t]he 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."[555]

7.202 Accordingly, the European Communities "requests the Panel to disregard all press releases and the invitations to public consultation submitted by the United States."[556]

7.203 In response to a question by the Panel, the European Communities states that it agrees with the following argument by the ACP third parties and "pleads them in the alternative"[557] to the European Communities' other arguments:

> "To the extent that the dispute relates to a measure which has been adopted pursuant to the Doha waiver and other legal instruments which came into existence only after an earlier dispute, such measure cannot be regarded as being a measure taken to comply with the recommendations and rulings of the DSB adopted in the pre-existing earlier dispute."[558]

7.204 The European Communities notes that "the United States invites the Panel to determine whether the current banana import regime of the European Communities remains covered by the Doha waiver."[559] However, according to the European Communities,

> "Such determination depends exclusively on the interpretation of the conditions set by the Doha waiver and, therefore, it is unrelated to 'compliance with DSB rulings'. The conditions imposed by the waiver in relation to the new tariff-only regime are the result of negotiations that were not related to the DSB rulings and the European Communities' compliance with them. Therefore, a dispute over the continued existence of the Doha waiver should have been brought under a new dispute settlement case and not as a case under Article 21.5 of the DSU."[560]

7.205 In response to the argument by the United States that "the Panel should take the EC's argument [in the parallel compliance proceeding brought by Ecuador in 2007] that its current bananas regime implements a suggestion by the compliance panel in Bananas III as a concession by the EC that the measure taken by the EC on January 1, 2006 is directly linked to the DSB's recommendations and rulings"[561], the EC responds that:

> "[I]n reaching any finding under the current proceedings, the Panel should not and cannot take into consideration any proceedings between the European Communities

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[554] European Communities' second written submission, para. 50.
[555] Final written version of the European Communities' opening oral statement at the substantive meeting of the Panel with the parties and third parties, para. 8.
[556] European Communities' second written submission, para. 50.
[557] European Communities' response to Panel question No. 11.
[558] ACP Countries' third party written submission, para. 94.
[559] European Communities' response to Panel question No. 11.
[560] Ibid.
[561] Final written version of the European Communities' opening oral statement at the substantive meeting of the Panel with the parties and third parties, para. 16.

> and parties other than the United States, such as the Article 21.5 proceedings requested by Ecuador in 1999. To do otherwise, would lead to inequitable results."[562]

7.206 In particular, the European Communities argues that:

> "[T]he United States cannot rely on the findings or suggestions of the first Ecuador Article 21.5 Panel. The United States cannot be harmed by those findings and suggestions. It is only fair that the United States should not derive any benefit from them either."[563]

7.207 Moreover, "the European Communities considers that the Panel cannot take into consideration in the current proceedings the claims and defences advanced in the proceedings brought by Ecuador."[564]

(b) The United States' response

7.208 The United States "requests that the Panel find that ... the EC has failed to comply with the recommendations and ruling of the DSB"[565], namely "the recommendations and rulings adopted by the Dispute Settlement Body on September 25, 1997[566]"[567], "includ[ing] the findings of inconsistencies of the EC's bananas regime as well as the recommendation that the European Communities 'bring the measures found in this Report and in the Panel Reports, as modified by this Report, to be inconsistent with the GATT 1994 and the GATS into conformity with the obligations of the European Communities under those agreements.'[568]"[569]

7.209 The United States contends that the "tariff and tariff rate quota measures [introduced by the European Communities in 2006] fail to bring the EC into compliance with the *Bananas III* recommendations and rulings and its WTO obligations."[570] The United States argues that:

> "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* ('*Bananas III*')[571], and many opportunities for reform afforded to the EC by the United States and other affected Members, the EC has yet to implement the DSB's recommendations and rulings with a WTO compliant import regime for bananas."[572]

7.210 The United States notes that "[o]n January 1, 2006, the EC implemented a new regime for importation of bananas through Council Regulation (EC) No. 1964/2005 ('Regulation 1964')[573]."[574] However, according to the United States, "[t]his latest regime continues to discriminate in favor of

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[562] European Communities' response to Panel question No. 78.
[563] European Communities' comments on United States' response to Panel question No. 42.
[564] European Communities' response to Panel question No. 78.
[565] United States' first written submission, para. 49.
[566] *(footnote original)* WT/DSB/M/37 (4 November 1997).
[567] United States' response to Panel question No. 5.
[568] *(footnote original) Bananas III (AB)*, WT/DS27/R/USA, para. 257.
[569] United States' response to Panel question No. 5.
[570] United States' first written submission, para. 3.
[571] *(footnote original)* Adopted 25 September 1997, WT/DSB/M/37 (4 November 1997).
[572] United States' first written submission, para. 1.
[573] *(footnote original)* Council Regulation (EC) No. 1964/2005, OJL 316/1, 2 December 2005, amending Council Regulation (EEC) No. 404-93, OJL 47/1, 25 February 1993. Exhibit US–1.
[574] United States' first written submission, para. 2.

imports of bananas originating in African, Caribbean and Pacific ('ACP') countries and against imports of bananas from other countries."[575]

7.211 Accordingly, the United States requests that the Panel reject the EC's preliminary objection that "Regulation 1964 is not a 'measure taken to comply' with recommendations and rulings of the DSB and therefore not within the scope of *Understanding on Rules and Procedures Governing the Settlement of Disputes* ('DSU') Article 21.5."[576],[577] The United States adds that it:

> "[W]as a party to the original *Bananas III* proceeding. It therefore has full rights to ensure that the EC complies with the recommendations and rulings of the DSB."[578]

(i) The current EC bananas regime is a measure taken to comply

7.212 The United States asserts that:

> "[T]he bananas import regime implemented by the European Communities on January 1, 2006 is a 'measure taken to comply with the recommendations and rulings' of the Dispute Settlement Body ('DSB') and is therefore properly before this Panel under Article 21.5 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ('DSU')."[579]

7.213 The United States describes that import regime in the following manner:

> "On January 1, 2006, the European Communities implemented a revised regime for the importation of bananas through Council Regulation (EC) No. 1964 of 2005. Article 1 of Regulation 1964 contains two elements. Paragraph 1 establishes that from January 1, 2006, the most-favored-nation, or MFN, tariff rate for bananas will be set at 176 euros per ton. Paragraph 2 creates an exception to this MFN rate by establishing a duty-free tariff rate quota of up to 775,000 tons per year available exclusively to bananas originating in the African, Caribbean and Pacific countries or ACP countries. MFN-origin bananas have no right to enter under the zero-duty ACP tariff rate quota."[580]

7.214 The United States agrees with European Communities that:

> "The text of Article 21.5 is clear that is applies where 'there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings' of the DSB. It is thus correct that Article 21.5 proceedings are limited to challenges regarding the existence or consistency of 'measures taken to comply,' not 'any' measure."[581]

7.215 However, "the United States recalls that, as the Appellate Body has noted, '[p]anels and the Appellate Body alike have found that what is a "measure taken to comply" in a given case is not

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[575] United States' first written submission, para. 2.
[576] *(footnote original)* EC First Written Submission, paras. 46-52.
[577] United States' second written submission, para. 3. See also ibid., para. 1.
[578] Final written version of the United States' closing oral statement at the substantive meeting of the Panel with the parties and third parties, para. 3.
[579] Final written version of the United States' opening oral statement at the substantive meeting of the Panel with the parties and third parties, para. 2.
[580] Ibid., para. 3.
[581] United States' response to Panel question No. 39.

determined exclusively by the implementing Member."[582],[583] Also, "an implementing Member's designation of a measure as one taken to comply, or not, is not determinative."[584],[585]

7.216 The United States does not contest the EC argument that introducing a tariff-only bananas import regime was not the only way for the European Communities to comply with the DSB recommendations and rulings of 1997 in the *EC – Bananas III* dispute. However, the United States contends that:

> "The EC argument turns the idea of 'measure taken to comply' on its head. The EC argues that any time there is more than one way to come into compliance, none of the options will ever be a 'measure taken to comply' because the responding Member could have made another choice instead. That is fundamentally wrong. A complaining Member must be able to have a panel look at the choice the responding Member actually made."[586]

7.217 The United States notes that "[t]he recommendation of the Appellate Body was for the EC to 'bring the measures found in this Report and in the Panel Reports, as modified by this Report, to be inconsistent with the GATT 1994 and the GATS into conformity with the obligations of the European Communities under those agreements.'"[587] Thus, the United States contends, "[c]ertainly a WTO-consistent tariff only regime would be consistent with this recommendation."[588]

7.218 The United States also argues that "[t]he 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."[589] According to the United States:

> "Whether taken together or separately, the EC's own declarations, the factual and legal continuum of EC actions since *Bananas III* (including the various legal instruments adopted by the EC), and the banana measures currently in force establish, with unmistakable clarity, that the EC's 2006 banana regime, set out in Regulation 1964, constitutes a 'measure taken to comply' with *Bananas III* recommendations and rulings and is therefore within the scope of this Panel's purview pursuant to DSU Article 21.5."[590]

7.219 According to the United States, there has been a continuum of events leading to the current EC bananas import regime, such that it would therefore qualify as a measure taken to comply: "the circumstances leading up to Regulation 1964 establish a series of steps on the part of the

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[582] *(footnote original)* Appellate Body Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/AB/RW, adopted 20 December 2005, para. 73.

[583] United States' comment on the European Communities' response to Panel question No. 14.

[584] *(footnote original) United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/AB/RW, adopted 17 February 2004, para. 73.

[585] Final written version of the United States' opening oral statement at the substantive meeting of the Panel with the parties and third parties, para. 4.

[586] United States' response to Panel question No. 42.

[587] Ibid.

[588] Ibid.

[589] *(footnote original) Mexico - Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States* (21.5) (WT/DS132/AB/RW), para. 121.

[590] United States' second written submission, para. 52.

EC since 1999 leading towards compliance with the *Bananas III* recommendations and rulings by means of a tariff-only regime to be installed no later than January 2006.[591],[592]

7.220 In particular, the United States notes that:

> "On September 25, 1997, the DSB adopted the panel and Appellate Body reports in *Bananas III* and recommended that the EC bring its measures into compliance. The EC stated that it could not do so immediately, and an arbitrator acting under Article 21.3 of the DSU determined that the EC would have fifteen months and one week to bring itself into compliance – that is until January 1, 1999. By that date, the EC implemented two regulations, consisting of a discriminatory tariff rate quota and a license-based system. These two regulations were then found in breach of the GATT 1994 and the GATS by a compliance panel established at the request of Ecuador and by an arbitrator reviewing a US request for authorization to suspend concessions. The DSB adopted the report of the Article 21.5 panel on May 6, 1999, again recommending that the EC bring itself into compliance. The DSB authorized the United States to suspend concessions on April 19, 1999."[593]

7.221 Subsequently:

> "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.[594] 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."[595]

7.222 The United States lays great emphasis on that status report by the European Communities:

> "As part of its status report on November 19, 1999, required under Article 21.6 of the DSU, the EC announced to the entire WTO Membership a second attempt to reform its banana regime. As reflected in the DSB minutes, this 'proposal to modify [the EC's] banana import regime' was 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.'[596] This description shows that the measures comprising this 'two-stage process' – a transitional period with quotas, with a flat-tariff at the end – were intended to be measures taken to comply."[597]

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[591] *(footnote original) See* EC Statement to the Dispute Settlement Body on 19 November 1999, WT/DSB/M/71, 11 January 2000; *EC Press Release*: "Commission gives new impetus to resolve banana dispute," IP/00/707, 5 July 2000.

[592] United States' second written submission, para. 50.

[593] Final written version of the United States' opening oral statement at the substantive meeting of the Panel with the parties and third parties, para. 5.

[594] *(footnote original)* WT/DSB/M/71, 11 January 2000, page 2.

[595] Final written version of the United States' opening oral statement at the substantive meeting of the Panel with the parties and third parties, para. 6.

[596] *(footnote original)* Minutes of Meeting of the Dispute Settlement Body held on 19 November 1999, WT/DSB/M/71 (11 January 2000).

[597] United States' response to Panel question No. 4.

7.223 The United States adds that:

> "[T]he EC's statement to the DSB on that date concludes with the following assessment by the EC of its two-stage proposal: 'The EC believed that its proposal provided the best outcome to this dispute.'"[598]

7.224 The United States notes that "[a]fter two years of continued non-compliance, in April 2001 the EC reached the *Understanding on Bananas* with the United States, and a very similar one with Ecuador."[599] The United States points out that:

> "Consistent with the proposal that the EC had laid out in November 1999, the [Bananas] Understanding set out a 'two-stage process', with a transitional period with tariff rate quotas granting preferential treatment for the ACP countries and the introduction of a 'Tariff Only regime for imports of bananas no later than 1 January 2006.'"[600]

7.225 While the United States does not consider the Bananas Understanding a mutually agreed solution[601], it "readily acknowledges the Understanding's direct relevance for purposes of establishing that the EC's current bananas import regime is a measure taken to comply with the DSB's rulings and recommendations."[602]

7.226 The United States argues that "[t]he 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."[603]

7.227 The United States adds that "[i]t is interesting that while the EC argues that the Understanding precludes the United States from bringing this claim at all using arguments not based on the text of the Understanding or any well-founded legal basis, it would ignore the plain meaning of the text."[604]

7.228 Turning to the text of the Bananas Understanding, the United States argues that:

> "The Understanding laid out a series of steps, over multiple years, through which the EC would bring itself into compliance. Paragraph A of the [Bananas] 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.'[605]"[606]

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[598] United States' comment on the European Communities' response to Panel question No. 4.

[599] Final written version of the United States' opening oral statement at the substantive meeting of the Panel with the parties and third parties, para. 7.

[600] United States' response to Panel question No. 4.

[601] The United States maintains that "[r]epeated efforts at negotiating a WTO-consistent and mutually acceptable solution with the EC have been unsuccessful." United States' first written submission, para. 1.

[602] United States' response to Panel question No. 44.

[603] Final written version of the United States' opening oral statement at the substantive meeting of the Panel with the parties and third parties, para. 7.

[604] Ibid. See also United States' response to Panel question No. 46.

[605] *(footnote original) US* – EC Understanding on Bananas, para. A. WT/DS27/59, G/C/W/270.

[606] Final written version of the United States' opening oral statement at the substantive meeting of the Panel with the parties and third parties, para. 8.

7.229 In turn:

> "Paragraph B [of the Bananas Understanding] states that the EC 'will introduce a Tariff Only regime for imports of bananas no later than 1 January 2006.' [A]lthough chronologically this would have been the last step to be taken, it is the first step outlined in the Understanding. ... [T]his was a central element in the 'means by which the long-standing dispute over the EC's banana import regime can be resolved,' [namely] ... 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."[607]

7.230 Furthermore:

> "Paragraph C [of the Bananas Understanding] begins with 'in the interim'. That is, before taking the final step set out in paragraph B, there were a series of other steps that needed to be taken. Paragraph C, in conjunction with Annex I, goes on to detail the interim licensing regime the EC would use between July 1, 2001, and December 31, 2005. These steps were 'interim' because they still discriminated between WTO Members, as evidenced *inter alia* by the fact that the EC recognized that it would need waivers of Article I and XIII of the GATT 1994."[608]

7.231 The United States notes that:

> "Paragraph D [of the Bananas Understanding] then deals with steps the United States would take, in response to the successful completion of interim steps by the EC, with respect to the US suspension of concessions against EC exports."[609]

7.232 In turn:

> "Paragraph E [of the Bananas Understanding] provides that the United States would lift its reserve concerning the waiver of the EC's WTO obligations under GATT 1994 Article I for ACP-origin bananas. In addition, the United States would work towards promoting the acceptance by the WTO membership of the request for the Article XIII waiver that would be needed for the management of quota C until December 31, 2005."[610]

7.233 The United States emphasizes that:

> "[P]er the terms of the Understanding, the measures taken to comply with the DSB recommendations included a series of interim steps and a final step on January 1, 2006 – that is, the introduction of a tariff only regime. The interim regime between July 1, 2001, and December 31, 2005, was a measure taken to comply, and the regime that the EC introduced on January 1, 2006, which it claims to be a tariff-only regime, is also a 'measure taken to comply.'"[611]

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[607] Final written version of the United States' opening oral statement at the substantive meeting of the Panel with the parties and third parties, para. 9.
[608] Ibid., para. 10.
[609] Ibid., para. 11.
[610] Ibid., para. 12.
[611] Ibid, para. 13.

7.234 Further, as regards the timing of the introduction of the current EC bananas import regime, the United States agrees[612] with the argument of Nicaragua and Panama that:

> "The [Bananas] Understanding called for a Tariff-Only regime by 1 January 2006 in order to come into compliance with Bananas III. Regulation 1964 took effect precisely on 1 January 2006 in order to put into force a 'tariff only' regime.[613] The timing of the current compliance measures, thus, fulfilled the Understanding's compliance timeline."[614]

7.235 According to the United States, there is a close link between the Bananas Understanding and the various EC internal legal instruments:

> "[T]he implementation of a tariff only regime by January 1, 2006 was part of the steps agreed in the [Bananas] Understanding with the EC that would constitute the 'means by which the long-standing dispute ... can be resolved.' This is expressly set out in paragraph B of the [Bananas] Understanding. Paragraph B references Regulation 404, as amended by Regulation 216. The first Whereas clause of Regulation 1964, in turn also references Regulation 404, as amended, with respect to the move to a tariff only regime by January 1, 2006. Regulation 1964 is inextricably linked to the Understanding and the steps that the EC had agreed to take for purposes of compliance with the *Bananas III* recommendations and rulings. The fact that the EC put this measure into place on the date contemplated by the Understanding reinforces the point that the EC, itself, understood that its new regime was a step it was taking to implement the rulings and recommendations of the DSB."[615]

7.236 The United States adds that "the progression of legal instruments adopted by the EC since *Bananas III*, further confirms the link between Regulation 1964 and the *Bananas III* rulings."[616]

7.237 According to the United States, those instruments start with Regulation 404, which was amended in 2001 by Regulation 216 to require a tariff only regime, and concluded with Regulation 1964, which purportedly implemented the EC's 'tariff only' regime."[617] In particular, the United States agrees[618] with the argument by Nicaragua and Panama that:

> "– Regulation 404, the underlying EC regulation examined in Bananas III, was found in several of its trade provisions to be WTO-inconsistent.
>
> – Regulation 216 amended Regulation 404 to require a Tariff-Only regime by no later than 1 January 2006 'to settle' Bananas III and 'compl[y] with the rules on international trade.'
>
> – Regulation 1964 implemented the current measures for the express purpose of fulfilling the tariff-only requirement of Regulation 404,[619] as amended by Regulation 216."[620]

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[612] United States' response to Panel question No. 14.
[613] (*footnote original*) *Id.*, Whereas Clause (1).
[614] Third Party joint written submission of Nicaragua and Panama, para. 54.
[615] United States' response to Panel question No. 14. See also United States' second written submission, para. 51.
[616] United States' second written submission, para. 50.
[617] Ibid.
[618] See United States' response to Panel question No. 13.
[619] (*footnote original*) Regulation 1964/2005.

7.238 According to the United States, these "three regulations ... provide evidence of the connection between the measure that was found to be in non-compliance in *Bananas III*, Regulation 404, and the measure subject to this proceeding, Regulation 1964."[621] The United States argues that:

> "Regulation 216, amending Regulation 404, set out an interim tariff rate quota regime, which would culminate with a tariff only regime by January 1, 2006. Regulation 1964 establishes the purported tariff only regime by January 1, 2006. This regime can be no other than the regime described by the EC since its proposal was made at the November 19, [1999] DSB meeting and expressly included in paragraph B of the [Bananas] Understanding entered into with the United States (and Ecuador). Indeed, paragraph B [of the Bananas Understanding] references Regulation 404, as amended by Regulation 216."[622]

7.239 As regards EC Regulation 1964, the United States points out that "the intended effect of the EC's current measures is closely linked to Regulation 216, which in 2001 sought to 'settle' the long-standing *Bananas* dispute by calling for a 'tariff only' regime by January 1, 2006."[623] Further:

> "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 *Bananas III*."[624]

7.240 The United States argues that:

> "The status of the EC's measures is further confirmed by numerous EC statements made between 1999 (when the EC first developed its 'two-stage' *Bananas III* compliance solution) through 2006 (when, according to the EC, it implemented its final stage). While these statements are too numerous to list here,[625] the EC statements made *after 2002*, when the EC argues, for purposes of this proceeding, that it implemented its 'measure taken to comply,' confirm that the EC itself did not believe it had taken a 'measure taken to comply' at that time."[626]

7.241 Exhibit US-8, which lists excerpts from the EC statements invoked by the United States, contains *inter alia* the following quotations from EC communications to WTO bodies:

(a) "The EC proposes to the DSB a 'two-stage' process for complying with *Bananas III*, under which a revised 'transitional' tariff quota system would first be implemented, to be followed by a '*flat-tariff*' regime no later than 1 January 2006.[627],[628] ("19 November 1999 EC Statement to the DSB"[629]);

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[620] Third Party joint written submission of Nicaragua and Panama, para. 53.
[621] United States' response to Panel question No. 13.
[622] United States' response to Panel question No. 13.
[623] United States' second written submission, para. 51.
[624] Ibid., para. 48.
[625] *(footnote original) See* Exhibit US–8 for a full list of EC statements.
[626] United States' second written submission, para. 49.
[627] *(footnote original)* Dispute Settlement Body, *Minutes of the Meeting Held in the Centre William Rappard on 19 November 1999*, WT/DSB/M/71, 11 January 2000, Item 1.
[628] Exhibit US-8, p. 1.
[629] Ibid.

(b) "The [EC] proposal envisages a two-stage process, comprising a tariff rate quota (TRQ) system for several years; *this system will be replaced by a tariff only system no later than 1 January 2006*."[630],[631] ("11 February 2000 EC Status Report to the DSB"[632]);

(c) "The EC and [US/Ecuador] have identified the *means* by which the long-standing dispute over the EC's banana import regime can be resolved ... [T]he EC will introduce a Tariff-Only regime for imports of bananas no later than 1 January 2006."[633],[634] ("April 2001 EC–US and EC–Ecuador Understandings"[635]); and

(d) "The *Understandings* are '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" [Bananas III]*'."[636],[637] ("22 June 2001 EC DSU Article 3.6 Notification"[638]).

7.242 Further, Exhibit US-8 contains the following excerpt from the European Communities' GATT Article XIII Waiver[639] of November 2001:

> "The *understandings* reached by the EC, Ecuador and the United States ... *identify the means by which the longstanding dispute over the EC's banana regime can be resolved*, in particular their provision for a temporary global quota allocation for ACP banana supplying countries ... *to enable them to prepare for a tariff-only regime* ..."[640],[641]

7.243 The United States argues that "[t]he various EC statements and communications provide factual evidence that the regime implemented on January 1, 2006 is a 'measure taken to comply'".[642]

7.244 The United States also:

> "note[s] that in the related [compliance] proceeding brought by Ecuador [in 2007], the EC argues that the January 1, 2006 regime implements one of the suggestions made

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[630] *(footnote original)* Status Report by the European Communities, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/51/Add.1, 11 February 2000 (emphasis added).

[631] Exhibit US-8, p. 1.

[632] Ibid.

[633] *(footnote original)* EC–US Understanding, paras. A and B; EC–Ecuador Understanding, paras. A and B.

[634] Exhibit US-8, p. 2.

[635] Ibid.

[636] *(footnote original)* EC Notification, 1st paragraph of Communication, WT/DS27/58, (emphasis added).

[637] Exhibit US-8, p. 2.

[638] Ibid.

[639] Ibid.

[640] *(footnote original)* GATT Article XIII Waiver, WT/MIN(01)/16, 14 November 2001 (emphasis added).

[641] Exhibit US-8, p. 2.

[642] United States' response to Panel question No. 41.

> by the panel in the Ecuador 21.5 report. In that proceeding, the EC argues that therefore the measure cannot be challenged."[643]

7.245 The United States "believes those arguments [by the European Communities] are completely unfounded."[644] However:

> "For purposes of this proceeding ... the Panel should take the EC's argument that its current bananas regime implements a suggestion by the compliance panel in *Bananas III* as a concession by the EC that the measure taken by the EC on January 1, 2006 is directly linked to the DSB's recommendations and rulings. ... [T]he Panel should conclude that the EC's current bananas import regime is a 'measure taken to comply'."[645]

7.246 Further, while the United States "is not claiming that th[e] last step [foreseen for the EC by the Bananas Understanding] is a measure taken to comply because of its relationship to the first Ecuador [compliance] proceeding [of 1999],"[646] the United States notes that "the first suggestion by the first Article 21.5 panel [requested by Ecuador in 1999] was indeed that the EC 'could choose to implement a tariff-only system for bananas, without a tariff quota.'"[647],[648] According to the United States, "[t]he fact that the panel in the first Ecuador 21.5 proceeding conceived of a tariff only regime as a potential means for compliance demonstrates the error in the EC argument that its move to what it describes as a tariff only regime in this proceeding is not a 'measure taken to comply.'"[649]

7.247 The United States argues that:

> "To the extent that the EC may be arguing that the first Ecuador 21.5 panel's legal reasoning cannot be considered by this Panel, the EC is wrong. Prior panel and Appellate Body reports can be taken into account by subsequent panels."[650]

Also, "with respect to the EC's claim in paragraph 9 that the United States cannot 'benefit' from a proceeding to which we were not a party, the United States notes that findings in a different proceeding may be considered by the Panel to the extent they are persuasive."[651]

(ii) The response of the United States to the EC arguments that the link with the original recommendations and rulings was broken

7.248 The United States also advances various arguments to refute the EC assertion that the link with the original recommendations and rulings of the DSB in 1997 in the *EC – Bananas III* dispute has been broken.

7.249 As regards the nature of the measures in question, the United States "agrees that the EC bananas regime in the 1990s contained additional tariff rate quotas allocated to different countries

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[643] Final written version of the United States' opening oral statement at the substantive meeting of the Panel with the parties and third parties, para. 16.
[644] Final written version of the United States' opening oral statement at the substantive meeting of the Panel with the parties and third parties, para. 16.
[645] Ibid. See also United States' response to Panel question No. 6.
[646] United States' comment on the European Communities' response to Panel question No. 13.
[647] *(footnote original) Bananas III (21.5) (Ecuador)*, para. 6.156.
[648] United States' response to Panel question No. 6.
[649] Ibid.
[650] United States' comment on the European Communities' response to Panel question No.6.
[651] United States' comment on the European Communities' response to Panel question No. 4.

and a licensing system for traders."[652] Nevertheless, the United States "disagrees with the EC's statement that its banana regime in 1990s was 'completely different'."[653] According to the United States "there is a great deal of similarity in that the current regime suffers from the same WTO non-compliant aspects as the regimes found to be in breach in the earlier *Bananas III* proceedings."[654] Further, the United States claims that "the essential nature of the EC's banana measures is closely linked to the original EC banana quota and tariff regime found to be WTO-inconsistent in *Bananas III*."[655]

7.250 As regards the EC arguments concerning the lapse of time between the DSB recommendations and rulings and the adoption of the current EC bananas import regime, the United States argues that "[t]his argument must be soundly rejected."[656] According to the United States:

> "Article 21.5 of the DSU does not contain any such 'reasonable period of time' limitation. Thus, there is no textual basis for the EC's proposed approach. ... [T]he EC is attempting to impute into the text terms and conditions that are not there and were not agreed by Members."[657]

7.251 Further, the United States argues that:

> "[T]he timing in this case derives from the timeline laid down in the Understanding itself, which required as a final step the implementation of a tariff only regime by January 1, 2006. 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 recognized that an abrupt fix to the bananas problem could have a negative impact. That is why the United States, Ecuador and others were willing to allow for a lengthy transitional period of adjustment leading to a new, tariff only regime by January 1, 2006, as set out in the Understanding."[658]

7.252 However, according to the United States, "[t]his forbearance, by the United States and the Latin American banana suppliers, has unfortunately been repaid by the EC with continued discrimination and noncompliance."[659] The United States adds that:

> "It would have been much welcomed if the EC had brought itself into compliance immediately upon adoption of the DSB's recommendations and rulings in 1997 or at the end of the reasonable period of time - that is, January 1, 1999. Instead, the EC chose to perpetuate a discriminatory system of tariff rate quotas."[660]

7.253 While noting that "[t]he final step provided for in the EC-US Understanding, the introduction of a tariff only regime by January 1, 2006, was not scheduled to happen until four years [after 2002]",

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[652] United States' response to Panel question No. 37.
[653] Ibid.
[654] United States' response to Panel question No. 37.
[655] United States' second written submission, para. 51.
[656] Final written version of the United States' opening oral statement at the substantive meeting of the Panel with the parties and third parties, para. 15.
[657] United States' response to Panel question No. 10.
[658] Ibid.
[659] Final written version of the United States' opening oral statement at the substantive meeting of the Panel with the parties and third parties, para. 15.
[660] Ibid.

the United States contends that "[t]o argue that the EC did not need to take that final step with respect to the EC-US Understanding would read paragraph B out of the Understanding."[661]

7.254 The United States also:

> "[N]ote[s] that in other cases, a long period of time between the original rulings and the 'measure taken to comply' has not prevented Article 21.5 review. For example, in the *FSC*[662] case, the EC requested and obtained the establishment of a second Article 21.5 panel almost 5 years after the original ruling by the DSB. In that case, the DSB adopted the recommendations and rulings in March 2000 and the second Article 21.5 panel was established February 2005. In addition, in *EC – Hormones*[663] the EC claimed compliance over five years from the date of adoption of the recommendations and rulings by the DSB. The EC claimed that if the United States disagreed, it should seek recourse to an Article 21.5 panel.[664] Accordingly, the EC itself has admitted what is already plain on the text of Article 21.5 - that the length of time is not a bar to having recourse to Article 21.5."[665]

7.255 Likewise, referring to the European Communities' Response to Questions from the Panel by the European Communities (29 April 2005) in *US - Softwood Lumber IV (Article 21.5 – Canada)*, the United States points out that:

> "[T]he EC position with respect to Article 21.5 [in that dispute was] that: 'The nature of the special procedures suggests that the purpose of the phrase "existence or consistency with a covered agreement of a measure taken to comply ..." in Article 21.5 is to cover any further dispute that relates to the original dispute'[666] and that the time lapse before the new measure is taken is not a bar to Article 21.5 proceedings against that measure.[667],[668]

7.256 As regards the European Communities' argument that the introduction of a tariff-only bananas import regime was an autonomous and internal policy decision of the European Communities, the United States refers to the text of the Bananas Understanding, and argues that "the fact that a tariff only regime could have been introduced by the EC independently of the bananas dispute does not change the fact that the Understanding on Bananas specifically provides for this step."[669] According to the United States, "[w]hat is relevant is that the EC agreed to include it in the Understanding, as

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[661] United States' second written submission, para. 46.

[662] *(footnote original) 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 March 14, 2006.

[663] *(footnote original) EC – Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998.

[664] *(footnote original) See* Minutes of Meeting held on 1 December 2003, WT/DSB/M/159 (15 January 2004), para. 23.

[665] United States' response to Panel question No. 10.

[666] *(footnote original)* Response to Questions from the Panel by the European Communities (29 April 2005) in *United States – Final Countervailing Duty Determination with Respect to certain Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU (DS257)*, para. 5.

[667] *(footnote original) Id.*, para. 14.

[668] United States' comment on the European Communities' response to Panel question No. 7.

[669] United States' response to Panel question No. 42.

paragraph B."[670] Conversely, the United States argues, "[a] 'political decision' could have been undone at any point."[671]

7.257 The United States adds that:

> "When the political decision to move to a tariff only system was taken is not relevant. It makes sense that the EC would only have agreed to sign a bilateral agreement committing itself to doing so only after the 'political decision' had been made. Indeed, the fact that the EC may have decided to move to a tariff only regime by January 1, 2006 before the Understanding and then included it in the Understanding seems to buttress our position."[672]

7.258 Further, the United States maintains that: "The EC's argument that ... paragraph [B of the Bananas Understanding] is just a 'simple reference' to secondary legislation 'which reflected the political decision of the European Communities to change its banana import regime'[673] before the signing of the Understanding is an attempted *post hoc* rationale inconsistent with the plain text of the Understanding."[674]

7.259 As regards the argument by the ACP third parties that the link with the original DSB recommendations and rulings was broken by the Bananas Understanding and by the Doha Waiver[675], the United States argues that "the ACP can point to nothing in the text of the DSU that speaks to 'breaking the connection'"[676], thus "[t]he ACP proposed approach is without any legal basis."[677]

7.260 According to the United States, in regard to the Bananas Understanding:

> "[A]s a matter of fact, the opposite is true. The [Bananas] Understanding affirms the connection between the DSB recommendations and rulings and the EC new banana regime. The [Bananas] Understanding is a bilateral understanding between the United States and the EC. In that Understanding, the EC agreed to undertake certain steps to bring itself into compliance. Those steps included, per the terms of paragraph B of the Understanding, the adoption of a tariff only regime by January 1, 2006. The waiver was itself contemplated within the terms of the Understanding. In any case, ... the January 1, 2006 regime was a measure to be taken to comply, expressly set out in the Understanding."[678]

7.261 Further, the United States disagrees with the argument of the ACP third parties that:

> "Paragraph 6 of the Doha waiver and th[e] Arbitrator's statement support the view that disputes may arise specifically from the Doha waiver and its implementation and justifies recourse to the dispute settlement system. To the extent that the dispute

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[670] United States' comment on the European Communities' response to Panel question No. 14.
[671] United States' comment on the European Communities' response to Panel question No. 72.
[672] United States' response to Panel question No. 47. See also United States' comment on the European Communities' response to Panel question No. 14; United States' comment on the European Communities' response to Panel question No. 72; and final written version of the United States' opening oral statement at the substantive meeting of the Panel with the parties and third parties, para. 9.
[673] *(footnote original)* Second Written Submission by the European Communities, para. 43.
[674] Final written version of the United States' opening oral statement at the substantive meeting of the Panel with the parties and third parties, para. 9.
[675] See ACP Countries' third party written submission, para. 7.
[676] United States' response to Panel question No. 9.
[677] Ibid.
[678] United States' response to Panel question No. 9.

> relates to a measure which has been adopted pursuant to the Doha waiver and other legal instruments which came into existence only after an earlier dispute, such measure cannot be regarded as being a measure taken to comply with the recommendations and rulings of the DSB adopted in the preexisting earlier dispute."[679]

7.262 In response, the United States again refers to the Bananas Understanding:

> "The waiver was contemplated as part of the Understanding. *See* paragraph E of the Understanding on Bananas. Therefore, it is hard to see how the existence of the waiver means the EC regime is not a 'measure taken to comply.'"[680]

7.263 Further, according to the United States:

> "The fact that the waiver expressly provided for recourse to dispute settlement simply means that the waiver was drafted as contemplated by the Uruguay Round Understanding on Waivers[681] and in a way in which most, if not all, waivers are drafted. This cannot have the implications that the ACP Third Parties argue. Finally, recourse to Article 21.5 is a recourse to dispute settlement[682] so there is in any case no inconsistency between the Arbitrator's statement and the US pursuit of this Article 21.5 proceeding."[683]

7.264 As a further argument relating to the Doha Waiver, the United States points out that:

> "[T]he Doha waiver, as well as the Article XIII waiver, were time bound. Any 'compliance' that the EC achieved through them would expire with the waivers. Consequently, in requesting the waiver, the EC must have known that additional steps would be required after the expiration of the waiver in order to be in compliance with the DSB's recommendations and rulings. Thus, the EC must always have known that some 'measure taken to comply' would be necessary after the waiver expired. Indeed, ... the Article XIII waiver was set on December 31, 2005 precisely because per the terms of the [Bananas] Understanding (paragraph B), the EC was to move to a tariff only regime by January 1, 2006. An Article XIII waiver would not have been needed if and when the EC introduced a tariff only regime."[684]

7.265 The United States "disagrees with the EC's assertion that the only dispute settlement avenue open to the United States is 'new proceedings under GATT Article XXIII.'[685]"[686] In particular, the United States disagrees "with the EC's argument that 'a dispute over the continued existence of the

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[679] ACP Countries' third party written submission, para. 94.

[680] United States' response to Panel question No. 11.

[681] *(footnote original) Understanding in Respect of Waivers of Obligations under the General Agreement on Tariffs and Trade 1994*, para. 3, provides that Members may have recourse to dispute settlement.

[682] *(footnote original)* DSU Article 21.5 provides, in relevant part, that "[w]here there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings such dispute shall be decided through recourse to these *dispute settlement procedures* ..." (emphasis added).

[683] United States' response to Panel question No. 11.

[684] Ibid.

[685] *(footnote original)* Although the United States appreciates the fact that in stating that: "If the United States considers that this new banana import regime breaches the GATT, the United States can challenge it," the EC is conceding that there is no "standing" requirement in the WTO Agreement.

[686] United States' comment on the European Communities' response to Panel question No. 17.

Doha waiver should have been brought under a new dispute settlement case and not as a case under Article 21.5 of the DSU.'[687],[688] The United States argues that:

> "In the current proceeding, [it] is challenging 'the consistency with a covered agreement of measures taken to comply' (DSU Article 21.5): that is, the United States is challenging the consistency with Article I and XIII of the GATT 1994 (a covered agreement) of the EC's current bananas regime (a measure taken to comply). The analysis of the consistency of that measure with Article I requires an analysis of the Doha waiver because the EC – which does not deny that the differential tariff treatment provided by the current regime for ACP and MFN bananas is in breach of Article I:1 – argues that the Doha waiver covers the breach. Therefore, the issue of the waiver's continued existence is properly before this Article 21.5 Panel."[689]

(iii) The response of the United States to the EC arguments that the dispute was settled before 2006

7.266 The United States advances a number of arguments to refute the EC assertion that the European Communities "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 US 'right to suspend concessions terminated'.[690],[691]

7.267 The United States argues that "[t]he EC's characterization of part-way measures taken not even halfway through the period of implementation envisioned in the EC-US Understanding finds no basis in the text of the Understanding and ignores multiple EC statements regarding its measures."[692]

7.268 In response to the EC arguments concerning the termination of the United States' right to retaliate in 2002, the United States contends that:

> "[T]he Understanding sets out a series of steps. Two significant steps were to be achieved by July 1, 2001, and January 1, 2002. As incentive to ensure that the EC took those steps, the United States agreed to first provisionally suspend its imposition of increased duties and then terminate the imposition of increased duties that the DSB had authorized the United States to apply. This only proves that both the United States and the EC complied with what is set out in paragraphs C and D of the Understanding. Up to that point, there had yet to be full compliance by the EC. Per the terms of the Understanding, there was an additional step to be taken."[693]

7.269 Also, according to the United States:

> "The terms of paragraph D [of the Bananas Understanding] did not 'terminate' the 'right of the United States to suspend concessions.' To the contrary, the United States agreed to terminate its 'imposition of increased duties' – i.e., its application at the time of its rights under the DSB authorization of April 19, 1999 to suspend concessions or other obligations – as consideration for the EC taking the step set out in

[687] *(footnote original)* Replies to the Panel's Questions by the European Communities, para. 20.
[688] United States' comment on the European Communities' response to Panel question No. 11.
[689] United States' comment on the European Communities' response to Panel question No. 11.
[690] *(footnote original)* EC First Written Submission, paras. 24, 49.
[691] United States' second written submission, para. 45.
[692] Ibid.
[693] Final written version of the United States' opening oral statement at the substantive meeting of the Panel with the parties and third parties, para. 14. See also United States' response to Panel question No. 22.

> paragraph C(2). This is yet another instance of the EC turning logic on its head, by arguing that the parties' forbearance in allowing the EC time to reform its bananas import regime must necessarily imply that the parties agreed the dispute had been resolved."[694]

7.270 The United States adds that:

> "The DSB granted the United States authorization to suspend concessions or other obligations on April 19, 1999, and that authorization remains in place. Thus, contrary to the EC's suggestion, there was no need for the United States to request (to borrow the EC's rather curious phrase) the 'right to reinstate those rights.' ... The commitment of the United States to take certain steps did not, however, mean that the multilateral authorization and other WTO rights of the United States were revoked. Had the parties to the Understanding intended for the DSB to revoke the authorization, they could easily have included a clause providing for a joint request to the DSB to that effect (much as they included clauses with respect to the EC's waiver requests); the [Bananas] Understanding, however, includes no such clause."[695]

7.271 According to the United States, "there was no need for the parties to include a provision revoking the US WTO-authorized right to suspend concessions, because the [Bananas] Understanding contemplated that the EC would introduce a WTO-consistent tariff-only regime immediately following the conclusion of the interim TRQ."[696]

7.272 The United States also responds to the argument of the ACP third parties that:

> "Article 22.8 of the DSU provides that 'the suspension of concessions or other obligations shall be temporary and shall only be applied until such time as the measure found to be inconsistent with a covered agreement has been removed, or the Member that must implement recommendations or rulings provides a solution to the nullification or impairment of benefits, or a *mutually satisfactory solution is reached*.' The fact that the US terminated its retaliation measures thus confirmed that the US considered the dispute as having been resolved through the mutually agreed solution in the form of the Understanding on Bananas reached with the EC."[697]

7.273 The United States points out that it "did not consider the dispute 'resolved' [in 2002] as there was still one more step the EC needed to take according to the [Bananas] Understanding."[698] Also, the United States "did not, and does not, consider the [Bananas] Understanding to be a mutually agreed solution."[699] Thus:

> "Article 22.8 of the DSU is not relevant in this situation, since there is no mutually agreed solution. The fact that the United States agreed to terminate its imposition of increased duties as an incentive for the EC to act, does not turn the Understanding into a mutually agreed solution."[700]

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[694] United States' response to Panel question No. 22.
[695] United States' response to Panel question No. 40.
[696] Ibid.
[697] ACP Countries' third party written submission, para. 61.
[698] United States' response to Panel question No. 43.
[699] Ibid.
[700] United States' response to Panel question No. 45.

7.274 The United States adds that:

> "[T]he ACP argument presumes that a complaining Member is compelled to apply suspension of concessions or other obligations unless one of the Article 22.8 conditions is met. That is not true – Members can choose not to apply their WTO authorization (or not to apply it in full) for all sorts of reasons that have nothing to do with whether the 22.8 conditions are met."[701]

7.275 Referring to the European Communities' Response to Questions from the Panel by the European Communities (29 April 2005) in *US – Softwood Lumber IV (Article 21.5 – Canada)*, the United States points out that:

> "[T]he EC position [in that dispute was] that: 'The obligation to comply with that recommendation is not extinguished through the adoption of a measure taken to comply that is accepted by the complainant but continues to exist without limits in time. The fact that the DSB has considered the issue as resolved for the purpose of surveillance under Articles 21.6 and 22.8 of the DSU does not extinguish the continuing obligation to withdraw the measure,'[702] and so Article 21.5 remains available."[703]

7.276 As regards the arguments of the European Communities concerning the withdrawal of the *EC – Bananas III* dispute from the agenda of the Dispute Settlement Body in 2002, the United States argues that:

> "It is incorrect to say that the issue was 'withdrawn' from the agenda. Instead, as is apparent from the DSB minutes for the February 1, 2002[704] meeting all that happened was that the EC declared its view that 'this matter should now be withdrawn from the agenda' (presumably meaning that despite Article 21.6, the EC need no longer put a status report on the agenda of future DSB meetings)."[705]

7.277 According to the United States:

> "A review of the minutes confirms that Ecuador agreed there was no need for the EC to put the issue on the agenda of future DSB meetings in light of the fact that the EC had taken the step set out in paragraph D of the Understanding and the next step that would need to be taken by the EC was implementation of a tariff only regime by January 1, 2006."[706]

7.278 Further, the United States notes that:

> "The DSB simply 'took note' of the statements and did not take a decision on this issue. The fact that other Members did not request that this matter be on the agenda of subsequent meetings presumably reflects that little would have been gained by keeping this matter on the DSB agenda until the EC took the next step on January 1, 2006."[707]

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[701] United States' response to Panel question No. 43.
[702] *(footnote original) Id.*, para. 12.
[703] United States' comment on the European Communities' response to Panel question No. 7.
[704] *(footnote original)* WT/DSB/M/119, 6 March 2002.
[705] United States' response to Panel question No. 21.
[706] Ibid.
[707] Ibid.

7.279 The United States argues that:

> "It is also clear from the statements made at the meeting that the dispute was not considered 'resolved'. For example, the minutes reflect the following statements:
>
> > '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.'[708]
> >
> > 'Honduras wished to reserve its rights, including the right to request that this matter be placed on the DSB agenda in the future.'[709]
> >
> > '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.'[710]"[711]

7.280 The United States adds that:

> "There have been other instances in which a status report has not been included on the DSB agenda, but that hardly indicates the issue has been resolved. See for example *EC – Hormones*, where although the item did not appear on the agenda, the EC itself recognized that it still needed to come into compliance."[712]

7.281 Referring again to the European Communities' Response to Questions from the Panel by the European Communities (29 April 2005) in *US - Softwood Lumber IV (Article 21.5 – Canada)*, the United States points out that:

> "[T]he EC position [in that dispute was] that: 'The obligation to comply with that recommendation is not extinguished through the adoption of a measure taken to comply that is accepted by the complainant but continues to exist without limits in time. The fact that the DSB has considered the issue as resolved for the purpose of surveillance under Articles 21.6 and 22.8 of the DSU does not extinguish the continuing obligation to withdraw the measure,'[713] and so Article 21.5 remains available."[714]

7.282 As to the EC argument that the United States never challenged the measures taken by the European Communities in 2002, the United States responds that:

> "The United States saw no reason to institute Article 21.5 proceedings for the 2002-2005 interim regime. This does not mean that the United States was then precluded from recourse to Article 21.5 proceedings once the EC took the next, flawed step."[715]

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[708] *(footnote original)* WT/DSB/M/119, 6 March 2002, para. 5.
[709] *(footnote original)* WT/DSB/M/119, 6 March 2002, para. 6.
[710] *(footnote original)* WT/DSB/M/119, 6 March 2002, para. 8.
[711] United States' response to Panel question No. 21.
[712] Ibid.
[713] *(footnote original) Id.*, para. 12.
[714] United States' comment on the European Communities' response to Panel question No. 7.
[715] United States' comment on the European Communities' response to Panel question No. 10.

7.283 According to the United States:

> "Even if [it] had had a reason to challenge the interim steps taken by the EC but had decided to wait until now, the United States would not have been precluded from taking such action. It is established that the failure, as of a given point in time, to challenge a measure as inconsistent with the WTO Agreement does not mean that there is tacit acceptance of the measure. See Panel report on *EEC - Quantitative Restrictions Against Imports of Certain Products from Hong Kong*, adopted July 12, 1983, BISD 30S/129, 138, paragraph 28."[716]

7.284 The United States adds that:

> "[I]t was not until the introduction of the new EC regime for bananas on January 1, 2006 that the EC 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 the Ecuador and US requests under Article 21.5"[717] (footnote omitted).

(iv) A compliance proceeding can extend to measures closely related to measures taken to comply

7.285 In its third party submission, Japan argues that:

> "[T]he Appellate Body in *US – Softwood Lumber IV (21.5)* addresses that, taking account of the context of Article 21.5 and the purpose of the DSU, 'a panel's mandate under Article 21.5 of the DSU is not necessarily limited to an examination of an implementing Member's measure declared to be "taken to comply",' and should also include 'some measures with a particularly *close relationship* to the declared "measure taken to comply", and to the recommendations and rulings of the DSB'.[718] The Appellate Body has further indicated in that case that, in order to find such a 'close relationship', an Article 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.'[719] The EC's 2006 regime was implemented subsequent to the adoption of the recommendations and rulings of the DSB 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.'[720] Moreover, Japan understands that the EC's 2006 regime is the measure which grants a preferential treatment to the imports of bananas from the ACP countries. In light of such timing, nature and effect of the EC's regime, Japan sees the argument that the EC's 2006 regime does not have a relationship with the recommendations and rulings of the DSB in *EC – Bananas III* dispute to be hardly convincing.[721],[722]

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[716] United States' second written submission, para. 47, footnote 35.
[717] United States' second written submission, para. 47.
[718] (*footnote original*) *US – Softwood Lumber IV (21.5)*, para. 77 (Emphasis added.)
[719] (*footnote original*) *Ibid.*
[720] (*footnote original*) The Understanding, Paragraph A.
[721] (*footnote original*) Japan notes that, in light of the WTO jurisprudence, the fact that the EC is not obliged to implement its 2006 regime does not support the argument that the regime is excluded from a "measure taken to comply" for the purpose of Article 21.5 of the DSU.
[722] Japan's third party written submission, paras. 16-17.

7.286 The United States declares that it "completely agrees with Japan that the EC's arguments that the January 1, 2006 regime is not a measure taken to comply is 'hardly convincing.'"[723] The United States argues that:

> "[T]he DSB has already made clear in past Article 21.5 proceedings that 'a panel's mandate under Article 21.5 of the DSU is not necessarily limited to an examination of an implementing Member's measure declared to be 'taken to comply'". See for example, *Australia Leather* and *Australia Salmon*."[724],[725]

2. The Panel's analysis

(a) The Panel's approach

7.287 The Panel needs to assess whether the United States has properly brought this dispute under Article 21.5 of the DSU. The Panel will conduct the analysis set out below, taking into account the following considerations.

(i) Burden of proof

7.288 We have already noted the rules regarding the burden of proof that are applicable to the preliminary issues raised by the European Communities.[726] As in the case of the previous preliminary objection raised by the European Communities, the Panel will assess first whether the European Communities has made a prima facie case supporting its contention. If such a prima facie case was found to exist, the Panel would turn to assessing whether the United States has succeeded in rebutting this preliminary objection by the European Communities. Alternatively, if the Panel found that the European Communities has not succeeded in making a prima facie case that the complaint of the United States falls outside of the scope of Article 21.5 of the DSU, the Panel would reject this preliminary objection by the European Communities without further analysis.

(ii) The specific issue before this Panel

7.289 Article 21.5 of the DSU provides that:

> "Where there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings such dispute shall be decided through recourse to these dispute settlement procedures, including wherever possible resort to the original panel. The panel shall circulate its report within 90 days after the date of referral of the matter to it. When the panel considers that it cannot provide its report within this time frame, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will submit its report."

7.290 The Panel notes that the preliminary objection of the European Communities focuses on one specific element of the language of Article 21.5 of the DSU: that Article 21.5 of the DSU is not applicable because the current EC bananas import regime, introduced on 1 January 2006, is not a

[723] United States' response to Panel question No. 12, para. 26. See also, para. 6.30 above.

[724] *(footnote original)* Panel Report, *Australia – Automotive Leather II (Article 21.5 – US)*, para. 6.4; and Panel Report, *Australia – Salmon (Article 21.5 – Canada)*, para. 7.10, sub-para. 22.

[725] United States' response to Panel question No. 12.

[726] See para. 7.76 to 7.79 above.

"measure taken to comply with the recommendations and rulings" adopted by the Dispute Settlement Body in the *EC – Bananas III* dispute in 1997.[727]

7.291 Accordingly, the Panel will address the European Communities' preliminary objection by focusing on the specific issue whether the current EC bananas import regime is a measure taken to comply for the purposes of Article 21.5 of the DSU.

(b) Whether the current EC bananas import regime is a measure taken to comply

(i) The limited scope of compliance proceedings pursuant to Article 21.5 of the DSU

7.292 At the outset of its analysis, the Panel notes that it agrees with the European Communities that "Article 21.5 proceedings ... cannot be used to challenge the legality of '*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.[728],[729] The Panel also agrees with the argument of the European Communities that, in general:

> "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."[730]

7.293 Both parties make reference to the *Canada – Aircraft (Article 21.5 – Brazil)*[731] dispute, where the Appellate Body stated that:

> "Proceedings under Article 21.5 do not concern just *any* measure of a Member of the WTO; rather, Article 21.5 proceedings are limited to those 'measures *taken to comply* with the recommendations and rulings' of the DSB. In our view, the phrase 'measures taken to comply' refers to measures which have been, or which should be, adopted by a Member to bring about compliance with the recommendations and rulings of the DSB. In principle, a measure which has been 'taken to comply with the recommendations and rulings' of the DSB will *not* be the same measure as the measure which was the subject of the original dispute, so that, in principle, there would be two separate and distinct measures[732]: the original measure which *gave rise* to the recommendations and rulings of the DSB, and the 'measures taken to comply' which are – or should be – adopted to *implement* those recommendations and rulings."[733]

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[727] See European Communities' first written submission, paras. 47 and 51.

[728] *(footnote original)* See, for example, the Appellate Body report in *Canada – Measures affecting the export of civilian aircraft, Recourse by Brazil to Article 21.5 of the DSU*, WT/DS70/AB/RW, dated July 21, 2000 ("*Canada/Aircraft*"), at paragraph 36.

[729] European Communities' first written submission, para. 46.

[730] Final written version of the European Communities' opening oral statement at the substantive meeting of the Panel with the parties and third parties, para. 5.

[731] See European Communities' first written submission, para. 46; and the United States' comments on the European Communities' response to Panel question No. 7.

[732] *(footnote original)* We recognize that, where it is alleged that there exist *no* "measures taken to comply", a panel may find that there is *no* new measure.

[733] Appellate Body Report on *Canada – Aircraft (Article 21.5 – Brazil)*, para. 36. See also Appellate Body Report on *Mexico – Corn Syrup (Article 21.5 – US)*, paras. 78-79.

7.294 Likewise, in *EC – Bed Linen (Article 21.5 – India)* the Appellate Body held that "[i]f a *claim* challenges a *measure* which is not a 'measure taken to comply', that *claim* cannot properly be raised in Article 21.5 proceedings."[734]

7.295 Similarly, the Appellate Body in *US – Softwood Lumber IV (Article 21.5 – Canada)* held that "there are some limits on the claims that can be raised in Article 21.5 proceedings[735]"[736], and observed the following "balance that Article 21.5 strikes between competing considerations"[737]:

> "On the one hand, [Article 21.5 of the DSU] seeks to promote the prompt resolution of disputes, to avoid a complaining Member having to initiate dispute settlement proceedings afresh when an original measure found to be inconsistent has not been brought into conformity with the recommendations and rulings of the DSB, and to make efficient use of the original panel and its relevant experience. On the other hand, the applicable time-limits are shorter than those in original proceedings, and there are limitations on the types of claims that may be raised in Article 21.5 proceedings. This confirms that *the scope of Article 21.5 proceedings logically must be narrower than the scope of original dispute settlement proceedings. This balance should be borne in mind in interpreting Article 21.5 and, in particular, in determining the measures that may be evaluated in proceedings pursuant to that provision*"[738] (emphasis added).

(ii) The Panel's role in assessing whether the current EC bananas import regime is a measure taken to comply

7.296 The European Communities argues that "the Appellate Body had found in its report ... [in *Softwood Lumber IV (Article 21.5 – Canada)*] that 'to be sure, characterizing an act by a Member as a measure taken to comply when the Member maintains otherwise is not something that should be done lightly by a panel'."[739] The Panel notes that the Appellate Body continued by stating that "[y]et, a panel, in examining the factual and legal circumstances within which the implementing Member takes action, may properly reach just such a finding in some cases."[740]

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[734] Appellate Body Report on *EC – Bed Linen (Article 21.5 – India)*, para. 78.

[735] *(footnote original)* The Appellate Body has confirmed the existence of such limits in several cases. For example, in *US – Shrimp (Article 21.5 – Malaysia)*, the Appellate Body found that the panel had committed no error in refusing to "re-examine, for WTO-consistency, even those aspects of a new measure that were part of a previous measure that was the subject of a dispute, and were found by the Appellate Body to be *WTO-consistent* … and that remain unchanged as part of the new measure." (Appellate Body Report, *US - Shrimp (Article 21.5 – Malaysia)*, para. 89 (original emphasis)) The Appellate Body has also found that a complaining party may not ask an Article 21.5 panel to re-examine certain matters ("the *particular* claim and the *specific* component of a measure that is the subject of that claim") when the original panel made findings in respect of these matters and those findings were not appealed. (Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 92-93) See also Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, paras. 121-122) However, when the measure taken to comply is a new measure, different from the measure at issue in the original proceedings, "a panel is not confined to examining the 'measures taken to comply' from the perspective of the claims, arguments and factual circumstances that related to the original measure". (Appellate Body Report, *Canada – Aircraft (Article 21.5 – Brazil)*, para. 41) See also the discussion in Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, paras. 88-89.

[736] Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 71.

[737] Ibid., para. 72.

[738] Ibid.

[739] European Communities' response to Panel question No. 12. See also Appellate Body Report, *US - Softwood Lumber IV (Article 21.5 – Canada)*, para. 74.

[740] Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 74.

7.297 The Panel recalls that the panel on *EC – Bed Linen (Article 21.5 – India)*, in a finding upheld by the Appellate Body[741], concluded that:

> "[I]t is clear that it is the Panel, and not the [respondent], which decides whether the measures cited by [the complainant] in the request for establishment are to be considered 'measures taken to comply' and therefore fall within the purview of this dispute. That said, however, it is also not [the complainant]'s right to determine which measures taken by the EC are measures taken to comply. Rather, this is an issue which must be considered and decided by an Article 21.5 panel."[742]

7.298 Likewise, in Australia – Salmon (Article 21.5 – Canada) the panel held that:

> "[A]n Article 21.5 panel cannot leave it to the full discretion of the implementing Member to decide whether a measure is one 'taken to comply'. If one were to allow that, an implementing Member could simply avoid any scrutiny of certain measures by a compliance panel, even where such measures would be so clearly connected to the panel and Appellate Body reports concerned, both in time and in respect of the subject-matter, that any impartial observer would consider them to be measures 'taken to comply'."[743]

7.299 Accordingly, the Panel considers that it is properly and ultimately its role, and not the role of either the complainant or the respondent, to decide whether the current EC bananas import regime is a measure taken to comply.

(iii) The current EC bananas import regime

7.300 The Panel will first assess what constitutes the current EC bananas import regime. The parties agree that the European Communities' current bananas import regime is the regime introduced through EC Regulation 1964/2005 on 1 January 2006.[744] In addition, in its request for the establishment of this compliance Panel the United States also refers to other EC Regulations, and maintains that:

> "[T]he measures through which the EC maintains its current import regime for bananas ... include:
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> – *Regulation (EEC) 404/93 of 13 February 1993, as amended by Regulation (EC) 216/2001 of 29 January 2001*;
>
> – Regulation (EC) No. 1964/2005 of 29 November 2005; and
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> – *for each of the regulations listed above, any amendments, implementing measures, and other related measures*."[745] (emphasis added).

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[741] "We agree with the Panel 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'." Appellate Body Report on *EC – Bed Linen (Article 21.5 – India)*, para. 78.

[742] Panel Report on *EC – Bed Linen (Article 21.5 – India)*, para. 6.15.

[743] Panel Report on *Australia – Salmon (Article 21.5 – Canada)*, para. 7.10, subparagraph 22. *See also* Panel Report on *Australia – Automotive Leather II (Article 21.5 – US)*, paras. 6.4-6.5.

[744] See European Communities' first written submission, para. 4, footnote 2; and United States' first written submission, para. 2.

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

7.301 The European Communities does not contest this reference by the United States to EC Regulations 404/1993 and 216/2001 and "any amendments, implementing measures and other related measures" to those regulations, in the context of the current EC bananas import regime.

7.302 The parties describe the current EC bananas import regime in a similar manner. In its request for the establishment of this compliance Panel the United States contends that:

> "[O]n 29 November 2005, the EC adopted Regulation (EC) No. 1964/2005, which establishes a preferential (zero-duty) TRQ available only to bananas originating in African, Caribbean and Pacific ("ACP") countries.[746] Bananas of other origins have no access to this 775,000 ton TRQ. Under Regulation (EC) No. 1964/2005 such other bananas are subject instead to a duty of 176 euros/ton.[747] The regulation took effect as of 1 January 2006."[748]

7.303 In turn, in its first written submission of September 2007 the European Communities describes its "import regime for bananas"[749]:

> "The European Communities subjects all banana imports to a single tariff of € 176 per ton. There are no other tariffs and there are no quantitative restrictions imposed on the importation of bananas. This import regime has been in force since January 1, 2006.
>
> The only exception to this rule is that the European Communities offers a trade preference to those banana producing countries that have signed the 'Cotonou Agreement'. Pursuant to the Cotonou Agreement, the European Communities has the obligation to accept 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.[750] In the sector of bananas, the European Communities has limited the quantity of bananas originating from Cotonou countries that can be imported free of duty to 775,000 tons per year (the 'Cotonou Preference').[751] All bananas imported from Cotonou countries beyond this 'cap' are subject to the tariff of € 176 per ton.[752]"[753]

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

[747] *(footnote original)* Regulation (EC) No. 1964/2005, para. 1, published in the Official Journal of the European Communities (OJEC) L 316/1 of 12 December 2005.

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

[749] European Communities' first written submission, title II.A.

[750] *(footnote original)* See the Cotonou Agreement, Article 37, in combination with Annex V, Article 1.

[751] *(footnote original)* Council Regulation (EC) 1964/2005, Article 1, paragraph 2.

[752] *(footnote original)* For the sake of completeness, it is noted that the European Communities' Generalised System of Preferences also provides that banana imports from Least Developed Countries are subject to a zero duty. This does not have any impact on the current proceedings: all Least Developed Countries that are exporting bananas to the European Communities are also Cotonou beneficiary countries (Yemen and Bangladesh are least developed countries but have no banana exports towards the European Communities).

[753] European Communities' first written submission, paras. 3-4.

(iv) Criteria for assessing whether the current EC bananas import regime is a measure taken to comply

7.304 As to whether the current EC bananas import regime is a measure taken to comply, which is the main issue to be assessed by the Panel in the context of the third preliminary objection of the European Communities, the Panel notes that in *US – Softwood Lumber IV (Article 21.5 – Canada)* the Appellate Body examined the meaning of the phrase "measure taken to comply"[754], and held that "[o]n its face ... the phrase 'measures taken to comply' seems to refer to measures taken *in the direction of*, or *for the purpose of achieving*, compliance."[755]

7.305 Further, the Appellate Body held that:

> "The word 'consistency' [in Article 21.5 of the DSU] implies that panels acting pursuant to Article 21.5 must objectively assess whether new measures are, in fact, consistent with relevant obligations under the covered agreements. As the Appellate Body has already stated, such an evaluation involves consideration of 'that new measure in its totality' and the 'fulfilment of this task requires that a panel consider both the measure itself and the measure's application.'[756]"[757]

7.306 Accordingly, the Appellate Body concluded that:

> "The fact that Article 21.5 mandates a panel to assess 'existence' and 'consistency' tends to weigh against an interpretation of Article 21.5 that would confine the scope of a panel's jurisdiction to measures that **move in the direction of**, or **have the objective of achieving**, compliance. These words also suggest that *an examination of the effects of a measure may also be relevant to the determination of whether it constitutes, or forms part of, a 'measure[] taken to comply'*.[758]"[759] (emphasis added; original emphasis in bold)

7.307 The Panel also notes that Article 21.5 of the DSU refers to "measures taken to comply *with the recommendations and rulings*". (emphasis added) As regards that language, the Appellate Body in *US – Softwood Lumber IV (Article 21.5 – Canada)* held that:

> "A ... feature of the first sentence of Article 21.5 is the express link between the 'measures taken to comply' and the recommendations and rulings of the DSB. Accordingly, *determining the scope of 'measures taken to comply' in any given case must also involve examination of the recommendations and rulings contained in the original report(s) adopted by the DSB*."[760] (emphasis added)

7.308 While noting that "the phrase 'measures taken to comply' does place some limits on the scope of proceedings under [Article 21.5 of the DSU]"[761], the Appellate Body in *US – Softwood Lumber IV (Article 21.5 – Canada)* also held that "in order to fulfil its mandate under Article 21.5, a panel must be able to take full account of *the factual and legal background against which relevant measures are*

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[754] See Appellate Body Report on *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 66.
[755] Ibid.
[756] *(footnote original)* Appellate Body Report, *US – Shrimp, (Article 21.5 – Malaysia)*, para. 87.
[757] Appellate Body Report on *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 67.
[758] *(footnote original)* Both participants agree that the effects of measures taken by an implementing Member can be relevant to determining whether or not that measure may be examined in proceedings under Article 21.5 of the DSU. (Participants' responses to questioning at the oral hearing).
[759] Appellate Body Report on *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 67.
[760] Ibid., para. 68.
[761] Ibid., para. 69.

taken, so as to determine the existence, or consistency with the covered agreements, of measures taken to comply"[762] (emphasis added). As mentioned above, in the same dispute the Appellate Body similarly held that:

> "To be sure, 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. Yet, a panel, *in examining the factual and legal circumstances within which the implementing Member takes action*, may properly reach just such a finding in some cases"[763] (emphasis added).

7.309 Looking at previous disputes where compliance panels reached such a finding, the Appellate Body in *US – Softwood Lumber IV (Article 21.5 – Canada)* noted that one of the panels in those previous compliance proceedings had "looked at the *timing* ... as well as the *nature* of the [measure in question]".[764] Likewise, the Appellate Body noted that another previous compliance panel had "found that [a measure] fell within the scope of its terms of reference because, *inter alia*, the [measure] at issue was 'inextricably linked' to the measure that [the respondent in that dispute] itself stated it had taken to comply, 'in view both of its timing and its nature'.[765]"[766]

7.310 In conclusion, in *US – Softwood Lumber IV (Article 21.5 – Canada)* the Appellate Body summarized its approach in the following way:

> "Taking account of all of the above, our interpretation of Article 21.5 of the DSU confirms that a panel's mandate under Article 21.5 of the DSU is not necessarily limited to an examination of an implementing Member's measure declared to be 'taken to comply'. Such a declaration will always be relevant, but there are additional criteria, identified above, that should be applied by a panel to determine whether or not it may also examine other measures. Some measures with a particularly close relationship to the declared 'measure taken to comply', and to the recommendations and rulings of the DSB, may also be susceptible to review by a panel acting under Article 21.5. Determining whether this is the case requires a panel to scrutinize these relationships, which may, depending on the particular facts, call for an examination of the timing, nature, and effects of the various measures. This also requires an Article 21.5 panel to examine the factual and legal background against which a declared 'measure taken to comply' is adopted. Only then is a panel in a position to take a view as to whether there are sufficiently close links for it to characterize such an other measure as one 'taken to comply' and, consequently, to assess its consistency with the covered agreements in an Article 21.5 proceeding."[767]

7.311 The Panel recalls that, in addition to arguing that its current bananas import regime is not a measure taken to comply, the European Communities explicitly identifies the step it has taken in accordance with paragraph C(2) of the Bananas Understanding as the final measure taken to comply in the *EC – Bananas III* dispute:

> "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

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[762] Ibid.
[763] Ibid., para. 74.
[764] Ibid.
[765] *(footnote original) Ibid.*, para. 6.5.
[766] Appellate Body Report on *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 75.
[767] Ibid.

> signed the [Bananas] Understanding and exchanged the Letters attached as an Exhibit to th[e European Communities' first written] submission ...
>
> In compliance with the mutually agreed solution, the European Communities introduced on January 1, 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 and this was the end of the banana dispute between the parties ...
>
> ... [A]s far as the banana dispute with the United States is concerned, the 'measures taken to comply' with the findings and recommendations of the Appellate Body in 1997 and the rulings and recommendations of the DSB in 1997 were taken by the European Communities in 2002 ..."[768]

7.312 The European Communities adds that this alleged final measure to comply was contained in "Council Regulation 2587/2001, adopted by the European Communities on December 19, 2001, which introduced the 2002-2005 banana import regime."[769] The United States disagrees with the EC argument that the 2002-2005 EC bananas import regime was the final measure taken to comply; however, the United States does not contest the reference by the European Communities to EC Regulation 2587/2001 in the context of the 2002-2005 bananas import regime of the European Communities.

7.313 The Panel also notes that, in addition to arguing that the current EC bananas import regime is a measure taken to comply, the United States contends that "'a panel's mandate under Article 21.5 of the DSU is not necessarily limited to an examination of an implementing Member's measure declared to be "taken to comply"' ..."[770],[771] Also, in its third party written submission, Japan argues that:

> "[T]he Appellate Body in *US – Softwood Lumber IV (21.5)* addresses that, taking account of the context of Article 21.5 and the purpose of the DSU, 'a panel's mandate under Article 21.5 of the DSU is not necessarily limited to an examination of an implementing Member's measure declared to be "taken to comply",' and should also include 'some measures with a particularly *close relationship* to the declared "measure taken to comply", and to the recommendations and rulings of the DSB'.[772],[773]

7.314 In the light of those arguments and of the aforementioned conclusions by the Appellate Body in *US – Softwood Lumber IV (Article 21.5 – Canada)*, the Panel will assess whether, based on the criteria identified by Appellate Body in *US – Softwood Lumber IV (Article 21.5 – Canada)*, the current EC bananas import regime is a measure taken to comply in itself. Further, taking into account the criteria identified by Appellate Body in *US – Softwood Lumber IV (Article 21.5 – Canada)*, the Panel will assess whether the current EC bananas import regime is a measure taken to comply because of "a particularly close relationship to the declared 'measure taken to comply' [i.e. the 2002-2005

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[768] European Communities' first written submission, paras. 48-50.

[769] European Communities' response to Panel question No. 13.

[770] *(footnote original)* Panel Report, *Australia – Automotive Leather II (Article 21.5 – US)*, para. 6.4; and Panel Report, *Australia – Salmon (Article 21.5 – Canada)*, para. 7.10, sub-para. 22.

[771] United States' response to Panel question No. 12.

[772] (*footnote original*) *US – Softwood Lumber IV (21.5)*, para. 77 (Emphasis added.).

[773] Japan's third Party written submission, paras. 16-17.

bananas import regime of the European Communities], and to the [original] recommendations and rulings of the DSB."[774]

(v) Whether the current EC bananas import regime is closely related to the original recommendations and rulings adopted by the DSB in 1997, including to the measure being reviewed and found inconsistent in the original panel and appellate proceedings

7.315 As mentioned above, Article 21.5 of the DSU refers to "measures taken to comply with the recommendations and rulings". In *US – Softwood Lumber IV (Article 21.5)* the Appellate Body held in regard to this phrase that:

> "A ... feature of the first sentence of Article 21.5 is the express link between the 'measures taken to comply' and the recommendations and rulings of the DSB. Accordingly, determining the scope of 'measures taken to comply' in any given case must also involve examination of the recommendations and rulings contained in the original report(s) adopted by the DSB."[775]

7.316 In the *EC – Bananas III* dispute, the Dispute Settlement body "adopted the Appellate Body Report in WT/DS27/AB/R and the Panel Reports in WT/DS27/R/ECU, WT/DS27/R/GTM-WT/DS27/R/HND, WT/DS27/R/MEX, WT/DS27/R/USA, as modified by the Appellate Body Report"[776] at its meeting of 25 September 1997.

7.317 In paragraph 9.1 of its report (WT/DS27/R/USA) adopted as a result of the original complaint of the United States, the original panel the *EC – Bananas III* dispute concluded "that for the reasons outlined in this Report aspects of the European Communities' import regime for bananas are inconsistent with its obligations under Articles I:1, III:4, X:3 and XIII:1 of GATT, Article 1.3 of the Licensing Agreement and Articles II and XVII of the GATS." Further, the original panel "recommend[ed] that the Dispute Settlement Body request the European Communities to bring its import regime for bananas into conformity with its obligations under GATT, the Licensing Agreement and the GATS."[777]

7.318 Largely confirming the findings of the original panel under appellate review, the Appellate Body "recommend[ed] that the Dispute Settlement Body request the European Communities to bring the measures found in this Report and in the Panel Reports, as modified by this Report, to be inconsistent with the GATT 1994 and the GATS into conformity with the obligations of the European Communities under those agreements."[778] The detailed findings of the original panel, as modified by the report of the Appellate Body, are summarised above.[779]

7.319 The Panel notes the close link that the Appellate Body in *US – Softwood Lumber IV (Article 21.5 – Canada)* established between the analysis of the original recommendations and rulings and the measures at which those recommendations and rulings are directed:

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[774] Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 74.
[775] Ibid, para. 68.
[776] Dispute Settlement Body, Minutes of the Meeting Held in the Centre William Rappard on 25 September 1997, WT/DSB/M/37.
[777] Panel Report on *EC – Bananas III (US)*, para. 9.2.
[778] Appellate Body Report on *EC – Bananas III*, para. 257.
[779] See section II.E.2 above.

> "Because such recommendations and rulings are directed at the measures found to be inconsistent in the original proceedings[780], such an examination necessarily involves consideration of those original measures."[781]

7.320 In the same dispute, the Appellate Body also held that:

> "Article 21.5 of the DSU identifies the task of a panel operating pursuant to that provision as resolving disagreements 'as to the existence or consistency with a covered agreement of a measure taken to comply with the recommendations and rulings' of the DSB. *This task cannot be done in abstraction from the measure that was subject of the original proceedings*[782]"[783] (emphasis added).

7.321 In line with the relevant request for the establishment of a panel in the original proceedings in *EC – Bananas III*[784], the above-mentioned findings in the original panel and Appellate Body proceedings concerned "the EC regime for the importation, sale and distribution of bananas established by Council Regulation (EEC) 404/93[785], and the subsequent EC legislation, regulations and administrative measures, including those reflecting the provisions of the Framework Agreement on Bananas, which implemented, supplemented and amended that regime."[786]

7.322 The original proceedings were dealing in particular with "the EC's common market organization for bananas introduced on 1 July 1993"[787] through EC Regulation 404/1993.[788] The original panel summarized the main preferential tariff and quantitative elements of that regime:

> "Title IV [of EC Regulation 404/1993], which regulates trade with third countries, establishes three categories of imports: (i) traditional imports from twelve

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[780] *(footnote original)* Article 19.1 of the DSU mandates the recommendations that panels and the Appellate Body are to make in the event of a finding that a measure is inconsistent with a covered agreement: they "shall recommend that the Member concerned bring the measure into conformity with that agreement." (footnotes omitted) Thus, the text of Article 19.1 confirms the link between the measure taken to comply and the inconsistent measure that was the subject of the original proceedings.

[781] Appellate Body Report on *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 68.

[782] *(footnote original)* Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 68; Appellate Body Report, *US – FSC (Article 21.5 – EC II)*, para. 61. The Appellate Body has already recognized certain circumstances in which the scope of proceedings under Article 21.5 may be limited by the scope of the original proceedings. For example, a party cannot make the same claim of inconsistency against the same measure (or component of a measure) in an Article 21.5 proceeding if the original panel and Appellate Body found the measure to be consistent with the obligation at issue (Appellate Body Report, *US – Shrimp (Article 21.5 – Malaysia)*, paras. 89-99), or if the original panel found that the complaining party had not made out its claim with respect to the measure (or component of a measure). (Appellate Body Report, *EC – Bed Linen (Article 21.5 – India*), paras. 92-93 and 99) Similarly, a party may not, in proceedings under Article 21.5 of the DSU, seek to have the Appellate Body "revisit the original panel report" when that report was not appealed. (Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 78).

[783] Appellate Body Report on *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 102.

[784] See *EC – Bananas III*, Request for the Establishment of a Panel by Ecuador, Guatemala, Honduras, Mexico and the United States (WT/DS27/6), p. 1.

[785] *(footnote original)* Official Journal of the European Communities No. L 47 of 25 February 1993, pp.1-11.

[786] Panel Report on *EC - Bananas III (US)*, para. 1.1; and Appellate Body Report on *EC - Bananas III*, para. 1.

[787] Panel Report on *EC - Bananas III (US)*, para. 3.1. See also Appellate Body Report on *EC - Bananas III*, para. 1.

[788] See Article 33 of EC Regulation 404/1993; and Panel Report on *EC - Bananas III (US)*, para. 3.4.

> ACP countries[789]; (ii) non-traditional imports from ACP countries which are defined as both any quantities in excess of traditional quantities supplied by traditional ACP countries and any quantities supplied by ACP countries which are not traditional suppliers of the EC; and (iii) imports from third (non-ACP) countries.
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> ...
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> "Imports of bananas from the twelve traditional ACP countries enter duty-free up to the maximum quantity fixed for each ACP country ... These allocations collectively amount to 857,700 tonnes. These quantities are not bound in the EC Schedule. There is no provision in the EC regulations for an increase in the level of traditional ACP allocations.
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> ...
>
> Imports of non-traditional ACP bananas and bananas from third countries are subject to a tariff quota (also referred to by the EC as the 'basic tariff quota') of, originally, 2 million tonnes (net weight). This tariff quota was increased to 2.1 million tonnes in 1994 and to 2.2 million tonnes as of 1 January 1995. These tariff quota quantities were bound in the EC Uruguay Round Schedule.[790] The tariff quota can be adjusted on the basis of a 'supply balance' to be derived from production and consumption forecasts prepared in advance of each year.[791] In 1995 and 1996, a volume of 353,000 tonnes was added to the tariff quota as a result of 'consumption and supply needs' resulting from the accession of three new EC member States, Austria, Finland and Sweden. This additional volume is not bound in the EC Schedule. In practice, however, the EC's tariff quota for non-traditional ACP and third-country banana imports was increased to 2.553 million tonnes.[792]
>
> Of the tariff quota referred to above, 90,000 tonnes are reserved for duty-free entries of non-traditional ACP bananas. This volume is bound in the EC Schedule as a result of the BFA. By regulation, the EC allocated this import volume largely among specific supplying countries ..."[793]

7.323 Thus, a key element of the measure being reviewed and found inconsistent in the original proceedings was the preferential treatment by the European Communities of banana imports from ACP countries, as compared with the treatment accorded by the European Communities to other WTO Members. That preferential treatment involved a zero-duty tariff rate quota of 857,700 tons reserved for traditional ACP bananas imports and a zero-duty tariff rate quota of 90,000 tons reserved for non-traditional ACP bananas imports.

7.324 In essence, the current EC bananas import regime also maintains a preference for ACP bananas imports. In its request for the establishment of this compliance Panel the United States argues that:

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[789] *(footnote original)* Belize, Cape Verde, Côte d'Ivoire, Cameroon, Dominica, Grenada, Jamaica, Madagascar, Suriname, Somalia, St. Lucia, and St. Vincent and the Grenadines (Article 15.1 of Council Regulation (EEC) 404/93 (as amended) and the Annex thereto).

[790] *(footnote original)* Schedule LXXX - European Communities.

[791] *(footnote original)* Article 16 of Council Regulation (EEC) 404/93 (as amended).

[792] *(footnote original)* In addition, the EC issued hurrican licences, see para. 3.15 below.

[793] Panel Report on *EC - Bananas III (US)*, paras. 3.7-3.10.

> "Regulation (EC) No. 1964/2005, which establishes a preferential (zero-duty) TRQ available only to bananas originating in African, Caribbean and Pacific ('ACP') countries.[794] Bananas of other origins have no access to this 775,000 ton TRQ. Under Regulation (EC) No. 1964/2005 such other bananas are subject instead to a duty of 176 euros/ton.[795],[796]

7.325 Likewise, the European Communities concedes that its current bananas import regime maintains a preference for ACP countries:

> "*[T]he European Communities offers a trade preference to those banana producing countries that have signed the 'Cotonou Agreement' [i.e., to ACP countries]. ...* In the sector of bananas, the European Communities has limited the quantity of bananas originating from Cotonou countries that can be imported free of duty to 775,000 tons per year (the 'Cotonou Preference').[797] All bananas imported from Cotonou countries beyond this 'cap' are subject to the tariff of € 176 per ton[798],[799] (emphasis added).

7.326 Thus, both the original and the current EC bananas import regimes maintain, in the form of one or more tariff rate quotas at a zero in-quota duty, a preferential treatment for ACP countries in comparison with the treatment accorded to other WTO Members. These are important similarities in the nature and effects of the import regime reviewed in the original panel and appellate proceedings, and the current EC bananas import regime, which is being contested by the United States before this compliance Panel.

7.327 The Panel notes that EC Regulation 404/1993 *on The Common Organization of the Market in Bananas* was the main measure reviewed in the original panel and Appellate Body proceedings. As mentioned above, the original proceedings concerned "the EC regime for the importation, sale and distribution of bananas established by Council Regulation (EEC) 404/93[800], and the subsequent EC legislation, regulations and administrative measures, including those reflecting the provisions of the Framework Agreement on Bananas, which implemented, supplemented and amended that regime."[801]

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

[795] *(footnote original)* Regulation (EC) No. 1964/2005, para. 1, published in the Official Journal of the European Communities (OJEC) L 316/1 of 12 December 2005.

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

[797] *(footnote original)* Council Regulation (EC) 1964/2005, Article 1, paragraph 2.

[798] *(footnote original)* For the sake of completeness, it is noted that the European Communities' Generalised System of Preferences also provides that banana imports from Least Developed Countries are subject to a zero duty. This does not have any impact on the current proceedings: all Least Developed Countries that are exporting bananas to the European Communities are also Cotonou beneficiary countries (Yemen and Bangladesh are least developed countries but have no banana exports towards the European Communities).

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

[800] *(footnote original)* Official Journal of the European Communities No. L 47 of 25 February 1993, pp.1-11.

[801] Panel Report on *EC - Bananas III (US)*, para. 1.1; and Appellate Body Report on *EC - Bananas III*, para. 1.

7.328 In its request for the establishment of this compliance panel the United States describes "the measures through which the EC maintains its current import regime for bananas "[802], by making explicit reference, in addition to EC Regulation 1964/2005, to "Regulation (EEC) 404/93 of 13 February 1993, as amended by Regulation (EC) 216/2001 of 29 January 2001"[803] and to "any amendments, implementing measures, and other related measures"[804] to those EC Regulations. In the context of the current EC bananas import regime, the European Communities does not contest the reference by the United States to EC Regulation 404/93, as amended by EC Regulation 216/2001, and to "any amendments, implementing measures, and other related measures"[805] to those EC Regulations.

7.329 The Panel notes also that EC Regulation 1964/2005 has been adopted pursuant to EC Regulation 404/1993, as amended by EC Regulation 216/2001. This is argued by the European Communities itself[806], and it is confirmed by the Bananas Understanding, which in paragraph B makes explicit reference to both previous regulations:

> "*In accordance with Article 16(1) of Regulation No. (EC) 404/93 (as amended by Regulation No. (EC) 216/2001)*, the European Communities (EC) will introduce a Tariff Only regime for imports of bananas no later than 1 January 2006."[807] (emphasis added)

7.330 Indeed, EC Regulation 216/2001 amended Article 16 of EC Regulation 404/1993 thus:

> "1. This Article and Articles 17 to 20 shall apply to imports of fresh products falling within CN code ex 0803 00 19 *up to the entry into force of the rate of the common customs tariff for those products, no later than 1 January 2006*, established under the procedure provided for in Article XXVIII of the General Agreement on Tariffs and Trade.
>
> 2. Until the entry into force of the rate referred to in paragraph 1, imports of the fresh products referred to in the said paragraph shall be under the tariff quotas opened by Article 18"[808] (emphasis added).

7.331 In turn, EC Regulation 1964/2005 makes explicit reference to EC Regulation 404/1993 in the first recital of its preamble:

> "Council Regulation (EEC) No 404/93 of 13 February 1993 on the common organisation of the market in bananas provides for the entry into force of a tariff only regime for imports of bananas no later than 1 January 2006." (footnote omitted)

7.332 Further, Article 1.1 of EC Regulation 1964/2005 fulfils the function determined by Article 16.1 of EC Regulation 404/1993, as amended by EC Regulation 216/2001:

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[802] *EC – Bananas III (Article 21.5 – US)*, Request for the Establishment of a Panel (WT/DS27/83) 2 July 2007, p. 2.
[803] Ibid., pp. 2-3. See also United States' response to Panel question No. 38.
[804] *EC – Bananas III (Article 21.5 – US)*, Request for the Establishment of a Panel (WT/DS27/83) 2 July 2007, pp. 2-3. See also United States' response to Panel question No. 38.
[805] *EC – Bananas III (Article 21.5 – US)*, Request for the Establishment of a Panel (WT/DS27/83) 2 July 2007, pp. 2-3. See also United States' response to Panel question No. 38.
[806] See European Communities' response to Panel questions Nos. 14 and 72.
[807] Documents WT/DS27/58 of 2 July 2001, p. 2, para. B, and WT/DS27/59 of 2 July 2001, para. B.
[808] EC Regulation 216/2001, Article 1.1.

> "As from 1 January 2006 the tariff rate for bananas (CN code 0803 00 19) shall be EUR 176/tonne."

7.333 Article 3.1 of EC Regulation 1964/2005 makes further reference to EC Regulation 404/1993 by providing that:

> "The Commission shall be assisted by the Management Committee for Bananas established by Article 26 of Regulation (EEC) No 404/93 ..."

7.334 The Panel notes that EC Regulation 404/93 on the Common Organization of the Market in Bananas continued to apply even following the introduction, on 1 January 2006, of the current EC bananas import regime through EC Regulation 1964/2005, and beyond the establishment of this compliance Panel by the Dispute Settlement Body on 12 July 2007. As indicated above, EC Regulation 1964/2005 makes several explicit references to EC Regulation 404/1993, without repealing the latter. Further, in its request for the establishment of the Panel dated 2 July 2007, the United States explicitly identified EC Regulation 404/1993 as one of "the measures through which the EC maintains its current import regime for bananas"[809] Neither party has argued that EC Regulation 404/1993 was not in force at the time of the establishment of this Panel.

7.335 The Panel also notes that the first compliance panel requested by Ecuador, in response to the EC argument that a compliance Panel should not look at the EC Regulations representing the European Communities' attempt to comply with the original recommendations and rulings of the DSB as of the expiry of the reasonable period of time on 1 January 1999, through amendments to EC Regulation 404/1993, found that:

> "[I]t is clear that the two measures specified by Ecuador (Regulations 1637/98 and 2362/98) were 'taken [by the European Communities] to comply' with the DSB's recommendations, *as they modify aspects of the EC's banana import regime found by the original panel and Appellate Body reports to be inconsistent with the EC's WTO obligations*. There is no suggestion in the text of Article 21.5 that only certain issues of consistency of measures may be considered. Nor is there a suggestion that the term 'measures' has a special meaning in Article 21.5 that would imply that only certain aspects of a measure can be considered"[810] (emphasis added).

7.336 Article 1.1 of EC Regulation 1637/1998 also amended *inter alia* Article 16 of EC Regulation 404/1993, and EC Regulation 2632/1998 "la[id] down detailed rules for applying the arrangements for the importation of bananas under the tariff quotas provided for in Article 18(1) and (2) of Regulation (EEC) No 404/93 and *for the importation of quantities of traditional ACP bananas as referred to in Article 16 of that Regulation*, and also the arrangements outside those quotas"[811] (emphasis added).

7.337 Similarly, Article 1.1 of Regulation 1964/2005 fulfils the function set out in Article 16.1 of EC Regulation 404/1993, as amended by EC Regulation 216/2001; that amendment by EC Regulation 216/2001 concerned an aspect of the EC's bananas import regime found by the original panel and Appellate Body reports to be inconsistent with the European Communities' WTO obligations.

7.338 In the light of the foregoing legal and factual background of the current EC bananas import regime, the Panel concludes that the current EC bananas import regime, in particular EC Regulation

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

[810] Panel Report on *EC – Bananas III (Article 21.5 – Ecuador)*, para. 6.8.

[811] EC Regulation 2632/1998, Article 1.

1964/2005 is closely related to the measure reviewed and found inconsistent in the original panel and Appellate Body proceedings, and thus is closely related to the original recommendations and rulings adopted by the DSB in 1997.

(vi) Whether the current EC bananas import regime constitutes a measure taken by the European Communities in the direction of, or for the purpose of achieving, compliance

7.339 The Panel notes that the Appellate Body in *US – Softwood Lumber VI (Article 21.5 – Canada)* held that:

> "Article 21.5 proceedings do not occur in isolation but are part of a 'continuum of events'.[812] This is a consequence of the mandate of an Article 21.5 panel, namely, to examine whether recommendations and rulings from the original dispute have been implemented consistently with the covered agreements."[813]

7.340 The Panel will therefore assess the relevant factual and legal developments following the adoption of recommendations and rulings by the DSB on 25 September 1997. The Panel recalls that in the arbitration award of 7 January 1998 in *EC – Bananas III* pursuant to Article 21.3 of the DSU, the arbitrator referred to "Article 21.1 of the DSU[, which] stipulates that 'prompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members'."[814] The same arbitrator concluded that:

> "[P]ursuant to Article 21.3(c) [of the DSU], the 'reasonable period of time' for the European Communities to implement the recommendations and rulings of the DSB adopted on 25 September 1997 in *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, shall be the period from 25 September 1997 to 1 January 1999."[815]

> <u>The European Communities' first attempt to comply with the original DSB recommendations and rulings, and its review under dispute settlement proceedings</u>

7.341 At the end of the above reasonable period of time, 1 January 1999[816], the European Communities introduced the above-mentioned "Regulation (EC) No. 1637/98 ... amending Regulation (EEC) No. 404/93 ... on the common organization of the market in bananas, and (ii) Regulation (EC) No. 2362/98 ... laying down detailed rules for the implementation of Regulation 404."[817]

7.342 Both EC Regulations were found to be measures taken to comply with the original recommendations and rulings of the DSB.[818] They were also found to be inconsistent with these recommendations and rulings in two, practically simultaneous proceedings: (i) an arbitration pursuant to Article 22.6 of the DSU between the European Communities and the United States[819]; and (ii) a compliance proceeding requested by Ecuador against the European Communities.[820] A third compliance proceeding requested by the European Communities to establish that those

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[812] (*footnote original*) Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 121.
[813] Appellate Body Report on *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 103.
[814] Award of the Arbitrator on *EC – Bananas III* (WT/DS27/15), para. 18.
[815] Ibid., para. 20.
[816] See Panel Report on *EC – Bananas III (Article 21.5 – Ecuador)*, para. 2.1.
[817] Ibid. See also Decision by the Arbitrators on *EC – Bananas III (US) (Article 22.6 - EC)*, para. 5.3.
[818] See Decision by the Arbitrators on *EC – Bananas III (US) (Article 22.6 - EC)*, para. 4.3.
[819] See Decision by the Arbitrators on *EC – Bananas III (US) (Article 22.6 - EC)*.
[820] See Panel Report on *EC – Bananas III (Article 21.5 – Ecuador)*.

EC Regulations "must be presumed to conform to WTO rules"[821] referred to the negative findings of the compliance panel requested by Ecuador.[822]

7.343 In the arbitration between the European Communities and the United States pursuant to Article 22.6 of the DSU, the arbitrators held that "any assessment of the level of nullification or impairment presupposes an evaluation of consistency or inconsistency with WTO rules of the implementation measures taken by the European Communities, i.e. the revised banana regime, in relation to the panel and Appellate Body findings concerning the previous regime."[823] Accordingly, the arbitrators concluded that "there is a continuation of nullification or impairment of US benefits under the revised EC regime"[824] *inter alia* because "the reservation of the quantity of 857,700 tonnes for traditional ACP imports under the revised regime is inconsistent with paragraphs 1 and 2 of Article XIII of GATT."[825] In conclusion, in their decision of 9 April 1999 the arbitrators "determine[d] the level of nullification or impairment suffered by the United States in the matter *European Communities – Regime for the Importation, Sale and Distribution of Bananas ...*"[826]

7.344 On 19 April 1999, the DSB granted authorization for the United States to suspend concessions "consistent with the decision of the Arbitrators contained in document WT/DS27/ARB."[827]

7.345 Similarly to the above arbitration pursuant Article 22.6 of the DSU, the first compliance panel requested by Ecuador found in its report circulated on 6 May 1999 *inter alia* that "the reservation of the quantity of 857,700 tonnes for traditional ACP imports under the revised regime is inconsistent with paragraphs 1 and 2 of Article XIII of GATT [and] ... the country-specific allocations to Ecuador as well as to the other substantial suppliers are not consistent with the requirements of Article XIII:2."[828] Further, in respect of Article I of the GATT 1994 the first compliance panel requested by Ecuador found in relevant parts that:

> "[T]he level of 857,700 tonnes for duty-free traditional ACP imports can be considered to be required by the Lomé Convention because it appears to be based on pre-1991 best-ever exports and not on allowances for investments. However, we also find that it is not reasonable for the European Communities to conclude that Protocol 5 of the Lomé Convention requires 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 is not required by Protocol 5 of the Lomé Convention. Accordingly, absent any other applicable requirement of the Lomé Convention, those excess volumes are not covered by the Lomé waiver and the preferential tariff thereon is therefore inconsistent with Article I:1.
>
> Also in respect of Article I of GATT, we find that in respect of preferences for non-traditional ACP imports, it is 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 Euro per tonne for out-of-quota imports, are required by Article 168 of the Lomé Convention. Therefore, we find that

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[821] *EC – Bananas III (Article 21.5 – EC)*, Request for the Establishment of a Panel (WT/DS27/40), p. 2.
[822] See Panel Report on *EC – Bananas III (Article 21.5 – EC)*, para. 4.15.
[823] Decision by the Arbitrators on *EC – Bananas III (US) (Article 22.6 - EC)*, para. 4.3.
[824] Ibid., para. 5.98.
[825] Ibid., para. 5.96.
[826] Ibid., para. 8.1.
[827] Dispute Settlement Body, Minutes of Meeting held in the Centre William Rappard on 19 April 1999 (WT/DSB/M/59), 3 June 1999, p. 11.
[828] Panel Report on *EC – Bananas III (Article 21.5 – Ecuador)*, para. 6.160.

> the violations of Article I:1, as alleged by Ecuador in respect of preferences for non-traditional ACP imports, are covered by the Lomé waiver."[829]

7.346 The first compliance panel requested by Ecuador:

> "[C]onclude[d] that ... aspects of the EC's [revised] import regime for bananas are inconsistent with the EC's obligations under Articles I:1 and XIII:1 and 2 of GATT 1994 and Articles II and XVII of GATS. [T]herefore ... there is nullification or impairment of the benefits accruing to Ecuador under the GATT 1994 and the GATS within the meaning of Article 3.8 of the DSU.
>
> The Panel recommend[ed] that the Dispute Settlement Body request the European Communities to brings its import regime for bananas into conformity with its obligations under the GATT 1994 and the GATS."[830]

7.347 EC Regulations 1637/1998 and 2362/1998 were also the subject of dispute settlement proceedings brought at the end of 1998 by the European Communities, which invoked Article 21.5 of the DSU. In its request for the establishment of that compliance panel, the European Communities noted that:

> "In the DSB meeting of 22 September 1998, the original complainants expressed their concern 'about the EC's failure to comply with the DSB's recommendations'. They stated that 'consultations had confirmed that the Community and the complaining parties could not agree on the WTO-consistency of the measures taken by the EC to comply with the DSB's recommendations by 1 January 1999'. They emphasised that '[t]here was no doubt with regard to the existence of such a disagreement between the Community and the complaining parties'. They also stated that 'they had made it clear that there was no basis for any further consultations and had no plans to hold further consultations'."[831]

7.348 The European Communities also argued that:

> "Article 23 of the DSU confirms that there is a general principle in the WTO agreements that measures taken by WTO Members are in conformity with their rules unless they have been challenged under the appropriate dispute settlement procedures and proven not to conform. Since none of the original complainants has continued to pursue the procedures under Article 21.5, they must presently be deemed to be satisfied with the way in which the European Communities has brought its measures into conformity with the recommendations and rulings of the DSB in this case."[832]

7.349 Accordingly, "the European Communities request[ed] the establishment of a panel under Article 21.5 of the DSU with the mandate to find that the above-mentioned implementing measures of the European Communities must be presumed to conform to WTO rules unless their conformity has been duly challenged under the appropriate DSU procedures."[833]

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[829] Ibid., paras. 6.161-6.162.
[830] Ibid., paras. 7.1-7.2.
[831] *EC – Bananas III (Article 21.5 – EC)*, Request for the Establishment of a Panel (WT/DS27/40), p. 2.
[832] Ibid.
[833] Ibid.

7.350 In its report, circulated on 12 April 1999, the compliance panel requested by the European Communities decided "not [to] make findings as requested by the European Communities."[834] Nevertheless, the same compliance panel stated:

> "We agree with the European Communities that there is normally no presumption of inconsistency attached to a Member's measures in the WTO dispute settlement system. At the same time, we also are of the view that the failure, as of a given point in time, of one Member to challenge another Member's measures cannot be interpreted to create a presumption that the first Member accepts the measures of the other Member as consistent with the WTO Agreement. In this regard, we note the statement by a GATT panel that 'it would be erroneous to interpret the fact that a measure has not been subject to Article XXIII over a number of years, as tantamount to its tacit acceptance by contracting parties'.[835]"[836]

7.351 Also, the compliance panel requested by the European Communities made reference to the findings of inconsistency by the first compliance panel requested by Ecuador:

> "[W]e note that immediately prior (on the same date) to the establishment of this Panel, a panel was established by the DSB at the request of Ecuador to consider Ecuador's claim in an Article 21.5 proceeding that the EC's implementing measures are not consistent with its WTO obligations. The same three individuals are the panelists in these two Article 21.5 proceedings. Since we have found in the proceeding initiated by Ecuador that the EC's implementing measures are *not* consistent with its WTO obligations, it is clear that they cannot be presumed to be consistent in this proceeding.[837]

7.352 The above three procedures established that the first attempt of the European Communities to bring itself into compliance with the original recommendations and rulings adopted by the DSB in the *EC – Bananas III* dispute in 1997, was inconsistent with the European Communities' WTO obligations. The Panel reads that as a clear indication that the original attempt of the European Communities to bring itself into compliance by 1 January 1999 was unsuccessful.

Subsequent developments

7.353 The United States points out that following the European Communities' first, unsuccessful attempt to bring itself into compliance with the original DSB recommendations and rulings:

> "In November 1999, the EC announced a second attempt to reform its banana regime, which was allegedly to comprise a 'two-stage process, namely, after a transitional period during which a tariff quota system would be applied with preferential access for ACP countries, a flat tariff would be introduced.'[838]"[839]

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[834] Panel Report on *EC – Bananas III (Article 21.5 – EC)*, para. 5.1

[835] *(footnote original)* Panel report on *EEC – Quantitative Restrictions Against Imports of Certain Products from Hong Kong*, adopted on 12 July 1983, BISD 30S/129, 138, paragraph 28.

[836] Panel Report on *EC – Bananas III (Article 21.5 – EC)*, para. 4.13.

[837] Panel Report on *EC – Bananas III (Article 21.5 – EC)*, para. 4.15.

[838] *(footnote original)* Minutes of Meeting of the Dispute Settlement Body held on 19 November 1999, WT/DSB/M/71 (11 January 2000).

[839] United States' first written submission, para. 5.

7.354 At the meeting of the DSB held on 19 November 1999:

> "[T]he European Communities said that after extensive consultations with all the interested parties, the EC had put forward a proposal to modify its banana import regime. The EC considered that, under the present circumstances, *the most appropriate option would be to put in place 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 level of the flat tariff would be negotiated pursuant to Article XXVIII of GATT 1994 and in accordance with the negotiating directives contained in the proposal. During the transitional period, the quota management system would be a key issue. Detailed rules for administration of the tariff quota which would be adopted at a later stage were of considerable importance for the acceptability of the new regime. For this reason, the EC would seek agreement from interested countries on the management system. The EC was ready to start this process immediately. He noted that finding the means to respect its international obligations as well as other objectives constituted a considerable challenge for the EC. The EC believed that its proposal provided the best outcome to this dispute."[840]

7.355 At the same DSB meeting:

> "[T]he European Communities clarified that during the transitional period, three quotas would be available to all suppliers. The first would be the bound quota of 2.2 million tonnes at 75 Ecus/tonne, and the second would be an autonomous quota of 353,000 tonnes at the same tariff level. A third tariff quota of 850,000 would also be available. A preference of 275 Ecus/tonne would be granted to ACP countries. That third quota would be characterized by a bidding procedure through which an abatement with respect to the out-of-quota bound tariff rate would be determined. This auctioning-striking price system would resolve both the level of the tariff and the distribution of licences requested as well as the available quantities. A key practical aspect of the transitional quota system was the management of the first two quotas. The preferred option of interested parties for distribution of licences was a historical system, but could only be implemented if there was agreement on a mechanism compatible with both WTO and EC law. Unless such an agreement materialised, the alternative would be an appropriate form of a 'first-come first-served system' for the two quotas at 75 Ecus/tonne provided that the administrative problems could be overcome in such a way that the scheme was non-discriminatory."[841]

7.356 A few months later, in its status report to the DSB of 11 February 2000, also referred to by the United States[842], the European Communities stated that:

> "As it has been explained before to the DSB, the EC has now developed a proposal for the reform of the banana regime. The proposal envisages a two-stage process, comprising a tariff rate quota (TRQ) system for several years; this system should be replaced by a tariff only system no later than 1 January 2006. ...
>
> ...

[840] Dispute Settlement Body, Minutes of Meeting held in the Centre William Rappard on 19 November 1999 (WT/DSB/M/71), 11 January 2000, para. 2.

[841] Dispute Settlement Body, Minutes of Meeting held in the Centre William Rappard on 19 November 1999 (WT/DSB/M/71), 11 January 2000, para. 5.

[842] See Exhibit US-8, p. 1.

> As the proposal of November 1999 makes clear, if no feasible administrative system which will resolve the dispute can be found regarding the distribution system for licences in a TRQ system it will not be possible to maintain the proposal for a transitional TRQ regime; in that case negotiations under GATT Article XXVIII to replace the current system with a tariff only regime are envisaged."[843]

7.357 Approximately one year later, in spring 2001 the European Communities reached two separate but almost identical understandings on bananas with the United States and with Ecuador.[844] Although in the context of the second preliminary issue the parties contest the status and relevance of their Bananas Understanding[845], as regards the third preliminary issue, they both attach great relevance to that Understanding for the purposes of assessing whether the current EC bananas import regime is a measure taken to comply.

7.358 According to the European Communities, "a determination of whether a particular measure constitutes a 'measure taken to comply' should be based [*inter alia*] on ... the agreement reached between the parties (in our case the [Bananas] Understanding) and the rights and obligations undertaken in it ..."[846] Likewise, the United States "readily acknowledges the Understanding's direct relevance for purposes of establishing that the EC's current bananas import regime is a measure taken to comply with the DSB's rulings and recommendations."[847]

7.359 As noted in its analysis of the European Communities' second preliminary objection, the Panel does not intend to assess the status of the Bananas Understanding.[848] Nevertheless, in the light of parties' agreement on the relevance of the Bananas Understanding for the third preliminary issue, the Panel will look at the language of that Understanding.

7.360 The Bananas Understanding provides in Paragraph A that "[t]he European Commission and [the United States/Ecuador] have identified the means by which the long-standing dispute over the EC's banana import regime can be resolved."[849] Further, in its communication to the DSB concerning the Understanding, the European Communities referred to the Understanding as "a mutually satisfactory solution ... 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)."[850]

7.361 The Bananas Understanding sets out a series of bananas import regimes to be implemented by the European Communities, which are in line with what was announced by the European Communities at the DSB meeting of 19 November 1999 and in its above-mentioned status report of 11 February 2000.

7.362 Paragraph B of the Understanding provides that "[i]n accordance with Article 16(1) of Regulation No. (EC) 404/93 (as amended by Regulation No. (EC) 216/2001),

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[843] *EC – Bananas III*, Status Report by the European Communities (WT/DS27/51/Add.1), 8 September 1999.

[844] See documents WT/DS27/58 of 2 July 2001; WT/DS27/59 of 2 July 2001; and WT/DS27/60 of 9 July 2001.

[845] See paras.7.39 to 7.75 above.

[846] European Communities' response to Panel question No. 7.

[847] United States' response to Panel question No. 44.

[848] See paras. 7.100 and 7.117 above.

[849] Documents WT/DS27/58 of 2 July 2001, p. 2, para. A, and WT/DS27/59 of 2 July 2001, para. A.

[850] Document WT/DS27/58 of 2 July 2001, p. 1.

the European Communities (EC) will introduce a Tariff Only regime for imports of bananas no later than 1 January 2006."[851]

7.363 In turn, paragraph C of the Bananas Understanding provides that:

> "C. In the interim, the EC will implement an import regime on the basis of historical licensing as follows:
>
> 1. Effective 1 July 2001, the EC will implement an import regime on the basis of historical licensing as set out in Annex 1.
>
> 2. Effective as soon as possible thereafter, subject to Council and European Parliament approval and to adoption of the Article XIII waiver referred to in paragraph E, the EC will implement an import regime on the basis of historical licensing as set out in Annex 2. The Commission will seek to obtain the implementation of such an import regime as soon as possible."[852]

7.364 In exchange for the commitments by the European Communities set out in paragraphs B and C of the Bananas Understanding, paragraph D of the Understanding provides with respect to the United States that:

> "D. With respect to the United States' imposition of increased duties applied to certain EC products as of 19 April 1999 covering trade in an amount of US$191.4 million per year (the 'increased duties'):
>
> 1. Upon implementation of the import regime described in paragraph C(1), the United States will provisionally suspend its imposition of the increased duties.
>
> 2. Upon implementation of the import regime described in paragraph C(2), the United States will terminate its imposition of the increased duties.
>
> 3. The United States may reimpose the increased duties if the import regime described in paragraph C(2) does not enter into force by 1 January 2002."

7.365 Further, paragraph E of the Bananas Understanding stipulates that:

> "The United States will lift its reserve concerning the waiver of Article I of the GATT 1994 that the EC has requested for preferential access to the EC of goods originating in ACP states signatory to the Cotonou Agreement; and will actively work towards promoting the acceptance of an EC request for a waiver of Article XIII of the GATT 1994 needed for the management of quota C under the import regime described in paragraph C(2) until 31 December 2005."

7.366 The above-mentioned waivers were ultimately adopted by the Doha Ministerial Conference on 14 November 2001. They waived obligations of the European Communities under provisions of the GATT 1994 with which the original EC bananas import regime had been found to be inconsistent

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[851] Ibid., p. 2, para. B, and Document WT/DS27/59 of 2 July 2001, para. B.
[852] Documents WT/DS27/58 of 2 July 2001, p. 2, para. C, and WT/DS27/59 of 2 July 2001, para. C.

in the original proceedings and with which the revised EC bananas import regime of 1999 was found to be inconsistent by the arbitrators pursuant to Article 22.6 of the DSU and by the first compliance panel requested by Ecuador.

7.367 In the Doha Waiver from Article XIII:1 and 2 of the GATT 1994, the Ministerial Conference "decide[d that]… [w]ith respect to the EC's imports of bananas, as of 1 January 2002, and until 31 December 2005, paragraphs 1 and 2 of Article XIII of the GATT 1994 are waived with respect to the EC's separate tariff quota of 750,000 tonnes for bananas of ACP origin."[853] The Article XIII Doha Waiver made specific reference to the Bananas Understandings, by "*[t]aking note* of the understandings reached by the EC, Ecuador and the United States that identify the means by which the longstanding dispute over the EC's banana regime can be resolved, in particular their provision for a temporary global quota allocation for ACP banana supplying countries under specified conditions."[854] As is clear from its text, the same recital of the Article XIII Doha Waiver noted that the interim step foreseen by paragraph C of that Understanding was "temporary", which is also confirmed by the fact that the Article XIII Doha Waiver applied only until the tariff-only regime foreseen by paragraph B of the Bananas Understanding was supposed to enter into force. Further, the Article XIII Doha Waiver referred to "the exceptional circumstances surrounding the resolution of the bananas dispute and the interests of many WTO Members in the EC banana regime"[855], and "*[r]ecogniz[ed]* the need to afford sufficient protection to the ACP banana supplying countries, including the most vulnerable, during a limited transition period, to enable them to prepare for a tariff-only regime."[856]

7.368 The Doha Waiver from Article I:1 of the GATT 1994 "*[c]onsider[ed]* that, in the field of trade, the provisions of the ACP-EC Partnership Agreement requires preferential tariff treatment by the EC of exports of products originating in the ACP States."[857] In the Article I Doha Waiver, the WTO Ministerial Conference "decide[d that]… [s]ubject to the terms and conditions set out hereunder, Article I, paragraph 1 of the General Agreement shall be waived, until 31 December 2007, to the extent necessary to permit the European Communities to provide preferential tariff treatment for products originating in ACP States as required by Article 36.3, Annex V and its Protocols of the ACP-EC Partnership Agreement,[858] without being required to extend the same preferential treatment to like products of any other member."[859] Further, the Article I Doha Waiver provides that "[w]ith respect to bananas, the additional provisions in the Annex shall apply."[860] According to that Annex to the Article I Doha Waiver, "[t]he waiver would apply for ACP products under the Cotonou Agreement until 31 December 2007. In the case of bananas, the waiver will also apply until 31 December 2007, subject to the following, which is without prejudice to rights and obligations under Article XXVIII."[861]

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[853] Transitional Regime for the EC Autonomous Tariff Rate Quotas on Imports of Bananas, Decision of 14 November 2001 (WT/MIN(01)/16), 16 November 2001, para. 1.

[854] Ibid., third recital.

[855] Ibid., fourth recital.

[856] Transitional Regime for the EC Autonomous Tariff Rate Quotas on Imports of Bananas, Decision of 14 November 2001 (WT/MIN(01)/16), 16 November 2001, fourth recital.

[857] European Communities – The ACP-EC Partnership Agreement (WT/MIN(01)/15), 14 November 2001, third recital.

[858] *(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.

[859] European Communities – The ACP-EC Partnership Agreement (WT/MIN(01)/15), 14 November 2001, para. 1.

[860] Ibid., para. 3*bis*.

[861] Ibid., Annex, *chapeau*.

7.369 As regards modifications to the EC bananas import regime in the period following the adoption of the Bananas Understanding, the Panel notes that the European Communities argues that it has not adopted its current bananas import regime specifically pursuant to paragraph B of the Bananas Understanding.[862] This argument seems to contradict the European Communities' argument on good faith under the second preliminary issue that it "has *fully* complied with its obligations under the [Bananas] Understanding in good faith and relying on the expectation that the United States would also comply with its own obligations."[863] (emphasis added) That latter argument would suggest that the European Communities argues that the bananas import regimes it introduced on 1 July 2001, 1 January 2002 and 1 January 2006 correspond to paragraphs C(1), C(2) and B of the Bananas Understanding, respectively.

7.370 In the light of the similarities between paragraph C(1) and Annex 1 of the Bananas Understanding, on the one hand, and EC Regulation 216/2001, on the other hand, the European Communities EC Regulation 216/2001 Amending Regulation (EEC) No 404/93 on the Common Organisation of the Market in Bananas clearly corresponds to Phase I of the interim regime set out by paragraph C of the Bananas Understanding.

7.371 Indeed, according to paragraph C(1) of the Bananas Understanding, the first phase of that interim regime was supposed to become "[e]ffective on 1 July 2001". Similarly, the relevant modifications in the management of tariff quotas set out in EC Regulation 404/1993, took effect on 1 July 2001. Under the second paragraph of Article 2 of EC Regulation 216/2001:

> "[The Regulation] shall apply from 1 April 2001. However, the Commission may, according to the procedure laid down in Article 27, delay the date until 1 July 2001 at the latest, if this proves necessary for the implementation of the modifications in the management of the tariff quotas."

7.372 In turn, Article 1 of EC Commission Regulation 395/2001, notes that it "seeks ... to comply with international commitments entered into by the Community within the World Trade Organisation (WTO)"[864], and provides that "Article 1 of Regulation (EC) No 216/2001[, which introduces the relevant modifications to EC Regulation 404/1993 shall apply from 1 July 2001."

7.373 Under Annex 1 of the Bananas Understanding, which describes Phase I of the EC interim bananas import regime:

> "1. A bound tariff-rate quota (TRQ) designated as quota 'A' will be set at 2,200,000 tonnes. An autonomous TRQ designated as quota 'B' will be set at 353,000 tonnes. These TRQs will be managed as one, with the total quota being 2,553,000 tonnes. There is no expectation of allocation of shares of either of these TRQs among country suppliers, and the Commission will not seek to convene a meeting to that effect of the principal supplying countries except upon the joint request of all such countries. The tariff applied to bananas imported in the 'A' and 'B' quotas shall not exceed 75 euro/tonne.
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> 2. A TRQ designated as quota 'C' will be set at 850,000 tonnes.

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[862] European Communities' second written submission, para. 43. The European Communities also argues that "[t]he introduction of the tariff-only import regime was decided by the European Communities at least 2 years before the signing of the [Bananas] Understanding." Final written version of the European Communities' closing oral statement at the substantive meeting of the Panel with the parties and third parties, para. 6.

[863] European Communities' second written submission, para. 39.

[864] EC Regulation 395/2001, recital 7.

3. Import licenses for 83% of the 'A' and 'B' TRQs will be distributed to 'traditional' operators based on each qualified 'traditional' operator's 1994-96 average annual final reference volume ('reference volume') for the 'A/B' quotas. Qualified 'traditional' operators will be identified on the basis of the distribution of licenses that occurred under Regulation 404, Article 19.1(a) and Regulation 1442, Article 3.1(a) for 'Category A subfunction (a)'. Importers will not need to produce new evidence.

4. Licenses for TRQ 'C' are intended to be distributed broadly in accordance with the principles to be utilized in managing of licenses for TRQ's 'A' and 'B' and on the basis of imports of ACP-origin bananas. The European Commission and the United States will consult again within 4 weeks with a view to finalizing the licensing principles for TRQ 'C'.

5. Within each TRQ, licenses may be used to import bananas from any source. Licenses to import bananas into TRQ 'C' cannot be used to import bananas into TRQs 'A' or 'B', and vice versa.

6. A 'non-traditional' operator category will be created with respect to 17% of the quantity of the 'A and B' TRQs. Non-traditional operators cannot become traditional operators in subsequent periods. Management of non-traditional imports will be done by simultaneous examination."

7.374 In turn, the preamble of EC Regulation 216/2001 makes reference to original recommendations and rulings in the *EC – Bananas III* dispute:

> "There have been numerous close contacts with supplier countries and other interested parties to settle the disputes arising from the import regime established by Regulation (EEC) No 404/93 and *to take account of the conclusions of the special group set up under the dispute settlement system of the World Trade Organisation (WTO)*"[865] (footnote omitted, emphasis added).

7.375 Further, the preamble of EC Regulation 216/2001 describes the regime that this EC Regulation intends to introduce, in a very similar way as Annex 1 to the Bananas Understanding:

> "Analysis of all the options presented by the Commission suggests that *establishment in the medium term of an import system founded on the application of a customs duty at an appropriate rate and application of a preferential tariff to imports from ACP countries provides the best guarantees*, firstly of achieving the objectives of the common organisation of the market as regards Community production and consumer demand, *secondly of complying with the rules on international trade, and thirdly of preventing further disputes*.
>
> However, such a system must be introduced upon completion of negotiations with the Community's partners in accordance with WTO procedures, in particular Article XXVIII of the General Agreement on Tariffs and Trade (GATT). The result of these negotiations must be submitted for approval to the Council which must also, in accordance with the provisions of the Treaty, establish the applicable level of the Common Customs Tariffs.

[865] EC Regulation 216/2001, recital 1.

> *Until the entry into force of that regime,* the Community should be supplied under several tariff quotas open to imports from all origins and managed in line with the recommendations made by the dispute settlement body. *The first tariff quota of 2200000 tonnes at a rate of EUR 75 should be bound in the WTO. A second, additional tariff quota of 353000 tonnes should be opened to cater for the increase in consumption resulting from enlargement of the Community in 1995, with the same rate applying. To ensure satisfactory supply to the Community, a third, autonomous tariff quota of 850000 tonnes should be opened, also for all origins.* Under this latter tariff quota, provision should be made for the possibility, in accordance with an appropriate procedure, of a reduction in the applicable customs duty in order to allow the effective importation of bananas originating in third countries which do not benefit from the tariff preferences granted in respect of bananas originating in ACP countries.
>
> In view of the contractual obligations towards the ACP countries and the need to guarantee them proper conditions of competition, application to imports of bananas originating in those countries of a tariff preference of EUR 300 per tonne would allow the trade flows in question to be maintained. This will entail in particular the application to such imports of zero duty under the three tariff quotas.
>
> ...
>
> Provision should be made for the additional tariff quota of 353000 tonnes to be modified to take account of any increased Community demand found when a supply balance is drawn up. Provision should also be made for suitable specific action to be taken in response to exceptional circumstances liable to affect supply of the Community market."[866] (emphasis added)

7.376 Article 1 of EC Regulation 216/2001 amended EC Regulation 404/1993 accordingly.

7.377 As regards Phase II of the European Communities' interim import regime foreseen under paragraph C(2) of the Bananas Understanding, as mentioned above, the European Communities argues that that phase was contained in "Council Regulation 2587/2001, adopted by the European Communities on December 19, 2001, which introduced the 2002-2005 banana import regime."[867] The United States does not contest the reference by the European Communities to EC Regulation 2587/2001 in the context of the 2002-2005 bananas import regime of the European Communities.

7.378 The European Communities notified that EC Regulation to the DSB with the following introduction: "By ... Regulation [2587/2001], the EC has implemented Phase 2 of the [Bananas] Understandings with the United States and Ecuador (circulated as document WT/DS27/58 of 2 July 2001)."[868]

7.379 As the European Communities itself argues[869], similarly to EC Regulation 216/2001, the preamble to EC Regulation 2587/2001 provides that "[t]here have been numerous close contacts with supplier countries and other interested parties to settle the disputes arising from the import regime

[866] EC Regulation 216/2001, recitals 2-5 and 7.
[867] European Communities' response to Panel question No. 13.
[868] *EC – Bananas III*, Status Report by the European Communities (WT/DS27/51/Add.25), 21 January 2002, p. 1.
[869] See European Communities' response to Panel question No. 13.

established by Regulation (EEC) No 404/93 and to take account of the conclusions of the panel set up under the dispute settlement system of the World Trade Organisation (WTO)."[870]

7.380 Further, Article 1.4 of EC Regulation 2587/2001 amends Article 18 of EC Regulation 404/1993 in line with Annex 2 to the Bananas Understanding, which describes Phase II of the interim bananas import regime of the European Communities.

7.381 Finally, on 1 January 2006, EC Regulation 1964/2005 entered into force. As mentioned above, the European Communities identifies that Regulation as the measure introducing its current bananas import regime.[871] Also, the European Communities does not contest that EC Regulation 1964/2005 corresponds to paragraph B of the Bananas Understanding, which provides that "In accordance with Article 16(1) of Regulation No. (EC) 404/93 (as amended by Regulation No. (EC) 216/2001), the European Communities (EC) will introduce a Tariff Only regime for imports of bananas no later than 1 January 2006."

7.382 The preamble of EC Regulation 1964/2005 explicitly refers to "Council Regulation (EEC) No 404/93 of 13 February 1993 on the common organisation of the market in bananas provides for the entry into force of a tariff only regime for imports of bananas no later than 1 January 2006."[872] Further, the preamble of EC Regulation 1964/2005 makes ample reference to the arbitrations pursuant to the Annex to the Article I Doha Waiver[873], which addressed the two unsuccessful attempts of the European Communities to rebind its bananas tariff in 2005.

Specific arguments by the European Communities to refute the proposition that its current bananas import regime is a measure taken to comply

7.383 To assess whether the above events effectively constitute a "continuum of events[874]"[875] between the original DSB recommendations and rulings and the current EC bananas import regime, the Panel will look at the main arguments raised by the European Communities to refute the proposition that its current bananas import regime is a measure taken to comply. Most of these arguments relate, at least in part, to the European Communities' argument that its final measure taken to comply was its 2002-2005 bananas import regime, which corresponds to Phase II of the interim regime set out in the Bananas Understanding.

Termination of the suspension of concessions by the United States

7.384 The European Communities argues that its 2002-2005 bananas import regime was the final measure taken to comply since "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."[876]

7.385 Referencing Paragraph D of the Bananas Understanding[877], the European Communities argues that "the United States' retaliation rights terminated upon the European Communities' implementation of th[e 2002-2005] tariff-quota based regime."[878] According to the European Communities, "the fact that the United States accepted to have their retaliation rights terminated upon the implementation of

[870] EC Regulation 2587/2001, recital 1.
[871] See European Communities' first written submission, para. 4, footnote 2.
[872] EC Regulation 1964/2005, recital 1.
[873] See ibid., recitals 3-5.
[874] (*footnote original*) Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 121.
[875] Appellate Body Report on *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 103.
[876] European Communities' first written submission, para. 49.
[877] See para. 7.184 above.
[878] European Communities' first written submission, para. 49.

the tariff-quota-based import regime described in paragraph C-2 of the [Bananas] Understanding confirms that the implementation of that import regime was the agreed 'measure taken to comply'".[879] Further, the European Communities contends, "[t]he fact that the [Bananas] Understanding provided for the *termination* and not for the continuation of the *suspension* of the retaliation rights of the United States after January 1, 2002 confirms that there was no dispute between the United States and the European Communities after that date."[880]

7.386 The European Communities additionally considers the dispute to have concluded since "the United States never requested from the DSB the right to reinstate those rights with relation to that import regime."[881] Also, according to the European Communities, under the Bananas Understanding, "[t]he only case in which the United States would re-impose retaliatory measures was if the Phase II regime [set out in paragraph C-2 of the Bananas Understanding] '(did) not enter into force by 1 January 2002'."[882]

7.387 According to the European Communities, "the right to suspend concessions must be revoked once the defending WTO Member has fully complied with the DSB's recommendations and rulings.[883]"[884] The European Communities explains that:

> "Article 22.8 of the DSU provides that retaliation measures must be terminated 'when a mutually agreed solution is reached'. In the present case, the United States agreed to terminate its retaliation measures upon implementation of phase 2 of the [Bananas] Understanding, i.e., the introduction of the 2002-2005 import regime. This is further evidence that the tariff only regime to be introduced in 2006 was not 'a measure taken to comply'."[885]

7.388 As noted above, in the arbitration concerning the level of suspension originally proposed by the United States[886] (*EC – Bananas III (US) (Article 22.6 – EC)*, pursuant to Article 22.6 of the DSU the arbitrator concluded that:

> "In light of the foregoing considerations, the Arbitrators determine that the level of nullification or impairment suffered by the United States in the matter *European Communities – Regime for the Importation, Sale and Distribution of Bananas* is US$191.4 million per year. Accordingly, the Arbitrators decide 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 Article 22.4 of the DSU."[887]

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[879] European Communities' second written submission, para. 44.
[880] European Communities' comments on United States' response to Panel question No. 22.
[881] European Communities' first written submission, para. 49.
[882] European Communities' second written submission, para. 44.
[883] *(footnote original)* See the Handbook on the WTO Dispute Settlement System, A WTO Secretariat Publication prepared for publication by the Legal Affairs Division and the Appellate Body, Cambridge University Press, at page 81.
[884] European Communities' first written submission, para. 24.
[885] European Communities' response to Panel question No. 8.
[886] See *EC – Bananas III*, Recourse by the United States to Article 22.2 of the DSU (WT/DS27/43), 14 January 1999.
[887] Decision by the Arbitrators on *EC – Bananas III (US) (Article 22.6 – EC)*, para. 8.1.

7.389 The United States modified its request for suspension of concessions accordingly[888], and on 19 April 1999, the DSB granted authorization for the United States to suspend concessions:

> "[P]ursuant to the US request under Article 22.7 of the DSU, [the DSB] agree[s] to grant authorization 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."[889]

7.390 The United States subsequently suspended concessions beginning in 1999.

7.391 At the DSB meeting of 1 February 2002, the United States made the following statement:

> "[T]he United States ... was pleased to note that the EC had increased the quota for Latin American banana exporting countries by 100,000 tonnes effective from 1 January 2002. 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."[890]

7.392 The Panel notes that the United States does not contest that this was in response to the introduction of Phase II of the European Communities' interim bananas import regime set out in the Bananas Understanding. However, the United States argues that:

> "[T]he Understanding sets out a series of steps. Two significant steps were to be achieved by July 1, 2001, and January 1, 2002. As incentive to ensure that the EC took those steps, the United States agreed to first provisionally suspend its imposition of increased duties and then terminate the imposition of increased duties that the DSB had authorized the United States to apply. This only proves that both the United States and the EC complied with what is set out in paragraphs C and D of the Understanding. Up to that point, there had yet to be full compliance by the EC. Per the terms of the Understanding, there was an additional step to be taken."[891]

7.393 The Panel notes that Article 21.5 of the DSU does not make any reference to retaliation, nor to the suspension or termination of concessions. Nor does Article 22.8 of the DSU address what measures can be considered as "measures taken to comply". This latter is a term used in Article 21.5 of the DSU.

7.394 The Panel recalls that the above arbitration procedure pursuant to Article 22.6 of the DSU merely established the maximum annual amount of permissible suspension of concessions; neither the arbitrator, nor the DSB indicated the period during which the United States would be entitled to apply retaliatory measures.

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

[889] Dispute Settlement Body, Minutes of Meeting held in the Centre William Rappard on 19 April 1999 (WT/DSB/M/59), 3 June 1999, p. 11.

[890] Dispute Settlement Body, Minutes of Meeting held in the Centre William Rappard on 1 February 2002 (WT/DSB/M/119), 6 March 2002, para. 8.

[891] Final written version of the United States' opening oral statement at the substantive meeting of the Panel with the parties and third parties, para. 14. See also United States' response to Panel question No. 22.

7.395 Article 22.1 of the DSU provides that "[c]ompensation and the suspension of concessions or other obligations are temporary measures available in the event that the recommendations and rulings are not implemented within a reasonable period of time." Likewise, Article 22.8 of the DSU provides that: "[t]he suspension of concessions or other obligations shall be temporary." This was also confirmed by the arbitrator in *EC – Bananas III (US) (Article 22.6 – EC)*, who held that "authorization to suspend concessions or other obligations is a temporary measure pending full implementation by the Member concerned."[892]

7.396 The Panel agrees with the United States that "Members can choose not to apply their WTO authorization (or not to apply it in full)."[893] This is illustrated by the history of the *EC – Bananas III* dispute, where Ecuador chose not to retaliate despite the authorization to do so.[894]

7.397 The Panel considers that the suspension of concessions is a right, not an obligation. Article 3.7 of the DSU provides that "[t]he last resort which this Understanding provides to the Member invoking the dispute settlement procedures is the *possibility* of suspending the application of concessions or other obligations under the covered agreements on a discriminatory basis vis-à-vis the other Member, subject to authorization by the DSB of such measures" (emphasis added). The European Communities also recognizes that retaliation involves a "right to suspend concessions".[895]

7.398 Article 22.8 of the DSU provides that: "[t]he suspension of concessions or other obligations ... shall only be applied until such time as the measure found to be inconsistent with a covered agreement has been removed, or the Member that must implement recommendations or rulings provides a solution to the nullification or impairment of benefits, or a mutually satisfactory solution is reached."

7.399 The Panel reads this part of Article 22.8 of the DSU as establishing a time-limit until which a Member authorized to retaliate may exercise its right to retaliate. In other words, once authorized to retaliate, a Member may choose whether or not to retaliate, but a Member choosing to retaliate shall not apply such retaliation beyond the time-limit set out by Article 22.8 of the DSU. The Panel agrees with the argument of the United States that "Members can choose not to apply their WTO authorization (or not to apply it in full) for all sorts of reasons that have nothing to do with whether the 22.8 conditions are met."[896] Indeed, the award of the arbitrator pursuant to Article 22.6 of the DSU explicitly refers to "Members that for whatever reasons do not wish to suspend concessions."[897]

7.400 Since Members have the right but not the obligation to retaliate, the Panel does not believe that the mere fact that a Member suspends and then terminates the suspension of concessions necessarily means that "the measure found to be inconsistent with a covered agreement has been removed, or the Member that must implement recommendations or rulings provides a solution to the nullification or impairment of benefits, or a mutually satisfactory solution is reached."

7.401 Indeed, the arbitrator in *EC – Bananas III (US) (Article 22.6 – EC)* noted that the "*temporary* nature [of retaliation] indicates that it is the purpose of countermeasures to *induce compliance*."[898]

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[892] Decision by the Arbitrators on *EC – Bananas III (US) (Article 22.6 – EC)*, para. 6.3.

[893] United States' response to Panel question No. 43.

[894] See *EC – Bananas III*, Recourse by Ecuador to Article 22.2 of the DSU (WT/DS27/52), 9 November 1999; Decision by the Arbitrators on *EC – Bananas III (Ecuador) (Article 22.6 – EC)*; *EC - Bananas III*, Recourse by Ecuador to Article 22.7 of the DSU (WT/DS27/54), 8 May 2000; and Dispute Settlement Body, Minutes of Meeting held in the Centre William Rappard on 18 May 2000 (WT/DSB/M/80), 26 June 2000, para. 58.

[895] European Communities' first written submission, para. 24.

[896] United States' response to Panel question No. 43.

[897] Decision by the Arbitrators on *EC – Bananas III (US) (Article 22.6 – EC)*, para. 4.11.

[898] Ibid., para. 6.3.

Likewise, the arbitrator in *EC – Bananas III (Ecuador) (Article 22.6 – EC)* stated that "the object and purpose of Article 22 ... is to induce compliance."[899] Further, Article 22.1 of the DSU provides 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."

7.402 The Panel agrees with the European Communities that paragraph D of the Bananas Understanding linked the termination of the United States' suspension of concessions to the timely introduction of Phase II of the interim regime set out in paragraph C(2) of the Understanding. However, the Bananas Understanding referred to by the European Communities, also includes paragraph B, which provides for a final step to follow immediately Phase II of the interim regime. In its statement at the DSB meeting of 1 February 2002 on "terminat[ing] the suspension of concessions in effect since 1999"[900] the United States made explicit reference to the Bananas Understanding and the step set out in paragraph B thereof:

> "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."[901]

7.403 The Panel lastly recalls that in *EC – Bananas III (US) (Article 22.6 – EC)* the arbitrator noted that "the European Communities argues that if we consider the WTO consistency of its banana regime in an arbitration proceeding under Article 22, we will deprive Article 21.5 of its *raison d'être*."[902] The arbitrator "disagree[d]"[903], stating that "[f]or those Members that for whatever reasons do not wish to suspend concessions, Article 21.5 will remain the prime vehicle for challenging implementation measures."[904]

7.404 In the light of the above, the Panel considers that the right to invoke Article 21.5 of the DSU shall apply to the United States irrespective of whether it terminated its suspension of concessions in 2002. Indeed, Article 21.5 of the DSU does not make any reference to retaliation, nor to the suspension or termination of concessions. Nor does Article 22.8 of the DSU talk about what measures can be considered as measures taken to comply, which is addressed in Article 21.5 of the DSU. Thus, the termination of the United States' suspension of concessions cannot in itself be read as a waiver of the US right to bring a compliance dispute or as an acceptance by the United States that the 2002-2005 EC bananas import regime would be the final EC measure taken to comply.

Withdrawal from the DSB agenda

7.405 The European Communities also argues that "the issue of the implementation of the EC-Bananas III DSB recommendations and rulings was withdrawn from the DSB's agenda with the consent of all WTO members (including the United States), in accordance with Article 21.6 of the DSU."[905] Accordingly, the European Communities contends:

> "[A] compliance panel is excluded when a dispute has been settled. In fact, such a dispute is considered resolved once and for all. This is evidenced by the wording of Article 21.6 of the DSU, which specifies that the issue of implementation of the

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[899] Decision by the Arbitrators on *EC – Bananas III (Ecuador) (Article 22.6 – EC)*, para. 76.

[900] Dispute Settlement Body, Minutes of Meeting held in the Centre William Rappard on 1 February 2002 (WT/DSB/M/119), 6 March 2002, para. 8.

[901] Ibid.

[902] Decision by the Arbitrators on *EC – Bananas III (US) (Article 22.6 – EC)*, para. 4.11.

[903] Decision by the Arbitrators on *EC – Bananas III (US) (Article 22.6 – EC)*, para. 4.11.

[904] Ibid.

[905] European Communities' response to Panel question No. 20.

> recommendations or rulings of the DSB stays on its agenda 'until the issue is resolved'. This obviously means that a dispute taken off the agenda is considered resolved."[906]

7.406 At the DSB meeting held on 1 February 2002[907], under the agenda item "Surveillance of implementation of recommendations adopted by the DSB", the Chairman of the DSB recalled that "Article 21.6 of the DSU required that 'unless the DSB decides otherwise, the issue of implementation of the recommendations or rulings shall be placed on the agenda of the DSB meeting after six months following the date of establishment of the reasonable period of time pursuant to paragraph 3 and shall remain on the DSB's agenda until the issue is resolved'."[908]

7.407 In the specific context of the *EC – Bananas III* dispute, the DSB Chairman "drew attention to document WT/DS27/51/Add.25 which contained the status report by the EC on progress in the implementation of the DSB's recommendations concerning its banana import regime."[909]

7.408 Subsequently, the European Communities stated that:

> "[T]he EC 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 EC] said that the regime set out in [EC] Regulation [2587/2001] would be applicable until the time the EC's 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. Under these circumstances, the EC considered that this matter should now be withdrawn from the DSB agenda."[910]

7.409 In response, at the same meeting of the DSB, various Members, including Ecuador, Honduras and the United States made statements. Subsequently, "[t]he DSB *took note* of [those] statements."[911]

7.410 The issue of the "Implementation by the European Communities of the recommendations and rulings of the DSB in relation to 'European Communities – Regime for the Importation, Sale and Distribution of Bananas'[912] and related subsequent WTO proceedings" appeared on the DSB agenda four years later, at the first meeting of the DSB following the introduction of the current EC bananas import regime.[913] It was discussed as an autonomous agenda item, separate from "Surveillance of implementation of recommendations adopted by the DSB", and "the EC noted its disagreement with the categorization of this matter as an 'implementation issue' relevant to Article 21 of the DSU."[914] The issue was further discussed at numerous subsequent DSB meetings during 2006[915] and in early

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[906] Ibid.

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

[908] Ibid., para. 1.

[909] Ibid., para. 2.

[910] 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.

[911] Ibid., 6 March 2002, para. 8.

[912] *(footnote original)* WT/DS27.

[913] See Dispute Settlement Body, Minutes of Meeting held in the Centre William Rappard on 20 January 2006 (WT/DSB/M/203), 24 February 2006.

[914] Ibid., para. 55.

[915] See Dispute Settlement Body, Minutes of Meeting held in the Centre William Rappard on 17 February 2006 (WT/DSB/M/205), 31 March 2006; Dispute Settlement Body, Minutes of Meeting held in the Centre William Rappard on 17 March 2006 (WT/DSB/M/207), 26 April 2006; Dispute Settlement Body, Minutes of Meeting held in the Centre William Rappard on 21 April 2006 (WT/DSB/M/210), 30 May 2006;

2007[916] until the DSB finally addressed the request for the establishment of compliance panels by Ecuador[917] and by the United States.[918]

7.411 The European Communities invokes the following part of the third sentence of Article 21.6 of the DSU: "the issue of implementation of the recommendations or rulings shall ... remain on the DSB's agenda until the issue is resolved", and argues that therefore "a dispute taken off the agenda is considered resolved."[919] The Panel considers that this can be ascertained only after analysing the text of Article 21.6 in line with the customary rules of interpretation.

7.412 Article 21.6 of the DSU provides that:

> "The DSB shall keep under surveillance the implementation of adopted recommendations or rulings. The issue of implementation of the recommendations or rulings may be raised at the DSB by any Member at any time following their adoption. Unless the DSB decides otherwise, the issue of implementation of the recommendations or rulings shall be placed on the agenda of the DSB meeting after six months following the date of establishment of the reasonable period of time pursuant to paragraph 3 and shall remain on the DSB's agenda until the issue is resolved. At least 10 days prior to each such DSB meeting, the Member concerned shall provide the DSB with a status report in writing of its progress in the implementation of the recommendations or rulings."

7.413 The excerpt invoked by the European Communities, namely that "the issue of implementation of the recommendations or rulings shall ... remain on the DSB's agenda until the issue is resolved" appears to be categorical. It uses the word "shall", which implies an obligation, and the word "remain", which implies continued action by the DSB.

7.414 However, this sentence begins with the qualifier "[u]nless the DSB decides otherwise". This qualification also applies to part of the same sentence invoked by the European Communities. Accordingly, per the terms of the sentence invoked by the European Communities, a plausible interpretation of the third sentence of Article 21.6 of the DSU in the Panel's view is that the DSB may decide that the "issue of implementation of the recommendations or rulings shall [*not*] remain on the DSB's agenda until the issue is resolved".

Dispute Settlement Body, Minutes of Meeting held in the Centre William Rappard on 17 May 2006 (WT/DSB/M/212), 20 June 2006; Dispute Settlement Body, Minutes of Meeting held in the Centre William Rappard on 19 June 2006 (WT/DSB/M/215), 25 July 2006; Dispute Settlement Body, Minutes of Meeting held in the Centre William Rappard on 19 July 2006 (WT/DSB/M/217), 12 September 2006; Dispute Settlement Body, Minutes of Meeting held in the Centre William Rappard on 1 September 2006 (WT/DSB/M/219), 6 October 2006; Dispute Settlement Body, Minutes of Meeting held in the Centre William Rappard on 28 September 2006 (WT/DSB/M/220), 2 November 2006; Dispute Settlement Body, Minutes of Meeting held in the Centre William Rappard on 26 October 2006 (WT/DSB/M/221), 4 December 2006; Dispute Settlement Body, Minutes of Meeting held in the Centre William Rappard on 21 November 2006 (WT/DSB/M/222), 12 January 2007; and Dispute Settlement Body, Minutes of Meeting held in the Centre William Rappard on 19 December 2006 (WT/DSB/M/224), 9 February 2007.

[916] See Dispute Settlement Body, Minutes of Meeting held in the Centre William Rappard on 23 January 2007 (WT/DSB/M/225), 8 March 2007; and Dispute Settlement Body, Minutes of Meeting held in the Centre William Rappard on 20 February 2007 (WT/DSB/M/226), 26 March 2007.

[917] See Dispute Settlement Body, Minutes of Meeting held in the Centre William Rappard on 20 March 2007 (WT/DSB/M/228), 2 May 2007.

[918] See Dispute Settlement Body, Minutes of Meeting held in the Centre William Rappard on 12 July 2007 (WT/DSB/M/235), 30 August 2007.

[919] European Communities' response to Panel question No. 20.

7.415 The third sentence of Article 21.6 of the DSU provides that "[t]he DSB shall keep under surveillance the implementation of adopted recommendations or rulings." Reading the first and third sentences of Article 21.6 of the DSU together suggests that the DSB may fulfil its mandate of keeping "under surveillance the implementation of adopted recommendations or rulings" otherwise than by maintaining that issue on the agenda. The DSB could indeed do so for reasons of efficiency, for instance in cases where no new elements warranting a debate occur between its meetings.

7.416 The first sentence of Article 21.6 of the DSU provides that it is "[t]he DSB [that] shall keep under surveillance the implementation of adopted recommendations or rulings" and the third sentence of the same paragraph refers to the "*DSB's* agenda". (emphasis added) However, issues do not appear automatically on the DSB agenda. It is the right of WTO Members to raise the issue of the implementation of adopted recommendations or rulings. The second sentence of Article 21.6 of the DSU provides that "any Member" "may" "raise[]" "[t]he issue of implementation of the recommendations or rulings ... at the DSB", and establishes that this right might be exercised "at any time following the ... adoption [of recommendations and rulings]".

7.417 As regards the specific case before this Panel, the Panel considers that the statements by Members at the DSB meeting of 1 February 2002 indicate that Members did not consider the "issue of the implementation of the recommendations or rulings" resolved at the time of that DSB meeting. On the contrary, most Members who spoke referred to the final step foreseen in the Bananas Understanding and the need to comply with that step, which was subsequent to the 2002-2005 EC bananas import regime.

7.418 For instance, the United States noted that "[it] would continue to work closely with the EC and other Members to address any issues that might arise as the EC moved to a tariff-based system for bananas and implemented the terms of the bilateral Understanding on Bananas."[920]

7.419 Likewise, although "Ecuador ... considered that this item should no longer appear on the agenda of future DSB meetings"[921], it also stated that:

> "[The Bananas] Understanding constituted a sound basis for the EC to implement a transitional banana import regime so that by 1 January 2006, at the latest, a WTO-compatible tariff-only regime would be put into place. 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."[922]

7.420 Ecuador added that:

> "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"[923] (emphasis added).

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[920] Dispute Settlement Body, Minutes of Meeting held in the Centre William Rappard on 1 February 2002 (WT/DSB/M/119), 6 March 2002, para. 7.

[921] Ibid., para. 5.

[922] Ibid.

[923] Ibid., para. 5.

7.421 Honduras also referred to the Bananas Understandings and:

> "[E]xpressed [the] expectation that in order to implement the Understandings on Bananas in accordance with the agreement reached at Doha, the EC would not impose a prohibitive tariff that would make it impossible for Honduran bananas to enter the EC market. Honduras hoped that this agreement would be honoured in good faith. It should be kept in mind that Honduras had taken into account the interests of all parties as well as the integrity of the world trading system."[924]

7.422 The European Communities also referred to the Bananas Understanding when requesting that the issue be withdrawn from the DSB agenda:

> "[T]he regime set out in [EC] Regulation [2587/2001] would be applicable *until the time the EC's 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."[925] (emphasis added)

7.423 The Panel considers that the above statements by Members at the DSB meeting of 1 February 2002 do not reflect an agreement by Members that the issue of the implementation of the DSB recommendations and rulings in the *EC - Bananas III* dispute could not be brought back to the DSB agenda at a later point.

7.424 In fact, Honduras explicitly "reserve[d] its rights, including the right to request that this matter be placed on the DSB agenda in the future."[926] Following the introduction of the current EC bananas import regime, Honduras and other Members raised the issue of the "Implementation by the European Communities of the recommendations and rulings of the DSB in relation to 'European Communities – Regime for the Importation, Sale and Distribution of Bananas'[927] and related subsequent WTO proceedings" at DSB meeting held in 2006 and in early 2007, in line with the right set out in the second sentence of Article 21.6.

7.425 As mentioned above, at its meeting of 1 February 2002 the DSB "*took note* of the statements"[928] made in the context of the "Surveillance of implementation of recommendations adopted by the DSB" in the *EC – Bananas III* dispute. In this regard the United States argues that:

> "The DSB simply 'took note' of the statements and did not take a decision on this issue. The fact that other Members did not request that this matter be on the agenda of subsequent meetings presumably reflects that little would have been gained by keeping this matter on the DSB agenda until the EC took the next step on January 1, 2006."[929]

7.426 The Panel notes that under the agenda item "Surveillance of implementation of recommendations adopted by the DSB", the DSB would usually both "take note of the statements made" and explicitly "agree to revert to the matter at its following regular meeting" in situations where no Member contests that compliance has not yet been achieved by the complainant or the dispute is not yet settled.

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[924] Ibid., para. 6.
[925] Ibid., para. 3.
[926] Dispute Settlement Body, Minutes of Meeting held in the Centre William Rappard on 1 February 2002 (WT/DSB/M/119), 6 March 2002, para. 6.
[927] *(footnote original)* WT/DS27.
[928] Dispute Settlement Body, Minutes of Meeting held in the Centre William Rappard on 1 February 2002 (WT/DSB/M/119), 6 March 2002, para. 9.
[929] United States' response to Panel question No. 21.

7.427 Under the agenda item "Surveillance of implementation of recommendations adopted by the DSB", the DSB would merely "take note of the statements made" without explicitly agreeing to revert to the matter in various types of situations. In some cases, it seems that the DSB would merely take note of the statements made because no Member contests that compliance has been achieved.[930] However, there are also numerous instances where, under the agenda item "Surveillance of implementation of recommendations adopted by the DSB", the DSB would merely take note of statements contesting whether compliance has been achieved, without explicitly agreeing to revert to the matter.[931]

7.428 Therefore, the Panel cannot consider the mere fact that the DSB only took note of the statements made at its meeting of 1 February 2002 as an indication that the original DSB recommendations in the *EC – Bananas III* dispute were fully complied with, nor as an indication that those recommendations were not fully complied with.

7.429 The Panel notes in this context that, on at least one occasion, the DSB discussed the "Surveillance of implementation of recommendations adopted by the DSB" and merely took note of statements contesting whether compliance had been achieved, and subsequently agreed to establishing a compliance panel pursuant to Article 21.5 of the DSU. In *EC – Bananas III*, at the DSB meeting of 25 November 1998 the DSB Members expressed diverging opinions as to the first EC attempt to comply referred to in a status report of the European Communities[932] achieves compliance.[933] The DSB merely took note of the statements made, without explicitly agreeing to revert to the matter at its next regular meeting.[934] This did not prevent the DSB from establishing, at a later meeting, the first compliance panel requested by Ecuador in *EC – Bananas III*.[935]

7.430 In the light of the above, the Panel does not consider that the mere fact that the issue of the implementation of the recommendations or rulings in the *EC – Bananas III* dispute was withdrawn from the DSB agenda necessarily means that that issue was definitively resolved. Accordingly, the Panel finds that it cannot draw the conclusion suggested by the European Communities from the text of Article 21.6 of the DSU and the termination of the United States' suspension of concessions in 2002.

7.431 If the Panel were to reach the opposite conclusion in this dispute, WTO Members might have no other choice but to ensure that the issue of the implementation of recommendations or rulings was constantly maintained on the agenda of each DSB session merely for the sake of making sure that that issue was not considered resolved by a panel. This would be the case even when no useful or meaningful discussion of the implementation of recommendations or rulings can be expected at a specific point in time prior to the issue of the implementation of recommendations or rulings being

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[930] See Dispute Settlement Body, Minutes of Meeting held in the Centre William Rappard on 26 September 2000 (WT/DSB/M/89), 23 October 2000, para. 46; and Dispute Settlement Body, Minutes of Meeting held in the Centre William Rappard on 16 June 1999 (WT/DSB/M/64), 21 July 1999, p. 2.

[931] See Dispute Settlement Body, Minutes of Meeting held in the Centre William Rappard on 21 October 1998 (WT/DSB/M/49), 19 November 1998, p. 4; Dispute Settlement Body, Minutes of Meeting held in the Centre William Rappard on 27 January 2000 (WT/DSB/M/74), 22 February 2000, p. 8; and Dispute Settlement Body, Minutes of Meeting held in the Centre William Rappard on 27 January 2000 (WT/DSB/M/74), 22 February 2000, p. 6.

[932] See *EC – Bananas III*, Status Report by the European Communities (WT/DS27/17/Add.3), 13 November 1998.

[933] See Dispute Settlement Body, Minutes of Meeting held in the Centre William Rappard on 25 November 1998 (WT/DSB/M/51), 22 January 1999, pp. 3-5.

[934] See ibid., p. 5.

[935] See Dispute Settlement Body, Minutes of Meeting held in the Centre William Rappard on 12 January 1999 (WT/DSB/M/53), 18 March 1999.

resolved. Such a practice would result in unnecessarily lengthy agendas for DSB meetings being adopted and would not contribute towards the smooth functioning of that body.

The relevance of the Doha Waivers

7.432 As noted above, in November 2001 the Doha Ministerial Conference adopted two waivers from Articles I:1, and from XIII:1 and 2 of the GATT 1994, respectively, for a limited period of time. Nevertheless, the Parties contest the relevance of the Doha Waivers for establishing whether or not the current EC bananas import regime is a measure taken to comply.

7.433 The European Communities does not disagree that the preamble of EC Regulation 1964/2005 makes reference to the two arbitrations and to the European Communities' unsuccessful attempts to rebind its bananas tariff pursuant to the Article I Doha Waiver. However, the European Communities contests the US argument summarised by the European Communities as "an assertion that the Preamble of Regulation 1964/2005 refers to the arbitrations held in 2005 within the context of the Doha waiver and, hence, Regulation 1964/2005 must be considered as a measure taken to comply with the recommendations and rulings adopted by the DSB in 1997."[936] According to the European Communities, "this point [does not] suffice ... to establish a link between the tariff only regime and the recommendations and rulings of the DSB in 1997"[937] because "the subject matter of the 2005 arbitrations has no relation to the 1997 DSB recommendations and rulings."[938]

7.434 The European Communities argues also that the Article I Doha Waiver proves that the current EC bananas import regime is not a measure taken to comply:

> "[T]he arbitrations were part of the waiver granted by the WTO to the Cotonou Agreement. The Cotonou Agreement was only signed in 2000, i.e., 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."[939]

7.435 The parties do not contest that the two Doha Waivers are linked to paragraph E of the Bananas Understanding, which provides that:

> "The United States will lift its reserve concerning the waiver of Article I of the GATT 1994 that the EC has requested for preferential access to the EC of goods originating in ACP states signatory to the Cotonou Agreement; and will actively work towards promoting the acceptance of an EC request for a waiver of Article XIII of the GATT 1994 needed for the management of quota C under the import regime described in paragraph C(2) until 31 December 2005."

7.436 Both Doha Waivers were adopted for a limited period of time. The Article XIII Doha Waiver applied until the end of 2005, i.e. until the end of the application of the 2002-2005 EC bananas import regime, which was the day preceding the entry into force of the tariff-only regime set out in

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[936] European Communities' second written submission, para. 46. The United States originally formulated that argument in the following way: "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 *Bananas III*." United States' second written submission, para. 48.

[937] European Communities' second written submission, para. 47.

[938] Ibid., para. 48.

[939] Ibid., para. 47.

paragraph B of the Bananas Understanding. In turn, the Article I Doha Waiver applied to bananas in general until 31 December 2007, but the Annex to the Article I Doha Waiver provided for the possibility of the waiver expiring at the end of 2005:

> "If the EC has failed to rectify the matter, this waiver shall cease to apply to bananas upon entry into force of the new EC tariff regime ... on 1 January 2006."[940]

7.437 The European Communities argues, in the context of its rebuttal of the United States' claim under Article I of the GATT 1994, that the Article I Doha Waiver applied to bananas until the end of 2007.[941] The Panel will not address that issue at this point.

7.438 It suffices to note here that the argument of the European Communities implies that the Article I Doha Waiver would have applied both during the validity of the 2002-2005 EC bananas import regime and the current EC bananas import regime, thus establishing a link between the two regimes. This raises the question why the European Communities sees its 2002-2005 as its final measure taken to comply.

7.439 If, on the contrary, the Article I Doha Waiver was to have expired in regard to bananas at the end of 2005, it would have applied, similar to the Article XIII Doha Waiver, exactly during Phase II of the interim EC bananas import regime set out in paragraph C(2) of the Bananas Understanding. Such possible coincidence between the period of validity of both Doha Waivers and Phase II of the interim EC bananas import regime, as well as the wording of paragraph E of the Bananas Understanding would establish a close link between the Doha Waivers and Phase II of the interim EC bananas import regime.

7.440 Given such a close link between the Doha Waivers and Phase II of the interim EC bananas import regime, the Panel agrees with the United States that the step set out in paragraph C(2) of the Bananas Understanding "w[as] 'interim' because [it] still discriminated between WTO Members, as evidenced *inter alia* by the fact that the EC recognized that it would need waivers of Article I and XIII of the GATT 1994."[942]

7.441 In any event, since the Doha Waivers applied incontestably during the entire Phase II of the interim EC bananas import regime and they were limited in time, they are relevant for confirming that Phase II of the interim EC bananas import regime could not be the final measure taken to comply by the European Communities. All parties concerned were of the opinion that only when a tariff-only regime was introduced would the case be closed.

7.442 The Panel notes that the European Communities also argues that "the United States invites the Panel to determine whether the current banana import regime of the European Communities remains covered by the Doha waiver."[943] However, according to the European Communities:

> "Such determination depends exclusively on the interpretation of the conditions set by the Doha waiver and, therefore, it is unrelated to 'compliance with DSB rulings'. The conditions imposed by the waiver in relation to the new tariff-only regime are the result of negotiations that were not related to the DSB rulings and the European Communities' compliance with them. Therefore, a dispute over the

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[940] European Communities – The ACP-EC Partnership Agreement (WT/MIN(01)/15), 14 November 2001, Annex, fifth tiret.

[941] See paras. 7.549 to 7.5517.552 below.

[942] Final written version of the United States' opening oral statement at the substantive meeting of the Panel with the parties and third parties, para. 10.

[943] European Communities' response to Panel question No. 11.

> continued existence of the Doha waiver should have been brought under a new dispute settlement case and not as a case under Article 21.5 of the DSU."[944]

7.443 The United States responds that:

> "In the current proceeding, [it] is challenging 'the consistency with a covered agreement of measures taken to comply' (DSU Article 21.5): that is, the United States is challenging the consistency with Article I and XIII of the GATT 1994 (a covered agreement) of the EC's current bananas regime (a measure taken to comply)."[945]

7.444 The request of the United States for the establishment of this compliance Panel[946], and this Panel's subsequent mandate upon establishment by the DSB, confirms that point by the United States.

7.445 Further, the United States argues that:

> "The analysis of the consistency of that measure with Article I requires an analysis of the Doha waiver because the EC argues that the Doha waiver covers the breach. Therefore, the issue of the waiver's continued existence is properly before this Article 21.5 Panel."[947]

7.446 Indeed, it is the European Communities that invokes the Doha Waiver as a defence against the US claim under Article I of the GATT 1994. Accordingly, the Panel rejects the EC argument that, because of the Article I Doha Waiver and related arbitration proceedings, the Panel should not address the US compliance complaint.

The relevance of the Bananas Understanding

7.447 As noted above[948], both parties agree that the Bananas Understanding is relevant for assessing whether the current EC bananas import regime is a measure taken to comply.

7.448 In the context of its arguments that its 2002-2005 bananas import regime was the final measure taken to comply, the European Communities argues that:

> "[T]he fact that the European Communities introduced a tariff-only regime on January 1, 2006, in accordance with the provisions of Regulation 216/2001, does not have any legal significance for the European Communities' relations with the United States. The European Communities simply implemented its own legislation in accordance with its provisions."[949]

7.449 Further, the European Communities contends, "there is no link between the recommendations and rulings of the DSB [adopted in 1997] and the political decision of the European Communities to introduce a tariff-only import regime by January 1, 2006."[950] According to the European Communities, its "political decision [on introducing a tariff-only regime] had already been taken

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[944] Ibid.
[945] United States' comment on the European Communities' response to Panel question No. 11.
[946] See *EC – Bananas III (Article 21.5 – US)*, Request for the Establishment of a Panel (WT/DS27/83) 2 July 2007.
[947] United States' comment on the European Communities' response to Panel question No. 11.
[948] See paras. 7.357 to 7.359 above.
[949] European Communities' response to Panel question No. 14.
[950] European Communities' second written submission, para. 45.

before the signing of the Understanding between the United States and the European Communities and their reaching an agreement on the appropriate 'measures taken to comply'."[951]

7.450 The Panel disagrees with the European Communities that there is no link between the political decision of the European Communities to introduce a tariff-only import regime by 1 January 2006 and the original DSB recommendations and rulings. EC Regulation 216/2001, which the European Communities identifies as the legislation embodying its political decision amends Article 16(1) of EC Regulation 404/1993 to the following:

> "This Article and Articles 17 to 20 shall apply to imports of fresh products falling within CN code ex 0803 00 19 *up to the entry into force of the rate of the common customs tariff for those products, no later than 1 January 2006*, established under the procedure provided for in Article XXVIII of the General Agreement on Tariffs and Trade" (emphasis added).

7.451 Article 1.1 of EC Regulation 1964/2005 was adopted explicitly in accordance with Article 16(1) of EC Regulation 404/1993, as amended by EC Regulation 216/2001.

7.452 Further, EC Regulation 216/2001 explicitly mentions that:

> "There have been numerous close contacts with supplier countries and other interested parties to settle the disputes arising from the import regime established by Regulation (EEC) No 404/93 and to take account of the conclusions of the special group set up under the dispute settlement system of the World Trade Organisation (WTO)" (footnote omitted).

7.453 Thus, the EC regulation identified by the European Communities as embodying its political decision to introduce a tariff-only regime explicitly links the current EC bananas import regime to the original recommendations and rulings of the DSB.

7.454 The Panel also disagrees with the European Communities on the relevance of the political decision adopted prior to, and referenced in, the Bananas Understanding. The European Communities concedes that its political decision was incorporated into a binding legislation. As a matter of fact, that binding legislation modified the prior binding legislation, which in turn served as a legal basis for the necessary additional legislation to introduce the current EC bananas import regime.

7.455 The Panel considers it unrealistic that any Member would "identif[y] the means by which [a] long-standing dispute over [its] import regime [concerning a key sector of agricultural trade] can be resolved", without first conducting a reflection process and taking a political decision on the relevant means to resolve that dispute. The same applies to the recording of that decision into an instrument concluded with another Member and subsequently communicated to the DSB as a "mutually agreed solution".

7.456 Also, if such a political decision has already been incorporated into a Member's domestic legislation, it would seem all the more reasonable that the instrument recording that decision and concluded with another Member would refer to such legislation, as does paragraph B of the Bananas Understanding.

7.457 In short, the alleged political nature of the European Communities' prior decision to introduce a tariff-only bananas import regime does not diminish the relevance of the Bananas Understanding for establishing whether the current EC bananas import regime is a measure taken to comply. In fact, the

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[951] Ibid., para. 43.

European Communities argues that its current EC bananas import regime corresponds to the step set out in paragraph B of the Bananas Understanding. In the context of its second preliminary objection, the European Communities contends that it "has *fully* complied with its obligations under the [Bananas] Understanding in good faith and relying on the expectation that the United States would also comply with its own obligations."[952] As analysed above, this can only be interpreted to mean that the European Communities is arguing that its import regimes introduced on 1 July 2001, 1 January 2002 and 1 January 2006 correspond to Phases I and II of its interim bananas import regime and to the final step set out in the Bananas Understanding.

7.458 Further, even if it were true, as the European Communities argues, that it "simply implemented its own legislation in accordance with its provisions"[953], the Panel cannot fail to note the following. The legislation invoked by the European Communities, namely EC Regulation 216/2001 explicitly refers to the original measure under review in the original panel and Appellate Body proceedings, i.e. EC Regulation 404/1993[954], and to the need "to take account of the conclusions of the special group set up under the dispute settlement system of the World Trade Organisation".[955]

7.459 In the light of the above, without assessing the legal status of the Bananas Understanding, the Panel confirms that that Understanding is relevant for assessing whether the current EC bananas import regime is a measure taken to comply.

7.460 As regards the text of the Bananas Understanding analysed above, the Panel notes that both paragraphs B and C of the Bananas Understanding describe steps to be taken by the European Communities, and use the word "will". Accordingly, the Panel considers that the Bananas Understanding attaches at least equal importance to the two regimes set out in those two paragraphs.

7.461 Further, on the basis of the relative position of paragraphs B and C, and the phrase "in the interim" in the latter, the Panel considers that the Bananas Understanding accords key importance to the tariff-only regime as a "means by which the long-standing dispute over the EC's banana import regime can be resolved. In fact, paragraph B of the Bananas Understanding, which provides for the introduction of "a Tariff Only regime for imports of bananas no later than 1 January 2006"[956], immediately follows paragraph A, which stipulates that "[t]he European Commission and [the United States/Ecuador] have identified the means by which the long-standing dispute over the EC's banana import regime can be resolved."[957] In turn, paragraph C, which provides for "an import regime on the basis of historical licensing"[958] only appears after paragraph B, and is introduced with the phrase "in the interim".

> The original DSB recommendations and rulings do not prescribe the introduction of a tariff-only regime

7.462 The European Communities also argues that "[t]here is no single finding or recommendation of the Appellate Body that could be complied with only through the introduction of a tariff only import regime"[959]:

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[952] European Communities' second written submission, para. 39.
[953] European Communities' response to Panel question No. 14.
[954] EC Regulation 216/2001, recital 1.
[955] Ibid.
[956] Documents WT/DS27/58 of 2 July 2001, p. 2, para. B, and WT/DS27/59 of 2 July 2001, para. B.
[957] Documents WT/DS27/58 of 2 July 2001, p. 2, para. A, and WT/DS27/59 of 2 July 2001, para. A.
[958] Documents WT/DS27/58 of 2 July 2001, p. 2, para. C, and WT/DS27/59 of 2 July 2001, para. C.
[959] European Communities' second written submission, para. 45.

> "A careful analysis of the findings and recommendations of the Appellate Body report in the *EC–Bananas III* case does not reveal any element that could support a conclusion that the European Communities was obliged to move into a tariff only regime in order to bring itself into compliance with the covered agreements. Quite to the contrary, the findings and recommendations of the Appellate Body allowed the European Communities to bring itself into compliance through the adoption of a revised, tariff-quota-based import regime with a different allocation of quotas and import licenses."[960]

7.463 In fact, to make such a positive suggestion, the original panel or the Appellate Body should have issued suggestions pursuant to Article 19.1 of the DSU, which clearly distinguishes recommendations from suggestions:

> "Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement. *In addition to its recommendations*, the panel or Appellate Body may suggest ways in which the Member concerned could implement the recommendations" (footnotes omitted; emphasis added).

7.464 The Panel recalls that no suggestions were issued in the original panel and appellate proceedings. Further, the Panel recalls that the first compliance panel requested by Ecuador did issue suggestions pursuant to Article 19.1. The first and second suggestions of that panel concerned a "tariff-only system for bananas":

> "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."[961]

7.465 The Panel notes that parties disagree whether, in the light of the fact that those suggestions were made in a proceeding not involving the United States, they are relevant before this compliance Panel. The Panel does not need to address that question.

7.466 The Panel needs to address the specific argument by the European Communities that its current bananas import regime is not a measure taken to comply since "[t]here is no single finding or recommendation of the Appellate Body that could be complied with only through the introduction of a tariff only import regime."[962] In that context, the Panel notes that the first compliance panel requested by Ecuador introduced its suggestions with the following introduction:

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

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[960] Ibid.
[961] Panel Report on *EC – Bananas III (Article 21.5 – Ecuador)*, paras. 6.156-6.157.
[962] European Communities' second written submission, para. 45.

> In light of our findings and conclusions with respect to Articles I and XIII of GATT, the requirements of the Lomé Convention and the coverage of the Lomé waiver, above, in our view, *the European Communities has at least the following options for bringing its banana import regime into conformity with WTO rules*"[963] (emphasis added).

7.467 The Panel considers that irrespective of the status of the above-mentioned suggestions for this compliance dispute, it can properly take into consideration the above introduction to those suggestions, including their highlighted portion, as it forms part of the jurisprudence of a previous panel.

7.468 Indeed, in *Japan – Alcoholic Beverages II*, the Appellate Body held that:

> "Adopted panel reports are an important part of the GATT *acquis*. They are often considered by subsequent panels. They create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute. However, they are not binding, except with respect to resolving the particular dispute between the parties to that dispute. In short, their character and their legal status have not been changed by the coming into force of the *WTO Agreement*."[964]

7.469 The Panel notes that the italicized parts in the introduction to the above-mentioned suggestions by the first compliance panel requested by Ecuador confirm Members' freedom to choose how they implement DSB recommendations and rulings, or suggestions issued pursuant to Article 19.1 of the DSU. The European Communities seems to refer to this freedom in its argument that "[f]ollowing 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."[965]

7.470 Accordingly, the fact that the original DSB recommendations and rulings did not explicitly require the European Communities to bring itself into compliance specifically through the introduction of a tariff-only import regime is irrelevant for establishing whether the current EC bananas import regime is a measure taken to comply.

The timing of the US compliance challenge

7.471 As regards the timing of the US compliance challenge, the European Communities makes two main arguments.

7.472 First, the European Communities agrees[966] with the argument made in the ACP third parties' joint written submission that:

> "Article 21.5 proceedings must necessarily be initiated within a reasonable period of time from the date the recommendations and rulings to bring the matter into conformity with WTO obligations were adopted. In the present case, the recommendations and rulings of the Panel and the Appellate Body in the original

[963] Panel Report on *EC – Bananas III (Article 21.5 – Ecuador)*, paras. 6.154-6.155.
[964] Appellate Body Report on *Japan – Alcoholic Beverages II*, p. 14.
[965] Final written version of the European Communities' opening oral statement at the substantive meeting of the Panel with the parties and third parties, para. 5.
[966] See European Communities' response to Panel question No. 10.

> dispute were adopted by the DSB in September 1997. Ten years can hardly be regarded as a reasonable period of time."[967]

7.473 Second, in the context of its arguments that Phase II of its interim bananas import regime was the final measure taken to comply, the European Communities contends that:

> "If the United States had considered that the European Communities had failed to implement that 'measure taken to comply', the United States should have brought an Article 21.5 proceeding against that import regime at that time. However, the United States never challenged the 2002-2005 banana import regime. This means that the dispute that had led to the 1997 DSB recommendations and rulings was terminated upon the European Communities' implementation of the measure agreed with the United States."[968]

7.474 The Panel will first consider the timing of the US request for compliance proceedings in relation to the adoption of the DSB recommendations and rulings and the introduction of the 2002-2005 EC bananas import regime.

7.475 The Panel agrees with the argument of the United States that "Article 21.5 of the DSU does not contain any 'reasonable period of time' limitation."[969] Indeed, Article 21.5 of the DSU is silent on the timing of the start of a compliance dispute.

7.476 The Panel recalls that in *US – Softwood Lumber IV (Article 21.5 – Canada)* the Appellate Body held that:

> "Article 21.5 is one paragraph within an Article entitled 'Surveillance of Implementation of Recommendations and Rulings'. As a whole, Article 21 deals with events *subsequent* to the DSB's adoption of recommendations and rulings in a particular dispute. The various paragraphs of Article 21 make clear that following such recommendations and rulings, further relevant developments and disagreements are to be dealt with through the reporting and surveillance modalities set out therein, and in such a way as to achieve 'prompt resolution'. ... Article 21 sets out a number of mechanisms to ensure collective oversight of that Member's implementation. With respect to ... measures taken to comply, they are found in Article 21.5."[970]

7.477 The Panel does not consider that a Member is entitled to compliance proceedings pursuant to Article 21.5 of the DSU merely because the same product, as in the original dispute, is being affected. At the same time, the Panel does not consider it appropriate to try to establish a specific threshold for the admissibility of requests for compliance panel proceedings based on the time elapsed between the adoption of the original DSB recommendations and rulings and the submission of a compliance request. In the absence of specific criteria in the DSU for such determination, each case must be assessed on its own merits.

7.478 Given the considerable time that has passed since the DSB adopted its original recommendations and rulings in 1997, the resolution of the dispute through the more expeditious compliance proceedings, rather than through standard dispute settlement procedures seems all the

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[967] ACP Countries' third party written submission, para. 65. See also European Communities' second written submission, para. 43.

[968] European Communities' response to Panel question No. 16. See also European Communities' first written submission, paras. 21 and 49.

[969] United States' response to Panel question No. 10.

[970] Appellate Body Report on *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 70.

more warranted by Article 21.1 of the DSU, which provides that "prompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members."

7.479 Article 3.3 of the DSU similarly provides that: "[t]he prompt settlement of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members."

7.480 The Appellate Body and panels have also highlighted the importance of prompt compliance. As the panel report on *Australia – Salmon (Article 21.5 – Canada)*, referenced by the Appellate Body in *US – Softwood Lumber IV (Article 21.5 – Canada)*[971], states:

> "[A] complainant, after having prevailed in an original dispute, should not have to go through the entire DSU process once again if an implementing Member in seeking to comply with DSB recommendations under a covered agreement is breaching, inadvertently or not, its obligations under other provisions of covered agreements. In such instances an expedited procedure should be available. This procedure is provided for in Article 21.5. It is in line with the fundamental requirement of 'prompt compliance' with DSB recommendations and rulings expressed in both Article 3.3 and Article 21.1 of the DSU."[972]

7.481 Further, in the context of the above-referenced "balance that Article 21.5 strikes between competing considerations"[973], the Appellate Body in *US – Softwood Lumber IV (Article 21.5 – Canada)* held that:

> "[Article 21.5 of the DSU] seeks to promote the prompt resolution of disputes, to avoid a complaining Member having to initiate dispute settlement proceedings afresh when an original measure found to be inconsistent has not been brought into conformity with the recommendations and rulings of the DSB, and to make efficient use of the original panel and its relevant experience. On the other hand, the applicable time-limits are shorter than those in original proceedings ... This balance should be borne in mind in interpreting Article 21.5 and, in particular, in determining the measures that may be evaluated in proceedings pursuant to that provision."[974]

7.482 The Panel next addresses the timing of the US compliance request relative to the introduction of the 2002-2005 EC bananas import regime. The Panel's above summary of the developments following the first attempt of the European Communities to comply with the DSB recommendations and rulings identifies various indications in unilateral EC statements, the bilateral Bananas Understanding, and in the multilateral Article XIII Doha Waiver, that Phase II of the interim EC bananas import regime would be followed without interruption by a tariff-only regime, at the latest by 1 January 2006. Therefore, the Panel considers it reasonable that the United States might not have seen a "reason to institute Article 21.5 proceedings for the 2002-2005 interim regime"[975] prior to the implementation of the alleged tariff-only regime, thus before 2006.

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[971] Ibid., paras. 78-79.

[972] Panel Report on *Australia – Salmon (Article 21.5 – Canada)*, para. 7.10, paragraph 9 of the Panel's preliminary ruling.

[973] Appellate Body Report on *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 72.

[974] Ibid.

[975] United States' comment on the European Communities' response to Panel question No. 10.

7.483 The United States made its request for the establishment of a compliance Panel on 2 July 2007, during the period of validity of the current EC bananas import regime. Following the introduction of the current EC bananas regime on 1 January 2006, throughout 2006 and into early 2007 the "Implementation by the European Communities of the recommendations and rulings of the DSB in relation to 'European Communities – Regime for the Importation, Sale and Distribution of Bananas'[976] and related subsequent WTO proceedings" was included in the agenda of the DSB. On 23 February 2007, Ecuador requested the establishment of a compliance panel in the same dispute.

7.484 The Panel agrees with the United States that merely because the United States did not invoke Article 21.5 of the DSU against the 2002-2005 EC bananas import regime "does not mean that the United States was then precluded from recourse to Article 21.5 proceedings once the EC took the next ... step"[977]. Moreover, the Panel is of the view that "[e]ven if the United States had had a reason to challenge the interim steps taken by the EC but had decided to wait until now, the United States would not have been precluded from taking such action."[978]

7.485 The compliance panel requested by the European Communities in *EC – Bananas III* stated that:

> "[T]he failure, as of a given point in time, of one Member to challenge another Member's measures cannot be interpreted to create a presumption that the first Member accepts the measures of the other Member as consistent with the WTO Agreement. In this regard, we note the statement by a GATT panel that 'it would be erroneous to interpret the fact that a measure has not been subject to Article XXIII over a number of years, as tantamount to its tacit acceptance by contracting parties'.[979]"[980]

7.486 The Panel recalls that the European Communities raises the above arguments concerning the timing of the current EC bananas import regime in order to refute the proposition that that regime is a measure taken to comply. In particular, the European Communities argues that its final measure taken to comply was its 2002-2005 bananas import regime.

7.487 As mentioned above, and referred to by the United States[981], in *US – Softwood Lumber IV (Article 21.5 – Canada)* the Appellate Body held that:

> "[A] panel's mandate under Article 21.5 of the DSU is not necessarily limited to an examination of an implementing Member's measure declared to be 'taken to comply'. Such a declaration will always be relevant, but there are additional criteria ... that should be applied by a panel to determine whether or not it may also examine other measures. Some measures with a particularly close relationship to the declared 'measure taken to comply', and to the recommendations and rulings of the DSB, may also be susceptible to review by a panel acting under Article 21.5. Determining whether this is the case requires a panel to scrutinize these relationships, which may, depending on the particular facts, call for an examination of the *timing* ... of the various measures."[982]

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[976] *(footnote original)* WT/DS27.
[977] United States' comment on the European Communities' response to Panel question No. 10.
[978] United States' second written submission, para. 47, footnote 35.
[979] *(footnote original)* Panel report on *EEC – Quantitative Restrictions Against Imports of Certain Products from Hong Kong*, adopted on 12 July 1983, BISD 30S/129, 138, paragraph 28.
[980] Panel Report on *EC – Bananas III (Article 21.5 – EC)*, para. 4.13.
[981] See United States' response to Panel question No. 12.
[982] Appellate Body Report on *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 75.

7.488 The Panel will therefore analyse the timing of the current EC bananas import regime in relation to what the EC argues was its final measure to comply, i.e. the 2002-2005 EC bananas import regime, as well as to the original DSB recommendations and rulings.

7.489 The Panel is aware that the introduction of the current EC bananas import regime took place more than nine years after the adoption of the original recommendations and rulings, and four years following the introduction of the 2002-2005 EC bananas import regime.

7.490 Nevertheless, in the context of establishing whether a measure is a measure taken to comply for the purposes of Article 21.5 of the DSU, the Panel does not consider that the issue of timing should be confined to the length of time that elapses between the adoption of the original recommendations and rulings, and the introduction of the measure alleged by the respondent to be a measure taken to comply.

7.491 As regards in particular the timing of the current and the 2002-2005 EC bananas import regimes, the Panel recognizes that the two import regimes did not overlap in time. However, there is no disagreement between the parties that the current EC bananas import regime entered into force on 1 January 2006, and replaced "the import regime implemented by the European Communities between 2002 and 2005"[983], which applied until 31 December 2005. Also, as noted above, both regimes were closely related to EC Regulation 404/1993, which was reviewed in the original panel and appellate proceedings, and which only expired at the end of 2007.

7.492 Further, as mentioned above, there were various indications in unilateral EC statements, the bilateral Bananas Understanding, and in the multilateral Article XIII Doha Waiver, that the European Communities intended to introduce a tariff–only regime immediately following Phase II of the interim EC bananas import regime, the latest by 1 January 2006.

7.493 Accordingly, the Panel considers that the timing of current and the 2002-2005 EC bananas import regimes cannot prevent the current EC bananas import regime from being considered as a measure taken to comply. Rather, there is an obvious and sufficiently close temporal link between the European Communities' 2002-2005 bananas import regime and its current bananas import regime, introduced on 1 January 2006.

7.494 Turning to the timing of the current EC bananas import regime and the adoption of the original DSB recommendations and rulings, the Panel recalls the close link of the current EC bananas import regime to the original recommendations and rulings and to the measure reviewed in the original panel and Appellate Body proceedings. EC Regulation 1964/2005 was adopted, at least in part, pursuant to EC Regulation 404/1993, which was abolished only at the end of 2007. The Panel also refers to Articles 21.1 and 3.3 of the DSU, and to the Panel's above conclusions on the basis of "prompt compliance" and "prompt settlement" set out in those provisions of the DSU.

7.495 Accordingly, the Panel finds that the timing of the current EC bananas import regime relative to the original recommendations and rulings does not prevent this compliance Panel from considering the current EC bananas import regime as a measure taken to comply.

Whether a particularly close link exists between the current and the 2002-2005 EC bananas import regimes

7.496 As noted above, the European Communities argues that its current bananas import regime is not a measure taken to comply since its final measure taken to comply was its 2002-2005 bananas import regime.

[983] European Communities' second written submission, para. 49.

7.497 As referred to by the United States, in *US – Softwood Lumber IV (Article 21.5 – Canada)* held that:

> "[A] panel's mandate under Article 21.5 of the DSU is not necessarily limited to an examination of an implementing Member's measure declared to be 'taken to comply'. Such a declaration will always be relevant, but there are additional criteria, identified above, that should be applied by a panel to determine whether or not it may also examine other measures. *Some measures with a particularly close relationship to the declared 'measure taken to comply', and to the recommendations and rulings of the DSB, may also be susceptible to review by a panel acting under Article 21.5.*"[984] (emphasis added)

7.498 As to the criteria to "[d]etermin[e] whether this is the case"[985] the Appellate Body found that it:

> "[R]equires a panel to scrutinize these relationships, which may, depending on the particular facts, call for an examination of the timing, nature, and effects of the various measures. This also requires an Article 21.5 panel to examine the factual and legal background against which a declared 'measure taken to comply' is adopted. Only then is a panel in a position to take a view as to whether there are sufficiently close links for it to characterize such an other measure as one 'taken to comply' and, consequently, to assess its consistency with the covered agreements in an Article 21.5 proceeding."[986]

7.499 The Panel notes that it has already found that there is a sufficiently close relationship between the current EC bananas import regime and the original DSB recommendations and rulings in the *EC – Bananas III* dispute, in particular with the measures reviewed by the original panel and appellate proceedings in that dispute.[987] Further, in the context of its analysis of the European Communities' arguments that its 2002-2005 bananas import regime was the final measure taken to comply, the Panel has already found that there is a sufficiently close temporal relationship between the current and the 2002-2005 EC bananas import regimes.[988]

7.500 The Panel will now analyse the remaining criteria laid down by the Appellate Body in *US – Softwood Lumber IV (Article 21.5 – Canada)*, in particular whether there is a sufficiently close relationship between the current and the 2002-2005 EC bananas import regimes as regards the nature and effect of the two regimes and their factual and legal background.

The nature and effects of the current and the 2002-2005 EC bananas import regimes

7.501 As regards the nature and effects of the current and the 2002-2005 EC bananas import regimes, the Panel notes that the European Communities' 2002-2005 regime is "an import regime on the basis of historical licensing"[989] and involves a number of tariff rate quotas. Conversely, the current EC bananas import regime does not involve a licensing system for MFN bananas.

7.502 Despite those differences, both the current and the 2002-2005 EC bananas import regimes involve a preferential tariff rate quota for ACP countries. EC Regulation 2587/2001, which, the

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[984] Appellate Body Report on *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 75.
[985] Ibid.
[986] Appellate Body Report on *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 75.
[987] See para. 7.494 above.
[988] See para. 7.493 above.
[989] Documents WT/DS27/58 of 2 July 2001, p. 2, para. C, and WT/DS27/59 of 2 July 2001, para. C.

European Communities contends, "introduced the 2002-2005 banana import regime"[990], amended Article 18 of EC Regulation 404/1993 *inter alia* to provide for a zero-duty preferential tariff rate quota (Quota C) of 750,000 tonnes for ACP bananas.[991]

7.503 Likewise, the Bananas Understanding provides that, under the European Communities' 2002-2005 bananas import regime, "[t]he TRQ 'C' will be 750,000 tonnes and will be reserved for bananas of ACP origin."[992]

7.504 In turn, Article 1 of EC Regulation 1964/2005, which both parties identify as the EC measure introducing the current EC bananas import regime[993], provides:

> "1. As from 1 January 2006 the tariff rate for bananas (CN code 0803 00 19) shall be EUR 176/tonne.
>
> 2. Each year from 1 January, starting from 1 January 2006, an autonomous tariff quota of 775 000 tonnes net weight subject to a zero-duty rate shall be opened for imports of bananas (CN code 0803 00 19) originating in ACP countries."

7.505 In other words, the European Communities' current bananas import regime maintained the preferential tariff rate quota of the previous regime for ACP countries. Indeed, the European Communities describes its current bananas import regime:

> "The European Communities subjects all banana imports to a single tariff of € 176 per ton. ...
>
> The only exception to this rule is that the European Communities offers a trade preference to those banana producing countries that have signed the 'Cotonou Agreement'. ... [T]he quantity of bananas originating from Cotonou countries that can be imported free of duty [is] 775,000 tons per year (the 'Cotonou Preference').[994] All bananas imported from Cotonou countries beyond this 'cap' are subject to the tariff of € 176 per ton.[995],[996]

7.506 Importantly, the preferential in-quota duty was zero under both EC import regimes, and the beneficiaries of the TRQ, namely ACP countries, were the same under both regimes. The quantity of the preferential tariff quota was only slightly different; the current EC bananas import regime even increased it by 25,000 tonnes *per annum*.

7.507 The Panel also notes that it is exactly the preference given to ACP countries in comparison to the rest of the WTO Members that the United States is contesting in this compliance dispute. In its request for the establishment of this compliance Panel, the United States argues that the current

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[990] European Communities' response to Panel question No. 13.

[991] See EC Regulation 2587/2001, Article 1.4.

[992] Documents WT/DS27/58 of 2 July 2001, and WT/DS27/59 of 2 July 2001, Annex 2, para. 3.

[993] See United States' first written submission, para. 2; and European Communities' first written submission, para. 4, footnote 2.

[994] *(footnote original)* Council Regulation (EC) 1964/2005, Article 1, paragraph 2.

[995] *(footnote original)* For the sake of completeness, it is noted that the European Communities' Generalised System of Preferences also provides that banana imports from Least Developed Countries are subject to a zero duty. This does not have any impact on the current proceedings: all Least Developed Countries that are exporting bananas to the European Communities are also Cotonou beneficiary countries (Yemen and Bangladesh are least developed countries but have no banana exports towards the European Communities).

[996] European Communities' first written submission, paras. 3-4.

EC bananas import regime is inconsistent with Articles I and XIII of the GATT 1994[997] because it maintains:

> "[A] preferential (zero-duty) TRQ available only to bananas originating in African, Caribbean and Pacific ('ACP') countries.[998] Bananas of other origins have no access to this 775,000 ton TRQ. Under Regulation (EC) No. 1964/2005 such other bananas are subject instead to a duty of 176 euros/ton.[999] The regulation took effect as of 1 January 2006."[1000]

7.508 In the light of the above and despite the differences between the two regimes, the Panel finds that the maintenance of a zero-duty preferential tariff rate quota for ACP countries is a key similarity in the nature and effects of the current and the 2002-2005 EC bananas import regimes. This similarity is essential in the dispute before this compliance Panel, including for assessing whether there is a sufficiently close link between the two import regimes.

Legal and factual background of the two regimes

7.509 As regards the general legal and factual background of the current and the 2002-2005 EC bananas import regimes, the Panel refers to its above analysis of the first attempt of the European Communities to comply with the original DSB recommendations and rulings, and to its summary of subsequent events.

7.510 As also noted above, the European Communities declares that its 2002-2005 bananas import regime was introduced through EC Regulation 2587/2001 on 1 January 2002.[1001] Further, the European Communities states that its current bananas import regime was introduced through EC Regulation 1964/2005 on 1 January 2006.

7.511 Both regimes are closely connected to the original DSB recommendations and rulings in the *EC – Bananas III* dispute. As regards EC Regulation 2587/2001, the European Communities argues that the preamble of that Regulation:

> "[S]tates that the Regulation introduces the measures resulting from:
>
> '... numerous close contacts with supplier countries and other interested parties to settle the disputes ... and to take into account of the conclusions of the panel set up under the dispute settlement system of the World Trade Organisation (WTO).'"[1002]

7.512 Further, like the measures constituting the first attempt of the European Communities to bring itself into compliance with the original DSB recommendations and rulings, EC Regulation 2587/2001

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

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

[999] *(footnote original)* Regulation (EC) No. 1964/2005, para. 1, published in the Official Journal of the European Communities (OJEC) L 316/1 of 12 December 2005.

[1000] *EC – Bananas III (Article 21.5 – US)*, Request for the Establishment of a Panel (WT/DS27/83) 2 July 2007, p. 2.

[1001] See European Communities' response to Panel question No. 13.

[1002] Ibid.

"modif[ies] aspects of the EC's banana import regime found by the original panel and Appellate Body reports to be inconsistent with the EC's WTO obligations [i.e., Regulation 404/1993]."[1003]

7.513 As for EC Regulation 1964/2005, the Panel has already found that that regulation is closely related to the original DSB recommendations and rulings, in particular to EC Regulation 404/1993, which was the measure reviewed in the original panel and appellate proceedings.

7.514 Likewise, the Panel finds that both EC Regulations 2587/2001 and 1964/2005 are closely related to EC Regulation 216/2001.

7.515 Article 1.1 of EC Regulation 216/2001 amended Article 16.1 of EC Regulation 404/1993 to the following:

> "This Article and Articles 17 to 20 shall apply to imports of fresh products falling within CN code ex 0803 00 19 up to the entry into force of the rate of the common customs tariff for those products, no later than 1 January 2006, established under the procedure provided for in Article XXVIII of the General Agreement on Tariffs and Trade."

7.516 Similarly to EC Regulation 216/2001, EC Regulation 2587/2001 amended EC Regulation 404/1993. In particular, Article 1.3 of EC Regulation 2587/2001 amended Article 16.1 of EC Regulation 404/1993, "last amended by Regulation (EC) No 216/2001"[1004] to the following:

> "This Article and Articles 17 to 20 shall apply to imports of fresh products falling within CN code 0803 00 19 until the entry into force, no later than 1 January 2006, of the rate of the common customs tariff for those products established under the procedure provided for in Article XXVIII of the General Agreement on Tariffs and Trade (GATT)."

7.517 This amendment did not affect but rather confirmed the essence of Article 16.1 of EC Regulation 404/1993, as previously amended by EC Regulation 216/2001, namely that the European Communities would introduce a common customs tariff for bananas by 1 January 2006, following negotiations with relevant WTO Members pursuant to Article XXVIII of the GATT 1994.

7.518 As mentioned above, the preamble of EC Regulation 1964/2005 refers to the need to adopt such a common customs tariff pursuant to the amended EC Regulation 404/1993:

> "Council Regulation (EEC) No 404/93 of 13 February 1993 on the common organisation of the market in bananas provides for the entry into force of a tariff only regime for imports of bananas no later than 1 January 2006"[1005] (footnote omitted).

7.519 EC Regulation 1964/2005 then refers to the "negotiations under Article XXVIII of the GATT 1994 with a view to modifying certain concessions for bananas"[1006] and to the unsuccessful attempts of the European Communities to rebind its bananas tariff.[1007]

7.520 Finally, Article 1.1 of EC Regulation 1964/2005 fulfils the function set out in Article 16.1 of EC Regulation 404/1993, as amended by EC Regulations 216/2001 and 2587/2001, and provides that "[a]s from 1 January 2006 the tariff rate for bananas (CN code 0803 00 19) shall be EUR 176/tonne."

[1003] Panel Report on *EC – Bananas III (Article 21.5 – Ecuador)*, para. 6.8.
[1004] EC Regulation 2587/2001, first recital of the preamble, footnote 4.
[1005] EC Regulation 1964/2005, recital (1).
[1006] Ibid., recital (2).
[1007] Ibid., recitals (3)-(5).

7.521 The Panel concludes that the above legal and factual background of the current and the 2002-2005 EC bananas import regimes, in particular the above close link between EC Regulations 404/1993, 216/2001, 2587/2001 and 1964/2005, indicate that the two regimes have a particularly close relationship.

7.522 That close relationship is confirmed by the role of the Bananas Understanding in the developments following the first attempt of the European Communities to bring itself into compliance with the original recommendations and rulings of 1997. Indeed, the Bananas Understanding confirms the European Communities' unilateral offers in 1999 and 2000 to bring itself into compliance with the original DSB recommendations and rulings through a two-stage approach, the second stage of which would involve a tariff-only EC bananas import regime to be introduced by 1 January 2006.

7.523 Subparagraphs C(1) and C(2) as well as Annexes 1 and 2 of the Bananas Understanding set out the "interim" steps to be taken by the European Communities prior to 1 January 2006. In turn, paragraph B of the Bananas Understanding, which both parties consider relevant in the context of the European Communities' third preliminary objection, explicitly refers to "Article 16(1) of Regulation No. (EC) 404/93 (as amended by Regulation No. (EC) 216/2001)". The Panel cannot fail to note in this context that Article 16.1 of EC Regulation 404/1993, and the various amendments and steps pursuant to that Article, are key in establishing the close link between EC Regulations 404/1993, 216/1993, 2587/1993 and 1964/2005.

7.524 Further, the Bananas Understanding, which both parties consider relevant for assessing the European Communities' third preliminary objection, provides in paragraph A that "[t]he European Commission and the United States have identified the means by which the long-standing dispute over the EC's banana import regime can be resolved."[1008] The European Communities' communication to the DSB concerning the Bananas Understanding states that "[t]he European Communities (EC) wish to notify the Dispute Settlement Body (DSB) that they have reached, 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)*"[1009] (emphasis added). The Panel considers that these phrases give rise to a strong link between the Bananas Understanding and the original panel and appellate proceedings in *EC – Bananas III*.

(c) Conclusion

7.525 On the basis of the above reasons taken together, the Panel concludes that there is clearly a "'continuum of events'[1010],[1011] between the original DSB recommendations and rulings in the *EC – Bananas III dispute* and the current EC bananas import regime.

7.526 As mentioned earlier, the first attempt of the European Communities to bring itself into compliance as of the end of the "reasonable period of time" "to comply with the relevant DSB recommendations and rulings", i.e. by 1 January 1999, was found to be inconsistent with the WTO rules in at least two dispute settlement procedures. This confirms that the European Communities' first attempt to bring itself into compliance was unsuccessful.

[1008] Documents WT/DS27/58 of 2 July 2001, and WT/DS27/59 of 2 July 2001, para. A.
[1009] Document WT/DS27/58 of 2 July 2001, p. 1.
[1010] (*footnote original*) Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 121.
[1011] Appellate Body Report on *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 103.

7.527 The Panel finds that the above-summarized developments following the first attempt of the European Communities to comply with the original DSB recommendations and rulings constitute a second attempt by the European Communities to comply with those recommendations and rulings.

7.528 As expressed in unilateral EC statements to the DSB and in legislation adopted by the European Communities, and also confirmed in the bilateral Bananas Understandings and in the multilateral Doha Waivers, a central element of that two-stage EC attempt to comply is the introduction of a tariff-only bananas import regime by 1 January 2006.

7.529 The Panel notes that the European Communities' argument that the need to introduce the final tariff-only regime is not part of the European Communities second attempt to comply would, as the United States argues, "read paragraph B out of the [Bananas] Understanding."[1012] Further, as analysed above[1013], the same argument by the European Communities cannot be sustained even on the basis of the EC domestic legislation invoked by the European Communities as the alleged real basis for adopting EC Regulation 1964/2005. The Panel finds that the current EC bananas import regime, introduced on 1 January 2006, constitutes an integral part of that second EC attempt to comply, although obviously this does not imply that the current EC bananas import regime would be necessarily consistent with the covered agreements, which is a matter that does not belong within the assessment of this preliminary issue.

7.530 Indeed, in the light of its analysis of the relevant criteria established by the Appellate Body in *US – Softwood Lumber IV (Article 21.5 – Canada)*, there is a particularly close link between the current bananas import regime and the 2002-2005 EC bananas import regime, which the EC argues constitutes its final measure taken to comply. The three bananas import regimes introduced by the European Communities on 1 July 2001, 1 January 2002 and 1 January 2006, were all part of the European Communities' second attempt at bringing itself into compliance.

7.531 In the light of the above, the Panel concludes that in itself the current bananas import regime is a measure taken to comply with the original recommendations and rulings of the DSB in the *EC – Bananas III* dispute. Further, the current bananas import regime is a measure taken to comply with the original recommendations and rulings of the DSB in the *EC – Bananas III* dispute also on the basis of its particularly close relationship to the alleged final measure taken to comply by the European Communities, i.e. the 2002-2005 EC bananas import regime.

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

F. PRELIMINARY OBJECTION OF THE EUROPEAN COMMUNITIES CONCERNING THE LACK OF FORMAL CONSULTATIONS

7.533 In addition to the above, in its first written submission, the European Communities had raised the additional preliminary objection claim that "[t]he United States … did not request consultations."[1014]

7.534 According to the European Communities:

> "The United States requested the establishment of this Panel by invoking Article 21.5 of the DSU on July 2, 2007, without having requested consultations with the European Communities. The European Communities protested the lack of a prior

[1012] United States' second written submission, para. 46.
[1013] See para. 3.5 above.
[1014] European Communities' first written submission, paras. 33-38.

> request for consultations in the DSB meeting of July 12, 2007, where the United States' request was discussed and the decision for the establishment of the Panel was taken."[1015]

7.535 The European Communities argued that the United States' complaint is vitiated by the lack of prior consultations between the Parties[1016] because:

> "It is settled law that a complaining party is *not* entitled to request the establishment of a panel unless it has first submitted a *request* for consultations.[1017] 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.[1018]"[1019]

7.536 In response, the United States did not contest the absence, in these compliance proceedings, of "formal consultations[pursuant to Article 4 of the DSU,] in addition to the discussions already being held"[1020] between the parties. However, the United States argued that:

> "[It] was surprised that the EC raised this procedural objection given that the United States and the EC had expressly agreed that the extensive discussions between the United States and the EC concerning the EC's new regime prior to the request for a panel would fulfill any consultation requirement. The EC appears to have recognized this when, as discussed below, it formally withdrew at the July 12, 2007, DSB meeting any procedural objection to panel establishment stemming from the lack of a formal request for consultations.[1021] This procedural arrangement is reflected in an exchange of letters between the United States Trade Representative ('USTR') and the EC Commissioner for Trade. In that exchange, the USTR proposed that 'our discussions to that point would fulfill 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.'[1022] In his reply, the Commissioner agreed that the 'EU would be ready not to object to a US request for the establishment of a panel in July.'[1023] Further communications between the United States and the EC confirmed that the EC was making an unconditional commitment not to raise the lack of formal consultations as a procedural hurdle."[1024]

7.537 As regards the substance of the European Communities' preliminary objection, the United States argued that:

[1015] Ibid., para. 30. See also ibid., para. 38.

[1016] See ibid., paras. 33-38.

[1017] *(footnote original)* See the Panel Report in *Mexico – Definitive Anti-Dumping Measures on Beef and Rice, Complaint with Respect to Rice*, WT/DS295/R ("*Mexico – Rice*"), at paragraphs 7.41 and 7.45.

[1018] *(footnote original)* See the Panel Report in *Brazil – Export Financing Programme for Aircraft*, WT/DS46/R, dated April 14, 1999 ("*Brazil/Aircraft*"), at paragraph 7.10, upheld by the Appellate Body.

[1019] European Communities' first written submission, para. 33.

[1020] United States' second written submission, para. 17.

[1021] *(footnote original)* Minutes of Meeting of the Dispute Settlement Body held on 12 July 2007, WT/DSB/M/235 (30 August 2007), para. 7.

[1022] *(footnote original)* Letter from Amb. Schwab to Commissioner Mandelson, dated March 28, 2007, fifth paragraph.

[1023] *(footnote original)* Letter from Commissioner Mandelson to Amb. Schwab, dated 4 April 2007, sixth paragraph.

[1024] United States' second written submission, para. 4.

> "Formal consultations are not a prerequisite to the establishment of a panel under Article 21.5. Contrary to the EC's assertion, it is not 'settled law that a complaining party is *not* entitled to request the establishment of a panel unless it has first submitted a *request* for consultations.'[1025] The Appellate Body's analysis of this issue in *Mexico – HFCS (21.5)* amply supports the US view on this point."[1026]

7.538 In particular, according to the United States:

> "In *Mexico – HFCS (21.5)*, 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.'[1027] 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.'[1028] 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.'[1029],[1030]

7.539 The United States added that "the only prerequisite explicitly set forth in Article 21.5 for proceedings under that provisions is that there be a 'disagreement' as to whether a Member has implemented the recommendations and rulings of the DSB."[1031] The United States pointed out that "[s]uch a disagreement clearly exists in this case"[1032], and it advances various textual, contextual, factual and policy arguments[1033] to support the point that its compliance complaint is not vitiated by the lack of formal consultations.

7.540 The Panel notes that the European Communities, in it second written submission, reiterated that "[i]n the present case, the United States did not submit a request for consultations prior to requesting the establishment of this Panel[, and that t]his would have sufficed for the Panel to dismiss the United States' complaint outright."[1034]

7.541 The European Communities, however, also stated that:

> "[A]s the United States points out in its second written submission, it appears that an agreement had been reached between the United States Trade Representative and the Commissioner for Trade of the European Communities expressly providing that the United States and the European Communities agree to dispense with consultations in the present case. This agreement was reached prior to the United States' request for the establishment of this Panel.

[1025] *(footnote original)* EC First Written Submission, para. 33 (internal footnote ommitted).
[1026] United States' second written submission, para. 6.
[1027] *(footnote original)* 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 ("Mexico - HFCS (21.5)(AB)*"),WT/DS132/AB/RW, adopted 21 November 2001, para. 58.
[1028] *(footnote original) Id.*, para. 64.
[1029] *(footnote original) Id.*, para. 65.
[1030] United States' second written submission, para. 7.
[1031] Ibid., para. 8.
[1032] Ibid., para. 8.
[1033] See ibid., paras. 9-19.
[1034] European Communities' second written submission, para. 4.

> In light of this agreement, *the European Communities withdraws the objection raised in paragraph 38 of its first written submission*"[1035] (emphasis added).

7.542 Given the explicit withdrawal by the European Communities of its preliminary objection concerning the lack of formal consultations in this dispute, the Panel refrains from assessing this preliminary objection, and turns to the substantive claims of the United States in this dispute.

G. THE UNITED STATES' CLAIM UNDER ARTICLE I OF THE GATT 1994

1. The United States' claim

7.543 The United States argues that the European Communities' import regime for bananas and, more specifically, the tariff quota, which allows a specified yearly volume of 775,000 mt of bananas of ACP origin to enter the European Communities' market duty-free, is inconsistent with Article I of the GATT 1994. The United States argues that through this regime the European Communities "applies a zero tariff rate to imports of bananas originating in ACP countries in a quantity up to 775,000 tons but does not accord the same duty-free treatment to imports of bananas originating in all other WTO Members".[1036] The United States adds that the preference granted to bananas of ACP origin is not covered by the waiver from Article I:1 of the GATT 1994, the ACP-EC Partnership Agreement waiver (Doha Waiver), which was granted to the European Communities by the WTO Ministerial Conference in Doha on 14 November 2001.[1037]

7.544 In the United States' view:

> "[T]he EC is providing an 'advantage, favour, privilege or immunity' to ACP Members by according ACP bananas duty-free access within the 775,000 ton tariff rate quota, while subjecting all MFN bananas to a 176 euros per ton duty. The duty-free treatment, amounting to a tariff savings of $4.33 per box, is only available to bananas of ACP origin."[1038]

7.545 The United States adds that:

> "[T]he measure by which the EC 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… [and] the EC is failing to accord the ACP tariff advantage 'immediately and unconditionally' to the 'like product' of other WTO Members. Although MFN

[1035] Ibid., paras. 5-6. But see ACP Countries' third party written submission, paras. 32-49, written version of Cameroon's oral statement at the Panel's substantive meeting with the parties and third parties, para. 17, written version of Jamaica's oral statement at the Panel's substantive meeting with the parties and third parties, para. 4, written version of Saint Lucia's oral statement at the Panel's substantive meeting with the parties and third parties, para. 25, written version of Saint Vincent and the Grenadines' oral statement at the Panel's substantive meeting with the parties and third parties, para. 5, and written version of Suriname's oral statement at the Panel's substantive meeting with the parties and third parties, paras. 2-6.

[1036] United States' first written submission, para. 49. See also, United States' second written submission, para. 96.

[1037] Ministerial Conference, European Communities, The ACP – EC Partnership Agreement, Decision of 14 November 2001 (WT/MIN(01)/15), 14 November 2001. See United States' second written submission, paras. 67-80, and written version of United States' opening statement during substantive meeting with the parties and third parties, paras. 27-34.

[1038] United States' first written submission, para. 30.

> 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"[1039]

7.546 The United States further states that the European Communities' preference for bananas of ACP origin is no longer covered by the Doha Waiver. In the United States' view:

> "Under the express terms of the Annex [to the Doha Waiver, the Bananas Annex], the EC 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 EC 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 January 1, 2006."[1040]

7.547 The United States concludes that:

> "[T]he EC's Article I waiver expired on January 1, 2006, upon the implementation of the new EC banana measures. In the absence of this waiver, the EC's banana measures are maintained in violation of GATT Article I."[1041]

2. The European Communities' response

7.548 The European Communities has not invoked any arguments to contest the United States' claim that the preference granted to bananas of ACP origin would be inconsistent with Article I of the GATT 1994.[1042]

7.549 The European Communities considers, however, that this preference is covered by a waiver from Article I:1 of the GATT 1994, the Doha Waiver, approved by the WTO Ministerial Conference in November 2001.[1043] The European Communities states that the duration of this waiver was made to correspond to the duration of the trade preferences granted by the European Communities pursuant to the Cotonou Agreement, i.e., until the end of 2007.[1044] According to the European Communities,

> "[T]he 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."[1045]

7.550 The European Communities also argues that, in accordance with the language contained in the Doha Waiver, this waiver would only cease to apply to bananas "upon entry into force of the new

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[1039] Ibid., paras. 31-32 (footnote omitted).
[1040] Ibid., para. 35.
[1041] United States' second written submission, para. 80.
[1042] 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.
[1043] Ministerial Conference, European Communities, The ACP – EC Partnership Agreement, Decision of 14 November 2001 (WT/MIN(01)/15), 14 November 2001.
[1044] European Communities' first written submission, para. 25. See also European Communities' response to panel question No. 28, para. 55.
[1045] European Communities' first written submission, para. 54. See also European Communities' second written submission, para. 56, and European Communities' response to panel question No. 89, para. 163.

EC tariff regime", which the European Communities considers to mean "the tariff regime that was presented to the Arbitrator and on which the Arbitrator made a pronouncement in its Award."[1046]

7.551 In the European Communities' view:

> "The European Communities has fully satisfied the condition for the continued application of the Doha waiver ... . The European Communities introduced on January 1, 2006 a different import regime than the one analysed by the Arbitrator and the evidence derived from the operation of this import regime clearly establishes that it more than maintains total market access for MFN suppliers."[1047]

7.552 In conclusion, the European Communities argues that, since the preference granted to imported bananas originating in ACP countries continues to be covered by the Doha Waiver, the Panel should reject the United States' claim under Article I:1 of the GATT 1994.[1048]

3. Article I:1 of the GATT 1994

7.553 Under Article I:1 of the GATT 1994:

> "With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III ... any advantage, favour, privilege or immunity granted by any contracting party [Member] 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 [Members]."[1049]

7.554 In *Canada – Autos*, the Appellate Body explained the object and purpose of Article I:1 of the GATT 1994 as follows:

> "Th[e] object and purpose [of Article I:1] is to prohibit discrimination among like products originating in or destined for different countries. The prohibition of discrimination in Article I:1 also serves as an incentive for concessions, negotiated reciprocally, to be extended to all other Members on an MFN basis."[1050]

7.555 In *Indonesia – Autos*, referring to the Appellate Body's ruling in *EC – Bananas III*, the panel explained how to carry out the examination of a measure under Article I:1 of the GATT 1994:

> "The Appellate Body, in *Bananas III*, confirmed that to establish a violation of Article I, there must be an advantage, of the type covered by Article I and which is not accorded unconditionally to all 'like products' of all WTO Members."[1051]

[1046] European Communities' first written submission, para. 55.
[1047] Ibid., para. 56. See also European Communities' second written submission, paras. 57-58.
[1048] European Communities' first written submission, para. 62. See also European Communities' second written submission, para. 65.
[1049] *Ad* note omitted.
[1050] Appellate Body Report on *Canada – Autos*, para. 84.
[1051] Panel Report on *Indonesia – Autos*, para. 14.138.

4. Panel's analysis

7.556 The Panel starts by recalling that the European Communities has chosen not to contest the United States' claim that the preference granted to bananas of ACP origin is inconsistent with Article I of the GATT 1994.

7.557 Following the above-mentioned approach set out by the Appellate Body in *EC – Bananas III*, as described by the panel in *Indonesia – Autos*, the Panel will nevertheless consider the arguments and evidence presented by the United States, in order to determine whether they are sufficient to establish a prima facie case of inconsistency with Article I of the GATT 1994. If this were determined to be the case, the Panel would then turn to assessing whether the European Communities has made a prima facie case that such inconsistency is covered by the Doha Waiver granted by the WTO Ministerial Conference on 14 November 2001.

(a) Is the ACP preference inconsistent with Article I:1 of the GATT 1994?

7.558 As noted above, in order to analyse a claim under Article I:1 of the GATT 1994, the Panel needs to determine first whether the measure challenged constitutes an advantage (or favour, privilege or immunity), of the type covered by Article I. If that were the case, the Panel would then turn to the issues of the likeness of products and the immediate and unconditional extension of such advantage.

(i) Whether the preference granted by the European Communities constitutes an advantage of the type covered by Article I of the GATT 1994

7.559 The following facts are not in dispute:

(a) Under the terms of Council Regulation (EC) No. 1964/2005 of 24 November 2005, and in accordance with the European Communities' commitments under the ACP-EC Partnership Agreement, also known as the Cotonou Agreement, the European Communities allows a volume of 775,000 mt of bananas to enter the EC market free of tariff duties;

(b) This duty-free treatment is only available to imports of bananas originating in ACP countries, and not to like bananas originating in other Members; and,

(c) Imported bananas originating in other Members, as well as imports of bananas originating in ACP countries beyond the annual volumes prescribed in the tariff quota, are subject to a specific tariff of €176/mt.[1052]

In other words, access eligibility to this preference depends on the origin of the bananas, as only ACP bananas qualify.

7.560 The Panel notes that the term "advantage", under Article I:1 of the GATT 1994, has traditionally been given a broad scope by GATT and WTO panels, as well as by the Appellate Body.[1053] In this regard, the Panel concludes that the duty-free treatment available to imports of bananas originating in ACP countries, solely because of their origin, constitutes an advantage, when compared to the ordinary treatment accorded to bananas of all other origins, which are subject to a

[1052] See tariff regime for imports of bananas to the EC, in Council Regulation (EC) No. 1964/2005 of 24 November 2005, Exhibit US-1. See also, United States' first written submission, paras. 2 and 23, and European Communities' first written submission, paras. 3 and 4.

[1053] "[A] broad definition has been given to the term 'advantage' in Article I:1 of the GATT 1994 by the panel in *United States – Non-Rubber Footwear*." Appellate Body Report on *EC – Bananas III*, para. 206, quoting GATT Panel Report on *US – Non-Rubber Footwear*, para. 6.9.

specific tariff of €176/mt. This advantage applies regardless of the trade effects produced by the actual level of the MFN tariff, since access to the preference granted by the European Communities affects the competitive opportunities for bananas from MFN suppliers vis-à-vis those accorded to bananas originating in ACP countries.

(ii) Whether the relevant products in this dispute are like products

7.561 As to whether the relevant products in this dispute are "like products", the Panel notes that the original panel in this dispute already "consider[ed] whether bananas from the EC, ACP countries, BFA countries and other third countries are 'like' products for purposes of the claims made in respect of Articles I, III, X and XIII of GATT"[1054], and found that:

> "The factors commonly used in GATT practice to determine likeness, such as, for example, customs classification, end-use, and the properties, nature and quality of the product, all support a finding that bananas from these various sources should be treated as like products.[1055] Moreover, all parties and third parties to the dispute have proceeded in their legal reasoning on the assumption that all bananas are 'like' products in spite of any differences in quality, size or taste that may exist.
>
> We find that bananas are 'like' products, for purposes of Article I, III, X, and XIII of GATT, irrespective of whether they originate in the EC, in ACP countries, in BFA countries or in other third countries."[1056]

7.562 Similarly, in the original proceedings the Appellate Body stated that:

> "As no participant disputes that all bananas are like products, the non-discrimination provisions apply to all imports of bananas, irrespective of whether and how a Member categorizes or subdivides these imports for administrative or other reasons."[1057]

The Appellate Body concluded that "[i]n the present case, the non-discrimination obligations of the GATT 1994, specifically Articles I:1 and XIII[1058], apply fully to all imported bananas irrespective of their origin ..."[1059]

7.563 The European Communities has not contested the United States' assertion that "MFN bananas and ACP origin bananas are 'like product' imports".[1060]

7.564 Accordingly, and in the light of the relevant findings in earlier proceedings in this dispute, the Panel confirms that the relevant products in this dispute, fresh bananas (corresponding to tariff item

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[1054] Panel Report on *EC – Bananas III (Ecuador)*, para. 7.62.

[1055] (*footnote original*) For a general discussion of relevant factors for determining the likeness of products, see Panel Report on "Japan – Taxes on Alcoholic Beverages", adopted on 1 November 1996, WT/DS8/R, WT/DS10/R & WT/DS11/R, pp. 111-114, paras. 6.20-6.23, as modified by, Appellate Body Report on "Japan – Taxes on Alcoholic Beverages", adopted on 1 November 1996, WT/DS8/AB/R, WT/DS10/AB/R & WT/DS11/AB/R, pp. 19-21.

[1056] Panel Report on *EC – Bananas III (Ecuador)*, paras. 7.62-7.63.

[1057] Appellate Body Report on *EC – Bananas III*, para. 190.

[1058] (*footnote original*) We do not agree with the Panel's findings that Article X:3(a) of the GATT 1994 and Article 1.3 of the *Licensing Agreement* preclude the imposition of different import licensing systems on like products when imported from different Members. See our Findings and Conclusions, paras. (l) and (m).

[1059] Appellate Body Report on *EC – Bananas III*, para. 191.

[1060] United States' first written submission, para. 32.

080300 12 or 080300 19) originating in ACP countries, are like products to fresh bananas originating in other WTO Members, including MFN suppliers.

(iii) Whether the preference granted by the European Communities is immediately and unconditionally extended

7.565 Finally, it is not contested between the parties that the preference granted by the European Communities to bananas of ACP origin is not extended to like bananas originating in the territories of any other WTO Members, including MFN suppliers.

7.566 As this advantage, in this case, is not extended to the like products of any other WTO Members, it is necessarily not extended "immediately", nor "unconditionally". This is notwithstanding the fact that the Panel notes that, in addition to the preferences granted to bananas of ACP origin under the Cotonou Agreement, the European Communities also grants autonomous duty-free access to its market to bananas originating in Least Developed Countries (LDCs) under the Everything But Arms (EBA) arrangement.[1061]

(iv) Preliminary conclusion regarding the United States' claim under Article I:1 of GATT 1994

7.567 For the reasons indicated above, the Panel finds that the United States has successfully made a prima facie case that the preference granted by the European Communities to an annual duty-free tariff quota of 775,000 mt of imported bananas originating in ACP countries constitutes an advantage for this category of bananas, which is not accorded unconditionally to like bananas originating in non-ACP WTO Members. The Panel therefore finds that this preference is inconsistent with Article I:1 of GATT 1994.

(b) Is the preference covered by a waiver?

7.568 Having found that the preference granted by the European Communities to imported bananas originating in ACP countries is inconsistent with Article I:1 of the GATT 1994, the Panel will now turn to the issue of whether this preference is covered by the Doha Waiver.

(i) Terms and conditions of the Doha Waiver and the Bananas Annex

7.569 In examining the terms of conditions contained in the Doha Waiver, the Panel recalls the words of the Appellate Body in its *EC – Bananas III* report:

> "Although the WTO Agreement does not provide any specific rules on the interpretation of waivers, Article IX of the WTO Agreement and the Understanding in Respect of Waivers of Obligations under the General Agreement on Tariffs and Trade 1994, which provide requirements for granting and renewing waivers, stress the exceptional nature of waivers and subject waivers to strict disciplines. Thus, waivers should be interpreted with great care."[1062]

7.570 While the Doha Waiver was valid until 31 December 2007[1063], with regard to bananas this was subject to the terms and conditions set out in the text of the Decision by which the WTO

[1061] Council Regulation (EC) No. 980/2005 of 27 June 2005. European Communities' response to Panel question No. 66, paras. 98-100. See para. 2.38 above.

[1062] Appellate Body Report on *EC – Bananas III*, para. 185. See also GATT Panel Report on *US – Sugar Waiver*, para. 5.9.

[1063] Ministerial Conference, European Communities, The ACP – EC Partnership Agreement, Decision of 14 November 2001 (WT/MIN(01)/15), 14 November 2001, p. 2, para. 1.

Ministerial Conference adopted this waiver. Those terms and conditions include the additional provisions contained in the Annex to the Doha Waiver Decision (the Bananas Annex).[1064]

7.571 Under the terms and conditions set out in the Bananas Annex, the European Communities was to announce a proposed rebinding of its tariff on bananas.[1065] Within a 60-day period following the announcement by the European Communities of its intentions concerning the rebinding of the tariff on bananas, any WTO Member exporting bananas on an MFN basis could request that an arbitrator determine "whether the envisaged rebinding of the EC tariff on bananas would result in at least maintaining total market access for MFN banana suppliers".[1066] Should the arbitrator find that this was not the case, according to the first sentence in the fifth tiret of the Bananas Annex, the European Communities was to "rectify the matter". In this case, the second sentence in the fifth tiret of the Bananas Annex provides that the European Communities was to enter into consultations with those interested parties that had requested the arbitration. According to the third sentence in the fifth tiret of the Bananas Annex, if, notwithstanding these consultations, no mutually satisfactory solution was agreed, the same arbitrator could be called upon again, this time to determine "whether the EC had rectified the matter". If the arbitrator found that the European Communities had failed to rectify the matter, the fifth sentence in the fifth tiret of the Bananas Annex provides that the waiver would "cease to apply to bananas upon entry into force of the new EC tariff regime". Pursuant to the sixth sentence in the fifth tiret of the Bananas Annex, the entirety of this process had to be conducted in such a manner that the "negotiations and the arbitration procedures [should] be concluded before the entry into force of the new EC tariff only regime on 1 January 2006".[1067]

7.572 Whether the Doha Waiver covers the European Communities' current banana import regime may accordingly depend on whether or not, under the Bananas Annex, the Doha Waiver expired with the introduction of the "new EC tariff regime" on 1 January 2006. Indeed, whether or not the Doha Waiver expired on this date is the main issue of contention between the parties to this dispute.

(ii) Uncontested facts

7.573 The following facts are uncontested:

(a) On 31 January 2005, the European Communities notified the WTO Members that it intended to replace its tariff concessions on tariff item 0803 00 19 (bananas) included in the European Communities' Schedule CXL, with a bound duty of €230/mt. In its notification, the European Communities indicated that its communication constituted the announcement under the terms of the Bananas Annex to the Doha Waiver.[1068]

(b) In March and April 2005, a number of WTO Members requested arbitration, pursuant to the Bananas Annex.[1069]

[1064] Ministerial Conference, European Communities, The ACP – EC Partnership Agreement, Decision of 14 November 2001 (WT/MIN(01)/15), 14 November 2001, p. 3, para. 3bis. The Bananas Annex is an integral part of the Doha Waiver.

[1065] Bananas Annex, tirets 1, 2 and 5.

[1066] Ibid., tirets 2-4.

[1067] Ibid., tiret 5.

[1068] Article XXVIII:5 Negotiations, Schedule CXL – European Communities, Addendum (G/SECRET/22/Add.1), 1 February 2005. See para. 2.18 above.

[1069] 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*,

(c) In August 2005, the arbitrator delivered its first award pursuant to the Bananas Annex, concluding 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".[1070]

(d) On 13 September 2005, the European Communities notified the interested parties its revised proposal to provide 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.[1071]

(e) On 26 September 2005, and in accordance with the terms of the Bananas Annex, the European Communities requested arbitration on its revised proposal.[1072]

(f) In October 2005, the arbitrator delivered its second award pursuant to the Bananas Annex, concluding that:

> "[T]he European Communities' proposed rectification ... 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' [and that] consequently ... the European Communities has failed to rectify the matter, in accordance with the fifth tiret of the Annex to the Doha Waiver [the Bananas Annex]".[1073]

(g) On 1 January 2006, the European Communities put into force a new regime for the importation of bananas, through Council Regulation (EC) No. 1964/2005, which includes a €176/mt MFN tariff, as well as a 775,000 mt duty-free tariff-rate quota for ACP bananas.[1074]

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.1), 4 April 2005. See para. 2.19 above.

[1070] 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, para. 94. 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. See para. 2.19 above.

[1071] European Communities, The ACP – EC Partnership Agreement, Second Recourse to Arbitration Pursuant to the Decision of 14 November 2001, *Award of the Arbitrator* (WT/L/625), 27 October 2005, para. 7. See para. 2.20 above.

[1072] 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. See para. 2.21 above.

[1073] European Communities, The ACP – EC Partnership Agreement, Second Recourse to Arbitration Pursuant to the Decision of 14 November 2001, *Award of the Arbitrator* (WT/L/625), 27 October 2005, para. 127. See para. 2.21 above.

[1074] Exhibit US-1, Council Regulation (EC) No. 1964/2005. See para. 2.36 above.

(iii) Main issue contested between the parties

7.574 As mentioned above, the main issue contested between the parties is whether, under the terms of the Bananas Annex, the Doha Waiver expired with regard to bananas on 1 January 2006. Each party suggests an alternative approach:

(a) The United States argues that, with regard to bananas, the Doha Waiver expired automatically upon the entry into force of the new European Communities' tariff regime, inasmuch as two successive arbitrations determined that the European Communities' proposed rebinding of its tariff on bananas would not result in at least maintaining total market access for MFN suppliers; and

(b) The European Communities argues instead that, with regard to bananas, the Doha Waiver would expire after all the procedural steps envisaged in the Bananas Annex had been completed, but only if the European Communities put into force an identical regime to that analysed by the arbitrator or a new regime that would also fail to result in at least maintaining total market access for MFN suppliers.

7.575 Specifically, the United States argues that:

> "Under the express terms of the [Bananas] Annex, the EC had two opportunities to propose a regime that met the conditions set out in the waiver. In 2005, pursuant to the [Bananas] Annex arbitration mechanism, two WTO arbitrators determined that the two proposals made by the EC 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 January 1, 2006".[1075]

7.576 The European Communities responds that:

> "[T]he correct interpretation of the Doha waiver is that it would expire, with regard to bananas, 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. …
>
> 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 European Communities considers that the phrase '*the new EC tariff regime*' can only refer 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

[1075] United States' first written submission, para. 35.

> MFN suppliers, then the Doha waiver would continue to apply until the end of 2007."[1076]

7.577 In other words, the United States asks the Panel to recognize the expiration of the Doha Waiver for bananas by noting the European Communities' fulfilment of the conditions identified in the Bananas Annex, namely, two negative arbitral awards and the introduction of a new EC tariff regime for bananas.[1077] Conversely, the European Communities argues that the Doha Waiver would have expired for bananas before the end of 2007 only if, in addition to those conditions, the European Communities' had put in place a regime for the importation of bananas that did not satisfy the standard of "maintaining total market access for MFN countries."[1078] The European Communities argues further that the expiration of the Doha Waiver would only occur if the bananas import regime implemented by the European Communities was also the same regime found by the arbitrator not to satisfy the standard of the Doha waiver, under the procedures in the Bananas Annex, rather than a different one.[1079]

(iv) Conditions envisaged in the Bananas Annex

7.578 As noted above, the completion of the intermediate procedural steps envisaged in the terms and conditions set out in the Bananas Annex, i.e., the two negative arbitral awards, is an uncontested matter of fact. Indeed, two successive arbitrations, as envisaged respectively in the fourth and fifth tirets of the Bananas Annex, reached the conclusion that the European Communities' proposed rebinding of its tariff on bananas would not result in at least maintaining total market access for MFN suppliers.[1080] Furthermore, on 1 January 2006, the European Communities put into force a new regime for the importation of bananas, which was different from the one previously applied.[1081]

7.579 As also noted above, however, the European Communities argues that its current regime for the importation of bananas is not to be considered as "the new EC tariff regime" in the terms contained in the Bananas Annex. Additionally, the European Communities argues that its current regime for the importation of bananas results in at least maintaining total market access for MFN banana suppliers, taking into account the European Communities' relevant commitments.

7.580 The European Communities' arguments in this regard raise two main questions:

(a) Whether the European Communities' current regime for the importation of bananas is to be considered as "the new EC tariff regime" in the sense of the terms contained in the Bananas Annex; and

(b) Whether, the Bananas Annex links the expiration of the Doha Waiver with regard to bananas to the mere entry into force of such new regime or whether, under the Bananas Annex, only a new tariff regime that does *not* at least maintain total market access would result in such expiration of the waiver.

[1076] European Communities' first written submission, paras. 54-55. See also European Communities' second written submission, para. 56, and European Communities' response to panel question No. 29, paras. 56-57.

[1077] United States' second written submission, paras. 67-68.

[1078] European Communities' first written submission, para. 54. See also European Communities' second written submission, para. 57 and European Communities' response to panel question No. 29, para. 56.

[1079] European Communities' first written submission, para. 55. See also European Communities' second written submission, para. 58 and European Communities' response to panel question No. 29, paras. 56-57.

[1080] See above, paras. 2.19 and 2.21.

[1081] See above, para. 2.36.

7.581 The Panel will accordingly consider the European Communities' arguments in this regard.

(v) Is the European Communities' current bananas regime "the new EC tariff regime"?

7.582 The first issue raised by the European Communities is whether the European Communities' current regime for the importation of bananas is to be considered as "the new EC tariff regime" under the terms contained in the fifth sentence of the fifth tiret of the Bananas Annex.

7.583 Under the fifth tiret of the Bananas Annex:

> "The second arbitration award will be notified to the General Council. If the EC has failed to rectify the matter, this waiver shall cease to apply to bananas *upon entry into force of the new EC tariff regime*" (emphasis added).

7.584 As noted above, the European Communities argues that:

> "[T]he phrase '*the new EC tariff regime*' can only refer 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."[1082]

7.585 The European Communities then concludes that it "has fully satisfied the condition for the continued application of the Doha waiver". First, because it "introduced on January 1, 2006 a different import regime than the one analysed by the Arbitrator". And secondly, because this new regime "maintained total market access for MFN suppliers".[1083]

7.586 The Panel agrees with the European Communities that its current bananas import regime is different from the ones analysed by the arbitrators under the Bananas Annex. However, the Panel fails to see how the terms of the Bananas Annex support the conclusion drawn from that fact by the European Communities, namely that the European Communities has fully satisfied the condition for the continued application of the Doha Waiver. More specifically, the Panel disagrees with the European Communities that the phrase "the new EC tariff regime" can only refer to the tariff regime that was presented to the arbitrator and on which the arbitrator made a pronouncement in its award. Indeed, the terms of the Doha Waiver do not support the interpretation of the expression "the new EC tariff regime" proposed by the European Communities.

7.587 The ordinary meaning of the word "new" suggests something that is "[n]ot existing before; now made or existing for the first time ... Different from a thing previously existing, known, etc."[1084] Taking into account this ordinary meaning of the word "new", the expression the "new EC tariff regime" for bananas, in the context in which it is used in the fifth tiret of the Bananas Annex, should be read as any regime adopted by the European Communities that is different from the one previously in existence. This regime would be "new", regardless of whether it was the regime originally proposed by the European Communities and analysed by the arbitrator or a different one.

[1082] European Communities' first written submission, para. 55.
[1083] European Communities' first written submission, para. 56. See also, ibid., para. 55.
[1084] *The New Shorter Oxford English Dictionary*, fifth edition (Clarendon Press, 2002), Vol. II, p. 1914.

7.588 As noted by the United States, in the Bananas Annex, the measures examined by the Arbitrator are not referred to by the terms "the new tariff regime". Rather, the matter examined by the Arbitrator is described under the terms of the Bananas Annex, as "the envisaged rebinding of the EC tariff on bananas", "the rebinding", or to a determination of "whether the EC has rectified the matter".[1085]

7.589 In any event, the European Communities' current tariff regime is clearly different from the one previously in existence. Furthermore, the sixth sentence of the fifth tiret of the Bananas Annex provides that "[t]he Article XXVIII negotiations and the arbitration procedures shall be concluded before *the entry into force of the new EC tariff only regime on 1 January 2006*" (emphasis added). The European Communities' current banana import regime entered into force exactly on that date.

7.590 Consequently, the Panel is not persuaded that the expression "the new EC tariff regime" used in the fifth sentence of the fifth tiret of the Bananas Annex does not apply to the bananas import regime instituted by the European Communities from 1 January 2006, through Council Regulation (EC) No. 1964/2005.

(vi) Is the maintenance of total market access for MFN banana suppliers a relevant consideration for extending the duration of the Doha Waiver with regard to bananas?

7.591 The Panel now turns to the second question raised by the European Communities, namely, whether the European Communities' current regime for the importation of bananas results in at least maintaining total market access for MFN banana suppliers, taking into account the relevant EC commitments. In order to address this argument, however, the Panel needs first to verify whether, under the terms set out in the Bananas Annex, the Panel has the authority and is required to determine if the European Communities' current regime for the importation of bananas results in at least maintaining total market access for MFN banana suppliers.

7.592 If the Panel were to verify that, under the terms set out in the Bananas Annex, it has the authority to make such a finding and that it is required to do so and if the Panel further found that, indeed, the European Communities' current regime for the importation of bananas results in at least maintaining total market access for MFN banana suppliers, the question would then be whether such a determination implies that the Doha Waiver, as it applies to bananas, has remained in force.

7.593 The Panel notes in this regard the European Communities' argument that:

> "[T]he text of the Doha waiver shows that the 'test' for the termination of the waiver was whether the European Communities would introduce an import regime that maintains the total market access of MFN suppliers and not whether the Arbitration Awards would be negative for the European Communities."[1086]

7.594 However, this argument is not persuasive. The text of the fifth tiret of the Bananas Annex is clear enough:

> "If *the arbitrator determines* that the rebinding would not result in at least maintaining total market access for MFN suppliers, the EC shall rectify the matter. Within 10 days of the notification of the arbitration award to the General Council, the EC will enter into consultations with those interested parties that requested the arbitration. In the absence of a mutually satisfactory solution, the *same arbitrator*

[1085] See United States' response to panel question No. 29, para. 55.

[1086] European Communities' second written submission, para. 57. See also ACP Countries' third party written submission, paras. 97, 100 and 112.

> *will be asked to determine ... whether the EC has rectified the matter*. The second arbitration award will be notified to the General Council. *If the EC has failed to rectify the matter*, this waiver shall cease to apply to bananas upon entry into force of the new EC tariff regime" (emphasis added).

7.595 In our view, the expression "*If the EC has failed to rectify the matter*, this waiver shall cease to apply" used in the last full sentence of the fifth tiret cannot be read in isolation from the expression "In the absence of a mutually satisfactory solution, the *same arbitrator will be asked to determine ... whether the EC has rectified the matter*." The Panel agrees in this regard with the United States' statement that:

> "The phrase '[i]f the EC has failed to rectify the matter' [at the beginning of the fifth sentence in tiret 5 of the Bananas Annex], can only refer back to the determination required to be made by the [second] arbitrator pursuant to the third sentence [of the same tiret]."[1087]

7.596 Under the terms contained in the Bananas Annex, the authority to determine whether the European Communities' proposed regime for the importation of bananas would result "in at least maintaining total market access for MFN banana suppliers" fell on the arbitrator and not on any other WTO body.

7.597 The Bananas Annex contemplated two successive rounds of examination. Through the first round, the arbitrator would examine the European Communities' original proposed rebinding of the EC tariff on bananas to determine whether this proposed rebinding would maintain total market access for MFN banana suppliers. Through the second round of examination, if such were the case, the arbitrator would examine the revised proposal, to determine whether it had rectified the matter (i.e., if it would result in maintaining total market access for MFN banana suppliers, to the extent that the previous proposal had failed such test).

7.598 The terms contained in the Bananas Annex do not envisage any further examination after the second arbitral award. In particular, no third round of examination is provided for in the Bananas Annex. The terms of reference of this compliance Panel are to examine the consistency of the European Communities' bananas import regime with the WTO agreements and not to review the findings made by the arbitrator.

7.599 The European Communities argues that the duration of the Doha Waiver was not linked to the number of arbitrations lost by the European Communities before the new import regime was introduced, but rather it depended on whether the new import regime actually maintains total market access for MFN suppliers.[1088] In the European Communities' view:

> "[T]he 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."[1089]

7.600 The Panel concurs with the statement by a number of the third parties that any determination regarding the continued existence of the Doha waiver should not be based on purely "formalistic

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[1087] Written version of the United States' opening statement during substantive meeting with the parties and third parties, para. 32. See also United States' response to panel question No. 56, para. 98.

[1088] European Communities' first written submission, para. 54.

[1089] Ibid.

arguments".[1090] However, under the terms of the Bananas Annex, it was the arbitrator, and not a dispute settlement compliance panel, that had the authority to conduct a substantive analysis in order to determine whether the European Communities' proposed regime for the importation of bananas would result in maintaining total market access for MFN banana suppliers. Moreover, under the terms of the Bananas Annex, it was the European Communities that had the burden to either propose a rebinding of its tariff on bananas that would result in maintaining total market access for MFN banana suppliers or, if it had failed to do so through its original proposal, to rectify the matter to the satisfaction of the same arbitrator through a second examination.

7.601 The European Communities raises a hypothetical question concerning subsequent action taken by the European Communities in the event that the arbitrator *had* issued a favourable ruling with respect to the European Communities' proposed regime for the importation of bananas. The European Communities asks the Panel to consider what would have happened then if (i) the European Communities had then implemented a different system from that examined by the arbitrator or, (ii) the operation of the system actually implemented by the European Communities did not in fact maintain market access for bananas.[1091] This argument does not change the terms actually contained in the Bananas Annex. Even if the arbitrator had made such a finding and the European Communities later implemented a different system from that examined by the arbitrator, there is nothing in the Bananas Annex that would have prevented any WTO Member from having recourse to dispute settlement proceedings. Through such proceedings, a panel could have been asked to determine whether in those circumstances the system ultimately imposed by the European Communities was inconsistent with the WTO agreements and whether the Doha Waiver was still in effect.

7.602 It is true that, since the arbitrator had to base its findings on a proposed regime, the actual operation of such regime in the future could result in effects on the bananas market different from those estimated by the arbitrator. This may happen in any prospective determination, such as the one that, under the terms of the Bananas Annex, the arbitrator was to conduct regarding the European Communities' proposed regime. The arbitrator based its determination on the terms of the European Communities' proposal, including through the use of theoretical analyses and arithmetic calculations, and availing itself of the best available information at the time. Even if this was to be regarded as a shortcoming of the rules contained in the Bananas Annex, it would not change the terms of that text, nor would it mean the insertion of new additional steps that were not provided for or even intended by the WTO membership.

7.603 The Panel also notes that, under the terms contained in the Bananas Annex, the authority to determine whether the European Communities' proposed regime for the importation of bananas would result "in at least maintaining total market access for MFN banana suppliers" for the purpose of the waiver fell on the arbitrator. Such authority was to be exercised, if needed, through two successive rounds of arbitration envisaged in the Bananas Annex. Accordingly, the issue could not be decided by a WTO dispute settlement compliance panel, or by any other WTO body.

7.604 The Panel notes the European Communities' arguments that its current bananas import regime would maintain total market access for MFN suppliers.[1092] However, in view of the preceding analysis, after the completion of the two rounds of arbitration and the entry into force of a new

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[1090] See ACP Countries' third party written submission, paras. 4, 5, 99, 107, 110, 111, 156 and 158.

[1091] European Communities' second written submission, para. 59. See also ACP Countries' third party written submission, para. 111.

[1092] See, *inter alia*, European Communities' first written submission, paras. 7-17 and 56-61, European Communities' second written submission, para. 53, written version of the European Communities' oral statement during substantive meeting with the parties and third parties, paras. 11 and 13, European Communities' response to panel question No. 3, paras. 4-6, No. 18, para. 45, No. 29, para. 57, No. 31, para. 63, No. 67, para. 101, and No. 85, para. 152.

bananas import regime, the maintenance of total market access for MFN banana suppliers is not a relevant consideration for maintaining the application of the Doha Waiver with regard to bananas beyond 1 January 2006. The opportunity for the European Communities to demonstrate that its proposed tariff only regime would maintain total market access for MFN banana suppliers, for the purpose of maintaining the Doha waiver, was to be exercised through the arbitration proceedings envisaged in the Bananas Annex.

7.605 In consequence, the Panel finds that it is not within its terms of reference to determine whether the European Communities' current regime for the importation of bananas results in at least maintaining total market access for MFN banana suppliers, for the purposes provided in the Bananas Annex.

(vii) Conclusion regarding the Doha Waiver

7.606 For the reasons indicated above, with the completion of the different intermediate procedural steps envisaged in the terms and conditions set out in the Bananas Annex, and upon the entry into force of the bananas import regime instituted by the European Communities through Council Regulation (EC) No. 1964/2005, the Doha Waiver cannot extend to the EC banana regime introduced from 1 January 2006. The European Communities has failed to make a prima facie case that, since the entry into force of the new EC tariff regime, on 1 January 2006, a waiver from Article I:1 of GATT 1994 has been in force to cover the preference granted by the European Communities to imported bananas originating in ACP countries.

5. Conclusion

7.607 For the reasons indicated in this section, the Panel finds that the preference granted by the European Communities to an annual duty-free tariff quota of 775,000 mt of imported bananas originating in ACP countries constitutes an advantage for this category of bananas, which is not accorded to like bananas originating in non-ACP WTO Members. The Panel therefore finds that this preference is inconsistent with Article I:1 of GATT 1994. The Panel further finds that the European Communities has failed to demonstrate the existence of a waiver from Article I:1 of GATT 1994 to cover such preference.

H. THE UNITED STATES' CLAIM UNDER ARTICLE XIII OF THE GATT 1994

1. Summary of parties' arguments

(a) The United States' claim

7.608 The United States has requested the Panel to find that the European Communities' current bananas import regime is inconsistent with paragraphs 1 and 2 of Article XIII of the GATT 1994.[1093]

7.609 The United States argues that:

> "There can be no doubt that Article XIII [of the GATT 1994] applies with respect to the current [bananas] tariff rate quota regime, just as it did with respect to the EC's prior banana import regimes."[1094]

[1093] United States' first written submission, paras. 3, 27, 48 and 49. See also United States' second written submission, para. 96.

[1094] United States' first written submission, para. 38.

7.610 In the United States' view:

> "The EC's 775,000 ton limit on duty-free access for ACP bananas is also a tariff quota within the meaning of Article XIII. As such, the EC's tariff quota is subject to the non-discrimination requirements of Article XIII."[1095]

7.611 In that respect, the United States recalls the words of the compliance panel in *EC – Bananas III (Article 21.5 – Ecuador)*:

> "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.[1096]"[1097]

7.612 The United States adds that, although the European Communities was granted a waiver of its obligations under Article XIII by the WTO Ministerial Conference in November 2001[1098], this waiver expired in accordance with its terms on December 31, 2005.[1099] Accordingly, "[t]he EC has no Article XIII waiver currently in force".[1100]

7.613 According to the United States:

> "In disregard of GATT Article XIII:1 and the *EC – Bananas III* findings, the EC 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 EC's banana regime, entering the EC market duty-free up to a quantity of 775,000 tons. No MFN supplier receives any such tariff rate quota treatment. By using a tariff rate quota on ACP imports, and an entirely different means to restrict MFN imports, the EC is preventing 'like' imports from being 'treated equally, irrespective of origin' in violation of GATT Article XIII:1."[1101]

7.614 The United States adds that:

> "The EC's exclusive 775,000 ton ACP tariff rate quota fails to distribute *any* share whatsoever to MFN suppliers, let alone a share they would have expected to obtain in the absence of restrictions. This is so even though many of the excluded MFN suppliers are principal or substantial suppliers of bananas to the EC, and leading exporters of bananas to the world market. Therefore, the ACP tariff rate quota

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[1095] United States' second written submission, para. 85.

[1096] (*footnote original*) *EC – Bananas III (Article 21.5 – Ecuador)*, para. 6.20.

[1097] United States' first written submission, para. 38.

[1098] 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. See para. 2.12.

[1099] United States' first written submission, paras. 18, 20 and 47. See also United States' second written submission, para. 94.

[1100] United States' first written submission, para. 47. See also United States' response to panel question No. 33, paras. 61-62.

[1101] United States' first written submission, para. 42. See also United States' second written submission, para. 94, and written version of United States' opening statement during substantive meeting with the parties and third parties, para. 21.

established through Regulation 1964, like prior ACP tariff rate quotas, is inconsistent with Article XIII:2."[1102]

(b) The European Communities' response

7.615 The European Communities has responded that the preference granted to ACP bananas does not violate Article XIII of the GATT 1994.[1103]

7.616 In the European Communities' view:

> "[B]anana imports from Latin American and other MFN suppliers are not subject to any quantitative restriction: they are simply subject to a tariff. 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."[1104]

7.617 The European Communities also states that:

> "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."[1105]

7.618 In other words:

> "[T]he 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."[1106]

7.619 The European Communities adds that:

> "There is extensive GATT and WTO practice to support the view that Members do not regard exclusion from a tariff quota as a matter governed by Article XIII. This practice is to be found in the waivers that have been granted for various preferential schemes. With few exceptions (such as the 2001 waiver respecting bananas) these waivers are limited to Article I, and yet the preferences granted under these waivers regularly include tariff quotas for the beneficiary countries only."[1107]

7.620 According to the European Communities, "the facts in the current proceedings are not the same as those that faced the [*EC – Bananas III*] Panel and Appellate Body in 1997".[1108] The

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[1102] United States' first written submission, para. 46. See also United States' second written submission, para. 95.

[1103] European Communities' first written submission, para. 63.

[1104] Ibid., para. 64.

[1105] Ibid., para. 65. See also European Communities' second written submission, paras. 71-72, and European Communities' response to panel question No. 91, paras. 166-168.

[1106] Written version of European Communities' opening statement during substantive meeting with the parties and third parties, para. 14. See also European Communities' second written submission, para. 90.

[1107] European Communities' second written submission, para. 75.

[1108] European Communities' first written submission, para. 67. See also ibid., para. 68.

European Communities adds that its current bananas import regime is also "very different" to "the 2002-2005 banana import regime".[1109]

> "The main difference was that the 2002-2005 import regime was an 'all-tariff-quota' regime, where virtually all imports were made pursuant to tariff quotas with different terms, awarded to different groups of countries and administered in different ways. That import regime, which has been qualified as the equivalent of a 'quota system', was not necessarily fully compatible with the provisions of Article XIII of the GATT. For this reason, the United States and the European Communities agreed that a WTO waiver from the application of Article XIII was necessary."[1110]

7.621 In view of the characteristics of its current bananas import regime, the European Communities argues that an

> "Article XIII waiver is not relevant for the current proceedings. The current [bananas] import regime of the European Communities is not an 'all-tariff-quota' system and cannot be qualified as the equivalent of a 'quota system'. There is a single tariff imposed on all banana imports, with the exception of the preference granted to the Cotonou beneficiary countries which is limited by a 'cap'."[1111]

7.622 The European Communities requests the Panel to reject the United States' arguments concerning Article XIII in their entirety.[1112]

2. Order of analysis

7.623 In order to consider the United States' claim under Articles XIII:1 and 2 of the GATT 1994, the Panel will begin by addressing the European Communities' systemic arguments concerning the interrelation of Articles I and XIII of the GATT 1994 and the latter's applicability to the European Communities' bananas import regime, as well as the United States' response to those arguments. If the European Communities' arguments in that context were rejected, the Panel would then address the United States' substantive claim under both paragraphs 1 and 2 of Article XIII. In the alternative, there would be no need to assess the United States' substantive claim under Article XIII:1 and 2 of the GATT 1994.

3. The applicability of Article XIII of the GATT 1994 to the European Communities' bananas import regime

(a) The European Communities' arguments

7.624 As noted above, the European Communities argues that Article XIII of the GATT 1994 is not applicable to the tariff preference granted by the European Communities to bananas from ACP countries. In the European Communities' view, "Article XIII does not cover cases of tariff discrimination: this is the role of GATT Article I:1."[1113] The European Communities considers that Article XIII of the GATT 1994 does not cover the case when some WTO Members have been

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[1109] European Communities' response to panel question No. 33, para. 66. See also written version of European Communities' opening statement during substantive meeting with the parties and third parties, para. 25.

[1110] European Communities' response to panel question No. 33, para. 66.

[1111] Ibid., para. 67. See also European Communities' response to panel question No. 92, paras. 169-170.

[1112] European Communities' first written submission, para. 69. See also European Communities' second written submission, para. 95.

[1113] European Communities' first written submission, para. 65. See para. 7.617 above.

included in a tariff quota and others have not, but "applies only to the kinds of treatment accorded to the various Members who are included in the tariff quota".[1114] The European Communities states that:

> "The justification for this interpretation lies to some extent in the ordinary meaning of the terms of Article XIII, but more particularly in their context (as well as the 'subsequent practice' of Members) and in the object and purposes of the GATT."[1115]

7.625 The European Communities argues that, by looking at their "ordinary meaning":

> "[T]he terms of Article XIII [of the GATT 1994], taken in isolation, are open to either of the interpretations proposed in this dispute, but ... they fit more easily into the one put forward by the European Communities".[1116]

7.626 With respect to such "ordinary meaning", the European Communities argues first that "there is something to be gained by looking closely" at the terms used in Article XIII:5 of the GATT 1994, by which the provisions of Article XIII "shall apply" to tariff quotas. The European Communities considers in this respect that:

> "The phrase 'shall apply to any tariff quota instituted or maintained by an contracting party', although by no means definitively excluding the interpretation proposed by the United States, seems nevertheless to sit more easily with that which the European Communities has maintained. Thus, if the drafters had wished to give Article XIII the broader meaning favoured by the United States they would have most likely used a phrase such as Article XIII *shall apply to the operation of tariff quotas etc*. Instead they chose to speak of the tariff quota itself, as though it was this arrangement alone that was concerning them."[1117]

7.627 Turning to the ordinary meaning of the terms used in Article XIII:2 of the GATT 1994, the European Communities argues that:

> "The language of this paragraph, while again not being in itself decisive, gives a further weight to the European Communities' interpretation, because it commences with the phrase 'In applying import restrictions to any product'. Applying this to tariff quotas the phrase could be taken to read 'In applying tariff quotas to any product'. Once again this directs attention at the tariff quotas themselves rather than at their relationship with another import regime (which is the issue in the current dispute)."[1118]

7.628 The European Communities then argues that the principal context of the terms in Article XIII is provided by the GATT 1994, which in its view:

> "[H]as obvious implications for the interpretation of Article XIII because of the way in which [the GATT] maintains a fundamental distinction between tariff and non-tariff measures. Thus, tariffs are regulated by Article I and Article II, whereas non-tariff measures are governed by Article XI and Article XIII. Discrimination in tariffs is dealt with by Article I and in non-tariff measures by Article XIII. Article XI forbids non-tariff measures whereas tariffs although not forbidden, are placed within

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[1114] European Communities' second written submission, para. 66. See also ibid., para. 90.
[1115] Ibid., para. 90.
[1116] Ibid., para. 70.
[1117] European Communities' second written submission, para. 67.
[1118] Ibid., para. 69.

> the limits set in Members' schedules by Article II. The European Communities has not found any instance where the same rule has been treated as both a tariff and a non-tariff measure. Even where both elements are present they have been separated for the purpose of applying GATT articles. Thus, in the first Article 21.5 case brought by Ecuador in respect of the European Communities' 1998 banana regime the panel distinguished between the quantitative elements, to which it applied Article XIII, and the tariff discrimination elements, to which it applied Article I[1119]."[1120]

7.629 As an additional note related to the context in which the terms are used in Article XIII of the GATT 1994, the European Communities argues that:

> "All of the rules spelt out in the subparagraphs of paragraph [XIII:2] concern the distribution of tariff quotas. There is no reference whatsoever to the relationship between tariff quotas and different import regimes applied to other products. Thus, this context suggests that the rules in Article XIII concern only the internal quantitative distribution of tariff quotas."[1121]

7.630 The European Communities notes finally that:

> "There is extensive GATT and WTO practice to support the view that Members do not regard exclusion from a tariff quota as a matter governed by Article XIII. This practice is to be found in the waivers that have been granted for various preferential schemes. With few exceptions (such as the 2001 waiver respecting bananas) these waivers are limited to Article I, and yet the preferences granted under these waivers regularly include tariff quotas for the beneficiary countries only."[1122]

7.631 In the European Communities' view:

> "[T]here could hardly be clearer examples of such 'subsequent practice' [by the WTO Members in interpreting Article XIII]. The practice existed at two levels, firstly in the form of the waiver decisions taken by the CONTRACTING PARTIES, and secondly in the form of the measures taken by GATT and WTO Members under the authorization provided by those decisions. The first level of practice was necessarily 'concordant' since it took the form of mutual action by all GATT members. For the same reason it was also necessarily 'common'. Finally, the line of decisions was consistent, and there has been no contrary GATT or WTO practice. Furthermore, the practice has involved taking a particular stance on the interpretation of the GATT. All the decisions indicate that Members assumed 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."[1123]

[1119] (*footnote original*) *EC – Bananas III (Article 21.5 – Ecuador)*, paras. 6.160 and 6.161.
[1120] European Communities' second written submission, para. 71.
[1121] Ibid., para. 73.
[1122] European Communities' second written submission, para. 75.
[1123] Ibid., para. 84. See also written version of European Communities' opening statement during substantive meeting with the parties and third parties, paras. 15-25.

7.632 Turning to the issue of the "object and purpose of the agreement", the European Communities adds that "there are a number of considerations that confirm the interpretation put forward by the European Communities regarding the application of Article XIII to tariff quotas".[1124] In its view:

> "[T]he objective of Article XIII and in particular of paragraph 2 is to achieve particular quantitative distributions of trade. In the case of quotas it is evident that the appropriate distribution was to be achieved by direct quantitative measures, in the last resort by allocating specific quantities to individual exporting countries. When, as required by paragraph 5 [of Article XIII], 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."[1125]

7.633 The European Communities argues that "[c]onsideration of the objects and purposes of GATT also leads to a rejection of the interpretation proposed by the United States for paragraph 1 of Article XIII".[1126] In the European Communities' view, the interpretation proposed by the United States "would lead to non-Members of the WTO being accorded rights under the GATT".[1127]

> "Such a situation would arise because the United States' interpretation would require paragraph 1 to be read as though it said that no tariff quota could be applied to ACP Members unless a similar tariff quota were accorded to all other exporting (or importing) countries. Unlike a 'prohibition or restriction', a tariff quota can be beneficial rather than prejudicial to the country to which it is accorded., and since the condition in paragraph 1 applies to imports from (or exports to) all third countries, and not merely those that are WTO Members, under the United States' interpretation the benefit of a tariff quota could not be given to a Member unless it was also accorded to all non-Members. Thus, adopting this interpretation one could have a situation where a Member which wished to let all other Members share in a tariff quota could not do so unless it also allowed non-Members a similar share. In the European Communities' view such an outcome is contrary to the object and purpose of GATT."[1128]

(b) The United States' arguments

7.634 The United States begins by noting the European Communities' argument that:

> "[T]he 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.[1129] Indeed, the EC 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.'[1130]"[1131]

[1124] European Communities' second written submission, para. 85.
[1125] Ibid., para. 87.
[1126] Ibid., para. 88.
[1127] Ibid.
[1128] European Communities' second written submission, para. 88.
[1129] (*footnote original*) EC first written submission, paras. 64-65.
[1130] (*footnote original*) EC first written submission, para. 3.
[1131] United States' second written submission, para. 82.

7.635 In response, the United States contends that:

> "The EC's description of its measure defies reality. EC Regulation 1964, the measure subject to this proceeding, itself refers to a 'tariff rate quota for bananas originating in ACP countries.' In the sixth whereas clause EC Regulation 1964 states that 'a tariff rate quota for bananas originating in ACP countries should also be opened.'[1132] 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.'[1133],[1134]

7.636 The United States argues further that:

> "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 ton tariff rate quota for ACP origin bananas. The panel and arbitrator each rejected the EC's argument, explaining that 'a tariff quota is a quantitative limit on the availability of a specific tariff rate' and therefore, Article XIII applied to the 857,700 ton limit.[1135] The 775,000 ton limit on the duty-free rate reserved for ACP countries is likewise a tariff rate quota subject to Article XIII."[1136]

7.637 The United States adds that:

> "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.[1137] 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.'[1138] The Appellate Body confirmed that the 'essence' of Article XIII 'is that like products should be treated equally, irrespective of origin.'[1139],[1140]

7.638 The United States notes further that:

> "Article XIII prohibits the EC 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."[1141]

[1132] (*footnote original*) EC Regulation 1964 at 6th "Whereas" clause. Exhibit US-1.
[1133] (*footnote original*) EC Regulation, Article 1.2. Exhibit US-1.
[1134] United States' second written submission, para. 83.
[1135] (*footnote original*) *EC – Bananas III (Article 21.5 – Ecuador)*, para. 6.20 and *EC – Bananas III (US) (Article 22.6 – EC)*, para.5.9
[1136] Written version of United States' opening statement during substantive meeting with the parties and third parties, para. 18. See also United States' second written submission, paras. 84-85.
[1137] (*footnote original*) *EC – Bananas III (Panel)*, para. 7.69.
[1138] (*footnote original*) *Id.*
[1139] (*footnote original*) *EC – Bananas III, (AB*), para. 190.
[1140] Written version of United States' opening statement during substantive meeting with the parties and third parties, para. 19.
[1141] United States' second written submission, para. 91.

7.639 For these reasons, the United States concludes that:

> "[I]t is clear that the EC's ACP-exclusive tariff quota is subject to the requirements of GATT Article XIII. It is also undisputed that the EC's waiver from its obligations under Article XIII expired on December 31, 2005. Thus, as demonstrated in the US First Written Submission, because the EC uses a tariff rate quota on ACP imports and an entirely different means to restrict MFN imports, the EC is preventing 'like' imports from being 'treated equally, irrespective of origin' in breach of GATT Article XIII:1.
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> Moreover, because the EC 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 ... [T]he EC 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 EC breaches its obligations under GATT Article XIII:2 because it failed to 'similarly prohibit or restrict' those non-ACP bananas."[1142]

(c) Panel's analysis

(i) Relevance of Article XIII of the GATT 1994 to tariff quotas in agriculture

7.640 At the outset, the Panel notes that Article XIII was originally drafted in the GATT 1947 to address the administration of quantitative restrictions, in particular country quotas and any other quotas. As a result of the Uruguay Round of Multilateral Trade Negotiations, quantitative restrictions in agriculture were to be abolished and tariffied. As the panel on *Turkey – Textiles* stated in the context of Articles XI and XIII of the GATT 1994:

> "The prohibition on the use of quantitative restrictions forms one of the cornerstones of the GATT system. A basic principle of the GATT system is that tariffs are the preferred and acceptable form of protection. Tariffs, to be reduced through reciprocal concessions, ought to be applied in a non-discriminatory manner independent of the origin of the goods (the 'most-favoured-nation' (MFN) clause). ... The prohibition against quantitative restrictions is a reflection that tariffs are GATT's border protection 'of choice'. Quantitative restrictions impose absolute limits on imports, while tariffs do not. In contrast to MFN tariffs which permit the most efficient competitor to supply imports, quantitative restrictions usually have a trade distorting effect, their allocation can be problematic and their administration may not be transparent ...
>
> *Participants in the Uruguay Round recognized the overall detrimental effects of non-tariff border restrictions (whether applied to imports or exports) and the need to favour more transparent price-based, i.e. tariff-based, measures; to this end they devised mechanisms to phase-out quantitative restrictions in ... agriculture ... . This recognition is reflected in ... the Agreement on Agriculture where quantitative restrictions were eliminated*[1143] ..."[1144] (emphasis added).

[1142] Ibid., paras. 94-95.

[1143] (*footnote original*) Under the Agreement on Agriculture, notwithstanding the fact that contracting parties, for over 48 years, had been relying a great deal on import restrictions and other non-tariff measures, the use of quantitative restrictions and other non-tariff measures was prohibited and Members had to proceed to a "tariffication" exercise to transform quantitative restrictions into tariff based measures.

7.641 Notwithstanding tariffication, the text of Article XIII of the GATT 1947, including its title, "Non-discriminatory Administration of Quantitative Restrictions", has not been modified in the Uruguay Round. The Panel reads that title as being relevant to maintaining a close link with Article XI of the GATT 1994, entitled "General Elimination of Quantitative Restrictions". The above-mentioned panel on *Turkey – Textiles* stated that:

> "The wording of Articles XI and XIII is clear. Article XI provides that as a general rule (we note the wording of the title of Article XI: "*General Elimination* of Quantitative Restrictions"), WTO Members shall not use quantitative restrictions against imports or exports.
>
> ...
>
> Article XIII provides that if and when quantitative restrictions are allowed by the GATT/WTO, they must, in addition, be imposed on a non-discriminatory basis."[1145]

7.642 Following tariffication, Article XIII of the GATT 1994 remains relevant for the agricultural sector. As the Appellate Body stated earlier in this dispute, "[i]f the negotiators had intended to permit Members to act inconsistently with Article XIII of the GATT 1994 [by virtue of the provisions of the Agreement on Agriculture], they would have said so explicitly."[1146] In particular, Article XIII of the GATT 1994 is relevant to one of the few remaining permissible practices with a quantitative dimension in agriculture: tariff quotas. In this context, this Panel notes that the original panel requested by Ecuador in this dispute found, similarly to the panel on *Turkey – Textiles*, that:

> "The wording of Article XIII is clear. If quantitative restrictions are used (as an exception to the general ban on their use in Article XI), they are to be used in the least trade-distorting manner possible."[1147]

7.643 The original panel requested by Ecuador in this dispute added that:

> "In this case, we are concerned with tariff quotas, which are permitted under GATT rules, and not quantitative restrictions *per se*. However, Article XIII:5 makes it clear, and the parties agree, that Article XIII applies to the administration of tariff quotas. ... In interpreting the terms of Article XIII, it is important to keep their context in mind. Article XIII is basically a provision relating to the administration of restrictions authorized as exceptions to one of the most basic GATT provisions – the general ban on quotas and other non-tariff restrictions contained in Article XI."[1148]

(ii) Analysis of Article XIII:5 of the GATT 1994

7.644 The analysis of the European Communities' arguments concerning the interrelation of Articles I and XIII of the GATT 1994, and the applicability of the latter to the EC banana import regime necessarily involves Article XIII:5 of the GATT 1994, which provides that "[t]he provisions of this Article shall apply to any tariff quota instituted or maintained by any contracting party [WTO Member], and, in so far as applicable, the principles of this Article shall also extend to export

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[1144] Panel Report on *Turkey – Textiles*, paras. 9.63-9.65.
[1145] Ibid., paras. 9.61-9.62.
[1146] Appellate Body Report on *EC – Bananas III*, para. 157. See also Panel Report on *US – Line Pipe*, para. 7.40.
[1147] Panel Report on *EC – Bananas III (Ecuador)*, para. 7.68.
[1148] Ibid.

restrictions." As mentioned earlier, the European Communities does not contest that, in principle, by virtue of Article XIII:5, Article XIII is applicable to tariff quotas.[1149]

7.645 First, the Panel looks at the language of Article XIII:5 of the GATT 1994. The words "any" (both before the terms "tariff quota" and "contracting party") and "shall" in Article XIII:5 underscore the absolute and categorical nature of the application of "the provisions of ... Article [XIII]" to tariff quotas. The Panel notes also that Article XIII:5 uses the term "*any tariff quota* instituted or maintained by any [Member]" in the singular. The Panel reads this to mean that Article XIII of the GATT 1994 is also applicable to one single tariff quota, and that this is so irrespective of whether that single tariff quota is part of an import regime with more tariff quotas or is part of an import regime that comprises only one tariff quota.

7.646 In an import regime containing a tariff quota with a preferential in-quota duty (whether or not a zero duty) for some Members, and a higher out-of-quota MFN duty, the in- and out-of-quota duties are two facets of the same preferential tariff quota. As the first compliance panel requested by Ecuador in this dispute stated, "a tariff quota is a quantitative limit on the availability of a specific tariff rate".[1150] Citing that statement, the panel on *US – Line Pipe* established that "[it] see[s] no reason to disagree with the United States that a tariff quota involves the '[a]pplication of a higher tariff rate to imported goods after a specified quantity of the item has entered the country at a lower prevailing rate'."[1151] (footnote omitted)

7.647 Neither of the parties contest that the European Communities has, under its current banana import regime introduced on 1 January 2006, a preferential zero-duty tariff quota of 775,000 mt per annum reserved for ACP countries, combined with an MFN applied duty of 176 €/mt. The tariff quota represents a quantitative limit on the preference to ACP countries because any ACP banana imports to the European Communities exceeding that quantitative limit are subject to the out-of-quota MFN duty.

7.648 Thus, the European Communities' current banana import regime is a tariff-quota-based import regime, and the in- and out-of-quota duties are inherent parts of that regime. Accordingly, and in the light of Article XIII:5 of the GATT 1994, in principle, Article XIII of the GATT 1994 applies to all aspects of a preferential tariff quota, including the out-of-quota duty.

(iii) Interrelation of Articles I and XIII of the GATT 1994

7.649 The European Communities argues that the applicability of Article I of the GATT 1994 to tariff discrimination prevents the applicability of Article XIII of the GATT 1994 to the European Communities' current bananas import regime.[1152]

7.650 Article I of the GATT 1994 is entitled "General Most-Favoured-Nation Treatment". Paragraph 1 of Article I stipulates that:

> "With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation

[1149] See European Communities' second written submission, para. 49.

[1150] Panel Report on *EC – Bananas III (Article 21.5 – Ecuador)*, para. 6.20; and Decision by the Arbitrators on *EC - Bananas III (US) (Article 22.6 – EC)*, para. 5.9.

[1151] Panel Report on *US – Line Pipe*, para. 7.18.

[1152] See European Communities' first written submission, para. 65, European Communities' second written submission, paras. 71-72, and European Communities' response to panel question No. 91, paras. 166-168.

> and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, any advantage, favour, privilege or immunity granted by any contracting party [WTO Member] 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 [WTO Members]."

7.651 The Panel notes that Members' measures must comply with all relevant provisions of the covered agreements. In regard to the applicability of Article XIII of the GATT 1994 in the specific context of agriculture, as mentioned above, the Appellate Body found earlier in this dispute that "[i]f the negotiators had intended to permit Members to act inconsistently with Article XIII of the GATT 1994 [by virtue of the provisions of the Agreement on Agriculture], they would have said so explicitly."[1153]

7.652 As the European Communities argues, Article I of the GATT 1994 covers tariff discrimination.[1154] As a result, Article I does not address the quantitative element of the European Communities' current bananas import regime, which is covered by Article XIII of the GATT 1994. As elaborated further below[1155], the European Communities' current bananas import regime contains an important quantitative element, and even if that element is applicable directly to the ACP countries, it results in a restriction for MFN bananas within the meaning of Article XIII:1 of the GATT 1994.

7.653 As regards a partial overlap between two provisions in the covered agreements, Article XIII:2(d) of the GATT 1994 and Article 5.2 of the Safeguards Agreement, the panel on *US - Line Pipe* stated that:

> "As noted by the panel in *Turkey – Textiles*, 'the principle of effective interpretation or 'l'effet utile' or in Latin *ut res magis valeat quam pereat* reflects the general rule of interpretation which requires that a treaty be interpreted to give meaning and effect to all the terms of the treaty. For instance one provision should not be given an interpretation that will result in nullifying the effect of another provision of the same treaty.'[1156] An interpretation of Article XIII that applies that provision in the context of safeguard measures does not, in our view, nullify any of the provisions of the Safeguards Agreement. All of the provisions of the Safeguards Agreement remain fully applicable. Although there may be some duplication between Article XIII:2(d) and Article 5.2 of the Safeguards Agreement, duplication is not the same as nullification."[1157]

7.654 Applying the same approach to the interrelation of Articles I and XIII of the GATT 1994, this Panel notes that, even if there was some overlap between those two Articles, giving effect to Article XIII would not nullify the effect of Article I.

7.655 The Panel also notes that in *EC – Bananas III* the European Communities argued, in regard to the Lomé Waiver, that:

[1153] Appellate Body Report on *EC – Bananas III*, para. 157. See also Panel Report on *US – Line Pipe*, para. 7.40.

[1154] See European Communities' first written submission, para. 65.

[1155] See para. 7.660 below.

[1156] (*footnote original*) *Turkey – Textiles* at footnote 327.

[1157] Panel Report on *US – Line Pipe*, para. 7.45.

> "[W]here aspects of a measure have been found to be covered by the waiver for purposes of Article I, they should not be found to violate another GATT provision imposing MFN-like obligations similar to those that have been waived ..."[1158]

7.656 The original panel requested by Ecuador in *EC – Bananas III* found – a finding later reversed by the Appellate Body[1159] – that the Lomé Waiver from Article I:1 of the GATT 1994 would extend to Article XIII:1 of the GATT 1994.[1160] In this context, that panel had also looked into the "close relationship between Articles I and XIII:1".[1161]

7.657 The Appellate Body rejected the original panel's conclusion that the Lomé Waiver from Article I:1 would automatically extend to Article XIII:1 of the GATT 1994.[1162] The Appellate Body noted that "[t]he Panel based its conclusion on the need to give 'real effect'[1163] to the Lomé Waiver and on the 'close relationship'[1164] between Articles I:1 and XIII:1".[1165] At the same time, however, the Appellate Body stated that, "although Articles I and XIII of the GATT 1994 are both non-discrimination provisions, *their relationship is not such that a waiver from the obligations under Article I implies a waiver from the obligations under Article XIII*"[1166] (emphasis added).

7.658 The Appellate Body did not elaborate further on the relationship between Articles I and XIII of the GATT 1994. Nevertheless, the rejection by the Appellate Body of the panel's finding on the scope of the Lomé Waiver indicates that Articles I and XIII of the GATT 1994 do not have the same scope, and that an inconsistency with Article XIII is possible irrespective of whether or not there is an inconsistency with Article I.

7.659 Finally, the Panel notes that on two earlier occasions in the *EC – Bananas III* dispute the European Communities made an objection to the applicability of Article XIII of the GATT 1994 to the then 857,700 mt duty-free tariff quota for ACP bananas[1167] similar to the objection the European Communities has made in these proceedings regarding the 775,000 mt duty-free tariff quota for ACP bananas. Both the first compliance panel requested by Ecuador and the arbitrator in the proceedings requested by the European Communities pursuant to Article 22.6 of the DSU rejected that objection:

> "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

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[1158] Panel Report on *EC – Bananas III (Ecuador)*, para. 7.104.

[1159] See Appellate Body Report on *EC – Bananas III*, para. 188.

[1160] See Panel Report on *EC – Bananas III (Ecuador)*, para. 7.110.

[1161] The original panel on *EC- Bananas III* stated that "both [Articles I and XIII:1] prohibit discriminatory treatment. Article I requires MFN treatment in respect of 'rules and formalities in connection with importation', a phrase that has been interpreted broadly in past GATT practice, such that it can appropriately be held to cover rules related to tariff quota allocations. Such rules are clearly rules applied in connection with importation. Indeed, they are critical to the determination of the amount of duty to be imposed. To describe the relationship somewhat differently, Article I establishes a general principle requiring non-discriminatory treatment in respect of, inter alia, rules and formalities in connection with importation. Article XIII:1 is an application of that principle in a specific situation, i.e., the administration of quantitative restrictions and tariff quotas. In that sense, the scope of Article XIII:1 is identical with that of Article I." (footnote omitted) Panel Report on *EC – Bananas III (Ecuador)*, para. 7.107.

[1162] See Appellate Body Report on *EC – Bananas III*, para. 188.

[1163] (*footnote original*) Panel Reports, para. 7.106.

[1164] (*footnote original*) *Ibid*., para. 7.107.

[1165] Appellate Body Report on *EC – Bananas III*, para. 182.

[1166] Appellate Body Report on *EC – Bananas III*, para. 183.

[1167] Panel Report on *EC – Bananas III (Article 21.5 – Ecuador)*, paras. 4.26-4.27, 6.19-6.20; and Decision by the Arbitrators on *EC – Bananas III (US) (Article 22.6 – EC)*, paras. 5.8-5.9.

> 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."[1168]

7.660 In the context of the European Communities' objection to the applicability of Article XIII in regard to the European Communities' preferential duty-free tariff quota for ACP countries, the main difference between the European Communities' former and current preferential tariff quota for ACP countries is the level of the quantitative limit. The current preferential tariff quota for ACP countries has been set at 775,000 mt instead of 857,000 mt. From the viewpoint of the applicability of Article XIII, that quantitative difference is irrelevant as it does not eliminate the quantitative element of the European Communities' measure. As stated by the first compliance panel requested by Ecuador and the arbitrator in the proceedings requested by the European Communities pursuant to Article 22.6 of the DSU, it is the very quantitative limit that establishes the applicability of Article XIII of the GATT 1994 to the European Communities' preferential tariff quota for ACP countries. Such applicability does not depend on the specific level of the quantitative limit, nor on whether MFN countries are also subject to a tariff quota or only an MFN tariff.[1169]

7.661 The Panel therefore rejects the argument made by the European Communities that:

> "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."[1170]

7.662 In the light of the foregoing, the Panel is justified in addressing the consistency of the European Communities' current bananas import regime with Article XIII of the GATT 1994. Accordingly, the Panel will now turn to the substantive claims of the United States under Articles XIII:1 and 2 of the GATT 1994.

4. The United States' claim under Article XIII:1 of the GATT 1994

(a) The United States' arguments

7.663 The United States argues that:

> "By using a tariff rate quota on ACP imports, and an entirely different means to restrict MFN imports, the EC is preventing 'like' imports from being 'treated equally, irrespective of origin' in violation of GATT Article XIII:1."[1171]

(b) The European Communities' response

7.664 In the view of the European Communities, there is no inconsistency with Article XIII:1 of the GATT 1994 in its challenged measures. According to the European Communities:

> "[T]he Cotonou Preference does not violate GATT Article XIII, as established by a number of facts and considerations.

[1168] Panel Report on *EC – Bananas III (Article 21.5 – Ecuador)*, para. 6.20; and Decision by the Arbitrators on *EC – Bananas III (US) (Article 22.6 – EC)*, para. 5.9.

[1169] See Panel Report on *EC – Bananas III (Article 21.5 – Ecuador)*, para. 6.20; and Decision by the Arbitrators on *EC – Bananas III (US) (Article 22.6 – EC)*, para. 5.9.

[1170] European Communities' first written submission, para. 65.

[1171] United States' first written submission, para. 42. See also United States' second written submission, para. 94.

> First, banana imports from Latin American and other MFN suppliers are not subject to any quantitative restriction: they are simply subject to a tariff. 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.
>
> 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 ...
>
> 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."[1172]

7.665 The European Communities adds that:

> "[T]he interpretation proposed by the United States for paragraph 1 of Article XIII… would lead to non-Members of the WTO being accorded rights under the GATT. Such a situation would arise because the United States' interpretation would require paragraph 1 to be read as though it said that no tariff quota could be applied to ACP Members unless a similar tariff quota were accorded to all other exporting (or importing) countries. Unlike a 'prohibition or restriction', a tariff quota can be beneficial rather than prejudicial to the country to which it is accorded, and since the condition in paragraph 1 applies to imports from (or exports to) all third countries, and not merely those that are WTO Members, under the United States' interpretation the benefit of a tariff quota could not be given to a Member unless it was also accorded to all non-Members. Thus, adopting this interpretation one could have a situation where a Member which wished to let all other Members share in a tariff quota could not do so unless it also allowed non-Members a similar share. In the European Communities' view such an outcome is contrary to the object and purpose of GATT. As illustrated by national practice in matters such as anti-dumping and countervailing duty law, Members do not in general regard WTO obligations as extending to the treatment of imports from non-Members.
>
> On the other hand, the European Communities' interpretation of Article XIII gives rise to no such unacceptable consequences. By limiting the application of Article XIII to the quantitative aspects of tariff quotas paragraph 1 can be taken to say that no quantitative limitation may be placed on a Member's share of a tariff quota unless all other countries' shares are similarly limited. This interpretation accords rights to Members rather than non-Members and so does not conflict with the objects of the GATT."[1173]

7.666 With respect to the reference made by the United States to the panel report in *EC – Bananas III*, the European Communities argues that:

[1172] European Communities' first written submission, paras. 63, 64, 65 and 67. See also European Communities' second written submission, paras. 66-95.

[1173] European Communities' second written submission, paras. 88-89.

> "The United States quotes the *EC – Bananas III* panel to the effect that because of Article XIII:1 'a Member may not limit the quantity of imports from some Members but not from others'[1174]. The statement is uncontroversial. If discriminatory quantitative restrictions were not prohibited in this way then the basic GATT objective of eliminating discrimination could be undermined whenever there was an exception to the general ban on quantitative restrictions that is imposed by Article XI.
>
> However, that 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 that, as explained above, is fundamental to the GATT. 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, albeit that those quotas were created by distinct legal instruments."[1175]

7.667 The European Communities also comments the reference made by the United States to the Appellate Body report in *EC – Bananas III*:

> "The United States also quotes the Appellate Body in *EC – Bananas III* where it addresses the GATT non-discrimination provisions – Articles I and XIII. At the outset it is worth stressing, as the United States quite properly acknowledges, that in these passages the Appellate Body was concerned with both of these provisions. In the first quotation the Appellate Body makes the non-controversial observation that the essence of these GATT obligations is that products should be treated equally, irrespective of their origin[1176]. In the second quotation, taken from the same paragraph, the Appellate Body says that the object and purpose of the non-discrimination provisions would be defeated if 'by choosing a different legal basis for imposing import restrictions, or by applying different tariff rates' a Member could avoid the application of these provisions.
>
> Once again, no one could dissent from such propositions. The provisions of Articles I and XIII provide a comprehensive system of barriers to discrimination, in which there are no gaps or crevices through which national measures can penetrate, no matter how cunningly they are drafted."[1177]

7.668 In conclusion, according to the European Communities:

> "[T]he scope of Article XIII, in particular of paragraphs 1 and 2, does not extend to the relationship between the treatment of those Members that are covered by a tariff quota and that of those which are not. The justification for this interpretation lies to some extent in the ordinary meaning of the terms of Article XIII, but more particularly in their context (as well as the 'subsequent practice' of Members) and in the object and purposes of the GATT."[1178]

[1174] (*footnote original*) Panel report *EC – Bananas III*, para. 7.69.
[1175] European Communities' second written submission, paras. 91-92.
[1176] (*footnote original*) Appellate Body report *EC – Bananas III*, para. 190.
[1177] European Communities' second written submission, paras. 93-94.
[1178] Ibid., para. 90.

(c) Panel's analysis

(i) The relevant language of Article XIII:1 of the GATT 1994 for this dispute

7.669 According to Article XIII:1 of the GATT 1994:

> "No prohibition or restriction shall be applied by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation of any product destined for the territory of any other contracting party, 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."

7.670 Replacing the terms "any contracting party", "any other contracting party" and "all third countries" with the relevant WTO Members involved in this dispute, the Panel understands that the United States' claim under Article XIII:1 invokes that provision in the following way:

> "No prohibition or restriction shall be applied by [the European Communities] on the importation of any product of the territory of [MFN banana suppliers] ... unless the importation of the like product of [the beneficiaries of the ACP tariff quota] ... is similarly prohibited or restricted."

7.671 In the context of the United States' claim that the European Communities does not treat MFN bananas "equally" nor restricts them "similarly" to bananas from ACP countries, the only possible reading of Article XIII:1 is the one provided by the Panel in the preceding paragraph. The Panel does not agree with the European Communities that this interpretation "would lead to non-Members of the WTO being accorded rights under the GATT."[1179] In fact, the main purpose of Article XIII:1 of the GATT 1994 is that products from WTO Members should not have restrictions imposed upon them, unless similar restrictions are placed on the like products of other countries.

7.672 In this dispute, the United States argues that bananas from MFN suppliers, including from the United States, should be protected under Article XIII:1 of the GATT 1994. Accordingly, if the term "any other contracting party" in Article XIII:1 is replaced with "MFN banana suppliers", and the term "any contracting party" is replaced with "the European Communities" (which the European Communities does not seem to contest), the term "all third countries" may indeed refer to the ACP countries. In that context, the term "all third countries" does not necessarily exclude WTO Members other than the European Communities and MFN banana suppliers. Also, even if "all third countries" should be interpreted as referring also to non-Members of the WTO, an issue this Panel does not address, the Panel's above interpretation of the terms of Article XIII:1 does not imply that Article XIII:1 would suddenly be turned into a provision protecting non-Members.

(ii) The applicability of Article XIII:1 of the GATT 1994

7.673 In the light of that interpretation of the relevant terms of Article XIII:1, the Panel needs to address three issues:

(a) Whether bananas are like products;

(b) Whether any prohibition or restriction is applied by the European Communities on the importation of bananas from the territories of MFN banana suppliers, including the United States; and

[1179] Ibid., para. 88.

(c) Whether the importation of the like product from the beneficiaries of the ACP tariff quota is similarly prohibited or restricted.

Whether all bananas are like products

7.674 The Panel has already concluded that the relevant products in this dispute, fresh bananas (corresponding to tariff item 0803 00 12 or 0803 00 19) originating in ACP countries, are like products to those fresh bananas originating in other WTO Members, in terms of Article I of the GATT 1994.[1180] Based on the same considerations, and for the purpose of the United States' claim under Article XIII of the GATT 1994, the Panel may also consider them to be like products in terms of Article XIII. This is irrespective of their origin, i.e., independently of whether they are produced in ACP or MFN countries, or whether they are subject to the MFN out-of-quota tariff, the preferential in-quota tariff under the ACP tariff quota or to any further preferential import regime of the European Communities.

Whether any prohibition or restriction is applied by the European Communities on the importation of bananas of the territory of MFN banana suppliers, including the United States

7.675 Article XIII:1 of the GATT 1994, entitled "Non-discriminatory Administration of Quantitative Restrictions", can apply in this dispute only if there is a "prohibition or restriction" within the meaning of Article XIII:1 on the importation of bananas from MFN banana suppliers, including the United States, to the European Communities. This is the second issue the Panel will address under Article XIII:1, noting that, for the purposes of the analysis, finding either a restriction or a prohibition would be sufficient for the Panel to move to the third element of its analysis under Article XIII:1.

7.676 As regards the existence of any "restriction", the Panel notes that, while panels and the Appellate Body have not looked into the meaning of the term "restriction" specifically under Article XIII of the GATT 1994, traditionally, they have interpreted that term broadly in the context of other provisions, such as Article XI of the GATT 1994.[1181]

7.677 Also, in the context of Article XI and other non-discrimination provisions of the GATT 1994, it has been found that GATT disciplines on the use of restrictions are not meant to protect "trade flows", but rather the "competitive opportunities of imported products". As the panel on *Argentina – Hides and Leather* stated in the context of Article XI of the GATT 1994:

> "[A]s to whether [the challenged measure] makes effective a restriction, it should be recalled that Article XI:1, like Articles I, II and III of the GATT 1994, protects competitive opportunities of imported products, not trade flows.[1182,1183]

7.678 In the light of the above-mentioned close link between Articles XI and XIII of the GATT 1994, the Panel considers that this broad interpretation of the word "restriction" under Article XI is relevant also for Article XIII.

[1180] See para. 7.564 above.

[1181] See Panel Report on *India – Quantitative Restrictions*, paras. 5.129-5.130. See also Panel Report on *Turkey – Textiles*, para. 9.64; Panel Report on *India – Autos*, paras. 7.320 and 7.322; and Panel Report on *Argentina – Hides and Leather*, para. 11.17.

[1182] (*footnote original*) See the Appellate Body Reports on *Japan – Taxes on Alcoholic Beverages* (hereafter "*Japan – Alcoholic Beverages II*"), adopted on 1 November 1996, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, at p.16; *Korea – Taxes on Alcoholic Beverages*, adopted on 17 February 1999, WT/DS75/AB/R, WT/DS84/AB/R, at paras. 119-120 and 127.

[1183] Panel Report on *Argentina – Hides and Leather*, para. 11.20.

7.679 Given that broad interpretation of the term "restriction", the Panel sees the European Communities' preferential ACP tariff quota as a restriction for bananas from MFN banana suppliers, including the United States, within the meaning of Article XIII:1 of the GATT 1994. As the European Communities acknowledges, its banana import regime confers a benefit, although a quantitatively limited one, to bananas from ACP countries; bananas from the United States and other MFN banana suppliers cannot have access to that quantitatively limited benefit.[1184] Any benefit accorded to fresh bananas of only some Members presumably affects the competitive opportunities of like bananas imported from other Members, including from the United States, to the European Communities market. By its very nature, such a benefit reserved for some Members generally represents a disadvantage for other Members.

7.680 The European Communities argues that Article XIII only deals with quantitative restrictions and quantitative discrimination, and not tariff restrictions or discrimination. In this context, the Panel notes that the word "quantitative" means "[p]ossessing quantity, magnitude, or spatial extent"; "[t]hat is, or may be, considered with respect to the quantity or quantities involved; estimated or estimable by quantity."[1185]

7.681 On its face, the quantity of bananas that MFN suppliers can export to the European Communities is not restricted by the European Communities' current bananas import regime: MFN suppliers can export as many bananas to the European Communities as they wish. However, such suppliers can export bananas to the European Communities only at the MFN €176/mt out-of-quota tariff. Therefore, the quantities of bananas that MFN suppliers can export to the European Communities are certainly affected by the fact that, up to the quantitative limit set by the tariff quota, the ACP countries are entitled to export bananas to the European Communities at a zero in-quota duty. As stated by the first compliance panel requested by Ecuador in this dispute, "[a]s to the EC's suggestion that Ecuador has no interest in the collective allocation to traditional ACP suppliers, we note that *the price and even the volume of Ecuador's exports could be affected by the price and volume of traditional ACP exports*"[1186] (emphasis added).

7.682 Further, as mentioned earlier, under the tariff quota, the benefit accorded to ACP countries is determined in a quantitative manner. Up to the quantitative limit specified by the tariff quota, ACP countries can export bananas to the European Communities under the preferential in-quota duty. Beyond the quantitative limit, ACP banana exports to the European Communities are also subject to the out-of-quota duty.

7.683 As mentioned above, both the first compliance panel requested by Ecuador and the arbitrator in the proceedings requested by the European Communities pursuant to Article 22.6 of the DSU established that it is the very quantitative limit that establishes the applicability of Article XIII to the European Communities' preferential tariff quota for ACP countries. Such applicability does not depend on the specific level of the quantitative limit, nor on whether MFN countries are also subject to a tariff quota or only to an MFN tariff.[1187]

7.684 Having established and identified a restriction within the meaning of Article XIII:1 of the GATT 1994 on banana imports from MFN suppliers to the European Communities, the Panel turns to the third and last aspect of its analysis under Article XIII:1: whether banana imports from ACP countries to the European Communities are similarly restricted.

[1184] See European Communities' first written submission, para. 4.

[1185] *The New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993), Vol. II, p. 2439.

[1186] Panel Report on *EC – Bananas III (Article 21.5 – Ecuador)*, para. 6.22.

[1187] See ibid., para. 6.20; and Decision by the Arbitrators on *EC - Bananas III (US) (Article 22.6 – EC)*, para. 5.9.

(iii) Whether the importation of bananas from ACP countries is similarly restricted

7.685 As mentioned earlier, similar to the MFN countries, the ACP countries may export bananas to the European Communities at the MFN out-of-quota tariff. However, as the European Communities itself acknowledges[1188], ACP countries can also export bananas under the lower in-quota duty, which is not available to MFN countries. The in-quota duty is zero, while the out-of-quota duty is 176 €/mt. Since bananas from MFN countries do not have access to that preferential tariff quota reserved for bananas from ACP countries, on its face, the importation into the European Communities of bananas from ACP countries is not "similarly restricted" compared to that of bananas from MFN countries.

7.686 The Panel notes in this context that, according to Exhibit EC-7 (Table 15), total European Communities' banana imports from the ACP countries amounted to 891,218 mt in 2006, and to a proportional 439,328 mt during the first half of 2007. In other words, since the introduction of the European Communities' preferential ACP tariff quota, most European Communities banana imports from the ACP countries have taken place under the beneficial zero in-quota duty of 775,000 mt per annum. Consequently, as indicated in Exhibit EC-5 (Table 10), the European Communities has collected €20,454,544 of tariff revenues on the 891,218 mt of total ACP banana imports in 2006, while it collected €579,687,363 of tariff revenues on the 3,293,679 mt total MFN imports in the same year. Thus, in the first year of the application of its current banana import regime, the European Communities has collected approximately 28 times more tariff revenues on its MFN banana imports for almost four times the amount of imports than for its total banana imports from ACP countries. In other words, in 2006, on average, the European Communities has subjected each quantitative unit of MFN banana import to approximately seven times more duty than each equal quantitative unit of ACP banana import. These figures illustrate the way in which the European Communities' current banana import regime restricts MFN banana imports, including any imports from the United States, within the meaning of Article XIII:1 of the GATT 1994; at the same time, it is quite clear that ACP bananas are not similarly restricted.

7.687 This Panel also notes that the original panel requested by Ecuador in this dispute stated that:

> "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. Thus, a Member may not limit the quantity of imports from some Members but not from others. But as indicated by the 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."[1189]

7.688 In its ruling in *EC – Bananas III*, the Appellate Body upheld the relevant findings of that original panel in the context of Article XIII:1, by stating that:

> "When th[e] principle of non-discrimination is applied to the allocation of tariff quota shares to Members not having a substantial interest, it is clear that a Member cannot, whether by agreement or by assignment, allocate tariff quota shares to some Members not having a substantial interest while not allocating shares to other Members who likewise do not have a substantial interest. To do so is clearly inconsistent with the requirement in Article XIII:1 that a Member cannot restrict the importation of any

[1188] See, for example, European Communities' first written submission, para. 4.
[1189] Panel Report on *EC – Bananas III (Ecuador)*, para. 7.69.

> product from another Member unless the importation of the like product from all third countries is 'similarly' restricted.
>
> Therefore, ... we conclude that the Panel found correctly 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 is inconsistent with the requirements of Article XIII:1 of the GATT 1994.
>
> The [tariff quota] reallocation rules [of the BFA] allow the exclusion of banana-supplying countries, other than BFA countries, from sharing in the unused portions of a tariff quota share. Thus, imports from BFA countries and imports from other Members are not 'similarly' restricted. We conclude, therefore, that the Panel found correctly that the tariff quota reallocation rules of the BFA are inconsistent with the requirements of Article XIII:1 of the GATT 1994."[1190]

7.689 Based on the reasoning of the original panel and the Appellate Body in this dispute, both the first compliance panel requested by Ecuador and the arbitrator in the proceedings requested by the European Communities pursuant to Article 22.6 of the DSU established inconsistency with Article XIII:1 of the GATT 1994, by stating that:

> "[S]ome non-substantial suppliers, namely the ACP suppliers, could benefit from access to the 'other' category of the MFN tariff quota once the 857,700 tonne tariff quota was exhausted. On the other hand, non-substantial suppliers from third countries have no access to the 857,700 tonne tariff quota once the 'other' category of the MFN tariff quota is exhausted. Individual Members in these two groups – traditional ACP suppliers and the other non-substantial suppliers – are accordingly not similarly restricted. This disparate treatment is inconsistent with the provisions of Article XIII:1, which require that '[n]o … restriction shall be applied by any Member on the importation of any product of the territory of any other Member … unless the importation of the like product of all third countries … is similarly prohibited or restricted'."[1191]

7.690 In the proceedings before this Panel, the European Communities argues that its current banana import regime is different from the previous ones addressed by the Appellate Body and the previous panels in this dispute.[1192] In the European Communities' view, "the tariff quotas that [the *EC – Bananas III* panel] was examining extended to all of the Members that were affected by the dispute"[1193], while under the current bananas import regime "MFN Members are not subject to any quantitative restriction".[1194]

7.691 The European Communities argues that the report of the Appellate Body in *EC – Bananas III* confirms this interpretation of Article XIII:

> "In that case the Appellate Body did not say that wherever like products were treated unequally as regards origin there would be a breach of Article XIII. The Appellate Body simply confirmed that a breach of GATT Article XIII may be found where

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[1190] Appellate Body Report on *EC – Bananas III*, paras. 161-163.

[1191] Panel Report on *EC – Bananas III (Article 21.5 – Ecuador)*, para. 6.26; and Decision by the Arbitrators on *EC - Bananas III (US) (Article 22.6 – EC)*, para. 5.14.

[1192] European Communities' first written submission, para. 67. See also ibid., para. 68.

[1193] European Communities' second written submission, para. 92.

[1194] European Communities' first written submission, para. 68.

> different tariff quotas are imposed to different groups of countries and are administered in a discriminatory manner."[1195]

7.692 In the original dispute the Appellate Body noted that, in regard to the earlier European Communities' measures before the original panel and the Appellate Body:

> "It ha[d] been argued by the European Communities that there are two separate EC import regimes for bananas, the preferential regime for traditional ACP bananas and the *erga omnes* regime for all other imports of bananas. Submissions made by the European Communities raise the question whether this is of any relevance for the application of the non-discrimination provisions of the GATT 1994 and the other Annex 1A agreements. The European Communities argues, in particular, that the non-discrimination obligations of Articles I:1, X:3(a) and XIII of the GATT 1994 and Article 1.3 of the *Licensing Agreement*, apply only *within* each of these separate regimes. The Panel found that the European Communities has only one import regime for purposes of applying the non-discrimination provisions of the GATT 1994 and Article 1.3 of the *Licensing Agreement*."[1196]

7.693 In response to that argument by the European Communities, the Appellate Body established that:

> "The issue here is not whether the European Communities is correct in stating that two separate import regimes exist for bananas, but whether the existence of two, or more, separate EC import regimes is of any relevance for the application of the non-discrimination provisions of the GATT 1994 and the other Annex 1A agreements. The essence of the non-discrimination obligations is that like products should be treated equally, irrespective of their origin. As no participant disputes that all bananas are like products, the non-discrimination provisions apply to all imports of bananas, irrespective of whether and how a Member categorizes or subdivides these imports for administrative or other reasons. If, by choosing a different legal basis for imposing import restrictions, or by applying different tariff rates, a Member could avoid the application of the 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."[1197]

7.694 Accordingly, the Appellate Body "uph[e]ld the findings of the [original] Panel[1198] that the non-discrimination provisions of the GATT 1994, specifically, Articles I:1 and XIII, apply to the relevant EC regulations, irrespective if there is one or more 'separate regimes' for the importation of bananas."[1199]

7.695 As the original panel requested by Ecuador also noted, "to accept that a Member could establish quota regimes by different legal instruments and argue that they are not as a consequence

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[1195] Ibid., para. 66.
[1196] Appellate Body Report on *EC – Bananas III*, para. 189.
[1197] Appellate Body Report on *EC – Bananas III*, para. 190.
[1198] (*footnote original*) Panel Reports, paras. 7.82 and 7.167.
[1199] Appellate Body Report on *EC – Bananas III*, para. 191.

subject to Article XIII would be, as argued by the Complainants, to eviscerate the non-discrimination provisions of Article XIII."[1200]

7.696 Under the European Communities' current bananas import regime, there might be no tariff quota applicable to the MFN countries, and the ACP tariff quota might be the only preferential tariff quota. However, that would not reduce the relevance of the statement by the Appellate Body that "[t]he issue here is not whether the European Communities is correct in stating that two separate import regimes exist for bananas, but whether the existence of two, or more, separate EC import regimes is of any relevance for the application of the non-discrimination provisions of the GATT 1994 and the other Annex 1A agreements". As long as the European Communities has a preferential tariff quota reserved for some Members and a higher MFN out-of-quota duty for all other Members, that statement remains relevant. Further, the absence of more than one tariff quota reserved for some WTO Members under the European Communities' current bananas import regime makes the following statement by the Appellate Body even more relevant in these proceedings:

> "If, by choosing a different legal basis for imposing import restrictions, or by applying different tariff rates, a Member could avoid the application of the 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."[1201]

7.697 In the light of the foregoing, despite the European Communities' arguments on the specificity of its current bananas import regime and the preferential ACP tariff quota under such regime, the Panel reiterates that ACP banana imports to the European Communities are not similarly restricted as are like banana imports from MFN suppliers such as the United States.

7.698 Having found that the current EC bananas import regime shows all three elements set out in Article XIII:1, the Panel concludes that the European Communities' current bananas import regime, in particular its preferential tariff quota reserved for ACP countries, is inconsistent with Article XIII:1 of the GATT 1994.

5. The United States' claim under Article XIII:2 of the GATT 1994

(a) The United States' arguments

7.699 The United States maintains that the European Communities' current bananas import regime is also inconsistent with Article XIII:2 of the GATT 1994. In the view of the United States:

> "The EC's exclusive 775,000 ton ACP tariff rate quota fails to distribute *any* share whatsoever to MFN suppliers, let alone a share they would have expected to obtain in the absence of restrictions. This is so even though many of the excluded MFN suppliers are principal or substantial suppliers of bananas to the EC, 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."[1202]

[1200] Panel Report on *EC – Bananas III (Ecuador)*, para. 7.79.
[1201] Appellate Body Report on *EC – Bananas III*, para. 190.
[1202] United States' first written submission, para. 46.

7.700 The United States adds that:

> "Article XIII:2(d) required the EC, 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 EC avoid discriminating against the imports of non-ACP banana suppliers. [The European Communities] failed to do so. Instead, the EC 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. [1203] Thus, the EC breaches its obligations under GATT Article XIII:2 because it failed to 'similarly prohibit or restrict' those non-ACP bananas".[1204]

(b) The European Communities' arguments

7.701 As noted above, the European Communities responds that "the Cotonou Preference does not violate GATT Article XIII."[1205] In the European Communities' view, "the scope of Article XIII, in particular of paragraphs 1 and 2, does not extend to the relationship between the treatment of those Members that are covered by a tariff quota and that of those which are not."[1206]

7.702 The European Communities argues that the United States' invocation of Article XIII:2:

> "[F]ails 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 and which was the subject of the remarks made by the panel that are quoted by the United States. In the previous regime, exporting countries were granted various levels of access to the reduced tariff level. 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".[1207]

7.703 The European Communities adds that:

> "[T]he objective of Article XIII and in particular of paragraph 2 is to achieve particular quantitative distributions of trade. In the case of quotas it is evident that the appropriate distribution was to be achieved by direct quantitative measures, in the last resort by allocating specific quantities to individual exporting countries. When, as required by paragraph 5, 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

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[1203] (*footnote original*) *See, e.g.*, Appellate Body Report, *European Communities – Measures Affecting the Importation of Certain Poultry Products*, WT/DS69/AB/R, adopted 23 July 1998 ("*EC – Poultry (AB)*"), para. 101.

[1204] United States' second written submission, para. 95.

[1205] European Communities' first written submission, para. 63.

[1206] European Communities' second written submission, para. 90.

[1207] European Communities' first written submission, para. 68.

> plausible that the drafters of Article XIII would have envisaged using paragraph 2 to achieve such a goal."[1208]

(c) Panel's analysis

7.704 The United States has invoked both the chapeau and subparagraph (d) of Article XIII:2 of the GATT 1994.[1209]

(i) Chapeau of Article XIII:2 of the GATT 1994

7.705 Article XIII:2 of the GATT 1994 stipulates in its chapeau that:

> "In applying import restrictions to any product, contracting parties [WTO Members] shall aim at a distribution of trade in such product approaching as closely as possible the shares which the various contracting parties [WTO Members] might be expected to obtain in the absence of such restrictions and to this end shall observe the following provisions ..."

7.706 The original panel requested by Ecuador in this dispute confirmed that language by stating that "the object and purpose of Article XIII:2 is to minimize the impact of a quota or tariff quota regime on trade flows by attempting to approximate under such measures the trade shares that would have occurred in the absence of the regime."[1210]

7.707 The Panel notes that Cameroon, a beneficiary from the European Communities' preferences, argues in its statement at the substantive meeting of the Panel with the parties and third parties that:

> "[I] t is well known that the ACP banana producers are less competitive than the MFN producers. In comparison with the latter, the ACP producers produce at higher costs. For geographical and historical reasons, they do not have the same economies of scale as the MFN producers. Further, the ACP producers can only compete with them on markets on which they have preferential access. Proof of this fact is that even the Caribbean ACP Countries, which are situated at the doorstep of the United States, do not manage to compete with MFN producers on the North American market. The absence of preferential access and higher costs structures prevent ACP producers from entering the United States market. Given that the European Community constitutes the only major banana market to offer preferential access, the ACP Countries are entirely dependent on this market."[1211]

7.708 The Panel has already established that the European Communities' current bananas import regime subjects bananas from MFN suppliers, including from the United States, to a restriction within the meaning of Article XIII:1 of the GATT 1994. The Panel also takes note of the statement by Cameroon that ACP producers can only compete with MFN producers in markets where they enjoy preferential access, which has not been contested by either other ACP third parties nor by the European Communities. This statement constitutes a recognition that the preferential ACP tariff quota regime under the European Communities' current bananas import regime is indispensable for the very existence of ACP banana imports to the European Communities. It is not necessary to

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[1208] European Communities' second written submission, para. 87.

[1209] See *EC – Bananas III (Article 21.5 – US)*, Request for the Establishment of a Panel (WT/DS27/83) 2 July 2007, p. 2; United States' first written submission, para. 45; and United States' second written submission, para. 95.

[1210] Panel Report on *EC – Bananas III (Ecuador)*, para. 7.68.

[1211] Written version of Cameroon's oral statement at the Panel's substantive meeting with the parties and third parties, para. 5.

further assess this alleged lack of competitiveness of ACP countries. The above uncontested statement suffices to find that, given that MFN countries are excluded from the European Communities' preferential ACP tariff quota, by definition, the ACP preference does not "aim at a distribution of trade in [bananas] approaching as closely as possible the shares which the various [Members, including both ACP and MFN countries] might be expected to obtain in the absence of such restrictions." Thus, the Panel also finds that on its face the European Communities' current bananas import regime, including its preferential ACP tariff quota, is inconsistent with the chapeau of Article XIII:2 of the GATT 1994.

(ii) Subparagraph (d) of Article XIII:2 of the GATT 1994

7.709 The United States has also invoked subparagraph (d) of Article XIII:2 of the GATT 1994.[1212] That subparagraph provides that:

> "(d) In cases in which a quota is allocated among supplying countries the contracting party applying the restrictions may seek agreement with respect to the allocation of shares in the quota with all other contracting parties having a substantial interest in supplying the product concerned. In cases in which this method is not reasonably practicable, the contracting party concerned shall allot to contracting parties having a substantial interest in supplying the product shares based upon the proportions, supplied by such contracting parties 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 contracting party 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."

7.710 As stated by the original panel requested by Ecuador in this dispute:

> "Article XIII's general requirement of non-discrimination is modified in one respect by Article XIII:2(d), which provides for the possibility to allocate tariff quota shares to supplying countries. Any such country specific allocation must, however, 'aim at a distribution of trade ... approaching as closely as possible the shares which Members might be expected to obtain in the absence of such restrictions' (chapeau of Article XIII:2(d)).
>
> Article XIII:2(d) further specifies the treatment that, in case of country-specific allocation of tariff quota shares, must be given to Members with 'a substantial interest in supplying the product concerned'. For those Members, the Member proposing to impose restrictions may seek agreement with them as provided in Article XIII:2(d), first sentence. If that is not reasonably practicable, then it must allot shares in the quota (or tariff quota) to them on the basis of the criteria specified in Article XIII:2(d), second sentence."[1213]

7.711 That same original panel addressed the question whether, under Article XIII:2(d), "country-specific shares can also be allocated to Members that do not have a substantial interest in

[1212] See United States' first written submission, para. 45.
[1213] Panel Report on *EC – Bananas III (Ecuador)*, paras. 7.70-7.71.

supplying the product and, if so, what the method of allocation would have to be."[1214] The panel noted that:

> "As to the first point, we note that the first sentence of Article XIII:2(d) refers to allocation of a quota 'among supplying countries'. This could be read to imply that an allocation may also be made to Members that do not have a substantial interest in supplying the product. If this interpretation is accepted, any such allocation must, however, meet the requirements of Article XIII:1 and the general rule in the chapeau to Article XIII:2(d). Therefore, if a Member wishes to allocate shares of a tariff quota to some suppliers without a substantial interest, then such shares must be allocated to all such suppliers. Otherwise, imports from Members would not be similarly restricted as required by Article XIII:1.[1215] As to the second point, in such a case it would be required to use the same method as was used to allocate the country-specific shares to the Members having a substantial interest in supplying the product, because otherwise the requirements of Article XIII:1 would also not be met."[1216]

7.712 On appeal, the Appellate Body stated that:

> "Article XIII:2(d) provides specific rules for the allocation of tariff quotas among supplying countries, but these rules pertain only to the allocation of tariff quota shares to Members 'having a substantial interest in supplying the product concerned'. Article XIII:2(d) does not provide any specific rules for the allocation of tariff quota shares to Members not having a substantial interest. Nevertheless, *allocation to Members not having a substantial interest must be subject to the basic principle of non-discrimination. When this principle of non-discrimination is applied to the allocation of tariff quota shares to Members not having a substantial interest, it is clear that a Member cannot, whether by agreement or by assignment, allocate tariff quota shares to some Members not having a substantial interest while not allocating shares to other Members who likewise do not have a substantial interest.* To do so is clearly inconsistent with the requirement in Article XIII:1 that a Member cannot restrict the importation of any product from another Member unless the importation of the like product from all third countries is 'similarly' restricted"[1217] (emphasis added).

7.713 The Panel notes that all MFN countries are excluded from the European Communities' preferential ACP tariff quota, and the group of MFN countries includes both substantial and non-substantial suppliers of bananas to the European Communities. The United States has argued that:

> "The EC's exclusive 775,000 ton ACP tariff rate quota fails to distribute *any* share whatsoever to MFN suppliers, let alone a share they would have expected to obtain in the absence of restrictions. This is so even though many of the excluded MFN suppliers are principal or substantial suppliers of bananas to the EC, and leading exporters of bananas to the world market".[1218]

[1214] Ibid., para. 7.73.

[1215] (*footnote original*) See Panel Report on "EEC Restrictions on Imports of Apples from Chile", adopted on 10 November 1980, BISD 27S/98, 114, 116, paras. 4.11, 4.21.

[1216] Panel Report on *EC – Bananas III (Ecuador)*, para. 7.73.

[1217] Appellate Body Report on *EC – Bananas III*, para. 161.

[1218] United States' first written submission, para. 46.

7.714 Also, according to Exhibit EC-7, for each year since 1999, MFN suppliers have had high shares of European Communities banana imports among all banana suppliers, in many cases higher than those of ACP suppliers. Accordingly, several MFN suppliers may be considered to have a substantial interest in supplying bananas to the European Communities under Article XIII:2(d) of the GATT 1994.

7.715 In the light of the way in which Article XIII:2(d) has been interpreted by the original panel and the Appellate Body in this dispute, a preferential tariff quota that is granted exclusively to some Members and not to others, including substantial suppliers, cannot result in a distribution of trade in bananas that would approach as closely as possible the shares which the various Members might be expected to obtain in the absence of such restrictions. Further, the same preferential tariff quota does not comply with the second sentence of Article XIII:2(d) that:

> "In cases in which [agreement with respect to the allocation of shares in the quota with all other contracting parties having a substantial interest in supplying the product concerned] is not reasonably practicable, the contracting party concerned shall allot to contracting parties having a substantial interest in supplying the product shares based upon the proportions, supplied by such contracting parties 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."

7.716 Accordingly, the Panel finds that the European Communities' current bananas import regime, including its preferential ACP tariff quota, is inconsistent with subparagraph (d) of Article XIII:2 of the GATT 1994, as well as with the chapeau of Article XIII:2.

6. The existence of an applicable waiver

7.717 As the Appellate Body stated in the context of Article XIII earlier in this dispute:

> "Non-discrimination obligations apply to all imports of like products, except when these obligations are specifically waived or are otherwise not applicable as a result of the operation of specific provisions of the GATT 1994, such as Article XXIV.[1219] In the present case, the non-discrimination obligations of the GATT 1994, specifically Articles I:1 and XIII[1220], apply fully to all imported bananas irrespective of their origin, except to the extent that these obligations are waived ..."[1221]

7.718 As the United States argues in these proceedings, the waiver from Articles XIII:1 and 2 adopted by the Ministerial Conference in Doha[1222] expired by its own terms on 31 December 2005.[1223] The Panel also notes that the European Communities does not argue that that waiver is still in force. Indeed, the Panel finds that there is no waiver in force to cover the European Communities' current bananas import regime and exonerate any inconsistencies of such regime with Articles XIII:1 and 2 of the GATT 1994.

[1219] (*footnote original*) *Panel on Newsprint*, adopted 20 November 1984, BISD 31S/114.

[1220] (*footnote original*) We do not agree with the Panel's findings that Article X:3(a) of the GATT 1994 and Article 1.3 of the *Licensing Agreement* preclude the imposition of different import licensing systems on like products when imported from different Members. See our Findings and Conclusions, paras. (l) and (m).

[1221] Appellate Body Report on *EC – Bananas III*, para. 191.

[1222] See 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.

[1223] United States' first written submission, paras. 18, 20 and 47. See also United States' second written submission, para. 94.

7.719 Also, for the reasons set out by the Appellate Body earlier in this dispute[1224], even if the Doha Article I waiver applied to bananas beyond the end of 2005, which the Panel has already found not to be the case[1225], the coverage of that waiver from Article I of the GATT 1994 would not automatically extend to Article XIII.

7. Conclusion

7.720 For the reasons explained above, the Panel concludes that the European Communities' current bananas import regime, in particular its preferential tariff quota reserved for ACP countries, is inconsistent with Articles XIII:1 and 2 of the GATT 1994. The Panel also concludes that there is no waiver in force that exonerates the inconsistencies of the European Communities' current bananas import regime with Articles XIII:1 and 2 of the GATT 1994.

I. FINAL REMARKS

7.721 In the factual section of this Report, the Panel noted that a significant number of developing and least developed country Members stated their respective substantial interest in the matter before this Panel and reserved their third-party rights to participate in these proceedings.

7.722 The Panel is aware of the economic and social effects of the European Communities' measures at issue in this case, particularly for ACP and Latin American banana exporting countries. In recognizing this, as in previous panel proceedings, the Panel decided to grant third parties participatory rights which were substantially broader than those normally afforded to them under the DSU.[1226] This was done in the light of the particular circumstances of the present case, and without the intention of setting any type of precedent.

7.723 In any event, the Panel wishes to recall the words of the original panel in the *EC – Bananas III* dispute:

> "The procedures under the DSU serve to ensure the settlement of disputes among WTO Members in accordance with WTO obligations, not to add to or diminish these obligations. Accordingly, our terms of reference are to assist the DSB in reaching conclusions with regard to the legal consistency with WTO rules of the EC's common market organization for bananas. ...
>
> From a substantive perspective, the fundamental principles of the WTO and WTO rules are designed to foster the development of countries, not impede it. Having heard the arguments of a large number of Members interested in this case and having worked through a complex set of claims under several WTO agreements, we conclude that the system is flexible enough to allow, through WTO-consistent trade and non-trade measures, appropriate policy responses in the wide variety of circumstances across countries, including countries that are currently heavily dependent on the production and commercialization of bananas."[1227]

[1224] See Appellate Body Report on *EC – Bananas III*, para. 188.
[1225] See para. 7.606 above.
[1226] Panel Report on *EC – Bananas III (Ecuador)*, para. 8.2.
[1227] Panel Report on *EC – Bananas III (Ecuador)*, paras. 8.1 and 8.3.

VIII. CONCLUSIONS

A. GENERAL CONCLUSIONS

8.1 In light of the findings above, and regarding the preliminary objections advanced by the European Communities the Panel finds that:

(a) The United States had, under the DSU, the right to request the initiation of the current compliance dispute settlement proceedings;

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

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

8.2 The Panel accordingly rejects the preliminary issues raised by the European Communities.

8.3 After having examined the substantive claims raised by the United States, as well as the defences invoked by the European Communities, the Panel concludes that:

(a) The preference granted by the European Communities to an annual duty-free tariff quota of 775,000 mt of imported bananas originating in ACP countries constitutes an advantage for this category of bananas, which is not accorded to like bananas originating in non-ACP WTO Members, and is therefore inconsistent with Article I:1 of GATT 1994;

(b) With the expiration of the Doha Waiver from 1 January 2006 as it applied to bananas, the European Communities has failed to demonstrate the existence of a waiver from Article I:1 of GATT 1994 to cover the preference granted by the European Communities to the duty-free tariff quota of imported bananas originating in ACP countries; and,

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

8.4 In consequence, the Panel concludes that, through its current regime for the importation of bananas, established in Council Regulation (EC) No. 1964/2005 of 29 November 2005, in particular its duty-free tariff quota for bananas originating in ACP countries, the European Communities has failed to implement the recommendations and rulings of the DSB.

B. NULLIFICATION OR IMPAIRMENT OF BENEFITS

8.5 The Panel has noted the European Communities' argument that the preferential tariff quota reserved for ACP countries has no impact on the value of relevant EC banana imports from the United

States.[1228] The Panel likewise notes that the European Communities argues that such preferential tariff quota therefore "does not cause the United States any nullification or impairment of a benefit for which the European Communities can face suspension of concessions [under Article 22 of the DSU]".[1229]

8.6 The Panel notes, however that, under Article 3.8 of the DSU, in cases where there is infringement of obligations assumed under a covered agreement, the action is considered prima facie to constitute a case of nullification or impairment of benefits under that agreement.

8.7 In this respect, the Panel finds relevant the statement made by the panel in the original proceedings that:

> "WTO rules are not concerned with actual trade, but rather with competitive opportunities. Generally, it would be difficult to conclude that a Member had no possibility of competing in respect of a product or service. The United States does produce bananas in Puerto Rico and Hawaii. Moreover, even if the United States did not have even a potential export interest, its internal market for bananas could be affected by the EC regime and that regime's effect on world supplies and prices. Indeed, with the increased interdependence of the global economy, which means that actions taken in one country are likely to have significant effects on trade and foreign direct investment flows in others, 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 than ever to affect them, directly or indirectly."[1230]

8.8 In the same proceedings, the Appellate Body confirmed the panel's finding and stated that "the United States is a producer of bananas, and a potential export interest by the United States cannot be excluded" and that "[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".[1231]

8.9 The Panel has already noted that the current proceedings involve a "compliance" case, under Article 21.5 of the DSU, regarding the matter of whether certain measures allegedly taken to comply with the recommendations and rulings of the DSB in an original dispute conducted under the WTO's dispute settlement procedures are consistent with the WTO covered agreements. By their nature, compliance cases are linked with the original proceedings in the dispute. The Panel finds guidance in this respect in the Appellate Body's statement that "Article 21.5 proceedings do not occur in isolation from the original proceedings, but… both proceedings form part of a continuum of events."[1232]

8.10 Considering the link between the current compliance proceedings and the original proceedings in the dispute, the Panel does not find that the European Communities has successfully rebutted the legal presumption established by Article 3.8 of the DSU that its inconsistent measures nullify or impair benefits accruing to the United States under the WTO agreements. The arguments advanced by the European Communities on the alleged lack of nullification or impairment have not rendered irrelevant the considerations made by the panel and by the Appellate Body in the course of

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[1228] European Communities' second written submission, para. 98. See also written version of European Communities' opening statement during substantive meeting with the parties and third parties, paras. 26.

[1229] European Communities' first written submission, para. 75.

[1230] Panel Report on *EC – Bananas III*, para. 7.50.

[1231] Appellate Body Report on *EC – Bananas III*, para. 136.

[1232] Appellate Body Report on *Chile – Price Band System (Article 21.5 – Argentina)*, para. 136.

the original proceedings, regarding the actual and potential trade interests of the United States in the dispute.

8.11 In any event, the presumption, under Article 3.8 of the DSU, that a breach of an obligation under a WTO covered agreement constitutes a case of nullification or impairment of trade benefits, is different from the determination of the precise level of such nullification or impairment, which is an exercise conducted under Article 22 of the DSU, in cases when a complaining party has requested authorization to suspend concessions or other obligations. It is not the task of a compliance panel to determine the level of nullification or impairment of trade benefits accruing to the United States, which would result from the measures maintained by the European Communities that are inconsistent with the GATT 1994.

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

C. RECOMMENDATION

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