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.