EUROPEAN COMMUNITIES – REGIME FOR THE IMPORTATION, SALE AND DISTRIBUTION OF BANANAS – RECOURSE TO ARTICLE 21.5 OF THE DSU BY THE UNITED STATES

(AB-2008-9)

APPELLEE SUBMISSION OF THE UNITED STATES OF AMERICA

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Table of Reports Cited

Short Form	Full Citation
Panel Report	Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/RW/USA, circulated 19 May 2008
Argentina – Poultry	Panel Report, *Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil*, WT/DS241/R, adopted 19 May 2003
Bananas III (Panel)	Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/R, adopted 25 September 1997, as modified by the Appellate Body Report, WT/DS27/AB/R
Bananas III (AB)	Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted 25 September 1997
Bananas III (21.5)(Ecuador)	Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 by Ecuador*, WT/DS27/RW/ECU, adopted 6 May 1999
Bananas III (22.6)(US)	*European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Arbitration by the European Communities*, WT/DS27/ARB (April 9, 1999)
Dominican Republic – Cigarettes (AB)	Appellate Body Report, *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes*, WT/DS302/AB/R, adopted 19 May 2005
EC – Bed Linen (21.5) (AB)	Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India*, WT/DS141/AB/RW, adopted 24 April 2003
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EEC – Quantitative Restrictions	Panel report, *EEC - Quantitative Restrictions Against Imports of Certain Products from Hong Kong*, adopted July 12, 1983, BISD 30S/129
India – Autos	Panel Report, *India - Measures Affecting the Automotive Sector*, WT/DS146/R, WT/DS175/R, adopted April 5, 2002
Japan – Alcohol Taxes (AB)	Appellate Body Report, *Japan – Taxes on Alcoholic Beverages,* WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R adopted 1 November, 1996
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US – Offset Act (AB)	Appellate Body Report, *United States – Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/AB/R, WT/DS234/AB/R, adopted 27 January 2003
US – Shrimp (21.5) (AB)	Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 by Malaysia*, WT/DS58/AB/RW, adopted 21 November 2001
US – Superfund	Panel Report*, United States – Taxes on Petroleum and Certain Imported Substances*, L/6175, adopted 17 June 1987, BISD 34S/136

I. INTRODUCTION AND EXECUTIVE SUMMARY

1. The European Communities ("EC") has appealed the findings related to the three preliminary issues through which the EC claimed the United States was precluded from having recourse to Article 21.5 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"). In addition, the EC has appealed the Panel's finding that the preferential tariff quota reserved for bananas from the African, Caribbean and Pacific countries ("ACP countries") is inconsistent with Article XIII:1 and Article XIII:2 of the General Agreement on Tariffs and Trade 1994 ("GATT 1994"). Furthermore, the EC seeks reversal of the Panel's inability to harmonize the timetable in this proceeding with the parallel proceeding brought by Ecuador. Finally, the EC has appealed the Panel's "failure" to take into account the repeal of the measure that was the subject of this proceeding.

2. The EC argues that the Panel's "erroneous legal findings and conclusions . . . raise important systemic issues for the application of the GATT and the DSU that go beyond the banana dispute."[1] Nothing could be further from the truth. Most of these issues have been decided in this dispute several times already. The Panel engaged in a very thorough analysis of the issues presented pursuant to the relevant provisions of the WTO covered agreements and, indeed, used reasoning that is consistent with that of prior panels and the Appellate Body.[2] The EC's arguments are, for the most part, the same arguments, or repackaged versions of them. In many places the EC mischaracterizes the Panel's reasoning.

3. The United States has not attempted to rebut every argument and every mischaracterization by the EC in this submission. Nonetheless, the United States addresses the EC's claims of error in sufficient detail to permit the Appellate Body to reject the EC's appeals and uphold the Panel's conclusions, and the Appellate Body should not infer that silence by the United States with respect to any particular EC argument connotes agreement. The United States would be glad to address any EC argument not addressed explicitly in this submission at the oral hearing.

4. The United States will begin by addressing the EC's claims of error related to GATT 1994 Article XIII. Next, the United States will address the three procedural claims that were correctly rejected by the Panel. Finally, the United States will address two additional procedural claims that arose during and at the very end of the Panel proceeding.

5. The United States respectfully requests that the Appellate Body reject the EC's appeal in its entirety for the reasons set forth below.

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[1] Appellant's Submission by the European Communities ("EC's Appellant Submission"), para. 1.

[2] *Japan – Alcohol Taxes (AB)*, p. 14 (prior adopted panel and Appellate Body reports create legitimate expectations among WTO Members).

II. THE PANEL DID NOT ERR IN ITS ANALYSIS OF GATT 1994 ARTICLE XIII

6. The United States understands that the EC is challenging the Panel's reasoning with respect to GATT 1994 Article XIII on three grounds:

7. First, the EC claims that the Panel erred in finding that its banana import regime, consisting of a 775,000 ton zero duty tariff rate quota ("TRQ") applicable only to ACP countries is a tariff rate quota subject to Article XIII by operation of Article XIII:5.

8. Second, the EC claims that the Panel erred in finding that a preferential tariff rate quota applicable only to ACP countries provides discriminatory treatment, because while MFN supplier are denied market access at the in-quota tariff rate there is no restriction on the quantity that MFN suppliers may provide at the higher, over-quota tariff rate.[3]

9. Third, the EC claims that the Panel failed to properly interpret Article XIII:2 because there is no restriction on the United States because the United States does not currently export bananas to the European Communities. Consequently, the U.S. market share would remain the same with or without the EC's discriminatory TRQ.

10. Despite the EC's attempt at casting these issues as matters of first impression[4] and characterizing the Panel's findings as "likely to create significant problems" for WTO Members offering trade preferences to developing country Members[5], the legal issues raised by this dispute are not novel at all. The Panel conducted a thorough analysis of the issues presented and its findings are anchored in the text of the GATT 1994, and indeed consistent with the reports of earlier panels, arbitrators, and the Appellate Body in this dispute. Furthermore, the fact that this is a proceeding under Article 21.5 of the DSU carries with it certain consequences. As the Appellate Body has made clear, an Article 21.5 panel "conduct[s] its work against the background of the original proceedings, and with full cognizance of the reasons provided by the original panel. The original determination and original panel proceedings, as well as the redetermination and the panel proceedings under Article 21.5, form part of a continuum of events."[6] It is well established that adopted panel and Appellate Body reports "are treated as a final resolution to a dispute between the parties to that dispute."[7]

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[3] Of course, there is no restriction on the quantity ACP suppliers can provide at the over-quota tariff rate either.

[4] EC's Appellant Submission, para. 111.

[5] EC's Appellant Submission, para. 120.

[6] *Mexico - HFCS (21.5) (AB)*, para. 121.

[7] *EC -Bed Linen (21.5)(AB)*, paras. 91-93. See also *US - Shrimp (21.5) (AB)* , para. 97.

11. For the reasons set out below, the claims of error with respect to Article XIII must be rejected.

A. The Panel Correctly Determined that the EC's Regime is a Tariff Quota Subject to Article XIII:5

12. The EC claims that the "Panel erred when it interpreted Article XIII:1 and Article XIII:5 as supporting the conclusion that Article XIII covers an import regime where (a) imports from all Members are subject to a simple tariff, but not to any quantitative restrictions, (b) there is a preferential tariff offered to certain Members and (c) this preferential tariff is applied only to part of the beneficiaries' exports."[8] The EC takes issue with the Panel's finding that GATT 1994 Article XIII is applicable to a "single tariff quota . . . 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."[9] This is the same argument the EC has made in previous Bananas proceedings that a cap on a tariff preference is not a tariff quota and that the two regimes (the ACP tariff quota and the MFN tariff) must be examined separately (the "separate regimes" argument). These arguments have been rejected some four times before and should be rejected again now.[10]

13. The Panel correctly began its GATT 1994 Article XIII analysis by determining whether the EC's preferential tariff rate quota for ACP bananas was subject to the disciplines of Article XIII through operation of Article XIII:5.[11] Article XIII:5 provides, in relevant part, that "[t]he provisions of this Article shall apply to any tariff quota instituted or maintained by any contracting party [WTO Member]."

14. A "tariff quota" is a "quantitative limit on the availability of a specific tariff rate".[12] As the Panel correctly notes, "[n]either of the parties contest that the European Communities has, under its current banana import regime introduced on 1 January 2006, a preferential zero-duty

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[8] EC's Appellant Submission, para. 131.

[9] Panel Report, para. 7.645. EC's Appellant Submission, paras. 111, 112 and 131-135.

[10] These arguments have been rejected by the original panel in this dispute, the Appellate Body, the panel in the first Ecuador Article 21.5 proceeding and the arbitrator in the Article 22.6 arbitration.

[11] Panel Report, para. 7.644.

[12] Panel Report, para. 7.646, citing Panel Report on *Bananas III (21.5)(Ecuador)*, para. 6.20; and *Bananas III (22.6) (US)*, para. 5.9. See also, Panel Report on *US – Line Pipe*, para. 7.18 (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'."

tariff quota of 775,000 mt per annum reserved for ACP countries, combined with an MFN applied duty of 176 €/mt."[13] The Panel therefore correctly concluded that the tariff quota represents a quantitative limit on the preferential rate available to ACP countries, that the EC's banana import regime is a "tariff-quota-based import regime", and therefore it is subject to the disciplines of Article XIII.[14]

15. As the United States demonstrated during the Panel proceedings, EC Regulation 1964, containing the measure subject to this proceeding, itself refers to a "tariff rate quota for bananas originating in ACP countries."[15] The EC's insistence that its regime is not a tariff quota regime defies reality.[16]

16. The EC takes issue with the characterization by the Panel that its banana import regime is a "tariff-quota-based import regime".[17] In doing so, it repackages its "separate regimes" arguments and reasserts that "simple tariff discrimination" is not covered by Article XIII:1.

17. While the EC measure subject to this proceeding may be simpler than the EC's prior bananas import regimes, nothing in the text of Article XIII:5 supports the EC's arguments. The Panel correctly noted that Article XIII:5 uses the term "any" in front of " tariff quota" and uses "tariff quota" in the singular[18]. Thus, according to the plain meaning of the terms of Article XIII:5, if a WTO Member institutes a (any) tariff rate quota, that tariff rate quota it is subject to the disciplines of Article XIII. Article XIII:5 does not condition the applicability of Article XIII to only instances in which "all imports" of the product subject to the tariff quota are "effected through the allocation of tariff quotas."[19]

18. The EC argues that the Panel "misinterpreted the findings of the Appellate Body in the previous *EC– Bananas* case" because that case dealt with a regime where all imports were

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[13] Panel Report, para. 7.647.

[14] Panel Report, paras. 7.647 and 7.648.

[15] U.S. second written submission to the Panel, para. 83 and Exhibit US-1, containing Council Regulation (EC) No. 1964/2005, OJL 316/1, 2 December 2005.

[16] In October of 2005, the EC requested an extension of the Article XIII waiver that was about to expire for the 775,000 ton TRQ for ACP bananas. It seemed to recognize then that its preferential TRQ for ACP bananas was indeed a tariff rate quota subject to GATT 1994 Article XIII. Request for Extension of a Waiver Under GATT Article XIII, *Tariff Rate Quota for Bananas of ACP Origin*, G/C/W/529, 11 October 2005.

[17] EC's Appellant Submission, para. 112 and paras. 131 - 135.

[18] Panel Report, para. 7.645.

[19] EC's Appellant Submission, para. 135.

effected through the allocation of tariff quotas, each group of suppliers was allocated a tariff quota with different terms, and some groups were allocated country specific tariff quotas, while some MFN countries were only allocated a general "other" tariff quota.[20] The fact that the EC's import regime subject to the earlier findings of the Appellate Body was more complex than the regime subject to this proceeding does make the Appellate Body's findings irrelevant. As will be discussed further below, the Appellate Body's reasoning in *Bananas III* continues to be relevant and support the Panel's conclusions. The issue of applicability of Article XIII to the EC's bananas regime is decided based on the text of the covered agreements, and particularly, Article XIII:5. The Panel correctly concluded that the EC's banana regime, with its tariff rate quota reserved for ACP bananas, established a tariff quota within the meaning of Article XIII:5. Thus, the Panel correctly moved on to examine whether that tariff rate quota met the requirements of Article XIII.

B. The Panel Correctly Determined that the EC's Regime Violated Article XIII:1

19. In paragraph 135 of its appellant submission, the EC argues that "[t]here is nothing in that Report of the Appellate Body that could support the conclusion that the application of Article XIII:1 should be extended to cover situations of simple tariff discrimination if the preferential treatment is offered only to part of the beneficiaries' exports." This statement not only mischaracterizes the EC's measure subject to this proceeding, it also dismisses the Appellate Body's reasoning with respect to the EC's "separate regimes" argument in *Bananas III*.

20. As it did at the panel stage, the EC continues to argue that a simple tariff rate quota applicable only to some countries is simply tariff discrimination subject to GATT Article I, but not GATT Article XIII. In paragraph 134, the EC argues that "the text of Article XIII:1 does not introduce an 'MFN rule', i.e. it does not impose on a Member the obligation to extend to all Members the preferences it grants to only some countries. This means that, if the European Communities were to grant a simple tariff preference to the ACP countries, Article XIII would not oblige the European Communities to extend this tariff preference to all other WTO Members. There is nothing in Article XIII (or any other GATT provision) implying that this situation should change simply upon the imposition of a limit on the quantities of ACP bananas that could enjoy this tariff preference."[21]

21. As the Panel correctly concluded, the EC's measure subject to this proceeding is not a simple tariff preference for ACP countries. It is a tariff quota subject to Article XIII.

22. The *Bananas III* Panel Report established that Article XIII:1's non-discrimination

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[20] EC's Appellant Submission, para. 135.

[21] EC's Appellant Submission, para. 134.

principle requires that like products of *all* Members must be similarly restricted:

> 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 . . . . A Member may not restrict imports from some Members using one means and restrict them from another using another means.*[22]

23. The Appellate Body expounded on this by stating that "Article XIII:1 sets out a basic principle of non-discrimination in the administration of both quantitative restrictions and tariff quotas."[23] The Appellate Body agreed with the panel's conclusion 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."[24]

24. Furthermore, the Appellate Body firmly rejected the EC's arguments that the non-discrimination obligations of, *inter alia*, Articles I:1 and XIII apply only within each separate regime. It stated 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 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 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.[25]

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[22] *Bananas III (Panel)*, para. 7.69 (emphasis added).

[23] *Bananas III (AB)*, para. 160.

[24] *Bananas III (AB)*, para. 162.

[25] *Bananas III (AB)*, para. 190. (Emphasis in original).

25. The reasoning of the *Bananas III* panel and Appellate Body reports apply with equal force to this proceeding. The EC cannot avoid its obligations by carving out a portion of its market for preferential access without any multilateral controls over how that carve-out was determined and without any consideration of how the carve-out affects access into the same market for other "like" products.

26. Therefore, this is not a case, as the EC would argue, of the Panel introducing an "MFN rule" into Article XIII:1. It is clear from the text of Article XIII:1, as correctly found in the *Bananas III* panel and Appellate Body reports, that Article XIII:1 itself contains a non-discrimination requirement when a tariff quota is used.

27. The shallowness of the EC's legal argumentation on this point is demonstrated by its remarks in the introduction to its Article XIII discussion. The EC argues that "[t]he fallacy in the Panel's legal interpretations is best illustrated by the completely unreasonable results to which they lead: according to the Panel, if the European Communities were to offer to the ACP countries an unlimited trade preference, then its measure would be in full compliance with Article XIII. In contrast, if the European Communities were to protect the interests of the MFN countries and limit the quantity of ACP bananas that can benefit from that trade preference, then it would automatically breach Article XIII of the GATT. The Panel qualifies a measure limiting the loss of trade caused to the MFN countries as 'illegal' and allows a measure causing greater loss of trade to be 'legal'."[26]

28. The EC's "concerns" are misplaced as the Panel's approach would permit the measure allegedly causing greater loss of trade to be found WTO-inconsistent. If the EC offered a pure tariff preference to the ACP countries, that was not available to other WTO Members, that would be subject to GATT 1994 Article I and would be "illegal" unless covered by a waiver or by operation of some other specific provision of the GATT 1994, such as Article XXIV.[27] Such a pure tariff preference would not be subject to the obligations of Article XIII because it would not contain a quantitative restriction nor would it be a tariff quota. Therefore, to claim that it would be in "full compliance with Article XIII" is inapposite. On the other hand, if such a preference were quantitatively limited (as is the case with the regime subject to this proceeding), it would be subject to Article XIII and its non-discrimination obligations.[28]

29. The EC claims that the Panel erred in concluding that there was a "quantitative

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[26] EC's Appellant Submission, para. 119.

[27] *Bananas III (AB)*, para. 191.

[28] The United States notes that the EC's statement that such limitation would be to "protect the interests of the MFN countries" is almost am admission of the discriminatory impact of such measure. One would not need to "protect" the MFN countries, if there was no harm.

restriction" imposed on the MFN countries, and in particular the United States.[29] The EC claims that the Panel "developed a theory pursuant to which a lower tariff offered to one Member becomes automatically a "quantitative restriction" on all other Members, provided that it is offered to only some, and not all, quantities exported by the beneficiary."[30] However, the EC has misunderstood Article XIII:1 and the Panel's application of it to the facts of the EC's bananas regime.

30. Article XIII:1 states:

> No prohibition or restriction shall be applied by any [Member] on the importation of any product of the territory of any other [Member] or on the exportation of any product destined for the territory of any other [Member], unless the importation of the like product of all third countries or the exportation of the like product to all third countries is similarly prohibited or restricted.

31. What the EC characterizes as a "theory developed by the Panel" is the natural application of the requirements contained in Article XIII:1 that in applying a "prohibition or restrictions" like products be similarly treated. As the Appellate Body has noted, the "essence of the non-discrimination obligations is that like products should be treated equally, irrespective of origin."[31]

32. It is uncontested that all bananas, wherever they are from, are like products. It is also clear that the EC's bananas regime subject to this proceeding treated bananas of ACP origin differently than bananas from other WTO Members. Only ACP bananas had access to the zero-duty tariff quota.

33. The EC argues that "the first condition for the application of Article XIII:1" is that there be "a quantitative restriction on the imports coming from the aggrieved Member" and that that condition has not been satisfied. The EC does explain where this "condition" appears in the text of Article XIII:1.

34. The Panel correctly found 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

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[29] EC's Appellant Submission, para. 121.

[30] EC's Appellant Submission, para. 122.

[31] *Bananas III (AB)*, para. 190.

on whether MFN countries are also subject to a tariff quota or only to an MFN tariff."[32]

35. As noted above, Article XIII:5 makes clear that the "[n]o . . . restriction" obligation of Article XIII:1 applies to tariff quotas. The "restriction" in the present instance is (as the Panel correctly found) a quantitative limit on a benefit (zero-duty access) only available to the ACP countries. The MFN countries are completely denied access to this benefit and therefore they are "restricted" in their access to the EC market for bananas and clearly not "treated equally" as the ACP countries.

36. The United States also notes that the text of Article XIII:1 is broad: no prohibition or restriction. It does not say: no prohibition or quantitative restriction. Again, while the use of quantitative restrictions or tariff rate quotas makes Article XIII applicable, the basic obligation (per Article XIII:1) is that like products be treated similarly once the choice is made to apply restrictions with respect to a product.

37. The Panel's approach to Article XIII:1, as explained above, was correct, and the Appellate Body should affirm the Panel's finding that the EC breached Article XIII:1. Rather than addressing every erroneous assertion by the EC, the United States would simply add the following two points.

38. First, the Panel did not find that "any benefit" granted to ACP countries is a "quantitative restriction" on MFN suppliers. What the Panel found was the tariff quota exclusively reserved for ACP countries brings the measure within the ambit of Article XIII and is discriminatory, in breach of the requirements of Article XIII.

39. Second, the EC argues, as it did during the panel proceedings, that the GATT and WTO waivers covering preferential tariff quotas demonstrate "the common understanding on the part of the GATT contracting parties and WTO Members that exclusion from a preferential tariff quota does not constitute an infringement of Article XIII."[33] No such "common understanding" exists. As an initial matter, the EC has nowhere pointed to any discussion of Article XIII in connection with these waivers. The EC is basing its argument on a presumption that Article XIII was considered at all in connection with these waivers. Such a presumption by the EC falls far short of the "subsequent practice" that the EC seeks to claim. Furthermore, most of the waivers cited by the EC originated between 1948 and 1994. This highlights the fact that later WTO practice on this issue actually contradicts the "subsequent practice" the EC seeks to portray.

40. As the *Bananas III* Appellate Body report pointed out, during the period 1948 to 1994,

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[32] Panel Report, para. 7.683, citing to *Bananas III (21.5)(Ecuador*), para. 6.20 and *Bananas III (22.6)(US)*, para. 5.9.

[33] EC's Appellant Submission, para. 146.

the contracting parties granted only one waiver of GATT Article XIII.[34] During that period, there were almost no actions by the Contracting Parties regarding the application of Article XIII. The only GATT cases that broadly addressed Article XIII had nothing to do with the application of Article XIII to tariff quotas.[35] In the absence of clear guidance, the pre-*Bananas III* waivers are of limited utility.

41. With the adoption of *Bananas III*, for the first time an adopted report addressed the application of GATT XIII to tariff quotas.[36] The *Bananas III* panel and Appellate Body reports specifically found that a GATT Article I waiver covering a preferential tariff quota cannot be read to excuse that tariff quota from the obligations of GATT Article XIII.[37] Following the adoption of *Bananas III*, the subsequent WTO waivers requested and granted for preferential tariff quotas have, in numerous instances, reflected the findings of that Report. As the United States noted during the meeting of the Panel with the parties, its most recent waiver requests for preferential programs covered both Articles I and XIII of the GATT.[38] Thus, neither of these EC arguments provide any basis to disturb the Panel's conclusion that the EC's bananas regime is in breach of Article XIII:1 of the GATT 1994.

C. The Panel Correctly Interpreted Article XIII:2 and XIII:2(d)

42. The EC claims that the Panel failed to properly interpret and apply Article XIII:2. The EC claims that Article XIII:2 "applies solely on quantitative restrictions imposed on the aggrieved Member".[39] The EC makes two arguments. First, that since there are no quantitative restrictions applied on the United States Article XIII:2 does not apply. Second, that because the United States does not export bananas to the EC, the "ACP preference could not be considered inconsistent with the *chapeau* of Article XIII:2, because even in its *absence* the United States' share of trade in bananas in the European Communities would *approach as closely as possible* the United States' existing share of trade in bananas: zero."[40]

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[34] *Bananas III (AB)*, para. 187.

[35] *EEC – Apples,* paras. 4.11, 4.21 and *EEC – Quantitative Restrictions*, para. 33.

[36] *Bananas III* (Panel), para. 7.69.

[37] *Bananas III (AB)*, paras. 183-187.

[38] U.S. – Caribbean Basin Economic Recovery Act (CBERA) (Request) G/C/W/508/Rev 1; U.S. – African Growth and Opportunity Act (AGOA) (Request), G/C/W/509/Rev 1; U.S. – Andean Trade Preferences Act (Request) G/C/W/510/Rev 1.

[39] EC's Appellant Submission, para. 150.

[40] EC's Appellant Submission, para. 153. (Emphasis in original).

43. These arguments are just a different version of the EC's procedural argument that the United States suffers no nullification or impairment from the EC's violations of Articles I and XIII of the GATT 1994 and is therefore, according to the EC, precluded from having recourse to dispute settlement. The United States will address that issue separately, but would make the following points regarding Article XIII:2.

44. Article XIII:2 states, in relevant part:

> In applying import restrictions to any product, [Members] shall aim at a distribution of trade in such product approaching as closely as possible the shares which the various [Members] might be expected to obtain in the absence of such restrictions and to this end shall observe the following provisions [. . .].

45. The EC argues that "[t]he words '*in applying import restrictions'* establish that paragraph 2 is solely concerned with quantitative restrictions imposed on the aggrieved Member, and not with other measures imposed on the aggrieved Member, such as simple tariffs."[41] The EC does not cite to any authority that would support this proposition. Certainly, the chapeau to Article XIII:2 does not read "in applying import restrictions on a Member". The chapeau reads "in applying import restrictions *to any product*".

46. As the Appellate Body explained in *Bananas III*, Article XIII:1 sets out a basic principle of non-discrimination in the administration of tariff quotas. Article XIII:2 sets out the specific rules Members must observe if quotas or tariff quotas are used with respect to a product, in particular how shares of the quota are to be allocated among the various supplying countries.[42] Therefore, XIII:2 is logically concerned with the market for the product and what restrictions may be applied to that market. It is undeniable that the EC measure subject to this proceeding contains an import restriction, in the form of the preferential tariff quota for ACP bananas. Therefore, the EC was required to follow the allocation rules set forth in Article XIII:2. Whatever the result of an allocation according to those rules would have meant for the United States individually, the Panel correctly concluded that the shares accorded to the ACP countries (100 percent) were not consistent with the allocation rules in Article XIII:2.

47. Aside from its arguments that the United States is not "aggrieved", the EC does not argue that the Panel erred in its analysis of Article XIII:2 and XIII:2(d).

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[41] EC's Appellant Submission, para. 149. (Emphasis in original).

[42] *Bananas III* (AB), paras. 160 - 161.

III. THE PANEL CORRECTLY REJECTED THE EC'S PROCEDURAL CLAIM THAT THE EC-US BANANAS UNDERSTANDING BARRED THE UNITED STATES FROM BRINGING THIS COMPLIANCE PROCEEDING

48. In its Notice of Appeal, the EC asserts two claims of error by the Panel related to alleged "legal effects" of the EC-US Bananas Understanding (Understanding). The EC challenges the Panel's:

(a) findings concerning the "legal effects" of the Understanding; and,

(b) interpretation and application of the principle of good faith in WTO law.

49. The Panel correctly noted that the core of the EC's arguments in this respect has been that:

> 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.[43]

50. The Panel correctly found that the EC "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."[44] The Panel looked at the text of the Understanding itself and correctly determined that nothing in that text expressed a direct or even indirect acceptance by the United States of the Cotonou Preference beyond 2005.

51. The Panel also analyzed the text of the Doha Waiver, given that the only possible link to an "acceptance" by the United States regarding the Cotonou Preference was through the paragraph expressing the U.S. agreement to "lift its reserve concerning the waiver of Article I of the GATT 1994."[45] The Panel correctly found that there could be no "indirect acceptance" through this language because that the Doha waiver did "not provide that it would unconditionally apply beyond 2005 in regard to bananas."[46] Indeed, the Panel correctly noted that "one of the main points of contention between the parties to this compliance dispute

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[43] Panel Report, para. 7.143, quoting from EC's first written submission to the Panel, para. 16.

[44] Panel Report, para. 7.151.

[45] Understanding on Bananas, paragraph E. WT/DS27/59; G/C/W/270 (2 July 2001).

[46] Panel Report, para. 7.150.

concerns the conditions of the validity of the Doha Waiver . . . to bananas in 2006-2007."[47]

52. The EC's arguments with respect to these two claims are merely continued attempts at reading something into the Understanding that is just not there - that the United States "accepted" the continued existence of the preference for ACP countries - while at the same time reading out of the Doha waiver the annex setting out the conditions under which the Doha waiver would expire with respect to bananas before the end of 2007.

53. Finally, the United States notes that the EC has not challenged the Panel's correct analysis of the expiration of the Doha waiver in 2006, and the consequential finding by the Panel that the EC's measures were inconsistent with Article I of the GATT 1994.

A. The Panel Did not Err in its Conclusion that the EC-US Understanding Does not Have the Legal Effects Alleged by the EC

54. The Panel correctly noted, in agreeing with the panel in *India - Autos*, that the issue of whether a mutually agreed solution may prevent parties from bringing compliance proceedings "is not expressly addressed in the DSU."[48] Just like the panel in *India - Autos*, it correctly declined to address the broader issue of whether a mutually agreed solution could bar a complaining Member from having recourse to Article 21.5 proceedings. Nonetheless, just like the panel in *India - Autos*, it proceeded to analyze the terms of the Understanding itself to determine whether the Understanding could have the effect the EC alleged.[49]

55. The United States understands the Panel's order of analysis to be a reflection of its attempt to address the three main arguments made by the EC with respect to its preliminary objection - that the Understanding was a mutually agreed solution that barred the U.S. claim; that alternatively, the Understanding was a legally binding agreement with the same effect; and, finally, that the principle of "good faith"barred the U.S. claim. These three arguments all hinge on the EC's claim that the United States accepted the continued existence of the ACP preference. To address each of these, the Panel, following the analytical framework laid out in *India - Autos*, had to begin by looking at the text of the Understanding itself in light of the EC allegations.

1. The Panel Did not Establish Preconditions for All Mutually Agreed Solutions; It Merely Assessed the Understanding at Issue in this Proceeding

[47] Panel Report, para. 152.

[48] Panel Report, para. 7.91, quoting from panel report in *India - Autos*, para. 7.114.

[49] Panel Report, paras. 7.89 - 7.93.

56. The EC takes issue with what it calls the Panel's "definition of 'mutually agreed solution'." The EC argues that the Panel has established "prohibitive conditions" that must be met in order for a mutually agreed solution to have the preclusive effect that the EC alleges.[50] The Panel did no such thing, and, as will be discussed below, there is no such preclusive effect for mutually agreed solutions in any case.

57. The EC mischaracterizes the Panel's statement in paragraph 7.107. The Panel did not set out three "conditions" that every mutually agreed solution must meet. The Panel merely explained that based on the "three reasons *taken together*" (emphasis in original) it considered that the Understanding did not, as a matter of fact, have the legal effect that the EC argued.

58. Indeed, in paragraph 83 of its appellant submission, the EC sets out a number of factors that should be examined in deciding whether an agreement qualifies as a mutually agreed solution in lieu of what the EC claims the Panel did. The EC states that the qualification of an agreement as a mutually agreed solution should depend on "the content of the agreement", "in particular the rights and obligations mutually accepted by its signatories", and the characterization of the agreement as a "mutually agreed solution" by its signatories.[51] These are precisely the factors that the Panel took into account in its analysis. It examined the content of the Understanding in the section entitled "The terms and main elements of the Bananas Understanding."[52] In doing so, it correctly assessed the obligations that were expressly agreed to by each signatory to the Understanding. In addition, it is incorrect to say that the Panel did not examine the issue of the significance of the characterization of a mutually agreed solution by the signatories.[53] Needless to say, the problem here is that the EC insists on characterizing the Understanding as something the United States never intended it to be.

59. The EC is therefore appealing something that the Panel did not do. The Appellate Body can therefore dispose of this aspect of the EC's appeal simply by finding that the EC has misunderstood the Panel's approach.

60. Turning to the substance of the three points that the Panel noted in paragraph 7.107 of its report, the EC first takes issue with the "first condition" set out by the Panel. The first reason noted by the Panel was that the "Bananas Understanding provides only for a means, i.e. a series

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[50] The United States notes that contrary to what the EC alleges, the Panel was clear to state that it was basing its conclusion on the three reasons "taken together". See Panel Report, para. 7.107.

[51] EC's Appellant Submission, para. 83.

[52] See e.g. Panel Report, paras. 7.94 - 7.110; also paras. 7.111 - 7.120.

[53] Panel Report, paras. 7.131-7.141.

of future steps, for resolving and settling the dispute."[54] This flows from paragraph A of the Bananas Understanding, which clearly states that "[t]he European Communities and the United States have identified the means by which the long-standing dispute over the EC's banana regime can be resolved." The rest of the Bananas Understanding sets out the various subsequent steps that the parties to it were to follow, culminating with the EC introduction of a tariff only regime for imports of bananas no later than January 1, 2006.

61. The Panel recognized that given the multi-year, multi-step nature of the roadmap set out in the Understanding, it would have been impossible to say in 2001 that the dispute was settled. Indeed, the EC-US Understanding nowhere says that. The EC assertion that the Panel has set a "condition" "that only agreements recording measures that have already been implemented should qualify as 'mutually agreed solutions'" is false.[55] The Panel has merely set out the facts based on a correct reading of the terms of the Understanding.

62. The EC's argument about the "second condition" is equally wrong. The Panel did not set a "condition" that an agreement cannot qualify as a mutually agreed solution if it is concluded after the adoption of DSB recommendations and rulings. The Panel merely used the fact that the Understanding was agreed to subsequent to recommendations and rulings of the DSB as relevant historical context for assessing the European Communities' preliminary objection."[56] That context provided a basis for the identification of the "means by which" this dispute could be resolved: " the Panel notes a close link between each of the following: (i) the DSB recommendations and related suggestions made previously in this 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."[57] Thus, of particular relevance was the fact that in order to secure a solution to the dispute, the parties to the Understanding would have to fulfill all the steps included in it. It is a fact that in this compliance proceeding there is a dispute regarding whether the EC complied with the final step set out in the Understanding. In summary, contrary to the EC's assertions, the Panel did not develop a legal interpretation as to how the timing of agreements generally can affect whether they are mutually agreed solutions or not. The Panel simply noted that, in this case, the sequence of events helped to understand the nature of the Understanding.

63. The EC's arguments about the third purported "condition" are likewise wrong. Again,

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[54] Panel Report, para. 7.107, subparagraph (a).

[55] EC's Appellant Submission, para. 75.

[56] Panel Report, para. 7.121 - 7.130.

[57] Panel Report, para. 7.127.

the Panel was not identifying a "condition" or a "legal interpretation" of what types of agreements qualify as a "mutually agreed solution", but was making a correct assessment of the fact that from the beginning the United States has disagreed with the EC's characterization of the Understanding as a "mutually agreed solution". The United States directs the Appellate Body to paragraphs 33 through 35 of its second written submission to the Panel.

64. The United States cannot help but be surprised by the EC's mischaracterization of the Panel's reasoning. The EC argues that the Panel's "erroneous legal interpretation" is based on reading Article 3.6 as requiring "that mutually agreed solutions be notified to the DSB jointly".[58] The Panel clearly stated that "Article 3.6 of the DSU uses the passive voice, and it does not specify whether the parties shall notify a mutually 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."[59] The Panel went on to state that it was "not address[ing] whether the Bananas Understanding was notified properly under Article 3.6 of the DSU".[60]

2. The Panel Did Not Err in its Conclusion that the EC-US Understanding Does Not Have the Legal Effects Alleged by the EC

65. In paragraphs 85 to 91 of its Appellant's Submission the EC claims that the Panel has "introduce[d] an erroneous limitation on the types of other 'legally binding agreements' that can be enforceable and produce full legal effects in the WTO legal order."[61] The Panel did no such thing. The Panel declined to agree with the EC's unsupported arguments that the Understanding, whether cast as a mutually agreed solution or a binding bilateral agreement, precluded the United States from having recourse to Article 21.5 of the DSU because as a matter of fact the Understanding plainly did not contain such a limitation. As the United States has already noted, the Panel declined to make a finding on the general issue of whether a mutually agreed solution or legally binding agreement between parties to a dispute may prevent such parties from bringing compliance disputes[62]. The Panel did note, in support of its finding that the Understanding did not have such effect, that in light of the requirement contained in Articles 3.5 and 3.7 of the DSU that any mutually agreed solution must be consistent with the covered agreements, it was "convinced that a complainant must have the right of having recourse to WTO dispute

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[58] EC's Appellant Submission, para. 82.

[59] Panel Report, para. 7.132.

[60] Panel Report, para. 7.133.

[61] EC's Appellant Submission, para. 87.

[62] Panel Report, para. 7.91.

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."[63]

66. The United States notes that the EC's arguments in this section are limited to claiming that somehow the Panel's specific finding on the interpretation of the EC-US Understanding will cast doubt on a number of *other* procedural agreements entered into by WTO Members. The EC has presented no legal arguments as to why the Panel's fact-specific conclusions with respect to the EC-US Understanding actually at issue in this proceeding should be reversed.

67. The EC position, if adopted by this Panel, would lead to very unfortunate consequences: a responding Member that failed to comply with the terms of a mutually agreed solution would appear to be able to claim immunity both from further proceedings on the original dispute (by virtue of the EC position on the legal effect of mutually agreed solutions) as well as from a claim under the mutually agreed solution (in view of the fact that mutually agreed solutions are not included in the list of covered agreements in the DSU). Nothing in the DSU suggests that a complaining Member should lose its rights in such a way.[64] The EC's alleged concern that a different result will lead to legal uncertainty that terms agreed will not be respected[65] rings hollow when one of the principal issues in this proceeding is the fact that the EC failed to fulfill the final step contemplated by the Understanding.

3. The Panel Did Not Err with Respect to the Alleged Principle of Good Faith

68. The EC's "good faith" arguments proceed from mistaken premises. Even if one accepted that the general principle of international law that a party to an agreement is to perform that agreement in good faith has any relevance, the issue is whether the EC is in compliance with its WTO obligations - the factual underpinning of the EC's argument is absent.

69. It is clear from the text of the Understanding that what the United States agreed to do was "lift its reserve concerning the waiver of Article 1 of the GATT 1994" requested by the EC.[66]

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[63] Panel Report, para. 7.120.

[64] There is no basis in the DSU for attributing any legal consequences to a mutually agreed solution other than the specific ones listed in Articles 3.6, 12.7, and 22.8. 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 attribute to such solutions.

[65] EC's Appellant Submission, para. 90.

[66] Paragraph E of the US - EC Understanding.

The United States did that. The United States did not, however, agree that in lifting its reserve it would have less rights than any other WTO Member after the waiver was adopted. The EC is wrong in stating that the United States is "challenging the Doha waiver".[67] The United States challenged an EC measure that lost the protection of the waiver because the EC failed to comply with the terms of the waiver. The United States has done nothing inconsistent with its commitments under the Understanding or with the waiver.

70. The EC alleges that one of the Panel's errors is that it "does not provide any justification for its conclusion" in rejecting the EC's allegations regarding good faith.[68] Indeed, the EC even alleges, outside the scope of its notice of appeal, that the Panel acted inconsistently with Article 11 of the DSU in this regard. We request that the Appellate Body disregard this claim consistent with its approach in disputes such as *US – Countervailing Measures*.[69] In any case, nothing could be further from the truth.

71. Having already thoroughly analyzed the text of the Understanding with respect to the EC's other arguments, the Panel correctly acknowledged this in its discussion regarding the EC's arguments on good faith:

> 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.[70]

72. The Panel also correctly notes that in this compliance proceeding the United States is alleging that the EC has failed to comply with one of the terms of the Understanding - that the EC introduce a tariff only regime for imports of bananas by January 1, 2006.[71] The Panel was right to note, therefore, that the EC's argument about an "alleged parties' one-sided compliance with the Bananas Understanding has limited relevance for assessing whether the Bananas

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[67] EC's Appellant Submission, para. 92.

[68] EC's Appellant Submission, para. 94. In this vein, the United States is puzzled by the EC's allegation that "[t]here is not a single line in the Panel Report providing the reasons for which the Panel rejects these arguments." (EC's Appellant Submission, para. 96).

[69] *US – Countervailing Measures*, para. 74 ("if appellants intend to argue that issue [and Article 11 claim] on appeal, they must refer to it in Notices of Appeal in a way that will enable appellees to discern it and know the case they have to meet.")

[70] Panel Report, para. 7.159.

[71] The United States notes that this step is expressly set out in paragraph B of the Understanding, as opposed to the EC's claim regarding the U.S. acceptance of the Cotonou Preference which is nowhere to be found.

Understanding prevents the United States from bringing this compliance dispute."[72]

73. The EC's second and third allegations of error by the Panel center around the EC's disregard for what the Appellate Body itself has found with respect to Article 3.10 of the DSU. Contrary to EC allegations, the Panel did not err in its legal interpretation of the principle of good faith and Article 3.10 of the DSU."[73]

74. Article 3.10 provides, in relevant part: "It is understood . . . that, if a dispute arises, all Members will engage in these procedures in good faith in an effort to resolve the dispute." Article 3.10 is not a general incorporation of "good faith" principles of public international law. It is useful to note that Article 3.10 expresses an "understanding", not an obligation. In addition, Article 3.10 simply notes that, when a dispute has been initiated, Members will make best efforts to resolve it.

75. In *Argentina – Poultry* the panel, building on the Appellate Body's findings in *US – Offset Act (AB)*, noted that "[i]t is clear to us . . . that such findings [that a Member has not acted in good faith] should not be made lightly. In *US – Offset Act (AB)* the Appellate Body found that:

> 'Nothing, however, 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.'[74]

76. The *Argentina – Poultry* panel then went on to find that: "two 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'."[75] In that case, Argentina had not alleged that Brazil had violated any substantive provision of the WTO agreements, there was no reason to examine the second condition, as there was no basis to find that Brazil had violated the principle of good faith in bringing the proceeding.[76]

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[72] Panel Report, para. 7.157.

[73] EC's Appellant Submission, para. 101.

[74] *Argentina – Poultry*, para. 7.35, citing to *US – Offset Act (AB*), para. 297.

[75] *Argentina – Poultry*, para. 7.36.

[76] *Id*.

77. If one ignored the fact that the United States did not "accept" in the Understanding not to challenge the EC measures once the EC failed to abide by the terms of the waiver, the same reasoning and result would apply in this case. There is no allegation here that the United States has violated any of its WTO obligations. On the facts and on the law, the Panel reached the correct conclusion.

4. Other EC Arguments Are Also Unavailing

78. The EC's arguments in paragraphs 102 through 106 are related to the EC's continued insistence that in agreeing to "lift its reserve", the United States gave up its rights. We have nothing further to add on this point at this time than what the United States submitted to the Panel. With respect to the EC's arguments in paragraphs 109 and 110, the responsibility of the Panel was to analyze the consistency of the EC's measures with the EC's WTO obligations. The Understanding came before the Panel because the EC raised it as a defense. The Panel's approach was correct and the EC's suggestion to the contrary is wrong. Finally, the EC asserts that the "Panel's analysis of the legal effects of the Understanding in the context of the European Communities' second preliminary objection was inconsistent with its analysis of the same legal effects in the context of the European Communities' third preliminary objection."[77] This assertion is symptomatic of the EC's approach in this appeal – to continue to insist that the Panel should have read into the Understanding terms that are simply not there (e.g., that the United States accepted the continuance of the Cotonou Preference through 2007) – while at the same time read out of the Understanding the final step that the EC agreed to take as part of the roadmap to resolve this dispute: to introduce a tariff only regime by 2006.

B. The Panel Did not Err in Finding that the Banana Import Regime Subject to This Proceeding was a "Measure Taken to Comply"

79. The EC's main argument is that the Panel "failed to take properly into consideration the legal effects of the [EC-US Bananas] Understanding and , in particular, of the agreement between the United States and the European Communities that the United States' right to retaliate would terminate upon the European Communities' implementation of the tariff-quota-based regime described in paragraph C-2 of the Understanding."[78] The EC argues that the "importance placed by the United States on the Phase II regime and the important link between the termination of retaliation and the implementation of that regime support the conclusion that the United States and the European Communities had agreed to consider the Phase II regime as the 'measure taken to comply' with which the dispute would be over.[79] The Panel rightfully rejected this EC argument and so should the Appellate Body.

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[77] EC's Appellant Submission, para. 108.

[78] EC's Appellant Submission, para. 40.

[79] EC's Appellant Submission, para. 41.

80. The Understanding makes three simple points about measures that the EC was agreeing to take.[80] The Understanding's first sentence (letter A of the Understanding) says that the United States and the EC have identified the means to resolve the banana dispute. The Understanding's second sentence (letter B) describes that means: "the EC will introduce a Tariff Only regime for imports of bananas no later than 1 January 2006." Letter C provides that "In the interim," the EC will implement two other import regimes. The structure and wording of the Understanding therefore make clear that the resolution of the dispute depended on an EC measure to be taken on January 1, 2006 – not merely on the "interim" actions taken before that date. The entire point of the Understanding was to commit the EC to bring itself into WTO compliance definitively on January 1, 2006, after the expiration of an agreed set of "interim" transition provisions. In this connection it also bears recalling that in letter E of the Understanding, the United States and the EC agreed that "a waiver of Article XIII of the GATT 1994 [was] needed for" the interim regime, and that the waiver would expire on December 31, 2005. This confirms that the United States and the EC, when they entered into the Understanding, considered that further measures, beyond the interim regime, would be necessary to actually comply with the recommendations and rulings of the DSB in this dispute.

81. In this factual context, there is no basis whatsoever for the EC's contention that the measures at issue in this proceeding are *not* "measures taken to comply" with the DSB's rulings and recommendations in this dispute. The parties expected the EC to remove its interim banana import regime and to introduce a new one that would resolve the dispute on January 1, 2006. And, as expected, the EC removed its interim banana import regime and introduced a new one with effect from January 1, 2006 (though regrettably the substance of the new EC regime respected neither the Understanding nor the EC's WTO obligations). For these reasons, the measures at issue in this proceeding are "measure taken to comply" with the DSB rulings and recommendations in this dispute. The [Panel understood this, and the] Appellate Body need go no further than this to dispose of the EC's appeal.

82. Once again, the EC bases its argument upon a false premise (the incorrect assertion that the United States terminated its "right to retaliate") and upon fallacious logic (the incorrect argument that termination of the imposition of duties necessarily implied acceptance of the interim regime as implementation).[81]

83. We turn first to the EC's false premise. The text of the EC-US Understanding nowhere speaks of a termination of the U.S. right to retaliate. Paragraph D.1 uses the phrase

[80] Panel report, page B-3.

[81] The EC even misquotes the Panel's findings from paragraph 7.404 of the Panel Report by replacing the phrase "termination of the United States' suspension of concessions" with its preferred reading "termination of US retaliation". The United States wonders how this is consistent with Article 3.10's admonition that Members will engage in dispute settlement procedures in good faith.

"provisionally suspend its imposition of the increased duties", while paragraph D.2 uses the phrase "terminate its imposition of the increased duties."[82] The Understanding does not use the phrase "terminate its right to retaliate".

84. Moreover, as the United States explained at the meeting of the Panel with the parties:

> The EC argues that the fact that the United States agreed to terminate its application of the authorized suspension of concessions and related obligations upon the completion of Phase II "confirms" that the implementation of that import regime was the agreed "measure taken to comply". As we have already explained, the 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. (Emphasis added).

85. It is plainly incorrect to say that U.S. "retaliation rights terminated." The DSB granted the United States authorization to suspend concessions or other obligations on April 19, 1999. It is correct that the United States agreed to "terminate *the imposition* of the increased duties" – *i.e.,* to take the steps required under its domestic law no longer to impose its retaliation – under the conditions set forth in paragraph C(2) of the Understanding. 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 Understanding, however, includes no such clause.[83]

86. Therefore, it is clear that the factual premise on which the EC claim of error is based is wrong. In addition, the conclusions that the EC would like to draw from the U.S. termination of its imposition of duties is also wrong. A Member can choose not to apply its WTO authorization (or not to apply it in full) for all sorts of reasons. As the Panel explained, "Members have the right but not the obligation to retaliate."[84] The fact that a complaining Member chooses not to exercise that right, does not mean that the complaining Member has accepted that the responding

[82] Exhibit US-2.

[83] *See* U.S. response to Panel question No. 40.

[84] The Panel correctly notes to the fact that in this dispute Ecuador sought and obtained authorization to retaliate but chose not to retaliate. Panel Report, para. 7.396.

Member's measures are (or have become) consistent with its WTO obligations.[85] In this connection, the United States recalls that Article 3.7 of the DSU provides that the suspension of concessions is only one possible response to a failure to come into compliance; Article 3.7 favors other steps, such as "the provision of compensation . . . as a temporary measure pending the withdrawal of the measure which is inconsistent with a covered agreement." The interim regime contemplated in letter C of the Understanding – as a temporary measure pending the agreed-upon resolution of the dispute – is in that sense analogous to the compensation mentioned in DSU Article 3.7 and, like such compensation, in no way suggests that the parties considered the interim regime to constitute implementation of the recommendations and rulings of the DSB.

87. The EC makes numerous other allegations of error by the Panel with respect to the Panel's determination that the EC's bananas regime subject to the proceeding was a "measure taken to comply" and, therefore, that the United States had properly brought this dispute under Article 21.5 of the DSU. Most of these allegations are based on mischaracterizations of the Panel Report. The United States will limit its comments in this submission, but would be happy to address any questions the Appellate Body may have at the oral hearing.

88. First, the EC alleges that the Panel "erred when it failed to take into consideration the *lack of any link* between the contested measure and the DSB recommendations and rulings in 1997."[86] (Emphasis added). It is the EC that continues to allege the lack of any link, when the United States clearly demonstrated, and the Panel agreed, that there is a clear link between the recommendations and rulings and the EC regime subject to this proceeding. As it did before the Panel, the EC argues that the "findings and recommendations of the Appellate Body in [*Bananas III*] does not reveal any element that could support the 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."[87] This is correct, but besides the point. It is true that the EC had options available to it in order to come into compliance with the DSB recommendations and rulings. Nonetheless, it agreed, through the express terms of the Bananas Understanding - the "means" by which this long-standing dispute should have been resolved - to take certain interim steps culminating in a tariff-only regime by January 1, 2006. While it implemented a new regime on January 1, 2006, it was regrettably not a tariff-only regime and not consistent with the covered agreements.

89. In paragraphs 47 through 52 of its Appellant's Submission, the EC alleges that the Panel

[85] In this connection the United States cannot help but be struck by the inconsistency between the EC's position in this appeal and its position in the pending *Hormones* appeal; in that other appeal, the EC argues that a complaining Member must remove its suspension of concessions even if it has doubts about the WTO-consistency of a measure taken to comply.

[86] EC's Appellant Submission, para. 43.

[87] *Id*.

failed to examine the "specific measure at issue" and based its findings on the similarities between the regime subject of the original *Bananas III* proceeding and this one, but not the differences. Even the most casual reading of the Panel Report reveals that this is just incorrect. The Panel looked very carefully at the regime and its underlying measures. It indeed noted similarities because the regime under review and the prior regime were both regimes intended to provide a preference to ACP bananas.

90. In paragraphs 53 through 60, the EC alleges that the Panel erred in relying on three prior proceedings to support its finding that the regime was a measure taken to comply. Specifically, the EC alleges that the Panel cannot use the findings of the first Ecuador Article 21.5 proceeding in the current proceeding. Ironically, the EC also argues that the Panel could not rely on statements made by the arbitrators in the Article 22.6 arbitration which was between the EC and the United States. Setting aside the fact that adopted panel reports create legitimate expectations and should be taken into account when relevant[88], the Panel is only using these reports as further evidence of the link between the DSB's recommendations and rulings and the regime at issue. This is particularly relevant in the context of a dispute that has lasted so long.

91. In paragraph 57 of the EC's Appellant Submission, the EC appears to be making a claim of inconsistency with Article 11 of the DSU. The United States again notes that in its Notice of Appeal, the EC does not include an Article 11 claim. Therefore, such a claim, if it is now being asserted, is not properly before the Appellate Body.[89]

92. The mere suggestion that the Panel may have acted inconsistently with Article 11 of the DSU with respect to this issue is completely unwarranted. The Panel's analysis of this issue is extensive, spanning 51 pages of the Panel's report, without counting the 20 pages in which the Panel summarizes the arguments of the parties. In that analysis, the Panel thoroughly considered every argument made by the parties (and arrived at the correct conclusion). There can be no doubt that as a matter of fact there is a clear continuum of events that lead one from the original recommendations and rulings of the DSB in *Bananas III* to the regime that is the subject of these proceedings. That the path is long and tortuous does not alter that fact. The length of time and the many events along the way are a direct result of the numerous attempts by the affected parties to provide the EC with the necessary political space to finally resolve this dispute and the continued refusal by the EC to do so. We refer the Appellate Body to our second written submission to the Panel, paragraphs 44 through 52, for our explanations of why the EC's regime subject of this proceeding is a "measure taken to comply".

93. The EC's fourth allegation is with respect to the Panel's use of the Doha waiver in its

[88] *Japan – Alcohol Taxes*, p. 14.

[89] *US – Countervailing Measures*, para. 74 ("if appellants intend to argue that issue [and Article 11 claim] on appeal, they must refer to it in Notices of Appeal in a way that will enable appellees to discern it and know the case they have to meet.")

analysis is likewise unwarranted. The Panel was using the fact that the waiver was time limited as further evidence of the fact that implementation of Phase II interim regime could no be the final measure taken to comply. The Panel did not rely solely on the waiver to make its determination.

94. Finally, in paragraph 67 the EC argues that the Panel failed to identify "the criteria that would allow it to judge whether the similarities were more important than the differences" between the regime subject of the original recommendations and rulings and the regime subject to these proceedings. This is just the flip side of its argument that the Panel only looked at the similarities. The United States would note that subpart (iv) of the Panel's analysis is entitled "Criteria for assessing whether the current EC bananas import regime is a measure taken to comply." The EC may disagree with the Panel's conclusion, but it cannot claim that the Panel did not do a thorough analysis.

IV. THE PANEL DID NOT ERR IN ITS FINDING RELATED TO NULLIFICATION OR IMPAIRMENT

95. It is disingenous for the EC to allege that the Panel "*confused* the notion of 'nullification or impairment' in Article 3.8 of the DSU with the 'interest' that a complaining party must have in order to have 'standing' to commence dispute settlement proceedings." (Emphasis added). It was the EC itself who "confused" the issues by arguing that as a threshold matter the Panel needed to determine whether the United States had "standing" to bring this proceeding and, if so and if there was a violation, whether "there is nullification or impairment of a benefit accruing to the United States for which the European Communities can face suspension of concessions."[90]

96. This issue has been decided in this dispute several times already. As the United States explained in its first submission to the Panel[91], and as the Panel recognized in its analysis in paragraphs 8.9 and 8.10 of the Panel Report, the fact that the Panel was established under Article 21.5 of the DSU carries with it certain consequences. Of most immediate relevance to the legal arguments of the parties is the consequence that, as the Appellate Body has made clear, an Article 21.5 panel "conduct[s] its work against the background of the original proceedings, and with full cognizance of the reasons provided by the original panel. The original determination and original panel proceedings, as well as the redetermination and the panel proceedings under Article 21.5, form part of a continuum of events."[92] It is well established that adopted panel and Appellate Body reports "are treated as a final resolution to a dispute between the parties to that

[90] EC First Written Submission to the Panel, paras. 73 and 74.

[91] US First Written Submission to the Panel, para. 26.

[92] *Mexico - HFCS (21.5)(AB)*, para. 121.

dispute."[93]

97. Thus, it is relevant that in *Bananas III*, the Appellate Body report which formed the basis for the rulings and recommendations addressed to the EC in this dispute (and which one assumes the EC has accepted), the Appellate Body rejected similar arguments by the EC. Both the findings and the reasoning of the Appellate Body remain 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. The Appellate Body quoted the panel in *United States – Superfund*:

> Article III:2, first sentence, cannot be interpreted to protect expectations on export volumes; it protects expectations on the competitive relationship between imported and domestic products. A change in the competitive relationship contrary to that provision must consequently be regarded *ipso facto* as a nullification or impairment of benefits accruing under the General Agreement. A demonstration that a measure inconsistent with Article III:2, first sentence, has no or insignificant effects would therefore in the view of the Panel not be a sufficient demonstration that the benefits accruing under that provision had not been nullified or impaired even if such a rebuttal were in principle permitted.[94]

98. The EC argues that "[i]n order to act consistently" with the *Superfund* reasoning, the Panel should have analyzed the trade data supplied by the EC.[95] That assertion completely disregards the conclusion of the *Superfund* panel, and the Appellate Body in Bananas III [96], that it was unnecessary to examine the parties' submissions regarding trade effects in order to determine that benefits accruing to the complaining Member had been nullified or impaired, linking its decision to the breach of the legal provision, Article III:2, alone. The same result must apply here.

99. The 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 previously 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."[97] In addition, "the internal market of the United States for bananas could be affected by the EC banana regime and by its

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[93] *EC - Bed Linen(21.5)(AB)*, paras. 91-93. See also *US - Shrimp (21.5)(AB)*, para. 97.

[94] *Bananas III (AB)*, para. 252, quoting *US – Superfund*, para. 5.1.9.

[95] EC's Appellant Submission, para. 164.

[96] *See Bananas III (AB*), para. 253

[97] *See Bananas III (AB)*, para. 251.

effects on world supplies and world prices of bananas."[98] These realities have not changed, and as the Panel found, "[t]he arguments advanced by the European Communities on the alleged lack of nullification or impairment have not rendered irrelevant the considerations made by the panel and by the Appellate Body in the course of the original proceedings, regarding the actual and potential trade interests of the United States in the dispute."[99]

100. Despite this, the EC insists that the Panel was "wrong to rely on the findings of the Appellate Body in the *EC-Bananas III* case in 1997, because the facts of the present case are very different from the facts of 1997."[100] The EC continues by stating, "That report of the Appellate Body confirms that the finding of a 'nullification or impairment' of a benefit accruing to the United States was based on the European Communities' violation of the GATS. As the Appellate Body stated, 'the claims under the GATS and the GATT 1994 relating to the EC import licensing regime are inextricably interwoven in this case,'" citing to paragraph 137 of the report of the Appellate Body in *Bananas III*.[101]

101. The EC's quote selection is curious. In the paragraph preceding its chosen excerpt, the Appellate Body clearly states that: [w]e are satisfied that the United States was justified in bringing its claims under the GATT 1994 in this case,"[102] and in that same paragraph, the Appellate Body also makes the oft-cited statement regarding the United States being a producer of bananas, having a potential export interest and having an internal market that could be affected by the EC banana regime.[103] The Appellate Body's comment about the GATS and GATT claims being "interwoven" is a separate point. Thus, the EC is wrong to say that the Appellate Body's finding in *Bananas III* "was based on the European Communities' violation of the GATS."

102. The EC also seeks to rely on the 1999 Decision by the Arbitrators for support.[104] Yet, this Decision is a decision in the Article 22.6 arbitration in which the issue was, *inter alia*, the determination of the level of nullification or impairment suffered by the United States in order to determine the equivalent level of suspension of concessions. The issue of the existence of nullification or impairment as a result of a violation is separate and distinct from the issue of what the actual level of nullification or impairment is. Once again, the EC is confusing the two

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[98] *Id.*

[99] Panel Report, para. 8.10

[100] EC's Appellant Submission, para. 167.

[101] EC's Appellant Submission, para. 167.

[102] *Bananas III (AB)*, para. 136.

[103] *Id.*

[104] EC's Appellant Submission, para. 168.

issues.

103. This issue was addressed in the answer to questions from the Panel. Although this information is part of the record, we would like to reprint part of our answer to Question 24:

> 45. This Panel does not have before it the issue of what is the level of nullification or impairment suffered by the United States for purposes of determining the level of suspension of concessions for which it could receive authorization. Therefore, what standard the Panel would use to determine this is not relevant. The question of whether the United States has "standing" was settled by the Appellate Body in *Bananas III*. Indeed, the passage quoted by the EC, and related passages not quoted, support our views.
>
> 46. The passage quoted by the EC in paragraph 73 is taken from paragraph 6.10 of the *Bananas III* Article 22.6 proceeding. [footnote ommited.] Paragraph 6.10 must be read in conjunction with paragraphs 6.9 and 6.11. It is notable that in those paragraphs, the Arbitrators address similar arguments made by the EC in the earlier *Bananas III* proceedings. These three paragraphs summarize earlier findings with respect to the issue of the U.S. right to bring claims under the GATT 1994 against the EC's bananas regime and the difference between the existence of nullification or impairment where there is a violation and the "level" of nullification or impairment for purposes of an authorization to suspend concessions. The United States agrees with the analysis in these three paragraphs and would like to take this opportunity to recall them:
>
> > "6.9 In the original panel proceeding we held 'that under the DSU the United States has a right to advance the claims that it had raised in this case.' We recall the EC's argument in the original dispute that if a Member not suffering nullification or impairment of WTO benefits in respect of bananas were allowed to raise a claim under the GATT, that Member would not have an effective remedy under Article 22 of the DSU. We also note the complainants' argument in the original dispute that Article 3.8 of the DSU presupposes a finding of infringement prior to a consideration of the nullification or impairment issue, suggesting that even if no compensation were due, an infringement finding could be made. We agree." (Internal footnotes omitted).
> >
> > "6.10 The *presumption* of nullification or impairment in the case of an infringement of a GATT provision as set forth by Article 3.8 of the DSU cannot in and of itself be taken simultaneously as *evidence* proving a particular level of nullification or impairment allegedly suffered by a Member requesting authorization to suspend concessions under Article 22 of the DSU at a much later stage of the WTO dispute settlement system. The review of the level of nullification or impairment by Arbitrators from the objective benchmark foreseen by Article 22 of the DSU, is a separate process that is independent from the

> finding of infringements of WTO rules by a panel or the Appellate Body. As a result, a Member's potential interests in trade in goods or services and its interest in a determination of rights and obligations under the WTO Agreements are each sufficient to establish a right to pursue a WTO dispute settlement proceeding. However, a Member's legal interest in compliance by other Members does not, in our view, automatically imply that it is entitled to obtain authorization to suspend concessions under Article 22 of the DSU." (Emphasis in original).
>
> "6.11 Over the last decades of GATT dispute settlement practice, it has become a truism of GATT law that lack of *actual* trade cannot be determinative for a finding that no violation of a provision occurred because it cannot be excluded that the absence of trade is the result of an illegal measure." (Emphasis in original).

104. For the reasons stated above the EC's arguments regarding nullification or impairment must be rejected.

V. THE PANEL DID NOT ERR IN ITS HANDLING OF THE REPEAL OF THE EC REGULATION SUBJECT TO THIS PROCEEDING

105. The EC asserts that:

> (1) the Panel failed to correctly assess the facts of the case by refusing to take into account the fact that EC Regulation 1964/2005, the measure subject to this proceeding, was repealed on December 31, 2007[105], and
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> (2) "it is settled law that a panel cannot make any recommendations to the DSB with regard to measures that have ceased to exist following the establishment of the Panel."[106]

The EC is wrong on both counts.

106. As is clear from the record, this issue was not raised before the Panel until the interim review stage, three months after the Panel had its substantive meeting with the Parties (on November 6 and 7, 2007). The EC did not raise the issue of the alleged factual errors when it had the chance to comment on the descriptive sections of the panel report, which were circulated to the parties on January 11, 2008. As noted by the Panel, the EC stated in writing that it had no comments on the descriptive sections of the draft report.[107] It was not until the interim review

[105] EC's Appellant Submission, paras. 179 - 186.

[106] EC's Appellant Submission, para. 187.

[107] Panel Report, para. 6.14.

that the EC alleged that the descriptions of the measure are issue were incomplete, because they failed to mention that they had been repealed. In addition, the EC also requested that the Panel delete the draft recommendation because the measure was no longer in existence. These issues were discussed at an interim review meeting of the Panel with the parties held on February 25, 2008.

107. The United States begins by addressing the assertion that a Panel cannot make a recommendation with respect to a measure that ceased to exist following the establishment of the Panel.

108. It is incorrect to state that a panel is prohibited from including recommendations regarding measures that may no longer exist. Indeed, various panels and the Appellate Body have made recommendations on modified or expired measures.[108]

109. The EC relies on the report of the Appellate Body in *United States – Import Measures on Certain Products from the European Communities* for its proposition. However, the measure at issue in that dispute had ceased to exist prior to the establishment of the panel's terms of reference.[109] The situation in this dispute stands at the opposite extreme where the alleged repeal of the measure has arisen almost at the end of the proceeding.

110. According to the EC, EC Regulation 1964/2005 was repealed through Council Regulation 1528/2007. Council Regulation 1528/2007 was adopted on December 20, 2007 and came into effect December 31, 2007, when it was published in the Official Journal of the European Union. The Panel held its substantive meeting with the Parties on November 6 and 7, 2007, more than a month *before* Council Regulation 1528/2007 was even adopted and almost 2 months before the repeal took effect. Clearly, there would have been no time for the parties to address the significance, or lack thereof, of the new Council Regulation.

111. Regulation 1528/2007 was not a measure within the Panel's terms of reference. In addition, it could not be evidence relevant to the Panel's evaluation of the EC's bananas regime subject to this proceeding as that measure existed at the time of establishment of the panel. While the Appellate Body has said that: "steps and acts of administration that pre-date or post-date the establishment of a panel may be relevant to determining whether or not a violation [of a covered agreement] exists at the time of establishment,"[110] the EC is not asserting that Regulation 1528/2007 has relevance for determining consistency with the GATT 1994 of Regulation 1964/2005 "at the time of [panel] establishment." The EC is arguing that this post-establishment

[108] *See, e.g.*, *EC – Biotech*, paras. 8.16 & 8.36; *EC – Customs (AB)*, para. 310; Appellate Body Report, *Dominican Republic – Cigarettes (AB)*, para. 129.

[109] *US – Import Measures (AB)*, paras. 60-82.

[110] *EC - Customs (AB)*, para. 186 (internal quotes and footnote ommitted).

measure terminated the measure within the Panel's terms of reference.

112. The EC notes that after the interim review the Panel changed the text of paragraph 8.13 of the report. The EC alleges that the Panel amended the report to provide a " 'concealed' recommendation"[111] and the "Panel does not provide any explanation as to what this statement might mean."[112] The reason for this change is very simple - because this is a compliance proceeding, a new recommendation is not needed.

113. In its written comments on the interim report, the United States sought the elimination of the recommendation but for completely different reasons than the EC. A compliance panel is tasked with determining wether measures taken to comply exist, and, when such measures exist, whether they comply with the recommendations and rulings of the DSB. It suffices for the Panel to conclude that the EC has failed to implement the recommendations and rulings of the DSB, as the Panel did in paragraph 8.4.[113] Therefore, the United States requested that the recommendation be deleted.

114. Turning briefly to the first claim of error alleged by the EC, that the Panel failed to properly assess the facts, the United States notes that the EC, once again, appears to be improperly raising an Article 11 claim in its submission.[114] We once again request that the Appellate Body disregard this claim, consistent with its approach in disputes such as *US – Countervailing Measures*. However, for completeness sake, we make the following comments.

115. The EC's attempt to introduce evidence about the alleged repeal of EC Regulation 1964/2007 during the interim review stage is contrary to both the DSU and the *Working Procedures for the Panel.* DSU Article 15.2 permits parties, during the interim review stage of the proceedings, to submit comments on the draft report and to make requests for "the panel to review precise aspects of the interim report." The Appellate Body in *EC – Sardines* stated that "[a]t that time, the panel process is all but completed; it is only – in the words of Article 15 – 'precise aspects' of the report that must be verified during the interim review . . . this, in our view, cannot properly include an assessment of new and unanswered evidence."[115] The Appellate Body confirmed that "the interim stage is not an appropriate time to introduce new

[111] EC's Appellant Submission, para. 190.

[112] EC's Appellant Submission, para. 191.

[113] *See*, *e.g.*, *US – FSC (Second Article 21.5)(AB)*, para. 100(b) (the Appellate Body upheld the Article 21.5 panel's conclusion that the United States continued to fail to implement fully the operative DSB recommendations and rulings, and the Appellate Body made no recommendation itself).

[114] EC's Appellant Submission, para. 180.

[115] *EC – Sardines (AB)*, para. 301.

evidence."[116] This is indeed what the EC was attempting to do when it presented a 154-page document to the Panel and the United States for the first time at the interim review meeting held on February 25, 2008. The Appellate Body affirmed this limitation on the introduction of new evidence in its report in *EC – Customs*.[117]

116. In addition, paragraph 11 of the *Working Procedures for the Panel* requires that Parties "submit all factual evidence to the Panel as early as possible and no later than during the substantive meeting." Submission of evidence regarding the scope of the measure at issue at the interim report stage hardly meets this requirement.

117. Finally, the United States would note that the collective effect of four out of five requests during the interim stage, and in particular the ones with respect to paragraphs 2.36 and 8.13 of the interim report, seemed intended to elicit statements from the Panel to the effect that the EC was no longer in a situation of "non-compliance" because the challenged measure no longer exists. Whether that is the case on the facts and the merits was beyond the terms of reference of the Panel. Nonetheless, it is not clear what exactly has replaced the repealed measure.

118. For all the foregoing reasons, the EC's claims of error regarding the Panel's treatment of the alleged repeal of EC Regulation 1964/2007 should be rejected.

VI. THE PANEL DID NOT ERR IN NOT HARMONIZING THE TIMETABLE

119. The EC seeks reversal of the Panel's failure to harmonize the timetables of the procedures in this proceeding and in the similar proceeding brought by Ecuador.

120. The United States does not understand why the EC has included this element in its appeal in this proceeding. As the EC recognizes, the compliance panel in the U.S. proceeding is legally distinct from the compliance panel in the Ecuador proceeding.[118] However, the EC appears basically to be complaining that the Ecuador panel did not slow down its timetable to match the timetable in the U.S. proceeding. Indeed, of the panel actions described in paragraphs 9-18 of the EC Appellant Submission, not a single one involves the panel in the U.S. proceeding (that is, the panel to which this appeal relates).[119] The EC's concerns, therefore, are not directed to decisions

[116] *Id.*

[117] *EC – Customs (AB)*, para. 259.

[118] To be sure, the EC's drafting in this section tends to obscure this point and thus to confuse the issues, because the EC often refers to "the Panel" without being particularly clear which of the two panels it has in mind. See, e.g., EC's Appellant Submission, para. 11.

[119] As mentioned in the previous note, the EC's use of "the Panel" in paragraph 15 of its appellant submission is unclear. However, the reference to a timetable established on June 29 in the second sentence makes clear that the paragraph relates to the Ecuador panel; the panel in this proceeding had not yet been established on that

taken by the panel in the U.S. proceeding. On that basis alone this portion of the EC's appeal in this proceeding should be rejected.

121. Turning to the substance of the EC's appeal, the Panel stated its reasons for not harmonizing very clearly in paragraphs 7.7 - 7.11. The Panel carefully considered the issues presented by the request for harmonization and reached an appropriate decision that addressed all the procedural issues implicated by the EC's request. Indeed, the Panel made clear that it initially intended to harmonize the timetables but was not able to find a better alternative to the one it adopted.[120] As the Panel recognized, there was a two-month difference between the composition of the two panels. The Panel had to reconcile that difference with the fact that these proceedings are compliance proceedings, which are intended to be brief. Article 21.5 requires that panels circulate their reports within 90 days after the date of referral of the matter. Clearly a two-month delay in the Ecuador proceeding would have seriously compromised that DSU requirement. The fact that Ecuador, as the complaining party in the first proceeding, objected to delay its proceeding in order to allow for the U.S. proceeding to "catch up" is not unreasonable.[121] Contrary to the EC's assertions, the Panel did not "violate the procedural rights of [one Member] . . . in order to better protect the procedural rights of another."[122] In fact, in exercising its "margin of discretion" with respect to the procedural aspects of the proceedings, the Panel was careful to protect the due process rights of all parties. For example, it ensured that replies to questions and comments on replies in the U.S. proceeding were received before issuance of the interim report in the Ecuador proceeding in order to prevent the arguments of the parties being influenced by advance knowledge of the findings of the panel in the Ecuador proceeding.[123]

122. The EC argues that even a combined reading of the words "shall be harmonised" and "to the greatest extent possible" means that the timetable "must absolutely be harmonised at some stage"[124] [125] and that a panel could only not harmonize if it was "impossible" to do so.[126] Of

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date.

[120] Panel Report, para. 7.10.

[121] The United States would also note that this is the second time Ecuador has had recourse to Article 21.5 against the EC since the DSB adopted the recommendations and rulings in for *Bananas III* on September 25, 1997, almost eleven years ago. See WT/DSB/M37 (4 November 1997).

[122] EC's Appellant Submission, para. 30.

[123] Panel Report, para. 7.11.

[124] EC's Appellant Submission, para. 23.

[125] The EC argues that the phrase "to the greatest extent possible" can only apply to the first provision because, in its view, it is the only one for which "it makes sense" to have the qualification. EC's Appellant Submission, para. 21. The correct grammatical reading of the text of Article 9.3 leads to the conclusion that the

course, the EC's words "must absolutely . . . at some stage" are not words of the DSU text.[127] In this connection, the Appellate Body's approach to the term "shall" as it is found in Article 9.2 of the DSU is instructive.

123. Article 9.2 of the DSU reads in relevant part: "[i]f one of the parties to the dispute so requests, the panel shall submit separate reports on the dispute concerned." In *US-Offset Act (AB*), the Appellate Body determined that even though Article 9.2 explicitly provided that the panel "shall" submit separate reports if one of the parties requested, such a requirement could not be read in isolation of other provisions of the DSU and without taking into account the overall object and purpose of the DSU.[128] In this regard, the Appellate Body noted that Article 3.3 of the DSU provides that "the prompt settlement of disputes is essential to the effective functioning of the WTO." The Appellate Body reasoned that if the right to a separate report were unqualified, "[s]uch an interpretation would clearly undermine the overall object and purpose of the DSU to ensure the 'prompt settlement' of disputes."[129] The same reasoning applies here with greater force, given the fact that the "shall" in Article 9.3 is qualified by "to the greatest extent possible."

124. In addition, the Appellate Body has explained that panels have a "margin of discretion" to deal with procedural issues, in accordance with due process.[130] Furthermore, the Appellate Body has instructed that "an appellant requesting the Appellate Body to reverse a panel's ruling on matters of procedure must demonstrate the prejudice generated by such legal ruling."[131]

125. The EC contends that the "Panel's failure to harmonise the proceedings had led to a situation where the timetables of the two proceedings had become conflicting and imposing an undue limitation on the European Communities' ability to properly defend itself."[132] While it is

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qualification "to the greatest extent possible" applies to both having the same panelists serve on both panels and having the timetables harmonized.

[126] EC's Appellant Submission, para. 22.

[127] Furthermore, the EC's approach in fact proves too much. Under the EC's approach, if a second panel were established the day before a panel circulated its final report, the final report would have to be held up for the entire time of the proceedings of the second panel since the only date left for the two panels to satisfy the EC's proposed "absolute" requirement would be the date of circulation of the final report.

[128] *US – Offset Act (AB)*, paras. 310 - 311.

[129] *US – Offset Act (AB)*, para. 311.

[130] Appellate Body Report in *EC – Hormones*, footnote 138 to para. 152. See also *US–Offset Act (AB)*, paras. 315 and 316.

[131] *EC – Hormones*, footnote 138 to para. 152.

[132] EC's Appellant Submission, para. 16.

clear that the workload for the parties and the Panel was heavy at times, it is not clear how having the same deadlines for all submission would have relieved the EC's workload. In addition, as the EC itself notes, the Panel did adjust some deadlines at the EC's request.[133] In addition, the final set of submissions in this proceeding were made due before issuance of the panel's interim findings in the Ecuador proceeding. Therefore, the EC has not been prejudiced in a manner that would warrant reversal of the Panel's failure to harmonize.

126. In addition, the EC argues that the Article 9.3 unequivocally requires the Panel to provide an objective justification and that the Panel failed to do so.[134] The text of Article 9.3, however, contains no such requirement. And, in any case, the EC's assertion that the Panel failed to provide an objective justification is refuted by the thorough discussion contained in paragraphs 7.1 through 7.12 of the report; the Panel has provided a cogent explanation as to why it was unable to harmonize the timetables.

127. Finally, the United States notes that even if the Appellate Body were to reverse the Panel's findings on harmonization, that reversal should have no effect on the merits of the dispute or the substantive findings of the Panel[135].

VII. THE EC'S NOTICE OF APPEAL DOES NOT COMPLY WITH RULE 20(2)(D) OF THE *WORKING PROCEDURES FOR APPELLATE REVIEW*

128. The EC's notice of appeal does not comply with Rule 20(2)(d)(iii) of the *Working Procedures for Appellate Review*. Contrary to that rule's requirements, the notice of appeal does not contain an indicative list of the paragraphs of the panel report containing the alleged errors. Indeed, the notice of appeal does not mention even a single paragraph of the Panel Report.[136]

129. The Appellate Body will be aware that the United States considers that there are disadvantages to the requirement in Rule 20 of substantive notices of appeal, given the limited amount of time available for consideration of appeals; and that any advantages of requiring substantive notices of appeal are limited by the fact that appellant submissions are filed so soon

[133] EC's Appellant Submission, para. 17.

[134] EC's Appellant Submission, para. 24. The EC does not, however, make a claim under Article 12.7 of the DSU that the Panel failed to provide the basic rationale behind its finding.

[135] Cf., e.g., *US – FSC (Article 21.5)(AB)*, paras. 256(g) and 257.

[136] In addition, the compliance of the notice of appeal with Rule 20(2)(d)(i) is doubtful; several paragraphs of the notice of appeal simply speak of the "erroneous findings" of the Panel without actually identifying *which* findings are alleged to be erroneous. Paragraphs 2(a), (c) and (d) of the notice of appeal present this problem most starkly. At the same time, the United States recognizes that the Appellate Body used the word "introduced" in Rule 20(2)(d)(i) instead of "described," which may make this a closer question. *See* Communication from the Appellate Body, 7 October 2004, WT/AB/WP/W/9, Annex A, part I(A).

after notices of appeal. The United States would support the Appellate Body's reconsideration of these issues at an appropriate time.

130. At the same time, however, at present Rule 20(2)(d) states the grounds for the sufficiency of the notice of appeal. The Appellate Body has in past disputes emphasized that non-compliance with the requirements for a notice of appeal can result in the Appellate Body's declining to consider matters not properly raised within the Notice of Appeal.[137] The EC has defended the importance of the rule,[138] and it has sought dismissals of appeals on this basis in the past.

131. The notice of appeal in this proceeding, however, is a far cry from the requirements of the Rule. Indeed, it is also a far cry from another EC notice of appeal that was challenged as inconsistent with the requirements of Rule 20, namely the notice of appeal in the *Sugar* dispute. The Appellate Body considered that that notice of appeal met the requirements of the rule, but a comparison between that one and the one at issue shows how much farther from the Rule's requirements the notice of appeal in this proceeding is (as well as showing that the EC understands how to draft a proper notice of appeal).[139]

132. The United States therefore respectfully requests that the Appellate Body find that the notice of appeal in this proceeding fails to comply with Rule 20(2)(d) and to dismiss the appeal on that basis.

133. Finally, we note that – in addition to the problems mentioned above – the EC's notice of appeal nowhere contains a claim under DSU Article 11. The EC's appellant submission, however, asserts in several places that the Panel acted inconsistently with Article 11. We have elsewhere in this submission identified those places. Regardless of how the Appellate Body disposes of the request made in the previous paragraphs of this section, we request, consistent with the Appellate Body's treatment of this issue in the *US – Countervailing Measures* dispute, that the Appellate Body consider the EC's Article 11 claims as not properly before the Appellate Body.

VIII. CONCLUSION

134. For the foregoing reasons, the United States respectfully requests that the Appellate Body reject each of the EC's requests in this appeal.

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[137] *E..g., US – Countervailing Measures (AB)*, para. 75.

[138] *See* Minutes of Meeting of the Dispute Settlement Body held on 19 May 2004, WT/DSB/M/169, para. 46 (the EC "supported the Appellate Body's view that the Notice of Appeal did not only trigger an appeal, but also enabled the appellee to fully exercise its right of defence").

[139] *EC – Sugar Subsidies (AB)*, Annex 5.