EUROPEAN COMMUNITIES – REGIME FOR THE IMPORTATION, SALE AND DISTRIBUTION OF BANANAS

Recourse to Article 21.5 of the DSU by the United States

(WT/DS27)

SECOND WRITTEN SUBMISSION OF

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I. INTRODUCTION

1. Two days before the date of this submission marked the tenth anniversary of the adoption by the Dispute Settlement Body ("DSB") of the recommendations and rulings in *European Communities – Regime for the Importation, Sale and Distribution of Bananas* ("*Bananas III*").[1] And, more than five years ago, the United States and the European Communities ("EC") "identified the means by which the long-standing dispute over the EC's banana import regime can be resolved."[2] It is regrettable that the EC made a choice not to carry out the steps that were identified at that time.

2. This submission responds to both the EC's preliminary objections and to the EC's defenses to the U.S. claims. The United States respectfully requests that this Panel reject the EC's objections and find that the EC's measures are inconsistent with the EC's obligations under the GATT 1994.

II. THE EC'S PRELIMINARY OBJECTIONS SHOULD BE REJECTED

3. The EC argues that the U.S. complaint should be dismissed in its entirety based on the following three preliminary objections:

(1) the United States did not request consultations prior to the request for establishment of this Panel[3];

(2) the EC-US Understanding bars the United States from challenging the consistency of the EC's current measures[4]; and,

(3) the EC's Regulation 1964 is not a " measure taken to comply" with recommendations and rulings of the DSB and therefore not within the scope of *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") Article 21.5[5].

For the reasons stated below, the Panel should reject all three requests.

A. The United States Was Not Required to Request Consultations with the EC

4. First, the United States was surprised that the EC raised this procedural objection given that the United States and the EC had expressly agreed that the extensive discussions between the

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[1] Adopted 25 September 1997, WT/DSB/M37 (4 November 1997).

[2] *European Communities - Regime for the Importation, Sale and Distribution of Bananas - Understanding on Bananas between the European Communities and the United States,* WT/DS27/59, 2 July 2001 ("EC-US Understanding"), paragraph A. Exhibit US - 2.

[3] First Written Submission by the European Communities ("EC First Written Submission"), paras. 33 - 38.

[4] EC First Written Submission, paras. 39 - 45.

[5] EC First Written Submission, paras. 46 - 52.

United States and the EC concerning the EC's new regime prior to the request for a panel would fulfill any consultation requirement. The EC appears to have recognized this when, as discussed below, it formally withdrew at the July 12, 2007, DSB meeting any procedural objection to panel establishment stemming from the lack of a formal request for consultations.[6] This procedural arrangement is reflected in an exchange of letters between the United States Trade Representative ("USTR") and the EC Commissioner for Trade. In that exchange, the USTR proposed that "our discussions to that point would fulfill any consultation requirement and the EU would not object to a U.S. request for the establishment of a Panel at the first DSB meeting at which a U.S. request is considered."[7] In his reply, the Commissioner agreed that the "EU would be ready not to object to a US request for the establishment of a panel in July."[8] Further communications between the United States and the EC confirmed that the EC was making an unconditional commitment not to raise the lack of formal consultations as a procedural hurdle.

5. The United States understands that this objection may have been lodged without an understanding of the commitment undertaken at the very highest levels. However, inasmuch as the EC has raised this objection, the United States responds as follows.

6. Formal consultations are not a prerequisite to the establishment of a panel under Article 21.5. Contrary to the EC's assertion, it is not "settled law that a complaining party is not entitled to request the establishment of a panel unless it has first submitted a *request* for consultations."[9] The Appellate Body's analysis of this issue in *Mexico – HFCS (21.5)* amply supports the U.S. view on this point. Although in that dispute the Appellate Body did not see it necessary to decide the specific question of whether lack of consultations is a bar to Article 21.5 proceedings – a question the EC requests this Panel to decide – its analysis is nonetheless instructive and persuasive.

7. In *Mexico – HFCS (21.5)*, the Appellate Body observed that while, as a general matter, "consultations are a pre-requisite to panel proceedings," the requirement that parties engage in consultations "is subject to certain limitations."[10] After reviewing the requirements of DSU Articles 4.3, 4.7 and 6.2, the Appellate Body concluded that "the lack of prior consultations is not a defect that, by its very nature, deprives a panel of its authority to deal with and dispose of a

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[6] Minutes of Meeting of the Dispute Settlement Body held on 12 July 2007, WT/DSB/M/235 (30 August 2007), para. 7.

[7] Letter from Amb. Schwab to Commissioner Mandelson, dated March 28, 2007, fifth paragraph.

[8] Letter from Commissioner Mandelson to Amb. Schwab, dated 4 April 2007, sixth paragraph.

[9] EC First Written Submission, para. 33 (internal footnote ommitted).

[10] Appellate Body Report, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States, Recourse to Article 21.5 of the DSU by the United States ("Mexico - HFCS (21.5)(AB)*"),WT/DS132/AB/RW, adopted 21 November 2001, para. 58.

matter."[11] While the Appellate Body did not decide whether this general rule was applicable to Article 21.5, it stated that "*even if* the general obligations in the DSU regarding prior consultations were applicable" to Article 21.5 proceedings, "non-compliance would not have the effect of depriving the panel of its authority to deal with and dispose of the matter."[12]

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

9. The EC suggests that the use of the phrase "through recourse to these dispute settlement procedures" in Article 21.5 could not refer to something "less than all" the procedures contained in the DSU, the inference being that it must include consultations.[13] However, there are several difficulties with the EC position.

10. First, contrary to the EC's statement, nothing in the phrase "these dispute settlement procedures" supports the proposition that that phrase extends to every aspect of the DSU that applies to the establishment of a panel in the first instance. To the contrary, the phrase "dispute settlement procedures" encompasses a broader range of procedures such as Article 22.6 and Article 25 for which consultations are clearly not required.[14]

11. Second, the EC fails to note that the phrase "these dispute settlement procedures" in Article 21.5 is different from the broader phrase found in DSU Article 23: "the rules and procedures of this Understanding." This difference makes clear that the EC is wrong to suggest that Article 21.5 cannot refer to "less than all" of the DSU. And the EC is on record as agreeing that aspects of the procedures do not apply to Article 21.5 proceedings, such as the ability for the Member concerned to have a reasonable period of time to comply with a compliance panel's recommendation.

12. Third, the EC fails to observe that the phrase "through recourse to these dispute settlement procedures" is part of the larger phrase "such dispute shall be *decided* through recourse to these dispute settlement procedures" (emphasis added). Interpretation of the phrase "these dispute settlement procedures" must take account of the context of that phrase, and the word "decided" is an important part of that interpretation: consultations, though they may serve

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[11] *Id*., para. 64.

[12] *Id*., para. 65.

[13] EC First Written Submission, para. 36.

[14] For an elaboration of this point, see the discussion in Panel Report on *United States - Import Measures on Certain Products from the European Communities*, WT/DS165/R, adopted January 10, 2001 (as modified by the Appellate Body), para. 6.119, 6.121. While the Appellate Body later concluded that the Panel need not have reached the issue, and that the Panel's findings were therefore without legal effect, the Panel's substantive reasoning on the proper interpretation of Article 21.5 is sound.

a valuable function in helping the parties to clarify their respective positions and in helping them to achieve a settlement (functions that, in this case, were served well, if unsuccessfully, by the bilateral contacts between the parties), are not a means of "deciding" a dispute. It is the panel procedures that serve the function of "deciding" – and thus it is the panel procedures to which "these dispute settlement procedures" must refer.

13. Fourth, the conclusion that consultations are not required is supported by other context as well, namely DSU Article 21.1, which provides: "Prompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members." To interpret Article 21.5 to require another round of consultations would only serve to delay the resolution of this question.

14. To conclude that consultations are required before establishment of an Article 21.5 panel would ignore the fact that the disputing parties engaged in consultations prior to the filing of the original request for establishment of a panel and participated in a lengthy dispute settlement process before a 21.5 panel. It also would ignore the fact that the complaining party has already waited throughout the "reasonable period of time" for the Member concerned to come into compliance. Upon completion of the reasonable period of time, the complaining Member must be able promptly obtain confirmation of the Member concerned's compliance or non-compliance, since, in the latter case, the nullification or impairment would continue unabated.

15. Fifth, we also note that the EC has previously accepted that a formal request for consultations is not a prerequisite for a request for the establishment of an Article 21.5 panel. In an earlier related proceeding, the EC requested the establishment of Article 21.5 panel to determine that measures taken by the EC were in conformity with its WTO obligations.[15] The EC did not in that instance seek consultations with any of the original complaining parties.[16]

16. Even aside from the EC's flawed legal theory, the Panel should not, in this case, sustain the EC's procedural objection.

17. First, we note that Article 4.3 of the DSU permits the parties to vary the consultation requirements by mutual agreement. In this case, the United States and the EC agreed that formal consultations in addition to the discussions already being held would not be necessary.

18. Second, the EC explicitly withdrew any procedural objection based on the lack of a formal consultation request in its DSB statement at the July 12, 2007 meeting. After noting its view that the U.S. request should have been preceded by consultations, the EC stated: "Having said that, in order to facilitate the task of the Panel composed in the context of the case initiated

[15] WT/DS27/40, December 14, 1998.

[16] The panel report was never put in the DSB agenda for adoption.

by Ecuador . . . the EC had decided not to object to the US request."[17] The EC made a solemn declaration to the Members of the DSB that the EC had decided not to object to the panel establishment on the grounds of a lack of a formal request for consultations. In light of the EC's solemn declaration, we recall again the Appellate Body's statement in *Mexico – HFCS (21.5)*: "*even if* the general obligations in the DSU regarding prior consultations were applicable" to Article 21.5 proceedings, "non-compliance would not have the effect of depriving the panel of its authority to deal with and dispose of the matter."[18] This situation – where the EC both agreed with the United States not to require consultations and then joined the consensus to establish this Panel – is precisely a situation in which the Panel should find that it has the "authority to deal with and dispose of" the substance of this proceeding.

19. Finally, the EC also argues that, as a matter of policy, a lack of consultations deprives the responding party with an opportunity to negotiate a solution, deprives the WTO membership, and in particular third parties, from notice and an opportunity to join the consultations.[19] Even if it were appropriate for the Panel to take those considerations into account, they should not lead to the conclusion that the EC seeks. As an initial matter, the DSU does not guarantee a role for third parties in consultations. For example, a complaining party could request consultations of the type provided under Article XXIII of the GATT 1994. Furthermore, it would not be an exaggeration to characterize this as one of the most well-known and well-debated trade disputes ever. Throughout the long history of this dispute, the EC has had plenty of opportunities to negotiate a solution. This dispute has been the subject of countless discussions at the DSB, and third parties have been given every possible opportunity to participate, above and beyond what is provided for in the DSU. It is hard to imagine what formal consultations would have achieved that over ten years of litigation, discussions, and negotiations have not been able to achieve.

20. We respectfully request that the Panel reject the EC's request to dismiss for lack of consultations.

B. The EC-US Understanding on Bananas Does Not Preclude This Proceeding

21. The EC's second preliminary objection - that the EC-US Understanding [20] bars this proceeding - is equally groundless.[21]

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[17] Minutes of Meeting of the Dispute Settlement Body held on 12 July 2007, WT/DSB/M/235 (30 August 2007), para. 7.

[18] Id. Para. 65.

[19] EC First Written Submission, para. 35.

[20] Exhibit US - 2.

[21] EC First Written Submission, paras. 39-45.

22. As a preliminary remark, the United States wishes to draw the Panel's attention to the fact that this portion of the EC's submission consists of a series of legal assertions without a single citation to the DSU (or any other provision of the WTO Agreement). Nor has the EC referred to the findings in any Appellate Body or panel report to support its assertions. It is difficult to see how the EC's skeletal argumentation meets its burden to put forward evidence and argumentation on its objection.[22] A defending Party is not required to try to put flesh on the bones of the complaining Party's arguments before responding to them.

23. It appears, however, that the lynchpin of the EC's argumentation is the assertion that because the United States has "accepted in the EC-US Understanding the principle that the Cotonou Preference would continue to exist until the end of 2007, the United States is now barred from challenging the existence of the Cotonou Preference in the period between the end of 2005 and the end of 2007." The EC's assertion is incorrect.

24. In the first place, nothing in the EC-US Understanding says that the United States was agreeing to a reduction in its rights to challenge the WTO-consistency of any EC measure. Whatever the legal status of the EC-US Understanding (which is discussed further below), the fact remains that it contains no clause or provision in which the United States "accepted" that it would be "barred" from recourse to the Dispute Settlement Understanding.

25. The EC instead points to the paragraph in the EC-US Understanding concerning the Article I waiver that the EC had requested at the time of the discussions that led to the Understanding. That provision of the EC-US Understanding reads as follows: "The United States will lift its reserve concerning the waiver of Article I of the GATT 1994 that the EC has requested for preferential access to the EC of goods originating in ACP states signatory to the Cotonou Agreement ... ."

26. This provision did not itself change the legal situation with respect to the EC's tariff preferences. The U.S. willingness to lift its reserve on consideration of a waiver of the EC's Article I obligations did not itself make the EC's tariff preferences WTO-consistent, nor did it insulate those tariff preferences from challenge under the DSU. Nothing in Articles IX:3 and IX:4 of the WTO Agreement suggests that a Member's willingness to support a waiver request has independent legal consequences. Moreover, the United States fails to understand why the EC believes that – if its position were adopted by this Panel – any Member would ever agree to support an EC waiver request in the future: no WTO Member would make such a commitment if the legal consequence were that it – but not other Members who had not yet agreed to support the waiver – were barred from challenging the measure for which the waiver had been requested.

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[22] It is well established in WTO dispute settlement that the party invoking the affirmative to a particular claim or defense bears the burden of proof with respect to it. *See* Appellate Body Report, *United States - Woven Woolen Shirts*, p. 14, WT/DS33/AB/R, 25 April 1997.

The entire process of incrementally building support for waiver requests would be undermined by the legal consequences that the EC proposes in this submission.

27. In addition, as contemplated by the EC-US Understanding, the United States did support the adoption of a waiver of the EC's Article I obligations, and a waiver was ultimately approved at Doha. Article 3*bis* of the waiver states that "[w]ith respect to bananas, the additional provisions in the Annex shall apply."[23] These additional provisions (discussed in more detail below), set out conditions which the new EC regime on bananas would have to meet. The provisions also set out a special arbitration mechanism whereby if an arbitrator found twice that the EC regime did not meet the conditions set out in the Annex, the Article I waiver would cease to apply with respect to bananas before the end of 2007. As explained in its first submission, and in more detail below, the United States believes that the EC's Article I waiver ceased to apply upon entry into force of the new EC regime for bananas on January 1, 2006.

28. Though the foregoing sufficiently disposes of this preliminary objections, the United States wishes to make some additional comments about certain points raised by the EC.

29. *First*, the United States reiterates its disagreement with the EC's contention that the EC-US Understanding represented a "mutually agreed solution" as that term is used in the DSU. A fair reading of the EC-US Understanding can lead to only one conclusion: that it would have been impossible in June of 2001 to say that the dispute had been "solved." The EC-US Understanding begins by saying that "The European Commission and the United Stats have identified the *means* by which the long-standing dispute over the EC's banana import regime *can be resolved*" (emphasis added).

30. In its second paragraph, paragraph B, the EC-US Understanding sets out the end point of the actions to be taken by the EC under the Understanding. Paragraph B states that the EC will "introduce a Tariff Only regime for imports of bananas no later than 1 January 2006." Thus, the final step to consummate the "solution" would not be taken until almost five years after the date of the EC-US Understanding.

31. Furthermore, that end point was to be preceded by two intermediate milestones: Paragraph C describes two interim phases between 2001 and 2006. Paragraph C and Annexes 1 and 2 specified steps that the EC would have to take during each one of these interim phases; and paragraph D conditioned U.S. suspension and termination of its increased duties on those steps.

32. In summary, it is clear from its text that the EC-US Understanding was a document that identified the "means" to resolve the dispute, and set out a path forward, but that no solution

[23] See Exhibit US - 3.

acceptable to both parties had yet been put in place on the date of the EC-US Understanding and that the Understanding was not itself the end of the dispute.

33. *Second*, the United States wishes to reiterate its disagreement with the EC's attempts to re-characterize the EC-US Understanding. Those attempts began very soon after the Understanding was concluded. In June 2001 the EC unilaterally notified the EC-US Understanding to the DSB and declared it was a "mutually agreed solution" for purposes of Article 3.6.[24]

34. In a communication to the DSB on June 26, 2001, the United States corrected the record by explaining that the EC-US Understanding was not a mutually agreed solution notified pursuant to DSU Article 3.6, but rather a "means" for resolving the long-standing bananas dispute and included "steps yet to be taken."[25] In addition, at the February 2002 DSB meeting, the United States again made clear that there were still compliance steps to be taken by the EC in order to implement the terms of the EC-US Understanding, namely that the EC was required to move to a WTO-consistent "tariff only" regime by January 1, 2006.[26]

35. Contrary to the EC's arguments, the letter exchange between former Ambassador Zoellick and then-Commissioner Pascal Lamy confirms the conditional nature of the EC-US Understanding. In the letter, the United States clearly states that it "may revise its adherence" to the EC-US Understanding if the EC makes changes that affect various allocations provided for under the Understanding. In addition, the letter acknowledges that if conditions related to the waivers were not satisfied in due time, "each party may revise its adherence to the Understanding, in the event that the parties cannot find a mutually satisfactory solution in such circumstances." The fact that former Ambassador Zoellick used the words "mutually agreed solution" does not vitiate the fact that the "solution" contemplated would take multiple years and multiple steps to achieve – and would be achieved only if the EC took the final step prescribed in the EC-US Understanding - that is, by introducing a "tariff only regime" by January 1, 2006.

36. *Third*, the United States disagrees with the EC's assertion that, pursuant to Article 31(3)(c) of the *Vienna Convention on the Law of Treaties* ("Vienna Convention"), the EC-US Understanding must be taken into consideration to determine the parties' rights and obligations under the GATT 1994 and the DSU.[27]

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[24] WT/DS27/58, dated 2 July, 2001.

[25] WT/DS27/59, Exhibit US - 2, second paragraph.

[26] Minutes of the Meeting of the Dispute Settlement Body held on 1 February 2002, WT/DSB/M/119 (6 March 2002), para. 8.

[27] EC First Written Submission, para. 43.

37. The EC has advanced this Article 31(3)(c) argument in a number of recent disputes in which it is the responding party. The United States is not aware that it has yet been successful. For example, this argument was raised by the EC in *EC – Biotech*[28] and rejected by that panel. We urge this panel to do likewise.

38. Nothing in the customary rules of interpretation of public international law, as reflected in Article 31(3)(c) of the Vienna Convention, supports the EC's assertion that the EC-US Understanding acts as a procedural defense for the EC. Article 31(3)(c) of the Vienna Convention deals with interpretation of the covered agreements. The EC is not arguing that the EC-US Understanding indicates a particular interpretation of any term in any covered agreement; the EC appears to be arguing that the Understanding has altered the covered agreements. Article 31(3)(c) does not deal with this issue.

39. To the contrary, Article 31(3)(c) of the Vienna Convention provides for the taking into account, in the interpretation of a treaty, "any relevant rules of international law applicable in the relations between the parties." The *EC – Biotech* panel found that "the rules of international law" that are to be "taken into account" in the interpretation of the WTO Agreements "are those which are applicable in the relations between the WTO Members."[29] The panel expressly rejected the notion that the "rules of international law" could be those applicable only to the disputing parties. Since the EC-US Understanding is a bilateral agreement between only the parties to this dispute, not all Members of the WTO, it cannot be considered part of any "applicable rules of law" that could inform the panel's interpretation of the covered agreements.

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

41. The EC itself has in fact conceded that there is no bar to proceeding with dispute settlement even in the face of an agreement between the parties to a dispute. It is worth noting that, during the *India – Autos* proceeding (which, like the negotiation of the EC-US Understanding, took place in the spring of 2001), the EC also held the view that a mutually agreed solution could not prevent recourse to the DSU: "Even if the 1997 [EC-India] Agreement had settled the matter in dispute in the present case, that would still not preclude the European Communities from bringing this dispute. The 1997 Agreement was not a 'covered agreement' in

[28] Panel Report, *European Communities - Measures Affecting the Approval and Marketing of Biotech Products* ("*EC - Biotech*"), WT/DS291/R, WT/DS292/R, adopted 21 November 2006.

[29] *EC - Biotech*, para. 7.68.

the sense of Article 1.1 of the DSU. Therefore, the rights and obligations of the parties under the 1997 Agreement were not enforceable under the DSU."[30]

42. The panel in *India – Autos* noted that there is no provision in the DSU that expressly addresses the issue of whether parties to a mutually agreed solution are precluded from dispute settlement procedures. The panel recognized "that the right for any WTO Member to bring a dispute to the DSB is one of the fundamental tenets of the DSU, and that it could not be lightly assumed in what particular circumstances the drafters of the DSU might have intended such right to be foregone."[31] The panel ultimately did not find it necessary to issue a finding on this legal question.[32]

43. In sum, it is telling that the EC, as a complaining party, has taken the opposite view of the one it advances in this dispute. As mentioned, in *India – Autos*, "the European Communities argued that, not being a 'covered agreement' under the DSU, the [mutually agreed solution] cannot be invoked by India 'in order to justify the violation of its obligations under the GATT and the TRIMs Agreement.'"[33] For the same reason, the EC-US Understanding – whether or not it is a "mutually agreed solution" – cannot "be invoked by [the EC] 'in order to justify the violation of its obligations under the GATT.'"

C. The U.S. Complaint Falls Within the Scope of Article 21.5

44. The EC's final preliminary objection – that the U.S. complaint falls outside the scope of Article 21.5 because the EC's January 1, 2006, banana measures are not "measures taken to comply" – ignores the plain text of the EC-US Understanding, EC Regulation 1964, and the long history of this dispute, and should therefore be rejected.

45. The EC first argues that it took its "*final* 'measure taken to comply'" with the EC-US Understanding in January 2002, "when the EC introduced a new tariff-based quota regime with the characteristics agreed in Annex II of the Understanding" and the U.S. "right to suspend concessions terminated"[34] (emphasis added). The EC's characterization of part-way measures taken not even halfway through the period of implementation envisioned in the EC-US Understanding finds no basis in the text of the Understanding and ignores multiple EC statements regarding its measures.

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[30] Panel Report, *India - Measures Affecting the Automotive Sector*, WT/DS146/R, WT/DS175/R, adopted April 5, 2002, para. 4.38.

[31] *Id.*, para. 7.115.

[32] *Id*, para. 7.134.

[33] *India – Autos*, para. 7.109 (footnote omitted).

[34] EC First Written Submission, paras. 24, 49.

46. As already outlined in paragraphs 29 through 32, the EC-US Understanding contemplated a series of steps that would culminate with the introduction of a "tariff only" regime by January 1, 2006. As required by the terms of the EC-US Understanding, the United States terminated its increased duties upon the EC's implementation of the steps provided for in Annex II. But, this only means that the two interim phases contemplated in the paragraph C of the EC-US Understanding were completed. The final step provided for in the EC-US Understanding, the introduction of a tariff only regime by January 1, 2006, was not scheduled to happen until four years later. To argue that the EC did not need to take that final step with respect to the EC-US Understanding would read paragraph B out of the Understanding.

47. The EC also argues that the United States never challenged the measures taken by the EC in 2002 that it considers to be the "measures taken to comply" with the recommendations and rulings of the DSB. As explained above, it was not until the introduction of the new EC regime for bananas on January 1, 2006 that the EC took the final, and unfortunately flawed, step required by the Understanding. Ever since, the issue of non-compliance has been the subject of discussions at the DSB, culminating with the Ecuador and U.S. requests under Article 21.5.[35]

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

49. The status of the EC's measures is further confirmed by numerous EC statements made between 1999 (when the EC first developed its "two-stage" *Bananas III* compliance solution) through 2006 (when, according to the EC, it implemented its final stage). While these statements are too numerous to list here,[36] the EC statements made *after 2002,* when the EC argues, for purposes of this proceeding, that it implemented its "measure taken to comply," confirm that the EC itself did not believe it had taken a "measure taken to comply" at that time:

- A January 2002 EC News Statement confirming that "[i]n the past, two European Union banana regimes were challenged successfully in the WTO, prompting U.S. retaliation against EU products. On 11 April 2001, the U.S. Government and European Commission reached an *understanding to resolve this long-standing*

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

[36] *See* Exhibit US - 8 for a full list of EC statements.

dispute. A new EU regime will provide a transition to a *tariff-only system* by 2006."[37]

- A June 2004 EC press release noting that "[w]e are now moving to the *final phase of our agreement* and replacing the complex quota system by a *simple tariff system* . . . in opening the last phase of the change [sic] our banana regime we will fully respect our WTO commitments . . . . *Settling the long standing WTO dispute*, in the understandings between the EU and respectively Ecuador and the United States on bananas the EU undertook to introduce a *tariff-only regime* for the import of bananas no later than 1 January 2006."[38]

- A February 17, 2005, EC Commission report stating that "[i]n January 2001 the Council decided that *a tariff-only import regime had to take place no later than January 2006. Consistently with the Understandings* concluded between the EU and respectively the United States and Ecuador in April 2001, an interim regime through import licenses is being currently applied."[39]

- An August 1, 2005, EC statement following the First Arbitration Award where the EC noted that "[i]n order *to put an end to the long-standing bananas dispute*, the EU agreed with Ecuador and the United States in 2001 to move from a complex import system based on a combination of tariffs and quotas for MFN bananas to a *regime solely based on a tariff by 1 January 2006*."[40]

- A September 12, 2005, EC press release stating that "[t]he Commission's new proposal confirms Europe's commitment to *ending this longstanding dispute* . . . . The EU agreed with Ecuador and the United States in 2001 to move from a complex import system based on a combination of tariffs and quotas for MFN bananas to a *regime solely based on a tariff by 1 January 2006.*"[41]

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[37] "Transatlantic Relations after 11 September," *EU/US News: A review of Transatlantic Relations*, Vol. IV:8, January 2002, p. 9 (emphasis added). Exhibit US-9.

[38] "Banana imports: Commission proposes to open tariff-only negotiations," *EC Press Release*, IP/04/707, 2 June 2004 (emphasis added). Exhibit US-10.

[39] Report from the Commission to the European Parliament and the Council on the operation of the common organization of the market in bananas, COM(2005) 50 final, 17 February 2005, p. 5 (emphasis added).

[40] European Commission, "Banana: WTO arbitrates over banana tariff," 1 August 2005 (emphasis added). Exhibit US-11.

[41] "Commission presents revised banana tariff proposal," *EC Press Release*, IP/05/1127, 12 September 2005 (emphasis added).

- A November 29, 2005, EC press release confirming that "[*i*]*n an effort to put an end to the long-standing banana dispute, the EU agreed with Ecuador and the United States in 2001* to move from a complex import system based on a combination of tariffs and quotas for MFN bananas *to a regime solely based on a tariff by 1 January 2006,* and obtained two waivers from its WTO obligations for the preference granted to bananas from the ACP countries under the terms of the ACP-EC Partnership Agreement . . . ."[42]

- An April 3, 2006, EC Consultation Document stating: *"[h]onouring the agreement concluded in 2001 with the [U.S.]* and taking into account the results of arbitrations with the [WTO], the [EU] substituted a tariff-only regime for the previous system of import quotas by region of origin."[43]

50. In short, the circumstances leading up to Regulation 1964 establish a series of steps on the part of the EC since 1999 leading towards compliance with the *Bananas III* recommendations and rulings by means of a tariff-only regime to be installed no later than January 2006.[44] A close examination of those circumstances, in particular the progression of legal instruments adopted by the EC since *Bananas III*, further confirms the link between Regulation 1964 and the *Bananas III* rulings. Those instruments start with Regulation 404, which was amended in 2001 by Regulation 216 to require a tariff only regime, and concluded with Regulation 1964, which purportedly implemented the EC's "tariff only" regime.

51. The current EC banana regime was implemented on January 1, 2006 – the exact same timing envisioned by Regulation 216 in 2001. Moreover, the essential nature of the EC's banana measures is closely linked to the original EC banana quota and tariff regime found to be WTO-inconsistent in *Bananas III*. Finally, the intended effect of the EC's current measures is closely linked to Regulation 216, which in 2001 sought to "settle" the long-standing *Bananas* dispute by calling for a "tariff only" regime by January 1, 2006.

52. Whether taken together or separately, the EC's own declarations, the factual and legal continuum of EC actions since *Bananas III* (including the various legal instruments adopted by the EC), and the banana measures currently in force establish, with unmistakable clarity, that the EC's 2006 banana regime, set out in Regulation 1964, constitutes a "measure taken to comply"

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[42] "European Union adopts new 'tariff-only' import regime for bananas from 1 January 2006," *EC Press Release*, IP/05/1493, 29 November 2005 (emphasis added).

[43] "Towards a reform of the internal aspects of the Common Organisation of the Market in Bananas", *Consultation document of the impact analysis steering group*, April 3, 2006, p. 1. (Emphasis added). Exhibit US-12.

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

with *Bananas III* recommendations and rulings and is therefore within the scope of this Panel's purview pursuant to DSU Article 21.5.

III. THE EC'S ARGUMENTS ABOUT "STANDING" AND NULLIFICATION OR IMPAIRMENT HAVE BEEN REJECTED BEFORE AND SHOULD BE REJECTED ONCE AGAIN

53. In addition to its preliminary objections, the EC raises two additional arguments, both of which appear to be of a threshold nature. The EC contends that the Panel, in order to resolve this dispute, must perform two analyses of U.S. claims: first, it must determine if the United States has standing to challenge the EC's measures under Article 21.5, and second, it must "examine what is the nullification or impairment suffered by the United States."[45] Both of these EC arguments ignore the clear guidance of the Appellate Body in the underlying *Bananas III* proceedings, in which it addressed these very same issues and rejected very similar reasoning by the EC.

A. The United States Has Standing to Challenge the EC's Banana Regime

54. In *Bananas III*, the Appellate Body upheld the panel's finding that the United States "had standing" to bring claims under the GATT 1994[46] against the EC's banana measures. In that proceeding, as here, the EC argued that, because the United States "ha[d] never exported a single banana to the European Community," it "could not possibly suffer any trade damage."[47] From the EC's perspective, this lack of trade effect or damage meant, in turn, that the United States could not, as a threshold matter, challenge the EC's measures under the GATT. The Appellate Body disagreed.

55. In reaching its conclusion, the Appellate Body made the general observations that "a Member has broad discretion in deciding whether to bring a case against another Member under the DSU" and that Members are "expected to be largely self-regulating in deciding whether any such action would be 'fruitful'"[48] within the meaning of DSU Article 3.7.

56. The Appellate Body then proceeded to make the following specific observations about the United States: "the United States is a producer of bananas, and a potential export interest by the United States cannot be excluded"; and "[t]he internal market of the United States for bananas

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[45] EC First Written Submission, para. 74.

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

[47] *Bananas III (AB)*, para. 250.

[48] *Bananas III (AB)*, para. 135.

could be affected by the EC banana regime, in particular, by the effects of that regime on world supplies and world prices of bananas."[49]

57. Quoting from the panel report, the Appellate Body also stated that:

> with the increased interdependence of the global economy, . . . Members have a greater stake in enforcing WTO rules than in the past *since any deviation from the negotiated balance of rights and obligations is more likely to affect them*, directly or indirectly.[50]

58. In light of this guidance, including the broad discretion afforded Members in choosing to initiate dispute settlement proceedings, the stake the United States holds in making sure that the EC complies with its WTO obligations, and the fact that the United States continues to be a producer of bananas,[51] it is clear that the United States may challenge the EC's banana measures in this compliance proceeding.

B. The United States Is Not Required to Demonstrate Nullification or Impairment of Benefits to Advance Claims of an EC Breach of GATT Articles I and XIII

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

60. The EC's argument presumes that the ultimate outcome of dispute settlement is the suspension of concessions by the complaining Member. To the contrary, Article 3.7 of the DSU specifies three potential means by which a dispute can be resolved: a mutually agreed solution consistent with the covered agreements; withdrawal of WTO-inconsistent measures; or, as a "last resort," suspension of concessions. Neither of the first two requires calculation of the level of nullification or impairment suffered by the complaining Member. Moreover, the second of these makes clear that withdrawal of a WTO inconsistency is a preferred outcome, without regard to the impact of the inconsistency on the complaining Member.

61. It is only when a WTO challenge has reached arbitration under DSU Article 22 that the level of nullification or impairment suffered by the complaining party becomes relevant. The Member seeking

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

[50] *Bananas III (AB*), para. 136. (Emphasis added).

[51] The United States continues to be a producer of bananas – in 2006 the United States produced 31,900 MT of bananas (10,000 MT produced in Hawaii and 21,900 in Puerto Rico). *See* United States Department of Agriculture, *Noncitrus Fruits and Nuts: 2006 Summary* (July 2007) and USDA's National Agricultural Statistics Service, Puerto Rico field office. Exhibit US-13. Indeed, the EC recognized as much when it proposed to retaliate against U.S. bananas in the Foreign Sales Corporation (WT/DS108) dispute. *See* Exhibit US-14.

authorization from the DSB to suspend concessions must propose the level of such suspension. If the Member concerned objects to the proposed level, the matter is automatically referred to arbitration. The arbitrator is tasked with assessing whether the level of suspension of concessions is equivalent to the level of nullification or impairment.[52]

62. In any event, the EC made a similar argument to the original panel and Appellate Body, but its argument was rejected. The reasoning of the Appellate Body remains applicable here. In determining that the United States did in fact suffer nullification or impairment of benefits at the hands of the EC's banana measures, the Appellate Body made clear that a showing of trade effects is unnecessary for purposes of demonstrating that there has been a breach of a provision of the GATT. 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.[53]

63. The *Superfund* panel decided that it was unnecessary to examine the parties' submissions regarding trade effects in order to determine that benefits accruing to the complaining Member had been nullified or impaired, linking its decision to the breach of the legal provision, Article III:2, alone. In *Bananas III*, the Appellate Body determined that the same reasoning applied.[54] It likewise should apply here.

64. 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 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."[55] In addition, "the internal market of the United States for bananas could be affected by the EC banana regime and by its effects on world supplies and world prices of bananas."[56] Thus, the Panel should dismiss the EC's arguments.

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[52] *See* DSU, Article 22.4.

[53] *Bananas III (AB)*, para. 252, quoting GATT Panel Report, *United States – Taxes on Petroleum and Certain Imported Substances*, L/6175, adopted 17 June 1987, BISD 34S/136 ("*US – Superfund*"), para. 5.1.9.

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

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

[56] *Id.*

IV. THE EC'S ARTICLE I WAIVER HAS EXPIRED, AND IT THEREFORE MAINTAINS ITS BANANA MEASURES IN BREACH OF GATT ARTICLE I

65. The United States turns now to the core substantive issues before the Panel -- the EC breaches of Articles I and XIII of the GATT.

66. The United States has already demonstrated in its First Written Submission that the EC maintains its tariff preference for ACP banana suppliers in breach of its basic MFN obligations under GATT Article I..[57] The EC does not appear to contest that its banana regime is in breach of GATT Article I, but argues, instead, that the Article I Waiver is still in effect.

67. As discussed in greater detail below, the EC's arguments ignore the very make-up of its own measures, as well as the plain text of the waiver and its Annex. Pursuant to the terms of the Annex, following two negative arbitration determinations, the waiver "cease[d] to apply to bananas upon entry into force of the new EC tariff regime."[58]

68. An analysis of the EC's Article I Waiver begins with the chapeau of the Annex, which states that, "[i]n the case of bananas, the waiver will also apply until 31 December 2007, *subject to the following*, which is without prejudice to the rights and obligations under Article XXVIII." A waiver that is "subject" to other conditions is "in a state of subjection or dependence" or "subordinate" to those conditions.[59] The continuation of the waiver until December 31, 2007, is therefore entirely dependent on, or subordinate to, the EC's fulfillment of the several conditions laid out in the body of the Annex.

69. Tirets one and two of the Annex define the steps to be taken by the EC prior to arbitration. The EC must begin consultations "[n]o later than 10 days after the conclusion of Article XXVIII negotiations" and "early enough to finalize the process of consultations under the procedures hereby established at least three months *before the entry into force of the new EC tariff-only regime*." These tirets further require the EC, during that consultation period, to demonstrate that MFN "WTO market-access commitments relating to bananas" will be protected. These initial steps demonstrate that the EC's regime was, and is to be governed by multilateral procedures, and that the procedures and commitments set out in Annex must be satisfied by the EC *prior to* applying a "tariff only" regime.

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[57] *See* First Written Submission of the United States of America, September 3, 2007 ("US First Written Submission"), paras. 28-33.

[58] WTO Ministerial Conference, *European Communities - The ACP-EC Partnership Agreement, Decision of 14 November 2001*, WT/MIN(01)/15, 14 November 2001 ("Article I Waiver"), Annex, tiret five. Exhibit US-3.

[59] The Compact Edition of the Oxford English Dictionary (1971), p. 3121.

70. Tirets three through five establish a centerpiece of the Annex -- the special arbitration controls under which the EC waiver automatically lapses in the event it implements a tariff regime after two negative arbitration reviews.

71. Tiret four sets forth the terms of the first arbitration proceeding, including a 90-day review timetable and a mandate to determine "whether the envisaged rebinding of the EC tariff on bananas would result in at least maintaining total market access for MFN banana suppliers, taking into account . . . all EC WTO market-access commitments relating to bananas." By assigning this mandate to a neutral arbitrator for review *prior to 2006*, tiret four underscores the imperative of multilateral review and approval before implementation of an EC "tariff only" regime. Latin American banana suppliers recognized that imperative and initiated arbitration in 2005. The Arbitrator concluded that the EC's "envisaged rebinding" of 230 euros per ton would not fulfill the EC's MFN market access commitment.[60]

72. Tiret five describes how the EC must "rectify the matter" following a negative determination in the first arbitration. The ordinary meaning of the word "rectify" is "to put or set right" or "to remedy (a bad or faulty condition or state of things)."[61] The term "matter" in this case refers to the EC's failure to satisfy the mandated standard of tiret four ("at least maintaining total market access for MFN banana suppliers, taking into account . . . all EC WTO market-access commitments.").

73. The second and third sentences of tiret five lay out the first of two avenues by which the EC can set right, or remedy, its failed "envisaged rebinding." First, the EC must consult with the interested parties within 10 days to determine whether a "mutually satisfactory solution" can be found. This obligation stresses both the need for all parties to agree to the final solution, as well as the fact that the EC rebinding must be approved under the Annex procedures prior to 2006. Second, in the absence of a mutually agreed solution, within 30 days of a new arbitration request, the same arbitrator will be asked to determine if the EC has "rectified" the matter.

74. The fifth sentence of tiret five specifies the automatic consequence of a second, negative arbitration determination against the EC: "[i]f the EC *has failed to rectify the matter, this waiver shall cease to apply to bananas upon entry into force of the new EC tariff regime*." The mandatory consequence, the expiration of the waiver, takes effect "*upon entry into force* of the new EC tariff regime," meaning that the waiver terminates automatically upon entry into force of the new EC regime, not at some later point in time.

75. The closing sentence of the Annex, which states that "[t]he Article XXVIII negotiations and the arbitration procedures *shall be concluded before* the entry into force of the new EC tariff

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[60] Award of the Arbitrator, *European Communities – The ACP-EC Partnership Agreement – Recourse to Arbitration Pursuant to the Decision of 14 November 2001*, WT/L/616, 1 August 2005 ("*AAI*"), para. 94.

[61] The Compact Edition of the Oxford English Dictionary (1971), p. 2448.

only regime on 1 January 2006," again mandates an arbitration outcome consistent with the previous sentences and a proper Article XXVIII outcome prior to 2006 in order to fulfill the Annex requirements.

76. The Annex clearly sets out a mechanism whereby once an arbitrator found twice that the EC had presented a tariff proposal that did not meet the conditions of the Annex, the waiver would automatically expire once the new EC tariff regime went into effect. The EC argues that "the new EC tariff regime" could only refer to the regime that was found to be inconsistent with the conditions of the Annex by the arbitrator and that as long as it introduced a different regime and that regime "did indeed" maintain the total market access of the MFN suppliers, the waiver would apply until the end of 2007.[62] The text of the Annex does not support that interpretation.

77. The United States notes that recital 11 to the Article I waiver provides context supporting the above reading of the Annex. Recital 11 states:

> any re-binding of the EC tariff on bananas under the relevant GATT Article XXVIII procedures *should result in at least maintaining total market access for MFN banana suppliers* and their willingness to accept *a multilateral control on the implementation of this commitment*.[63]

The reference to "*multilateral control*"refers to the Annex arbitration procedures and argues against any EC interpretation that would allow the waiver to continue in effect in the face of the two negative arbitral determinations and a subsequent unilateral determination of "compliance" by the EC. The EC's interpretation, which would allow it, at the end of the day, to apply any regime it chose, cannot be reconciled with the intent of the drafters to impose multilateral controls over the banana regime.

78. While the text of the Annex is clear, supplementary means of interpretation, however, confirm that the waiver expired upon implementation of the EC's new banana measures.[64]

79. Supplementary means of interpretation such as the waiver history demonstrate that the parties negotiated the special procedures embodied in the Annex over the course of many months with the purpose of preventing the EC from installing an unacceptable banana tariff as of 2006.[65] Indeed, because the original EC draft of the Annex failed to state a consequence for EC choices

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[62] EC First Written Submission, para. 55.

[63] Article I Waiver, Recital 11 (emphasis added).

[64] *See* Vienna Convention, Article 32.

[65] *See* Draft EC modification to G/C/W/187/Add. 2, 19 October 2001; Council for Trade in Goods, *European Communities – The ACP-EC Partnership Agreement: Revision* (Communication from the European Communities), G/C/W/187/Add. 2/Rev. 1, 2 November 2001; and Draft EC Proposal for Article I waiver, 11 November 2001. Exhibit US-15.

after negative arbitration rulings,[66] and that EC proposal was not accepted. It was to overcome this very concern that Members insisted that the language of the fifth and sixth sentences of tiret five be inserted into the Annex:

> If the *EC has failed to rectify the matter, this waiver shall cease to apply to bananas* upon entry into force of the new EC tariff regime. The Article XXVIII negotiations and the arbitration procedures shall be concluded before the entry into force of the new EC tariff only regime on 1 January 2006.

Absent this explicit consequence following two arbitration losses prior to 2006, the waiver would not have been approved.

80. For all the reasons stated above, the EC's Article I waiver expired on January 1, 2006, upon the implementation of the new EC banana measures. In the absence of this waiver, the EC's banana measures are maintained in violation of GATT Article I.

V. THE EC MAINTAINS ITS EXCLUSIVE TARIFF RATE QUOTA FOR ACP BANANAS IN VIOLATION OF GATT ARTICLE XIII

81. In its first written submission, the EC presents several arguments for why the disciplines of GATT Article XIII do not apply to its banana tariff quota. Each of these arguments ignores the text of Article XIII as well as underlying panel and Appellate Body reports in the *Bananas* dispute and should therefore be rejected.

A. The EC's Tariff Rate Quota Is a Quantitative Restriction Within the Meaning of Article XIII

82. First, the EC argues that the measures contained in EC Regulation 1964 are not subject to the requirements of GATT Article XIII because the ACP tariff quota is not a "quantitative restriction," but rather a "cap" on a tariff preference.[67] Indeed, the EC goes so far as to declare that it "subjects all banana imports to a single tariff of 176 euro per ton. There are no other tariffs and there are no quantitative restrictions imposed on the importation of bananas."[68]

83. The EC's description of its measure defies reality. EC Regulation 1964, the measure subject to this proceeding, itself refers to a "tariff rate quota for bananas originating in ACP countries." In the sixth whereas clause EC Regulation 1964 states that "a tariff rate quota for

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[66] Draft EC Proposal for Article I waiver, 11 November 2001. Exhibit US-15.

[67] EC First Written Submission, paras. 64-65.

[68] EC First Written Submission, para. 3.

bananas originating in ACP countries should also be opened."[69] In addition, Article 1.2 states that "an autonomous tariff quota of 775,000 tonnes per net weight subject to a zero-duty rate shall be opened for imports of bananas . . . originating in ACP countries."[70]

84. There is nothing new in the EC's attempt to cast its discriminatory ACP tariff rate quota as a "cap" on a tariff preference. The Arbitrators in *Bananas III (22.6)(US)* rejected this exact same argument nearly eight years ago,[71] concluding that "in our view, the 857,700 tonne limit on traditional ACP imports is a tariff quota and therefore Article XIII applies to it."[72]

85. The same conclusion applies here. The EC's 775,000 ton limit on duty-free access for ACP bananas is also a tariff quota within the meaning of Article XIII. As such, the EC's tariff quota is subject to the non-discrimination requirements of Article XIII.

B. Article XIII Applies Even Where the Entire EC Banana Market Is Not Controlled by Quotas

86. Next, the EC argues that Article XIII only applies to "different tariff quotas . . . imposed to different groups of countries"[73] but not, as is the case under its banana measures, where "MFN Members are not subject to any quantitative restriction."[74] It is not surprising that the EC offers no support for this proposition. That is because both the text of Article XIII as well as numerous panel or Appellate Body reports that have examined the application of Article XIII dictate the opposite result - that Article XIII does in fact apply to the EC's ACP-exclusive tariff rate quota.

87. As the Arbitrator in *Bananas III (22.6)(US)* has already confirmed, the EC's exclusive ACP quota is by definition a tariff rate quota, since it "is a quantitative limit on the availability of a specific tariff rate."[75] Because all tariff rate quotas are subject to the requirements of GATT Article XIII by virtue of Article XIII:5, which provides that "[t]he provisions of this Article

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[69] EC Regulation 1964 at 6th "Whereas" clause. Exhibit US - 1.

[70] EC Regulation, Article 1.2. Exhibit US - 1.

[71] *See* Decision by the Arbitrators, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Arbitration by the European Communities*, WT/DS27/ARB (April 9, 1999) ("*Bananas III (22.6)(US)*"), para. 5.9 ("The European Communities essentially argues that the amount of 857,700 tonnes for traditional imports from ACP States constitutes *an upper limit on a tariff preference* and is not a tariff quota subject to Article XIII.") (emphasis added).

[72] *Bananas III (22.6)(US)*, para. 5.11.

[73] EC First Written Submission, para. 66.

[74] EC First Written Submission, para. 68.

[75] *Bananas III (22.6)(US)*, para. 5.9.

[XIII] shall apply to *any* tariff quota instituted or maintained by any Member," the requirements of Article XIII apply to the EC's ACP duty-free tariff quota.[76]

88. The *Bananas III* Panel Report affirmed that Article XIII:1's non-discrimination 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.*[77]

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

90. To interpret Article XIII's application otherwise would ignore the guidance of the Appellate Body in *Bananas III*, in which it concluded that "the essence of the non-discrimination obligations [of GATT Articles I and XIII] is that like products should be treated equally, irrespective of their origin."[78] In addition, the Appellate Body stated that:

> If, by choosing a different legal basis for imposing import restrictions, or by applying different tariff rates, a Member could avoid the application of non-discrimination provisions to the imports of like products from different Members, the object and purpose of the non-discrimination provisions would be defeated. It would be very easy for a Member to circumvent the non-discrimination provisions of the GATT 1994 and the other Annex 1A agreements, if these provisions apply only *within* regulatory regimes established by that Member.[79]

91. Thus, Article XIII prohibits the EC from establishing a duty-free tariff rate quota for some Members, but not others, and from denying equal treatment to banana imports of all origins. This interpretation of Article XIII prevents Members from circumventing their basic GATT non-discrimination obligations, and is equally as applicable in this instance as it was ten years ago. Just as it did in the original *Bananas III* proceeding, the EC again attempts to elude Article XIII

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[76] The panel in *EC- Bananas (21.5)(Ecuador)* reached a similar conclusion. *See* U.S. First Written Submission, para. 38.

[77] 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 (Panel)*"), para. 7.69 (emphasis added).

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

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

coverage by arguing that the separation of its market into two separate regimes -- one covered by a tariff, the other by a tariff quota -- absolves it of its non-discrimination obligations. As then, the EC's arguments should be rejected.

92. In essence, the EC seeks to "eviscerate"[80] its non-discrimination obligations by interpreting Article XIII such that it would permit the EC unfettered discretion to carve-out a portion of its market for preferential access without any multilateral controls over how that carve-out was determined and without any consideration of how the carve-out affects access into the same market for other "like" products. The EC's interpretation turns Article XIII on its head by distorting a restriction on discriminatory measures into a *carte blanche* for discriminatory measures, as long as a Member's entire market is not subject to a quantitative restriction.

93. The EC's own prior statements also call into question its arguments. The EC's 2001 request for a waiver from Articles XIII:1 and XIII:2 stated that its ACP-exclusive tariff quota "*requires* a waiver from the obligations established under Article XIII GATT."[81] In October 2005, the EC sought to extend that very same Article XIII waiver for its new proposed regime that consisted of the same ACP tariff quota reserve (increased to 775,000 tons), in combination with a 187 euro per ton MFN tariff. That proposed regime, which the EC said needed an Article XIII waiver, was structured exactly like the EC's current banana measures, with ACP bananas subject to a tariff quota and MFN bananas subject to a tariff and no quota.[82]

C. The EC Maintains its ACP Tariff Rate Quota in Breach of GATT Article XIII

94. As demonstrated above, it is clear that the EC's ACP-exclusive tariff quota is subject to the requirements of GATT Article XIII. It is also undisputed that the EC's waiver from its obligations under Article XIII expired on December 31, 2005. Thus, as demonstrated in the U.S. First Written Submission, because the EC uses a tariff rate quota on ACP imports and an entirely different means to restrict MFN imports, the EC is preventing "like" imports from being "treated equally, irrespective of origin" in breach of GATT Article XIII:1.[83]

95. Moreover, because the EC fails to distribute any share whatsoever of its ACP tariff quota to MFN suppliers, let alone a share they would have expected to obtain in the absence of

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

[81] *See [Draft] Request for a WTO Waiver Under Article IX.3 of the Marrakech Agreement Establishing the World Trade Organization Submitted to the Council for Trade in Goods and the Council for Trade in Services: Interim Regime for the EC Bound and Autonomous Tariff Rate Quotas on Imports of Bananas (CN Code 08030019)*, 21 May 2001 ("Request for Article XIII Waiver, 21 May 2001") (emphasis added). Exhibit US-4.

[82] *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.

[83] *See* US First Written Submission, paras. 40-42.

restrictions, it maintains its tariff quota in breach of GATT Article XIII:2.[84] In particular, Article XIII:2(d) required the EC, once it opted to impose a tariff quota on banana imports entering its market, to ensure, on failure to reach agreement on quota shares among suppliers, that it "allot[ed] to Members having a substantial interest in supplying the product shares based upon the proportions, supplied by such Members during a previous representative period." Only having done so could the EC avoid discriminating against the imports of non-ACP banana suppliers. It failed to do so. Instead, the EC chose to allot no share whatsoever to non-ACP suppliers with a substantial interest and no share to non-ACP suppliers with no substantial interest.[85] Thus, the EC breaches its obligations under GATT Article XIII:2 because it failed to "similarly prohibit or restrict" those non-ACP bananas.

VI. CONCLUSION

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

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

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

[84] *See* US First Written Submission, paras. 43-48.

[85] *See, e.g.,* Appellate Body Report, *European Communities – Measures Affecting the Importation of Certain Poultry Products*, WT/DS69/AB/R, adopted 23 July 1998 ("*EC – Poultry (AB)*"), para. 101.

List of Exhibits

Exhibit US-	Title
8	Table of EC's statements describing "tariff only" as a "measure taken to comply"
9	*EU/US News: A review of Transatlantic Relations*, Vol. IV:8, January 2002
10	EC Press Release: "Banana imports: Commission proposes to open tariff-only negotiations," 2 June 2004
11	European Commission: "Banana: WTO arbitrates over banana tariff," 1 August 2005
12	European Commission: "Towards a reform of the internal aspects of the Common Organisation of the Market in Bananas," 3 April 2006
13	U.S. Department of Agriculture, U.S. banana production statistics
14	*United States – Tax Treatment for "Foreign Sales Corporations": Recourse by the European Communities to Article 4.10 of the SCM Agreement and Article 22.7 of the DSU*, WT/DS108/26 (25 April 2003).
15	Article I Waiver negotiating history documents