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

WT/DS27

COMMENTS BY THE UNITED STATES TO THE ANSWERS TO THE PANEL'S QUESTIONS TO THE PARTIES AND THIRD PARTIES

November 26, 2007

A. Questions addressed to Parties

1. The United States appreciates the opportunity to provide comments on the answers to the Panel questions by the EC and third parties submitted on November 21, 2007. The United States will provide comments on some of those answers as set forth below. With respect to those answers on which the United States is not providing comments, the United States submits that the arguments presented are substantially the same as in previous submissions and statements or are rebutted elsewhere in the U.S. comments, so the United States will refrain from repeating its arguments.

1. Both Parties

Q3. (Both Parties) In paragraph 42 of its Third Party submission Colombia concludes that "the tariff level that would result in at least maintaining the conditions of competition between *MFN bananas and ACP bananas* cannot be more than €11/tonne." Can the Parties provide a reasoned answer on whether they agree or disagree with the argument raised by Colombia.

2. The question of maintaining total market access is, as is apparent from the findings in the two separate arbitrations on this issue, one that is factually complex. The United States is not surprised that the EC position in this proceeding, as it was in those two arbitrations, is that the current EC regime maintains total market access, making this the third different regime for which the EC has made this claim. The arbitrator was unpersuaded by the EC's claims in each of the two prior proceedings in which this question was within the terms of reference of the proceeding, and so the waiver ceased to apply with respect to bananas. In this proceeding, the Panel is spared from having to review yet another claim by the EC regarding total market access since this question is not within this Panel's terms of reference.

Q4. (Both Parties) Please comment on the relevance, if any, of the following, for assessing whether, pursuant to Article 21.5 of the DSU, the current EC bananas import regime is a measure "taken to comply":

(a) The arbitration proceedings conducted under Article 21.3(c) of the DSU (WT/DS27/15);

(b) The first compliance proceedings requested by Ecuador pursuant to Article 21.5 of the DSU;

(c) The arbitration requested by the EC under Article 22.6 of the DSU;

(d) The EC statement in the DSB, referenced by the US in paragraph 6 of its first written submission in the following way: "In November 1999, the EC announced a second attempt to reform its banana regime, which was allegedly to comprise a 'two-stage process, namely, after a transitional period during which a tariff quota system would be applied with preferential access for ACP countries, a flat tariff would be introduced.'[1] The transitional period was to end no later than January 1, 2006."; and,

(e) The Understanding on Bananas, signed between the EC and the US on 11 April 2001 (WT/DS27/58 and WT/DS27/59).

3. With respect to the EC's argument made in paragraph 7 of its answer to this question, it is incorrect to say that the U.S. retaliation rights were terminated. The United States refers the Panel to the U.S. answer to question 40.

4. The United States also notes that the EC has failed to address item (d) of the Panel's question. This is telling, as the EC's statement to the Members of the DSB on that occasion shows that the measures comprising the "two-stage process" to which the EC referred – a transitional period with quotas, with a flat-tariff at the end – were intended to be measures taken to comply. Indeed, the EC's statement to the DSB on that date concludes with the following assessment by the EC of its two-stage proposal: "The EC believed that its proposal provided the best outcome to this dispute."

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

Q6. (Both Parties) Can the Parties provide a reasoned explanation on whether the EC's current bananas import regime might qualify as a measure taken to comply with the suggestions made pursuant to Article 19 of the DSU by the first compliance panel requested by Ecuador in the late 1990s, in particular in the light of the following statement in paragraph 40 of the joint Third Party written submission of Nicaragua and Panama: "The EC's related assertion that *Bananas III* 'could [not] be complied with only through the introduction of a tariff only import regime'[2] is equally puzzling. It ignores the compliance suggestion of the first *Bananas III* Article 21.5 panel... and ... runs contrary to the parties'... plan for compliance."

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

[2](*footnote original*) EC Second Submission, para. 45.

6. It is not clear what the EC is referring to in its answer when it says that the United States cannot use the "findings" of the first Ecuador 21.5 proceeding. If the reference was intended to be with respect to the "suggestions" made by the first Ecuador 21.5 panel, we once again note that a suggestion made by a panel under DSU Article 19.2 is neither a "recommendation" nor a "ruling" within the meaning of Article 21.5 of the DSU.

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

Q7. (Both Parties) In paragraph 46 and footnote 17 of its first written submission the EC refers to the report of the Appellate Body in *Canada – Aircraft (21.5 Brazil)*. Can the EC elaborate on that reference and on the following statement in paragraph 51 of its first written submission: "[A]n abuse of Article 21.5 (and its expedited procedures) would run against the nature and the object of Article 21.5 and the findings of the Appellate Body in the *Canada – Aircraft* case." Can the US comment on the EC's response.

8. The United States notes that the EC position with respect to Article 21.5 is that: "The nature of the special procedures suggests that the purpose of the phrase 'existence or consistency with a covered agreement of a measure taken to comply …' in Article 21.5 is to cover any further dispute that relates to the original dispute"[3] and that the time lapse before the new measure is taken is not a bar to Article 21.5 proceedings against that measure.[4] It is further useful to note the EC position that: "The obligation to comply with that recommendation is not extinguished through the adoption of a measure taken to comply that is accepted by the complainant but continues to exist without limits in time. The fact that the DSB has considered the issue as resolved for the purpose of surveillance under Articles 21.6 and 22.8 of the DSU does not extinguish the continuing obligation to withdraw the measure,"[5] and so Article 21.5 remains available. In this proceeding, the United States has provided sufficient evidence to demonstrate that the measure subject to the challenge is a measure taken to comply with the earlier proceeding in which the United States and the EC were involved.

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

[4]*Id*., para. 14.

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

9. The United States has demonstrated that the EC's current banana regime is a "measure taken to comply". We refer the Panel to our second written submission, paragraphs 44 through 52, and our opening statement, paragraphs 3 through 16.

Q8. (Both Parties) Can the EC elaborate on the following statement in paragraph 50 of its second written submission: "The European Communities wishes to stress the difference in meaning of 'settling a dispute' and 'compliance' with DSB's recommendations and rulings. A WTO Member might well be ready to go 'beyond' what is necessary for compliance, in order to avoid future disputes on a particular subject matter." Can the US comment on the EC's response.

10. With respect to paragraph 15 of the EC's responses, not only is the EC claiming in this proceeding that the final step it agreed to undertake in the Understanding is not a "measure taken to comply," it did not even implement that step consistently with the terms of paragraph B - as it did not, despite its arguments to the contrary, implement a tariff only regime. Neither did it implement a regime that is consistent with its WTO obligations. As the United States explained, the Understanding was not a mutually agreed solution for purposes of DSU Article 3.6. And, even if it were, the United States disagrees with the EC's argument that mutually agreed solutions preclude recourse to Article 21.5 proceedings.[6]

11. The EC statement in paragraph 15 that it "considers that once a complaining party has settled a dispute, through any measures it has agreed to, such party may not bring Article 21.5 proceedings" stands in stark contrast with its statement in response to the Lumber panel cited in our comment to question 7 that "[t]he obligation to comply with that recommendation is not extinguished through the adoption of a measure taken to comply that is accepted by the complainant but continues to exist without limits in time."[7]

12. With respect to the EC's arguments in paragraph 16, the United States refers the Panel to its answer to questions 40 and 45.

Q10. (Both Parties) Can the Parties provide a reasoned answer on whether they agree or disagree with the following statement contained in paragraph 81 of the written submission by the ACP Third Parties that "it appears that, in order to be

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[6]See U.S. Second Written Submission, paragraphs 21through 43.

[7]Response to Questions from the Panel by the European Communities (29 April 2005) in *United States – Final Countervailing Duty Determination with Respect to certain Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU (DS257)*, para. 12.

considered as being 'measures taken to comply', the challenged measures must be clearly connected to the panel and Appellate Body report, both in time and in respect of the subject-matter. This criterion is clearly not satisfied in the present case." As well as in the following statement contained in paragraph 65 of the same submission that "Article 21.5 proceedings must necessarily be initiated within a reasonable period of time from the date the recommendations and rulings to bring the matter into conformity with WTO obligations were adopted. In the present case, the recommendations and rulings of the Panel and the Appellate Body in the original dispute were adopted by the DSB in September 1997. Ten years can hardly be regarded as a reasonable period of time."

13. As the United States has explained before, the interim regime provided for in the Understanding for the period covering January 1, 2002 through the end of 2005 was a measure taken to comply. It did not, as the EC would argue, constitute the final measure taken to comply. The Understanding set out another step, to be taken by January 1, 2006. The United States saw no reason to institute Article 21.5 proceedings for the 2002-2005 interim regime. This does not mean that the United States was then precluded from recourse to Article 21.5 proceedings once the EC took the next, flawed step. It bears repeating that the January 1, 2006 regime is neither tariff only (as contemplated by the Understanding), but, most importantly, it is not consistent with the EC's WTO obligations.

Q11. (Both Parties) Can the Parties provide a reasoned answer on whether they agree or disagree with the following statement contained in paragraph 94 of the written submission of the ACP Third Parties: "[T]he Arbitrator in the first Arbitration award ... stated that '[t]he compliance of the European Communities with the conditions of the Doha waiver may be the subject of review in the context of dispute settlement, a point expressly confirmed by Paragraph 6 of the Waiver […]'[8]. Paragraph 6 of the Doha waiver and this Arbitrator's statement support the view that disputes may arise specifically from the Doha waiver and its implementation and justifies recourse to the dispute settlement system. To the extent that the dispute relates to a measure which has been adopted pursuant to the Doha waiver and other legal instruments which came into existence only after an earlier dispute, such measure cannot be regarded as being a measure taken to comply with the recommendations and rulings of the DSB adopted in the preexisting earlier dispute."

[8](*footnote original*) Award of the Arbitrator, *EC – The ACP-EC Partnership Agreement – Recourse to Arbitration pursuant to the Decision of 14 November 2000*, WT/L/616, at paragraph 47.

14. The United States disagrees with the EC's argument that "a dispute over the continued existence of the Doha waiver should have been brought under a new dispute settlement case and not as a case under Article 21.5 of the DSU."[9] In the current proceeding, the United States is challenging "the consistency with a covered agreement of measures taken to comply" (DSU Article 21.5): that is, the United States is challenging the consistency with Article I and XIII of the GATT 1994 (a covered agreement) of the EC's current bananas regime (a measure taken to comply). The analysis of the consistency of that measure with Article I requires an analysis of the Doha waiver because the EC – which does not deny that the differential tariff treatment provided by the current regime for ACP and MFN bananas is in breach of Article I:1 – argues that the Doha waiver covers the breach. Therefore, the issue of the waiver's continued existence is properly before this Article 21.5 Panel. (And, as the Panel knows, the United States disagrees with the EC argument that the Doha waiver is still in effect with respect to bananas.)

Q12. (Both Parties) Can the Parties provide a reasoned answer on whether they agree or disagree with the following statement contained in paragraphs 16-17 of the Third Party written submission of Japan: "[T]he Appellate Body in *US – Softwood Lumber IV (21.5)* addresses that, taking account of the context of Article 21.5 and the purpose of the DSU, 'a panel's mandate under Article 21.5 of the DSU is not necessarily limited to an examination of an implementing Member's measure declared to be "taken to comply",' and should also include 'some measures with a particularly *close relationship* to the declared "measure taken to comply", and to the recommendations and rulings of the DSB'.[10] The Appellate Body has further indicated in that case that, in order to find such a 'close relationship', an Article 21.5 panel may need to examine not only 'the timing, nature, and effects of the various measures,' but also 'the factual and legal background against which a declared "measure taken to comply" is adopted.'[11] The EC's 2006 regime was implemented subsequent to the adoption of the recommendations and rulings of the DSB and, it is explicitly identified in the Understanding, Paragraph B, as a measure 'by which the long-standing dispute over the EC's banana import regime can be resolved.'[12] Moreover, Japan understands that the EC's 2006 regime is the measure which grants a preferential treatment to the imports of bananas from the ACP countries. In light of such timing, nature and effect of the EC's regime, Japan sees the argument that the EC's 2006 regime does not have a relationship with the

[9]Replies to the Panel's Questions by the European Communities, para. 20.

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

[11](*footnote original*) *Ibid.*

[12](*footnote original*) The Understanding, Paragraph A.

recommendations and rulings of the DSB in *EC – Bananas III* dispute to be hardly convincing.[13]"

15. As the Panel knows, the United States disagrees with the EC's contention that the factual and legal background demonstrate that its current banana regime is not a measure taken to comply. See U.S. second written submission, paragraphs 44 through 52, and our opening statement, paragraphs 3 through 16.

Q13. (Both Parties) Can the Parties provide a reasoned answer on whether they agree or disagree with the following statement contained in paragraph 53 of the Third Party joint written submission of Nicaragua and Panama: "The progression of relevant EC legal instruments further reinforces the legal connection between the offending Bananas III measures of Regulation 404 and the current measures of Regulation 1964:

-- Regulation 404, the underlying EC regulation examined in Bananas III, was found in several of its trade provisions to be WTO-inconsistent.

-- Regulation 216 amended Regulation 404 to require a Tariff-Only regime by no later than 1 January 2006 'to settle' Bananas III and 'compl[y] with the rules on international trade.'

-- Regulation 1964 implemented the current measures for the express purpose of fulfilling the tariff-only requirement of Regulation 404,[14] as amended by Regulation 216."

16. The EC's answer to this question is another attempt at reading paragraph B out of the Understanding on Bananas between the United States and the EC. As the United States has explained before, the measure described under Phase 2 of the Understanding was a measure taken to comply. But, there was yet another step contemplated in the Understanding. The EC's failure to refer to the proceedings by the United States in Regulation 216/2001 is hardly determinative of the issue of whether the introduction of a tariff only regime by January 1, 2006 was a measure taken to comply with the recommendations and rulings in the dispute between the United States and the EC; in this connection, the United States recalls that, as the Appellate Body has noted, "[p]anels and the Appellate Body alike have found that what is a 'measure taken to

[13](*footnote original*) Japan notes that, in light of the WTO jurisprudence, the fact that the EC is not obliged to implement its 2006 regime does not support the argument that the regime is excluded from a "measure taken to comply" for the purpose of Article 21.5 of the DSU.

[14](*footnote original*) Regulation 1964/2005.

comply' in a given case is not determined exclusively by the implementing Member."[15] In any event, the United States is not claiming that this last step is a measure taken to comply because of its relationship to the first Ecuador proceeding. The United States has demonstrated that the January 1, 2006 regime is a measure taken to comply. See U.S. second written submission, paragraphs 44 through 52, and our opening statement, paragraphs 3 through 16.

Q14. (Both Parties) Can the Parties provide a reasoned answer on whether they agree or disagree with the following statement contained in paragraph 54 of the Third Party joint written submission of Nicaragua and Panama: "The [Bananas] Understanding called for a Tariff-Only regime by 1 January 2006 in order to come into compliance with Bananas III. Regulation 1964 took effect precisely on 1 January 2006 in order to put into force a 'tariff only' regime.[16] The timing of the current compliance measures, thus, fulfilled the Understanding's compliance timeline."

17. The United States would like to point out that it has not argued that the EC agreed "for the first time" on the introduction of a tariff only regime when it agreed to the Understanding. When the EC decided to go to "tariff only" is not relevant (just as the Appellate Body did not consider it relevant in the *Lumber* dispute that the assessment review began before there were any DSB recommendations and rulings). What is relevant is that the EC agreed to include it in the Understanding, as paragraph B.

Q16. (Both Parties) In paragraph 24 of the its [sic] first written submission, the EC argues that: "[T]he right to suspend concessions must be revoked once the defending WTO Member has fully complied with the DSB's recommendations and rulings.[17]" Can the EC elaborate on whether, in its opinion, if this was the case, the Member who has "lost the right to suspend concessions" with respect to a particular measure would have also necessarily lost its right of access to the WTO dispute settlement system with respect to such measure. Can the EC also elaborate whether, in its view, these rights could be reinstated and, if so, under what conditions, if any. Can the US comment on the EC's response.

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

[16](*footnote original*) *Id.,* Whereas Clause (1).

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

18. First, the United States disagrees with the EC statement contained in paragraph 36 that the "United States and the European Communities agreed in the Understanding . . . that the 'measure taken to comply' . . . would be the 2002-2005 banana import regime." As the United States has explained before, the Understanding contains a series of steps, one of which is the 2002-2005 regime. The Understanding just as clearly set out a final step in paragraph B - the introduction of a tariff only regime by January 1, 2006. Thus, the United States also disagrees with the EC's assertion in paragraph 37 that the only dispute settlement avenue open to the United States is "new proceedings under GATT Article XXIII."[18]

19. Second, as the United States has explained in its answer to questions 40, 43 and 45, the United States agreed to terminate its "imposition" of increased duties. This did not mean that the multilateral authorization and other WTO rights of the United States were "revoked." Much of the EC's discussion is thus based on an incorrect premise.

Q18. (Both Parties) In paragraph 25 of its first written submission the EC states that "*As part of the deal reached between the [US and the EC] within the context of the Understanding*, it was agreed that the [US] would support the grant of a waiver from the application of GATT Article I, paragraph 1 for the Cotonou Agreement. *This waiver was* indeed granted during the Doha Ministerial Conference on November 14, 2001 (*the 'Doha waiver'*).[19]" (emphasis added) In turn, in paragraph 29 of the same submission the EC argues that it "has complied with all conditions for the continued operation of the Doha waiver until the end of 2007, including the obligation to introduce a banana import regime that 'at least maintains total market access for MFN countries'." Can the EC confirm that the last sentence refers to the EC's current import regime. If yes, can the EC explain how its above-cited statements fit with its argument that its current bananas import regime is not a measure taken to comply. Can the US comment on the EC's response.

20. These EC arguments are part of its attempt to argue that the United States is barred from bringing this proceeding because it has "accepted" the Cotonou preference for bananas through the end of 2007. The United States has explained why this argument is wrong.[20] In this regard,

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

[19] (*footnote original*) A waiver from the application of GATT Article XIII was also granted in Doha, covering the tariff quota-based banana import regime that the European Communities had agreed with the United States to implement by January 1, 2002. The duration of that waiver was until the end of 2005. A similar waiver is not needed anymore because, since January 1, 2006, the European Communities does not have a tariff-quota based banana import regime.

[20]See U.S. Second Written Submission, paras. 23 through 27.

the United States disagrees with the EC statement, in paragraph 42, that the "United States would support the grant of an unconditional WTO waiver from Article I of the GATT covering the preferential treatment of ACP bananas until the end of 2007." As paragraph E clearly states, the United States agreed to "lift its reserve concerning the waiver of Article I of the GATT 1994." We refer the Panel to our answer to question 54.

Q23. (Both Parties) Can the EC elaborate on the following statement in paragraph 70 of its first written submission: "Article 3.8 of the DSU allows the defending party to rebut the presumption that the challenged measure causes a nullification or impairment of a benefit accruing to the complaining party". Through what means and under what circumstances could a Member demonstrate that a breach of rules in a covered agreement has *not* had an adverse impact on other Members? Can the US comment on the EC's response.

21. The United States notes that by referring the Panel back to the passages of its written submission where it addressed the issue of nullification or impairment, the EC has not provided any elaboration. As we have noted in our answers to questions 24, 50 and 51, the EC's arguments regarding nullification or impairment (and the parallel arguments regarding "standing") seem to conflate the existence of nullification or impairment, with the level of nullification or impairment that would be relevant in an Article 22.6 arbitration. As we have noted before, the Appellate Body confirmed that as a producer of bananas with a potential export interest and legitimate concern about is internal market, the United States need only demonstrate violations under the covered agreements to establish that its competitive relationship with the EC has been nullified or impaired.

Q26. (Both Parties) Can the Parties provide a reasoned answer on whether they agree or disagree with the following statement contained in paragraph 125 of the Third Party joint written submission of Nicaragua and Panama: "The United States' net-import status only reinforces its trading interest, not the converse. Precisely because imports displaced by the EC's discrimination could be diverted into the U.S. market, the United States has a legitimate trading interest (confirmed by the *Bananas III* Panel and Appellate Body)[21] in ensuring that the EC's discrimination does not disrupt its internal market, global supplies, or market pricing."

22. Once again, we note that the EC answer appears to be conflating the issue of the existence of nullification or impairment, which is presumed when there is a breach of an obligation, as the United States believes there is here, with the level of nullification or impairment. The United

[21](*footnote original*) *Bananas III (Panel),* para. 7.50; *Bananas III (AB),* para. 251.

States disagrees that the EC has successfully rebutted the existence of nullification or impairment, for the reasons explained in our answer to this question.

Q29. (Both Parties) Can the EC elaborate on the first sentence of its following statement in paragraph 55 of its first written submission: "*[T]he phrase 'the new EC tariff regime' can only refer to the tariff regime that was presented to the Arbitrator and on which the Arbitrator made a pronouncement in its Award*. In other words, the Doha waiver would cease to apply only if the European Communities implemented the import regime analysed by the Arbitrator and found not to satisfy the standard of the Doha waiver" (emphasis added). Can the US provide a reasoned answer on whether it agrees or disagrees with that statement.

23. With respect to the EC answer to this question, the United States would like to note that it disagrees with the statement in paragraph 57 that "it is undisputed for purposes of the current proceedings that [the current EC import regime for bananas] maintains the total market access of the MFN suppliers and, therefore, that it satisfies the Doha waiver's standard." The United States has demonstrated that the terms of the waiver annex are clear and that the waiver has ceased to apply with respect to bananas as of the entry into force of the new EC regime. Therefore, the standard contained in the waiver is not relevant any more. As such, there has been no need to address this particular factual issue and it is outside the terms of reference of this proceeding.

Q30. (Both Parties) Can the EC provide evidence to support the following argument in paragraph 64 of its second written submission: "The European Communities was ready to agree to automatic termination of the waiver in case of an 'ex post' assessment through arbitration (i.e. once the regime had been put in place); but certainly not willing to have 'dramatic' consequences for the future of ACP economies dependent on a mere 'ex ante' control, an exercise necessarily based on estimations." Can the EC explain the legal relevance of that argument in these compliance proceedings. Can the US provide a reasoned answer on whether it agrees or disagrees with that statement.

24. The United States would note that it is the EC that has argued that its Article I violation is excused by the continued existence of the Article I waiver with respect to bananas. Therefore, the continued applicability of the Doha waiver is necessarily before this Panel. The United States has explained why it believes that the text and context of the Doha waiver annex support its interpretation and not the EC interpretation.

Q33. (Both Parties) Can the Parties comment on the relevance, if any, for the Panel's analysis of the US claims under Article XIII of the GATT 1994, of the fact that, under the Bananas Understanding, the US was required to actively work towards promoting the EC request for a waiver of Article XIII of the GATT 1994 and of the following provision in the Bananas Understanding, referenced in paragraph 17 of the US first written submission: "a waiver of Article XIII of the GATT 1994 needed for the management of quota C [the ACP quota]". Can the Parties also comment on the following statement in footnote 11 of the EC's first written submission: "A waiver from the application of GATT Article XIII was also granted in Doha, covering the tariff quota-based banana import regime that the European Communities had agreed with the United States to implement by January 1, 2002. The duration of that waiver was until the end of 2005. A similar waiver is not needed anymore because, since January 1, 2006, the European Communities does not have a tariff-quota based banana import regime."

25. The EC answer to this question once again relies on its failed argument that a tariff preference limited by a "cap" is not a tariff rate quota subject to Article XIII. The United States has demonstrated that this argument is wrong and inconsistent with the findings and reasoning of the panel in the first Ecuador Article 21.5 proceeding and the Article 22.6 arbitration. The EC's differentiation of an "all-tariff-quota" regime and the current regime does not change the fact that there is currently a tariff rate quota in existence, which is subject to Article XIII disciplines.

3. European Communities

Q.61 (EC) Can the EC confirm the data contained in Exhibit US-13 concerning US bananas production.

26. As the EC did not explain what were the discrepancies it found, the United States is not in a position to provide further information.

Q.67. (EC) Can the EC provide a reasoned answer on whether it agrees or disagrees with the following statement made in paragraph 2 of the US first written submission: "[e]ven this [€176/mt] tariff level is uncertain, as the EC has failed to re-bind its banana tariff rate."

27. The United States disagrees with the EC statement in its answer that it is not disputed that the 176 euro per ton applied tariff more than maintains total market access for MFN suppliers and its related statement that the EC has met the conditions of the waiver. As the United States has demonstrated, the EC did not meet the conditions clearly set out in the annex to the Doha

waiver and therefore the waiver has ceased to apply with respect to bananas. Therefore, the annex standard of "maintaining total market access for MFN suppliers" is no longer relevant and is not an issue in this proceeding. It is incorrect to say it is "undisputed".

Q69. (EC) Can the EC provide a reasoned answer on whether it agrees or disagrees with the following statement made in paragraph 24 of the US first written submission: "In accordance with these provisions, bananas of MFN origin enter the EC-27 market at a rate of 176 euros per ton (equating to $4.33/box, or 33% *ad valorem*), or 135% higher than the 75 euros per ton rate previously assessed on all MFN bananas entering the EC from January 1, 1995, to December 31, 2005. Under the 176 euro per ton rate, bananas from the developing countries of Latin America contributed 580 million euros, or approximately US$790 million, to the EC's 2006 customs revenues."

28. The United States notes that the EC does not appear to dispute the accuracy of the data presented by the United States. We find it interesting that part of the EC's answer is to try to draw a comparison with the "old system" - a system that was found to be inconsistent with the EC's WTO obligations.

Q72. (EC) Can the EC identify the process and instruments through which it developed its "political decision" to introduce a tariff-only banana import regime as of 1 January 2006.

29. The United States once again notes that when the political decision to introduce a tariff-only regime was made does not vitiate the fact that it was included in the Understanding on Bananas between the United States and the EC and was part of the means through which the dispute would be resolved. A "political decision" could have been undone at any point.

Q74. (EC) Can the EC provide a reasoned answer on whether it agrees or disagrees with the following statement contained in paragraph 12 of the Third Party joint written submission of Nicaragua and Panama: "In the case of the Article XIII waiver (where the terms and conditions had already been negotiated in the [Bananas] Understanding), the United States was required to 'actively work towards promoting the acceptance of an EC request.' By contrast, in the case of the Article I waiver (where specific conditions were still needed), the United States pledged only to '*lift its reserve*... Since the action the United States undertook in paragraph E did

not even constitute a pledge of final support for the waiver request, it could hardly be considered a renunciation of all future DSU rights."

30. The United States notes that "lifting the reserve" on the Article I waiver allowed the waiver discussion to go forward. It would not necessarily result in the EC receiving the waiver, as the EC suggests.

Q77. (EC) Can the EC provide a reasoned answer on whether it agrees or disagrees with the following statement contained in paragraphs 50-51 of the US second written submission: "[T]he 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. 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." Can the US comment on the EC's response.

31. The EC has chosen not to provide a reasoned answer to this question, but merely to refer back to its answers to questions 13 and 14. The United States notes that first and foremost, the Understanding on Bananas between the United States and the EC expressly included a tariff only regime by January 1, 2006 as the final step of the means through which the dispute would be resolved. The progression of EC regulations helps to establish the connection between the regulation that was found to be in breach of the EC obligations in *Bananas III* and the current regulation, which constitutes the measure taken to comply that is at issue in this proceeding.

Q78. (EC) Can the EC provide a reasoned answer on whether it agrees or disagrees with the following statement in paragraph 16 of the US' written version of the opening oral statement during the substantive meeting with the parties: "[T]he Panel should take the EC's argument that its current bananas regime implements a suggestion by the compliance panel in *Bananas III* as a concession by the EC that the measure taken by the EC on January 1, 2006 is directly linked to the DSB's recommendations and rulings."

32. Contrary to what the EC implies in its answer to this question, the United States is not asking the Panel to examine the record of the other proceeding; instead, we have submitted, as part of our evidence and argumentation in this proceeding, an EC statement made in the other proceeding.

33. The United States further wishes to draw the Panel's attention to the fact that the EC did not, in its answer to this question, furnish any explanation of why the EC's argument in the Ecuador proceeding would not amount to a concession that its current regime is linked to the DSB's recommendations and rulings in this dispute.

Q79. (EC) Can the EC provide a reasoned answer on whether it agrees or disagrees with the following statement contained in paragraph 34 of the US second written submission: "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.'[22] 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.[23]"

34. The United States has explained in its written submissions and oral statement its long-standing position regarding the Understanding. With respect to the EC's answer to this question, the United States would like to make the following comments.

35. The EC claims that it has "complied" with the terms of the Understanding and that it would be contrary to the principle of "good faith interpretation" for the United States to deny its commitment and refuse to acknowledge the ACP preference. In the first place, however, as we have explained before, the EC interpretation of the Understanding is incorrect. Second, while the EC complied with some terms of the Understanding, it continues to deny that it agreed in that Understanding to introduce a tariff only regime by January 1, 2006, in flagrant disregard for the words of paragraph B of the Understanding. In contrast, the United States has complied with every commitment it actually undertook – as opposed to the ones that the EC erroneously ascribes to the United States – under the Understanding.

36. We agree with the EC statement in paragraph 136 that "there cannot be any doubt that the purpose of the Understanding was that of finding a solution of the dispute that was acceptable for

[22] (*footnote original*) WT/DS27/59, Exhibit US - 2, second paragraph.

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

both parties." That solution was comprised of a series of steps, culminating with the final step to be taken by January 1, 2006. The terms of the Understanding itself make clear that the dispute could not have been said to have been resolved when the Understanding was reached. The United States explained in paragraph 35 of its second written submission why the letter exchange of May 2001 does not support the EC's arguments.

Q80. (EC) Can the EC provide a reasoned answer on whether it agrees or disagrees with the following statement contained in paragraph 38 of the US second written submission: "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."

37. The United States has not argued that the Understanding must be "ignored." The United States refers the Panel to paragraphs 21-43 of the U.S. rebuttal submission where we explain why the EC's legal arguments repeated in its answer are incorrect.

Q81. (EC) Can the EC provide a reasoned answer on whether it agrees or disagrees with the following assertion contained in paragraph 10 of the written version of Brazil's oral statement during the substantive meeting with the parties: "If accepted [the EC's argument] would significantly undermine the effectiveness of Article 21.5, for the reason that parties to an agreed solution would be authorized to rewrite their multilateral commitments. Any measure based on an agreed solution would automatically escape the test of consistency with the covered agreements. Thereby it would give Members a blanket waiver to override their obligations, with serious implications on the predictability and security of the multilateral trading system."

38. The United States agrees with Brazil's statement. The United States has responded to the arguments made by the EC in its answer before. See U.S. Second Written Submission, paragraphs 21 through 43.

Q82. (EC) In the light of its statement that "there can be only one notion of 'nullification or impairment' for purposes of the DSU", can the EC explain what is the relevance,

if any, of the arbitration the EC had requested pursuant Article 22.6 of the DSU for the EC's argument in this dispute that there would be no nullification or impairment of any benefits accruing to the US, and that the US would not have any standing in this dispute.

39. Once again the United States notes that the EC continues to confuse the existence of nullification or impairment with the level of nullification or impairment for purposes of determining the level of suspension of concessions that may be authorized.

Q83. (EC) Can the EC explain what is the relevance, if any, in the context of its arguments on nullification and impairment of any US benefits, of the following statement in paragraph 39 of the EC's second written submission: "[T]he United States has already drawn the benefits from the [Bananas] Understanding." What were the benefits that the US derived from the Bananas Understanding?

40. The EC's answer makes the unspoken but mistaken assumption that the United States derives no benefit from the tariff only regime that was to be the final step in the process contemplated by the Understanding. To the contrary, as the Understanding makes clear, the United States had (and indeed still has) every interest in seeing a WTO-consistent banana regime put into place, so that this dispute can be put to rest. In that sense, the United States has not yet received the benefits of the Understanding.

41. However, the issue in these proceedings is not whether the United States benefitted, but whether the EC has taken the final measure to comply and whether that measure is consistent with the covered agreements. Furthermore, we note that the EC did not answer that part of the Panel's question that asks how this EC discussion of "benefits" relates to the EC's arguments about nullification and impairment. In fact, that EC discussion has no bearing on the nullification and impairment issue; as the United States has previously explained[24], the EC has been unable to show that there is no nullification and impairment to the United States in this case. Indeed, in light of the fact that this Panel's task is set by DSU Article 21.5, the question of nullification and impairment is neither within the terms of reference of this Panel nor relevant to the determinations that Article 21.5 calls upon this Panel to make.

42. In reply to the EC's comments in paragraph 149, the United States would simply like to note that the Understanding was agreed to by both parties as a means of resolving one of the longest-standing inconsistencies with the international trade rules that have been agreed to by all Members.

[24]U.S. Second Written Submission, paras. 59 - 64; Opening Statement, paras. 44 - 48.

Q84. (EC) Can the EC elaborate on the following statement in paragraph 101 of its second written submission: "If the Panel refuses to recognise this fact today, but finds that the Cotonou Preference breaches some GATT rule, the United States will probably seek to impose retaliation measures against the European Communities as it did in 1999. The parties will then have to go through a new round of arbitration procedures under Article 22 of the DSU in order to confirm the already known fact that the 'level of nullification and impairment suffered' by the United States is zero and, therefore, that the level of retaliation the United States can impose is also zero." Why should the Panel, in the EC's view, assume that if it were to find that the challenged EC measure is inconsistent with the WTO Agreements, the parties would not find a mutually agreed solution or the EC would not bring its measure into conformity?

43. The request by the EC for the Panel to provide "clear guidance" to the United States regarding the level of nullification or impairment must be rejected. Such "guidance" would be outside the terms of reference of an Article 21.5 panel. The Panel will carry out its function (and, in that sense, will provide "guidance" to help the parties resolve their dispute) if it makes the findings necessary to determine whether or not the EC's banana regime is consistent with the EC's WTO obligations. Moreover, the United States hopes that if the EC regime is found in breach of the EC's WTO obligations, the EC will finally bring its measure into compliance.

Q85. EC) In paragraph 12 of its first written submission the EC states that "[t]he increase in the prices paid to banana producers combined with the increased quantities of bananas imported into the European Communities shows that the introduction of the current banana import regime of the European Communities has had a very positive impact on the owners of banana plantations in the Latin American countries." Can the EC explain if it uses this argument in this dispute with US because the EC might imply that the owners of banana plantations in the Latin American countries might also be of US origin. If yes, what is the overall proportion of US ownership in banana plantations, per country? What is the relevance of this, if any, in the context of the EC's arguments concerning US standing in this dispute, and any nullification and impairment of any benefits accruing to the US? Can the EC explain the same in the light of the following statement in paragraph 25 of the EC's second written submission: "The European Communities allocated the licences to the US-based banana trading companies as agreed in the Understanding."

44. With respect to the arguments made by the EC in paragraph 154, we have already explained why the EC's argument regarding nullification and impairment is incorrect. See U.S.

comments to question 83. Therefore, we do not agree that the interim tariff rate quota regime set out in the Understanding eliminated the nullification and impairment to the United States.

Q86. (EC) Can the EC provide a reasoned answer on whether it agrees or disagrees with the following statement in paragraph 124 of the joint Third Party written submission of Nicaragua and Panama: "Given the presence of U.S. banana production, the Panel and Appellate Body had no trouble confirming the United States' 'export interest' in bananas. Indeed, the EC itself effectively acknowledged that U.S. export interest by proposing a withdrawal of concessions on U.S. bananas in the *Foreign Sales Corporation* dispute.[25]"

45. With respect to the EC reference to "adverse impact", Article 3.8 states that "there is normally a presumption that a breach of the rules has an adverse impact on other Members parties to the covered agreement." Once again the EC is confusing the existence of nullification or impairment with the level of nullification or impairment. The EC also has failed to recognize that nullification or impairment is not an issue in an Article 21.5 proceeding.

Q87. (EC) Can the EC provide a reasoned answer on whether it agrees or disagrees with the following statement in paragraph 123 of Nicaragua and Panama's joint Third Party written submission: "As the *Bananas III* Panel and Appellate Body both observed, the United States is a *producer of bananas*, with annual volumes of nearly 32,000 metric tons in Puerto Rico and Hawaii. *This is more production than in some of the ACP countries, where the EC has never questioned the presence of a banana trading interest.*" (emphasis added)

46. See our comment above.

Q88. (EC) Can the EC provide a reasoned answer on whether it agrees or disagrees with the following statement in paragraph 63 of the Third Party joint written submission of Nicaragua and Panama: "In the past, the EC has readily acknowledged that if the Arbitrator issued a second negative determination (which it incontestably did in its Second Award), the waiver would automatically lapse upon implementation of its new regime: '[i]f the [Second] Award is negative, then all parties represented here

[25](*footnote original*) *See* Exhibit US-14.

fall off the precipice together. The landing risks to be hard. The EC loses its waiver for the ACP preference upon the entry into force of tariff-only ...'[26]"

47. As the EC has refused to answer the Panel's question, the Panel would be justified in drawing the logical inference from the refusal.

Q89. (EC) Can the EC provide a reasoned answer on whether it agrees or disagrees with the following statement in paragraph 66 of the US second written submission: "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."

48. Noting that the EC does not argue that the Doha waiver was for "legal certainty", the answer would seem to confirm that it does not contest that the banana regime is in breach of GATT Article I.

Q91. (EC) Can the EC provide a reasoned answer on whether it agrees or disagrees with the following statement in paragraphs 95-97 of the Third Party joint written submission of Nicaragua and Panama: "'*Shall* apply' and '*any* tariff quota' make clear that Article XIII must apply to any and all tariff quotas maintained by a Member. When paragraph 5 is read as a whole, it further makes clear that any tariff quota maintained by a Member must be considered a 'restriction' for purposes of 'the provisions' of Article XIII.[27] / The EC struggles to claim that the text of Articles XIII:1 and 5 should be read to apply 'only to the kinds of treatment accorded to the various Members who are included in the tariff quota.'[28] The absolute character of the phrases '*any* tariff quota' in paragraph 5 and '*no* ... restriction' in paragraph 1 preclude that reading. The EC shows equal strain in claiming that 'the effect of paragraph 5 is *somehow to modify* the meaning' of Articles XIII:1 and XIII:2.[29] The fifth paragraph's phrase '[t]he provisions of this Article shall apply to,' by its plain meaning, simply extends the term 'restriction' in Articles XIII:1 and 2 to include any tariff quota, but nowhere allows the obligations of those 'provisions' to be altered."

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[26](*footnote original*) EC Oral Statement in *AAII*, para. 4 (emphasis added).

[27] (*footnote original*) *See Bananas III (Article 21.5-Ecuador)*, para. 6.20.

[28](*footnote original*) EC Second Submission, para. 66.

[29](*footnote original*) *Id*., paras. 67 and 68.

49. The EC's answer emphasizing the "quantitative division" and "internal division" ignores the rulings of the Bananas III panel and Appellate Body with respect to the non-discrimination aspects of Article XIII:1 and the rejection of the EC's "separate regimes" arguments.

Q94. (EC) Can the EC provide a reasoned answer on whether it agrees or disagrees with the following statement in paragraph 45 of the US first written submission: "The *Bananas III* panel determined that if a Member allocates tariff rate quota shares to Members not having a substantial interest in supplying the product, then shares must be allocated to *all* suppliers. This is because '[o]therwise, imports from Members would not be similarly restricted as required by Article XIII:1.'[30]"

50. The United States agrees with the EC that Article XIII does not supplant Article I:1. The EC, however, attempts to make Article I supplant Article XIII. The United States does not agree with that position, which in any event has previously been rejected by the Appellate Body.

Q95. (EC) Can the EC provide a reasoned answer on whether it agrees or disagrees with the following statement in paragraph 87 of the US second written submission: "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.'[31] 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 [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.[32]"

51. The United States appreciates the EC conceding that Article XIII applies and notes the EC answer disavows the statement made in paragraph 64 of its first written submission that "the conditions for the application of GATT Article XIII are not satisfied."

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[30] (*footnote original*) *Id*., para. 7.73.

[31] (*footnote original*) *Bananas III (22.6)(US)*, para. 5.9.

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

B. QUESTIONS ADDRESSED TO PARTIES AND THIRD PARTIES

Q100. (Both Parties, Nicaragua and Panama) Can Nicaragua and Panama provide a reasoned answer on whether they consider that, under the DSU, there is any requirement to have a qualified trade interest, or otherwise any threshold, in order to have standing in WTO dispute settlement proceedings? Would the EC, as a net importer of bananas, have standing to bring a claim similar to the one under examination by this Panel? Can the EC and the US comment on the response by Nicaragua and Panama.

52. The United States agrees with Nicaragua's and Panama's explanation that the DSU does not contain an actual trade threshold requirement in order for a WTO Member to bring a claim. With respect to whether the EC would have standing to bring a claim "similar to the one under examination by this Panel", it is not clear whether the question is whether the EC could bring a claim with respect to its own measure (as it did in 1999). If so, the United States disagrees that the EC can bring such a claim, for reasons other than the fact that it is a net importer of bananas. Some of those reasons were explained in the panel report on the Article 21.5 proceeding sought by the EC in 1999.[33] If the question is whether the EC could bring a claim against some other hypothetical WTO Member with a measure similar to the one challenged here, the United States believes that nothing in the DSU would prevent the EC from exercising its discretion in deciding whether to bring a case.

Q101. (Both Parties, Nicaragua and Panama) Can Nicaragua and Panama elaborate on the following argument in paragraph 99 of their joint Third Party written submission: "As the EC is quantitatively 'restricting' imports of ACP bananas within the meaning of Article XIII:1, and is failing to 'similarly restrict' MFN-origin bananas, a violation of Article XIII:1 has been established." Can the Parties comment on Nicaragua and Panama's response.

53. Nicaragua's and Panama's response is consistent with the arguments made by the United States in this proceeding.

Q102. (Both Parties and Cameroon) Can Cameroon elaborate, and provide any evidence as appropriate, to support the assertion contained in paragraphs 27 and 28 of the written version of its oral statement during the substantive meeting with the Panel, in the sense that "the main beneficiaries of the new [EC] regime are the small producers in the MFN exporting countries who have repeatedly expressed their

[33] *See European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 by the European Communities,* WT/DS27/RW/EEC, 12 April 1999, unadopted, para. 4.7.

satisfaction with the new opportunities offered by the new regime... [and that] the liberalisation brought about by the abolition of the import licence system has created new opportunities for the MFN exporters". Can the EC and the US comment on the response by Cameroon.

54. The United States thanks Cameroon for the additional information provided, but recalls its view that any claim by the EC regarding total market access is not within this Panel's terms of reference.

Q103. (Both Parties and Colombia) Can Colombia elaborate on the following statement in paragraph 47 of its Third Party submission: "[T]he prime example of a discriminatory quantitative restriction is when a product originating from a Member or group of Members is subject to a TRQ to which all like products originating from all other third Members are not subject." Can the Parties comment on Colombia's response.

55. The United States believes that there are several possible examples of discriminatory regimes that would violate the requirements of Article XIII, one of which is an exclusive tariff quota for a group of Members of the type at issue here. Collectively, the text of paragraphs one and five of Article XIII disallows any tariff quota that does not "similarly restrict" all imports of a product in a like manner. The text of Articles XIII:2 and XIII:5 further requires a Member, once it opts to impose a tariff quota on banana imports entering its market, to ensure that it allots shares to Members resembling those that would have otherwise existed in an unrestricted market. As highlighted by Colombia, the fact that the EC opted to exclude MFN suppliers *entirely* from the ACP tariff quota makes its breach of these provisions impossible to deny.

Q107. (Both Parties and Japan) Can Japan explain the following statement in footnote 17 of its third party submission: "Japan understands that the EC does not object to the fact that the United States has 'standing' in this case." Can the EC and the US comment on the response by Japan.

56. The EC's discussions of the issues of "standing" and "nullification or impairment" are not the model of clarity. The United States agrees with Japan that the EC's arguments are aimed mainly at the issue of the level of nullification or impairment for which the EC could face suspension of benefits - an issue which is not relevant for this proceeding. Nonetheless, the EC has specifically requested that the Panel determine whether the United States has standing. As the United States has explained previously, the United States does have "standing" to pursue this proceeding. The EC appears to agree that the United States would have standing to challenge the

EC regime under regular dispute settlement, just not Article 21.5.[34]

[34]Replies to the Panel's Questions by the European Communities, para. 37.