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

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

November 21, 2007

A. Questions addressed to Parties

1. Both Parties

Q1. (Both Parties) Can the Parties confirm the EC bananas import data contained in Exhibits ACP-1 and ACP-3.

1. The data in Exhibits ACP-1 and ACP-3 appear to be consistent with official Eurostat statistics available to the United States.

Q2. (Both Parties) How did the actual market and regulatory conditions for the import of bananas change following the various enlargements of the EC in the period 1999 and 2007?

2. There have been two EC enlargements between 1999 and 2007, and three since 1995. In 1995, when Austria, Finland, and Sweden joined the EC, the EC enlarged its MFN tariff quota by 353,000 mt, thereby increasing its MFN tariff-quota volume to 2.553 million mt.[1]

3. In May 2004, when the EC enlarged its membership to include ten Central and Eastern European countries, it maintained the EC-15 interim arrangement without alteration and established a separate tariff-quota arrangement applicable to the EC-10 Members for the duration of the interim period. Under that "interim" EC-10 arrangement, an MFN tariff quota was set at 300,000 tons from 1 May to 31 December 2004,[2] and at 460,000 tons for calendar year 2005.[3] The interim EC-10 tariff quota and 75 euro per ton tariff represented a substantial increase in MFN banana access restrictions relative to the zero-duty unlimited access accorded by most of the acceding EC-10 countries prior to enlargement.

4. In January 2007, Romania and Bulgaria acceded to the EC. In 2005, prior to accession, Romania imported 143,000 metric tons of Latin American bananas, subject to a tariff of 16%;[4] Bulgaria imported 55,000 metric tons, subject to a tariff of 11.2%.[5] Following their accession, both countries became subject to the 176 euro per ton tariff.

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[1] *See* Council Regulation (EC) No. 1637/98, OJL 210/28, 28 July 1998, Article 1.

[2] Commission Regulation (EC) No. 838/2004, OJL 127/52, 29 April 2004, Article 3.1. Since the ACP had not historically supplied the EC-10, they received no additional tariff-quota allocation.

[3] Commission Regulation (EC) No. 1892/2004, OJL 328/50, 30 October 2004, Article 3.1.

[4] U.N. Comtrade Database: Romania banana imports 2002-2005, Exhibit US- 16.

[5] U.N. Comtrade Database: Bulgaria banana imports 2002-2005, Exhibit US-16.

5. The EC has not yet provided Article XXIV or XXVIII compensation to MFN suppliers for any of these accessions.

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.

6. The United States restates its position that the Article I waiver has ceased to apply with respect to bananas. Therefore, the waiver's access standard is of no continuing legal relevance. The United States notes that Colombia's Third Party submission and oral statement support the view that the waiver has ceased to apply with respect to bananas.[6]

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.'[7] 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).

7. These five items are part of the long procedural history of this dispute. We will address each one separately.

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[6] *See* Colombia Third Party Submission, para. 9, and oral statement, paras. 6 and 7.

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

8. The arbitration proceeding under Article 21.3(c) (item a), resulted in the granting of over fifteen months for the EC to come into compliance after the adoption of the recommendations and rulings by the DSB in *Bananas III*, that is until January 1, 1999. This result set the stage for the procedural steps that followed.

9. The first Article 21.5 proceeding brought by Ecuador (item b) is not directly relevant to this proceeding, as the United States was not a party to it. Nonetheless, it occurred in parallel with the Article 22.6 proceeding requested by the EC as a result of the request for suspension of concessions by the United States (item c). Both proceedings were brought because in late 1998, the EC issued two new regulations amending Regulation (EC) 404, the regulation that had been the subject of the *Bananas III* rulings, which the original parties to Bananas III believed were not in compliance with the EC's WTO obligations. In April 1999, the first Article 21.5 panel and the Article 22.6 arbitrator both found that the new EC regulations were in breach of the GATT 1994 and the GATS. The DSB authorized the United States to suspend concessions in accordance with the award of the Article 22.6 arbitrator. (And, with respect to Ecuador's recourse to Article 21.5, the DSB once again requested the EC to come into compliance with its obligations under the GATT 1994 and the GATS.) As of this point, the EC had therefore yet to come into compliance with its WTO obligations.

10 Item d is very relevant to establishing that the January 1, 2006 regime is a "measure taken to comply." As part of its status report on November 19, 1999, required under Article 21.6 of the DSU, the EC announced to the entire WTO Membership a second attempt to reform its banana regime. As reflected in the DSB minutes, this "proposal to modify its [the EC's] banana import regime" was to comprise a "two-stage process, namely, after a transitional period during which a tariff quota system would be applied with preferential access for ACP countries, a flat tariff would be introduced."[8] This description shows that the measures comprising this "two-stage process" – a transitional period with quotas, with a flat-tariff at the end – were intended to be measures taken to comply.

11 Item e, the Understanding on Bananas between the EC and the United States, is also very relevant. It "identified the means by which the long-standing dispute over the EC's banana import regime can be resolved." Consistent with the proposal that the EC had laid out in November 1999, the Understanding set out a "two-stage process", with a transitional period with tariff rate quotas granting preferential treatment for the ACP countries and the introduction of a "Tariff Only regime for imports of bananas no later than 1 January 2006." (See Paragraphs B and C of the Understanding). The interim steps set out in the Understanding, as well as the final step the EC was to take by January 1, 2006, are all "measures taken to comply". The regime introduced by the EC on January 1, 2006, which the EC claims (albeit erroneously) to be a tariff-only regime, corresponds to the step set out in paragraph B of the Understanding and to the EC's

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

own description before the DSB of its compliance proposal.

Q5. (Both Parties) Can the US identify the DSB recommendations and ruling referenced in the following statement in paragraph 49(3) of the US first written submission: "the EC has failed to comply with the recommendations and ruling of the DSB." Can the EC comment on the US' response.

12. The "recommendations and rulings of the DSB" refer to the recommendations and rulings adopted by the Dispute Settlement Body on September 25, 1997.[9] They include the findings of inconsistencies of the EC's bananas regime as well as the recommendation that the European Communities "bring the measures found in this Report and in the Panel Reports, as modified by this Report, to be inconsistent with the GATT 1994 and the GATS into conformity with the obligations of the European Communities under those agreements."[10]

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'[11] 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."

13. As a preliminary matter, in this proceeding the United States is claiming that the current EC regime is not consistent with the covered agreements and therefore fails to implement the recommendations and rulings adopted by the DSB in the original U.S. proceeding. Given the U.S. claims and the EC's arguments in response, the question before this Panel is whether the EC's current regime is a measure taken to comply with those recommendations and rulings and whether the regime is WTO-inconsistent. (And, as the Panel knows, the United States considers that it is.) In addition, as a technical matter, the United States notes 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. That being said, the United States takes this opportunity to make two other points.

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[9]WT/DSB/M/37 (4 November 1997).

[10]*Bananas III (AB)*, WT/DS27/R/USA, para. 257.

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

14. First, as Nicaragua and Panama point out in paragraph 40, the first suggestion by the first Article 21.5 panel was indeed that the EC "could choose to implement a tariff-only system for bananas, without a tariff quota."[12] The fact that the panel in the first Ecuador 21.5 proceeding conceived of a tariff only regime as a potential means for compliance demonstrates the error in the EC argument that its move to what it describes as a tariff only regime in this proceeding is not a "measure taken to comply." For this and the reasons we have given elsewhere, the EC's argument is wrong.

15. In addition, the quoted passage comes after the paragraph in which Nicaragua and Panama point out that in the related Article 21.5 proceeding brought by Ecuador, the EC is arguing that its January 1, 2006 import regime cannot be challenged because it implements a suggestion made by the first Article 21.5 panel, while in this proceeding the EC argues that the regime is not a measure taken to comply at all. This only highlights the inconsistency in the EC's argumentation, when it tries to wrongly take advantage of the second suggestion in the Ecuador 21.5 proceeding.

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.

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.

Q9. (Both Parties) Can the Parties provide a reasoned answer on whether they agree or disagree with the following statement contained in paragraph 7 of the ACP Third Parties' written submission: "[W]ith the adoption of the Understanding on Bananas

[12] *Bananas III (21.5) (Ecuador)*, para. 6.156.

> **and the Doha waiver, new rights and obligations have arisen for WTO Members. These two new legal instruments which must necessarily be taken into account to decide on the WTO compatibility of the new EC banana import regime have been adopted after the DSB issued its recommendations and rulings in the original *Banana III case*. They have thus broken the connection with the original *Banana III case*, preventing from considering the new EC banana import regime as a measure taken to comply with the recommendations and rulings of the DSB in the original *Banana III* case."**

16. The United States understands the quoted passage to address two points. One is that the Understanding and the Doha waiver have to be taken into account in determining the WTO compatibility of the EC's new banana regime. The second point seems to be that the Understanding and the Doha waiver have "broken the connection" with the original *Bananas III* recommendations and rulings and therefore the new EC bananas regime is not a "measure taken to comply." The United States disagrees with both points.

17. As the United States explained in its second written submission, the EC is not arguing that the EC-US Understanding on Bananas indicates a particular interpretation of the GATT 1994 (the covered agreement relevant to this proceeding). Likewise, the ACP Third Parties have not explained how the Understanding may assist in the interpretation of the GATT 1994. The EC's argument has been that the Understanding precludes the United States from bringing this proceeding. Indeed, there is nothing in the Understanding that alters the WTO Agreement. The United States refers the Panel to paragraphs 36 through 43 of its second written submission. In addition, the United States would note that as the United States and the EC are the only two parties to the Understanding, no rights and obligations could flow from it with respect to other WTO Members.[13]

18. The Doha waiver is, of course, a waiver agreed to by WTO Members at the Doha Ministerial which indeed alters the rights and obligations of WTO Members, by providing for the waiver of Article I:1 of the GATT 1994 for certain preferential tariff treatment provided by the EC to ACP countries. Among other things, the waiver specifically provided for an annex relating to bananas. This annex is part of the "rights and obligations" arising from the waiver. The United States has demonstrated in its written submissions and oral statement, that the text of the annex can only support an interpretation that leads to the conclusion that the Doha waiver expired with respect to bananas upon the introduction of the January 1, 2006 import regime.

19. With respect to the allegation that the Understanding and the Doha waiver have broken the connection between the Bananas III recommendations and rulings and the January 1, 2006 regime, the ACP can point to nothing in the text of the DSU that speaks to "breaking the

[13] *Cf.* Article 34 of the *Vienna Convention on the Law of Treaties:* A treaty does not create either obligations or rights for a third State without its consent.

connection." The ACP proposed approach is without any legal basis. And, as a matter of fact, the opposite is true. The Understanding affirms the connection between the DSB recommendations and rulings and the EC new banana regime. The Understanding is a bilateral understanding between the United States and the EC. In that Understanding, the EC agreed to undertake certain steps to bring itself into compliance. Those steps included, per the terms of paragraph B of the Understanding, the adoption of a tariff only regime by January 1, 2006. The waiver was itself contemplated within the terms of the Understanding. In any case, it does not change the fact that the January 1, 2006 regime was a measure to be taken to comply, expressly set out in the Understanding.

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 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."

20. The United States disagrees with the argument raised by the ACP Third Parties, as well as the EC, that the time lapse between the adoption by the DSB of the recommendations and rulings in the original proceeding and the introduction of the measure that is the subject of this proceeding results in that measure not being a "measure taken to comply" properly the subject of an Article 21.5 proceeding. First and foremost, the United States notes that Article 21.5 of the DSU does not contain any such "reasonable period of time" limitation. Thus, there is no textual basis for the EC's proposed approach. Indeed, the EC is attempting to impute into the text terms and conditions that are not there and were not agreed by Members.

21. Second, the timing in this case derives from the timeline laid down in the Understanding itself, which required as a final step the implementation of a tariff only regime by January 1, 2006. As the United States noted in its oral statement, the United States, Ecuador, and the other original complaining parties recognized the importance that trade in bananas has for many of the ACP countries and recognized that an abrupt fix to the bananas problem could have a negative impact. That is why the United States, Ecuador and others were willing to allow for a lengthy transitional period of adjustment leading to a new, tariff only regime by January 1, 2006, as set out in the Understanding.

22. The United States would like to note that in other cases, a long period of time between the original rulings and the "measure taken to comply" has not prevented Article 21.5 review. For example, in the *FSC*[14] case, the EC requested and obtained the establishment of a second Article 21.5 panel almost 5 years after the original ruling by the DSB. In that case, the DSB adopted the recommendations and rulings in March 2000 and the second Article 21.5 panel was established February 2005. In addition, in *EC – Hormones*[15] the EC claimed compliance over five years from the date of adoption of the recommendations and rulings by the DSB. The EC claimed that if the United States disagreed, it should seek recourse to an Article 21.5 panel.[16] Accordingly, the EC itself has admitted what is already plain on the text of Article 21.5 - that the length of time is not a bar to having recourse to Article 21.5.

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 […]'[17]. 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."

23. The United States disagrees with the argument made by the ACP Third Parties that the Arbitrator's statement supports a conclusion that the January 1, 2006 import regime cannot be subject to an Article 21.5 proceeding. In paragraphs 44 through 47 of the first Arbitration award, the arbitrator was addressing the argument raised by Honduras, Nicaragua and Panama that the

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[14]*United States – Tax Treatment for "Foreign Sales Corporations", Second Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS108/AB/RW2, adopted March 14, 2006.

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

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

[17](*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.

scope of the arbitration could extend to an examination of whether the proposed EC rebinding was consistent with Paragraph 1 of the Doha Waiver. The arbitrator disagreed, explaining that the task of the Arbitrator was limited to the "*sui generis* process" set out in the annex, and therefore limited to the question of whether the envisaged rebinding would result in at least maintaining total market access for MFN banana suppliers.

24. The waiver was contemplated as part of the Understanding. *See* paragraph E of the Understanding on Bananas. Therefore, it is hard to see how the existence of the waiver means the EC regime is not a "measure taken to comply." The fact that the waiver expressly provided for recourse to dispute settlement simply means that the waiver was drafted as contemplated by the Uruguay Round Understanding on Waivers[18] and in a way in which most, if not all, waivers are drafted. This cannot have the implications that the ACP Third Parties argue. Finally, recourse to Article 21.5 is a recourse to dispute settlement[19] so there is in any case no inconsistency between the Arbitrator's statement and the U.S. pursuit of this Article 21.5 proceeding.

25. In addition, the Doha waiver, as well as the Article XIII waiver, were time bound. Any "compliance" that the EC achieved through them would expire with the waivers. Consequently, in requesting the waiver, the EC must have known that additional steps would be required after the expiration of the waiver in order to be in compliance with the DSB's recommendations and rulings. Thus, the EC must always have known that some "measure taken to comply" would be necessary after the waiver expired. Indeed, as the United States explains in response to question 33, the Article XIII waiver was set on December 31, 2005 precisely because per the terms of the Understanding (paragraph B), the EC was to move to a tariff only regime by January 1, 2006. An Article XIII waiver would not have been needed if and when the EC introduced a tariff only regime.

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*

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

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

> ***relationship*** **to the declared "measure taken to comply", and to the recommendations and rulings of the DSB'.[20] 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.'[21] 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.'[22] Moreover, Japan understands that the EC's 2006 regime is the measure which grants a preferential treatment to the imports of bananas from the ACP countries. In light of such timing, nature and effect of the EC's regime, Japan sees the argument that the EC's 2006 regime does not have a relationship with the recommendations and rulings of the DSB in *EC – Bananas III* dispute to be hardly convincing.[23]"**

26. The United States completely agrees with Japan that the EC's arguments that the January 1, 2006 regime is not a measure taken to comply is "hardly convincing." As Japan points out, the EC's regime is identified in paragraph B of the Understanding as one of the measures by which the long-standing bananas dispute could be resolved. This is evidence that the January 1, 2006 regime is a "measure taken to comply" properly the subject of this proceeding. Furthermore, the DSB has already made clear in past Article 21.5 proceedings that "a panel's mandate under Article 21.5 of the DSU is not necessarily limited to an examination of an implementing Member's measure declared to be 'taken to comply'". See for example, *Australia Leather* and *Australia Salmon*.[24]

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

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

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

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

[23](*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.

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

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,[25] as amended by Regulation 216."**

27. The United States agrees that the three regulations cited by Nicaragua and Panama in their joint Third Party submission provide evidence of the connection between the measure that was found to be in non-compliance in *Bananas III*, Regulation 404, and the measure subject to this proceeding, Regulation 1964. Since its announcement of a second attempt to reform its banana regime at the November 19, 1999 DSB meeting, the EC has described its compliance proposal as one involving a transitional period during which a tariff rate quota system would be applied with preferential access for ACP countries, culminating with a tariff only system by January 1, 2006. Regulation 216, amending Regulation 404, set out an interim tariff rate quota regime, which would culminate with a tariff only regime by January 1, 2006. Regulation 1964 establishes the purported tariff only regime by January 1, 2006. This regime can be no other than the regime described by the EC since its proposal was made at the November 19, DSB meeting and expressly included in paragraph B of the Understanding entered into with the United States (and Ecuador). Indeed, paragraph B references Regulation 404, as amended by Regulation 216. We refer the Panel to our discussion of these issues in our First Written Submission, paragraphs 4 through 9, and our Second Written Submission, paragraphs 44 through 52.

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.[26] The timing of the current compliance measures, thus, fulfilled the Understanding's compliance timeline."

28. The United States agrees with the statement. The United States agrees that the implementation of a tariff only regime by January 1, 2006 was part of the steps agreed in the Understanding with the EC that would constitute the "means by which the long-standing dispute ... can be resolved." This is expressly set out in paragraph B of the Understanding. Paragraph B

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

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

references Regulation 404, as amended by Regulation 216. The first Whereas clause of Regulation 1964, in turn also references Regulation 404, as amended, with respect to the move to a tariff only regime by January 1, 2006. Regulation 1964 is inextricably linked to the Understanding and the steps that the EC had agreed to take for purposes of compliance with the *Bananas III* recommendations and rulings. The fact that the EC put this measure into place on the date contemplated by the Understanding reinforces the point that the EC, itself, understood that its new regime was a step it was taking to implement the rulings and recommendations of the DSB. (Of course, as we have shown in this proceeding, the EC was incorrect about whether the revised regime successfully resolved the WTO-inconsistency.)

Q15. (Both Parties) Can the US provide a reasoned answer on whether it agrees or disagrees with the following statement contained in paragraph 48 of the EC's second written submission: "[T]he 1997 dispute aimed at preserving the WTO rights of the complainants, while the 2005 arbitrations aimed at simply preserving the conditions of access to the EC market which the complainants and all other MFN suppliers were enjoying under the former TRQ regime. [A] Regulation adopted to conform to the aims of the 2005 arbitration cannot be a 'measure to comply' with the findings of the 1997 dispute." Can the EC comment on the US' response.

29. The United States disagrees with the EC's argument referenced above. As the United States has explained in the response to questions 13 and 14, there is a link between what the EC agreed in paragraph B of the Understanding (and described as part of its compliance plan on multiple other occasions) - that is to introduce a tariff only regime by January 1, 2006 - and Regulation 1964, which purports to implement a tariff only regime by January 1, 2006. The fact that Regulation 1964 may also be an untimely attempt by the EC to "rectify the matter" under the Annex to the Doha Waiver does not alter that link. There is no reason why a regulation cannot meet more than one "aim", nor is there any reason to believe that the provisions of the Doha waiver did anything more than commit the EC to ensure that measures it would take to comply with the DSB's rulings and recommendations would also meet certain other criteria. As we noted in paragraph 48 of our Second Written Submission, 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*.

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.[27]" Can the EC elaborate on whether, in its opinion, if this was the case, the Member who has

[27](*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.

"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.

Q17. (Both Parties) In paragraph 7 of its first written submission the US states that "[i]n April 2001, after more than two years of non-compliance, the United States and the EC reached an 'Understanding on Bananas', which established a phased series of steps to be taken by the EC over several years, in combination with certain waivers, *for the purpose of bringing itself into compliance with its WTO obligations*.[28]" (emphasis added) Can the US elaborate on the emphasized part of this statement? Would this mean that the Understanding on Bananas is a mutually agreed solution? Can the EC comment on the US' response.

30. As explained in paragraph 7 of our first written submission, the Understanding on Bananas between the United States and the EC (and the similar one reached between the EC and Ecuador) was agreed to more than two years after the reasonable period of time had expired for the EC to come into compliance with its obligations pursuant to the recommendations and rulings of the DSB in *Bananas III*. The object of the negotiations over the Understanding was to set out the steps through which compliance could be achieved. Paragraph A of the Understanding recognized this by stating the concept in slightly different terms: "The European Commission and the United States have identified the means by which the long-standing dispute over the EC's banana import regime can be resolved."

31. In its notification of the Understanding as a mutually agreed solution, the EC clearly linked the Understanding to the recommendations and rulings of the DSB in *Bananas III. See* first paragraph of EC notification, WT/DS27/58. Although the United States did not, and does not, consider the Understanding to be a mutually agreed solution pursuant to Article 3.6 [29], it was clearly the means through which such compliance could be achieved. Nonetheless, the fact that it would eventually lead to compliance, did not necessarily make it a mutually agreed solution.

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[28](*footnote original*) *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"). Exhibit US - 2. The EC-US Understanding was followed a few weeks later by a substantially similar understanding between the EC and Ecuador. See *European Communities - Regime for the Importation, Sale and Distribution of Bananas - Understanding on Bananas between the European Communities and Ecuador,* WT/DS27/60, 9 July 2001.

[29] WT/DS27/58, dated 2 July 2001. See also paragraphs 28 through 35 of the U.S. second written submission and the U.S. opening statement at the Panel meeting, paragraph 38.

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'*).[30]" (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.

Q19. (Both Parties) Can the Parties provide a reasoned answer on whether they agree or disagree with the following statement contained in paragraph 55 of the written submission of the ACP Third Parties: "[B]y definition, a mutually agreed solution contains the elements of the solution in the form of a series of actions that parties will have to undertake to comply with the agreement."

32. The United States disagrees with this statement. There is no definition of "mutually agreed solution" in the DSU. There is no requirement in the DSU that the "mutually agreed solution" be in writing or even "agreed" before the "solution" is implemented. For example, a responding Member may take an action on its own that is then considered sufficient by the complaining party. At that point, after the action has been taken, the complaining party may "agree" with the respondent that the action constitutes a "mutually agreed solution" that needs to be notified pursuant to Article 3.6 of the DSU. Or an offending measure could lapse of its own accord without any action being taken by the Member concerned, or the Member concerned could refrain from taking action that was deemed inconsistent. Neither of these involves "action" let alone action that "will" be undertaken. What should be clear is that there has to be agreement by the relevant parties that the solution indeed constitutes a "mutually agreed solution" that has to be notified. The United States has never agreed with the EC that the Understanding constitutes a mutually agreed solution for purposes of Article 3.6.

Q20. (Both Parties) Can the Parties provide a reasoned answer on whether they agree or

[30] (*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.

disagree that if, after having reached a mutually agreed solution (MAS), a complaining Member considered that the respondent Member has failed to comply with its obligations contained in that MAS, that complaining Member should be barred from challenging under Article 21.5 of the DSU a measure considered to be inconsistent with the WTO Agreements, because a MAS had been reached?

33. The United States disagrees that the existence of a mutually agreed solution bars a complaining Member from recourse to Article 21.5 proceedings.

34. There is no basis in the DSU for attributing any legal consequences to a mutually agreed solution other than the limited ones specified in Articles 3.6, 12.7, and 22.8. Article 3.6 requires that mutually agreed solutions be notified to the DSB and the relevant Councils and Committees. Article 12.7 provides that the existence of a mutually satisfactory solution reached prior to the conclusion of a panel proceeding affects the form and content of the panel's report: "Where a settlement of the matter among the parties to the dispute has been found, the report of the panel shall be confined to a brief description of the case and to reporting that a solution has been reached." Article 22.8 provides that "the suspension of concessions or other obligations shall be temporary and shall only be applied until such time as the measure found to be inconsistent with a covered agreement has been removed , or the Member that must implement recommendations or rulings provides a solution to the nullification or impairment of benefits, or a mutually satisfactory solution is reached." The fact that the legal consequences of a mutually agreed solution are spelled out in these three provisions is significant because it stands in stark contrast to the lack of any provision that assigns the legal consequences that the EC would attribute to such solutions.

35. In addition, mutually agreed solutions are not "covered agreements" within the meaning of Article 1 of the DSU. Indeed, a mutually agreed solution may not take the form of a written agreement at all. (*See* the U.S. response to question 19). Since mutually agreed solutions are not "covered agreements," the dispute settlement mechanism of the WTO is not available to enforce the provisions of mutually agreed solutions that take the form of a written agreement. The EC position, if adopted by this Panel, would therefore lead to very unfortunate consequences: a responding Member that failed to comply with the terms of a mutually agreed solution would appear to be able to claim immunity both from further proceedings on the original dispute (by virtue of the EC position on the legal effect of mutually agreed solutions) as well as from a claim under the mutually agreed solution (in view of the absence of mutually agreed solutions from the list of covered agreements in the DSU). Nothing in the DSU suggests that a complaining Member should lose its rights in such a way.

36. Furthermore, Article 3.5 of the DSU specifically requires mutually agreed solutions to be consistent with the covered agreements. The EC's approach would prevent such an examination.

37. The United States would like to draw the attention of the Panel to the related discussion in paragraphs 36 through 43 of our Second Written Submission and paragraphs 39 through 42 of our

opening statement at the Panel meeting.

Q21. (Both Parties) Can the Parties provide a reasoned answer on whether they agree or disagree with the following statement contained in paragraph 60 of the written submission of the ACP Third Parties: "Article 21.6 of the DSU makes clear that 'the issue of implementation of recommendations and rulings *shall* […] remain on the DSB's agenda until the issue is resolved' (emphasis added). As this issue has been withdrawn from the agenda with the agreement of all WTO Members, the issue of the implementation of the adopted recommendations and rulings in the *Bananas III* case is recognized as having been resolved. It cannot therefore be readdressed via Article 21.5 proceedings."

38. The United States disagrees with the statement. It is incorrect to say that the issue was "withdrawn" from the agenda. Instead, as is apparent from the DSB minutes for the February 1, 2002[31] meeting all that happened was that the EC declared its view that "this matter should now be withdrawn from the agenda" (presumably meaning that despite Article 21.6, the EC need no longer put a status report on the agenda of future DSB meetings). A review of the minutes confirms that Ecuador agreed there was no need for the EC to put the issue on the agenda of future DSB meetings in light of the fact that the EC had taken the step set out in paragraph D of the Understanding and the next step that would need to be taken by the EC was implementation of a tariff only regime by January 1, 2006. The DSB simply "took note" of the statements and did not take a decision on this issue. The fact that other Members did not request that this matter be on the agenda of subsequent meetings presumably reflects that little would have been gained by keeping this matter on the DSB agenda until the EC took the next step on January 1, 2006.

39. It is also clear from the statements made at the meeting that the dispute was not considered "resolved". For example, the minutes reflect the following statements:

> "Ecuador wished to reserve its rights under Article 21 of the DSU. Therefore if there was any disagreement concerning the measures applied by the EC, the matter could be referred to the original Panel pursuant to Article 21.5 of the DSU."[32]
>
> "Honduras wished to reserve its rights, including the right to request that this matter be placed on the DSB agenda in the future."[33]
>
> "The United States would continue to work closely with the EC and other Members to

[31]WT/DSB/M/119, 6 March 2002.

[32]WT/DSB/M/119, 6 March 2002, para. 5.

[33]WT/DSB/M/119, 6 March 2002, para. 6.

address any issues that might arise as the EC moved to a tariff-based system for bananas and implemented the terms of the bilateral Understanding on Bananas."[34]

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

Q22. (Both Parties) In paragraph 31 of its second written submission the US argues that "[the] end point [set out in paragraph B of the Bananas Understanding 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." In the light of that argument, can the US provide a reasoned answer on whether it agrees or disagrees with the following statement contained in paragraph 24 of the EC's first written submission: "The European Communities implemented the new import regime within the agreed deadline and the United States' right to suspend concessions was terminated. This was the end of the banana dispute between the United States and the European Communities". Can the EC comment on the US' response.

41. The United States disagrees with the argument made by the EC in paragraph 24 that the dispute between the United States and the EC "ended" with the imposition of the interim import regime set out in paragraph C(2) of the Understanding by January 1, 2002 (the import regime referenced in paragraph 24). As the United States has explained in its written submissions and in its opening statement, the Understanding set out a series of steps. Two interim steps, set out in paragraph C of the Understanding, were indeed achieved by the EC by July 1, 2001 and January 1, 2002. Nonetheless, there was a further step to be achieved by the EC, and set out in paragraph B of the Understanding on Bananas agreed to between the United States and the EC - the introduction of a tariff only regime by January 1, 2006.

42. In exchange for the steps that paragraph C set out for the EC to take, paragraph D of the Understanding provided that the United States also take certain steps. First, upon implementation of the import regime described in paragraph C(1), the United States would provisionally suspend its imposition of increased duties. Then, upon implementation of the regime described in C(2), the United States would terminate its imposition of increased duties. Given the EC's implementation of paragraph C, the United States took the steps set out in paragraph D. This only proves that the EC and the United States both complied with the steps set out in paragraphs C and

[34]WT/DSB/M/119, 6 March 2002, para. 8.

D of the Understanding. However, a further step remained to be taken by the EC.

43. Finally, the EC statement at the end of paragraph 24 that "[t]he United States' agreement to have their retaliation rights terminated confirms" that the dispute had ended because "the right to suspend concessions must be revoked once the defending WTO Member has fully complied with the DSB recommendations and rulings" is wrong. The terms of paragraph D did not "terminate" the "right of the United States to suspend concessions." To the contrary, the United States agreed to terminate its "imposition of increased duties" – *i.e.*, its application at the time of its rights under the DSB authorization of April 19, 1999 to suspend concessions or other obligations – as consideration for the EC taking the step set out in paragraph C(2). This is yet another instance of the EC turning logic on its head, by arguing that the parties' forbearance in allowing the EC time to reform its bananas import regime must necessarily imply that the parties agreed the dispute had been resolved.

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.

Q24. (Both Parties) Can the US provide a reasoned answer on whether it agrees or disagrees with the following statement contained in paragraph 73 of the EC's first written submission: "[The relevant finding of the Arbitrators in the arbitration bought by the EC pursuant to Article 22.6 of the DSU] confirms that the Panel must use different standards to determine (a) whether the alleged violation of a WTO rule sufficiently 'touches' upon the interests of the complaining party so as to justify the complaining party's 'standing' to commence dispute settlement proceedings, and (b) whether the complaining party suffers a 'nullification or impairment'. Moreover, it confirms that the standard that needs to be satisfied for a finding of 'nullification or impairment' should be based on facts and is more difficult to satisfy than the standard that needs to be satisfied for a finding of 'standing' to bring a complaint." Can the EC comment on the US' response.

44. In its discussion of the issue of nullification or impairment in section III.D of its first written submission, the EC requests that the Panel make two determinations. First, the EC asks the Panel to determine whether the United States has "standing" to bring this proceeding. Then, if the Panel finds that the United States has standing and that there is a violation, whether "there is nullification or impairment of a benefit accruing to the United States *for which the European*

Communities can face suspension of concessions."[35] (Emphasis added). The EC argues that this latter finding is necessary in order to "offer legal certainty to the parties and help them avoid future disputes, for example, under Article 22 of the DSU."[36] As a preliminary comment, we refer the Panel to paragraphs 47 and 48 of our opening statement, where we noted that the EC's assertion that a finding of WTO-inconsistency by the Panel would prolong the dispute and likely lead to the suspension of concessions by the United States is troubling.

45. This Panel does not have before it the issue of what is the level of nullification or impairment suffered by the United States for purposes of determining the level of suspension of concessions for which it could receive authorization. Therefore, what standard the Panel would use to determine this is not relevant. The question of whether the United States has "standing" was settled by the Appellate Body in *Bananas III*. Indeed, the passage quoted by the EC, and related passages not quoted, support our views.

46. The passage quoted by the EC in paragraph 73 is taken from paragraph 6.10 of the *Bananas III* Article 22.6 proceeding.[37] Paragraph 6.10 must be read in conjunction with paragraphs 6.9 and 6.11. It is notable that in those paragraphs, the Arbitrators address similar arguments made by the EC in the earlier *Bananas III* proceedings. These three paragraphs summarize earlier findings with respect to the issue of the U.S. right to bring claims under the GATT 1994 against the EC's bananas regime and the difference between the existence of nullification or impairment where there is a violation and the "level" of nullification or impairment for purposes of an authorization to suspend concessions. The United States agrees with the analysis in these three paragraphs and would like to take this opportunity to recall them:

> "6.9 In the original panel proceeding we held 'that under the DSU the United States has a right to advance the claims that it had raised in this case.' We recall the EC's argument in the original dispute that if a Member not suffering nullification or impairment of WTO benefits in respect of bananas were allowed to raise a claim under the GATT, that Member would not have an effective remedy under Article 22 of the DSU. We also note the complainants' argument in the original dispute that Article 3.8 of the DSU presupposes a finding of infringement prior to a consideration of the nullification or impairment issue, suggesting that even if no compensation were due, an infringement finding could be made. We agree." (Internal footnotes omitted).
>
> "6.10 The *presumption* of nullification or impairment in the case of an infringement of a GATT provision as set forth by Article 3.8 of the DSU cannot in and of itself be taken

[35]EC first written submission para. 74.

[36]*Id*.

[37]*European Communities – Regime for the importation, sale and distribution of bananas - recourse to arbitration by the European Communities under Article 22.6 of the DSU*, WT/DS27/ARB, dated 9 April 1999.

simultaneously as *evidence* proving a particular level of nullification or impairment allegedly suffered by a Member requesting authorization to suspend concessions under Article 22 of the DSU at a much later stage of the WTO dispute settlement system. The review of the level of nullification or impairment by Arbitrators from the objective benchmark foreseen by Article 22 of the DSU, is a separate process that is independent from the finding of infringements of WTO rules by a panel or the Appellate Body. As a result, a Member's potential interests in trade in goods or services and its interest in a determination of rights and obligations under the WTO Agreements are each sufficient to establish a right to pursue a WTO dispute settlement proceeding. However, a Member's legal interest in compliance by other Members does not, in our view, automatically imply that it is entitled to obtain authorization to suspend concessions under Article 22 of the DSU." (Emphasis in original).

"6.11 Over the last decades of GATT dispute settlement practice, it has become a truism of GATT law that lack of *actual* trade cannot be determinative for a finding that no violation of a provision occurred because it cannot be excluded that the absence of trade is the result of an illegal measure." (Emphasis in original).

Q25. (Both Parties) Can the US elaborate on the following statement in paragraph 64 of the US second written submission: "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." Can the EC comment on the US' response.

47. This statement was another way of saying that where there is an infringement under the WTO Agreement, as we have shown with respect to GATT Articles I and XIII in this case, the nullification or impairment is presumed without the need to show any particular level of trade effects. This is also the effect of Article 3.8 of the DSU. In addition, this follows the findings in *United States – Superfund*[38], which is quoted and summarized in the paragraphs 62 and 63 of our submission, as well as the Appellate Body's findings in *Bananas III*[39].

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,

[38]GATT Panel Report, *United States – Taxes on Petroleum and Certain Imported Substances*, L/6175, adopted 17 June 1987, BISD 34S/136.

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

the United States has a legitimate trading interest (confirmed by the *Bananas III* Panel and Appellate Body)[40] in ensuring that the EC's discrimination does not disrupt its internal market, global supplies, or market pricing."

48. As reflected in the answers to questions 24 and 25, and in our second written submission[41], the Appellate Body, in *Bananas III*, determined that a showing of trade effects is unnecessary for purposes of demonstrating that there has been a breach of a GATT provision. The Appellate Body based its reasoning on the *US – Superfund* panel report.[42] The United States notes that Nicaragua and Panama agree with this proposition.[43]

49. The point raised by Nicaragua and Panama in paragraph 125, makes reference to the observations made by the panel and the Appellate Body in *Bananas III* in the discussions related to the EC's arguments regarding standing and nullification or impairment. In particular, the Appellate Body noted that two points the Panel had made with regards to standing were "equally relevant to the question whether the European Communities has rebutted the presumption of nullification or impairment"arising from a finding of a violation.[44] Those two points were the fact that United States is a producer of bananas and a potential export interest cannot be excluded; and, the fact that the internal market of the United States for bananas could be affected by the EC bananas regime and its effects on world supplies and world prices of bananas.[45]

50. The United States agrees that these two conditions continue to apply. The United States is still a producer of bananas.[46] In addition, as a net importer of bananas, the United States continues to have a robust internal market for bananas that is affected by the EC bananas regime.

Q27. (Both Parties) Can the US provide the relevant WTO document, if any, supporting the following allegation in paragraph 14 of its first written submission: "On September 12, 2005, the EC proposed a revised banana 'tariff only' rate of 187 euro per ton for MFN suppliers, coupled with an enlarged ACP tariff rate quota of

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

[41]*See* U.S. Second Written Submission, paras. 53 through 64.

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

[43]Third Party Written Submission of Panama and Nicaragua, para. 122.

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

[45]*Id.*

[46]*See*, U.S. Second Written Submission, para. 58 and Exhibits US-13 and 14.

775,000 tons (reflecting a 25,000 ton increase in the then existing ACP tariff rate quota volume), at zero duty." Can the EC comment on the US' response.

51. The EC announced this proposed rate through a press release dated September 12, 2005, not a WTO document.[47] A day later, the EC sent a letter to the interested MFN parties notifying them of its revised banana tariff proposal.[48] That letter became a part of the record in the Second Arbitration.

Q28. (Both Parties) Can the EC elaborate on the following statement in paragraph 25 of its first written submission: "The duration of the Doha waiver is commensurate to the duration of the corresponding trade preferences found in Article 37 of the Cotonou Agreement, i.e., until December 31, 2007." Can the US provide a reasoned answer on whether it agrees or disagrees with that statement.

52. The United States understands that indeed the duration of the Doha waiver, except with respect to bananas, was tied to coincide with the duration of the maintenance of the non-reciprocal trade preferences granted to the ACP countries in order to facilitate the transition to the new trading arrangements. Article 36.3 of the Cotonou Agreement refers to the maintenance of the trade preferences. The Doha waiver contains repeated references to Article 36.3 of the Cotonou Agreement. Article 37 of the Cotonou Agreement provides that the new trading arrangements (known as economic partnership agreements) shall enter into force by 1 January 2008. That is why the Doha waiver is set to expire on December 31, 2007.

53. In addition, we draw the attention of the Panel to the public statements made by EC Trade Commissioner Mandelson (Exhibit US-17) and EC Director-General for Trade O'Sullivan (Exhibit US-18) linking the expiration of the Doha waiver and the economic partnership agreements.

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

[47] *See* "Commission Presents Revised Banana Tariff Proposal," *EC Press Release*, IP/05/1127,12 September 2005.

[48] *See Award of the Arbitrator, European Communities – The ACP-EC Partnership Agreement - Second Recourse to Arbitration Pursuant to the Decision of 14 November 2001*, WT/L/625, 27 October 2005 (AAII), para. 7.

waiver" (emphasis added). Can the US provide a reasoned answer on whether it agrees or disagrees with that statement.

54. The United States disagrees with the EC's interpretation of the waiver. We refer the panel to the discussion of this issue contained in paragraphs 67 through 80 of our second written submission and paragraphs 27 through 34 of our opening statement.

55. With respect to the phrase "the new EC tariff regime", the EC argument that it would refer to the import regime analyzed by the Arbitrator is incorrect. As a textual matter we note that the subject of the arbitration is referred to as the "envisaged rebinding" (tiret 4) or the "rebinding" (tiret 5, first sentence). It is highly unlikely that later on, tiret 5 would refer to it as "the new EC tariff regime". Surely, if that was the intention, it would have been expressed much more clearly.

56. We agree with the EC that the waiver should certainly have expired if the EC had gone ahead and implemented the regime that had just been found by the second arbitrator to "fail to rectify the matter". That could not have been the only scenario under which the waiver would have expired. The arbitration procedures contained in the annex were intended to provide multilateral control over the rebinding of the EC tariff. The annex provides the EC two opportunities to present a proposal that met the condition of "at least maintaining total market access for MFN banana suppliers." It would be absurd that after setting out such procedures, the MFN suppliers would be required to accept the unilateral determination of the EC that its new regime met the conditions of the annex and was entitled to keep the protection of the waiver, even if the "new regime" was only one "euro off" from the one reviewed by the arbitrator. Indeed, it is just as absurd to argue that MFN suppliers would have only provided for the waiver to lapse if the EC implemented the regime that had been found to be inconsistent with the conditions of the annex.

57. Therefore, the only reasonable explanation that takes account of the text and context of the annex is that "the new EC tariff regime" means whatever new regime the EC put into place after the second negative arbitration.

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.

58. The United States is not in a position to comment on what the EC was ready to agree to or not. The United States has explained why it believes the text and context of the annex do not support the EC interpretation of the annex. In this regard, we refer the Panel to our answer to question 29 and to the passages from our written submission and opening statement there referenced.

Q31. (Both Parties) Can the Parties provide a reasoned answer on whether they agree or disagree with the following statement contained in paragraph 18 of the Third Party written submission of Colombia: "[T]he EC has failed to indicate what is the 'envisaged rebinding of the EC tariff on bananas' within the meaning of the Waiver Annex. An *applied* tariff of €176/tonne does not constitute a 'rebinding'." As well as on the similar statement in paragraph 85 of the joint Third Party written submission of Nicaragua and Panama: "In the first place, the lapsed standard requires a *bound* arrangement (*i.e.,* an 'envisaged *binding*'). As the Arbitrator confirmed, that requirement necessitates a tariff binding governed by GATT Article II.[49] The EC, by its own admission, has never bound the current arrangement.[50] Indeed, it has never even clarified when or if it will, and what the new concessions might be."

59. The United States agrees with both of the quoted statements. A rebinding of the EC tariff on bananas was clearly part of the process set out in the annex to the waiver. For example, tiret 2 of the annex required the EC to notify interested parties of its "intentions concerning the rebinding of the EC tariff on bananas." As the Arbitrator found, the "envisaged rebinding . . . describes the action at the centre of the required analysis."[51]

Q32. (Both Parties) Can the Parties provide a reasoned answer on whether they agree or disagree with the following statement contained in paragraph 11 of the Third Party joint written submission of Nicaragua and Panama: "At the time the Understanding was reached in April 2001, *no* interested MFN Member, the United States included, was willing to accept waiver authority for whatever 'more favourable' ACP banana treatment the EC wished to accord. To the contrary, the United States, Panama, Nicaragua, and the other Latin American banana-supplying countries had held reserves on the EC's Article I waiver request for over a year, precisely because the EC had not yet put adequate restrictions around those banana tariff preferences."

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[49](*footnote original*) *AAI,* paras. 20, 29.

[50](*footnote original*) *See, e.g.,* EC First Written Submission (Ecuador proceeding), paras. 15, 121; EC Second Written Submission (Ecuador proceeding), para. 67.

[51]*See 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. 20

60. On February 29, 2000, over a year before the Understanding on Bananas was reached, the EC first requested a waiver from its obligations under GATT Article I in order to cover preferential tariff treatment under the ACP-EC Partnership Agreement for a "transitional" period extending through December 31, 2007.[52] For more than a year after the request, it was opposed by the *Bananas III* complaining parties and other MFN banana producing countries, primarily on the grounds that the EC had yet to define its *Bananas III* compliance measures and, thus, had not yet made clear the banana measures and preferences to be covered by the waiver.[53] In this regard, we note the statement of the U.S. representative at the meeting of the Council for Trade in Goods held April 5 and May 18, 2000 in which she expressed a desire to work with the EC "to ensure that a waiver decision did nothing to reduce the EU's obligations to implement existing DSB rulings and recommendations on bananas."[54]

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."

61. Paragraph E of the Understanding on Bananas between the United States and the EC (as well as the similar Understanding between the EC and Ecuador), recognized that a waiver of Article XIII would be needed in order to make the tariff rate quota reserved exclusively for bananas of ACP origin WTO compliant for the duration of that preferential treatment. This was in light of the findings by the earlier Article 21.5 panel and Article 22.6 arbitrator, that the then

[52]Request for a WTO Waiver, *New ACP-EC Partnership Agreement*, G/C/W/187, 2 March 2000.

[53]*See* Council for Trade in Goods, *Minutes of the Meeting of the Council for Trade in Goods – 5 April and 18 May 2000*, G/C/M/43, 13 June 2000 ("CTG 5 April 2000 Minutes"), paras. 6.9, 6.12, 6.13, 6.15; Council for Trade in Goods, *Minutes of the Meeting of the Council for Trade in Goods – 7 July and 16 October 2000*, G/C/M/44, 30 October 2000 ("CTG 7 July 2000 Minutes"); Council for Trade in Goods, *Minutes of the Meeting of the Council for Trade in Goods – 16 October 2000*, G/C/M/45, 13 November 2000 ("CTG 16 October 2000 Minutes"); Council for Trade in Goods, *Minutes of the Meeting of the Council for Trade in Goods – 14 March 2001*, G/C/M/47, 25 April 2001 ("CTG 14 March 2001 Minutes").

[54]CTG 5 April 2000 Minutes, para. 6.9.

857,700 ton tariff rate quota reserved exclusively for bananas of ACP origin was in breach of Article XIII. The United States has demonstrated in its written submissions and opening statement that the same result applies in this instance.

62. The duration of the waiver was until December 31, 2005 precisely because per the terms of the Understanding (paragraph B) the EC was to move to a tariff only regime by January 1, 2006. A waiver of Article XIII would not be needed if and when the EC introduced a tariff-only regime. Despite its claims to the contrary, the EC did not introduce a tariff-only regime on January 1, 2006. The EC introduced a regime that includes, yet again, a tariff rate quota reserved exclusively for ACP origin bananas. As the United States has demonstrated, based again on the sound reasoning by the earlier Article 21.5 panel and the Article 22.6 arbitrator, a tariff preference subject to a cap is a tariff rate quota. Therefore, the January 1, 2006 import regime for bananas is a tariff rate quota based regime.

Q34. (Both Parties) Can the Parties comment on the relevance, if any, of the fact that paragraph 1 of the Doha Article XIII Waiver (WT/MIN(01)/16) refers to "the EC's *separate tariff quota* of 750,000 tonnes of bananas of ACP origin" (emphasis added), while paragraphs 2 and 3 of the same waiver mention "*separate tariff rate quota* for bananas originating in ACP states covered by this waiver" (emphasis added).

63. The United States does not believe there is any relevance to the fact that one paragraph uses the words "tariff quota" and two paragraphs use the words "tariff rate quota". The phrases are synonymous, as there can be no doubt that the references are all to the preferential tariff rate quota set out as quota C in the Understanding on Bananas.

Q35. (Both Parties) Can the US provide a reasoned answer on whether it agrees or disagrees with the emphasized part of the following statement in paragraph 75 of the EC's second written submission: "There is extensive GATT and WTO practice to support the view that Members do not regard exclusion from a tariff quota as a matter governed by Article XIII. This practice is to be found in the waivers that have been granted for various preferential schemes. *With few exceptions (such as the 2001 waiver respecting bananas)* these waivers are limited to Article I, and yet the preferences granted under these waivers regularly include tariff quotas for the beneficiary countries only." (emphasis added) Can the US comment on the legal relevance for this compliance dispute of the examples mentioned by the EC in paragraphs 76-82 of its second written submission. Can the EC comment on the US' response.

64. The trade preference regimes of other Members are not the subject of this proceeding. These EC arguments, though packaged as examples of "subsequent practice," are nothing but an

attempt to create a diversion from the EC's own words and actions, which until very recently were consistent with the notion that its bananas regime, with a tariff rate quota reserved exclusively for ACP bananas, required an Article XIII waiver.

65. Until December 2005, the EC had an Article XIII waiver for its ACP bananas tariff rate quota. In October 2005, before the expiration of that waiver, the EC requested an extension of the waiver for the newly proposed 775,000 ton TRQ for ACP bananas. That proposal was in response to the latest round of arbitration under the annex to the Doha waiver. The EC "suspended" its request for an Article XIII waiver at the meeting of the Council for Trade in Goods held on March 19, 2007[55] – that is, after Ecuador requested establishment of a panel and one day before that panel's establishment – citing "divergences" of opinion on how to proceed. The EC's argument that its request was only for "legal certainty"[56] is self-defeating, as it at best suggests that the EC was uncertain as to whether a waiver of Article XIII was necessary. However, whether the request was only for "legal certainty,"and not "legal necessity", does not change the fact that the EC's consistent practice (until litigation recommenced) on this particular issue has been to recognize the need for an Article XIII waiver.

66. It is noteworthy that the examples included by the EC in its second written submission relate to waivers granted before the *Bananas III* panel and Appellate Body reports, where the question of the relation of a GATT Article I waiver and a GATT Article XIII breach was first analyzed in detail. We also recall that it is only subsequent practice "*which establishes the agreement of the parties regarding [the treaty's] interpretation*" (emphasis added) that is entitled to consideration under the customary rules of treaty interpretation reflected in Article 31(3) of the Vienna Convention. The earlier waivers to which the EC cites do not establish any such agreement. Furthermore, we recall the findings of the panel and the Appellate Body, which (as provided for in Article 3.2 of the DSU) have clarified these provisions in this dispute already. Finally, if anything, the practice of Members subsequent to *Bananas III* tends to confirm that the findings of the panel and Appellate Body were correct: As the United States noted during the panel meeting, in its most recent requests for extension of the waivers for the Caribbean Basin Economic Recovery Act (as amended), the African Growth and Opportunity Act, and the Andean Trade Preference Act (as amended), the United States included both Article I and Article XIII, paragraphs 1 and 2.[57] To this we can add the EC's own practice related to bananas. Even if there are other examples – many of them much older – of instances where Members have only requested Article I waivers for alleged tariff rate quota systems, there can hardly be "a discernible pattern implying the agreement of the parties" as the EC argues.

67. In this connection, the United States would like to note that the section of the U.S.

[55]Minutes of the Meeting of the Council for Trade in Goods 19 March 2007, G/C/M/88 (26 April 2007).

[56]*Id*. para. 3.2.

[57]Waiver requests can be found at G/C/W/508/Rev. 1 (28 March 2007); G/C/W/509/Rev. 1 (28 March 2007); and G/C/W/510/Rev.1 (28 March 2007).

Generalized System of Preferences (GSP) cited in footnote 15 of the EC's second written submission does not support the EC's argument. That section deals with the eligibility of articles for purposes of GSP treatment and the withdrawal of duty-free treatment for an article for which imports from a particular GSP beneficiary into the United States exceeds certain limits. The Enabling Clause (and therefore, GSP programs) are not an issue in this dispute.

2. United States

Q36. (US) Can the US confirm the EC import data contained in Exhibits EC-1 and EC-2.

68. The data in Exhibits EC-1 and EC-2 appear to be consistent with the official Eurostat statistics available to the United States.[58]

Q37. (US) Can the US provide a reasoned answer on whether it agrees or disagrees with the following statement made in paragraph 18 of the EC's first written submission: "In the 1990s, the European Communities had in place a completely different banana import regime. That regime was based on the allocation of tariff quotas to various groups of banana exporting countries, coupled with a licensing system for the banana traders."

69. The United States disagrees with the EC's statement that its banana regime in 1990s was "completely different". In fact, there is a great deal of similarity in that the current regime suffers from the same WTO non-compliant aspects as the regimes found to be in breach in the earlier *Bananas III* proceedings. The United States agrees that the EC bananas regime in the 1990s contained additional tariff rate quotas allocated to different countries and a licensing system for traders.

Q38. (US) Can the US identify all amendments, implementing measures, and other measures related to Regulation (EEC) 404/93 of 13 February 1993, as amended by Regulation (EC) 216/2001 of 29 January 2001, and to Regulation (EC) No. 1964/2005, adopted by the EC since November 2005, if any, which would be relevant for the present case.

70. The amendments, implementing measures, and other measures related to Regulation (EEC) 404/93 of 13 February 1993, as amended by Regulation (EC) 216/2001 of 29 January 2001, include:

- Commission Regulation (EC) No. 395/2001, OJL 58/11, 28 February 2001;

[58]With respect to Exhibit EC-1, the United States found a discrepancy with respect to the year 1999 data for Ecuador. The statistic available to the United States for that year is 1,074,374.

- Council Regulation (EC) No. 2587/2001, OJL 345/13, 29 December 2001;
- Commission Regulation (EC) No. 896/2001, OJL 126/6, 8 May 2001;
- Commission Regulation (EC) No. 349/2002, OJL 55/17, 26 February 2002;
- Commission Regulation (EC) No. 1493/2003, OJL 204/30, 13 August 2003;
- Commission Regulation (EC) No. 838/2004, OJL 127/52, 29 April 2004;
- Commission Regulation (EC) No. 1892/2004, OJL 328/50, 30 October 2004; and
- Council Regulation (EC) No. 416/2001, OJL 60/43, 1 March 2001; Corrigendum to Council Regulation (EC) No. 416/2001, OJL 65/20, 7 March 2001; *superseded by* Council Regulation (EC) No. 980/2005, OJL 169/1, 30 June 2006.

71. The implementing regulations associated with Council Regulation No. 1964/2005 and adopted by the EC since November 2005 include:

- Commission Regulation (EC) No. 2014/2005, OJL 324/3, 10 December 2005;
- Commission Regulation (EC) No. 2015/2005, OJL 324/5, 10 December 2005;
- Council Regulation (EC) No. 2149/2005, OJL 342/19, 24 December 2005;
- Commission Regulation (EC) No. 219/2006, OJL 38/22, 9 February 2006;
- Commission Regulation (EC) No. 325/2006, OJL 54/8, 24 February 2006;
- Commission Regulation (EC) No. 566/2006, OJL 99/6, 7 April 2006;
- Commission Regulation (EC) No. 966/2006, OJL 176/21, 30 June 2006;
- Commission Regulation (EC) No. 1261/2006, OJL 230/3, 24 August 2006;
- Commission Regulation (EC) No. 1789/2006, OJL 339/3, 6 December 2006;
- Commission Regulation (EC) No. 34/2007, OJL 10/9, 17 January 2007; and
- Commission Regulation (EC) No. 47/2007, OJL 14/4, 20 January 2007.

Q39. (US) Can the US provide a reasoned answer on whether it agrees or disagrees with the following statement contained in paragraph 46 of the EC's first written submission: "It is settled law that the Article 21.5 proceedings can be used only to challenge the legality of the '*measures taken to comply*' with the recommendations and rulings of the DSB. They cannot be used to challenge the legality of '*any*' measure taken by the defending party, even if that measure relates to products that have been the subject of dispute resolution procedures in the past.[59]"

72. The text of Article 21.5 is clear that is applies where "there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings" of the DSB. It is thus correct that Article 21.5 proceedings are limited to challenges regarding the existence or consistency of "measures taken to comply," not "any" measure. For the reasons we have already given, the United States has established that the

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

January 1, 2006 bananas import regime is indeed a "measure taken to comply" with the *Bananas III* recommendations and rulings, and is not just "any" measure.

Q40. (US) Can the US provide a reasoned answer, including reference to any relevant legal bases, on whether it agrees or disagrees with the following statement contained in paragraph 49 of the EC's first written submission: "The United States' retaliation rights terminated upon the European Communities' implementation of this tariff-quota based regime and the United States never requested from the DSB the right to reinstate those rights with relation to that import regime."

73. First, the EC is incorrect to say that U.S. "retaliation rights terminated." The DSB granted the United States authorization to suspend concessions or other obligations on April 19, 1999, and that authorization remains in place. Thus, contrary to the EC's suggestion, there was no need for the United States to request (to borrow the EC's rather curious phrase) the "right to reinstate those rights." It is of course correct that the United States agreed to "terminate *the imposition* of the increased duties" – *i.e.,* to take the steps required under its domestic law no longer to impose its retaliation – under the conditions set forth in paragraph C(2) of the Understanding. The commitment of the United States to take certain steps did not, however, mean that the multilateral authorization and other WTO rights of the United States were revoked. Had the parties to the Understanding intended for the DSB to revoke the authorization, they could easily have included a clause providing for a joint request to the DSB to that effect (much as they included clauses with respect to the EC's waiver requests); the Understanding, however, includes no such clause. We further note that there was no need for the parties to include a provision revoking the U.S. WTO-authorized right to suspend concessions, because the Understanding contemplated that the EC would introduce a WTO-consistent tariff-only regime immediately following the conclusion of the interim TRQ.

Q41. (US) Can the US explain what exact legal value it would attach – for the purposes of WTO law and, in particular, these compliance proceedings – to the various public statements of the EC and the various communications between EC institutions referenced in paragraph 49 of the US second written submission and in Exhibit US-8.

74. The various EC statements and communications provide factual evidence that the regime implemented on January 1, 2006 is a "measure taken to comply". The statements and communication demonstrate that the EC itself considered that the introduction by January 1, 2006 of a tariff only regime for bananas (the EC claims that its 2006 regime is a tariff only regime) was part of the Understanding and part of the compliance for *Bananas III*. The weight of this long-standing evidence easily disproves the EC's new-found assertion that its current "tariff only" was an EC policy unrelated to *Bananas III*.

Q42. (US) Can the US provide a reasoned answer on whether it agrees or disagrees with the following statement contained in paragraph 45 of the EC's second written submission: "A careful analysis of the findings and recommendations of the Appellate Body report in the *EC–Bananas III* case does not reveal any element that could support a conclusion that the European Communities was obliged to move into a tariff only regime in order to bring itself into compliance with the covered agreements. Quite to the contrary, the findings and recommendations of the Appellate Body allowed the European Communities to bring itself into compliance through the adoption of a revised, tariff-quota-based import regime with a different allocation of quotas and import licenses... Therefore, there is no link between the recommendations and rulings of the DSB and the political decision of the European Communities to introduce a tariff-only import regime by January 1, 2006. Indeed, if one looks at the general trend of modernisation and liberalisation of the European Communities' common agricultural policy, one may conclude that the tariff-only banana import regime would have been introduced even in the absence of any dispute resolution proceedings in the banana sector, as it has been done in other product sectors. It is again noted that the United States does not offer any detailed analysis of the 1997 recommendations and rulings of the DSB that might establish a link with the tariff-only import regime of the European Communities."

75. The United States disagrees with the EC arguments. The United States has demonstrated in its written submissions and opening statement that the tariff only regime introduced on January 1, 2006 was part of the Understanding and therefore part of the "means" agreed by the United States and the EC for achieving compliance and resolving the dispute. The recommendation of the Appellate Body was for the EC to "bring the measures found in this Report and in the Panel Reports, as modified by this Report, to be inconsistent with the GATT 1994 and the GATS into conformity with the obligations of the European Communities under those agreements." Certainly a WTO-consistent tariff only regime would be consistent with this recommendation. In addition, we refer the Panel to the response to question 6, where the United States comments on the fact that in the first Article 21.5 proceeding brought by Ecuador, one of the panel's suggestions was that the EC implement a tariff only regime. Furthermore, the fact that a tariff only regime could have been introduced by the EC independently of the bananas dispute does not change the fact that the Understanding on Bananas specifically provides for this step.

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

Q43. (US) Can the US provide a reasoned answer on whether it agrees or disagrees with the following statement contained in paragraph 61 of the written submission of the ACP Third Parties: "Article 22.8 of the DSU provides that 'the suspension of concessions or other obligations shall be temporary and shall only be applied until such time as the measure found to be inconsistent with a covered agreement has been removed, or the Member that must implement recommendations or rulings provides a solution to the nullification or impairment of benefits, or a *mutually satisfactory solution is reached*.' The fact that the US terminated its retaliation measures thus confirmed that the US considered the dispute as having been resolved through the mutually agreed solution in the form of the Understanding on Bananas reached with the EC."

77. The United States disagrees with the arguments made by the ACP Third Parties in paragraph 61 of their written submission. As explained in response to question 40, the United States agreed in paragraph D(2) of the Understanding on Bananas with the EC, that it would "terminate the imposition of the increased duties" once the EC complied with the step provided for in paragraph C(2) of the Understanding. As the United States has explained, the United States did not consider the dispute "resolved" as there was still one more step the EC needed to take according to the Understanding. In addition, as the United States has also explained, it did not, and does not, consider the Understanding to be a mutually agreed solution.

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

Q44. (US) Can the US provide a reasoned answer on whether it agrees or disagrees with the conclusion reached by the EC in paragraph 21 of its second written submission that: "[The US statements cited therein] suffice to show that the United States always accepted and still accepts that the Understanding is binding upon both parties to this dispute and that its terms must be taken into consideration in order to determine the parties' rights and obligations under the GATT and the DSU."

79. The United States disagrees with the arguments made by the EC in that paragraph. The Understanding was between the United States and the European Communities and identified the means by which the bananas dispute could be resolved. The United States intended to comply with, and did comply with, the specific steps that it agreed to undertake, i.e. to provisionally suspend its imposition of increased duties upon implementation of Phase 1, to terminate the imposition of duties upon implementation of Phase 2, to lift its reserve concerning the Article I waiver, and to work towards promoting the acceptance of the Article XIII waiver. The United

States expected that the EC would comply with all the steps laid out in the Understanding, which included the introduction of a tariff only regime for bananas by January 1, 2006.

80. The United States has not argued that the Understanding has no relevance. To the contrary, the United States readily acknowledges the Understanding's direct relevance for purposes of establishing that the EC's current bananas import regime is a measure taken to comply with the DSB's rulings and recommendations. The Understanding confirms that point. On the other hand, the United States does not accept the legal effect being alleged by the EC – as the United States has explained, the Understanding does not bar the United States from having recourse to Article 21.5. Nor does it alter the parties' rights and obligations under the WTO Agreement.

Q45. (US) Can the US provide a reasoned answer on whether it agrees or disagrees with the following statement contained in paragraph 22 of the EC's second written submission that: "[a]ccording to Article 22.8 of the DSU, retaliatory measures shall only be applied until a mutually satisfactory solution is reached. Therefore, the fact that the US agreed to, first, suspend its retaliatory measures and, ultimately, to terminate those measures (upon introduction of the regime envisaged in Annex 2 of the Understanding) confirms that the Understanding was meant to be a mutually agreed solution."

81. The United States disagrees with the arguments made by the EC in paragraph 22 of its second written submission. As explained in response to questions 40 and 43, in paragraph D(2) of the Understanding on Bananas with the EC the United States agreed to "terminate the imposition of the increased duties" once the EC complied with the step provided for in paragraph C(2) of the Understanding. Accordingly, the United States met its commitment to the EC. As the United States has explained, including immediately after the unilateral notification of the Understanding to the DSB by the EC, the United States does not consider the Understanding to be a mutually agreed solution. Article 22.8 of the DSU is not relevant in this situation, since there is no mutually agreed solution. The fact that the United States agreed to terminate its imposition of increased duties as an incentive for the EC to act, does not turn the Understanding into a mutually agreed solution. In addition, as we noted in response to question 43, a Member may choose not to apply its WTO authorization (or not to apply it in full) for any number of reasons that having nothing to do with whether the conditions of Article 22.8 have been met.

Q46. (US) Can the US provide a reasoned answer on whether it agrees or disagrees with the following statement contained in paragraph 43 of the EC's second written submission: "Paragraph B [of the Bananas Understanding], to which the United States refers, makes a simple reference to a provision of the European Communities'

secondary legislation, which reflected the political decision of the European Communities to change its banana import regime. This political decision had already been taken *before* the signing of the Understanding between the United States and the European Communities and their reaching an agreement on the appropriate 'measures taken to comply'. This is confirmed by the fact that paragraph B refers to an already existing piece of European Communities' legislation. Therefore, the United States wrongly asserts in paragraph 18 of its written submission that the parties agreed in the Understanding that the tariff only regime would be a part of the 'measure taken to comply'."

82. The United States disagrees with the EC statements. It is astounding that on the one hand the EC insists that the Understanding is a binding mutually agreed solution that forecloses the ability of the United States to have recourse to this proceeding, yet at the same time try to read out paragraph B of the Understanding. The text of the annex is very clear. As the United States explained in its opening statement, paragraph A of the Understanding serves as the introduction for the steps that follow which "identified the means by which the long-standing dispute over the EC's banana import regime can be resolved." The very next paragraph, paragraph B, then states "the European Communities (EC) *will* introduce a Tariff Only regime for imports of bananas no later than 1 January 2006." (Emphasis added). Paragraph C then goes on to set out two interim steps. It cannot be clearer that paragraph B has to be part of the "means" by which the dispute will be resolved.

83. When the political decision to move to a tariff only system was taken is not relevant. It makes sense that the EC would only have agreed to sign a bilateral agreement committing itself to doing so only after the "political decision" had been made. Indeed, the fact that the EC may have decided to move to a tariff only regime by January 1, 2006 before the Understanding and then included it in the Understanding seems to buttress our position. Nonetheless, the timing of the "political decision" does not vitiate the fact that the EC agreed to include this step in the Understanding as part of the means to resolve the dispute.

Q47. (US) Did the legal and factual assumptions based upon which the US signed an *Understanding on Bananas* with the EC on 11 April 2001, the text of which is reproduced in documents WT/DS27/58 and WT/DS27/59, change by June 2001 when the Understanding was notified to the DSB?

84. No, the United States never considered that the Understanding was a mutually agreed solution for purposes of Article 3.6. The Understanding between the United States and the EC was not itself a mutually agreed solution, but only a step in the process that could have led to a mutually agreed solution. As a result, Article 3.6 of the DSU did not apply to the Understanding, and there was no need to notify the Understanding to the Dispute Settlement Body. Indeed, the U.S. position was well known to the EC.

85. Without seeking the consent of the United States, in June 2001, the EC notified the EC-US Understanding to the DSB and, incorrectly, asserted that the Understanding was a "mutually agreed solution" for purposes of Article 3.6. In a communication to the DSB on June 26, 2001, the United States corrected the record by explaining that the EC-U.S. Understanding was not a mutually agreed solution for purposes of Article 3.6 of the DSU. The United States said:

> As we have explained to the EC during bilateral discussions last week and indicated at meetings of the DSB, the Understanding identifies the means by which the long-standing dispute over the EC's banana import regime can be resolved, but, as is obvious from its own text, it does not in itself constitute a mutually agreed solution pursuant to Article 3.6 of the DSU. In addition, in view of the steps yet to be taken by all parties, it would also be premature to take this item off the DSB agenda.[60]

Q48. (US) Can the US provide a reasoned answer on whether it agrees or disagrees with the following statement contained in paragraph 71 of the EC's first written submission that: "there can be only one notion of 'nullification or impairment' for purposes of the DSU and, therefore, that this term has the same meaning both in the context of Article 3.8 of the DSU and of Article 22 of the DSU.

86. The EC statement appears to be trying to conflate the concept of the existence of nullification and impairment, which is presumed under Article 3.8 of the DSU, with the concept of the level of nullification and impairment which is a topic that is not within the terms of reference of this proceeding but rather would be for another proceeding where a Member has not complied with its WTO obligations. Article 3.8 of the DSU addresses the "existence" of nullification or impairment. Article 22 of the DSU addresses the "level" of nullification or impairment. We refer the Panel to our response to question 24, as the EC's paragraph 71 is directly related to paragraph 73, which is the subject of question 24.

87. This is an Article 21.5 panel. Its task is to determine whether a measure taken to comply with the DSB's recommendations and rulings exists or is inconsistent with a covered agreement. The issue of nullification or impairment is not within the terms of reference of, or relevant to, this proceeding.

Q49. (US) Can the US provide a reasoned answer on whether it agrees or disagrees with the following statement contained in paragraph 72 of the EC's first written submission that the EC: "draws support for this conclusion [regarding the notion of 'nullification or impairment' for purposes of the DSU] from the decision of the

[60]WT/DS27/59, G/C/W/270, 2 July 2001, second paragraph.

Arbitrators (pursuant to Article 22.6 of the DSU) in *US-Antidumping Act of 1916*, where it was held: 'the fact that the presumption [of nullification or impairment under Article 3.8 of the DSU] does not automatically translate to a given level does not mean that the level is 'zero'. The original Panel determined that the 1916 Act nullifies and impairs benefits accruing to the European Communities. In light of this conclusion, the level must be something greater than 'zero' and it is a contradiction in terms to suggest otherwise.'[61]"

88. The United States disagrees with the EC's use of this quote from the Decision by the Arbitrators in *US-Antidumping Act of 1916* to support its conclusion that the notion of nullification or impairment under Article 3.8 of the DSU is the same as under Article 22 of the DSU. Indeed, the paragraph quoted by the EC begins thus:

> "We agree with the arbitrators in *EC – Bananas III (US) (Article 22.6 – EC)* that the *presumption* of nullification or impairment, as provided in Article 3.8 of the DSU, by no means provides evidence of the *level* of nullification or impairment sustained by the Member requesting authorization to suspend obligations."[62] (Emphasis in original)

Q50. (US) Can the US provide a reasoned answer on whether it agrees or disagrees with the following statement contained in paragraphs 77 and 80 of the EC's first written submission: "As the Arbitrators confirmed, the United States' nullification or impairment could be based only on the 'impact on the value of relevant EC imports from the United States'.[63] Therefore, the United States cannot claim a nullification or impairment neither on the basis of any potential effect on the trade in bananas between the United States and third countries, nor on the basis of any potential effect on 'US content incorporated in Latin American bananas', such as US produced fertilizer, pesticides or machinery shipped to Latin America; US capital or management services used in banana cultivation; etc... None of the bases on which the nullification or impairment of the United States' benefits was found in 1997 and 1999 exists today."

89. The United States disagrees with the quoted EC statements. Once again the EC is conflating the finding of the existence of nullification or impairment, which is presumed where there is an infringement of an obligation under a covered agreement, with the issue of the level of nullification or impairment actually suffered in order to determine the level of suspension of

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[61](*footnote original*) See the Decision by the Arbitrators in *United States – Anti-dumping Act of 1916 (Original complaint by the European Communities), Recourse to Arbitration by the United States under Article 22.6 of the DSU*, WT/DS136/ARB, dated February 24, 2004 ("*US-Antidumping Act of 1916*"), at paragraph 5.50.

[62]*Id*.

[63](*footnote original*) See the Decision by the Arbitrators, at paragraph 7.1.

concessions that may be authorized. The quoted passages are from the Article 22.6 Arbitration, where the task is to ensure that the level of suspension of concessions or other obligations is equivalent to the level of the nullification or impairment suffered. Paragraph 7.1 of the Arbitration Decision, from which some of the quoted passages are taken, makes clear that the Arbitrator's comments were made in that particular context.

90. It was the *Bananas III* Appellate Body that settled the issue that is relevant for this proceeding. The Appellate Body confirmed that the United States – as a producer of bananas with a potential export interest and legitimate concern about its internal market – need only demonstrate violations under the covered agreements to establish that its competitive relationship with the EC has been nullified or impaired.

Q51. (US) Can the US provide a reasoned answer on whether it agrees or disagrees with the statements contained in paragraphs 81 to 83 of the EC's first written submission in the sense that, because in the current proceedings the US has not brought any claim under the GATS, there is no basis for a finding of nullification or impairment of benefits to the US.

91. The United States disagrees with the EC's statement. The Appellate Body, in paragraph 136 of its report, concluded that the United States "was justified in bringing its claim under the GATT 1994." The statement in paragraph 137 cited by the EC in paragraph 79 of its first written submission - linking the GATS and GATT 1994 claims - provides an additional reason why the United States was justified in bringing its claim in the prior proceeding. It was not the only reason. Once again the EC is conflating the notions of the existence of nullification or impairment as a result of an infringement with the level of nullification or impairment for purposes of suspension of benefits.

92. In paragaph 251, also cited by the EC, the Appellate Body once again relies on the status of the United States as a producer of bananas and the effect on its internal market for bananas as relevant to the finding of nullification or impairment of GATT 1994 benefits, and as "equally relevant to the question whether the European Communities has rebutted the presumption of nullification or impairment." Relying on the reasoning of *United States – Superfund*, the Appellate Body finds that there is no reason to reverse the conclusion of the panel that the infringement of obligations by the EC constituted prima facie evidence of nullification or impairment.

Q52. (US) Can the US provide a reasoned answer on whether it agrees or disagrees with the following statement in paragraph 102 of the EC's second written submission: "[I]f the facts of this case do not suffice to rebut the presumption of 'nullification or

impairment' under Article 3.8, then this presumption will never be rebutted in any case..."

93. The United States disagrees with the EC statement. The fact that the EC has failed to rebut the presumption in this case does not, as a matter of logic, permit the inference that no such cases can exist.

Q53. (US) Can the US provide a reasoned answer on whether it agrees or disagrees with the following statement in paragraph 11 of the EC's second written submission: "The United States also does not dispute the fact that the duration of the 'waiver requested' by the European Communities was until the end of 2007."

94. The United States does not dispute the fact that the Doha waiver contains a termination date of December 31, 2007. The waiver so states in paragraph 1. The United States disagrees with the EC assertion at the end of paragraph 11 that the "logical consequence" of this is that the United States accepted that the waiver "would continue to exist until the end of 2007." The waiver contains an annex which conditioned the continued the duration of the waiver with respect to bananas to the EC's fulfillment of several conditions. As the United States has demonstrated, the EC failed to meet those conditions and by operation of the terms of the waiver annex, the Doha waiver expired with respect to bananas upon the entry into force of the January 1, 2006 import regime for bananas. The EC argument would read the annex, an integral part of the Doha waiver, out of the waiver.

Q54. (US) Can the US provide a reasoned answer on whether it agrees or disagrees with the following statement in paragraph 12 of the EC's second written submission: "[T]he Understanding does not include any language that might indicate that the United States' acceptance of the Cotonou Preference until the end of 2007 was subject to any conditions relating to the characteristics of the Cotonou Preference... [As] as far as the United States is concerned, its acceptance of the Cotonou Preference is not qualified in any way. Indeed, the United States has not argued otherwise."

95. The United States disagrees with the EC statement. In the Understanding, the United States agreed to "lift its reserve" concerning the waiver of Article I of the GATT 1994. The agreement to lift the reserve merely allowed the discussions on the waiver to move forward. The waiver still needed to be negotiated. As explained in the answer to question 53, it is clear that the waiver contained an annex on bananas which conditioned the duration of the waiver with respect to bananas.

96. With respect to the tariff quota, the Understanding put an explicit deadline on the Article XIII waiver of December 31, 2005. Therefore, it is clear there was no unconditional acceptance of an ACP tariff quota after that date.

Q55. (US) Can the US provide a reasoned answer on whether it agrees or disagrees with the following statement in paragraph 53 of the EC's second written submission: "[F]or purposes of this dispute, it is uncontested that the current banana import regime of the European Communities more than maintains the total market access of the MFN banana exporting countries."

97. The United States disagrees with the EC statement. For the reasons previously provided by the United States[64], the issue of market access no longer has relevance given that the Article I waiver has ceased to apply.

Q56. (US) Can the US provide a reasoned answer on whether it agrees or disagrees with the following statement in paragraph 57 of the EC's second written submission: "[T]he Doha waiver ... states that the waiver shall cease to apply 'if the EC has failed to rectify the matter' and not '*if the Arbitrator considers* that the EC has failed to rectify the matter'. Therefore, the text of the Doha waiver shows that the 'test' for the termination of the waiver was whether the European Communities would introduce an import regime that maintains the total market access of MFN suppliers and not whether the Arbitration Awards would be negative for the European Communities."

98. The United States disagrees. Tiret five did not have to use the words "*if the Arbitrator considers that*," since those words were already effectively captured by that tiret. The fifth sentence of tiret five ("if the EC *has failed to rectify the matter* . . .") repeats the Arbitrator's terms of reference in sentence three ("whether the EC *has rectified the matter* . . ."). Sentence five thus effectively means "if the Arbitrator considers that the EC has failed to rectify the matter." The Arbitrator understood this and fulfilled that meaning by determining in its final determination the EC "*has failed to rectify the matter, in accordance with the fifth tiret of the Annex to the Doha waiver*."[65]

[64] *See* U.S. Second Written Submission, paras. 65 through 80 and U.S. Opening Statement, paras. 27 through 34.

[65] *AAII*, para. 127.

Q57. (US) Can the US provide a reasoned answer on whether it agrees or disagrees with the following statement in paragraph 69 of the EC's second written submission: "[Article XIII:2] commences with the phrase 'In applying import restrictions to any product'. Applying this to tariff quotas the phrase could be taken to read 'In applying tariff quotas to any product'. Once again this directs attention at the tariff quotas themselves rather than at their relationship with another import regime (which is the issue in the current dispute)."

99. This is the same "separate regimes" argument that the EC has unsuccessfully argued before. This arguments was rejected by the Appellate Body[66], as well as the panel in the first Article 21.5 proceeding brought by Ecuador and the Article 22.6 arbitrator.[67]

Q58. (US) Would the US argue that any non-reciprocal preferential quota can be WTO-consistent only if covered by an Article XIII waiver? Alternatively, could other provisions in WTO agreements, such as the Enabling Clause or Article XXIV of the GATT 1994, also excuse such non-reciprocal preferential quotas from inconsistency with WTO obligations, in the absence of an Article XIII waiver?

100. While there may be other WTO provisions that would be relevant in other cases, the EC has not claimed that either Article XXIV or the Enabling Clause excuses its failure to comply with Article XIII.

B. QUESTIONS ADDRESSED TO PARTIES AND THIRD PARTIES

97. (Both Parties and Third Parties, in particular Ecuador) In paragraph 31 of its first written submission the EC states that "[a]ll of the claims included in the United States' request for the establishment of the Panel were also included in the Ecuadorian request for the establishment of the Panel. The European Communities faced a situation where a Panel would be established to examine identical claims, but potentially following different timetables." Can the Parties and Third Parties, in particular Ecuador, explain if they believe that their arguments made in the dispute launched by Ecuador could be taken into consideration in this dispute and *vice* versa. Could evidence submitted in the dispute launched by Ecuador be taken into consideration in this dispute and *vice* versa? If not, why not? If only under certain conditions, what would those conditions be and what would be their basis?

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

[67] *See Bananas III (21.5)(Ecuador)*, paras. 6.20 - 6.29; *Bananas III (22.6)(EC)*, paras. 5.9 - 5.17.

101. The Ecuador proceeding and this proceeding are two separate proceedings. Although the members of the panel in each proceeding are the same, they are two separate panels. Each panel is tasked with making an objective assessment of the matter before it, which includes the facts and the legal argumentation presented in each proceeding. The Appellate Body has said that "[t]he duty to make an objective assessment of the facts is, among other things, an obligation to consider the evidence presented to a panel and to make factual findings on the basis of that evidence."[68] Although each complaining party in these two proceedings is a third party in the other, we note that the burden of proof with respect to the evidence each such party provides is different. It is well established in WTO dispute settlement that the party invoking the affirmative of particular claim, or defense, bears the burden of proof with respect to it.[69]

102. While the measure challenged in each case is the same, the claims are not identical, as the Ecuador proceeding contains an additional claim. The evidence presented, and the argumentation with respect to that evidence, must be considered in the context of each individual proceeding. The parties and third parties were free to present the same, or different, evidence and arguments in each dispute as they saw necessary. We note that the timetables in the two proceedings were not harmonized and the panels will be issuing two separate reports.

Q98. (Both Parties and Third Parties, in particular Ecuador) Could the Parties and Third Parties provide a reasoned answer on whether they agree or disagree with the following statement contained in paragraph 39 of the joint Third Party written submission of Nicaragua and Panama: "In [its] public submissions, the EC has specifically conceded that Regulation 1964 was intended to implement the 'second' compliance suggestion of the *Bananas III* Article 21.5 panel and, thus, falls within the jurisdiction of Article 21.5.[70] It defies all legal reasoning and ordinary common sense to admit in one compliance proceeding that the tariff and tariff quota of Regulation 1964 were 'measures taken to comply' with *Bananas III*, but contend in another largely identical compliance proceeding that those same measures had no connection at all to *Bananas III*."

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[68]Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, para. 133.

[69]*See* Appellate Body Report, *United States – Woven Woolen Shirts*, p. 14, WT/DS33/AB/R, 25 April 1997.

[70](*footnote original*) *See* First Written Submission by the European Communities (in Recourse to Article 21.5 by Ecuador), 20 July 2007 ("EC First Written Submission (Ecuador proceeding)"), paras. 16-25 *available at* http://trade.ec.europa.eu wtodispute/show.cfm?id=239&code=2 (last visited 22 October 2007); Second Written Submission by the European Communities (in Recourse to Article 21.5 by Ecuador), 13 August 2007 ("EC Second Written Submission (Ecuador proceeding)"), paras. 19-27 *available at* http://trade.ec.europa.eu/wtodispute/show.cfm?id=239&code=2 (last visited 22 October 2007).

103. The United States agrees with the statement by Nicaragua and Panama. The United States would like to draw the attention of the Panel to paragraph 16 of the United States opening statement.

Q99. (Both Parties, Brazil and Mexico) Can the Parties, Brazil and Mexico provide a reasoned explanation of whether, in their view, there is any difference between a "single tariff based" system and a "single tariff" system?

104. These are other ways of referring to the "tariff only regime" the EC was supposed to introduce by January 1, 2006 per the terms of the Understanding. Such a regime, which would have to be WTO-consistent, would have to be based on one single tariff for all (i.e. no tariff discrimination) or, if the conditions of the Doha waiver had been met by the EC, could involve two tariffs until the end of 2007, one for ACP countries and one for the rest of the WTO members but with no quota attached.

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.

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.

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

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.

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.

Q104. (Both Parties and Ecuador) Can the Parties and Ecuador provide a reasoned answer on whether they agree or disagree with the following statement contained in paragraph 19 of the written submission of the ACP Third Parties: "Minister Støre took forward his mission by chairing meetings of the monitoring group which kept the development of the EC's imports of bananas from the MFN under review with a view to determining whether MFN access had at least been maintained. When it became apparent that the EC import trends following the application of the tariff of €176 per ton indicated that market access for MFN bananas had not only been maintained but had even improved, Ecuador left the monitoring group and resorted to dispute settlement procedures."

105. The United States is not in a position to comment on events that took place within the group chaired by Minister Støre. The United States firmly believes, however, that Ecuador is within its right to pursue Article 21.5 proceedings against the EC.

Q105. (Both Parties and Ecuador) Is there any particular reason why the Understandings on Bananas that the EC reached with Ecuador and the US respectively in April 2001 were only notified to the DSB more than two months later? Is there any reason why such agreements were not notified jointly to the DSB by both parties to the respective agreements?

106. The Understanding between the United States and the EC was not itself a mutually agreed solution, but only a step in the process that could have led to a mutually agreed solution. As a result, Article 3.6 of the DSU did not apply to the Understanding, and there was no need to notify the Understanding to the Dispute Settlement Body.

107. Without seeking the consent of the United States, in June 2001, the EC notified the EC-US Understanding to the DSB and, incorrectly, asserted that the Understanding was a "mutually agreed solution" for purposes of Article 3.6. In a communication to the DSB on June 26, 2001, the United States corrected the record by explaining that the EC-U.S. Understanding was not a mutually agreed solution for purposes of Article 3.6 of the DSU. The United States said:

> As we have explained to the EC during bilateral discussions last week and indicated at meetings of the DSB, the Understanding identifies the means by which the long-standing dispute over the EC's banana import regime can be resolved, but, as is obvious from its own text, it does not in itself constitute a mutually agreed solution pursuant to Article 3.6 of the DSU. In addition, in view of the steps yet to be taken by all parties, it would also be premature to take this item off the DSB agenda.[71]

Q106. (Both Parties and Ecuador) Paragraph G of the *Understanding on Bananas* reached between the EC and Ecuador of 30 April 2001 (documents WT/DS27/58 and WT/DS27/60), states that "[t]he EC and Ecuador consider that this Understanding constitutes a mutually agreed solution to the banana dispute". In turn, the *Understanding on Bananas* reached between the EC and the US on 11 April 2001 (document WT/DS27/59), contain no equivalent statement. What value, if any, should be given to the statement contained in Paragraph G of the *Understanding on Bananas* reached between the EC and Ecuador? What value, if any, should be given to the different language contained in both understandings regarding this issue?

108. The United States would leave to Ecuador and the EC, as the negotiators and drafters of the Understanding between them, the question of what value to place on the language in Paragraph G of the Ecuador-EC Understanding. In this regard, the explanations expressed by Ecuador after the unilateral notification by the EC of both the Ecuador-EC Understanding and the EC- US Understanding, would appear helpful. In a communication to the DSB[72], Ecuador emphasized that the Understanding "identified means by which the long-standing dispute" could be solved, but that the Understanding was comprised of phases and required implementation of several key features requiring collective WTO membership action.[73] Ecuador also noted that since "several steps" needed to be taken, "it would be premature to take this item off the DSB agenda which considers this issue at every regular meeting pursuant to Article 21.6 of the DSU."[74] Finally, Ecuador concluded that although it "sees the Understanding as an agreed solution that can

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[71]WT/DS27/59, G/C/W/270, 2 July 2001, second paragraph.

[72]WT/DS27/60, G/C/W/274, 9 July 2001.

[73]*Id*., para 1.

[74]*Id*., para. 3.

contribute to an overall, definite and universally accepted solution, it must be made clear that the provisions of Article 3.6 of the DSU *are not applicable*."[75] (Emphasis added).

109. As the United States has stated, it did not consider that the Understanding was a mutually agreed solution for purposes of Article 3.6 of the DSU, therefore it would not have agreed to include such a statement in its Understanding with the EC.

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.

Q108. (US and Third Parties) Can the US and Third Parties provide a reasoned answer on whether they agree or disagree with the following statement contained in paragraph 16 of the EC's first written submission: "[T]he exports of the ACP countries benefiting from the Cotonou Preference show similar patterns to those of the MFN countries. Although the group as a whole increased its total exports of bananas towards the European Communities after the introduction of the new import regime, many individual countries have experienced significant reductions in their exports. For example, market data comparing the ACP countries' exports in the first six months of 2007 with the average quantities exported during the first six months of the period 2002 to 2005 (i.e. before the new import regime was introduced), reflected in the Table annexed to this submission as an Exhibit, shows that the exports of Saint Vincent were down by 30.7%, of Dominica down by 18.1%, of Jamaica down by 16.6%, of Cameroon down by 14.8%, of Ivory Coast down by 5.6%, of Belize down by 2.5% and of Santa Lucia down by 1.1%."

110. Please see answer to question 109.

Q109. (US and Third Parties, in particular Ecuador) Can the US and Third Parties, in particular Ecuador, provide a reasoned answer on whether they agree or disagree with the following statement contained in paragraph 17 of the EC's first written submission: "[T]he individual export performance of a particular country is influenced by various factors and cannot be taken as a proxy for the market access afforded by the European Communities to the relevant group of countries."

[75] *Id.*, paragraph after numbered para. 3.

111. To the extent that this assertion is intended to address the claims raised by the United States in this proceeding the United States disagrees with the EC. The Appellate Body has made clear that a showing of trade effects is unnecessary for purposes of demonstrating that there has been an infringement of a GATT provision.[76]

Q110. (US, Brazil, Colombia, Ecuador, Mexico, Nicaragua and Panama) Can the US, Brazil, Colombia, Ecuador, Mexico, Nicaragua and Panama provide a reasoned answer on whether they agree or disagree with the following statement in paragraph 64 of the EC's first written submission: "[B]anana imports from Latin American and other MFN suppliers are not subject to any quantitative restriction: they are simply subject to a tariff. Therefore, the conditions for the application of GATT Article XIII are not satisfied, i.e., there is no quantitative restriction imposed on one WTO Member that it is not imposed on all other countries."

112. The United States has addressed this issue in paragraphs 90 through 92 of its second written submission and paragraphs 18 through 26 of its opening statement.

Q111. (US, Brazil, Colombia, Ecuador, Mexico, Nicaragua and Panama) Can the US, Brazil, Colombia, Ecuador, Mexico, Nicaragua and Panama provide a reasoned answer on whether they agree or disagree with the following statement in paragraph 67 of the EC's first written submission: "[T]he facts in the current proceedings are not the same as those that faced the Panel and Appellate Body in 1997. It is noteworthy that the United States does not make any attempt to explain what are the restrictions on imports from MFN exporters that are not similar to those it says are affecting imports from ACP countries.

113. The United States disagrees with the EC statement. This appears to be another version of the EC's "separate regimes" argument, which has failed before. By operation of Article XIII:5, Article XIII applies to tariff rate quotas. Article XIII:1 then requires that like products from all Members be "similarly restricted."[77] There is no support in the text of Article XIII or in any WTO dispute settlement report that the Member making the claim [of inconsistency with Article XIII] has to be the one *subject* to the tariff rate quota.

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[76] *Bananas III (AB)*, para. 252, quoting GATT Panel Report, *United States – Superfund*, para. 5.1.9.

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

Q112. (US, Colombia, Ecuador, Mexico, Nicaragua and Panama) Can the US, Colombia, Ecuador, Mexico, Nicaragua and Panama confirm the following information contained in paragraph 13 of the EC's first written submission: "Guatemala managed to export into the European Communities 27,418 tons of bananas in 2006, instead of only 3,010 tons in 2005 (an increase of 811%). Peru exported 22,372 tons in 2006, instead of only 11,491 tons in 2005 (an increase of 94.7%)."

114. The data provided by the EC seems consistent with the data to which the United States has access. To the extent this data is intended to show trade effects, it is not relevant.

Q113. (US, Colombia, Ecuador, Mexico, Nicaragua and Panama) Can the US, Colombia, Ecuador, Mexico, Nicaragua and Panama provide a reasoned answer on whether they agree or disagree with the following statement contained in paragraph 10 of the EC's first written submission: "The market data [in Exhibit EC-2] shows that the increase in the total quantities of bananas imported from MFN countries during the first six months of 2007 is 8% if compared with the same period in 2006 and 15.1% if compared with the average quantities imported during the same period between 2002 and 2005. In comparison, the increase in the total quantities imported from ACP bananas during the same periods is only 1.5% and 13.9% respectively."

115. We refer the Panel to our answer to question 109.

Q114. (US, Colombia, Ecuador, Mexico, Nicaragua and Panama) Can the US, Colombia, Ecuador, Mexico, Nicaragua and Panama provide a reasoned answer on whether they agree or disagree with the following statement contained in paragraph 11 of the EC's first written submission: "[T]he average Latin American FOB prices (i.e., the prices actually paid to Latin American banana producers) in 2006 and during the first six months of 2007 are the highest prices ever. For example, the average annual FOB prices in Ecuador (based on information published by the Central Bank of Ecuador) were US$ 217 per ton in 2004, US$ 224 per ton in 2005, US$ 239 per ton in 2006 and US$ 232 per ton for the first six months of 2007. Likewise, the average annual FOB prices in Colombia were US$ 285 per ton in 2005, US$ 306 per ton in 2006 and US$ 321 per ton for the first six months of 2007."

116. We refer the Panel to our answer to question 109.

Q115. (US, Colombia, Ecuador, Mexico, Nicaragua and Panama) Can the US, Colombia, Ecuador, Mexico, Nicaragua and Panama provide a reasoned answer on whether they agree or disagree with the following statement contained in paragraph 15 of the EC's first written submission: "[A]lthough the group of MFN countries as a whole has seen a spectacular increase in the total volumes of bananas exported into the European Communities since January 1, 2006, there are certain countries (e.g., Ecuador) that have experienced a slight reduction in their individual exports. However, these reductions are not related to the introduction of the new import regime of the European Communities. These reductions are generally the result of a combination of internal difficulties faced by the banana industry of the particular country, random events (such as bad weather or natural disasters) and political or trade developments in those countries that affect the sourcing decisions of the multinational fruit trading companies."

117. We refer the Panel to our answer to question 109.

Q116. (US, Colombia, Ecuador, Mexico, Nicaragua and Panama) Can the US, Colombia, Ecuador, Mexico, Nicaragua and Panama provide a reasoned answer on whether they agree or disagree with the following statement contained in paragraphs 58 and 59 of the EC's first written submission: "[T]he volume of total imports of bananas from MFN countries has increased significantly since the introduction of the European Communities' new import regime... This shows that MFN suppliers have at least maintained the market access opportunities they had before the introduction of the new system... [M]aintaining total market access for MFN suppliers' definitely does not mean guaranteeing a particular level of trade to any individual MFN country... Ecuador's banana exports towards the European Communities have decreased in recent years. However, this is the result of a number of factors (e.g., weather conditions, natural disasters, local administrative measures affecting the decisions of banana trading companies, etc.) that have nothing to do with the import regime of the European Communities."

118. We refer the Panel to our answer to question 109.

Q117. (US, Colombia, Ecuador, Mexico, Nicaragua and Panama) Can the US, Colombia, Ecuador, Mexico, Nicaragua and Panama provide a reasoned answer on whether they agree or disagree with the following statement contained in paragraph 49 of the EC's second written submission: "The aim of the arbitrations was to 'maintain the total market access of the MFN suppliers' at its 2002 to 2005 level. This strongly suggests that the level of MFN market access between 2002 and 2005 was satisfactory

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

119. The United States disagrees with the EC statement. The bananas regime implemented by the EC by January 2002 was an interim step among the steps set out in the Understanding. As the United States has demonstrated, per the terms of the Understanding, the measures taken to comply with the DSB recommendations included a series of interim steps and a final step to be taken by January 1, 2006 - the introduction of a tariff only regime. The EC approach would write Articles I and XIII out of the GATT 1994 and replace them with the separate terms of reference for a special arbitration proceeding.

Exhibit List

Exhibit US-	Title
16	U.N. Comtrade Database; Romania and Bulgaria banana imports
17	Peter Mandelson & Louis Michel, "This Is not a Poker Game", *The Guardian*, October 31, 2007
18	Jeremy Smith, "EU heading for trade crunch over bananas", *Reuters*, November 14, 2007