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

Recourse to Article 21.5 of the DSU by the United States

(WT/DS27)

EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION

OF THE UNITED STATES OF AMERICA

October 3, 2007

I. THE EC'S PRELIMINARY OBJECTIONS SHOULD BE REJECTED

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

1. First, the United States was surprised that the EC raised lack of consultations as a procedural objection given that the United States and the EC had agreed, at the highest levels, that this objection would not be raised. The United States understands that this objection may have been lodged without an understanding of the commitment the EC had undertaken. Inasmuch as the EC has raised this objection, the United States responds as follows.

2. Formal consultations are not a prerequisite to the establishment of a panel under Article 21.5. The Appellate Body's analysis in *Mexico – HFCS (21.5)* amply supports the U.S. view. In *Mexico – HFCS (21.5)*, the Appellate Body observed that while, as a general matter, "consultations are a pre-requisite to panel proceedings," the requirement that parties engage in consultations "is subject to certain limitations." After reviewing the requirements of DSU Articles 4.3, 4.7 and 6.2, the Appellate Body concluded that "the lack of prior consultations is not a defect that, by its very nature, deprives a panel of its authority to deal with and dispose of a matter." While the Appellate Body did not decide whether this general rule was applicable to Article 21.5, it stated that "*even if* the general obligations in the DSU regarding prior consultations were applicable" to Article 21.5 proceedings, "non-compliance would not have the effect of depriving the panel of its authority to deal with and dispose of the matter."

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

4. The EC suggests that the phrase "through recourse to these dispute settlement procedures" in Article 21.5 could not refer to something "less than all" the procedures contained in the DSU, including consultations. There are several difficulties with the EC position. First, nothing in the phrase "these dispute settlement procedures" supports the proposition that that phrase extends to every aspect of the DSU. Second, the phrase is different from the broader phrase found in DSU Article 23: "the rules and procedures of this Understanding." This difference makes clear that the EC is wrong to suggest that Article 21.5 cannot refer to "less than all" of the DSU. Third, the phrase is part of the larger phrase "such dispute shall be *decided* through recourse to these dispute settlement procedures" (emphasis added). Consultations are not a means of "deciding" a dispute. It is the panel procedures that serve the function of "deciding" – and thus it is the panel procedures to which "these dispute settlement procedures" must refer.

5. To interpret Article 21.5 to require another round of consultations would only serve to delay the resolution of disputes, in contradiction to DSU Article 21.5 which provides that prompt compliance is "essential in order to ensure effective resolution of disputes to the benefit of all Members."

6. Fifth, we note that in an earlier related proceeding, the EC requested the establishment of

Article 21.5 panel to determine that measures taken by the EC were in conformity with its WTO obligations, without first seeking consultations with any of the original complaining parties.

7. Aside from the EC's flawed legal theory, the Panel should not sustain the EC's objection. First, as permitted by Article 4.3 of the DSU, the United States and the EC had an agreement that formal consultations would not be necessary. Second, the EC explicitly withdrew any procedural objection based on the lack of a formal consultation request in its DSB statement at the July 12, 2007 meeting. Finally, even if it were appropriate for the Panel to take the considerations raised by the EC into account, they should not lead to the conclusion that the EC seeks. The DSU does not guarantee a role for third parties in consultations. Throughout the long history of this dispute, the EC has had plenty of opportunities to negotiate a solution. This dispute has been the subject of countless discussions at the DSB, and third parties have been given every possible opportunity to participate, above and beyond what is provided for in the DSU. It is hard to imagine what formal consultations would have achieved that over ten years of litigation, discussions, and negotiations have not been able to achieve.

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

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

9. The EC's objection that the EC-US Understanding bars this proceeding is equally groundless. The lynchpin of the EC's argumentation appears to be the assertion that the United States has "accepted . . . the principle that the Cotonou Preference would continue to exist until the end of 2007" and therefore "the United States is now barred from challenging" its existence.

10. Nothing in the EC-US Understanding says that the United States was agreeing to a reduction in its rights to challenge the WTO-consistency of any EC measure. The EC points to the paragraph in the EC-US Understanding providing that the United States would lift its reserve concerning the Article I waiver. This provision did not itself change the legal situation with respect to the EC's tariff preferences. The U.S. willingness to lift its reserve regarding the waiver did not itself make the EC's tariff preferences WTO-consistent, nor did it insulate those tariff preferences from challenge under the DSU. Nothing in Articles IX:3 and IX:4 of the WTO Agreement suggests that a Member's willingness to support a waiver request has independent legal consequences. If the EC's position were adopted by this Panel, it is hard to see how any Member would ever agree to support an EC waiver request in the future, when the legal consequence of such a commitment would be that it – but not other Members who had not yet agreed to support the waiver – were barred from challenging the measure for which the waiver had been requested.

11. As contemplated by the EC-US Understanding, the United States did support the adoption of the waiver, and the waiver was ultimately approved at Doha. Article 3*bis* of the waiver states that "[w]ith respect to bananas, the additional provisions in the Annex shall apply." These additional provisions, set out conditions which the new EC regime on bananas would have to meet. The United States believes that the Article I waiver ceased to apply with respect to bananas n January 1, 2006.

12. Though not necessary, the United States wishes to make some additional comments. *First*, the United States disagrees with the EC's contention that the EC-US Understanding represented a "mutually agreed solution" as that term is used in the DSU. A fair reading of the EC-US Understanding can lead to only one conclusion: that it would have been impossible in June of 2001 to say that the dispute had been "solved." It is clear from its text that the EC-US Understanding was a document that identified the "means" to resolve the dispute, but that no solution acceptable to both parties had yet been put in place on the date of the EC-US Understanding and that the Understanding was not itself the end of the dispute. Indeed, the final step to consummate the "solution" would not be taken until almost five years after the date of the Understanding.

13. *Second*, in a communication to the DSB on June 26, 2001, after the unilateral notification of the EC-US Understanding as a "mutually agreed solution" by the EC, the United States corrected the record by explaining that the Understanding was not a mutually agreed solution notified pursuant to DSU Article 3.6. At the February 2002 DSB meeting, the United States again made clear that there were still compliance steps to be taken by the EC, namely the introduction of a WTO-consistent "tariff only" regime by January 1, 2006.

14. *Third*, the United States disagrees with the EC's assertion that, pursuant to Article 31(3)(c) of the *Vienna Convention on the Law of Treaties* ("Vienna Convention"), the EC-US Understanding must be taken into consideration to determine the parties' rights and obligations under the GATT 1994 and the DSU. Nothing in Article 31(3)(c) of the Vienna Convention supports the EC's assertion that the EC-US Understanding acts as a procedural defense for the EC. Article 31(3)(c) of the Vienna Convention deals with interpretation of the covered agreements. The EC is not arguing that the EC-US Understanding indicates a particular interpretation of any term in any covered agreement; the EC appears to be arguing that the Understanding has altered the covered agreements. Article 31(3)(c) does not deal with this issue.

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

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

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

17. The EC's objection that the EC's January 1, 2006 banana measures are not "measures taken to comply" ignores the plain text of the EC-US Understanding, EC Regulation 1964, and the long history of this dispute, and should therefore be rejected.

18. The EC first argues that it took its "*final* 'measure taken to comply'" with the EC-US Understanding in January 2002, "when the EC introduced a new tariff-based quota regime with the characteristics agreed in Annex II of the Understanding" and the U.S. "right to suspend concessions terminated" (emphasis added).

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

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

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

22. The status of the EC's measures is further confirmed by numerous EC statements made from 1999 through 2006. In particular, EC statements made *after 2002,* when the EC argues, for purposes of this proceeding, that it implemented its "measure taken to comply," confirm that the EC itself did not believe it had taken a "measure taken to comply" at that time.

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

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

23. In *Bananas III*, as here, the EC argued that, because the United States "ha[d] never exported a single banana to the European Community," it "could not possibly suffer any trade damage." According to the EC, this lack of trade effect or damage meant that the United States could not, as a threshold matter, challenge the EC's measures under the GATT. The Appellate

Body upheld the panel's finding that the United States "had standing" to bring claims under the GATT 1994 against the EC's banana measures.

24. In reaching its conclusion, the Appellate Body made the general observations that "a Member has broad discretion in deciding whether to bring a case against another Member under the DSU" and that Members are "expected to be largely self-regulating in deciding whether any such action would be 'fruitful'" within the meaning of DSU Article 3.7. The Appellate Body also observed that: "the United States is a producer of bananas, and a potential export interest by the United States cannot be excluded"; and "[t]he internal market of the United States for bananas could be affected by the EC banana regime, in particular, by the effects of that regime on world supplies and world prices of bananas." Quoting from the panel report, the Appellate Body also stated that "with the increased interdependence of the global economy, . . . Members have a greater stake in enforcing WTO rules than in the past *since any deviation from the negotiated balance of rights and obligations is more likely to affect them*, directly or indirectly."

25. In light of this guidance, the stake the United States holds in making sure that the EC complies with its WTO obligations, and the fact that the United States continues to be a producer of bananas, it is clear that the United States may challenge the EC's banana measures in this compliance proceeding.

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

26. To prevail on its claims of an EC breach of GATT Articles I and XIII, the United States is not required to demonstrate that the EC's banana measures nullify or impair benefits accruing to it.

27. Article 3.7 of the DSU specifies three potential means by which a dispute can be resolved: a mutually agreed solution consistent with the covered agreements; withdrawal of WTO-inconsistent measures; or, as a "last resort," suspension of concessions. Neither of the first two requires calculation of the level of nullification or impairment suffered by the complaining Member. The second of these makes clear that withdrawal of a WTO inconsistency is a preferred outcome, without regard to the impact of the inconsistency on the complaining Member. It is only when a WTO challenge has reached arbitration under DSU Article 22 that the level of nullification or impairment suffered by the complaining party becomes relevant.

28. The EC made a similar argument to the original panel and Appellate Body, but its argument was rejected. In determining that the United States did in fact suffer nullification or impairment of benefits at the hands of the EC's banana measures, the Appellate Body made clear that a showing of trade effects is unnecessary for purposes of demonstrating that there has been a breach of a provision of the GATT, quoting from the panel in *United States – Superfund.* The *Superfund* panel decided that it was unnecessary to examine the parties' submissions regarding trade effects in order to determine that benefits accruing to the complaining Member had been nullified or impaired, linking its decision to the breach of the legal provision, Article III:2, alone. The same reasoning should apply here. The Panel should dismiss the EC's arguments.

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

29. The EC does not contest that its banana regime is in breach of GATT Article I, but argues that the Article I Waiver is still in effect. The EC's arguments ignore the plain text of the waiver and its Annex. Pursuant to the terms of the Annex, following two negative arbitration determinations, the waiver "cease[d] to apply to bananas upon entry into force of the new EC tariff regime."

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

31. Tirets one and two of the Annex define the steps to be taken by the EC prior to arbitration. These tirets further require the EC, during that consultation period, to demonstrate that MFN "WTO market-access commitments relating to bananas" will be protected. Tirets three through five establish a centerpiece of the Annex -- the special arbitration controls under which the EC waiver automatically lapses in the event it implements a tariff regime after two negative arbitration reviews.

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

33. Tiret five describes how the EC must "rectify the matter" following a negative determination in the first arbitration. The ordinary meaning of the word "rectify" is "to put or set right" or "to remedy (a bad or faulty condition or state of things)." The term "matter" in this case refers to the EC's failure to satisfy the mandated standard of tiret four. The second and third sentences of tiret five lay out the first of two avenues by which the EC can set right, or remedy, its failed "envisaged rebinding." First, the EC must consult with the interested parties within 10 days to determine whether a "mutually satisfactory solution" can be found. Second, in the absence of a mutually agreed solution, within 30 days of a new arbitration request, the same arbitrator will be asked to determine if the EC has "rectified" the matter. The fifth sentence of tiret five specifies the automatic consequence of a second, negative arbitration determination against the EC: "[i]f the EC *has failed to rectify the matter, this waiver shall cease to apply to bananas upon entry into force of the new EC tariff regime*." The mandatory consequence, the expiration of the waiver, takes effect "*upon entry into force* of the new EC tariff regime," meaning that the waiver terminates automatically upon entry into force of the new EC regime, not at some later point in time.

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

35. Recital 11 to the Article I waiver provides context supporting the above reading of the Annex. Recital 11 states: "any re-binding of the EC tariff on bananas under the relevant GATT Article XXVIII procedures *should result in at least maintaining total market access for MFN banana suppliers* and their willingness to accept *a multilateral control on the implementation of this commitment*." The reference to "*multilateral control*"refers to the Annex arbitration procedures and argues against any EC interpretation that would allow the waiver to continue in effect in the face of the two negative arbitral determinations and a subsequent unilateral determination of "compliance" by the EC. The EC's interpretation, which would allow it, at the end of the day, to apply any regime it chose, cannot be reconciled with the intent of the drafters to impose multilateral controls over the banana regime.

36. While the text of the Annex is clear, supplementary means of interpretation, however, confirm that the waiver expired upon implementation of the EC's new banana measures. The waiver history demonstrate that the parties negotiated the special procedures embodied in the Annex with the purpose of preventing the EC from installing an unacceptable banana tariff as of 2006. The original EC draft of the Annex failed to state a consequence for EC choices after negative arbitration rulings. Members insisted that the language of the fifth and sixth sentences of tiret five be inserted into the Annex. Absent this, the waiver would not have been approved.

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

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

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

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

39. The EC's description of its measure defies reality. In the sixth whereas clause EC Regulation 1964 states that "a tariff rate quota for bananas originating in ACP countries should

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

40. There is nothing new in the EC's attempt to cast its discriminatory ACP tariff rate quota as a "cap" on a tariff preference. The Arbitrators in *Bananas III (22.6)(US)* rejected this exact same argument nearly eight years ago, concluding that "in our view, the 857,700 tonne limit on traditional ACP imports is a tariff quota and therefore Article XIII applies to it." The same conclusion applies here. The EC's 775,000 ton limit on duty-free access for ACP bananas is also a tariff quota within the meaning of Article XIII and subject to the non-discrimination requirements of Article XIII.

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

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

42. The Arbitrator in *Bananas III (22.6)(US)* confirmed that the EC's exclusive ACP quota is by definition a tariff rate quota, since it "is a quantitative limit on the availability of a specific tariff rate." Because all tariff rate quotas are subject to the requirements of GATT Article XIII by virtue of Article XIII:5, the requirements of Article XIII apply to the EC's ACP duty-free tariff quota.

43. The *Bananas III* Panel Report affirmed that Article XIII:1's non-discrimination principle requires that like products of *all* Members must be similarly restricted: "a Member may not limit the quantity of imports from some Members but not from others . . . . A Member may not restrict imports from some Members using one means and restrict them from another using another means."

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

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

> If, by choosing a different legal basis for imposing import restrictions, or by applying different tariff rates, a Member could avoid the application of non-discrimination

provisions to the imports of like products from different Members, the object and purpose of the non-discrimination provisions would be defeated. It would be very easy for a Member to circumvent the non-discrimination provisions of the GATT 1994 and the other Annex 1A agreements, if these provisions apply only *within* regulatory regimes established by that Member.

46. Thus, Article XIII prohibits the EC from establishing a duty-free tariff rate quota for some Members, but not others, and from denying equal treatment to banana imports of all origins. This interpretation of Article XIII prevents Members from circumventing their basic GATT non-discrimination obligations, and is equally as applicable in this instance as it was ten years ago. Just as it did in the original *Bananas III* proceeding, the EC again attempts to elude Article XIII coverage by arguing that the separation of its market into two separate regimes -- one covered by a tariff, the other by a tariff quota -- absolves it of its non-discrimination obligations. As then, the EC's arguments should be rejected.

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

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

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

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

50. Moreover, because the EC fails to distribute any share whatsoever of its ACP tariff quota to MFN suppliers, let alone a share they would have expected to obtain in the absence of restrictions, it maintains its tariff quota in breach of GATT Article XIII:2. In particular, Article

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

VI. CONCLUSION

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

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

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