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EUROPEAN COMMUNITIES - REGIME FOR THE IMPORTATION, SALE AND DISTRIBUTION OF BANANAS - RECOURSE TO ARTICLE 21.5 BY ECUADOR -

REPORT OF THE PANEL

The report of the Panel on European Communities - Regime for the Importation, Sale and Distribution of Bananas - Recourse to Article 21.5 by Ecuador - is being circulated to all Members, pursuant to the DSU. The report is being circulated as an unrestricted document from 12 April 1999 pursuant to the Procedures for the Circulation and Derestriction of WTO Documents (WT/L/160/Rev.1). Members are reminded that in accordance with the DSU only parties to the dispute may appeal a panel report. An appeal shall be limited to issues of law covered in the Panel report and legal interpretations developed by the Panel. There shall be no *ex parte* communications with the Panel or Appellate Body concerning matters under consideration by the Panel or Appellate Body.

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I. INTRODUCTION

1.1 On 18 August 1998, Ecuador, Guatemala, Honduras, Mexico and the United States acting jointly and severally, requested consultations (WT/DS27/18) with the European Communities in relation to the implementation of the recommendations of the Dispute Settlement Body (DSB) in the matter of the EC's regime for the importation, sale and distribution of bananas established by Council Regulation (EEC) No. 404/93 as amended by Council Regulation (EC) No 1637/98. Consultations were held on 17 September 1998. These consultations did not result in a mutually satisfactory solution of the matter.

1.2 On 13 November 1998, Ecuador requested the reactivation of the 17 September 1998 consultations (WT/DS27/30 and Add.1). Consultations were held between the European Communities and Ecuador on 23 November 1998. As these consultations did not result in a mutually satisfactory solution of the matter, Ecuador requested, on 18 December 1998, the DSB to reconvene the original panel in accordance with Article 21.5 of the DSU to examine the implementation of the DSB recommendations in the light of the General Agreement on Tariffs and Trade (GATT), the General Agreement on Trade in Services (GATS), and the Agreement on Import Licensing Procedures (WT/DS27/41).

1.3 The DSB, at its meeting on 12 January 1999, established a panel with the original panel members in accordance with Article 21.5 of the DSU. Brazil, Belize, Cameroon, Colombia, Costa Rica, Côte d'Ivoire, Dominica, Dominican Republic, Grenada, Haiti, Jamaica, Mauritius, Nicaragua, Saint Lucia, and Saint Vincent and the Grenadines reserved their third party rights to make a submission and to be heard by the Panel in accordance with Article 10 of the DSU.

(i) Terms of reference

1.4 The following standard terms of reference applied to the work of the Panel:

> "To examine, in the light of the relevant provisions of the covered agreements cited by Ecuador in document WT/DS27/41 the matter referred to the DSB by Ecuador, in that document and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements."

(ii) Panel composition

1.5 The Panel was composed as follows:

Chairman: Mr. Stuart Harbinson

Members: Mr. Kym Anderson
Mr. Christian Häberli

1.6 The Panel submitted its report to the parties to the dispute on 6 April 1999.

II. FACTUAL ASPECTS

2.1 The complaint examined by the Panel relates to the EC implementation of the DSB's recommendations in the matter European Communities - Regime for the Importation, Sale and Distribution of Bananas concerning the EC's import measures for bananas. The EC implementation measures at issue are contained in the following regulations: (i) Regulation (EC) No. 1637/98 ("Regulation 1637") amending Regulation (EEC) No. 404/93 ("Regulation 404") on the common organization of the market in bananas, and (ii) Regulation (EC) No. 2362/98 ("Regulation 2362") laying down detailed rules for the implementation of Regulation 404. Regulations 1637 and 2362 have been applied as from 1 January 1999.

A. ACCESS QUANTITIES AND COUNTRY ALLOCATIONS

2.2 Regulation 1637 provides for access to the EC market for three categories of banana imports: traditional ACP imports, non-traditional ACP imports, and imports from third (non-ACP) countries.

(i) Traditional ACP imports

2.3 Traditional ACP imports are defined as banana imports from twelve ACP countries[1] up to an annual aggregate limit of 857,700 tonnes.[2] As part of its implementation measures of the above-mentioned DSB recommendations, the EC has eliminated the country-specific allocations that previously existed for each of the twelve ACP countries. The aggregate import volume is not bound in the EC Schedule and there is no provision in the EC regulations for an increase in the level of the traditional ACP quantity.

(ii) Third-country and non-traditional ACP imports

2.4 The EC has a tariff quota commitment for banana imports of 2.2 million tonnes (net weight) bound in its Schedule. Regulation 1637 provides for additional tariff quota access of 353,000 tonnes per year.[3] This latter quantity is not bound in the EC Schedule (autonomous tariff quota).

2.5 The aggregate tariff quota quantity of 2.553 million tonnes has been allocated to Colombia, Costa Rica, Ecuador, and Panama and an "others" category in the proportions set out in Table 1. According to Regulation 2362, the country-specific allocations are based on imports into the EC during the years 1994 to 1996.[4] There are no specific provisions for reallocating unfilled portions of the country-specific allocations or the "others" category.[5] The "others" category of the tariff quota is reserved for imports of third-country bananas as well as non-traditional ACP bananas.

[1] Belize, Cameroon, Cape Verde, Côte d'Ivoire, Dominica, Grenada, Jamaica, Madagascar, Somalia, St. Lucia, St. Vincent and the Grenadines, and Suriname, see Annex to Regulation 1637.

[2] Annex I to Regulation 2362.

[3] Article 18.2 of Regulation 1637.

[4] Paragraph (2) of Regulation 2362.

[5] The provisions which allowed the reallocation of unfilled portions of the country-specific allocations have been repealed, see Article 31 of Regulation 2362.

Table 1 – EC Tariff Quota Allocations

Country	Share (%)	Volume ('000 tonnes)
Colombia	23.03	588.0
Costa Rica	25.61	653.8
Ecuador	26.17	668.1
Panama	15.76	402.4
Other	9.43	240.7
Total of the above	100.00	2,553.0

Note: Calculation of shares done by Secretariat based on 2.553.0 million tonne tariff quota and the percentage shares according to Annex I to Regulation 2362.

2.6 Non-traditional imports from ACP countries cover any quantities supplied in excess of traditional quantities supplied by ACP countries (i.e. in excess of 857,700 tonnes) or any quantities supplied by ACP countries which are not traditional suppliers to the EC, such as the Dominican Republic. Non-traditional bananas may be imported duty-free under the "others" category of the tariff quota and are limited to 240,748 tonnes (9.43 per cent of the 2.553 million tonne tariff quota). The country-specific allocations for non-traditional ACP imports provided for in EC Regulation 478/95 as the result of the Banana Framework Agreement (BFA) (totalling 90,000 tonnes) have been eliminated.[6]

B. TARIFF TREATMENT

2.7 Table 2 shows the EC tariffs applicable to traditional ACP, non-traditional ACP as well as third-country banana imports. It also summarizes the key modifications of the banana import regime with respect to tariffs, country-specific allocations and volumes which the European Communities has undertaken as part of its implementation measures.

[6] Article 31 of Regulation 2362.

Table 2 – The EC Import Regime for Bananas since 1 January 1999

Category of banana imports	Access volume	Source/definition	Tariffs applied	Modifications of the EC tariff quota regime under Regulations 1637 and 2362
Traditional ACP bananas	857,700 tonnes	Imports without country-specific quantitative limits from 12 traditional ACP countries.*	Duty-free	- elimination of country-specific allocations.
Non-traditional ACP bananas	2,553,000 tonnes	Imports of traditional ACP quantities above the 857,700 tonnes or any quantities supplied by ACP countries which are non-traditional suppliers.	Duty-free up to 240,748 tonnes. For additional imports the bound out-of-quota duty (currently 737 Euro per tonne minus 200 Euro per tonne) applies.	- elimination of country-specific allocations and "other" category totalling 90,000 tonnes. - increase in duty-free access opportunities from 90,000 tonnes to 240,748 tonnes under the "others" category of the 2.553 million tonnes tariff quota. - increase of the margin of preference for out-of-quota imports from 100 to 200 Euro per tonne.
Third-country bananas		Imports from any non-ACP source.	75 Euro per tonne up to 2.553 million tonnes. There are 4 country-specific allocations plus an "others" category. For additional imports the bound out-of-quota tariff applies (currently 737 Euro per tonne).	- modified country-specific allocations allocated to four Members and an "others" category - transferability of unfilled portions of country-specific allocations eliminated - increase in access opportunities by 90,000 tonnes to 2.553 million tonnes as the result of the elimination of country-specific allocations to non-traditional ACP suppliers.

*Belize, Cameroon, Cape Verde, Côte d'Ivoire, Dominica, Grenada, Jamaica, Madagascar, Somalia, St. Lucia, St. Vincent and the Grenadines, and Suriname.

C. ADMINISTRATIVE ASPECTS OF THE BANANA IMPORT REGIME

(i) Eligible operators

2.8 The tariff quota of 2.553 million tonnes and traditional ACP quantities (857,700 tonnes) are made available to two categories of operators – traditional operators and newcomers. Under the EC's amended banana import regime, the operator categories (A, B and C) and the activity functions (primary importer, secondary importer/customs clearer and ripener) have been abolished.

2.9 Under the amended regime, operators have access to the above quantities in the following proportions:[7]

traditional operators	92 per cent
newcomers	8 per cent.

[7] Article 2.1 of Regulation 2362.

This distribution between the two operator categories may be amended to "make better use of the tariff quotas and the traditional ACP quantities".[8] The quantities available in one operator category after requests have been fulfilled may be allocated to the other category.

2.10 To be eligible as a traditional operator, operators must be established in the European Communities during the period determining their reference quantity (explained below) and must have imported a minimum quantity of third-country and/or ACP-country bananas on their own account for subsequent marketing in the European Communities during the reference period.[9]

2.11 To qualify as a newcomer, an operator must be established in the European Communities at the time of registration and must have been engaged "independently and on his own account in the commercial activity of importing fresh fruit and vegetables falling within Chapters 7 and 8 of the Tariff and Statistical Nomenclature and the Common Customs Tariff, or products under Chapter 9 [coffee, tea, maté and spices] thereof if he has also imported products falling within Chapters 7 and 8 in one of the three years immediately preceding the year in respect of which registration is sought …". The declared customs value of such imports during that three-year period must be at least Euro 400,000.[10]

2.12 For the purposes of registration, newcomer operators are to provide, *inter alia*, to the competent authority in one of the EC member States certified evidence of having imported the products referred to above (import licences used or customs documents, as appropriate) and of having complied with the above minimum import value requirement.[11] Applications for registration must be made by 1 July of each year in not more than one of the member States. Renewal of a newcomer's registration is subject to submission of proof that at least 50 per cent of the quantity allocated was imported on the newcomer's own account.[12]

(ii) Determination of traditional operators' reference quantities and newcomer allocations

2.13 For each traditional operator, import entitlements are established (i.e. the annual "reference quantity") on the basis of quantities of bananas "actually imported" during the reference period.[13] The reference period for 1999 covers the years 1994-1996.[14] Written applications for reference quantities have to be submitted in one of the member States by 1 July of each year.[15] In their applications, operators have to provide data of the total volume of imports from origins covered by the tariff quota and of traditional ACP bananas during each year of the applicable reference period. Import volumes ("actual imports") are to be documented through both (i) copies of the import licences used either by the holder, or in the case of a transfer of the licence, by the transferee, and (ii) proof of payment of the customs duties. A traditional operator who furnishes proof of payment of customs duties, for the release into free circulation of a given quantity of bananas, without being the holder or the transferee holder of the relevant import licence, is considered to have actually imported the declared quantity provided that he has actually registered in a member State under Regulation (EEC) 1442/93 and/or fulfils the conditions of Regulation 2362 for registration as a traditional operator.[16]

[8] Article 2.2 of Regulation 2362.

[9] The minimum import quantity is 100 tonnes in any one year of the reference period, or 20 tonnes for bananas equal to or shorter than 10 cm. Article 3 of Regulation 2362.

[10] Article 7 of Regulation 2362.

[11] Article 8 of Regulation 2362.

[12] *Idem*.

[13] Article 4 of Regulation 2362.

[14] For operators established in the new member States (Austria, Finland and Sweden) the corresponding reference period is 1994 and the first three quarters of 1995, see Article 5.4 of Regulation 2362.

[15] Article 5 of Regulation 2362.

[16] Article 5.3 of Regulation 2362.

2.14 There are no reference quantities for newcomers. Applications for an annual quota must not exceed 10 per cent of the total annual quantity reserved for newcomers.[17] A new operator may become a traditional operator after three years of commercial activity.[18]

(iii) Import licensing procedures

2.15 Imports of traditional ACP, non-traditional ACP and third-country bananas are subject to licensing procedures.

2.16 For the purpose of issuing import licences, the Commission of the European Communities may fix an "indicative quantity" of the annual tariff quota for the first three quarters of the year in accordance with the proportions set out in Table 1 above. It may be decided that during that period, applications for licences may not exceed a certain percentage of the reference quantity of each traditional operator or of the quantity allocated to each newcomer.[19]

2.17 Applications for import licences have to be submitted in the European Communities member State where the operator is registered. Import licences are then issued, on a quarterly basis, following a two-round licensing procedure. In the first round, operators must specify, *inter alia*, the quantities requested from the origins specified in Table 1 above or from traditional ACP sources.[20]

2.18 A reduction coefficient is applied if licence requests, in any quarter and for any source, exceed significantly the indicative quantities or exceed the annual quantities available.[21] The reduction coefficients for each origin, if any, proportionally reduce the quantities indicated on the operators' licence requests.[22]

2.19 After the first round, the EC Commission publishes the origins and quantities for which new import licence applications can be made. For licence requests for origins that are subject to a reduction coefficient, operators may either renounce their licence requests or make new licence requests for the unfulfilled portion of their original licence request.[23] Import licences cannot be used to import from origins other than the origin indicated on the licence.[24]

2.20 Unused import licences are, if requested, re-allocated to the same operator, whether a licence holder or transferee, for use in a subsequent quarter in the same year as the original licence. Such applications are not subject to the reduction coefficient that may apply in that quarter.[25]

2.21 Import licences are transferable once:

(a) between traditional operators;

(b) from traditional operators to eligible newcomers;

(c) between eligible newcomers.

[17] Article 9 of Regulation 2362.
[18] Article 10 of Regulation 2362.
[19] Article 14 of Regulation 2362.
[20] Article 15 of Regulation 2362.
[21] Article 17 of Regulation 2362.
[22] For the applicable reduction coefficients in the first quarter of 1999, see Regulation (EC) No. 2806/98 and Regulation (EC) No.102/1999.
[23] Article 18 of Regulation 2362.
[24] Article 15.4 of Regulation 2362.
[25] Article 20 of Regulation 2362.

2.22 In the event of an import licence transfer among traditional operators, the reference quantity of the transferor and the transferee are, respectively, decreased and increased accordingly. In turn, traditional operators' reference quantities are reduced when transferred to a newcomer. Quantities transferred to a newcomer are credited when the new operator applies for traditional operator status.[26] Newcomers are not permitted to transfer import licences to traditional operators.[27]

D. LOMÉ WAIVER

2.23 The Fourth Lomé Convention, signed on 15 December 1989 between the European Communities and 68 African, Caribbean and Pacific (ACP) developing countries contains a protocol concerning bananas, along with provisions applying to products more generally. Like its predecessors, the Fourth Lomé Convention was notified to GATT and considered by a working party.

2.24 In December 1994, the European Communities was granted a waiver by the CONTRACTING PARTIES from the EC's obligations under Article I:1 of GATT 1947 as concerns the Lomé Convention.[28] The waiver provides, in paragraph 1 of the decision, as follows:

> "[T]he provisions of paragraph 1 of Article I of the General Agreement shall be waived, until 29 February 2000, to the extent necessary to permit the European Communities to provide preferential treatment for products originating in ACP States as required by the relevant provisions of the Fourth Lomé Convention, without being required to extend the same preferential treatment to like products of any other contracting party." [29]

2.25 In October 1996, the Lomé waiver was extended until 29 February 2000 (in accordance with the procedures mentioned in paragraph 1 of the Understanding in respect of Waivers and those of Article IX of the WTO Agreement).[30]

[26] Article 21.3 of Regulation 2362.
[27] Article 21 of Regulation 2362.
[28] GATT document L/7539 of 10 October 1994 and L/7539/Corr.1.
[29] Paragraph 1 of GATT document L/7604 of 19 December 1994.
[30] WT/L/186 of 18 October 1996.

III. PROCEDURAL ISSUES

3.1 The **European Communities** contested the original complainants' position that consultations were not required under Article 21.5 of the DSU, since that provision referred explicitly to "these dispute settlement procedures", i.e. the entirety of the DSU. Consultations were in fact held on 17 September 1998 with all the original complainants on the amendments to Regulation 404 as set out in Regulation 1637. Also, in a communication of 13 November 1998[31], Ecuador requested the "reactivation" of the consultations, which had started on 17 September 1998. In this communication, Ecuador explicitly referred to Regulation 2362. The consultations were held on 23 November 1998 in the presence of Ecuador and Mexico as original complainants.

3.2 The European Communities submitted that the alleged WTO-inconsistency of the revised EC import regime for bananas raised during consultations related exclusively to Articles I and XIII of GATT and Articles II and XVII of GATS. The European Communities was of the opinion that some claims raised by Ecuador in its first written submission went beyond the scope of this Panel procedure, which was limited to the settlement of a dispute "where there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the [original] recommendations and rulings" (Article 21.5 of the DSU). The matter which was within the terms of reference of this Panel was therefore to be limited to the matters on which the DSB had adopted its recommendations and rulings based on the original panel and AB reports.

3.3 The European Communities was of the view that Ecuador's reference to Article 19 of the DSU, amounted to an attempt to transform this Panel procedure into a sort of arbitration "*ex aequo et bono"* which, in the opinion of the European Communities, had no legal basis under Article 21.5, and whose suggested recommendations would have the effect of imposing a modification of the existing bindings in the EC Schedules as they were negotiated in the Uruguay Round. However, a panel established in accordance with Article 21.5 had to apply "these dispute settlement procedures", i.e. the DSU.

3.4 According to the European Communities, this Panel could therefore only verify the consistency of measures taken to comply with the original recommendations and rulings of the DSB by "clarify[ing] the existing provisions" and "preserv[ing] the rights and obligations of members under the covered agreements". Panels should, in accordance with Article 19.1, "recommend that the Member concerned bring that measure into conformity with that agreement". However, they were not empowered to "recommend specific, immediate actions" as Ecuador had suggested.[32] Article 19.1, last part, allowed panels to "suggest ways" (i.e. technical means) in which a Member could implement the recommendation. This should be read in its context, i.e. paragraph 2 of the same Article, which explicitly forbade panels to "add to or diminish the rights and obligations provided in the covered agreements". The European Communities did not agree and will not allow that any of its negotiated rights and obligations bound in its Schedule be modified or affected outside a trade negotiation.

3.5 **Ecuador** submitted that the terms of Article 21.5 left no doubt that the issue in an Article 21.5 panel was not merely whether the new measures were consistent with specific rulings and recommendations of the DSB but also whether the measures that were taken allegedly for that purpose were consistent with the rules of the WTO Agreement. The plain language of Article 21.5 caused no injustice to the defending party, and EC claims to the contrary in this dispute would be frivolous. While the panel process was accelerated under Article 21.5, the defending party had the benefit of panel and perhaps AB rulings, as it designed remedial measures over a "normal" 15-month period with frequent DSB meetings. Further extraneous matters would be avoided, since only measures taken and not taken to comply with the rulings and recommendations would be at issue, even though

[31] WT/DS27/30 of 16 November 1998.
[32] Ecuador's first submission, paragraph 27.

the question was conformity with any WTO covered agreement. Finally, any rights of the defending party needed to be balanced against the rights and interests of the complainant party or parties. By the time of an Article 21.5 proceeding against a recalcitrant defendant, the complaining parties would have been suffering nullification or impairment for two and a half years or more with no compensation.

3.6 In this proceeding, Ecuador submitted, it was evident that every Ecuadorian complaint concerned an EC measure that had either been maintained contrary to panel rulings or that had been modified or extended without conforming to the WTO rules. If the European Communities was seeking to invoke a procedural defence under Article 21.5, Ecuador submitted that more than a footnote was required to meet the burden of such a defence. As concerns Ecuador's request for specific recommendations and suggestions under Article 19 of the DSU, Ecuador submitted that nothing in its request was inconsistent with the language of the DSU or with the WTO agreements. The suggestion of "ways" to comply was not limited on its face to "technical means", as claimed by the European Communities. Further, the past history of this dispute, was ample grounds for the Panel to use the authorities granted by the DSU. Ecuador further submitted that while repealing non-conforming measures was an important part of compliance, it was not a remedy insofar as some illegal measures were not fully remedied and other measures inconsistent with the WTO were substituted.

IV. MAIN ARGUMENTS[33]

A. GENERAL

4.1 **Ecuador** challenged the conformity of the EC's revised system for the importation, sale and distribution of bananas with:

(a) Articles I and XIII of the General Agreement on Tariffs and Trade 1994 (GATT 1994);

(b) Articles II and XVII of the General Agreement on Trade in Services (GATS); and the rulings and recommendations of the original panel in its report on *European Communities - Regime for the Importation, Sale and Distribution of Bananas*[34] (hereinafter "Panel report"), as modified by the AB in its report on *European Communities - Regime for the Importation, Sale and Distribution of Bananas*[35] (hereinafter "AB report");

(c) Ecuador requested the Panel not only to reaffirm its prior rulings and interpretations, as confirmed and modified by the AB, but also to provide the *European Communities* with a more explicit recommendation and guidance how to comply.

4.2 The **European Communities** requested that the Panel reject all the allegations made by Ecuador both under the GATT and the GATS and find that the European Communities had complied with the original recommendations and rulings of the DSB adopted on 25 September 1997.

B. ISSUES RELATED TO THE GATT

4.3 **Ecuador** claimed that the revised EC system retained the same three categories of imports as the previous system and the same tariff treatment of those categories[36] except as follows:

(a) there were no individual country quotas in the ACP quantity for traditional ACP bananas;[37]

(b) for non-traditional ACP bananas[38], there was no longer any 90,000 tonne limit on the amount that could enter the European Communities duty-free under the "other" category of the third-country quotas. For quantities above the third-country quotas, the tariff preference for non-traditional ACP bananas had been increased from 100 Euro per tonne to 200 Euro per tonne;

(c) there were no country allocations to non-substantial suppliers.

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[33] Footnotes in this part of the report are those of the parties when not otherwise stated.
[34] 22 May 1997, WT/DS27/R/ECU.
[35] 9 September 1997, WT/DS27/AB/R.
[36] See Table 2 above under Factual Aspects, Secretariat remark.
[37] Traditional ACP bananas were defined as bananas originating in the following countries up to a limit of 857,700 tonnes: Belize, Cameroon, Cape Verde, Côte d'Ivoire, Dominica, Grenada, Jamaica, Madagascar, St. Lucia, Somalia, St. Vincent and the Grenadines and Suriname. Article 16.1 of Council Regulation (EEC) 404/93 as amended by Article 1 of Council Regulation (EC) 1637/98.
[38] Non-traditional ACP bananas were defined as quantities of bananas exported by the ACP countries which exceeded the quantity defined above. Article 15.1 of Council Regulation (EEC) 404/93 (as amended).

1. Article I Issues

(i) Traditional ACP bananas

4.4 **Ecuador** submitted that the revised system did not comply with Article I of GATT 1994 and the rulings of the panel and the AB, as concerns traditional ACP bananas, in three respects. First, the total allotment of 857,700 tonnes was equal to the sum of the previous individual traditional ACP country allocations prior to 1 January 1999, and the panel and the AB had already found that those allocations exceeded what was required under the Lomé waiver.[39] The European Communities could not rectify the problem of excessive individual allocations by cumulating them into one basket allotment in excess of that required for the sum of the shares of the countries participating in the basket. Ecuador argued that the revised system, by assigning a cumulative share to all traditional ACP suppliers, aggravated the violation of Article I since there were no individual limits, which meant that each country was in principle allowed to exceed its pre-1991 duty-free best-ever level.

4.5 Nor could the European Communities circumvent this obligation by devising new pretexts to justify the same quantities whose original rationale was rejected by the panel and the AB[40] before both of which the European Communities had stated that the figure of 857,700 tonnes included expected increases in banana exports after 1990. They were therefore outside the scope of the Lomé waiver, and were accordingly inconsistent to that degree with the EC's obligations under Article I of GATT 1994.[41] The discriminatory effect of this violation would also be exacerbated in practice because the revised import licensing system penalized the failure to use fully all licence quantities, for all countries. Together with the elimination of country limits for each traditional ACP country, the effect was to encourage maximum usage of the 857,700 tonne duty-free quota, and within that quota, to encourage a shift to the relatively more efficient suppliers and away from the less competitive among the ACP countries.

4.6 Second, Ecuador argued, the revised system's removal of individual country ceilings on duty-free access exacerbated the degree to which the EC's preferences exceeded what was "required" by the Lomé Convention and accordingly increased the degree of non-conformity with Article I of GATT 1994. As a consequence, every traditional ACP supplier could in principle ship 857,700 tonnes duty-free, whereas the panel and the AB held that any quantity for any country in excess of its pre-1991 "best-ever" was not required under the Lomé Convention and therefore not covered by the Lomé waiver. In Ecuador's view, this was more than a technical legal contravention, since the result was adverse commercial consequences. The traditional ACP suppliers would be more likely to ship the full available total of traditional ACP bananas, since the more productive and efficient among them would be able to plan, compete and invest accordingly.

4.7 The non-conformity with Article I could not, Ecuador argued, be off-set by a decrease in imports from less efficient traditional ACP suppliers since the panel's and AB's findings were very clear on that account, i.e. that the Lomé waiver applied for each traditional ACP supplier only up to that supplier's best-ever year before 1991.[42] Presumably, some or even many traditional ACP suppliers would effectively lose duty-free access to the European Communities because importers would naturally tend to buy from the most efficient and cheapest sources within a basket of countries.

[39] Panel report at paragraph 7.102; AB report at paragraph 175.
[40] Panel report at paragraph 4.131 and following; AB Report at paragraph 28.
[41] Panel report at paragraph 7.103; AB report at paragraph 175.
[42] As was noted by the AB in interpreting Article III, less favourable treatment for some cannot be balanced with more favourable treatment for others. See *United States - Standards for Reformulated and Conventional Gasoline*, adopted on 20 May 1996, WT/DS2/AB/R and WT/DS2/R.

4.8 Referring to Article 168(2)(a)(ii) of the Lomé Convention[43], in particular, the **European Communities** responded that it had to honour its obligations under the Lomé Convention. Moreover, it noted that Protocol 5 of the Lomé Convention[44] had been interpreted to mean that "the European Communities is 'required' under the relevant provisions of the Lomé convention to provide duty-free access for all traditional ACP bananas".[45] The European Communities was thus providing duty-free treatment to traditional banana imports from ACP countries for a maximum volume of 857,700 tonnes which was an "additional preferential treatment for traditional ACP bananas over and above the preferential treatment for *all* ACP bananas that is required by Article 168(2)(a)(ii)".[46] This corresponded therefore to the limitation of the volume of bananas, i.e. traditional imports, which could benefit from this preferential treatment, as envisaged by the terms of the Lomé waiver resulting from the interpretation by the AB.

4.9 Maintaining the maximum of 857,700 tonnes of traditional ACP bananas per year was fully justified after having applied the new interpretative criterion set out by the AB in its report (paragraphs 175 and 178). Traditional ACP bananas were not imported under the third-country tariff quotas, but competed with all the bananas that could be imported outside the bound tariff rate quota (and the autonomous quota), albeit with a preferential (duty-free) treatment as required by the Lomé Convention and permitted under the Lomé waiver. The margin of preference to the benefit of traditional ACP bananas outside the (bound and autonomous) tariff quotas was at present 737 Euro per tonne.[47] The European Communities recalled that the panel and the AB had considered that only pre-1991 best-ever import volumes from the traditional ACP banana suppliers could serve as justification to allow imports of traditional ACP bananas outside the tariff quotas. On the basis of the historical figures that were now available for pre-1991 best-ever import volumes of traditional ACP bananas (i.e. 952,933 tonnes), a maximum of 857,700 tonnes, duty-free, from all the traditional ACP banana suppliers was therefore entirely legitimate.[48]

4.10 The European Communities submitted that the original panel and the AB had agreed that the zero duty preference was "required" for traditional ACP bananas up to the level, for each supplier, of its pre-1991 best-ever exports to the European Communities, but that allowances for any country above that level were not within the waiver and were therefore inconsistent with Article I of GATT 1994. The sum of the individual country allocations for traditional ACP bananas under the prior system was 857,700 tonnes, which included for each traditional ACP country its best-ever exports to the European Communities, and for some countries an extra duty-free allotment based on expected increased production as a result of recent investments. The revised EC system created a single duty-free quota of 857,700 tonnes for all traditional ACP countries, with no limit on any individual ACP country's duty-free access within that overall quota.

4.11 **Ecuador** submitted in response, that a comparison of Annex 1 of the EC's first submission with the country limits of the prior system indicated that every country allocation was the same or less under Annex 1, except for Jamaica and Somalia, both of which were stated to have had a larger best-ever year in 1965 and 1966. Since the European Communities was putting forward this data as a defence after many years of not considering such data as valid for Lomé Convention, GATT or WTO purposes, the European Communities needed to do far more to explain why today such data should be

[43] I.e. " … take the necessary measures to ensure more favourable treatment than that granted to third-countries benefiting from the most-favoured-nation clause for the same products".

[44] I.e. " … [i]n respect of its banana exports to the Community markets, no ACP State shall be placed, as regards access to its traditional markets and its advantages on those markets, in a less favourable situation than in the past or at present".

[45] AB report at paragraph 178. See also paragraph 172.

[46] AB report at paragraph 170.

[47] It was scheduled to decrease to 708 Euro as from 1 July 1999.

[48] The relevant historical figures justifying the quantitative limitation of the importation of traditional ACP bananas at 857,700 tonnes are contained in Annex 1.

accepted as valid, required by the Lomé Convention, and within the scope of the Lomé waiver. The years in question all pre-dated the EC's agreements with traditional Lomé countries, or even the accession of the United Kingdom to the European Communities. Further, having found this data, there was no explanation why the European Communities did not consider itself "required" to grant the additional quantities to Somalia and Jamaica. Ecuador considered that even if the Panel were to accept as valid this data, and thus increase the "requirement" of the Lomé Convention and expanding the scope of the Lomé waiver, the revised EC system would still be inconsistent with Article I of GATT 1994 with respect to traditional ACP bananas, since it allowed any traditional ACP supplier duty-free access beyond its "best-ever" level.[49]

4.12 The **European Communities** noted that the AB had overruled the panel in the original dispute with regard to the coverage of the Lomé waiver which in the view of the AB[50] did not extend to Article XIII of GATT. The European Communities therefore considered itself to be compelled to abandon the country-allocation for the imports of traditional ACP bananas, since in spite of the preference, none of the banana-exporting ACP States was a substantial supplier of bananas to the EC's market. Under such circumstances, the European Communities did not see how it would be possible to allocate shares of the overall volume to individual ("specific") ACP States as long as the European Communities did not distribute its MFN tariff quotas among non-substantial suppliers. In this regard, the European Communities did no more than respect its WTO obligations the way it understood them, but the European Communities had an open mind if it was clarified in unambiguous terms that other options were available to it. Moreover, the inconsistency alleged by Ecuador did not relate to Article I of GATT, but, in the opinion of the European Communities, rather to an alleged inconsistency of the EC's banana import regime with the requirements of Article 1 of Protocol 5 on bananas because of the absence of country allocations for the preferential import volume for traditional ACP bananas.

4.13 Referring to the EC's argument in paragraph 4.12 above, **Ecuador** submitted that the AB, in ruling that the Lomé waiver did not apply to the EC's infringement of Article XIII, did not find that the European Communities was thereby excused from compliance with Article I of GATT 1994, including the AB's express affirmation that duty-free quantities in excess of a traditional ACP country's pre-1991 "best-ever" level were not within the scope of the Lomé waiver[51] and therefore infringed Article I. That infringement of Article I existed whether or not the Panel accepted the "new" old data on Jamaica and Somalia.

(ii) Non-traditional ACP bananas

4.14 **Ecuador** argued that, under the terms of the Lomé Convention, the more favourable tariff treatment in the revised system of non-traditional ACP bananas was not required by, and hence was not within the scope of, the Lomé waiver.[52] Ecuador considered that it was not justifiable to expand, in the amended system, the preferences allowed in the old system. Neither the limited finding regarding the previous system, nor the language of the Lomé waiver could justify such an increase. The panel and the AB affirmed, according to Ecuador, that the Lomé waiver covered duty-free treatment for 90,000 tonnes of non-traditional ACP bananas and a 100 Euro per tonne preference for such bananas above the overall tariff-rate quota (TRQ). Under the revised EC system, however, the 90,000 tonne cap on duty-free importation had been removed, and the preference for above-quota

[49] First Ecuador Submission at paragraphs 56-63.

[50] Paragraph 188 of the AB report in the original dispute, doc. WT/DS27/AB/R of 9 September 1997.

[51] AB report at paragraph 174, footnote 94.

[52] The relevant provision of the Lomé Convention in this regard was Article 168(2)(a)(ii), which provided that: " … the Community shall take the necessary measures to ensure *more favourable treatment* than that granted to third-countries benefiting from the most-favoured-nation clause for the same products" (emphasis added).

imports had been increased to 200 Euro per tonne. Ecuador argued that this Panel should find that the expansion of the preference was more than what was required by the Lomé Convention, and hence not justified under the Lomé waiver, and therefore not consistent with Article I of GATT 1994.

4.15 The **European Communities** noted that non-traditional imports of ACP bananas were currently benefiting from duty-free treatment within the tariff quotas (which amounted in practical terms to a preference of 75 Euro per tonne) and a duty preference of 200 Euro per tonne outside the tariff quotas. According to the European Communities, the fact that the AB had mentioned a volume of 90,000 tonnes for duty-free banana imports within the (bound) tariff quota and a figure of 100 Euro for any further preference was not an indication of an upper limit of the preference for non-traditional ACP bananas. The AB had limited itself to examining "whether the particular measures chosen by the European Communities to fulfil the obligations in [Article 168(2)(a)(ii)] to provide 'more favourable treatment' to non-traditional ACP bananas are also in fact 'necessary' measures …".[53] According to the European Communities, the AB had stated very clearly that "Article 168(2)(a)(ii) does not say that only *one* kind of measure is 'necessary'. Likewise, that Article does not say *what* kind of a measure is 'necessary'. Conceivably, the European Communities might have chosen some other 'more favourable treatment' in the form of a tariff preference for non-traditional ACP bananas." [54]

4.16 The European Communities further noted that the above figures were the ones on which the previous EC banana import regime was based. The Lomé waiver covered preferential treatment of ACP bananas over and above these figures to the extent that the waiver from Article I was only qualified by the condition that the preferential treatment had to be "required" by the Lomé Convention. Article 168(2)(a)(ii) of the Lomé Convention required preferential treatment of *all* ACP banana imports[55] unlike the requirements contained in Article 1 of Protocol 5 which were limited to traditional ACP banana suppliers. In the opinion of the European Communities, there was no basis for a volume limitation of such preferential treatment in Article 168(2)(a)(ii) of the Lomé Convention, nor for a limitation of the margin of preference to 100 Euro per tonne of non-traditional ACP bananas imported outside the tariff quotas.

4.17 **Ecuador** submitted that the revised EC system increased the preferences for non-traditional ACP bananas, both by eliminating the 90,000 tonne cap on duty-free entry and by increasing the preference for over-quota bananas to 200 Euro per tonne. These increases went beyond what the panel had found required under the Lomé Convention, and thus did not fall within the Lomé waiver, and were inconsistent with Article I of GATT 1994. In Ecuador's opinion, the AB's observation that *other* forms of tariff preference might have been chosen was used by the European Communities as a pretext to justify greater preferences of the same type. In granting the Lomé waiver, WTO Members did not give *carte blanche* to the European Communities and ACP States. The EC's actions and rationale for its substantial increase of those preferences were abusive, and unjustifiable in terms of the Lomé waiver or past rulings.

4.18 The **European Communities** argued that contrary to Ecuador's allegations in paragraphs 4.14 and 4.17 above, the elimination of the tariff quota share for non-traditional ACP bananas *reduced* the value of the preference granted under the previous EC banana import regime, since these bananas were now imported in competition with bananas from other sources under the general "others" category of the tariff quota that was not allocated to bananas of a particular origin. The European Communities thus considered that the abolition of the tariff quota share allocated to imports of non-traditional ACP bananas did not "expand" the preference for non-traditional ACP bananas beyond the requirements of Article 168(2)(a)(ii) of the Lomé Convention. In order to partly compensate for the

[53] Paragraph 173 of the AB report.
[54] *Idem*.
[55] Paragraph 170 of the AB report.

loss of the allocation of the 90,000 tonne tariff quota share for non-traditional ACP suppliers, the European Communities continued, it had agreed with these suppliers to increase the margin of preference for out-of-quota imports from 100 Euro per tonne to 200 Euro per tonne. In conclusion, the European Communities saw no valid basis for Ecuador's complaint regarding the preferential treatment of non-traditional imports of ACP bananas under the present regime.

2. Article XIII issues

4.19 **Ecuador** argued that the revisions of the EC's system were not sufficient to conform with the obligations of Article XIII, and in some respects aggravated the contraventions of Article XIII in the previous system. Indeed, even the size of the respective TRQ baskets was unchanged: 857,700 tonnes of duty-free access for traditional ACP bananas, and 2,553,000 tonnes of preferential tariff access for other bananas. The revised system retained the use of two TRQ regimes, and maintained the same overall quota level for each group as in the previous system, resulting in more favourable treatment of bananas from traditional ACP countries than from Ecuador or other countries. The panel and the AB had held that the EC's establishment of two banana import regimes, or use of different terminology, did not justify a separate evaluation of those regimes in terms of Article XIII. Ecuador considered that there was no exemption from the obligations of Article XIII for measures that favoured products of a group of countries where the same favouritism was not permitted for a single country, as was evident, for example, in the evaluation of the BFA by the panel and the AB.

4.20 Ecuador submitted that the questions with respect to the allocation of the TRQs were, firstly, whether the European Communities had complied with Article XIII, and the findings and recommendations in that regard, by according to traditional ACP countries, as a group, a share of the TRQ that was equal to the sum of the individual country shares for ACP bananas; and secondly whether the allocation assigned to Ecuador, relative to the share allotted to the ACP and to the import regime of the EC generally, conformed with Article XIII. Ecuador contended that in both respects the European Communities had failed to conform with Article XIII and the pertinent findings and recommendations of the panel.

4.21 Ecuador asserted, moreover, that the original panel had found that Article XIII did not permit the European Communities to allocate country shares to some non-substantial suppliers, while not doing so to others.[56] Ecuador noted that the particular country shares allotted to each traditional ACP supplier were based on the "best-ever" performance of each country prior to 1991, with a supplement even beyond that for some of the traditional ACP suppliers. However, actual imports from the traditional ACP countries as a group had been in the range of 200,000 tonnes less than the 857,700 tonnes in total allotments. In line with past rulings[57], the panel had found that the chapeau in Article XIII:2 constituted a "general rule" to which the provisions of Article XIII:2(d) were subordinate.[58] The panel had also found that the European Communities could leave in place the TRQs for traditional ACP bananas because it was of the view that the Lomé waiver applied to Article XIII violations as well as to violations of Article I.[59] This panel finding had been overruled by the AB.[60]

4.22 Ecuador argued that a discriminatory quota in favour of one country could not be cured by combining that quota share with another excessive country quota share. Indeed, were it otherwise, Article XIII would become meaningless. WTO members could then freely discriminate simply by

[56] Panel report at paragraphs 7.90-7.118.

[57] See working party report on "Quantitative Restrictions", adopted on 2, 4, and 5 March 1955, BISD 3S/170, 176, paragraph 24, cited at *Bananas III* panel report at paragraph 7.68, footnote 365.

[58] Panel report at paragraph 7.70.

[59] Panel report at paragraph 110.

[60] AB report at paragraph 188.

allocating quotas by blocks of two or more country quotas, instead of individual quotas. There was nothing in the findings of the panel or AB, or in the plain language of Article XIII, to suggest that such discrimination by blocks of countries was admissible. By eliminating the sub-allotments, Ecuador submitted, it was more likely that more of the quota would be filled, since more efficient traditional ACP suppliers would face little limit and would have an incentive for investment. The TRQ for traditional ACP bananas was isolated from competition from other sources such as Ecuador, both under the previous system and in the amended system, another advantage for traditional ACP bananas which was not accorded to other bananas.

4.23 The **European Communities** submitted that according to the findings of the panel and the AB with regard to Article XIII of GATT[61], tariff quota shares could not be allocated only to some non-substantial suppliers of a product. In examining the old EC banana regime, the AB had considered that (partial) allocation was an advantage which had not been extended to all non-substantial suppliers. Thus, the European Communities was not permitted under Article XIII:2(d) of GATT 1994 to allocate a specific tariff quota share only to non-traditional ACP banana suppliers. Therefore, the European Communities would have to allocate tariff quota shares to all non-substantial suppliers which the European Communities considered was difficult in practice. It would introduce undesirable rigidity in the administration of the tariff quota, as some tariff quota shares for non-substantial suppliers would have to be very small indeed. On the basis of these considerations, the European Communities had decided to introduce a general (undistributed) "others" category without allocation of country-specific tariff quota shares.

4.24 In order to respect the ruling of the AB, the European Communities continued, according to which breaches of Article XIII of GATT were not covered by the Lomé waiver, and in particular its finding in paragraph 188, the European Communities had refrained from allocating shares to any specific traditional ACP banana supplying country. The European Communities did not understand how the absence of a distribution of the quantity between traditional ACP suppliers could negatively affect Ecuador's export interests, since imports of traditional ACP bananas were in any case not counted against the (bound and autonomous) tariff quotas, on the one hand, while full competition outside the tariff quotas was already established by the Uruguay Round, on the other hand. The only differential treatment between Ecuadorian bananas and ACP traditional bananas was the tariff applied (duty-free vs. bound rate) but this was consistent with the Lomé waiver.

4.25 The European Communities submitted that a number of fundamental principles of GATT/WTO had to be observed when addressing this matter. They included the following: the Lomé waiver was a decision of the CONTRACTING PARTIES which was foreseen by the Marrakesh Agreement, Article IX.3, and was obligatory upon all the WTO Members. According to a general principle of public international law applied in the WTO by the AB, " … *an interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility* …".[62] Therefore, this Panel was not free to interpret Article XIII of GATT in such a way as to render the Lomé waiver " a redundancy or an inutility". To put it otherwise, it must be possible to apply the Lomé waiver in the context of the *existing* WTO rights and obligations.

4.26 According to the same principle, no interpretation of Article XIII of GATT could enlarge its scope to such an extent that Article I of GATT would be reduced, *in casu*, to "redundancy or inutility". Both these provisions were concerned with the MFN principle. However, they had their separate scope and purpose that could not be superposed or confused. The AB affirmed in the LAN

[61] Paragraph 7.90 of the panel report and paragraph 161 of the AB report.

[62] AB report on *United States – Standards for Reformulated and Conventional Gasoline*, adopted 20 May 1996, AB-1996-1, page 23.

case[63] that "*the security and predictability of 'the reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade' is an object and purpose of the WTO Agreement, generally, as well as of GATT 1994*". The *Newsprint* panel report [64] was a practical application of this important principle which in the EC opinion was relevant for the solution of the present case. As the AB in the "*India patent*" case had indicated, "… *both panels and the AB (…) must not add to or diminish rights and obligations provided in the WTO Agreement. This conclusion is dictated by two separate and very specific provisions of the DSU. (…) These provisions speak for themselves. Unquestionably, both panels and the AB are bound by them".*[65] Any claim or suggestion by the complainant, the European Communities submitted, had to be dealt with by the Panel with this fundamental principle in mind.

4.27 The European Communities submitted that it could not possibly be in Ecuador's best interest that imports of duty-free traditional ACP bananas be counted against imports at in-quota rates from other sources, including from Ecuador, since this would necessarily reduce the share of imported non-ACP bananas. The European Communities stressed that imports of traditional ACP bananas were not counted against any MFN tariff quota. They were imported duty-free *outside* the existing (bound and autonomous) MFN tariff quotas. If it were not for the conditions attached to the Lomé waiver, as interpreted by the panel and the AB in the original dispute, the European Communities would not have indicated any specific volume for such imports. It therefore considered that Article XIII of GATT did not apply to duty-free imports of traditional ACP bananas which were not counted against a tariff quota but to which a cap to the tariff preference was applied.

4.28 The European Communities considered that Article XIII:5 of GATT 1994 would not be applicable in the absence of the AB interpretation of the Lomé waiver limiting duty-free imports of traditional ACP bananas in the European Communities to a volume of 857,700 tonnes. This volume found therefore its basis exclusively in the conditions attached to the Lomé waiver, not in the EC's tariff bindings, nor in Article XIII which was meant, in the final analysis, to protect those bindings. Thus, the volume limitation for duty-free imports of traditional ACP bananas was inseparably attached to the Lomé waiver and was both required and permitted by the waiver. Referring to its obligations under Article 1 of Protocol 5, as confirmed by the AB[66], the European Communities submitted that it had an obligation to allow imports of traditional ACP bananas into the European Communities under an import arrangement that was separate from the import arrangement applying to bananas from other sources, because any other solution would negatively affect the bound tariff quota and thus reduce the share of non-ACP banana imports, breaching the principle set out in the AB report on LAN.[67] While it was true that, in accordance with the findings of the AB in the earlier dispute, the waiver only waived obligations of the European Communities under Article I:1 and not under Article XIII of GATT 1994, this waiver had to be given its full scope and meaning (see paragraph 4.25 above). The European Communities submitted that it would not be entitled to count preferential imports that were not included in a tariff binding against imports under the bound tariff quota. This question was extensively dealt with in the 1984 panel on *Newsprint*[68] which was relevant to the claim submitted by Ecuador in this case. [69] The European Communities quoted the *Newsprint*

[63] *European Communities - Customs Classification of Certain Computer Equipment*, AB-1998-2, paragraph 82.

[64] Adopted 20 November 1984, BISD 31S/114, 130, notably paragraphs 50 to 52.

[65] Paragraphs 46 and 47 (emphasis added).

[66] Paragraph 178.

[67] *European Communities - Customs Classification of Certain Computer Equipment*, AB-1998-2, paragraph 82.

[68] Adopted 20 November 1984, BISD 31S/114, 130, notably paragraphs 50 to 52.

[69] In the *Newsprint* case, the complainant (Canada) argued that the respondent (EC) had not respected its tariff commitment for newsprint, because it had bound a duty-free MFN tariff quota of 1.5 million tonnes but in 1984 had only allowed a volume of 500,000 tonnes to be imported duty-free in the European Communities. The European Communities responded that the MFN tariff rate quota had in the past been shared between

panel as saying "[...] It is in the nature of a duty-free tariff quota to allow specified quantities of imports into a country duty-free which would otherwise be dutiable, which is not the case for EFTA imports by virtue of the free-trade agreements. *Imports which are already duty-free, due to a preferential agreement, cannot by their very nature participate in an M.F.N. duty-free quota"* (emphasis added).

4.29 While the MFN tariff quotas for bananas were not duty-free, the European Communities continued, but allowed imports at reduced rates of duty, the logic of the above findings was even more compelling in that situation. If preferential duty-free imports were counted against an MFN tariff quota at reduced rates, this would completely undermine the value of the MFN tariff quota and thus the balance of rights and obligations negotiated in tariff negotiations between WTO Members. "[T]*he security and predictability of the reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade",* as the AB had indicated, would be put at serious risk.

4.30 On the other hand, duty-free imports of *non-traditional* ACP bananas were counted against the MFN quota. However, the EC's tariff binding for bananas specifically referred to imports of such non-traditional ACP bananas, for which a quota share of 90,000 tonnes had been allocated under the binding (see also paragraph 4.17 above). The situation of non-traditional ACP bananas *which were specifically referred to in the EC's tariff binding*, the European Communities submitted, was thus entirely different from that of traditional ACP bananas which were never the subject of any tariff negotiations under *GATT* or the WTO. The AB had recognised[70] that the European Communities was required, in accordance with Article 1 of Protocol 5, to grant traditional ACP bananas a tariff treatment that was preferential even in comparison to the import regime for non-traditional ACP bananas.[71] A "tariff quota share" in this context could only mean a defined import volume at a preferential tariff level. The value of a tariff preference resided in the preferential margin, much more than in the volume. The preferential margin of traditional ACP bananas was presently at 737 Euro per tonne, since these bananas were imported in competition with bananas imported out of quota, while the preferential margin for non-traditional ACP bananas was 200 Euro if imported out of quota and only 75 Euro if imported under the MFN tariff quota. Including traditional ACP bananas in the MFN tariff quota would thus mean (independently of the volume limitation) that the margin of preference would be reduced by 662 Euro per tonne (737 Euro – 75 Euro = 662 Euro).

4.31 In the opinion of the European Communities, there was no basis in the original panel or AB reports for such a drastic reduction of the margin of preference for traditional ACP bananas. The volume limit was thus a cap to this very substantial preference, but not an advantage to be shared under Article XIII of GATT with other (MFN) suppliers. Article XIII was a special MFN clause with regard to the distribution of (tariff) quotas, not a provision that governed volume limitations imposed on preferential suppliers. It was the preference that constituted the economic advantage for traditional ACP banana imports, whereas the volume limitation was a *disadvantage.* The volume limitation was thus inseparably linked to the tariff preference, but did not by itself constitute the preference.

Canada and some Northern European countries (Finland, Norway, Sweden) which had in the meantime been granted duty-free access in the context of the EC-EFTA free trade agreements. For this reason, the imports from these countries were no longer counted against the MFN tariff quota. Under these circumstances, the European Communities had reduced duty-free access under the MFN tariff quota to 500,000 tonnes which corresponded to the share of non-EFTA imports under that quota. During the proceedings of the *Newsprint* panel, the European Communities argued that if the panel held that this action was inconsistent with the EC's GATT obligations, then the European Communities would have no option but to count the duty-free imports from EFTA countries against the imports under the MFN tariff quota.

[70] Paragraph 173 of the report of the AB in the original dispute, doc. WT/DS27/AB/R of 9 September 1997.

[71] Paragraph 178 of the AB report, doc. WT/DS27/AB/R of 9 September 1997.

4.32 If Ecuador's approach were correct, the European Communities continued, the European Communities would have to distribute the 857,700 tonnes in part to substantial suppliers, including Ecuador. However, Ecuador would not have access to the preferential zero duty rate. Thus, since this volume was beyond the bound tariff quota of 2.2 million tonnes, the base rate of presently Euro 737 would apply to any quantities imported from Ecuador under such an additional "tariff quota". Of the 857,700 tonnes of the so-called "tariff quota", Ecuador would receive a share of 26.17 per cent (224,460 tonnes). This would be absurd since Ecuador was entitled to import into the EC's *unlimited* quantities of bananas at 737 Euro per tonne. The traditional ACP supplying countries would have access to 9.43 per cent of the same volume which was less than *a tenth* of the volume of imports from those countries that the European Communities was required by the Lomé Convention to allow at a duty-free level. In the view of the European Communities, it was self-evident that Ecuador would have no interest whatsoever to import under this "tariff quota", because it could much more easily import outside the quota at the same base rate, while importing under this "tariff quota" would imply additional customs procedures in order to count the import against the quota.

4.33 **Ecuador** recalled that the establishment of two banana import regimes or use of different terminology did not justify separate evaluation of those regimes in terms of Article XIII. Referring to the EC's invocation of the *Newsprint* case attempting to persuade the Panel that the entire 857,700 tonne quota should be viewed as merely a cap on the preferences for ACP suppliers, Ecuador submitted that the 857,700 tonne quota was not simply a capped tariff preference, as the European Communities had sheltered this traditional ACP quota from all competition, given that the over-quota tariff was prohibitive. Ecuador and other suppliers thus could not compete for this allocation. In this respect, the traditional ACP quota was very different from the quantitative "competitive need" limits set by the generalized system of preferences. Though such limits were a tariff rate quota, they were not an allocation in the sense of Article XIII, because other suppliers could compete with the beneficiaries, subject only to the difference in duty. The European Communities could do the same thing in this case, since then the European Communities would only be granting a tariff preference, not an allocation contrary to Article XIII.

4.34 Ecuador agreed with the European Communities that "Article XIII is a special MFN clause with regard to the distribution of (tariff) quotas, not a provision that governs volume limitations imposed on preferential tariffs" (see above, paragraph 4.31). Volume caps on preferential tariffs were, in the opinion of Ecuador, an Article I matter, covered by the Lomé waiver, as long as they were limited to a tariff preference. As the original panel had stated in paragraph 7.80 of its report, constructing tariff preferences in such a way that the "tariff quota construction" became an additional advantage was an Article XIII matter, which was not covered by the Lomé waiver. To the extent that the European Communities argued that its ACP "tariff quota construction" had nothing to do with Article XIII, Ecuador referred to the new Article 18(9) of Regulation 404 which was inserted by Regulation 1637.[72]

4.35 The EC response was also not convincing, Ecuador submitted, in regard to Ecuador's complaint with respect to the continuing infringement of the fundamental non-discrimination obligations of Article XIII, i.e. the prohibition in paragraph 1 against restricting products from one Member unless like products of other members were "similarly restricted," and the general rule of paragraph 2 that any allocation system must approximate as closely as possible the allocations that would be expected to prevail in the absence of restrictions. Ecuador noted that the European Communities, Colombia and Costa Rica had all objected to Ecuador's request that the Panel recommend that the European Communities drop the use of country allocations, on the basis that this request would deprive the European Communities of its "right" to allocate under Article XIII:2(d) and would deprive Colombia (and Costa Rica) of an alleged right to a country quota negotiated in the

[72] "Third State, traditional ACP and non-traditional ACP bananas re-exported from the Community shall not be counted against *the corresponding tariff quotas*" (emphasis added).

Uruguay Round. Ecuador stressed that it did not seek to deny any WTO Member its rights under the WTO in this dispute. The European Communities was indeed free to allocate by country, as long as it followed the requirements of Article XIII:1, the chapeau of Article XIII:2, and the provisions of Article XIII:2(d). However, as the original panel had ruled, neither the Uruguay Round schedules nor the allocation provisions of Article XIII:2(d) permitted violation of the requirements of Articles XIII:1 and XIII:2.

4.36 The provisions of Article XIII did not *require* the European Communities to allocate quotas, and Ecuador believed that the absence of country allocation would produce the most equitable result, given the manifold restrictions that had distorted the EC market for many years. But if the European Communities instead chose to allocate, then it must use a combination of recent representative period and special factors that resulted in a distribution approximating as closely as possible the shares that might be expected to prevail in the absence of restrictions, and that entailed similar restrictions on bananas from all sources. Ecuador did not believe that those requirements of Article XIII were met by the two systems chosen by the European Communities and by the use of a 1994-1996 period without adjustments for special factors.

4.37 The **European Communities** submitted that in accordance with the panel and AB reports, the European Communities applied the same method of allocation of import licences for all categories of bananas, irrespective of the source of supply to the extent that import licences were necessary in order to count the imports against a tariff quota or to administer the volume limitation for traditional ACP bananas. In this respect, the distribution rules were identical in all cases, since only substantial suppliers had been attributed country-specific shares under the MFN tariff quotas. Since no ACP country was a substantive supplier on the EC's market, no country-specific shares were allocated to any ACP country in respect of the volume limitation for traditional ACP banana imports. The European Communities noted, as concerns BFA allocations, that Nicaragua's shares were reallocated to Colombia in full in 1995 and in part in 1996, and Venezuela's share was partially transferred to Colombia in 1995. The European Communities confirmed Costa Rica's statement that it did not benefit from any transfers of shares under the BFA.

4.38 **Ecuador** submitted that the amended system did not correct, and even intensified, the non-conformity with Article XIII in the preferential treatment of BFA countries. The shares of Columbia and Costa Rica had been permanently increased by the amount of the reallocation of the shortfall that they were granted inconsistently with Article XIII under the previous system. Ecuador was further of the view that the revised system was inconsistent with the obligations of Article XIII to ensure that a TRQ allocation system approximated as closely as possible the distribution of shares that could be expected in the absence of restrictions. In addition to providing individual country allocations for the 12 ACP suppliers of traditional ACP bananas within the 857,700 tonne quota, the old EC system granted country allocations to four individual ACP countries and an "Other ACP" category for a total of 90,000 tonnes of bananas within the TRQ. The share assigned by the European Communities to Ecuador in the new system was less than warranted by any objective standard, including the trend of Ecuador's exports and, even more markedly, Ecuador's much larger share of the world market outside the EC's market. Ecuadorian bananas were subject to restrictions that were not similarly imposed on like bananas from other sources, contrary to the requirements of Article XIII:1. The European Communities had allotted individual country shares pursuant to the BFA to two substantial suppliers (Colombia and Costa Rica) and two non-substantial suppliers (Nicaragua and Venezuela), who also had shared in a system of preferential reallocation of shortfalls among themselves. Other countries, such as Ecuador, did not have a specific country allocation in the old system, and fell within an "others" category of the 2,553,000 tonne quota.

4.39 Ecuador submitted that Article XIII established two general rules, i.e. Article XIII:1 required that imports from one Member not be restricted unless imports of the like products from other sources

were "similarly restricted."[73] Further, the original panel noted that if Members applied quotas to a product, then, in the terms of the chapeau to Article XIII:2, "Members shall aim at a distribution of trade in such product approaching as closely as possible the shares which the various Members might be expected to obtain in the absence of such restrictions."[74] This interpretation was confirmed by the AB.[75] While Article XIII:2(d) allowed the use of country allocations, the panel noted that that authorization was subject to observance of the general rule of the chapeau.[76] That finding was likewise confirmed by the AB.[77]

4.40 According to Ecuador, the amended system still had to conform to these requirements. The EC regulations listed the shares of Ecuador and other substantial supplying countries as a proportion of the 2.553 million tonne tariff rate quota.[78] As a proportion of the entire quota of 3.41 million tonnes, however, the allocations would be different.[79] Ecuador claimed that its share had been limited relative to that of other countries as a result of this system and compared to the share that Ecuador could have expected to achieve in the absence of restraints. In other words, a country allocation or, in the case of the traditional ACP countries, a block allocation, benefited countries whose competitiveness was decreasing relative to others, by isolating part of the market from competition from other suppliers. Country allocations further restricted large and efficient suppliers' opportunities, such as Ecuador, to compete, both with producers in the restricted market and with other exporting countries that might be less efficient

4.41 Ecuador asserted that the non-conformity of the amended system with Article XIII as regards Ecuador could be shown objectively in terms of the evolution of Ecuador's share of the EC's market and, even more markedly, in Ecuador's share of world markets (see Chart 1 in Annex II). According to Ecuador, Chart 1 demonstrated that Ecuador's share of the EC's market had grown and far exceeded the share assigned to Ecuador in the present system. However, the object of Article XIII was not to freeze shares of the past, especially if those past periods had been distorted by restrictions. Charts 2 and 3 in Annex II, Ecuador submitted, were even more instructive in considering what share Ecuador might be expected to have in the absence of restrictions. Chart 2 indicated that Ecuador had a substantially larger share of the world market than of the EC's market. Chart 3 measured Ecuador's market share of the world outside of the EC's market. In a product such as bananas, Ecuador believed it was appropriate to consider relatively unrestricted markets elsewhere as much more indicative of what Ecuador might anticipate in the EC's market, if the restrictions were removed. Ecuador concluded that the share assigned to Ecuador was less than what Ecuador could expect in the absence of restrictions, in view of the provisions of Article XIII:1.

4.42 Ecuador further argued that the revised EC system contravened not only the general rule of Article XIII:2, but also specific provisions of Article XIII:2(d) which required that the allocation among substantial suppliers had to be based upon the proportions supplied "during a previous representative period, due account being taken of any special factors which may have affected or may be affecting the trade in the product." Referring to EC's claim that the allocations accorded to suppliers (other than traditional ACP suppliers) under the revised EC system were determined in accordance with average shares of the EC's market in the 1994 to 1996 period[80], Ecuador noted that

[73] Panel report at paragraph 7.69; AB report at paragraph 160.
[74] Panel report at paragraph 7.68.
[75] AB report at paragraph 161.
[76] Panel report at paragraph 7.70.
[77] AB report at paragraph 161.
[78] Ecuador: 26.17 per cent ; Costa Rica: 25.61 per cent; Colombia: 23.03 per cent; Panama: 15.76 per cent; Other: 9.43 per cent. Regulation 2362.
[79] Traditional ACP: 25.15 per cent; Ecuador: 19.59 per cent ; Costa Rica: 19.17 per cent; Colombia: 17.24 per cent; Panama: 11.8 per cent; Other: 7.1 per cent.
[80] Preambular Clause (2) of Regulation 2362.

the original panel had found that this period was distorted by the non-consistent aspects of the BFA, as well as other distortions related to the EC's licensing system.

4.43 In the opinion of Ecuador, it was not clear whether any country-share allocation system could be devised based on a representative period and special factors that would meet the requirements of Article XIII:2. The original panel confirmed what had been held by prior panels, that periods distorted by trade restrictions could not be considered representative.[81] Ecuador submitted that neither the period during which the previous banana import regime was in force (1 July 1993–31 December 1998), nor the period prior to that could be seen as "representative" since none of those periods were free of distortions. Ecuador further argued that since relative productive efficiency and capacity varied over time, the older the period chosen, the less likely it was to be representative, bearing in mind that the objective of Article XIII - and the requirement of the chapeau in Article XIII:2 - was to achieve an allocation that came as close as possible to that which would prevail in the absence of restrictions. The intent of Article XIII was not, in the opinion of Ecuador, to create everlasting entitlements based on past trading patterns.

4.44 Ecuador submitted that the result of the EC's system was that ACP countries, as a group, were assigned to a quota to which they had exclusive access. Other countries did not get an allocation by group. The ACP allocation was also far higher, being based on a cumulated pre-1991 best-ever formula, than could be justified by any formula or rule of Article XIII. If the 1994-1996 base period applied to Ecuador and other third countries were applied to the traditional ACP suppliers, the latter would receive a much lower share, while those of Ecuador and other third countries would rise.

4.45 The **European Communities** submitted that the "historical performance" scheme had to be based on some period in the recent past. While it was the least trade-disruptive option, it admittedly had the disadvantage of "freezing" the situation to a certain extent. However, on balance, the European Communities Ministers for Agriculture decided that a higher degree of certainty and predictability to importers than the "first-come, first-served" scheme was to be preferred at this stage and, contrary to the "auctioning" scheme, it was appropriate to leave the quota rent with the operators, thus avoiding an important financial impact on operators at a moment when already a major change in the rules was imposed upon them. The allocation of shares of the quota to those countries with a substantial interest in supplying the EC market was based on the reference period 1994-96 as were the quantities effectively imported by each importer on average during the recent three-year period. Data for 1997 was available but it was provisional at the time of preparing Regulation 2362. This period was the most favourable period for Ecuador since on the basis of the available data at the time, it represented Ecuador's best years. The allocations were calculated on the basis of the average of the actual import years and with a proportional distribution of unidentified sources. Therefore, Ecuador received a higher quota than it would have received based on actual 1994-96 figures only (26.17 per cent as compared to 25.38 per cent) (see also paragraph 4.52). The European Communities believed that the "historical performance" (or traditional/newcomers) scheme could only be legitimate if it was devised taking into account the conditions listed in Article 3.5(j) of the Licensing Agreement [82], namely licences had to be issued to applicants *in the past* and their distribution must be based on their full *utilization* during a recent representative period.[83] In the opinion of the European Communities, the new EC licensing system created by Regulation 2362 was entirely in line with Article 3.5 of the Licensing Agreement.

[81] Panel report at paragraph 7.94, footnote 365 *quoting* the panel report on *EEC Restrictions on Imports of Dessert Apples – Complaint by Chile*, adopted 10 November 1980, BISD 275/98, 113, paragraph 4.8.

[82] " … consideration should be given as to whether licences issued to applicants in the past have been fully utilized during a recent representative period."

[83] Ecuador's first written submission paragraph 97 *et sequitur.*

C. ISSUES RELATED TO THE GATS

(i) General

4.46 **Ecuador** argued that the new licensing system resulted in distribution of most of the import licences to those who had received them under the previous regime, including those who had obtained licences pursuant to criteria ruled inconsistent with the EC's obligations under the GATS. Further, the amended regime's newcomer category had been expanded and itself had criteria favouring EC operators over service suppliers of Ecuadorian and other non-EC origins. Ecuador concluded that the amended system, like its predecessor, created conditions of competition favouring service suppliers of EC and ACP origin, to the detriment of service suppliers of Ecuadorian and other third-country origin in contravention of Articles II and XVII of GATS.

4.47 The **European Communities** recalled that under Article 1 of the Licensing Agreement, an import licence was defined as "… an application or other document (other than that required for customs purposes) to the relevant administrative body as a prior condition for importation into a customs territory of the importing Member". Thus, the full utilization of a licence had to refer to the moment in which the use of the licence became indispensable, i.e. the clearance of bananas through customs. *Before* that moment, there was *no* import of bananas into the Community, but rather export operations from the country of production. *After* that moment, there was trading within the European Communities of already imported bananas, which were indistinguishable from any other banana in the EC market from any origin. The only objective and indisputable way of proving the "effective" importation was the payment of duties, either directly or through a customs agent on a fee or contract basis. This was the system chosen by the European Communities in Regulation 2362. Since operator categories had been abolished and any need for any third-country operator (indeed any operator in general) to purchase licences "in order to maintain [its] previous market share"[84] had consequently become obsolete.

4.48 Ecuador noted that Article XVII of GATS provided for national treatment for services and service suppliers whereas Article II of GATS required Members to accord the services and service suppliers of any other Member most-favoured-nation treatment. The AB upheld the original panel's conclusion that "treatment no less favourable" in Article II:1 of GATS should be interpreted to include *de facto*, as well as *de iure*, discrimination. Ecuador recalled that under the old EC banana import system, import licences for in-quota imports of third-country and non-traditional ACP bananas were allocated by "operator categories" and "activity functions". Operator categories A and B were subdivided into three types of activities. Performing one of these activities during a three-year reference period entitled the operator concerned to a portion of the future import licences that were linked to the imported quantities (see Annex III for details). In addition, Ecuador noted, the European Communities allowed operators who included or represented European Communities and traditional ACP producers to import third-country bananas and non-traditional ACP bananas to compensate for damage suffered from tropical storms (under so-called hurricane licences).

4.49 Ecuador recalled that the original panel had made a number of findings concerning the old regime which in Ecuador's opinion provided the factual and legal context for assessing whether the revised EC regime for allocating in-quota import licences complied with the EC's WTO obligations.[85] Referring to various paragraphs in the original panel's findings, Ecuador noted that[86] the original panel had found, with regard to the old regime's operator categories, activity functions, and hurricane licences, that:

[84] Paragraph 7.339 of panel report.
[85] See in particular the panel report at paragraphs 7.286, 7.293, 7.297, 7.330 and 7.331.
[86] Panel report at paragraphs 7.334,7.335, 7.362, 7.350, 7.363 and 7.392.

(a) the allocation to Category B operators of licences allowing the importation of third-country and non-traditional ACP bananas at in-quota tariff rates created less favourable conditions of competition for like service suppliers of complainants' origin and was therefore inconsistent with the requirements of Articles XVII and II of GATS;[87]

(b) the allocation to ripeners of Category A and B licences allowing the importation of third-country and non-traditional ACP bananas at in-quota tariff rates created less favourable conditions of competition for like service suppliers of complainants' origin and was therefore inconsistent with the requirements of Article XVII of GATS;[88] and that

(c) the allocation of hurricane licences exclusively to operators who included or directly represented European Communities or ACP producers created less favourable conditions of competition for like service suppliers of complainants' origin and was therefore inconsistent with the requirements of Articles XVII and II of GATS.[89]

Ecuador noted that the above findings were upheld by the AB.[90]

4.50 The **European Communities** submitted that already during the period 1994 to 1996, the factual situation of the banana imports into the European Communities could no longer support the findings of a *de facto* discrimination that the original panel made on the basis of earlier statistical data. Indeed, in that period already, third-country wholesale trade suppliers had gained a substantial share of the trade that was previously in the hands of mainly EC/ACP wholesale trade service suppliers. This was the case, for example, of the Category B operators that were no longer attributed, as the panel determined on the basis of 1992 data, almost exclusively to European Communities/ACP. The European Communities noted that two of the Category B operators referred to in the panel report[91] (Compagnie Fruitière and CDB/Durand) were both non-EC owned and Coplaca was no longer registered as an operator following the changes to the regime to base licence allocation on proof of imports. According to the European Communities, third-country operators already had some involvement in ACP imports prior to the regime and their reference quantities more than doubled from 1993 to 1996 (from 132,614 tonnes to 274,822 tonnes). In addition to the increase in their licence share through acquisition of, or partnerships with, formerly traditional EC/ACP operators, third-country operators also increased their licence allocations through transfer of licences from other companies and the purchase of licences. The European Communities considered that it would have been almost impossible for a panel which had these more accurate and more recent figures at its disposal to reach the conclusion of the original panel.[92] This was particularly true for the Ecuador-owned Noboa Group that continuously gained market access opportunities in the importation of third-country bananas into the European Communities.

4.51 As concerns the activity function rules, more accurate and more recent data pointed exactly in the same direction as those mentioned above. According to 1994 to 1996 statistics, three out of four of the biggest ripeners were non-EC owned and these three alone represented around 20 per cent of the total ripening capacity of the European Communities. The European Communities submitted that if the original panel had disposed of such data it could *not* have arrived at the conclusion that "… the allocation of such licences according to activity functions modifies conditions of competition in

[87] Panel report at paragraphs 7.314 and 7.353.
[88] Panel report at paragraph 7.368.
[89] Panel report at paragraphs 7.393 and 7.397.
[90] AB report at paragraphs 220, 225, 239, 244, 246, 248.
[91] Footnote 502 (Secretariat remark).
[92] Paragraph 7.336 *in fine*.

favour of service suppliers of EC origin given that the vast majority of ripeners who are actually supplying, or capable of supplying, wholesale services are of EC origin".[93]

4.52 The European Communities noted that, irrespective of the share of the market that wholesale trade suppliers of third-country, EC or ACP origin could have had in the past, only operators that had effectively imported bananas during the period 1994 to 1996, could be considered traditional importers under the new regime. There were no longer transfers of quota rent between operators, unless the operators themselves judged that economic or trade considerations justified a transfer of licences. Nor was it possible any longer to claim licence ownership on the basis of a name on a licence: it was now necessary to show, through proof of duty payment that the holder of the licence was also the legal holder of the bananas. The moment of customs clearance was the point in time that determined whether an export of bananas became an import. Only imports were relevant for the import licences and were covered by the import licensing procedures as defined in the Licensing Agreement. Finally, the European Communities submitted, it was no longer possible to claim non-existent "grandfather" rights in the trade either of ACP or of Latin American bananas, since the new EC licensing regime made no distinction between the origin of bananas that the operators wished to import, except for the sake of administering the country-specific tariff quota shares reserved for the four WTO Members having a substantial interest in supplying bananas to the European Communities. According to more recent statistics based on the applications by traditional importers filed according to the new EC licensing regime, the distribution of licences between third-country, ACP and EC wholesale service suppliers was now the following: 68 per cent: third-country wholesale service suppliers; 24 per cent: EC/ACP wholesale service suppliers; 8 per cent: newcomers who could be either from third-country or EC/ACP wholesale service suppliers.

(ii) Central Product Classification

4.53 The **European Communities** submitted that the DSB had recommended that it bring its regime for bananas into conformity with its obligations under the GATS on a number of points referred to in the original panel report[94] and upheld by the AB. The DSB recommendations and rulings in this case were limited to the compatibility with the EC obligations under the EC Market Access Specific Commitments set out in the EC-12 GATS Schedule "Distribution services, B. Wholesale Trade Services (CPC 622)". The original panel had indicated in particular[95] that the specific item 62221 CPC relating to "wholesale trade services of fruit and vegetables" was the appropriate CPC line describing the services in the EC's Schedule concerned with the case under dispute. The EC-15 Schedule (not bound yet for formal reasons) did not change the legal situation with respect to that specific commitment. In accordance with Article 21.5 of the DSU and its related terms of reference, this panel had thus the task of verifying the compliance with the above-mentioned recommendations and rulings of measures taken by the European Communities.

4.54 Referring to the findings in the panel and AB reports concerning in particular the CPC, integrated companies and the conformity of the previous banana import regime [96], the European Communities submitted that after the adoption by the DSB of the original recommendations and rulings, the Provisional Central Product Classification elaborated by the Statistical Office of the United Nations had been replaced by the Central Product Classification (CPC) - Version 1.0.[97] According to the "Correspondence Tables between the CPC Version 1.0 and Provisional CPC [98],

[93] *Idem*.
[94] Panel report at paragraphs 7.293, 7.297, 7.304, 7.306, 7.341, 7.353, 7.368, 7380, 7385, 7.393, 7.397.
[95] Paragraph 7.292.
[96] Panel report paragraphs 7.292 and 7.293; AB: paragraphs 225-227.
[97] United Nations document, Statistical Papers, Series M, No. 77, Ver. 1.0, 1998 (see UN Website www.un.org).
[98] *Idem*, page 351.

item 62221 "Wholesale trade services of fruit and vegetables" matched the CPC Version 1.0 to 61121 "Wholesale trade services, *except on a fee or contract basis*, of fruit of vegetables" (emphasis added). The new Head note to the CPC Version 1.0 stated that "This group includes - the services of wholesalers that purchase goods usually in large quantities and sell them to other businesses, sometimes after breaking bulk and re-packing the product into smaller packages". The conformity of the new EC banana import regime with the WTO agreements, including the original recommendations and rulings of the DSB, the European Communities argued, should therefore be assessed on the basis of this new reality. The European Communities added, however, that its Uruguay Round commitments were still valid.

4.55 According to Part One, Chapter II, Section B, of the CPC[99], "CPC, covering all goods and services (…), is a system of categories that are both exhaustive and mutually exclusive." Moreover, "the classification of products other than transportable goods, mainly services, shall be determined according to the terms and categories as described in the divisions, groups, classes or subclasses in sections 5 to 9 of the CPC.[100] In practical terms, the European Communities continued, with respect to the activities related to the importation, sale and distribution of bananas into the Community, a number of categories of services were involved (a) to h)). However, it was apparent from the description in the CPC and from the original panel and AB reports that the issue at stake in this Article 21.5 procedure concerned only item f), i.e. 61121 wholesale trade services of fruits and vegetables. The AB made clear that the definition of operator in Regulation 404 concerned only the provision of services under the "wholesale trade services, CPC 622" category and nothing else. Referring to paragraphs 7.294 and 7.296 of the original panel's report, the European Communities further argued that the new EC banana import regime should be considered only with respect to the EC's obligations under Articles II and XVII of GATS concerning the supply of services under mode (3).

4.56 Referring to several findings by the panel[101] and AB which had deemed various EC measures inconsistent with Articles II and XVII of GATS, the European Communities submitted that in order to live up to its WTO obligations as contained in its Schedules of GATS commitments, it had adopted an entirely new banana import regime as set out in Regulations 1637 and 2362. With respect to its GATS obligations, Articles 16 to 20 of Title IV of Regulation 404 had been withdrawn and replaced by Article 1 of Regulation 1637.[102] Moreover, the hurricane licences had been abolished and replaced by a system under Article 18.8 of Regulation 404 which explicitly was based on the principle of non-discrimination "between supply origins".

4.57 Further, the European Communities explained, Regulation 2362 made the tariff quotas and the traditional ACP bananas quantities available to two categories of operators, i.e. traditional importers and newcomers and based licence allocations on "actual imports". (For definitions and other details of Regulation 2362 see "Factual Aspects" above). The European Communities considered that by repealing the old banana import system and introducing new rules, it had complied with all of the seven points found inconsistent with the GATS by the original panel and AB. The new EC rules under Regulations 1637 and 2362 provided market access opportunities with no restraint to operators involved in wholesale trade services which were established in the European Communities (mode 3) within the CPC version 1.0 definition under item 61121. Any wholesaler commercially present in the European Communities, directly or through its subsidiary or other form of commercial presence, could be registered as traditional importer or newcomer, depending on the compliance with

[99] Paragraph 15, page 7.
[100] Part One, Chapter V, Section A, paragraph 56, page 19.
[101] Panel report at paragraphs 7.314, 7.320, 7.324, 7.326, 7.334-7.337, 7.339, 7.347, 7.349, 7.360-7.362, 7.364-7.367, 7.392 and 7.396. AB report at 231 and 234.
[102] In this document, the reference to provisions of Regulation 404 without any other precision should be understood as referring to the text as amended by Regulation 1637.

the definitions in the EC's regulations (Article 12 of Regulation 2362). The European Communities further explained that, in case the service was not supplied directly by a juridical person but through other forms of commercial presence, this did not imply that the benefit of these market access opportunities was extended to any other parts of the supplier which were located outside the territory where the service was supplied (Article XXVIII (g), footnote 12 of GATS).

4.58 Responding to the EC's arguments concerning the CPC above, **Ecuador** submitted that even if it were agreed that Members who identified their GATS commitments by reference to the Provisional CPC would now be defined by reference to the CPC Version 1.0, an identification of commitments according to item numbers in the CPC Version 1.0 would have to be done by using the concordance between the provisional and revised CPC[103] so that, although the item numbers used to define a commitment might change from those of the Provisional CPC, the scope of the commitment would not. In Ecuador's opinion, the "revised" classification scheme pertaining to the wholesale services at issue was a distinction without a difference. In no way did it warrant the conclusion put forward by the European Communities in paragraph 4.57 above that "[t]he new EC rules … provide market access opportunities with no restraint to *operators involved in wholesale trade services* which are established in the European Communities (mode 3) *within the CPC Version. 1.0 definition under item 61121"* (emphasis added).

4.59 Ecuador submitted that the provisional CPC and the CPC Version 1.0, items 62221 and 61121, respectively, were identical but for the phrase in CPC Version 1.0 "except on a fee or contract basis, of fruit and vegetables" which, in the opinion of Ecuador, only clarified the *existing* scope of the category since commission agent activities were in a separate item (621) in the Provisional CPC as well. In both classifications, the items fell within section 6, covering distributive trade services, the Head note to the section in the Provisional CPC of which was quoted by the panel.[104] Within section 6 of the Provisional CPC was group 622, "Wholesale trade services". Version 1.0 had no Head note to the section, but rather an explanatory note to group 611, which the European Communities quoted in its submission.[105] If the EC's point was to suggest that the scope of group 611 in the CPC Version 1.0 was narrower than the scope of item 622 of the Provisional CPC, Ecuador submitted it was incorrect. To the extent the Head note to CPC section 6 said anything different about wholesaling than was said in the explanatory note to group 611 of Version 1.0, it was that wholesalers might perform related, subordinated services in addition to their principal activity of reselling merchandise. That, however, was also true under the CPC Version 1.0. As the AB had observed, "[i]t is difficult to conceive how a wholesaler could engage in the 'principal service' of 'reselling' a product if it could not also purchase or, in some cases, import the product."[106]

4.60 As concerns the "both exhaustive and mutually exclusive" phrase in CPC Version 1.0, Ecuador was of the view that the categories of the Provisional CPC were equally exhaustive and mutually exclusive[107], and services related to the importation, sale and distribution of bananas into the Community was virtually identical to its arguments before the original panel that the complainant countries' services providers were engaged in every service but the ones covered by EC's GATS

[103] CPC Version 1.0 at pages 339-608.

[104] Panel report at paragraph 7.290. "Distributive trade services consisting in selling merchandise to retailers, to industrial, commercial, institutional or other professional business users, or to other wholesalers, or acting as agent or broker (wholesaling services) or selling merchandise for personal or household consumption including services incidental to the sale of the goods (retailing services). The principal services rendered by wholesalers and retailers may be characterized as *reselling merchandise*, accompanied by a variety of related, subordinated services, such as: maintaining inventories of goods, physically assembling, sorting and grading goods in large lots; breaking bulk and redistribution in smaller lots; delivery services; refrigeration services; sales promotion services rendered by wholesalers" (emphasis added; underlining original).

[105] CPC Version 1.0 at page 187.

[106] AB report at paragraph 226.

[107] Compare Provisional CPC at paragraph 21 at page 7 with CPC Version 1.0 at page 7, paragraph 15.

commitments.[108] In its report, the original panel addressed at length the nature and scope of the EC's GATS commitments and whether Ecuadorian and other third-country service suppliers engaged in importing and distribution of bananas in the European Communities were covered by those commitments.[109] In this proceeding, the European Communities appeared to argue that wholesaling began after customs clearance and ended before ripening.[110] Ecuador was of the view that the European Communities was trying to separate its licensing system from services covered by its GATS commitments, in order to exclude from its GATS commitments the wholesale distribution services provided by Ecuadorian and other third-country banana marketers who, through a commercial presence in the Community, imported bananas and sold them on the EC market. The original panel and the AB had already decided that the European Communities had GATS obligations to those services suppliers, and there was nothing in the appearance of CPC Version 1.0 that could justify a different result.

(iii) Issues of "Actual Importer" and of de facto discrimination

4.61 **Ecuador** submitted that the *de facto* discrimination in the EC's old licensing system persisted in the new system because of the EC's choice of criteria. By allocating licences on the basis of "actual importer", the European Communities had ensured that the predominantly EC and ACP services suppliers, to whom Category B, ripener, and hurricane licences were granted for importing Latin American bananas in the old system, would retain rights to most of those licences in the new one. Ecuador considered that the entire EC analysis of the GATS issues focused not on whether its amended system was in conformity with its GATS obligations, but on particular modifications that it claimed were responsive to the panel and AB findings.[111]

4.62 In the opinion of Ecuador, the heart of the EC's argument was that - as a matter of law - there could be no *de facto* discrimination in the amended system because the European Communities had changed the facts. *There is no de facto discrimination* did not follow from (i) the *Panel found the prior system to discriminate de facto;* and (ii) the *European Communities had abolished aspects of the old system found to discriminate*. Ecuador did *not* claim that nothing had changed in the EC licensing system. The question in this Article 21.5 proceeding, however, was not whether the prior system had changed, but whether the system that replaced it was *de iure* or *de facto* discriminatory against Ecuadorian and other third-country services suppliers, and thus inconsistent with the EC's GATS obligations. Ecuador submitted that the persistence of the discrimination in the old system in the new system was not an "assumption" by Ecuador, but was inherent in the architecture of the new system, in particular in its reliance on the EC's definition of "actual importer" to determine who qualified for licences. That is, the *logic* of the prior system was that rational operators would generally have ensured that their licences were used in their names rather than traded. In defining "actual importer" by that behaviour, the *European Communities* had ensured that operators who were in the "abolished" categories would retain licence allocations in the amended system, but as "actual importers."

4.63 Ecuador also argued that the amended system went further to tilt this system toward EC and ACP service suppliers. The pass-through effect of the "actual importer" criterion combined in the new system with a unified licence system to mean that those who had traditionally imported EC and ACP bananas would have an even higher proportion of total licences, which they, like other importers, would use to import Latin American bananas first. Ecuador claimed that the previous importers of ACP bananas were largely EC and ACP service suppliers. They were granted rights to

[108] See panel report at paragraphs 4.661, 4.662, 4.663, 7.291; AB report at paragraph 225, 226.
[109] See generally panel report at paragraphs 4.651-4.675, 7.287-7.296.
[110] See First EC Submission at paragraph 47 (list of services activities).
[111] For example: First EC Submission, heading preceding paragraph 55; First EC Submission at paragraph 56; First EC Submission at paragraph 56(b).

import Latin American bananas through the operator categories. Through the revised system, they not only "inherited" licences derived from the operator categories, but could freely use the licences they "earned" as importers of ACP bananas to try instead to import high-quota-rent Latin American bananas. All this was to the competitive detriment of Ecuadorian services suppliers to whom the European Communities owed GATS-consistent treatment.

4.64 The **European Communities** submitted that the notion of "actual imports" in the definition of traditional operators (Article 5 of Regulation 2362) ensured that the true and real importers during the representative period kept their traditional rights without losing the attached quota rent. Since the operators' categories had been eliminated there was no effect on the conditions of competition which were contrary to Article XVII.2 of GATS of the kind that the original panel had found as a matter of fact[112] in the previous regime. The less favourable conditions of competition that were found in the "opportunity to benefit from tariff quota rents equivalent to that which accrues to an initial licence holder, given that licence transferees are usually Category A operators who are most often service suppliers of foreign origin and since licence sellers are usually Category B operators who are most often service suppliers of EC (or ACP) origin"[113] were no longer existent. In particular, it was no longer possible to assert that the new regime "is intended to 'cross-subsidize' the latter category of operators with tariff quota rents in order to offset the higher costs of production, to strengthen their competitive position and to encourage them to continue marketing bananas of EC and traditional ACP origin".[114] The abolition of operator categories therefore put the new EC regime into compliance with Article XVII of GATS. In its original findings in paragraph 244, based on a *de facto* discrimination analysis [115], the AB ruled that "the allocation to Category B operators of 30 per cent of the licences for importing third-country and non-traditional ACP banana at in-quota tariff rates is inconsistent with the requirements of Article II of the GATS". The abolition of operator categories therefore put the new EC regime into compliance also with Article II of GATS.

4.65 Since, as mentioned above, the activity function rules had also been abolished, there was no longer any effect on the conditions of competition contrary to Article XVII.2 of GATS of the kind that the original panel had found as a matter of fact[116] in the previous regime. The less favourable conditions of competition that were found in the *fact* that "… service suppliers of EC as well as third-country origin do have comparable opportunities to file claims as to primary and secondary importation activities performed with the EC authorities, whereas service suppliers of complainants' origin do not enjoy equal competitive opportunities to make claims for the performance of ripening activities as service suppliers of EC origin"[117] was no longer present. Moreover, it could no longer be affirmed that "allowing third-country and non-traditional ACP imports at in-quota tariff rates to ripeners regardless of whether they have previously imported bananas is intended to strengthen their bargaining position in the supply chain towards primary importers".[118] The abolition of activity function rules therefore put the new EC regime into compliance with Article XVII of GATS.

4.66 A new set of rules, the European Communities continued, was now also in operation with respect to "exceptional circumstances affecting production or importation" which, in turn, "affect supply to the Community market" (Article 18.8 of Regulation 1637). The original panel had noted that "… our findings are limited to the present factual situation where hurricane licences are issued to operators who exclusively include or represent EC (or ACP) producers". The European Communities

[112] See findings in paragraph 239 of AB report.
[113] Paragraph 7.336, Secretariat remark.
[114] Paragraph 7.339, Secretariat remark.
[115] Which was again subject to the findings in paragraph 239. See also footnote 153 of the same AB report.
[116] See paragraph 239 of the AB report.
[117] Paragraph 7.362, Secretariat remark.
[118] Paragraph 7.367, Secretariat remark.

submitted that this was no longer the case under the new rules, given the abolition of operator categories. Moreover, Article 18.8, second sentence, of Regulation 1637 explicitly indicated that any specific measure taken in order to counter the exceptional circumstances in Article 18.8, "must not discriminate between supply origin". This new provision therefore put the European Communities into compliance with Article XVII of GATS. For the same reasons, it also complied with Article II of GATS.

(iv) Issues concerning customs clearance

4.67 **Ecuador** noted that the EC's amended system no longer had operator categories and activity functions, but in the opinion of Ecuador their effect on distribution of licences was still present in the new system. Under Regulation 2362, licences were allocated to only two categories of operators: i.e. to "traditional operators", who would normally obtain 92 per cent of the in-quota import licences, and to "newcomers", who would obtain 8 per cent. The new Regulation, however, adopted a criterion for licence eligibility for traditional operators that, according to Ecuador, largely replicated the effect of the old operator categories and activity functions, resulting in service suppliers of EC and ACP origin being allocated nearly the same volume of licences under the new regime as under the old.

4.68 Referring to Article 4 of Regulation 2362, Ecuador noted that import licences were allocated to each "traditional operator" based on its "reference quantity," which was determined by "the quantities of bananas actually imported during the reference period."[119] For 1999, the reference period was 1994-1996, the same as for 1998.[120] Under Article 5, the "actual importer" was the operator in whose name customs duties were paid.[121] In other words, an operator which was credited under the amended system with being the "actual importer" had, during the reference period, either itself cleared a shipment through customs (and therefore paid any customs duties due) or was named on the customs documentation as the owner on whose behalf the customs duties were paid by someone else, and as a result, would be allocated import licences. Ecuador considered that codifying a pattern of treatment that was developed based on discriminatory criteria was itself discriminatory. The European Communities had thus produced the same result by relying on the technicality of who paid the customs duties.

4.69 Ecuador argued that by the very nature of the previous system's licence allocations, a substantial proportion of the imports of in-quota third-country and non-traditional ACP bananas were physically imported by Ecuadorian and other third-country service suppliers, but were customs cleared into the European Communities by or on behalf of a holder of a Category B, ripener, or hurricane licence. Under the amended system, those former holders of Category B, ripener, and hurricane licences consequently were in a position to prove payment of duties for those imports and be deemed to be the "actual importers" entitled to import licences, even though they were not, in the opinion of Ecuador, the true importers in a commercial sense or would not have been but for the artificial distortions created by the prior system.

4.70 Thus, Ecuador argued, in order to import their bananas into the European Communities, Ecuadorian importers, had to enter into unfavourable contractual arrangements with the holders of Category B, ripener, or hurricane licences. In practice, four different types of arrangements were used:

(a) *Licence transfers,* in which the service provider who purchased the licence became the officially recognized transferee pursuant to Article 9 of Commission Regulation (EEC) No 3719/88. Licence transfers were rare.

[119] Regulation 2362, Article 4.1.
[120] *Idem.* Article 4.2.
[121] For details, see Factual Aspects above (Secretariat remark).

(b) *Licence "leases"* in which the Ecuadorian service supplier imported bananas and fulfilled customs formalities, but used a licence in the name of the original licence holder. These arrangements were also relatively uncommon.

(c) *Buy-back arrangements.* These were paper transactions in which third-country bananas were imported by an Ecuadorian service supplier but another service supplier was credited with entry of the goods.[122]

(d) *T1-sale*s, i.e. sales in the European Communities before customs clearance.[123]

4.71 Ecuador argued that the Ecuadorian service supplier was the real importer in a commercial sense in all four cases, but only in the first two cases did the new EC regulations give the Ecuadorian service supplier recognition as the "actual importer" and it was only in those two cases that the true importer would be able to prove payment of customs duties. In the two other cases, the holder of the Category B, ripener, or hurricane licence (under the old system) was considered as the "actual importer" under the new system.

4.72 Buy-back and particularly T1 sales covered a very large volume of bananas landed in the European Communities by Ecuadorian suppliers. Buy-back arrangements, Ecuador argued, were designed to keep reference quantities and licence entitlements in the hands of ripeners and other beneficiaries of the former allocation scheme. T1 sales were by definition what a primary importer was intended to do under the previous regime, but reflected also the unfavourable conditions of competition for Ecuadorian service providers under the old licence allocation rules.

4.73 Referring to the contractual arrangements in (a) and (b) of paragraph 4.70 above (licence transfer and licence lease) which included the payment of duties by the licence transferee or the licences leaser, the **European Communities** said that under the new EC regime the licence transferee or leaser was covered by the definition of traditional importer in Regulation 2362 and was also the legal holder of the bananas. In the contractual arrangement described under (c) in paragraph 4.70 (buy-back), there were two separate operations of selling and purchasing bananas. The first took place before the customs clearance (an export activity), the second after the customs clearance, a wholesale trade activity disconnected from any import activity which could include bananas of any origin already in free circulation in the European Communities and thus indistinguishable.

4.74 The European Communities submitted that there was no evidence that: (i) these contracts existed; (ii) that they existed in a relevant number so that they could be of any importance in these proceedings; (iii) that a legally relevant link was established between the two separate contracts of selling and purchasing. The simple affirmation *ex post* by a party to that effect could not be a reliable source of evidence in these matters and certainly did not reach the minimum standard of evidence

[122] The Ecuadorian service supplier bought or produced bananas in Ecuador, shipped them to the European Communities, and unloaded the goods at an EC port. The Ecuadorian importer then "sold" the bananas to a holder of a Category B, ripener or hurricane licence, who presented the licence and paid customs duties and immediately "sold" the bananas back to the Ecuadorian service supplier. The price of the second "sale" was the price of the first "sale" plus the customs duties and a payment (the quota rent) for use of the import licence. The Ecuadorian service supplier retained custody of the goods throughout, and resold or distributed them in the European Communities.

[123] In these transactions, an Ecuadorian service supplier bought or produced bananas in Ecuador, shipped them to the European Communities, and unloaded the goods at an EC port. In order to enter the bananas, the Ecuadorian service supplier sold them to another operator who was the holder of a Category B, ripener or hurricane licence. The licence holder fulfilled customs formalities and resold or distributed the bananas in the European Communities. As in the buy-back arrangement, the importer in fact paid the duties, because the sale price to the competing service supplier was discounted by both the amount of the duty and the quota rent.

under the principle on the burden of proof elaborated by the AB in the "Blouses and Shirt"[124] report. Referring to (d) of paragraph 4.70 above, the European Communities submitted that the contractual arrangement described therein (T1-sales) fit perfectly into the definition of an exporter. Ecuador itself admitted that there was no activity of importation involved. If the existence of a so-called T1-sales were able to qualify any exporter as a 'traditional importer' in the sense of Regulation 2362, this would be tantamount to the elimination of the definition all together. Given that the market access to the wholesale trade services in the European Communities was not limited but that the present level of the tariff represented an implicit limit on the number of bananas that could be imported into the European Communities, the possible number of bananas that could be exported (and of operators willing to export them) would always outnumber the bananas that were really imported (and the operators established in the European Communities). The activity of exporting bananas had, therefore in the opinion of the European Communities, no relevance when determining the "traditional" rights to import under Regulation 2362. No violation of the GATS could therefore be retained against the new EC licensing system.

4.75 **Ecuador** argued that since Ecuadorian service providers did not get a sufficient number of licences, they were effectively forced to make contractual arrangements with licence holders to stay in business. Only the European Commission, which managed the licensing system, had access to records documenting the volume of bananas that, for a given year, was physically imported into the European Communities by an Ecuadorian service supplier but customs cleared by another service supplier with a Category B, ripener or hurricane licence. In Ecuador's opinion, however, it followed from the nature of the system that holders of Category B, ripener or hurricane licences were the likely participants in arrangements with third-country importers, for two reasons.

4.76 First, they held the greatest volume of potentially available licences.[125] Secondly, Ecuador argued, most EC or ACP service suppliers with Category B, ripener or hurricane licences were not themselves equipped to import Latin American bananas and thus use their licences for their own imports. Importing bananas into the European Communities from Latin America required a sophisticated organization in both producing countries and the European Communities and an integrated transport chain involving specialized refrigerated cargo ships. Most holders of Category B, ripener and hurricane licences therefore chose an easier way to realize the economic value of licences to import Latin American bananas: in return for significant payments, they used them in buyback or T1 arrangements with the true importers - Ecuadorian or other third-country service suppliers. As a result of the way the prior system worked, Ecuador said, the EC's choice of customs clearance as the basis for allotting licences under the amended system had the effect of allocating licences to those who had them under the system found to be inconsistent with the GATS.

4.77 Ecuador submitted, as an example, the 1998 and 1999 licence allocation experience of the Antwerp-based company nv Firma Léon Van Parys (LVP) owned by Noboa, and therefore for GATS

[124] WT/DS33/AB/R, page 14.

[125] (a) Category A "primary importer" licences accounted for 37.905 per cent (57 per cent of 66.5 per cent of the total import licences for in-quota third-country and non-traditional ACP bananas; (b) Category C or newcomer licences accounted for only 3.5 per cent of the total volume of licences for in-quota third-country and non-traditional ACP imports. Newcomer licences were normally for small volumes; (c) Category A "secondary importer or customs clearer" licences gradually "migrated" to holders of other types of Category A licences. That is, the prior system encouraged holders of Category A "primary importer" or "ripener" licences to ensure that bananas imported under those licences were customs cleared in their own names, both to be registered as the official licence user to ensure against losing reference quantities and to gain access to future "secondary importer" licences reference quantities; (d) Category B and ripener licences accounted for 48.62 per cent (30 per cent and 28 per cent of 66.5 per cent, or 18.62 per cent) of the available licences for in-quota third-country and non-traditional ACP imports. Hurricane licences and the secondary importer licences that came into the hands of ripeners increased this volume.

purposes had been found to be an Ecuadorian service supplier.[126] The following table shows, for 1994-1996, LVP's imports of bananas into the European Communities, and the import licences LVP was allocated:[127]

Year	LVP imports (tonnes)[128]	Licences allocated (tonnes)
1994	97,620	32,631
1995	95,512	33,045
1996	90,403	36,285

During those years, Ecuador claimed, LVP was compelled for most of its imports to seek access to import licences that had been allocated to other operators. It did so through the various types of contractual arrangements discussed above.

4.78 The years 1994-1996 were the reference period both for 1998 under the prior system, and for 1999 under the amended system. Consequently, the change in LVP's licence allocation from 1998 to 1999 demonstrated the degree to which the amended system departed from or merely perpetuated the prior system. For these years LVP was allocated import licences for the following volumes:

1998: 39,828 tonnes
1999: 41,055 tonnes

Thus, the new licensing regime had improved LVP's licence allocation by only three per cent, while the licences that LVP paid for to cover most of its 1998 imports remained allocated to the original holders of Category B, ripener and hurricane licences, because they could show duty payment. Since its volume of physical imports to the European Communities had not dropped, LVP would be obliged to continue to seek access to other operators' licences for most of its imports in 1999. Indeed, in 1999 LVP was making the same contractual arrangements with the same licence holders as it did under the previous system.

4.79 Ecuador recalled that the original panel found that service suppliers of complainants' origin would "possibly" be able to claim reference quantities for customs clearance, and that it had been presented with insufficient information to determine whether companies carrying out customs clearance activities were predominantly in European Communities or third-country ownership or control.[129] The panel had therefore concluded that "service suppliers of European Communities as well as third-country origin do have comparable opportunities to file claims as to primary and secondary importation activities performed with the EC authorities. …"[130] In the opinion of Ecuador, these findings should not comfort the European Communities since the panel had been addressing customs clearance as one, relatively minor, aspect of banana marketing, not as practically the entire basis for future licence allocations. Also, the European Communities itself had acknowledged that using customs formalities as the criterion for allocating import licences would freeze licence

[126] See panel report at paragraphs 7.330–7.331; AB report at paragraphs 225 and 239.

[127] For reasons of confidentiality the figures have been changed but the proportions have been maintained. The actual data were available to the European Commission. While there could be minor differences between these figures and data retained by the Commission, any such minor differences would not affect the validity of the example.

[128] The figures used were based upon the volumes of bananas that were physically imported by LVP and customs cleared in the European Communities by LVP or another company. The figures exclude imports that were re-exported to non-EC countries. For clarity, also excluded were volumes subject to dispute between LVP and the European Commission concerning whether they were customs cleared in the European Communities or re-exported; their exclusion here was without prejudice to LVP's position in the dispute.

[129] Panel report at paragraph 7.362.

[130] *Idem*.

allocations.[131] The European Communities had done in its amended system precisely what the Commission warned would occur: by basing licence allocations on licence usage (i.e. customs clearance) in the 1994-1996 reference period, it had "fossilized" licence allocations that discriminated against Ecuadorian and other third-country service suppliers.

4.80 The **European Communities** was of the view that the new EC measures could not be compared with the old regime. Therefore, any allegation by Ecuador that a "drag-on effect" of the old inconsistencies of the GATS existed under the new regime should be rejected by the Panel. Ecuador's assumption was erroneous in law and in fact. As a matter of law, the European Communities argued, it was not easily understandable how the effects of a discrimination *de facto* that the panel had found with respect to certain aspects of the old EC licensing regime could continue at present when these aspects had been abolished all together. The inconsistencies with the GATS found by the original panel were caused by transfers of quota rent from certain, mainly third-country, wholesale trade service suppliers to certain EC/ACP wholesale trade service suppliers *as a de facto consequence* of the previous EC licensing regime. The panel had considered those transfers as discriminatory under Article XVII of GATS (and in certain more limited circumstances under Article II of GATS).

4.81 In the EC's view, its licensing system in its new modalities ensured full neutrality with respect to the wholesale service suppliers in the banana trade. Therefore, any transaction of licences between operators was now only justified by trade-related or economic considerations over which the European Communities had no control. According to the original panel, the old EC regime was judged discriminatory on the basis of Article XVII.2 of GATS not because the system *per se* created modifications in the conditions of competition but because it forced a transfer of quota rent from the mainly third country Category A operators to the mainly EC/ACP Category B operators. This latter aspect prevented the modification of conditions of competition from being "cured" by the transferability of licences. However, there was no comparison between the new system and the old system. No forced transfer of quota rent could now be claimed, as it was in the previous panel procedure on the basis of the 1992 figures presented by the original complainants.

4.82 Moreover, data shown in the EC rebuttal submission demonstrated that the factual situation that was available to the original panel when it took its decisions, did not appropriately reflect the reality as it developed already under the old regime in the period 1994 to 1996. These figures showed beyond any possible doubt that the very assumption of *de facto* discrimination in favour of EC or ACP wholesale service suppliers to the detriment of third-country wholesale service suppliers was no longer justified. To affirm that discrimination "lives on" in the new EC regime was contrary to the facts as had been demonstrated by the European Communities.

4.83 The European Communities recalled the original panel's affirmation: "Therefore, service suppliers of EC as well as third-country origin do have comparable opportunities to file claims as to primary and secondary importation activities performed with the EC authorities".[132] The European Communities considered therefore that the accomplishment of primary or secondary importation activities was not discriminatory under the old EC regime and did not breach Articles XVII or II of GATS. *A fortiori*, the new EC regime that had eliminated all distinction between activity functions had to be in line with the EC GATS' obligations in this respect. The European Communities noted that the fact that ripeners were entitled to import bananas was not *per se* contrary to any provision in any covered agreement, including the GATS. The original panel did not find any formal or *de facto* discrimination in the access to the activity of ripener in the European Communities. Any operator, irrespective of its origin, was entitled to act as a ripener provided it met the conditions under the old

[131] European Commission, "Working Document on Determination of Reference Quantities from 1995 Onwards", 6 October 1993, at paragraph 5, attached as Exhibit 15 to Ecuador's first submission to the panel of 9 July 1996.

[132] Paragraph 7.362 of the panel report.

EC Regulation 1442. What was considered contrary to the GATS was *de facto* discrimination that the original panel found, based mainly on 1992 data submitted by the complainants.[133]

4.84 The discrimination was therefore due to the fact, the European Communities continued, that ripeners sold licences and thus reaped quota rent from mainly primary importers. According to the data available to the panel at that time, the "vast majority" of ripeners were EC owned and the majority of primary importers were third-country owned. Ripeners who had sold licences under the old EC regime could no longer import under the new EC regime, since they had not paid the duties at the moment of the customs clearance of the bananas. Ripeners who had not sold licences under the old EC regime but had acted as importers, did not reap quota rent from primary importers. Thus, any traditional importer, including a ripener, if it met the conditions under the new EC licensing regime, was entitled to import within the strict (non-discriminatory) new limits set out in Regulation 2362. The European Communities recalled that, at the moment when the new EC licensing system entered into force, the majority of ripeners were of third-country origin and not of EC or ACP origin.

4.85 The European Communities further submitted that Ecuador confused export and import activity. It was erroneous to suggest that the volumes of exports of Ecuadorian bananas should be compared to the volumes that Ecuadorian wholesale service suppliers with a commercial presence in the European Communities imported into the Community. Traditionally, Ecuador was a producing and an exporting country. Wholesale service suppliers of Ecuadorian origin appeared on the import market in the European Communities quite late, coinciding with the entry into force of the old EC regime. The activity of the Ecuadorian companies involved in the importation of bananas into the European Communities had grown steadily and substantially during all the years of application of the old EC regime. It had increased even more as from the entry into force of the new EC regime.

4.86 The import licensing regime of the EC was concerned with the importation of bananas and not with the activity connected with the export of bananas from the places of production. Under the conditions stipulated in Regulation 2362, in order to be an importer it was necessary to be registered in one of the member States of the EC. Ecuador enjoyed a very favourable situation among the producing countries since it was the only producing country which had a major group established in the European Communities (Noboa group) performing import activities. By contrast and in comparison, Costa Rica, Colombia and Panama had no significant presence in the supplying of services connected to the importation of bananas into the European Communities (apart from a very small company for Costa Rica, Banatico, and a middle-sized company for Colombia, Banana Marketing). Moreover, another company from Ecuador, UBESA, traded mainly bananas for the Dole group (thus acting as a pure exporter) and Chiquita also exported from Ecuador (and imported into the European Communities). At the same time, a very limited producer and non-exporter like the United States had companies which had developed a major export activity from Latin American producing countries and an important activity of import into the European Communities.

4.87 **Ecuador** submitted that the European Communities should modify its import licensing system to allocate licences to the true importers who were the primary service providers and who took most of the commercial risk in marketing bananas in the European Communities. This could be done by basing reference quantities on submission by importers of evidence of their activities, in the form of: (i) invoices for purchase of bananas in the country of origin; (ii) shipping documents (bills of lading); and (iii) commercial invoices proving a first sale on EC territory. In the past, similar documentation was required by the European Communities to demonstrate reference quantities.[134] Ecuador argued that such a licensing system would not give an advantage to service providers of non-EC origin, but would create, for both non-EC and EC service suppliers, the fair opportunities required by Articles II and XVII of GATS. Ecuador asked that the Panel accompany its findings with these

[133] Paragraph 7.363 of Panel report.
[134] See Article 7 of Regulation 1442; panel report at paragraph 7.192.

specific recommendations to ensure that action by the European Communities to bring its import licensing system into conformity with the GATS would be forthcoming in the immediate future.

4.88 The European Communities contended that no WTO right could be derived from vague notions like "true importer in a commercial sense", "records documenting the volume of bananas that, for a given year, was physically imported in the European Communities", "true importer, i.e. the service supplier who in fact was in a position to and did undertake the critical steps in moving bananas from producing origins into the EC's market", etc. As the AB had indicated in its original report[135], it was the definition which could be found in the relevant EC regulations that determined the scope of the analysis on whether the European Communities had complied with its commitments and its obligations under the GATS. There was no definition of operator in the GATS, nor in the EC's Schedules of commitments; there was an EC commitment on wholesale trade services that was relevant insofar as it included activities covered in the definition of operator under the relevant EC regulations.

4.89 In **Ecuador's** view, the European Communities had not demonstrated why, in late 1998, it did not choose the more recent 1995-1997 period as the 1999 reference period since, in principle, any licensing system based on traditional trade flows should reflect the most recent trade flows. Ecuador stressed, however, that in its opinion, the reference period *per se* was not the source of the new system's inconsistency. It was, rather, the EC's decision to use the technicality of payment of customs duties to determine the "actual importer", instead of using commercial evidence to identify the *true* importer, i.e. the service supplier who was in a position to and did undertake the critical steps in moving bananas from producing countries into the EC market.

4.90 The reality of trade showed, the European Communities responded, that there was no factual or logical connection, let alone any legal necessity, between being a producer and exporter of bananas, on the one hand, and an importer in the European Communities, on the other hand.

4.91 The **European Communities** responded that the payment of customs duties was the only objective criterion that allowed the European Communities to verify which operator was entitled to the quality of traditional importer since it concerned the crucial moment for importation i.e. the customs clearance. The suggestions that Ecuador had put forward in paragraph 4.87 above (internal documents of private companies should provide evidence in order to be granted the traditional operator status) was the best recipe to engulf the European Communities and the operators into endless litigation in front of jurisdictions all over the world. In the opinion of the European Communities, no administrative power, including the EC internal offices, could decide on the validity of these documents without immediately raising a concern for other operators disposing of different concurring documents.

(v) Newcomers

4.92 **Ecuador** noted that the European Communities had awarded eight per cent of all banana import licences to "newcomers" in its amended system [136] and established criteria which companies must fulfil to qualify.[137] Ecuador submitted that certain of the newcomer criteria constituted both *de iure* and *de facto* discrimination against Ecuadorian and other third-country service suppliers in general, and against foreign service suppliers engaged in banana importing and wholesaling in particular. The newcomer criteria required a potential newcomer to have imported into the EC fresh fruits and vegetables (or a combination of fresh produce and coffee and tea), with a declared value of 400,000 Euro, in the one to three years preceding registration. This implied that a qualified newcomer

[135] Paragraph 225.
[136] Article 21 of Regulation 2362.
[137] *Idem*, Article 7. (Secretariat remark: for details see Factual Aspects above.)

was established in the Community, had been able to create the necessary physical and commercial infrastructure, and had been able to secure licences for any designated products requiring import licences. These requirements favoured EC services suppliers, Ecuador argued, since they measured commercial activity only with respect to the EC market. It was not apparent to Ecuador why a non-EC origin services supplier with a newly established commercial presence in the Community should not qualify as a "newcomer" if it documented an equivalent value of imports of fresh produce into Ecuador, or into any one or several other non-EC countries. Ecuador submitted that the failure of Regulation 2362 to permit a foreign origin services supplier established in the European Communities to demonstrate equivalent import experience elsewhere in the world was *de iure* discrimination in contravention of Article XVII of GATS.

4.93 The discrimination arose because of the interaction of the newcomer criteria with the EC's separate discrimination in the allocation of banana import licences, under both the previous and the amended licensing systems, in favour of EC origin service suppliers. Potential newcomers of Ecuadorian or other third-country origin faced extremely high barriers to entering the banana wholesale market in Europe. Such potential newcomers could only gain access by buying, for at least a year, the use of import licences allocated to holders of Category B ripener and hurricane licences in the previous system. Moreover, Ecuador argued, no entitlement to future newcomer status could be gained in 1999 unless the use of licence access was bought, under the amended licensing system, from the same former holders of Category B, ripener, or hurricane licences. The cost of having to buy access to banana import licences was a serious *de facto* barrier to entering the EC banana market, which exacerbated the *de iure* discrimination.

4.94 The **European Communities** responded that, in its opinion, the condition for newcomers was non-discriminatory *de iure*, since there was no distinction in Regulation 2362 between EC and non-EC service suppliers, on the one hand, and between non-EC service suppliers, on the other hand. Further, the condition was non-discriminatory *de facto*, since the basic assumption made by Ecuador to that effect was wrong. An importer of fruits and vegetables established in the European Communities was not necessarily an EC operator (service supplier) within the definition of Article XXVIII of GATS. Nor could it simply be assumed that there was an imbalance of EC origin operators in the fruits and vegetables sectors compared to non-EC operators to the detriment of the latter. The European Communities recalled that the biggest wholesale trader in fruits and vegetables in the world was Dole, a non-EC service supplier. The European Communities also recalled the rules on the burden of proof as expressed by the AB in the "Blouses and Shirts" report.

(vi) Remedial action

4.95 **Ecuador** argued that a system in conformity with the obligations of Articles I and XIII would include:

(a) a unified tariff-rate quota of 3.41 million tonnes within which all countries would compete, subject to different tariffs but without individual country allocations;

(b) each traditional ACP country would be entitled to duty-free treatment up to a quantity of bananas equal to its pre-1991 best-ever quantity;

(c) non-traditional ACP suppliers would be accorded duty-free treatment up to the first 90,000 tonnes they collectively exported to the European Communities;

(d) other exporters would pay a duty of 75 Euro per tonne, which rate would also apply to imports from ACP countries above their duty-free levels;

(e) for over-quota imports (i.e. above 3.41 million tonnes), ACP bananas would have a 100 Euro per tonne tariff preference over other bananas;

(f) the duty-free levels would not represent entitlements, in that non-ACP bananas could compete for the full 3.41 million tonnes but they would not get the duty-free benefits given to certain levels of ACP imports;

(g) for distribution of licences, newcomer criteria favouring EC service providers should be amended to remove such bias. For other licences, the definition of "actual importer" should be modified to remove the prejudice in favour of European Communities and ACP service providers, assuring that those who took the true commercial risk obtained equal rights to import licences.

4.96 Ecuador requested furthermore that the Panel recommend that the above system be implemented immediately. All elements of the system that would be inconsistent with the WTO but for the Lomé waiver (e.g. the tariff preferences) had to be terminated as of 29 February 2000, unless and until the waiver was extended.

4.97 Referring to Ecuador's suggestions concerning certain remedial actions to be taken by the European Communities under Article 19.1 (last sentence) of the DSU, the **European Communities** noted that there had been continuous contacts between the original complainants and the European Communities in order to resolve the divergences about the way in which this dispute could be resolved. The suggestions for remedial action that Ecuador was putting before the Panel had all been discussed during these contacts and had been discarded by the European Communities because they would not allow it to maintain a sufficient margin of preference for traditional and non-traditional imports of bananas from ACP countries. The panel, as the AB in the *India patent* case, reminded, was not a negotiating body and could only pronounce itself on the consistency or otherwise of the present EC banana import regime with its WTO obligations (*de lege lata*). The Panel had no authority to design, in lieu and place of the European Communities, its banana import regime (*de lege ferenda*) nor could it assess the legal and political obligations that the European Communities assumed *vis-à-vis* the banana-exporting ACP States.

4.98 The European Communities submitted that panels and the AB were not well equipped to determine legislative action to be taken by individual WTO Members. The European Communities believed that it had fulfilled its duty under the WTO. In the unlikely event that the Panel disagreed with this position, it might be helpful to receive some indication on what steps could be considered an appropriate remedy for any remaining inconsistency, provided such indications were no more than a clarification of existing WTO obligations rather than a substitute for future tariff negotiations. The European Communities considered the suggestions made by Ecuador to be totally outside the scope of the present dispute, particularly where Ecuador requested the European Communities to establish a single tariff quota of 3.41 million tonnes, while the EC's present tariff binding for bananas was no more than for a tariff quota of 2.2 million tonnes. Any extra tonnage over and above this bound tariff quota could only be agreed upon as the result of future tariff negotiations and not by a panel as the result of a dispute settlement procedure. Recommendations and rulings of the DSB could not add to or diminish the rights and obligations provided in the covered agreements.

D. CONCLUSION

4.99 For the reasons set forth above, **Ecuador** considered that the European Communities had failed to conform its measures with the rulings of the original panel and the obligations of the GATT 1994 and the GATS. The failure of the European Communities to take appropriate and expeditious action to fulfil its obligations meant that Ecuador, a developing country, continued to be deprived of the competitive opportunities to which Ecuador was entitled as a WTO Member. Finally, Ecuador

urged the Panel to be as specific as possible in its recommendation for a remedy, so that this dispute could finally be resolved.

4.100 The **European Communities** requested that the Panel reject all the allegations made by Ecuador both under the GATT and the GATS and find that the European Communities has complied with the original recommendations and rulings of the DSB adopted on 25 September 1997.

V. ARGUMENTS BY THIRD PARTIES

A. BRAZIL

5.1 **Brazil** submitted that, as the world's second largest producer of bananas, it had an interest in starting exports of the "cavendish" variety to the European Communities and had drawn the Government's attention to the need for provisions in the EC's new banana regime that would permit access for new entrants.

5.2 Brazil argued with respect to the creation of the "others" category within the EC's tariff quota that there was no longer any 90,000 tonne ceiling for duty-free imports of non-traditional ACP bananas. This implied, contrary to paragraph 255(g) of the AB report, that up to 241,000 tonnes of non-traditional ACP bananas could be imported duty-free. There was no guarantee that imports under the "others" category would be made from origins benefitting from duty-free treatment. However, for new entrants restricted to an "others" category in a market dominated by traditional suppliers, a negative tariff differential applicable to the full amount of the quota to which they had access would constitute a very serious obstacle to participation in the market. In practice, it would transform the "others" category into a market reserved for non-traditional ACP bananas.

5.3 Brazil did not contest the creation of the "others" category, nor did it wish to address the EC's calculation of the volume of the quota allocated to that category. Brazil questioned the manner in which that category would actually operate, as a result of unlimited duty-free access for non-traditional ACP bananas. If the current EC regime for the allocation of the tariff quota were to be maintained in terms of the "others" category, coupled with an unlimited duty-free access for non-traditional ACP bananas, a Member like Brazil, which had an unquestionable possibility of developing its export potential, would be shut off from the EC's market on a permanent basis. Brazil argued that, while substantial suppliers were shielded by their specific shares of the quota and traditional ACP bananas could be exported duty-free under a separate quota, non-substantial suppliers were the only exporters which had to compete on an unequal footing without any guarantee of access to the EC banana market.

5.4 In view of the reading that the AB had given to the term "required", and with reference to the findings and recommendations of the AB on this matter, Brazil submitted that the European Communities should not have provided duty-free access to non-traditional ACP bananas for the full amount of the "others" category of the tariff quota. This preferential treatment went beyond what was deemed to be "required" by the AB, and beyond a narrow interpretation of the Lomé waiver. It defeated one of the main functions of the "others" category, as laid out in paragraph 7.76 of the panel report, which consisted in avoiding the continuation of a distortion that was inherent to the operation of tariff quotas.

B. CAMEROON AND COTE D'IVOIRE

1. Issues related to the GATT

5.5 **Cameroon and Côte d'Ivoire** submitted that each of the EC's new provisions on preferential treatment afforded to the APC States was in conformity with Article I of GATT and consistent with the recommendations of the panel and the AB.

(i) Traditional ACP bananas

5.6 Referring to Ecuador's claim that the European Communities went beyond the requirements of the Lomé Convention by setting a global figure for duty-free imports of traditional ACP bananas at

the level of pre-1991 best-ever import volumes, Cameroon and Côte d'Ivoire argued that this was irrelevant for several reasons:

(a) the tariff preference established by the Lomé Convention for all ACP bananas did not have any quantitative limit;

(b) the only quantitative limit applied to traditional ACP bananas since they enjoyed guaranteed access ("additional preferential treatment"[138]); and

(c) guaranteed duty-free access for traditional ACP bananas did not exceed the pre-1991 best-ever level.

5.7 Cameroon and Côte d'Ivoire referred to the AB statement that "Article 168(2)(a)(ii) … applies to all ACP bananas" whether traditional or non-traditional[139], and to the requirement in Article 168(2)(a)(ii) that, for all ACP bananas, the European Communities shall take "… the necessary measures to ensure more favourable treatment than that granted to third-countries benefiting from the most-favoured-nation clause for the same products". In the view of Cameroon and Côte d'Ivoire, for all tariff measures taken pursuant to Article 168(2)(a)(ii), the European Communities, by virtue of the Lomé waiver, was not bound by the provisions of Article I of GATT. According to Article 168(2)(a)(ii), the European Communities could therefore legitimately grant duty-free access for imports of ACP bananas. Consequently, the tariff preference granted to traditional ACP bananas could not be contested under Article I of GATT.

5.8 Cameroon and Côte d'Ivoire argued that the AB had stated that Protocol 5 of the Lomé Convention allowed the granting of "additional preferential treatment" as well as "more favourable treatment" in Article 168(2)(a)(ii). In the view of Cameroon and Côte d'Ivoire, "additional preferential treatment" included guaranteed access for the ACP countries. According to Protocol 5, this guaranteed access was confined to the situation that had prevailed previously on their traditional markets. Under the EC's former banana regulations, the European Communities had decided, in order to provide guaranteed access within this quantitative limit, to allocate shares among ACP countries in the amount of their pre-1991 best-ever export volumes. The method, in principle, was not contested by the AB[140] although it was criticized on the grounds that this allocation did not give third countries specific shares.[141] The European Communities was therefore obliged to find another formula to guarantee access to ACP States. The new method adopted was to set an aggregate volume of imports reserved for traditional ACP countries, on the basis of the same uncontested reference quantity.

5.9 Cameroon and Côte d'Ivoire submitted further that there was nothing in the WTO rules that made it obligatory to allocate import volumes among suppliers. The AB itself had described the allocation among ACP countries as simply one option for the European Communities.[142] Moreover, the provisions of the Lomé Convention allowed the European Communities to make such a choice. Article 168(2)(a)(ii) provided for more favourable treatment for "products originating in the ACP States". More favourable treatment was therefore not on an individual basis. The same applied to Protocol 5 which stated that "no ACP State" shall be placed in a less favourable situation, and this applied to each ACP State or all ACP States together. In the absence of any GATT obligations and in view of the freedom of choice afforded by the Lomé Convention, and reaffirmed by the AB, the European Communities could legitimately decide to set a global volume for the traditional ACP bananas.

[138] Paragraph 170 of the AB report.
[139] Paragraphs 172 and 173 of the AB report.
[140] Paragraph 174 of AB report.
[141] Paragraph 162 of the AB report.
[142] Paragraph 174 of the AB report.

5.10 Cameroon and Côte d'Ivoire argued that the pre-1991 best-ever exports of the 12 ACP countries exceeded 900,000 tonnes and this fact had already been submitted to the panel and the AB in the course of their previous proceedings. The relevant official statistics collected by the European Communities showed a figure of 952,939 tonnes. By fixing a level of 857,700 tonnes, the European Communities had not exceeded the limits of the requirements under Protocol 5 to the Lomé Convention and traditional ACP bananas did not therefore benefit from any preference that they should not receive.

5.11 Cameroon and Côte d'Ivoire claimed that Ecuador's argument that a global figure would encourage full utilization of the traditional ACP volume was irrelevant since full utilization of import quotas, where established in conformity with WTO rules, was a general requirement in the WTO rules and could be found, inter alia, in Article XIII:2(d) of GATT or Article 3.5(h) of the Agreement on Import Licensing Procedures (ILA).

(ii) Non-traditional ACP bananas

5.12 Cameroon and Côte d'Ivoire submitted that with regard to the measures that might be taken by the European Communities to apply Article 168(2)(a)(ii) of the Lomé Convention, the AB had stated as a principle that this provision of the Lomé Convention made it obligatory to grant "more favourable treatment" for all ACP bananas and consequently for all non-traditional ACP bananas.[143] This provision did not indicate what kind of measure was necessary. The European Communities was therefore free to choose what necessary measures on "more favourable treatment" should be established.

5.13 Cameroon and Côte d'Ivoire argued that under the previous EC banana regime, non-traditional ACP bananas were guaranteed, first, access within the tariff quota of 2.2 million tonnes up to a limit of 90,000 tonnes, with a tariff preference of 75 Euro per tonne, and second, a tariff preference of 100 Euro per tonne for imports outside the tariff quota. The first measure was deemed necessary and required by the Lomé Convention and could not therefore be contested under Article I of GATT. The change in the new EC regulations, i.e. the elimination of reserved access for 90,000 tonnes of non-traditional ACP bananas was to the detriment of the ACP countries. Consequently, the new measure taken by the European Communities could only be found to be legitimate since it was less favourable than the previous one.

5.14 In the view of Cameroon and Côte d'Ivoire, the EC measure to increase the tariff preference to 200 Euro per tonne for imports outside the tariff quota should be endorsed because the panel and the AB had already found that the European Communities was free to fix the kind and level of preference to be afforded. It was "required" and "necessary" even more today since, first, the ACP countries had lost the guaranteed access for 90,000 tonnes of non-traditional bananas and had lost the marketing guarantee afforded by the former licensing system. Second, third countries had been given a separate tariff quota of 353,000 tonnes, and, third, under Article 168 of the Lomé Convention it was necessary to ensure that the conditions of competition for non-traditional ACP bananas were satisfactory.

(a) Article XIII issues

5.15 Cameroon and Côte d'Ivoire submitted that the volume fixed for traditional ACP bananas should not be considered a quantitative restriction as such since its purpose was mainly to administer the tariff preference granted for traditional ACP bananas. As this was more of a tariff measure, it should not be examined in the light of Article XIII because this Article only dealt with the application of quantitative restrictions. If the Panel were to consider that the measure in question should be examined in the light of Article XIII of GATT, Cameroon and Côte d'Ivoire submitted that the

[143] Paragraph 173 of the AB report.

European Communities had complied with the provisions of that Article as well as the conclusions and recommendations of the AB with regard to Article XIII.

5.16 Cameroon and Côte d'Ivoire submitted that the only reproach made by the AB with regard to Article XIII was that "[a Member may not allocate] tariff quota shares, whether by agreement or assignment, to some, but not to others, Members not having a substantial interest …".[144] In the view of Cameroon and Côte d'Ivoire, the new EC regime complied with these requirements since it did not allocate individual shares to each of the 12 traditional ACP States.

5.17 Referring to the AB statement that "… the non-discrimination provision applies to all imports of bananas, irrespective of whether and how a Member categorizes or sub-divides these imports for administrative or other reasons"[145], Cameroon and Côte d'Ivoire submitted that this conclusion demonstrated that the European Communities was free to fix one quantitative restriction for certain volumes of imports (the tariff quotas for third-country bananas) and another for other import volumes (the traditional ACP volume). In the view of Cameroon and Côte d'Ivoire, the only condition imposed by Article XIII on the imposition of several quantitative restrictions for a like product according to its origin was that the restrictions imposed should be similar.

5.18 Cameroon and Côte d'Ivoire submitted that the volume of 857,700 tonnes of traditional ACP bananas corresponded to the distribution of trade which these countries could expect in terms of the requirements of the chapeau to Article XIII:2. This could only be defined in relation to the favourable treatment they received under the Lomé Convention. For traditional ACP bananas, Protocol 5 to the Lomé Convention obliged the European Communities to grant "additional preferential treatment" (according to the expression used by the AB), which consisted of guaranteed access. As defined in relation to the pre-1991 best-ever export figure. Consequently, the share of trade which the ACP States could expect corresponded to this guaranteed access. Moreover, the share of trade attributed to the ACP States by the European Communities for their traditional exports was far from exceeding the volume they had a right to expect, given pre-1991 best-ever exports of 952,939 tonnes. The global figure of 857,700 tonnes for the traditional ACP volume was therefore consistent with the requirements of Article XIII:2 of GATT.

5.19 Cameroon and Côte d'Ivoire argued further that since the European Communities had the option and indeed was obliged to set a global import volume for traditional ACP suppliers, and since traditional ACP volumes corresponded to the level of trade, these countries had a right to expect, and since the European Communities could maintain this volume separately from tariff quotas in order to fulfil its commitments under the Lomé Convention, nothing in the GATT could prohibit the ACP countries from fully utilizing the volume that had been allocated to them.

5.20 Referring to Ecuador's claim that its specific share was lower than what it could expect in view of its world market share, Cameroon and Côte d'Ivoire submitted that these figures were of no relevance in determining the share of trade which Ecuador might expect in the European Communities since Article XIII limited the elements to be taken into account to the volume of imports of countries which applied quantitative restrictions. The tariff quota share allocated to Ecuador was fixed in Regulation 2362. To adjust this share, Ecuador would have to follow the normal procedures in Article XIII:4, i.e. it would have to request consultations with the European Communities or consult with Members before any readjustment could be initiated.

5.21 As concerns the representative period selected by the European Communities this was the most appropriate having regard to the GATT rules and Ecuador's interests. In the view of Cameroon and Côte d'Ivoire, the EC's bound tariff quota of 2.2 million tonnes for third-countries had to be taken

[144] Paragraph 162 of the AB report.
[145] Paragraph 190 of the AB report.

into account when applying the rule of the previous representative period because it constituted a "special factor" within the meaning of Article XIII.2(d). Neither the panel nor the AB had questioned the quota of 2.2 million tonnes. As restrictions on imports of bananas into the European Communities had existed for a long time, it was not unreasonable for the European Communities to conclude that the most appropriate base period for allocating shares to countries having a substantial interest would be the most recent period.

2. Issues related to the GATS

5.22 Cameroon and Côte d'Ivoire submitted that the new EC regulations were in conformity with the conclusions and recommendations of the panel and the AB with regard to Articles II and XVII of GATS.

5.23 Cameroon and Côte d'Ivoire considered that the inconsistency of the old import licence allocation system was due to the fact that 30 per cent of the licences, within the tariff quota of 2.2 million tonnes, was reserved for operators marketing EC bananas and traditional ACP bananas, most of which operators were of EC origin. The new regulations no longer made any reference to operator categories nor established any link between trade in the European Communities and traditional ACP bananas and access to import licences under tariff quotas. The new regulations went even further than the findings of the AB, since they provided for a single licensing system applicable to tariff quotas and the quantity of traditional ACP bananas.

5.24 Cameroon and Côte d'Ivoire submitted that the definition of "traditional importer" adopted by the European Communities was consistent with GATT rules relating to licensing procedures. The acceptance of import licence applications on the basis of the operator's import performance during a recent period was fully consistent with Article 3.5(j) of the Licensing Agreement. Ecuador's claim that the European Communities should have restricted the definition of "traditional importer" to shipments of bananas was incompatible with the above-mentioned provisions. Indeed, Ecuador's statement that "the European Communities should modify its import licensing system to allocate licences to the true importers who (…) are the primary service providers and take the vast majority of the commercial risk in marketing bananas to the European Communities"[146] referred to operators whose activity function had more to do with exports than imports.

5.25 Cameroon and Côte d'Ivoire submitted that the new import licence allocation rules were consistent with the principle of non-discrimination. The system was identical for all origins of bananas and, therefore, for all operators, whether EC or third-country operators. Furthermore, the new licence allocation rules had provisions with regard to the reference period, establishment in the European Communities, period of validity, transferability of licences, guarantee, etc., irrespective of the origin of operators.

5.26 In the view of Cameroon and Côte d'Ivoire, Ecuador's sole claim related to the selection of the reference period 1994-1996 enabling, in Ecuador's view, all operators holding import licences under the old system (Categories A, B and C) and which had actually used those licences to engage in importation, to submit references quantities for the grant of new licences. Cameroon and Côte d'Ivoire submitted that the method selected by the European Communities was in conformity with the rules set out in Article 3.5(j) of the Licensing Agreement. Given the allowance of an additional 353,000 tonnes of imports, the accession of Austria, Sweden and Finland into the European Communities and the non-availability of official data for the year 1997 at the time the new regulations were adopted, any reference period other than 1994-1996 would not have been sufficiently representative of recent banana trading conditions in the European Communities. That this period had enabled certain EC or ACP operators previously holding B licences to participate in the allocation of

[146] Paragraph 141 of Ecuador's first submission.

new rights did not give rise to a situation of discrimination. On the contrary, what would have constituted unacceptable discrimination was a prohibition of those operators from participating in the new licence allocation system.

5.27 In the view of Cameroon and Côte d'Ivoire it was also incorrect to claim that the new import licence allocation system "perpetuated" the situation criticized by the panel and the AB since, under Article 4.2 of Regulation 2362, the reference period of 1994-1996 applied only to the granting of import licences for the year 1999.

5.28 Cameroon and Côte d'Ivoire argued further that it was not correct to claim that all holders of B licences were able to present reference quantities for the period 1994–1996, in conformity with the "traditional importer" criterion, and to recover all the imports rights granted in the past to the detriment of third-country operators, such as Ecuador. According to information available to Cameroon and Côte d'Ivoire, operators holding B licences in the former system had to a very large extent lost their reference quantities to operators importing bananas from Latin America. The official statistics on the evolution of reference quantities between 1998 and 1999, following the introduction of the new regime, showed that Spanish and French operators, who accounted for most of the B licence holders on account of their links with European Communities and ACP production, had lost 41.21 per cent and 20.17 per cent, respectively, of their reference quantities.[147] Operators established in the northern EC countries, which were traditional importers of bananas from Latin America, had increased their reference quantities substantially: Sweden (+114.26 per cent), Finland (+85.14 per cent), Austria (+118.82 per cent) and Benelux (+374.90 per cent).

5.29 With regard to procedures for the allocation of import licences to "newcomers", Cameroon and Côte d'Ivoire submitted that the European Communities had adopted a broad definition of the term "new operator" which extended to all operators who had engaged in trade in any fruit and vegetables and in products such as coffee or spices. This definition made it possible to expand considerably the category of new operators, which today numbered more than 1,000. Ecuador's claim that this category should have included operators on the basis of their world-wide commercial reference quantities, outside the European Communities, was not only inconsistent with any of the GATT rules, but would have precluded proper implementation of Article 3.5(j) of the Licensing Agreement. It would have led to a proliferation of new operators and made it impossible for them to be issued licences for products in economic quantities.

5.30 Cameroon and Côte d'Ivoire concluded that Ecuador's claims should be rejected since the European Communities had conformed with the conclusions and recommendations of the panel and the AB as well as the GATT rules. Moreover, from a tariff point of view, the preferences afforded to ACP States by the European Communities under the new regulations were in conformity with the requirements of Article 168(2)(a)(ii)) of the Lomé Convention, both for traditional and non-traditional bananas. From the point of view of guaranteed access, the preference given to the ACP States by the European Communities for the importation of traditional bananas was consistent with the requirements of the Lomé Convention (Protocol 5). Consequently, taking into account the Lomé waiver, Ecuador had no grounds for claiming a violation of Article I of GATT.

C. THE CARIBBEAN STATES

5.31 The Governments of Belize, Dominica, Dominican Republic, Grenada, Jamaica, St. Lucia, and St. Vincent and the Grenadines ("Caribbean States") submitted that they supported the arguments of the European Communities in its request that the Panel affirm the conformity of its new regime with the covered agreements and to find that Guatemala, Honduras, Mexico and the United States must be deemed to have accepted that conformity.

[147] Annex 2 of the submissions of Cameroon and Côte d'Ivoire.

5.32 **The Caribbean States** submitted that they were heavily dependent upon the production of bananas and relied on the availability of their traditional markets in the European Communities, the protection of which had been assured by various Lomé Conventions, most recently Lomé IV ("the Lomé Convention") as amended. Each State had a significant interest in the outcome of these proceedings. Their economic well-being, social cohesion and political stability were dependent upon proper effect being given to the relevant provisions of the Lomé Convention.

5.33 The banana industry in the Caribbean States generated a large percentage of gross domestic product and foreign exchange earnings. In the Windward Islands some 34 per cent of the workforce in these islands was engaged in the industry and bananas provided a steady source of income to growers. While the Caribbean States' Windward Islands recognized and accepted the need to diversify their economies, any significant reduction in their traditional sales to the European banana market would be detrimental to the efforts made at national development and economic growth, all aimed at reducing poverty and integrating these economies into the global market. Undermining the new EC banana regime and, in particular, the guaranteed access and advantages of Caribbean States' bananas into the European Communities would destroy their banana industries. This would cause grave economic and social problems. The uncertainty which these proceedings generated were themselves highly destabilizing. It was not possible to invest in and develop the industry in the face of constant attacks on the EC banana import regime, attacks which were scarcely reconcilable with the Lomé waiver granted in 1994 which Ecuador itself had supported when it was extended in 1996.

5.34 The Caribbean States had difficulty in reconciling Ecuador's interpretation of the Lomé waiver with the broader societal commitments reflected in the Preamble to the WTO Agreement. This binding preambular language emphasized that the WTO system did not call for the mechanical application of rules in such a way as to give absolute precedence to market efficiencies. The legal provisions which this Panel was called upon to interpret and apply must be applied consistently with the "needs and concerns" of all WTO Members, taking account of their economic and social circumstances, the geographical conditions in which they found themselves, and their commitment to sustainable development.

5.35 The Caribbean States submitted that the EC's new tariff and quota system for bananas did not violate the GATT and that the new import licensing system did not violate the GATS.

1. Issues related to the GATT

(i) Traditional ACP bananas

5.36 The Caribbean States also submitted that, *inter alia*, the ACP tariff preferences were required by the Lomé Convention.

5.37 The Caribbean States argued that Ecuador was wrong in claiming that the 857,700 tonne limit on duty-free traditional ACP banana imports was a quantity which was "in excess of that justified by the requirements of the Lomé Convention". The European Court of Justice in Germany v Council[148] had referred to the Lomé requirement (Protocol 5) as being a level up to the "best ever exports prior to 1991". This interpretation of the Lomé requirement was confirmed and applied by the panel and AB decisions in relation to Protocol 5 of the Lomé Convention. The only issue for this Panel was, therefore, whether the figure of 857,700 tonnes exceeded "best ever exports prior to 1991". The "best ever" quantities exported by the traditional ACP exporters to Europe in the years prior to 1991 were approximately 940,000 tonnes.

[148] Case C – 280 192, ECR 1994, pI-4973, Judgment of 5 October 1994.

5.38 The Caribbean States submitted further that the elimination in the revised regime of individual country ceilings on duty-free access did not lead to EC preferences in excess of what was required. The total quantities from traditional ACP sources entitled to special protection under Protocol 5 of the Lomé Convention amounted to 940,000 tonnes. The fact that the European Communities had allocated 857,700 tonnes in the previous regime did not affect the entitlement of the ACP States under Protocol 5 of the Lomé Convention to the higher quantity or the obligation on the European Communities to protect the higher quantities.[149]

5.39 The Caribbean States argued that the individual quotas had been found to have infringed Article III, a violation which was found by the AB not to be covered by the Lomé waiver. This was the reason why the European Communities had dropped country-specific ACP tariff quota allocations. The panel and the AB had considered that their function was not to prescribe the detailed arrangements that must be implemented by the European Communities in order to comply with its Lomé Convention obligations. Rather, their function was to determine whether the methodology chosen by the European Communities to determine tariff quota allocations could reasonably be considered to have been "required" to meet obligations under the Lomé Convention. The AB had recognised that other methods might also be "required" by the Lomé Convention. The fact that the panel and the AB had accepted that the tariff quota allocation to individual ACP countries was "required" by the Lomé Convention did not preclude the use of a global tariff allocation to ACP countries. The Caribbean States submitted that the general allocation of 857,700 tonnes may equally be considered to be required by the Lomé Convention. However, it did not fall foul of Article XIII because the preferential agreement established by the Lomé Convention did not constitute a quota.

(ii) Non-traditional ACP bananas

5.40 The Caribbean States submitted that the expansion of duty-free access to "non-traditional" ACP bananas (previously limited to 90,000 tonnes) was "required" by the Lomé Convention. In the view of the Caribbean States, the AB had sought to emphasize that the duty-free benefit for non-traditional bananas applied to "all ACP non-traditional bananas" and had not suggested that the duty-free entry for such bananas should be limited to the 90,000 tonnes. The reference to 90,000 tonnes was merely for identification purposes to clarify the quantities to which the AB was referring. The Lomé waiver provided clearly that enhanced access of non-traditional bananas was "required" by the Lomé Convention. The relevant provision was Article 168(2)(a)(ii), which conferred duty-free entry on all ACP bananas. With regard to the argument that the European Court of Justice had ruled that Protocol 5 of the Lomé Convention superseded Article 168(2)(a)(ii), with the result that the European Communities was not "required" to give non-traditional ACP bananas more favourable treatment pursuant to that provision, the Caribbean States referred to paragraph 7.135 of the panel report and paragraph 173 of the AB report. By removing the limitation to 90,000 tonnes of duty-free access, the European Communities had chosen another form of "more favourable treatment", removing a cap on duty-free access that, as recognized by the AB, it had not been required to impose.

5.41 The Caribbean States concluded that the allocation of 857,700 tonnes in respect of traditional bananas, the duty-free treatment within the tariff quotas and the tariff preference of 200 Euro per tonne outside the tariff quota in respect of non-traditional bananas were, first, "required" by the Lomé Convention, second, provided for by the Lomé waiver, and third, were not incompatible with the GATT.

[149] Paragraph 7.101 of the panel report and paragraphs 174 and 177 of the AB report.

(iii) Article XIII issues

5.42 The Caribbean States submitted that the ACP tariff preferences did not constitute a quota within the meaning of Article XIII of GATT. In the alternative, the new regime had been designed consistently with Article XIII of GATT.

5.43 The Caribbean States argued that at no time since the adoption of Regulation 404 had the European Communities treated the preferences granted to the traditional ACP countries as part of the bound tariff quota in accordance with its obligations under Article 168(1) of the Lomé Convention which stated that "products originating in the ACP States shall be imported into the Community free of customs duties and charges having equivalent effect." Under Article 169 of the Lomé Convention, the European Communities was bound "not to apply to imports of products originating in ACP States any quantitative restrictions or measures having equivalent effect". If the Panel should rule that ACP preferences fell within the bound tariff quota, and if the European Communities fulfilled its obligations under the Lomé Convention to ensure access and advantages in the market for the appropriate quantity of traditional ACP bananas, third-country access to the European Communities would be reduced from 2.553 million to 1.7 million tonnes.

5.44 The Caribbean States argued further that whilst the imposition of a tariff constituted a restriction on imports, it did not come within the ambit of Articles XI and XIII of GATT.[150] The alternative view would have the result that Article XIII:1 applied to every tariff preference and therefore every discrimination within the meaning of Article I would necessarily also offend Article XIII. This could not have been the intention of the drafters of the GATT. Or if it was, the waiver of Article I must be accommodated by some other means within Article XIII. The Panel should, therefore, distinguish between those situations which Article XIII sought to address and those that were more properly covered exclusively by the provisions of Article I. The Caribbean States submitted that the preferential arrangements established by the Lomé Convention were governed by Article I and not Article XIII. Further, the history of the special trade agreements between the Lomé countries and the European Communities showed that the benefits and advantages to which the ACP traditional suppliers were entitled did not constitute a quota within the meaning of Article XIII. No reference was made in the Lomé Convention, including Protocol 5 thereof, to the award of a quota to ACP suppliers.

5.45 The Caribbean States argued that the above was confirmed, *inter alia*, by the Lomé waiver, including the context in which it was adopted. Following the finding that the Lomé Convention was not protected by the Article XXIV of GATT exemption for free-trade areas, the European Communities was required to obtain a waiver under Article XXV. The waiver was adopted expressly to accommodate the requirements of the Lomé Convention. It was unambiguously the intention of the CONTRACTING PARTIES that the European Communities should continue to be able to meet its historic obligations under the Lomé Convention which established a preferential agreement entitling ACP States to sell bananas (up to a limit) on a duty-free basis. It was scarcely credible that the CONTRACTING PARTIES could have intended to adopt a waiver under Article I which would nevertheless subject ACP bananas to the quota constraints of Article XIII. A finding by this Panel to the effect that the new regime had been established in breach of Article XIII would defeat the express intention of the waiver and the intention of those granting the waiver.

5.46 The Caribbean States supported their argument that the entitlement of ACP States to duty-free access did not constitute a quota by reference to the *Newsprint* panel finding that "imports, which are already duty free, due to a preferential agreement, cannot by their very nature participate in an MFN duty free quota".[151] In terms of its purpose and objectives, the Lomé Convention was a preferential

[150] Paragraph 7.154 of the panel report.
[151] *Newsprint* panel, L5680, BISD31, page 114; adopted November 1984.

agreement and the waiver confirmed that ACP banana imports were duty-free. When subjected to the rigours of Article XIII they were in the words of the *Newsprint* panel "already duty-free". They could not therefore participate in a duty-free quota, or themselves constitute a quota.

5.47 In the view of the Caribbean States, the imposition of a quantitative limit on the special tariff preference granted to traditional ACP bananas did not have the effect of transforming their special tariff and other preferential arrangements into a "quota". The ACP States had argued at the time of the adoption of Regulation 404 that there should not be a quantitative limit on the advantages accorded to ACP traditional suppliers. The advantages they had obtained under the individual national regimes were not subject to any quantitative limit and it was argued by the ACP States that there should not be a ceiling limiting the ability of ACP banana industries to develop. Indeed, one of the express purposes of the Lomé Convention was to encourage the increased production and development of industries and exports from the ACP countries to the European Communities. Nevertheless, despite the understanding of the Caribbean States as to the broader meaning and effect of the Lomé Convention, it was recognized that for WTO purposes the AB had ruled that the benefits of Protocol 5 did not apply without limit to bananas from traditional ACP States. For these purposes it was accepted that the limit of 857,700 tonnes was necessary to give practical effect to the conclusion of the AB regarding best ever pre-1991 levels.

5.48 The Caribbean States submitted that, if the Panel were to find that the preferences for traditional ACP suppliers constituted a tariff quota within the meaning of Article XIII:5 of GATT, the new EC regime had been designed consistently with Article XIII, specifically Article XIII:2(d). This was particularly the case when Article XIII was read in the context of the objectives and specific obligations of the Lomé Convention incorporated into the WTO system by the Lomé waiver.

5.49 The Caribbean States argued that Article XIII:1 set out the general obligation that restrictions applied to one Member must be "similarly" applied to other Members. The language clearly envisaged that there may be differences in the manner in which restrictions between Members were applied. The restrictions had to be "similar"[152] but need not be identical. The chapeau to Article XIII:2 sought to illuminate what could be considered to be "similar" prohibitions. The "expectations" of the ACP States were that the new EC banana regime was designed to meet the EC's obligations under the Lomé Convention and its Banana Protocol. Thus, in providing for duty-free imports of 857,700 tonnes of bananas from traditional ACP countries and a margin of tariff preference for any non-traditional ACP banana imports outside the tariff quota, the European Communities was doing no more than aiming "at a distribution of trade in such product approaching as closely as possible the share which the various Members might be expected to obtain in the absence of such restrictions", given its obligations under the Lomé Convention.

5.50 In the view of the Caribbean States, the sub-paragraphs of Article XIII:2 set out the principles which applied when a Member sought to meet the obligation of applying "similar" restrictions. However, Article XIII:2(d) had no application to traditional ACP bananas since the quantity allocated to the ACP States had not been assigned to the traditional ACP States individually.

5.51 The Caribbean States argued that the European Communities, by carving out the traditional ACP bananas, before calculating allocations to suppliers with substantial interest, was acting in accordance with the specific provisions of Article XIII:2(d) which required it to take due account of any special factors. In the view of the Caribbean States "any special factors" were not related to those states having a "substantial interest" (in other words the "special factors" could arise outside the interests of those states). Nor did the words "special factor" relate to the determination of a "previous representative period". The "special factors" which determined both the decision of the European Communities and the expectations of the European market were the provisions of the Lomé

[152]The Caribbean States submitted that the French word ("*semblable*") had an even wider meaning.

Convention, including its underlying principles, i.e. the importance of a secure and stable European banana market for the socio-economic fabric and the sustainable development of these countries.

2. Issues related to the GATS

5.52 The Caribbean States submitted that the re-structuring consequential to the adoption of Regulation 404 had led to a massive transfer of licences from EC origin companies to foreign-owned companies. Mere allegation that the EC's new licensing regime was discriminatory and violated Articles II and XVII of GATS did not relieve Ecuador of its fundamental obligation to prove its case. It was unsupported by any evidence and should be rejected by the Panel.

5.53 The Caribbean States submitted that Ecuador misunderstood the basis upon which the EC's new regime granted licences to operators.[153] The final paragraph of Article 5(3) of Regulation 2362 made clear that where there was a contradiction in the documentation, licences were awarded to the operator that actually paid the customs duty directly or via a customs agent or representative, regardless of whether that operator was the named holder or transferee of the import licence. The European Communities had taken positive steps to remove the benefit of having been a named holder of import licences. This departure from what would otherwise have been an administratively simpler system was designed specifically to benefit foreign owned companies which may have felt disadvantaged as a result of the previous Category B operator system.

5.54 The Caribbean States argued that Ecuador pointed to the factual situation pertaining to only one company - Leon van Parys (LVP) - which was a relatively small Belgian-registered and Ecuadorian-owned operator. It failed to provide any information on the numerous other companies associated with Ecuador or even owned by Ecuadorian nationals, e.g. Pacific Fruit Europe NV, Bana Trading Gmbh, Noboa Inc.

5.55 The Caribbean States submitted that Ecuador claimed that LVP's imports in 1994-1996 were "physically imported by LVP and customs cleared in the European Communities by LVP or another company".[154] If these quantities were customs-cleared by another company which was not acting as the agent of LVP, it must be questioned whether they were LVP imports. Ecuador provided no explanation as to the identity of these "other companies". Since LVP did not pay the customs duty and did not apparently own the bananas as they were "actually imported", it had to be assumed that LVP transported the goods by ship: the presumption must be that LVP was neither the owner of the goods nor responsible for them at the time that they cleared customs within the European Communities. If LVP had "actually imported" those bananas, its licence volumes would be substantially greater.

5.56 The Caribbean States argued that Ecuador provided no evidence to support the alleged distortion in favour of companies of EC and ACP origin. Licences in respect of at least 350,000 tonnes had been transferred from or sold by what were previously categorized as Category B operators to other operators, principally of non-EC origin. There was ample evidence that most if not all foreign-owned subsidiaries of wholesale banana suppliers had substantially increased their share of licences as a result of the new regime. Dole and Chiquita had increased their licence awards in excess of 100,000 tonnes. On the other hand, those companies which were awarded licences under the old regime were subject to a substantial reduction in their licences. Those tonnages, which they continued to hold, were only on the basis that they carried out the importation activity in the "relevant" period. Whether the licences granted to such EC and ACP origin companies arose directly as a result of them being awarded B licences originally, or whether the B licences were sold and the subsequent licences

[153] Paragraphs 119-120 of Ecuador's first submission.
[154] Footnote 84 in Ecuador's first submission.

which they were now awarded arose out of joint venture arrangements with Latin American banana importers independent of their ownership of Category B licences, was not proven.

5.57 The Caribbean States submitted that recent statistics comparing reference quantities in 1998 and 1999 showed that there had been a significant transfer of reference quantities from operators which were previously awarded Category B licences to operators that imported third-country bananas. Figures compiled by Odeadom demonstrated that operators from Spain and France, which held the majority of Category B licences under the previous regime, had lost approximately 41 and 20 per cent, respectively, of their reference quantities. Operators from the Northern European countries which imported almost exclusively Latin American bananas had made significant gains: Sweden had gained approximately 114 per cent, Finland 85 per cent, Austria 118 per cent and Germany 12 per cent.

5.58 The Caribbean States argued that Ecuador's claim that its companies had been almost unable to buy licences appeared to be inconsistent with the statement to the effect that "Ecuadorian companies had to invest some $40 million annually – a total of about $200 million – simply to buy back access for their imports".[155] At an estimated US$5 per box, this amounted to approximately 200,000 tonnes of licences which had been "bought back" by Ecuadorian companies. Given that Ecuador accounted for approximately 20 per cent of EC imports, on a proportionate basis, almost 1 million tonnes of licences were "bought back" each year by foreign owned companies. Thus, according to Ecuador, all Category B and ripener licences would have effectively been bought back by foreign-owned companies. Category B operators in France and Spain alone had sold or transferred approximately 300,000 to 350,000 tonnes of licences per annum.

5.59 The Caribbean States submitted that Ecuador effectively purported that import licences should no longer be awarded to importers, but to exporters. Ecuador expressed the desire that import licences should be based not on the "actual importer" but on the basis of a submission by importers of evidence of their activities, in the form of invoices for purchase of bananas in the country of origin, shipping documents (bills of lading) and commercial invoices proving a first sale on EC territory.[156] The Panel had no authority to accept this suggestion, which must be rejected. It ran contrary to the normal practice throughout the world of awarding import licences to the "actual importer". The person bearing the greatest risk was normally the "actual importer" who undertook to dispose of the fruit in the European market place and in many instances would have entered into long term commercial contracts with the "shipper", which had purchased the bananas from producers in Latin America. The importer would have invested in distribution networks, ripening centres and marketing programmes, all of which were essential to the business of importing. The definition offered by Ecuador, namely purchase of bananas in the country of origin, shipping and an invoice, could be met by an operator that was no more than a pure exporter and arranger of shipping that would have a tenuous link with the country of eventual imports.

5.60 The Caribbean States argued further that licence allocations based on submissions which may frequently be contradictory or incomplete would pose an unnecessary burden on importers and remove the transparency. Such a system would violate and undermine fundamental principles of the Licensing Agreement, specifically Article 3.2 and 3.3 thereof, as well as Article X:3(a) of GATT.

5.61 In the view of the Caribbean States there was no evidence that Ecuador's proposal based on invoices and shipping documents would "cure" the perceived wrong. Ecuador provided no evidence to show that under the factual situation as developed between 1993 and 1999 the award of licences on the basis of such "submissions" would be different from the licence procedures being challenged. The only evidence which Ecuador offered related to one company, LVP. Ecuador did not even attempt to

[155] Paragraph 19 of Ecuador's first submission.
[156] Paragraph 141 of Ecuador's first submission.

demonstrate that LVP would have benefited by an increased award of licences, should the system proposed by the Ecuador, have been adopted. Given that LVP was a member of the Noboa group of companies, it was likely that neither it nor its parent company would have met the requirements of "primary importer". Historically, Noboa did not qualify as a "primary importer" under the old regime for a number of its large contracts as it was deemed to take no commercial risk where a contract to purchase bananas at a fixed price from a European based importer existed and where the contract with Noboa amounted to no more than a c.i.f. contract. In such situations, the importer, based in Europe, would have qualified as the "primary importer" and the "secondary importer" .

5.62 Referring to Ecuador's statement that "Because … activity function (b) – was itself a source of entitlement to future licences under the prior system, licence holders had a powerful incentive to ensure that they were registered as the official licence users. Customs clearance was therefore done by them or in their names. A rational ripener with a licence, for example, would insist on buying bananas from a primary importer before customs clearance, so that the ripener could claim future reference quantity not only for ripening but also as a 'secondary importer'"[157], the Caribbean States submitted that this statement was not true. The amount of import licences in the hands of ripeners and/or secondary importers was minimal compared to the quantities of licences held by the primary importers. There were only four or five major primary importers in Europe and the secondary importer and ripener licences were divided between a number of different small operators. Those who were not already owned by or tied to a primary importer had little ability to control access to third county imports. If they did not respond to the demands of the powerful primary importers, the only bananas that would enter their ripening rooms or be handled by them, as secondary importers, would be those bananas they could obtain under their licences. All secondary importers of Category A combined would have licences equivalent to 65.5 per cent (operator category rules) multiplied by 15 per cent (activity function rules), i.e. 9.7 per cent (multiplied by a reduction coefficient). Thus no secondary importer was granted more than 10 per cent of its normal import requirements as a result of the previous banana regime. This quantity was insufficient relative to its need to make any demands on the primary importers.

5.63 The Caribbean States argued that Ecuador's case appeared to be premised on the belief that companies which were awarded ripener licences might actually have used those to import fruit and may benefit under the new regime. However, no evidence was given as to the extent to which ripeners were successful in subsequently becoming "importers". The Caribbean States submitted that the position of ripeners, which had a minimal amount of import licences, was extremely weak compared to the power of the multi-national companies such as Chiquita, Dole, Del Monte and Noboa, which controlled large quantities of licences and which, in practical terms, from the commencement of the operations refused to provide fruit to ripeners, which would not transfer their licences to them. The ripeners were fully dependent on such large companies because, even if they could use their own licences, the volumes accorded to them with their own licences were insignificant compared to the need they had for volumes to maintain high through-put of bananas in their ripening centres in order to pay the fixed overheads. Thus, even the ripener's quantities migrated to the large foreign owned companies. The major primary importers had the ability to carry out the secondary importation themselves and to use their own ripening centres. They began to do this immediately after Regulation 404 came into force.

5.64 The Caribbean States referred to the four methods of arrangements concerning importation under Regulation 404 described by Ecuador in paragraph 4.70 above. The Caribbean States submitted that it was incorrect and unsupported by any evidence to claim that licence transfers "were rare". Licence transfers were in fact a most common occurrence. Ecuador's own statement in relation to "purchasing" US$40 million per annum of licences was evidence of this fact. Licence leases, where licences remained in the name of the original licence holder, were rare. Buy-back arrangements were

[157] Paragraph 124 of Ecuador's first submission.

extremely rare in 1994-1996. While it was correct that the person who paid the duty in T1-sales might not be the person who purchased the bananas in the country of origin, this was a normal c.i.f. type transaction. The risk was wholly borne by the importer and there was no reason why the shipper or person who purchased from the producer should be recognized as the appropriate person to hold future licences. This would not be the normal practice in any other substantial trading country, or for other European imports. In the view of the Caribbean States it was incorrect to claim that "in all four cases, the Ecuadorian service supplier was the true importer in a commercial sense".[158] In particular in relation to T1-sales, Ecuador had provided no evidence that the offshore company selling on a c.i.f. basis had any presence in the European Communities. The Caribbean States submitted that no such evidence existed.

5.65 The Caribbean States argued that Ecuador sought to dismiss the finding of the panel in relation to secondary importers on the ground that this was one issue in a case involving many other issues.[159] Ecuador now claimed "that this is the entire basis for future licence allocations". The Caribbean States did not believe that the panel dismissed claims of certain parties solely on the grounds that the issue raised was of relatively lesser importance than other issues. Ecuador, having pointed out that the panel had dismissed the case for lack of evidence, failed to offer any evidence to support the charge that most secondary importers were of EC origin.

5.66 The Caribbean States submitted that the essence of Ecuador's claims was that the Panel should close its eyes to the existence of almost six years of trading history and view the position as between competing suppliers of wholesale banana services prior to Regulation 404. What Ecuador sought to do was to convert the WTO system into a legal system which would award damages or undo the wrongs that may have arisen as a result of a previous illegal regime. This was not the purpose of the WTO system. Article 1:1 of GATS provided that the GATS "applies to measures by Members affecting trade and services". Measures which were no longer in existence did not constitute "measures" and could not be the subject of a WTO dispute settlement procedure. Were the Panel to seek to address the consequences of a regime, considered previously to be illegal, the WTO dispute settlement system must be prepared to receive a flood of disputes in relation to all regimes which had been found illegal since the commencement of the GATT and which, prior to their being overturned, produced consequences which had in effect been continued as a result of the advantages granted improperly to previous Members or companies from those Members.

5.67 The Caribbean States requested that the Panel apply the "principle of effectiveness" identified by the AB. It must give practical meaning and effect to the Lomé waiver. This meant that ACP bananas were entitled to "access to and advantages on" the EC market "in the amount of their pre-1991 best-ever export volumes". Only this would promote the economic and social development of the Caribbean States consistently with the objectives of the WTO Agreement and the Lomé Convention. The Caribbean States submitted that the new EC banana import regime achieved these objectives consistently with the GATT and the GATS. The tariff preference was required by the Lomé waiver and was consistent with Articles I and XIII of GATT. The new licensing arrangements were consistent with the GATS. Ecuador had not provided the evidence required to displace its burden in proving its case. The Panel should reject Ecuador's request in its entirety.

D. COLOMBIA

5.68 In the view of Colombia, Article 21.5 of the DSU was a procedure applicable to situations where there was disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings. The terms of reference of the Panel were limited to examining the consistency of Regulations 1637 and 2362 with the relevant covered

[158] Paragraph 127 of Ecuador's first submission.
[159] Paragraph 136 of Ecuador's first submission.

agreements. Colombia submitted that at this stage the complainant could not include new claims, nor could the Panel examine issues not raised by the complainant.

5.69 **Colombia**'s concerns related to a situation where all imports (MFN, traditional and non-traditional ACP supplies) were credited against the existing tariff quota which would result in a 23 per cent reduction of current access to the EC market. Colombia would also be concerned about a situation where all imports would be credited against the existing tariff quota but an additional tariff quota for all suppliers would be opened with a volume equivalent to the ACP imports and at a tariff higher than 75 Euro per tonne but lower than the bound tariff. This situation would also lead to a reduction of current market access opportunities.

5.70 Colombia argued that the modalities for the Uruguay Round negotiations in agriculture indicated that "current access opportunities shall be maintained as part of the tariffication process".[160] It did not define "current access opportunities" which could refer to total imports, MFN imports, or imports from GATT Contracting Parties. In the case of the European Communities, the criteria selected to establish "current access opportunities" for bananas were very important since imports under preferential access accounted for more than 20 per cent of total imports and MFN imports from non-GATT contracting parties accounted for nearly 40 per cent of total imports. The reference volume of the "current access opportunities" was based on the average MFN trade for 1989-1991, i.e. at 1.9 million tonnes, while the average total imports exceeded 2.5 million tonnes. As a result of the BFA, the tariff quota volume was set at 2.1 million tonnes for 1994 and 2.2 million tonnes for 1995, of which 90,000 tonnes were allocated to imports from non-traditional ACP suppliers. The negotiation of the tariff quota also involved a commitment to increase the originally agreed volume in order to take account of the EC enlargement.

5.71 Colombia submitted that the market access commitment of the EC-15 was a tariff quota of 2,553,000 tonnes at 75 Euro per tonne for MFN suppliers and 90,000 tonnes duty-free for non-traditional ACP suppliers.

1. Article XIII Issues

5.72 Colombia submitted that a tariff quota administration through country-specific allocations was both a right and an obligation of the European Communities and that Ecuador had no legal right to request the elimination of country allocations to substantial suppliers. Colombia argued that the right of the European Communities to administer its tariff quota through the allocation of country shares was implicitly recognized by the panel in paragraph 7.85 of its report stating that at the time of the negotiation of the BFA, Colombia and Costa Rica were GATT contracting parties with a substantial interest. This right was distinct from the actual share allocated to each country which, in accordance with Article XIII:4 of GATT, could be adjusted. The right granted by Article XIII to an importing Member became an obligation for the European Communities by virtue of the commitments in its Schedule. One of the terms and conditions included under the market access commitment for bananas was a country allocation for Colombia as adjusted in accordance with Article XIII:4.

5.73 Colombia submitted that in accordance with Article XIII of GATT an importing Member could legitimately provide for country allocations to substantial suppliers while leaving open the opportunity to any other Member to compete for the remaining part of the quota. Moreover, in this case, the European Communities had bound itself to do so under "terms and conditions" established in its Schedule. Ecuador had no right to request denial of such rights.

[160] Modalities for the Establishment of Specific Binding Commitments under the Reform Programme. Doc. MTN.GNG/MA/W/24, 20 December 1993. These modalities where used as non-binding guidelines.

5.74 Colombia submitted further that if the country-specific allocations conformed with the provisions set out in Article XIII:2(d) of GATT, it must be assumed that they complied with the obligation to make an allocation that aimed at a distribution that resembled the shares the parties might obtain in the absence of the restriction. The chapeau of Article XIII:2 reflected an obligation with respect to means, not results. An obligation to attain a result would be impossible to achieve as it referred to a future situation (the distribution that would exist in the market if the restriction was not applied). Hence, the obligation under Article XIII:2 was to allocate country shares in accordance with criteria that were objective, reasonable and non-discriminatory rather than an obligation to allocate shares resulting in the distribution that would exist in the absence of a restriction. Given that a future event could not be foreseen, Article XIII:4 allowed any substantial supplier to request adjustment of the proportion determined or adjustment of the representative period in order to ensure a dynamic allocation of the import market.

5.75 In Colombia's view, one of the criteria that would result in a distribution that aimed at what the parties could expect in the absence of the restriction was provided for in the second sentence of Article XIII:2(d) which stated that when agreement was not reasonably practicable, the importing Member shall allot shares based upon the proportions supplied during a previous representative period. According to GATT practice, "a previous representative period" was a recent period and one that reflected three years of trade flows. Consequently, when a distribution was made based on a recent representative period, the importing Member fulfilled the requirement of aiming at the distribution that the parties might obtain in the absence of the restriction.

5.76 Colombia submitted that in the present case the European Communities had consulted with all four substantial suppliers seeking an assignment by agreement. When it became apparent that this was not possible, it had selected 1994 to 1996 as the recent representative period for which definitive data was available and made the corresponding allocations. The allocations corresponded to the distribution of the MFN trade during the selected representative period.

5.77 Colombia submitted that Ecuador's claim that the 1994-96 period was not representative due to the Article XIII violation found by the panel, was contrary to the principle that parties to a treaty were required to implement it in good faith. When the BFA was negotiated, there was no precedent indicating that it was not in conformity with Article XIII. On the contrary, all principles thereof and past practice were followed. Ecuador had never used its right under Article XIII:4 to request an adjustment of the reference period, country allocations or re-allocation rules until it brought an Article XIII action. Furthermore, Ecuador's suggestion implied that the implementation of the panel recommendations had retroactive effect and, since the re-allocation rules were found to be inconsistent with Article XIII, imports made under such allocation be discounted from Colombia's share. Ecuador's claim was without any legal basis under the dispute settlement mechanism which operated in a way that ensured that remedial action was forward-looking. Colombia argued that Costa Rica and Colombia should not be penalized for rules agreed and implemented in good faith.

5.78 With regard to Ecuador's argument that it should be granted a quota on the basis of its share of world trade, Colombia submitted that this was not a criterion relevant to Article XIII of GATT. Article XIII:2(d), second sentence referred to "shares based upon the proportions, supplied by such contracting parties during a previous representative period, of the total quantity or value of imports". This referred to supplies to the market of the importing Member applying the restriction. Two examples demonstrated that the criteria suggested by Ecuador were inapplicable: in 1994-1996, the Philippines, a marginal supplier to the European Communities, had over 9 per cent participation in world exports while Panama, a substantial supplier to the European Communities, had only 5 per cent of total world exports. Colombia submitted that the shares provided for in Regulation 2362 were consistent with Article XIII of GATT since they were based on the proportion of imports from each supplier in the period 1994-1996 which was a recent representative period.

5.79 Colombia submitted that the terms of reference of the Panel were precisely defined by Article 21.5 of the DSU. Consequently the scope of the review could not include new claims and was limited to an analysis of Regulations 1637 and 2362 adopted by the European Communities pursuant to the reports of the panel and AB. Ecuador's suggestions for remedial actions exceeded the scope of review.

5.80 Colombia had demonstrated that the country-specific allocations made by the European Communities complied with its GATT obligations. First, because the EC's obligation was to make a distribution that aimed at, not one that resulted in, the distribution that would exist in the absence of the restriction. Second, because the distribution corresponded to the proportions supplied by each supplier during a previous representative period. Colombia therefore requested the Panel to find that the country allocations made to the substantial suppliers were in accordance with Article XIII of GATT.

E. COSTA RICA

5.81 Costa Rica submitted that the complaint by Ecuador concerned matters of direct interest to Costa Rica. Ecuador challenged the obligation of the European Communities to accord a country-specific tariff quota allocation to Costa Rica and the other Members having a substantial interest in supplying bananas to the European Communities. It also challenged the methods used by the European Communities to determine the quota shares and hence the relative size of the quotas allocated to Costa Rica and Ecuador. The current rules of the DSU permitted only Ecuador to defend its interests as party whereas Costa Rica could merely participate in the proceedings as a third party.

5.82 Costa Rica argued that the Panel must go further than granting "enhanced" third-party status to Costa Rica and the other third parties. The Panel's task was to interpret multilateral agreements in respect of measures affecting Members other than the parties to this dispute. In the view of Costa Rica, the Panel must therefore, as Article 10.1 of the DSU confirmed, take into account the interests of third parties throughout the Panel process, including in the drafting of the findings. It was not sufficient to permit third parties to be present and to record their views in the descriptive part of the report. Their arguments, to the extent that they differed from those of the parties, must also be explicitly addressed in the Panel's findings.

5.83 Costa Rica submitted that in its first submission Ecuador did not clearly distinguish between claims relating to measures implementing the rulings of the panel and AB by the European Communities and claims relating to matters which neither the panel nor the AB had addressed. Ecuador's arguments did not take into account the limitation of Article 21.5 procedures to "measures taken to comply with the recommendations and rulings" of the DSB. Instead, on the allocation of the quota among supplying countries, Ecuador went so far as to ask the Panel "not only to reaffirm its prior rulings and interpretations, as affirmed and modified by the AB, but also to provide the European Communities with a more explicit recommendation and guidance as to how to comply …".[161]

5.84 For these reasons it was not clear to Costa Rica which findings Ecuador expected the Panel to make on the EC's creation and distribution of country-specific quotas for Members with a substantial supplying interest and which rulings or recommendations of the DSB these measures failed to comply with. Costa Rica assumed that Ecuador claimed that the allocation of country-specific quotas to the four Members with a substantial interest in supplying bananas and the distribution of the shares of the quota among those Members on the basis of their shares in the EC market in the period 1994-1996 were measures "taken to comply with the recommendations and rulings [of the DSB]" within the

[161] Paragraph 98 of Ecuador's first submission.

meaning of Article 21:5 of the DSU, and that both these measures were inconsistent with Article XIII of GATT. Costa Rica submitted that, if these were the claims of Ecuador, they must be rejected.

5.85 Costa Rica submitted that the allocation of country-specific quotas and the distribution of the quota shares among Members with a substantial supplying interest were matters on which neither the original panel nor the AB had made any ruling or recommendation and which could therefore not be raised as compliance issues in a proceeding under Article 21.5 of the DSU. Ecuador failed to take into account that there was an important distinction between the scope of ordinary panel procedures and that of procedures initiated in accordance with Article 21.5 of the DSU. In an ordinary panel procedure, a complaint could relate to any measure.[162] Proceedings under Article 21.5 were, however, limited to disputes on measures taken to comply with the recommendations or rulings of the DSB, i.e. exclusively about matters on which a panel or the AB had already made rulings and corresponding recommendations. This followed from the wording of Article 21.5, which accorded Members the right to resort to these procedures only in respect of a "disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings [of the DSB]". If a new matter could be submitted to a panel under an Article 21.5 procedure, the party complained against would be deprived of many of the procedural rights it would have enjoyed had the matter been submitted to an ordinary panel proceeding, including the right to an implementation period of 15 months. Moreover, an examination of entirely new issues within the constrained timeframe of Article 21.5 procedures amounted to a denial of due process.

5.86 Costa Rica submitted further that Ecuador was of the view that the European Communities should abandon country-specific quotas altogether. Ecuador, while conceding that country-specific quotas were permitted under Article XIII, essentially argued that a single global quota would be more efficient. Ecuador therefore did not distinguish between what it considered to be desirable *de lege ferenda* and the recommendations the Panel was entitled to make *de lege lata*. Furthermore, neither the panel nor the AB had made any rulings or recommendations calling into question the right of the European Communities to allocate country-specific quotas. On the contrary, their rulings and recommendations relating to the manner in which the country-specific quotas were to be administered implied that the European Communities had the right to make country-specific allocations.

5.87 According to Costa Rica, Ecuador was also of the view that the allocation of shares among the Members with a substantial interest in supplying bananas was inconsistent with Article XIII:2(d), second sentence, of the GATT, because the European Communities had selected 1994-1996 as the previous representative period, which could not be considered to be representative within the meaning of that provision, and because the European Communities should have taken into account special factors justifying the allocation of a larger share to Ecuador. However, neither the panel nor the AB had addressed the question of how the shares of the quota would have to be allocated among Members with a substantial supplying interest once the EC's separate regimes for ACP bananas and other bananas had been merged for the purposes of Article XIII. In the view of Costa Rica, the panel had made it explicit that it considered this matter to be a subsidiary issue that it need not examine.[163]

5.88 According to Costa Rica it was therefore clear that Ecuador was asking the Panel to address aspects of the banana import regime that had not yet been examined, to develop an entirely new interpretation of the concepts of "representative period" and "special factors" and to apply this interpretation to an extremely complex factual situation which was not the subject of a finding by the panel in the original proceeding. Ecuador's requests therefore fell outside the framework of Article 21.5 of the DSU and must consequently be rejected by the Panel.

[162] Article 7 of the DSU.
[163] Paragraphs 7.94 and 7.88 of the panel report.

1. Issues related to the GATT

5.89 Costa Rica submitted that the European Communities was not only permitted to allocate country-specific quotas to Costa Rica and the other Members with a substantial interest in supplying bananas under Article XIII of GATT but obliged to do so under Article II of GATT. The European Communities was entitled to allocate the quota shares on the basis of a previous representative period irrespective of any difficulties in determining a period that was representative.[164]

5.90 Costa Rica argued that the allocation of country-specific quotas was a right of the European Communities under Article XIII:2 of GATT. Article XIII:2 did not state that this right may only be exercised when there were no difficulties in establishing a period that was representative. The assumption underlying this provision was that a Member, by selecting a base period and appraising any special factors that may have affected or may be affecting the trade in the product, could arrive at a distribution of quota shares that satisfied the principle of non-discrimination. The drafters of Article XIII took into account the fact that no allocation method guaranteed a distribution of trade identical to that which would prevail in the absence of the restriction. They declared the non-discrimination requirement therefore to be satisfied when the measures taken "aim" at a distribution of trade "approaching as closely as possible" the distribution which "might be expected" in the absence of the quota. In the view of Costa Rica, it was therefore incorrect when Ecuador stated that "country allocations are allowed at least in some circumstances"[165] implying that there were circumstances in which a country-specific allocation was *a priori* excluded.

5.91 Costa Rica claimed further that the European Communities was obliged to allocate country-specific quotas to Costa Rica and the other Members with a substantial supplying interest in accordance with the tariff quota concession for bananas incorporated in its Schedule. This agreement was consequently part of the EC's obligations under Article II of GATT. For the purposes of an examination of the issues raised by Ecuador, two sets of obligations of the European Communities under the BFA could be distinguished:

(a) to allocate shares of the tariff quota established by the European Communities to countries with a substantial supplying interest, such as Costa Rica; and

(b) to allocate shares of this quota to countries not having a substantial supplying interest and to distribute, and under certain circumstances, redistribute, the quota shares in certain proportions.

5.92 Costa Rica argued that the first set of BFA obligations listed above had not been found to be inconsistent with the EC's obligations under the GATT. The panel had found that "it was not unreasonable for the European Communities to conclude that at the time the BFA was negotiated Colombia and Costa Rica were the only contracting parties that had a substantial interest in supplying the EC banana market in terms of Article XIII:2(d)"[166]. The European Communities therefore continued to observe those clauses of the BFA that were consistent with the GATT by allocating a share of its tariff rate quota to all Members with a substantial supplying interest. Only the second set of BFA obligations listed above was found by the panel to be inconsistent with Article XIII which had given the European Communities a valid ground for suspending the operation of those provisions.[167] However, the European Communities was under a legal obligation to continue to observe those clauses of the BFA that were not found to be invalid by the panel. This was confirmed by Article 44 of the Vienna Convention on the Law of Treaties, entitled "Separability of treaty provisions", which

[164] Paragraph 95 of Ecuador's first submission.
[165] Paragraph 105 of Ecuador's first submission.
[166] Paragraph 7.85 of the panel report.
[167] Paragraph 7.90 of the panel report.

codified the rules of customary international law governing the partial invalidity of a treaty. Paragraph 3 thereof provided:

> "If the ground [for suspending the operation of the treaty] relates solely to particular clauses, it may be invoked only with respect to those clauses where:
>
> (a) the said clauses are separable from the remainder of the treaty with regard to their application;
>
> (b) it appears from the treaty or is otherwise established that acceptance of those clauses was not an essential basis of the consent of the other party or parties to be bound by the treaty as a whole; and
>
> (c) continued performance of the remainder of the treaty would not be unjust."

5.93 Costa Rica claimed that all of the above conditions for the separability of treaty provisions were met in the present case. The clauses of the BFA providing for allocation of quota shares to countries with a substantial supplying interest could be applied separately from the clauses that called for a discriminatory administration of the quotas. Moreover, discrimination against the two non-BFA countries with a substantial supplying interest (Ecuador and Panama) was not an essential basis for the BFA countries and the EC's consent to the allocation of quota shares for the two BFA countries with a substantial supplying interest (Costa Rica and Colombia). No circumstances had arisen which would render the continued performance of the GATT-consistent provisions of the BFA unjust. On the contrary, the concession of the European Communities incorporating the BFA was "paid for" by the BFA countries through counter-concessions. It was therefore appropriate that the European Communities continued to perform those obligations under the BFA that it could implement consistently with the GATT, including the obligation to accord a country-specific quota to BFA countries with a substantial supplying interest.

5.94 The principles of international law governing the separability of treaty provisions, Costa Rica submitted, were particularly relevant in the case of the provisions contained in GATT Schedules of Concessions. The concessions incorporated in the Schedules generally resulted from a process of give and take during multilateral trade negotiations. The trade opportunities a Member must provide in accordance with its Schedule were therefore normally "paid for" by counter-concessions of other Members. If a concession was subsequently declared to be partly inconsistent with the GATT, the beneficiaries of that concession lost advantages without being able to withdraw the counter-concessions they had made to obtain that advantage, and the negotiated balance of concessions was consequently upset. To minimize such imbalances, the part of the concession that could be carried out consistently with the WTO agreements should be presumed to be separable from the part found to be inconsistent with such an agreement.

5.95 In the view of Costa Rica the European Communities had therefore the obligation under Article II of GATT to accord a country-specific quota to Colombia and Costa Rica and under Article XIII of GATT the obligation to extend this benefit to Ecuador and Panama. The European Communities could therefore not abandon its system of country-specific quotas for Members with a substantial supplying interest without violating its obligations under the GATT. Costa Rica submitted that Ecuador's request for the Panel to call upon the European Communities to eliminate country-specific quotas must therefore be rejected.

5.96 Costa Rica contended that the allocation of the quota shares among the Members with a substantial interest in supplying bananas on the basis of the 1994-1996 period met the requirements of Article XIII of GATT and that Ecuador bore the burden of proving that the EC's selection of a base period and appraisal of special factors was inconsistent with Article XIII.

5.97 According to the generally accepted rules on the distribution of the burden of proof, Costa Rica argued, Ecuador, as the party claiming that the EC's regime remained inconsistent with Article XIII, must provide evidence supporting the above claim.[168] If any uncertainty were to remain after the evaluation of the evidence before the Panel, the European Communities would have to be given the benefit of the doubt. This followed from the fact that Article XIII:4 specified that "the selection of a representative period for any product and the appraisal of any special factors affecting the trade in the products shall be made initially by the Member applying the restrictions" and that it then was for those Members which considered that there was a "need for an adjustment of the proportions determined or of the base period selected, or for the reappraisal of the special factors involved" to request consultations with the Member applying the restrictions. Costa Rica submitted that Ecuador had not met its burden of proof.

5.98 Costa Rica argued further that Ecuador objected to the selection of the 1994-1996 period because trade was distorted by measures which had been found to be inconsistent by the panel. However, there was nothing in the panel report suggesting that the European Communities should have chosen a more recent base period. Under the banana regime originally examined by the panel the European Communities had based the distribution of trade shares in 1995 on market shares in the 1989-1991 period. The Panel concluded that it was reasonable for the European Communities to base its determination that Colombia and Costa Rica were substantial suppliers in 1995 on their market shares during a three-year period ending four years before 1995. The European Communities was now basing the distribution of trade shares in 1999 on market shares during a period ending three years before 1999. Under the new banana import regime the base period selected was thus more recent than the period which the Panel considered to be relevant for the purpose of determining the substantial supplier status. Against this background it was difficult to see on which basis one could conclude that the choice of the base period was inconsistent with the recommendations and rulings the DSB made on the basis of the original panel's report.

5.99 Costa Rica recalled that Ecuador's share in the world market during the relevant base period would not justify a re-appraisal of the special factors affecting banana trade since, according to the data provided by Ecuador, the average share of Ecuador in the world market during the 1994-1996 period was 26.36 per cent which was almost identical to the quota share of 26.17 per cent allocated by the European Communities. In any case, trade statistics, as such, were not a special factor within the meaning of Article XIII:2. Statistics served to establish the shares of trade during a previous representative period; factors other than trade statistics could be used to determine whether the quota shares should differ from the trade shares during that period.

5.100 Furthermore, Costa Rica contended that Ecuador claimed that the increase in Costa Rica's country-specific quota share established under Annex I of Regulation 2362 was attributable to the shortfall reallocation carried out under the BFA.[169] Ecuador also claimed that the increase in Costa Rica's quota share, as a result of the recent changes introduced to the allocations of the country-specific quota, based on the 1994-1996 period, "precisely coincide with the shares taken from Venezuela and Nicaragua".[170] Costa Rica submitted that at no time during the years 1994, 1995 and 1996 did it benefit from the reallocation of country shares originally allocated to other BFA countries. The percentage allocated to Costa Rica faithfully reflected its share in the EC market during the representative period.

5.101 Costa Rica submitted that the allocation of country-specific quotas to Costa Rica and the other Members with a substantial interest in supplying bananas and the distribution of the quota shares

[168] See AB report on *United States - Measures Affecting Imports of Woven Wool Shirts and Blouses from India* (WT/DS33/AB/R) Section II. A. 1.

[169] Paragraph 15 of Ecuador's first submission.

[170] Paragraph 80, subparagraph 4, and paragraph 94 of Ecuador's first submission.

among those Members on the basis of their shares in the EC market during 1994-1996 were measures on which neither the panel nor the AB had made recommendations or rulings for adoption by the DSB. Costa Rica therefore considered that these measures were not "measures to comply with the recommendations and rulings" of the DSB and that they could not be examined in the framework of a proceeding under Article 21.5 of the DSU.

5.102 Costa Rica further considered that, if the Panel were to examine these measures, it would have to find that:

(a) the European Communities not only had the right to allocate country-specific quotas to Costa Rica and the other Members with a substantial interest in supplying bananas under Article XIII of GATT, but was obliged to do so under Article II of GATT; and

(b) Ecuador failed to demonstrate that the distribution of the quota shares on the basis of the shares of imports during the 1994-1996 period did not meet the requirements of Article XIII.

5.103 In either case Ecuador's request that the Panel recommend the elimination of country-specific quotas or a redistribution of the quota shares would therefore have to be rejected.

F. ECUADOR'S RESPONSE TO THIRD PARTIES

5.104 In response to the argument presented by the Caribbean States concerning the company Leon Van Parys (LVP) (see paragraph 5.54 above), **Ecuador** submitted that LVP was a substantial importer and wholesaler of Ecuadorian bananas on the EC market, and it was the largest EC company in the Noboa Group.

5.105 Ecuador submitted further that the Caribbean States had misunderstood Ecuador's statement that its services providers had invested some US$200 million under the prior system to buy-back market access (see paragraph 5.58 above).[171] The investment was the price of buying the ability to get bananas entered into the European Communities – in effect, the quota rent granted to EC and ACP services suppliers under the prior system – without obtaining the licences themselves.

5.106 Ecuador submitted that the Odeadom data cited by the Caribbean States showed only changes in licence allocations by member State and did not show changes in licence allocations by services provider. While some former Category B licence holders (in France and Spain or elsewhere) may not have always ensured that they had title at customs clearance, such that other operators could now claim reference quantities for those, that was not shown by data on shifts in licence allocations by member State. Indeed, a shift from one member Sate to another could as easily result from internal shifts in the operations of an operator group, or from licence transfers from one former Category B holder to another EC or ACP services provider in another member State, as from any shift to wholesalers of third-country bananas

5.107 In response to allegations that Ecuador's evidence was insufficient to substantiate continuing discrimination against Ecuadorian services suppliers, Ecuador submitted that the Noboa Group's licence allocations covered less than half of the volumes it physically imported into the European Communities (i.e. imports that were customs cleared either by a Noboa company or by an unrelated company).

[171] Paragraphs 81, 82 and 96 of the submission of the Caribbean States.

VI. FINDINGS

6.1 This case arises out of a challenge by Ecuador of the WTO-consistency of measures taken by the European Communities to implement the recommendations and rulings of the Dispute Settlement Body ("DSB") in *European Communities – Regime for the Importation, Sale and Distribution of Bananas* (DS/27/R/ECU & DS/27/AB/R). In particular, Ecuador claims that Regulations 1637/98 and 2362/98 are inconsistent with the EC's obligations under Articles I and XIII of GATT 1994 and Articles II and XVII of GATS. Ecuador also invokes Article 19 of the Dispute Settlement Understanding ("DSU") and requests the Panel to suggest how the European Communities could implement any recommendations that the Panel might make. We first consider certain procedural issues and our terms of reference and then examine Ecuador's claims.

A. WORKING PROCEDURES AND TIMETABLE

6.2 On 15 January 1999, we met with the parties to establish our working procedures and a timetable for the panel proceeding. Given the short period of time available to complete a proceeding under Article 21.5 of the DSU, we did not include in the timetable an interim review period. Both parties requested that we reconsider the possibility of having an interim report. We ultimately concluded that the time necessary to draft the report would not allow us to issue an interim report and still meet the 90-day deadline of Article 21.5. Accordingly, we confirm our initial decision not to provide an interim report.

B. TERMS OF REFERENCE

6.3 The European Communities argues that the terms of reference of this Panel are limited by Article 21.5 of the DSU to the "matters" on which the DSB adopted its recommendations or rulings based on the original panel and Appellate Body reports in this case.[172] In the EC's view, this Panel can only verify the consistency of measures taken to comply with those recommendations and not consider other claims raised by Ecuador.[173] In particular, the European Communities notes that it would be disadvantaged if new claims were allowed because the shorter period of time allowed for an Article 21.5 panel process (90 days compared to a normal panel timetable of at least six months) would affect its ability to defend its measures and because it would not be entitled to a new reasonable period of time to implement any new panel recommendations or rulings. It also argues that it would be inappropriate for the Panel to make recommendations on implementation of the sort requested by Ecuador.

6.4 In Ecuador's view, the limitation proposed by the European Communities is not found in the text of Article 21.5, which refers to disagreements as to the consistency with covered agreements of measures taken to comply with DSB recommendations and rulings. As to the shorter period of time, Ecuador notes that the European Communities has spent 15 months considering the implementation of the original recommendations and rulings and thus does not need as much time as might be necessary in a first-time challenge to an import regime. It also notes that it has waited a long time for the European Communities to comply with its obligations under the WTO Agreement. As to its request that the Panel make specific recommendations and suggestions, Ecuador argues that it has the right to make such a request under Article 19 of the DSU.

[172] Colombia and Costa Rica make a similar argument as third parties.

[173] According to the European Communities, such claims include Ecuador's arguments concerning its share of the tariff quota (e.g. concerning the "representative period", "special factors" and the effect of the so-called BFA reallocation), its request that the Panel suggest that the European Communities implement a global tariff quota for bananas, and its GATS arguments in respect of "actual" importers and newcomers.

6.5 In considering the scope of our terms of reference, we recall that when this case was referred to the Panel by the DSB, it was provided that the Panel would have standard terms of reference. Such terms of reference are defined in Article 7.1 of the DSU and, as adapted to this case, are as follows:

> "To examine, in the light of the relevant provisions of the covered agreements cited by Ecuador in document WT/DS27/41, the matter referred to the DSB by Ecuador in that document and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements".[174]

6.6 As recently explained by the Appellate Body:

> "'[T]he matter referred to the DSB for purposes of Article 7 of the DSU … must be the 'matter' identified in the request for establishment of a panel under Article 6.2 of the DSU. That provision requires the complaining Member, in a panel request, to 'identify the *specific measures at issue* and provide a brief summary of the *legal basis of the complaint* sufficient to present the problem clearly'. The '*matter* referred to the DSB', therefore, consists of two elements: the specific *measures* at issue and the *legal basis of the complaint* (or the *claims*)."[175]

6.7 Thus, pursuant to our terms of reference, we are to consider the matter referred to the DSB by Ecuador and that matter consists of the measures and claims specified by Ecuador in WT/DS27/41. The limitation suggested by the European Communities cannot be found in our terms of reference.

6.8 That limitation also cannot be found in the ordinary meaning of the terms of Article 21.5 of the DSU. The text of Article 21.5 provides (emphasis added):

> "Where 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, including wherever possible resort to the original panel."

Article 21.5 refers to the "consistency with a covered agreement of measures taken to comply with the recommendations and rulings". Here it is clear that the two measures specified by Ecuador (Regulations 1637/98 and 2362/98) were "taken [by the European Communities] to comply" with the DSB's recommendations, as they modify aspects of the EC's banana import regime found by the original panel and Appellate Body reports to be inconsistent with the EC's WTO obligations. There is no suggestion in the text of Article 21.5 that only certain issues of consistency of measures may be considered. Nor is there a suggestion that the term "measures" has a special meaning in Article 21.5 that would imply that only certain aspects of a measure can be considered.

6.9 This interpretation of Article 21.5 of the DSU is supported by its context and the object and purpose of the DSU. For example, Article 21.1 of the DSU states that "[p]rompt compliance with the recommendations and rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members". Article 3, which sets out the general provisions of the DSU, provides in its paragraph 3:

> "The prompt settlement of situation in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member is essential to the effective functioning of the

[174] WT/DS27/44.

[175] Appellate Body report on *Guatemala – Anti-dumping Investigation Regarding Portland Cement from Mexico*, adopted on 25 November 1998, WT/DS60/AB/R, paragraph 72.

> WTO and the maintenance of a proper balance between the rights and obligations of Members."

Acceptance of the EC argument would mean in many cases that two procedures would be necessary. One expedited panel procedure to ascertain if the offending measures have been removed, and a second normal panel procedure to consider the overall consistency with WTO obligations of the new measure. Such a process would not promote and would not be consistent with the prompt settlement of disputes.[176]

6.10 As to the EC's argument that it is unfair to expect it to defend itself in respect of new issues in an expedited panel process, we note that the issues raised by Ecuador in this proceeding are quite similar to those raised in *Bananas III*. As to the EC's argument that it will be deprived of a reasonable period of time in which to implement any new recommendations and rulings of the DSB, that would not justify limiting the scope of an Article 21.5 proceeding. In any event, in our view, these arguments to restrict the scope of Article 21.5 on the grounds of alleged unfairness are not based on the text of Article 21.5 and do not offset the arguments outlined above concerning the need to resolve promptly implementation issues in one panel proceeding.

6.11 As to the question of whether we have the authority to make suggestions in respect of implementation, it is clear from Article 19.1 of the DSU that panels do have such authority. There is nothing in Article 19.1 that suggests that it does not apply to panels established pursuant to Article 21.5. Indeed, the need for prompt resolution of disputes would support more frequent use of that authority in Article 21.5 cases than in others. However, whether we should make suggestions in this case is an issue for later consideration.

6.12 Accordingly, we find that our terms of reference cover all of the claims raised by Ecuador in this proceeding and that we are authorized by Article 19.1 of the DSU to make suggestions on implementation should we consider it appropriate to do so.

C. ARTICLE XIII OF GATT 1994

6.13 We first address Ecuador's claims under Article XIII of GATT 1994 since that Article regulates tariff quotas, the operation of which is the focus of this case. Ecuador claims that Regulations 1637/98 and 2362/98, in the way in which they (i) establish a tariff quota providing duty-free treatment for 857,700 tonnes of traditional banana imports from 12 ACP States and (ii) assign to Ecuador a country-specific share of the EC's MFN tariff quota for bananas, are inconsistent with the EC's obligations under Article XIII of GATT 1994.

6.14 In this regard, we note that Regulation 1637/98 confirms the tariff quota of 2,200,000 tonnes bound in the EC Schedule and an additional autonomous tariff quota of 353,000 tonnes.[177] These are at the same levels as in the prior regime. Given that an agreement on the allocation of country-specific allocations could not be achieved with the substantial suppliers, in Regulation 2362/98 the European Communities assigned the following country shares to each of the substantial suppliers pursuant to Article XIII:2(d) (i.e. Colombia, Costa Rica, Ecuador and Panama):

[176] Further support for our interpretation of Article 21.5 can be found in Article 9 of the DSU, paragraph 3 of which provides: "If more than one panel is established to examine the complaints related to the same matter, to the greatest extent possible the same persons shall serve on each of the separate panels and the timetable for the panel process in such disputes shall be harmonized." Such harmonization would be impossible if the limitation on the scope of Article 21.5 proposed by the European Communities were to be accepted.

[177] Article 18, paragraphs 1 and 2 of Regulation 1637/98.

Table 1 – EC tariff quota allocations for third-country and non-traditional ACP banana suppliers

Country	Share (%)[178]	Volume ('000 tonnes)[179]
Colombia	23.03	588.0
Costa Rica	25.61	653.8
Ecuador	26.17	668.1
Panama	15.76	402.4
Other	9.43	240.7
Total of the above	100.00	2,553.0

6.15 The Annex to Regulation 1637/98 provides for an aggregate quantity of 857,700 tonnes for traditional imports from ACP States. Under the revised EC regime, there are no longer any country-specific allocations to the 12 traditional ACP States (i.e. Belize, Cameroon, Cape Verde, Côte d'Ivoire, Dominica, Grenada, Jamaica, Madagascar, Somalia, St. Lucia, St. Vincent & the Grenadines, and Suriname).[180]

6.16 The relevant provisions of Article XIII are the following:

> *"Non-discriminatory Administration of Quantitative Restrictions*
>
> 1. No prohibition or restriction shall be applied by any Member on the importation of any product of the territory of any other Member or on the exportation of any product destined for the territory of any other Member, unless the importation of the like product of all third countries or the exportation of the like product to all third countries is similarly prohibited or restricted.
>
> 2. In applying import restrictions to any product, Members shall aim at a distribution of trade in such product approaching as closely as possible the shares which the various Members might be expected to obtain in the absence of such restrictions and to this end shall observe the following provisions:
>
> …
>
> (*d*) In cases in which a quota is allocated among supplying countries the Member applying the restrictions may seek agreement with respect to the allocation of shares in the quota with all other Members having a substantial interest in supplying the product concerned. In cases in which this method is not reasonably practicable, the Member concerned shall allot to Members having a substantial interest in supplying the product shares based upon the proportions, supplied by such Members during a previous representative period, of the total quantity or value of imports of the product, due account being taken of any special factors which may have affected or may be

[178] Annex I to Regulation 2362/98.
[179] Calculation of absolute shares based on the 2,553,000 tonne tariff quota and the shares of substantial suppliers according to Annex I to Regulation 2362/98.
[180] Annex to Regulation 1637/98 and Annex I to Regulation 2362/98.

affecting the trade in the product. No conditions or formalities shall be imposed which would prevent any Member from utilizing fully the share of any such total quantity or value which has been allotted to it, subject to importation being made within any prescribed period to which the quota may relate.

4. With regard to restrictions applied in accordance with paragraph 2 (*d*) of this Article or under paragraph 2 (*c*) of Article XI, the selection of a representative period for any product and the appraisal of any special factors affecting the trade in the product shall be made initially by the Member applying the restriction; *Provided* that such Member shall, upon the request of any other Member having a substantial interest in supplying that product or upon the request of the CONTRACTING PARTIES, consult promptly with the other Member or the CONTRACTING PARTIES regarding the need for an adjustment of the proportion determined or of the base period selected, or for the reappraisal of the special factors involved, or for the elimination of conditions, formalities or any other provisions established unilaterally relating to the allocation of an adequate quota or its unrestricted utilization.

5. The provisions of this Article shall apply to any tariff quota instituted or maintained by any Member, and, in so far as applicable, the principles of this Article shall also extend to export restrictions."

6.17 In examining the revised EC banana regime and its consistency with Article XIII, we recall that in *Bananas III* the Appellate Body overruled the panel's interpretation of the scope of the Lomé waiver and held that the Lomé waiver does not cover inconsistencies with Article XIII. Accordingly, in considering Article XIII issues, we do not consider what is or is not required by the Lomé Convention. We address that issue in connection with Ecuador's claims under Article I of GATT.

1. The 857,700 tonnes reserved for traditional imports from ACP States

6.18 Ecuador alleges that the division of the revised EC import regime for bananas into (i) an MFN tariff quota of 2,553,000 tonnes, in combination with (ii) an amount of 857,700 tonnes reserved for traditional imports from ACP States at a zero-duty level fails to conform to the non-discrimination requirements of Article XIII and amounts to a continued application of "separate regimes" of the sort found to be inconsistent with Article XIII by the original panel and the Appellate Body in *Bananas III*.

6.19 The European Communities responds that a single import regime exists under Regulations 1637/98 and 2362/98. It is the EC's position that for purposes of Article XIII the quantity of 857,700 tonnes for traditional ACP imports is outside the MFN tariff quota of 2,553,000 tonnes and Ecuador should therefore have no interest in it. In the EC's view, the amount of 857,700 tonnes constitutes an upper limit for the zero-tariff preference for traditional ACP imports. It notes that the tariff preference is required by the Lomé Convention and is covered by the Lomé waiver as to any inconsistency with Article I:1 of GATT. In addition, the European Communities relies on the panel report on *EEC - Imports of Newsprint*[181] in arguing that imports under preferential arrangements should not be counted against an MFN tariff quota. The European Communities also argues that its collective allocation of an amount of 857,700 tonnes for traditional imports from ACP States is effectively required by the Appellate Body report in *Bananas III.*

[181] Panel report on *EEC - Imports of Newsprint*, adopted on 20 November 1984, BISD 31S/114, 130-133.

(a) The Applicability of Article XIII

6.20 Article XIII:5 provides that the provisions of Article XIII apply to "tariff quotas". The European Communities essentially argues that the amount of 857,700 tonnes for traditional imports from ACP States constitutes an upper limit on a tariff preference and is not a tariff quota subject to Article XIII. However, by definition, a tariff quota is a quantitative limit on the availability of a specific tariff rate. Thus, Article XIII applies to the 857,700 tonne limit.

6.21 In our view, the *Newsprint* case does not affect the applicability of Article XIII to the tariff quota for traditional imports from ACP States. In that case, the European Communities had unilaterally reduced a 1.5 million tonnes tariff quota for newsprint to 500,000 tonnes on the grounds that certain past supplying countries under the tariff quota had entered into free-trade agreements with the European Communities and that the tariff quota should be reduced to reflect that fact. The panel held that the European Communities could not unilaterally make such a change. In passing, the *Newsprint* panel stated: "Imports which are already duty-free, due to a preferential agreement, cannot by their very nature participate in an MFN duty-free quota."[182] The *Newsprint* panel did not deal with the applicability of Article XIII to a case such as this one. Moreover, our findings do not imply that the European Communities must count from ACP States imports against its MFN tariff quota.

6.22 As to the EC's suggestion that Ecuador has no interest in the collective allocation to traditional ACP suppliers, we note that the price and even the volume of Ecuador's exports could be affected by the price and volume of traditional ACP exports. In any event, under *Bananas III*, it is clear that Ecuador may bring this claim.[183]

6.23 **Accordingly, we find that the 857,700 tonne limit on traditional ACP imports is a tariff quota and therefore Article XIII applies to it**.

(b) The Requirements of Article XIII and the 857,700 Tonne Tariff Quota for Traditional ACP Imports

6.24 Ecuador raises claims in respect of the 857,700 tonne tariff quota under both paragraphs 1 and 2 of Article XIII. We address these claims in that order. In assessing the 857,700 tonne tariff quota for traditional ACP exports in light of the requirements of Article XIII, we recall the Appellate Body's findings in *Bananas III* concerning "separate regimes":

> "The issue here is not whether the European Communities is correct in stating that two separate regimes exist for bananas, but whether the existence of two, or more, separate EC import regimes is of any relevance for the application of the non-discrimination provisions of the GATT 1994 and the other Annex 1A agreements. The essence of the non-discrimination obligations is that like products should be treated equally, irrespective of their origin. As no participant disputes that all bananas are like products, the non-discrimination provisions apply to all imports of bananas, irrespective of whether and how a Member categorises or subdivides these imports for administrative or other reasons. If, by choosing a different legal basis for imposing import restrictions, or by applying different tariff rates, a Member could avoid the application of the 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

[182] *Ibid.*, paragraph 55.

[183] Panel reports on *Bananas III*, paragraphs 7.47-7.52; Appellate Body report on *Bananas III*, paragraphs 132-138.

> agreements, if these provisions apply only within regulatory regimes established by that Member."[184]

6.25 We also recall the Appellate Body finding that the Lomé waiver does not justify inconsistencies with Article XIII. As stated by the Appellate Body:

> "In view of the truly exceptional nature of waivers from the non-discrimination obligations under Article XIII, it is all the more difficult to accept the proposition that a waiver that does not explicitly refer to Article XIII would nevertheless waive the obligations of that Article. If the CONTRACTING PARTIES had intended to waive the obligations of the European Communities under Article XIII in the Lomé Waiver, they would have said so explicitly."[185]

We, therefore, in our examination of the WTO-consistency of the EC's revised regime, have to apply fully the non-discrimination and other requirements of Article XIII to all "like" imported bananas irrespective of their origin, i.e. regardless of whether imports occur under the MFN tariff quota of 2,553,000 tonnes or under the tariff quota of 857,700 tonnes reserved for traditional ACP imports.

(i) Article XIII:1

6.26 In this regard, we note that under the revised regime, on the one hand, bananas may be imported under the MFN tariff quota on the basis of past trade performance by exporting countries during a previous representative period (i.e. the three-year period from 1994 to 1996). On the other hand, bananas from traditional ACP supplier countries may be imported up to a collective amount of 857,700 tonnes, which was originally set to reflect the overall amount of the pre-1991 best-ever exports by individual traditional ACP suppliers, with allowance made for certain investments.[186] We further note that exports under the tariff quota by some non-substantial suppliers (i.e. third-country and non-traditional ACP suppliers) are restricted, in aggregate, to 240,748 tonnes (i.e. the "other" category of the MFN tariff quota), whereas exports from other non-substantial sources of supply (i.e. traditional ACP suppliers) are restricted, in aggregate, to 857,700 tonnes. Moreover, some non-substantial suppliers, namely the ACP suppliers, could benefit from access to the "other" category of the MFN tariff quota once the 857,700 tonne tariff quota was exhausted. On the other hand, non-substantial suppliers from third countries have no access to the 857,700 tonne tariff quota once the "other" category of the MFN tariff quota is exhausted. Individual Members in these two groups – traditional ACP suppliers and the other non-substantial suppliers – are accordingly not similarly restricted. This disparate treatment is inconsistent with the provisions of Article XIII:1, which require that "[n]o … restriction shall be applied by any Member on the importation of any product of the territory of any other Member … unless the importation of the like product of all third countries … is similarly prohibited or restricted".

(ii) Article XIII:2

6.27 The general rule laid down in Article XIII:2 of GATT requires Members to "aim at a distribution of trade … approaching as closely as possible the shares which the various Members might be expected to obtain in the absence of such restrictions". To this end, where the option of allocating a tariff quota among supplying countries is chosen, Article XIII:2(d) provides that allocations of shares (i.e. country-specific allocations for *substantial* suppliers; and a global allotment in an "other" category for *non-substantial* suppliers unless country-specific allocations are allotted to

[184] Appellate Body report on *Bananas III*, paragraph 190.
[185] Appellate Body report on *Bananas III*, paragraph 187.
[186] The country-specific allocations for, e.g. Belize, Cameroon, Côte d'Ivoire and Jamaica seem to include allowances for investment made.

each and every non-substantial supplier) should be based upon the proportions supplied during a previous representative period. The European Communities explains that it chose the three-year period from 1994 to 1996 as the most recent three-year period for which reliable import data were available.

6.28 According to the information available to us, for traditional ACP supplier countries the average exports during the three-year period from 1994 to 1996 were collectively at a level of approximately 685,000 tonnes, which is only about 80 per cent of the 857,700 tonnes reserved for traditional ACP imports under the previous as well as under the revised regime. In contrast, the MFN tariff quota of 2.2 million tonnes (autonomously increased by 353,000 tonnes) has been virtually filled since its creation (over 95 per cent) and there have been some out-of-quota imports. Thus, the allocation of an 857,700 tonne tariff quota for traditional banana imports from ACP States is inconsistent with the requirements of Article XIII:2(d) because the EC regime clearly does not aim at a distribution of trade approaching as closely as possible the shares which various Members might be expected to obtain in the absence of restrictions.

6.29 **In light of the foregoing, and in light of the Appellate Body findings that the Lomé waiver does not cover inconsistencies with Article XIII, we find that imports from different *non-substantial* supplier countries are not similarly restricted in the meaning of Article XIII:1 of GATT. Moreover, we find that the allocation of a collective tariff quota for traditional ACP States does not approach as closely as possible the share which these countries might be expected to obtain in the absence of the restrictions as required by the chapeau to Article XIII:2 of GATT. Therefore, we find that the reservation of the quantity of 857,700 tonnes for traditional ACP imports under the revised regime is inconsistent with paragraphs 1 and 2 of Article XIII of GATT**.

(c) The Requirements of the Appellate Body report in *Bananas III*

6.30 The European Communities recalls that the panel and the Appellate Body held in *Bananas III* that it is required by the Lomé Convention to provide duty-free access to traditional exports from ACP suppliers in an amount of their pre-1991 best-ever exports (i.e. 857,700 tonnes) and that the Appellate Body held that it could not assign country-specific allocations to those suppliers inconsistently with Article XIII. It argues that in consequence the Appellate Body report in *Bananas III* requires it to provide a collective allocation of 857,700 tonnes to those suppliers.

6.31 We note, however, that the panel and Appellate Body reports made it clear that what was required by the Lomé Convention was not necessarily covered by the Lomé waiver. And, as the Appellate Body found in *Bananas III*, the European Communities is not authorized by the Lomé waiver to act inconsistently with its obligations under Article XIII. The Appellate Body also upheld the panel finding that the European Communities could not allocate country-specific shares to some non-substantial suppliers (e.g. traditional and non-traditional ACP countries and BFA signatories) unless country-specific allocations were also given to all non-substantial suppliers.

6.32 We stress that the foregoing analysis does not render the Lomé waiver meaningless (see paragraphs sections D.4 and F below). We have taken appropriate account of the EC's admonition that we should not interpret Article XIII so as to reduce the Lomé waiver or Article I to inutility. Nor have we added to or reduced the rights or obligations of Members contrary to Article 3.2 of the DSU.

2. Ecuador's Share of the MFN Tariff Quota

6.33 Article XIII:2(d) provides that if a Member decides to allocate a tariff quota it may seek agreement on the allocation of shares in the quota with those Members having a substantial interest in supplying the product concerned. In the absence of such an agreement, the Member:

> "shall allot to Members having a substantial interest in supplying the product shares based upon the proportions, supplied by such Members during a *previous representative period*, of the total quantity or value of imports of the product, due account being taken of any *special factors* which may have affected or may be affecting the trade in the product" (emphasis added).

6.34 Ecuador challenges the EC's allocation of the MFN tariff quota to it on the grounds that its share does not approximate the share that it might be expected to obtain in the absence of restrictions. It also argues that given the history of trade-distortive EC banana measures, it is far from clear that any country-share allocation system could be devised based on the idea of a representative period and special factors that would meet the requirements of Article XIII:2 (see paragraphs 6.47-6.48).

6.35 The European Communities notes that it based its calculation of country allocations under the MFN tariff quota of the revised regime on the three-year period from 1994 to 1996. In the EC's view, this was the most recent three-year period for which reliable data were available at the time.

(a) The Requirements of Article XIII

6.36 In considering Ecuador's claims regarding its tariff quota share under Article XIII, we recall our findings in *Bananas III*:

> "The wording of Article XIII is clear. If quantitative restrictions are used (as an exception to the general ban on this use in Article XI), they are to be used in the least trade-distorting manner possible. In the terms of the general rule of the chapeau of Article XIII:2:
>
> 'In applying import restrictions to any product, Members shall aim at a distribution of trade in such product approaching as closely as possible the shares which the various Members might be expected to obtain in the absence of such restrictions …'
>
> In this case we are concerned with tariff quotas, which are permitted under GATT rules, and not quantitative restrictions *per se*. However, Article XIII:5 makes it clear, and the parties agree, that Article XIII applies to the administration of tariff quotas. In light of the terms of Article XIII, it can be said that the object and purpose of Article XIII is to minimize the impact of a quota or tariff quota regime on trade flows by attempting to approximate under such measures the trade shares that would have occurred in the absence of the regime."[187]

6.37 We also noted the following:

> "[I]n order to bring its banana import regulations into line with Article XIII, the European Communities would have to take account of Article XIII:1 and XIII:2(d). In order to allocate country-specific tariff quota shares consistently with the requirements of Article XIII, the European Communities would have to base such shares on an appropriate previous representative period[375] and any special factors would have to be applied on a non-discriminatory basis."

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[375]"In this regard, we note with approval the statement by the 1980 *Chilean Apples* panel:

[187] Panel reports on *Bananas III*, paragraph 7.68.

> '[I]n keeping with normal GATT practice the Panel considered it appropriate to use as a 'representative period' a three-year period previous to 1979, the year in which the EC measures were in effect. Due to the existence of restrictions in 1976, the Panel held that that year could not be considered as representative, and that the year immediately preceding 1976 should be used instead. The Panel thus chose the years 1975, 1977, 1978 as a 'representative period'.'
>
> [Citation omitted.] In the report of the 'Panel on Poultry' issued on 21 November 1963, GATT Doc. L/2088, paragraph 10, the panel stated: '[T]he shares in the reference period of the various exporting countries in the Swiss market, which was free and competitive, afforded a fair guide as to the proportion of the increased German poultry consumption likely to be taken up by United States exports'. See also Panel report in 'Japan – Restrictions on Imports of Certain Agricultural Products, paragraph 5.1.3.7 [citation omitted]'."

6.38 It is to accomplish the chapeau's requirement that a "Member shall aim at a distribution of trade … approaching as closely as possible the shares which the various Members might be expected to obtain in the absence of restrictions", that Article XIII:2(d) requires, as one alternative, the allocation of shares on the basis of a previous representative period (adjusted for special factors if and to the extent appropriate).

6.39 If data from a period are out of date or imports distorted because the relevant market is restricted, then using that period as a representative period cannot achieve the aim of the chapeau. Thus, under GATT practice it is necessary that the "previous representative period" for purposes of Article XIII:2(d) be the most recent period not distorted by restrictions. As noted above, the panel on *EEC - Restrictions on Imports of Apples from Chile*[188], dealt with the question whether import restrictions reflected the proportion of imports to the European Communities "prevailing during a previous representative period" in the context of Article XI:2(c). That panel excluded the year 1976 from the most recent three-year period previous to 1979, the year when the EC restriction in dispute was in effect, and chose 1978, 1977 and 1975 instead. It held that 1976 could not be considered representative due to the existence of restrictions during that year.

6.40 The panel on *Japan - Restrictions of Imports of Certain Agricultural Products*[189] addressed the question of the absence of a "previous representative period" in the context of Article XI:2(c). It noted that:

> "… in the case before it the import restrictions maintained by Japan had been in place for decades and there was, therefore, no previous period free of restrictions in which the shares of imports and domestic supplies could reasonably be assumed to resemble those which would prevail today. … The Panel realized that a strict application of this burden of proof rule had the consequence that Article XI:2(c) could in practice not be invoked in cases in which restrictions had been maintained for such a long time that the proportion between imports and domestic supplies that would prevail in the absence of restrictions could no longer be determined on the basis of a previous representative period. … The Panel considered for these reasons that the burden of providing evidence that all requirements of Article XI:2(c)(i), including the proportionality requirement, had been met must remain fully with the contracting party invoking that provision."

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[188] Panel report on *EEC - Restrictions on Imports of Apples from Chile*, adopted on 10 November 1980, BISD 27S/98, paragraph 4.8.

[189] Panel report on *Japan - Restrictions on Imports of Certain Agricultural Products*, adopted on 22 March 1988, BISD 35S/163, paragraph 5.1.3.7.

6.41 We note that Article XI:2(c), which stipulates that quotas must be such as not to reduce the total of imports relative to domestic production which might reasonably be expected to rule between the two in the absence of restrictions, is an exception from the prohibition of quantitative restriction in Article XI:1. Article XIII regulates the non-discriminatory administration of quantitative restrictions, including, where applied, the allocation of shares among Members. The determination of a previous representative period under Article XIII raises similar problems as under Article XI:2. Thus we deem the above considerations pertinent to the case before us. The effect of a lack of a representative period under Article XIII is much less far-reaching than the lack of such a period under Article XI:2(c). In the *Japan – Restrictions* case, the lack of a suitable previous representative period precluded the use of the Article XI:2(c) exception. Under Article XIII, the lack of a suitable previous representative period would only preclude allocation of a tariff quota unilaterally. It would not preclude the use of a global tariff quota nor of country-specific allocations by agreement.

(b) The Representative Period

6.42 With regard to the selection of a "previous representative period" for applying the tariff-quota regime for imports of bananas to the European Communities, we recall that prior to 1993, EC member States applied different national import regimes. Some member States applied import restrictions or prohibitions, while imports to other member States were subject to a tariff-only regime or could enter duty-free.[190] Thus, that period could not serve as a previous representative period (see paragraph 6.37).

6.43 With the introduction of the common market organization for bananas in mid-1993, we note traditional ACP supplier countries were guaranteed country-specific allocations at pre-1991 best-ever import levels, which were far beyond their actual trade performance in the recent past. As of 1995, the Banana Framework Agreement (BFA) allocated shares of the 2,200,000 tonne tariff quota established by Regulation 404/93 to the substantial suppliers Colombia and Costa Rica. Given the distortions in the EC market prior to the BFA, the shares assigned to Colombia and Costa Rica could not have been based on a previous representative period. Moreover, the BFA contained WTO-inconsistent rules concerning the export certificate requirements and re-allocations of unused portions of country-specific allocations exclusively among BFA signatories, which further aggravated such distortions. The shares of non-traditional ACP supplier countries were also distorted because of the country-specific allocations within the quantity of 90,000 tonnes that were reserved for non-traditional ACP suppliers.

6.44 It could be argued that within the "other" category of the 2,200,000 tonne tariff quota (autonomously enlarged by 353,000 tonnes as of 1995 for the EC-15), Ecuador, Panama and the non-substantial third-country suppliers without allocated shares were competing on a relatively undistorted basis during the period when the previous regime was in force (although less so after the BFA entered into force). However, given that, for purposes of applying the requirements of Article XIII, it does not matter whether imports from some supplier countries were relatively less distorted than others since distortions with respect to one (group of) supplier countries will have repercussions on the import performance of other substantial or non-substantial supplier countries within a single-product market.

6.45 Accordingly, in our view, the 1994-1996 period could not serve as a previous representative period because of the presence in the market of the foregoing distortions.

6.46 We also note that the world market excluding the European Communities is of limited value for purposes of calculating country shares based on a previous representative period because different

[190] For a description of the market, see panel report on *EEC – Member States' Import Regime for Bananas*, issued on 3 June 1993 (not adopted), GATT Doc. DS32/R, pages 3-7.

banana-exporting countries have quite different market shares in different regions of the world. For example, Ecuador's world market share has increased from 26 to 36 per cent during the last decade and thus is significantly higher than its country allocation under the EC revised regime.[191] Panama had a world market share of approximately 2-3 per cent of the market outside the European Communities during the past decade which is much lower than its country allocation under the revised regime. The Philippines had a share of approximately 13-14 per cent of that market outside the European Communities during the past decade, but it does not export significant quantities to Europe. Thus, data on world-market shares of various supplier countries during any past period (regardless of whether such data includes or excludes exports to the European Communities) could hardly be relevant for purposes of calculating country shares based on imports to the European Communities reflecting a previous representative period. Because different banana-exporting countries have quite different market shares in different regions of the world, it would also be difficult, if not impossible, to use a regional or specific country market as a basis for allocating tariff quota shares.

(c) Special Factors

6.47 Ecuador suggests that the European Communities could comply with Article XIII by basing its system on the 1995-1997 period, with adjustments both for the need to cure the distortions that existed in the EC market and the changes in relative economic efficiency and competitiveness.

6.48 However, the European Communities did not use special factors to adjust the country-specific tariff quota share allocated to substantial suppliers under its new banana regime. While in theory special factors could be used to adjust shares based on a previous *un*representative period so as to meet the requirements of the chapeau to Article XIII:2, at least in the present case it would be difficult to do so in practice. We recall that, according to the Notes *Ad* Article XIII:4 and Article XI:2 of GATT, "the term 'special factors' includes changes in the relative productive efficiency as between domestic and foreign producers, or as between different foreign producers, but not changes artificially brought about by means not permitted under the Agreement." We note that in the past, GATT dispute settlement panels have appraised the consideration of special factors, such as "an overall trend towards an increase in Chile's relative productive efficiency and export capacity … [as well as] the temporary reduction of export capacity caused by [an] earthquake".[192] In our view, however, it would be inconsistent with paragraphs 2(d) and 4 of Article XIII to take account of special factors with respect to only one Member (see paragraph 6.37).

(d) Ecuador's Country-Specific Tariff-Quota Share

6.49 The reliance by the European Communities on a previous unrepresentative period, and without adjustment for special factors, would suggest that Ecuador's country-specific tariff-quota share does not approach the share that it might be expected to obtain in the absence of restrictions, as required by the chapeau to Article XIII:2. This is confirmed by the significant growth over the past decade in Ecuador's share of the EC[193] and world[194] markets. This growth indicates that Ecuador's country-specific tariff-quota share is less than it should be under the rules of Article XIII:2.

[191] Ecuador's world market share outside the European Communities in different three-year periods were approximately as follows: 1988-1990: 25 per cent; 1990-1992: 28 per cent; 1993-1995: 30 per cent; 1994-1996: 32 per cent; 1995-1997: 36 per cent.

[192] Panel report on *EEC - Restrictions on Imports of Apples from Chile*, adopted on 10 November 1980, BISD 27S/98, paragraph 4.17; panel report on *United States - Imports of Sugar from Nicaragua*, adopted on 13 March 1984, BISD 31S/67, paragraph 4.3; panel report on *EEC - Restrictions on Imports of Apples from Chile*, adopted on 22 June 1989, BISD 36S/93, paragraph 12.24.

[193] Annex II.

[194] Annex II.

6.50 **While Members have a degree of discretion in choosing a previous representative period, it is clear in this case that the period 1994-1996 is not a "representative period". Accordingly, we find that the country-specific allocations assigned by the European Communities to Ecuador as well as to the other substantial suppliers are not consistent with the requirements of Article XIII:2.**

D. ARTICLE I OF GATT 1994

6.51 Ecuador raises several claims under Article I. In respect of the preferential tariff of zero for the traditional imports from ACP States, Ecuador claims that the level of 857,700 tonnes exceeds what is required by the Lomé Convention and that the excess is therefore not covered by the Lomé waiver. Similarly, it claims that the collective allocation of 857,700 tonnes to the 12 traditional ACP States (as opposed to country-specific allocations) is not required by the Lomé Convention and therefore not covered by the Lomé waiver. Ecuador also challenges (i) the unlimited access to the "other" category of the MFN tariff quota at a zero-tariff level of non-traditional ACP imports and (ii) the tariff preference of 200 Euro per tonne for out-of-quota imports of ACP origin. In the previous EC regime, there was a 90,000 tonne limit on duty-free imports of non-traditional ACP bananas and the tariff preference for out-of-quota imports of ACP origin was 100 Euro per tonne.

6.52 The European Communities argues that these various provisions for ACP bananas are required by the Lomé Convention and are therefore covered by the Lomé waiver. It argues, in particular, that it was necessary to change the form of its preferential treatment of ACP imports to offset the limitations on such treatment imposed by the panel and Appellate Body reports in *Bananas III*.

1. The Lomé Waiver

6.53 In addressing Ecuador's claims under Article I:1, it is necessary to consider the scope of the Lomé waiver. In this regard, we recall that the operative paragraph of the Lomé waiver provides as follows:

> "Subject to the terms and conditions set out thereunder, the provisions of paragraph 1 of Article I of the General Agreement shall be waived, until 29 February 2000, to the extent *necessary* to permit the European Communities to provide *preferential treatment* for products originating in ACP States *as required by the relevant provisions* of the Fourth Lomé Convention, …"[195]

6.54 In considering the scope of the Lomé waiver in *Bananas III*, both the panel and the Appellate Body applied a two-stage analysis: first, consideration was given to the requirements of the Lomé Convention since only preferential treatment required by the Lomé Convention is covered by the waiver; second, the scope of the Lomé waiver was considered. This second question is of limited relevance in this case as the Appellate Body made clear in the previous case that the Lomé waiver permits inconsistencies only with Article I:1.

2. The Requirements of the Lomé Convention

6.55 In considering the requirements of the Lomé Convention, the relevant provisions of the Convention are Article 183 and Protocol 5 thereto, on the one hand, and Article 168, on the other.

6.56 Article 183 of the Lomé Convention deals specifically with bananas and provides:

[195] WT/L/186.

> "In order to permit the improvement of the conditions under which bananas originating in the ACP States are produced and marketed, the Contracting Parties hereby agree to the objectives set out in Protocol 5."

Protocol 5 in turn provides:

> "In respect of its banana exports to the Community markets, *no ACP State* shall be placed as regards *access to its traditional markets* and *its advantages on those markets*, in *a less favourable* situation than *in the past* or *at present*."

We recall that Article 183 and Protocol 5 were interpreted by the panel and the Appellate Body in the original dispute as applying only to *traditional* ACP banana imports.

6.57 Article 168 of the Lomé Convention deals more generally with preferences for ACP States. It provides as follows:

> "(1) Products originating in the ACP States shall be imported into the Community free of customs duties and charges having equivalent effect.
>
> (2)(a) Products originating in the ACP States:
>
> - listed in Annex II to the Treaty where they come under a common organization of the market within the meaning of Article 40 of the Treaty, or
>
> - subject, on import into the Community, to specific rules introduced as a result of the implementation of the common agricultural policy,
>
> shall be imported into the Community, notwithstanding the general arrangements applied in respect of third countries, in accordance with the following provisions:
>
> (i) those products shall be imported free of customs duties for which Community provisions in force at the time of import do not provide, apart from customs duties, for the application of any measure relating to their import;
>
> (ii) for products other than those referred to under (i), the Community shall take the necessary measures to ensure *more favourable treatment* than that granted to third countries benefitting from the most-favoured-nation clause for the same products."

We note that the preferential treatment foreseen by Article 168(2)(a)(ii) is not limited to traditional ACP exports to the European Communities; it covers any imports from ACP sources of products which are subject to a common market organization in the European Communities, i.e. also *non-traditional* ACP exports to the European Communities.

6.58 Given the factual circumstances under the previous regime, the Appellate Body summarized the preferential treatment required by the relevant provisions of the Lomé Convention - in keeping with the limits of its terms of reference in the original dispute - as follows:

> "Thus, of the relevant provisions of the measures at issue in this appeal, we conclude that the European Communities is *"required*" under the relevant provisions of the Lomé Convention to: provide duty-free access for all traditional ACP bananas;

> provide duty-free access for 90,000 tonnes of non-traditional ACP bananas; provide a margin of tariff preferences in the amount of 100 ECU/tonne for all other non-traditional ACP bananas; and allocate tariff quota shares to the traditional ACP States that supplied bananas to the European Communities before 1991 in the amount of their pre-1991 best-ever export volumes. We conclude also that the European Communities is *not "required"* under the relevant provisions of the Lomé Convention to: allocate tariff quota shares to some traditional ACP States in excess of their pre-1991 best-ever export volumes; allocate tariff quota shares to ACP States exporting non-traditional ACP bananas; or maintain the import licensing procedures that are applied to third country and non-traditional ACP bananas. We therefore uphold the findings of the Panel in paragraphs 7.103, 7.204 and 7.136 of the Panel Reports." [196]

6.59 In light of these Appellate Body findings in the original dispute, we will discuss in turn which elements of the revised EC regime are "*required*" by the Lomé Convention in respect of (i) traditional ACP imports and (ii) non-traditional ACP imports.

3. Preferences for Traditional ACP Imports

6.60 Ecuador claims that (i) the preferential tariff of zero on 857,700 tonnes of traditional ACP imports exceeds the volume on which such a preference is required by the Lomé Convention and (ii) the collective allocation of that volume to 12 ACP States is not required by the Lomé Convention.

(a) The Level of 857,700 Tonnes and Pre-1991 Best-Ever Export Volumes

6.61 In considering Ecuador's challenge to the level of 857,700 tonnes, we recall the statement by the Appellate Body quoted above that the Lomé Convention requires the European Communities to "allocate tariff quota shares to the traditional ACP States that supplied bananas to the European Communities before 1991 in the amount of their pre-1991 best-ever export volumes". In reaching this conclusion it referred to the requirement of Protocol 5 that "no ACP State shall be placed as regards access to its traditional markets and its advantages on those markets, in a less favourable situation than in the past or at present". Thus, the question arises which quantities reflect the pre-1991 best-ever exports by traditional ACP suppliers, individually and collectively.

6.62 As defended by the European Communities before the original panel and the Appellate Body, the level of 857,700 tonnes included allocations to Belize, Cameroon, Cote d'Ivoire and Jamaica in excess of their pre-1991 best-ever exports to the European Communities. These allocations were defended by the European Communities on the grounds that they took account of investments made in those countries which would subsequently expand their export capacities. We recall that the Appellate Body concluded that, *inter alia*, the European Communities is *not* "required" under the relevant provisions of the Lomé Convention to allocate tariff quota shares to traditional ACP States in excess of their pre-1991 best-ever export volumes to reflect such investments.[197]

6.63 In its submissions to this Panel, the European Communities argues that the total pre-1991 best-ever ACP exports to the European Communities in fact amounted to 952,939 tonnes. It states that the conclusion of the panel and Appellate Body reports that the Lomé Convention requires the European Communities to give duty-free treatment to pre-1991 best-ever ACP exports caused it to re-examine its calculation of the pre-1991 ACP banana export data. It appears that the increase in the total of pre-1991 best-ever exports is due mainly to the addition of an amount of approximately 100,000 tonnes to the totals of Jamaica and Somalia, based on 1965 exports. We note that at least some of the data on which the European Communities now bases its calculations of pre-1991 best-

[196] Appellate Body report on *Bananas III*, paragraph 178.
[197] Appellate Body report on *Bananas III*, paragraph 175.

ever exports was put forward by certain ACP States in the *Bananas III* dispute, but at that time not endorsed by the European Communities. While the European Communities has refrained from increasing the 857,700 tonne quantity reserved for traditional ACP imports, it argues that this amount can now be justified without reference to any amounts taking account of investments.

6.64 In the original panel report, we chose not to fix a starting date for consideration of pre-1991 best-ever exports by ACP States. We continue to take that position. In our view, there is no textual basis in the Lomé Convention for holding that only pre-1991 best-ever exports since a specific cut-off date should be taken into consideration for that calculation. While it is true that the first Lomé Convention entered into force in 1975, Protocol 5 does not set a limit on its reference to "the past".

6.65 **Accordingly, we find that on the basis of the data now offered by the European Communities, it is not unreasonable for the European Communities to conclude that the level of 857,700 tonnes for duty-free traditional ACP exports can be considered to be required by the Lomé Convention because it appears to be based on pre-1991 best-ever exports and not on allowances for investments.**

(b) Collective Allocation to Traditional ACP States

6.66 Ecuador's argument that the allocation by the European Communities of a collective share of 857,700 tonnes, accessible by all, to 12 traditional ACP States is not required by the Lomé Convention and, as such, is not covered by the Lomé waiver. Consequently, Ecuador argues that the preferential tariff of zero assigned to that volume of imports is inconsistent with Article I:1. The European Communities defends this collective allocation by reference to the Appellate Body's decision, based on Protocol 5 to the Lomé Convention, that it is required to give zero-tariff treatment to pre-1991 best-ever ACP exports and that it cannot allocate country-specific shares.

6.67 In considering this claim, we note that the Appellate Body explicitly concluded that the European Communities is required under the Lomé Convention to "allocate tariff quota *shares* to the traditional ACP *States* that supplied bananas to the European Communities before 1991 in the amount of their pre-1991 best-ever export *volumes*".[198] (emphasis added). In our view, the Appellate Body's choice of the plural in this sentence indicates that the requirements of the Lomé Convention refer to country-specific pre-1991 best-ever volumes. To put it differently, Protocol 5 to the Lomé Convention does *not* "require" the European Communities to allow certain traditional ACP suppliers to exceed their individual pre-1991 best-ever import quantity within the "collective" allocation of 857,700 tonnes reserved for all traditional ACP suppliers under the revised regime.

6.68 In our view, it is evident that the existence of a "collective" reservation of 857,700 tonnes entails the possibility that individual - more competitive - traditional ACP suppliers will exceed their individual pre-1991 best-ever import quantities at the expense of other - less competitive - traditional ACP suppliers. Such *de facto* reallocation to the benefit of more competitive traditional ACP suppliers within the collective allocation for traditional ACP suppliers would mean that those suppliers would obtain a preferential tariff of zero for volumes beyond those required by Protocol 5 of the Lomé Convention. Absent any other applicable requirement of the Lomé Convention, those excess volumes would not be covered by the Lomé waiver and the preferential tariff thereon would therefore be inconsistent with Article I:1. In this regard, we note the similarity between this conclusion and the Appellate Body's conclusion that the European Communities was not required to allocate country-specific shares in respect of non-traditional ACP bananas.

6.69 **Accordingly, we find that it is not reasonable for the European Communities to conclude that Protocol 5 of the Lomé Convention requires a collective allocation for traditional**

[198] Appellate Body report on *Bananas III*, paragraph 178.

ACP suppliers. Therefore, duty-free treatment of imports in excess of an individual ACP State's pre-1991 best-ever export volumes is not required by Protocol 5 of the Lomé Convention. Absent any other applicable requirement of the Lomé Convention, those excess volumes are not covered by the Lomé waiver and the preferential tariff thereon is therefore inconsistent with Article I:1.

4. Preferential Tariffs for Non-Traditional ACP Banana Imports

6.70 Ecuador claims that the unlimited preferential tariff of zero for non-traditional ACP banana imports within the "other" category of the MFN tariff quota and the tariff preference of 200 Euro per tonne for all other ACP banana imports are not required by Article 168(2)(a)(ii) of the Lomé Convention and therefore are preferential tariffs inconsistent with Article I:1 of GATT that are not covered by the Lomé waiver.

6.71 In this regard, we recall the Appellate Body's findings in *Bananas III*:

> "[T]he obligation imposed on the European Communities by Article 168(2)(a)(ii) to 'take the necessary measures to ensure more favourable treatment' for *all* ACP bananas 'than that granted to third countries benefiting from the MFN clause for the same product' does apply. … Both the duty-free access afforded to the 90,000 tonnes of non-traditional ACP bananas, imported in-quota, and the margin of tariff preference in the amount of 100 ECU/tonne afforded to all other non-traditional ACP bananas by the European Communities are clearly 'more favourable treatment' than that afforded by the European Communities to bananas from third countries benefiting from MFN treatment. Therefore the remaining issue under Article 168(2)(a)(ii) is whether the particular measures chosen by the European Communities to fulfil the obligations in that Article to provide 'more favourable treatment' to non-traditional ACP bananas are also in fact 'necessary' measures, as specified in that Article. In our view, they are. Article 168(2)(a)(ii) does not say that only *one* kind of measure is 'necessary'. Likewise, that Article does not say *what* kind of measure is 'necessary'. Conceivably, the European Communities might have chosen some other 'more favourable treatment' in the form of a tariff preference for non-traditional ACP bananas. But it seems to us that this particular measure can, in the overall context of the transition from individual national markets to a single Community-wide market for bananas, be deemed to be 'necessary'. … ".[199]

(a) The Preferential Tariff of Zero for Non-Traditional ACP Bananas

6.72 We recall that under the previous regime the preferential tariff of zero for non-traditional ACP bananas was limited to 90,000 tonnes of non-traditional ACP imports, with specific-country allocations to Belize, Cameroon, Cote d'Ivoire and the Dominican Republic. We note that under the revised regime the limitation of 90,000 tonnes was abolished in light of the Appellate Body finding that the European Communities is not required under the Lomé Convention to allocate tariff quota shares to ACP States exporting non-traditional ACP bananas.

6.73 The European Communities (and the ACP States) submit that the abolition of the allocations of overall 90,000 tonnes removes the protection that non-traditional ACP bananas enjoyed from competition by third-country, e.g. Latin American bananas. In that sense the preferential tariff of zero *per se* is insufficient to prevent non-traditional ACP imports from being displaced from the EC market by imports from Latin America.

[199]Appellate Body report on *Bananas III*, paragraph 173.

6.74 Ecuador, however, argues that the abolition of the 90,000 tonnes limitation enables non-traditional ACP imports to compete with imports from Latin America based on a preferential tariff of zero within the entire "other" category of 240,748 tonnes under the MFN tariff quota. In this sense, the preferential tariff of zero for non-traditional ACP bananas has been extended potentially up to 240,748 tonnes.

6.75 We recall that the obligation, contained in Article 168 of the Lomé Convention, to ensure duty-free or at least more favourable than most-favoured-nation treatment for products of ACP origin is in theory unlimited. As the Appellate Body put it, "Article 168(2)(a)(ii) does not say that only *one* kind of measure is 'necessary'. Likewise, that Article does not say *what* kind of measure is 'necessary'. Conceivably, the European Communities might have chosen some other 'more favourable treatment' in the form of a preferential tariff for non-traditional ACP bananas."[200]

6.76 Moreover, given the competitive conditions between ACP bananas and third-country bananas on the world market, we believe that the country-specific allocations in aggregate of 90,000 tonnes for non-traditional ACP imports free of in-quota tariffs was in overall terms an advantage in the sense of a protection from third-country competition rather than a limitation on exports to the European Communities which would otherwise have expanded.

6.77 While the reference by the Appellate Body to the possibility for the European Communities to have chosen "other" forms of preference does not necessarily imply that the European Communities is free at any time to expand significantly the scope of ACP preferences covered by the Lomé waiver, the statement by the Appellate Body suggests to us that the European Communities has some discretion as to what kind of preference it affords to the ACP States so as to offset the elimination of a preference that it cannot provide under WTO rules.

6.78 **In light of these considerations, we find that it is not unreasonable for the European Communities to conclude that non-traditional ACP imports at zero tariff within the "other" category of the MFN tariff quota is required by Article 168 of the Lomé Convention. Therefore, we find that the violation of Article I:1, as alleged by Ecuador, is waived by the Lomé waiver**.

(b) The Tariff Preference of 200 Euro per tonne for Non-Traditional ACP Bananas

6.79 We next address the issue whether the increase of the tariff preference for all other non-traditional ACP imports from 100 to 200 Euro per tonne is required by the Lomé Convention. Again, we recall that the scope of the obligations of Article 168 to provide duty-free or more favourable treatment to ACP is not limited to preferences enjoyed in the past before a given point in time. We also believe that the increase of the out-of-quota preferential tariff under the revised regime could constitute some other "more favourable treatment" in the form of a preferential tariff for non-traditional ACP bananas that the Appellate Body could conceive of in the original dispute and that the European Communities might have chosen to accord to non-traditional ACP suppliers with a view to offsetting the effect of the abolition of the allocation for these non-traditional ACP suppliers of 90,000 tonnes within the MFN tariff quota.

6.80 **Therefore, we find that it is not unreasonable for the European Communities to conclude that including the tariff preference of 200 Euro per tonne for out-of-quota imports of non-traditional ACP bananas is within the scope of what the European Communities is required to accord to non-traditional ACP supplies by virtue of the Lomé Convention. Therefore, we find that the violation of Article I:1, as alleged by Ecuador, is covered by the Lomé waiver**.

[200]Appellate Body report on *Bananas III*, paragraph 173.

E. GATS ISSUES

6.81 Ecuador claims that Regulations 1637/98 and 2362/98 are inconsistent with the EC's obligations under Articles II and XVII of GATS. More specifically, Ecuador alleges that (i) the criteria for qualifying as "traditional operator" based on the payment of customs duties, (ii) the choice of the period from 1994 to 1996 for the calculation of reference quantities for the allocation of licences, and (iii) the so-called "single pot" approach for issuing licences under the revised licensing procedures perpetuate the violations of Articles II and XVII of GATS (i.e. GATS' most-favoured nation and national treatment clauses) found by the original panel and the Appellate Body in *Bananas III*. Furthermore, Ecuador alleges that the (i) enlargement of the licence quantity reserved for "newcomers" to 8 per cent and (ii) the criteria for acquiring "newcomer" status under the revised licensing procedures violate Article XVII of GATS.

1. The Scope of the EC's Commitments on "Wholesale Trade Services"

6.82 The European Communities raises one preliminary issue in respect of Ecuador's GATS claims. It contends that the revision of the UN Central Product Classification system affects the interpretation of the scope of its market access and national treatment commitments on "wholesale trade services" which the European Communities has bound in its GATS Schedule.

6.83 The European Communities submits that the Provisional CPC has been replaced in the meantime by the Central Product Classification (CPC) - Version 1.0 ("Revised CPC"), and that the Revised CPC seeks to create a system of service categories that are both exhaustive and mutually exclusive. Therefore, in the EC's view, any services related to wholesale trade transactions which at the same time fall into another CPC category should be assessed on the basis of this new reality, i.e. should not be considered to be covered by the EC's commitments on "wholesale trade services".[201] The EC adds that the specific commitments bound in its GATS Schedule are still valid.

6.84 Ecuador contends that the scope of the EC's specific commitments under the GATS, which were bound in the EC GATS Schedule, cannot be affected by the subsequent modification of the Central Product Classification by the UN. Consequently, it is still the Provisional CPC that matters for purposes of interpreting the scope of the EC's commitments on "wholesale trade services".

6.85 We note that the specific commitments bound by the European Communities in its GATS Schedule with respect to the service sectors[202] or sub-sectors at issue in the original case were categorized according to the Services Sectoral Classification List which refers to the more detailed Provisional CPC.

6.86 We also recall that in *Bananas III*, the parties disagreed as to whether the panel's terms of reference comprised the narrower sub-sector of "wholesale trade services", or encompassed the broader sector of "distributive trade services" as described in a headnote to section 6 of the provisional CPC. The panel and Appellate Body findings in *Bananas III* were limited to service supply in the sub-sector of "wholesale trade services". The relevant definition of the Provisional CPC for "*wholesale trade services*" reads:

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[201] The European Communities notes that, according to the "Correspondence Tables between the CPC Version 1.0 and Provisional CPC", item 62221 "Wholesale trade services of fruit and vegetables" corresponds in the CPC Version 1.0 to 61121 "Wholesale trade services, except on a fee and contract basis, fruit and vegetables."

[202] Article XXVIII (e) of GATS: "'sector' of a service means,

(i) with reference to a specific commitment, one or more, or all, subsectors of that service, as specified in a Member's Schedule,

(ii) otherwise, the whole of that service sector, including all of its subsectors;"

> "Specialized wholesale services of fresh, dried, frozen or canned fruits and vegetables (Goods classified in CPC 012, 013, 213, 215)"

The description for "*distributive trade services*", in turn, provides:

> "Distributive trade services consisting in selling merchandise to retailers, to industrial, commercial, institutional or other professional business users, or to other wholesalers, or acting as agent or broker (wholesaling services) or selling merchandise for personal or household consumption including services incidental to the sale of the goods (retailing services). The principal services rendered by wholesalers and retailers may be characterized as reselling merchandise, accompanied by a variety of related, subordinated services, such as: maintaining inventories of goods, physically assembling, sorting and grading goods in large lots; breaking bulk and redistribution in smaller lots; delivery services; refrigeration services; sales promotion services rendered by wholesalers …"

6.87 We recall that with respect to both wholesale and distributive trade services, the European Communities had bound specific commitments on liberalization of market access and national treatment without specific conditions or limitations, and without scheduling any MFN exemptions. The original panel limited its findings to the narrower sub-sector of "wholesale trade services".

6.88 It is not entirely clear to us in which way, in the EC's view, the new categorization of service sectors according to the Revised CPC should affect the classification of service sectors on the basis of which the European Communities bound its specific commitments on market access and national treatment in its GATS Schedule. Therefore, it is not clear how the principle of the mutually exclusive categorization of service sectors could affect the reach of the EC's "wholesale trade services" commitments to those service transactions that do not fall into any other category of the Revised CPC. In any event, we do not see how the revision of the CPC could retroactively change the specific commitments listed and bound in the EC GATS Schedule on the basis of the Provisional CPC. Indeed, at the hearing, the EC stated that such a change in the EC's specific commitments bound in its GATS Schedule could only be made consistently with the requirements of Article XXI of GATS on the "Modification of Schedules".

6.89 In our view, what matters for purposes of interpreting the scope of the EC's commitments on "wholesale trade services" is that, according to the Provisional CPC descriptions quoted above, the *principal* services rendered by *wholesalers* relate to reselling merchandise, accompanied by a variety of related, *subordinated* services, such as, maintaining inventories of goods; physically assembling, sorting and grading goods in large lots; breaking bulk and redistribution to smaller lots; delivery services; refrigeration services; sales promotion services.

6.90 In light of these considerations, we find that it is this range of *principal* and *subordinated* "wholesale trade services" with respect to which the European Communities has committed itself to accord no less favourable treatment in the meaning of Articles II and XVII of GATS to services and service suppliers of other Members.

2. Licence Allocation Procedures

6.91 Ecuador claims that the revised EC licensing regime is inconsistent with Articles II and XVII of GATS because it perpetuates or carries on the discriminatory elements of the previous licensing system in that licences are allocated to those who used licences to import, and paid customs duties on, bananas during the 1994-1996 period. Moreover, it claims that the new, so-called "single pot" licensing allocation rules, under which, *inter alia*, past importers of ACP bananas may apply for

import licences to import Ecuadorian and other non-ACP bananas on the basis of reference quantities derived from their ACP banana imports, exacerbates the discriminatory elements of the past regime.[203]

6.92 The EC contends that it has abolished the previous licensing system including operator categories, activity functions, export certificates and hurricane licences. The new criterion for the allocation of licences to "traditional operators", i.e. proof of payment of customs duties, eliminates any "carry-on effects" from the previous to the revised licence allocation system and ensures that "true and real" importers in the past obtain licence entitlements for the future.

(a) Articles II and XVII of GATS

6.93 Before addressing Ecuador's claims, we recall the relevant GATS provisions. The most-favoured-nation clause of GATS is Article II:1, which provides:

> "With respect to any measure covered by this Agreement, each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country."[204]

Article XVII of GATS, its national treatment clause, provides:

> "1. In the sectors inscribed in its Schedule, and subject to any conditions and qualifications set out therein, each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, *treatment no less favourable* than that it accords to its own like services and service suppliers.
>
> 2. A Member may meet the requirement of paragraph 1 by according to services and service suppliers of any other Member, either *formally identical treatment* or *formally different treatment* to that it accords to its own like services and service suppliers.
>
> 3. Formally identical or formally different treatment shall be considered to be less favourable if it *modifies the conditions of competition* in favour of services or service suppliers of the Member compared to like services or service suppliers of any other Member" (emphasis added, footnote omitted).

6.94 The adjudication of claims under the national treatment and MFN clauses usually presupposes a two-step examination. For purposes of Article XVII, it is necessary to examine (i) whether the domestic and foreign services or service suppliers at issue are "like" and (ii) whether services or service suppliers of the complainant's origin are treated less favourably than those of domestic origin. For purposes of Article II, it is necessary to examine (i) whether services or service suppliers originating in different foreign countries are "like" and (ii) whether services or service suppliers of the complainant's origin are subject to less favourable treatment than those of other Members' origin.

6.95 In this context, we recall that issues such as the origin of services and service suppliers and the "likeness" of services or service suppliers of the complainant's origin and of those of EC or other third-country origin, as the case may be, were resolved in the original case and need not be addressed

[203] Ecuador refers in this regard to the reservation of 30 per cent of the licences required for in-quota imports of third-country and non-traditional ACP bananas to Category B operators, the reservation of 28 per cent of such import licences to ripeners under the activity function rules, and the allocation of hurricane licences exclusively to certain Category B operators.

[204] We note that MFN exemptions as foreseen in Article II:2 of GATS and the Annex on Article II Exemptions were not relevant in the original dispute.

by this reconvened Panel. We also note that the panel and the Appellate Body - albeit on different legal grounds - found that the national treatment obligation as well as the MFN treatment obligation under the GATS prohibit *de iure* and *de facto* discrimination. For purposes of resolving the claims before us, we need, therefore, not discuss whether the notion of *de facto* discrimination under Article II is similar to or narrower than the notion of *de facto* discrimination under Article XVII, and in particular under paragraphs 2 and 3 of that Article. We only need to recall that the original panel, but also the Appellate Body found that Article II of GATS, too, covers *de facto* discrimination: "… For these reasons we conclude that 'treatment no less favourable' in Article II:1 of the GATS should be interpreted to include *de facto* as well as *de iure*, discrimination …".[205] Therefore, we consider it appropriate to examine jointly the question whether or not the revised licence allocation procedures accord less favourable treatment in the meanings of Articles II and XVII of GATS to services or service suppliers of Ecuador.

(b) The Findings in *Bananas III* on Articles II and XVII of GATS

6.96 We recall our findings with respect to particular aspects of the licence allocation procedures which applied under the previous regime to third-country and non-traditional ACP imports within the tariff quota, to the extent they are relevant to the claims before this Panel, i.e.:

> "… that the allocation to Category B operators of 30 per cent of the licences allowing the importation of third-country and non-traditional ACP bananas at in-quota tariff rates created less favourable conditions of competition for like service suppliers of Complainants' origin and was therefore inconsistent with the requirements of Articles II and XVII of GATS."[206]

> "… that the allocation to ripeners of 28 per cent of Category A and B licences allowing the importation of third-country and non-traditional ACP bananas at in-quota tariff rates created less favourable conditions of competition for like service suppliers of Complainants' origin and was therefore inconsistent with the requirements of Article XVII of GATS."[207]

> "… that the allocation of hurricane licences exclusively to operators who included or directly represented EC (or ACP) producers created less favourable conditions of competition for like service suppliers of Complainants' origin and was therefore inconsistent with the requirements of Article XVII (or II) of GATS."[208]

These findings were upheld by the Appellate Body.

(c) The Revised EC Licensing Regime

6.97 Under the revised EC licensing regime, licences are allocated to importers on the basis of their reference quantities. These reference quantities are allocated to "traditional operators" (defined below) to the extent that they are able to show that they actually imported bananas in the 1994-1996 period. More particularly, Article 3 of Regulation 2362/98 provides:

> "*'[T]raditional operators'* shall mean economic agents established in the European Community during the period for determining their reference quantity … who have actually imported a minimum quantity of third-country and/or ACP-country bananas

[205] Appellate Body report on *Bananas III*, paragraph 234.
[206] Panel reports on *Bananas III*, paragraphs 7.341 and 7.353.
[207] Panel reports on *Bananas III*, paragraph 7.368.
[208] Panel reports on *Bananas III*, paragraph 7.393 (and paragraph 7.397).

> on their own account for subsequent marketing in the Community during a set reference period. The minimum quantity … shall be 100 tonnes imported in any one year of the reference period … [or] … 20 tonnes where the imports entirely consist of bananas with a length of 10 centimetres or less."

6.98 Article 5 of Regulation 2362/98 provides:

> "3. Actual import shall be attested by both of the following:
>
> (a) by presenting *copies of the import licences used* either by the *holder* or, in the case of a transfer … duly endorsed by the competent authorities, by the *transferee*, in order to release the relevant quantities for free circulation; and
>
> (b) by presenting *proof of payment of the customs duties* due on the day on which customs import formalities were completed. The payment shall be made either *direct* to the competent authorities or via a *customs agent* or *representative*.
>
> Operators furnishing *proof of payment of customs duties*, either direct to the competent authorities or via a customs agent or representative, for the release into free circulation of a given quantity of *bananas without being the holder or transferee holder of the relevant import licence … shall be deemed to have actually imported the said quantity provided that they have been registered in a Member State under Regulation No. 1442/93* and/or that they fulfil the requirements of *this Regulation* for registration as a *traditional operator*. Customs agents or representatives may not call for the application of this subparagraph." (emphasis added).

6.99 Article 31 of Regulation 2362/98 repeals Regulations 1442/93 and 478/95, which were the basis of the previous licensing regime. We note, however, that according to Article 5(3) of Regulation 2362/98, operators that have been registered under Regulation 1442/93 may acquire the status of a "traditional operator" under the revised licensing procedures.

(d) The Requirements of Articles XVII and II of GATS

6.100 In analyzing the EC's revised licensing regime under Article XVII of GATS, we recall that we noted in our decision in *Bananas III* that:

> "In order to establish a reach of the national treatment obligation of Article XVII, three elements need to be demonstrated: (i) the EC has undertaken a commitment in a relevant sector and mode of supply; (ii) the EC has adopted or applied a measure affecting the supply of services in that sector and/or mode of supply; and (iii) the measure accords to service suppliers of any other Member treatment less favourable than that it accords to the EC's own like service suppliers."[209]

As to the first two issues, we found that they had been demonstrated in *Bananas III* and they are not at issue here.

6.101 In respect of the third issue, we noted that there were four preliminary issues to be considered. Those were "(i) the definition of commercial presence and service suppliers; (ii) whether operators in the meaning of the EC banana regulations are service suppliers under GATS, (iii) the definition of services covered by EC commitments; and (iv) to what extent services and service suppliers of

[209] Panel reports on *Bananas III*, paragraph 7.314.

different origin are like".[210] These are not at issue in the present case, except for point (iii), which we have dealt with above.

6.102 For an analysis of the EC revised licensing regime under Article II of GATS we also recall our decision in *Bananas III*, where we stated:

> "In addressing the claim under Article II, we note that two elements need to be demonstrated in order to establish a violation of the GATS MFN clause: (i) the EC has adopted or applied a measure covered by GATS; (ii) the EC's measure accords to service or service suppliers of Complainants' origin treatment less favourable than that it accords to the like services or service suppliers of any other country."[211]

6.103 As to the first element, we have already determined in the original dispute that the EC import licensing procedures for bananas are measures affecting trade in services.[212] We also recall our discussion on the absence of MFN exemptions in the EC list of Article II exemptions which would be relevant to the claims before us.[213]

6.104 We now have to ascertain, for purposes of Article XVII, whether, by applying its revised licensing regime, the European Communities accords less favourable treatment to Ecuadorian services and service suppliers than it accords to its own like service and service suppliers. For purposes of Article II, we also have to ascertain whether, under the revised regime, less favourable treatment is being accorded to Ecuadorian services and service suppliers than to services and service suppliers of other Members. In this context, we recall our consideration above (see paragraph 6.95) that we deem it appropriate to examine jointly whether the EC's revised regime accords less favourable treatment in the meanings of both Article II and XVII to services or service suppliers of Ecuador. The crucial issue in respect of these claims against the EC's revised licensing procedures is whether the allocation of licences based on the criterion of "*actual payment*" of customs duties by "*traditional operators*" under the revised regime prolongs the allocation of licences on the basis of those aspects of the previous licensing system which were found to be inconsistent with the GATS in *Bananas III*.

6.105 In framing this issue for consideration, we do not imply that the European Communities is under an obligation to remedy past discrimination. Article 3.7 of the DSU provides that "… the first objective of the dispute settlement is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements." This principle requires compliance *ex nunc* as of the expiry of the reasonable period of time for compliance with the recommendations and rulings adopted by the DSB. If we were to rule that the licence allocation to service suppliers of third-country origin were to be "corrected" for the years 1994 to 1996, we would create a retroactive effect of remedies *ex tunc*. However, in our view, what the EC is required to ensure is to terminate discriminatory patterns of licence allocation with *prospective* effect as of the beginning of the year 1999.

6.106 At the outset of our analysis, we note that Ecuador does not claim that the new EC regime is *de iure* discriminatory. The issue, as in *Bananas III*, is whether it is *de facto* discriminatory in a way that is inconsistent with Articles XVII and II of GATS. In this regard, we recall that, pursuant to Article XVII:2, a Member may ensure no less favourable treatment for foreign services or service suppliers by according formally identical treatment or formally different treatment to that it accords to its own like service suppliers. Moreover, according to Article XVII:3, formally identical treatment may, nevertheless be considered to be less favourable treatment if it adversely modifies conditions of

[210] Panel reports on *Bananas III*, paragraph 7.317.
[211] Panel reports on *Bananas III*, paragraph 7.344.
[212] Panel reports on *Bananas III*, paragraph 7.277 *et seq.*
[213] Panel reports on *Bananas III*, paragraph 7.298.

competition for services or service suppliers of other Members. We also recall the panel and Appellate Body findings in the original dispute that the MFN clause of GATS includes prohibitions of both *de iure* and *de facto* discrimination.

(e) The Parties' Arguments

(i) Ecuador

6.107 Ecuador argues that the *de facto* discrimination in the EC's previous licensing regime persists because of the EC's choice of criteria for allocating licences. By basing licence allocation on the "actual importer" criterion, the European Communities ensures that the predominantly EC/ACP services suppliers to whom Category B, ripener and hurricane licences were issued in the previous regime will retain rights to most of those licences in the new regime. Overall, Ecuador argues that under the new regime, non-EC/ACP operators can be expected to receive only 44.6 per cent of the licences they should receive. [214]

6.108 Ecuador submits statistics on exports and licence allocations to individual companies under the previous and under the revised regime. In essence, these statistics show that Noboa, the principal Ecuadorian service supplier, is able to claim reference quantities for licence allocations in 1999 of approximately only half of its actual exports to the EC in the past.

6.109 Ecuador's position is that these statistics demonstrate that its wholesale service suppliers face less favourable conditions of competition than EC/ACP suppliers because they cannot obtain licences to import their bananas on terms as favourable as those EC/ACP suppliers who continue to benefit under the revised regime from the carry-on of GATS-inconsistent licence allocation criteria under the previous regime. In particular, we note in this regard Ecuador's view that this is to be expected because Ecuadorian service suppliers were forced to enter into unfavourable contractual arrangements with initial licence holders under the previous regime. Under many of those arrangements, according to Ecuador, original licence holders, whether or not they physically imported, may prove payment of customs duties which makes them "actual importers" for purposes of licence allocations under the revised regime. Such contractual arrangements continue under the revised regime. Therefore, Ecuador alleges that its suppliers of wholesale services are subject to less favourable treatment than suppliers of such services of EC/ACP origin.

(ii) European Communities

6.110 The European Communities argues at the outset that the facts on which the original panel had based its conclusions had so changed by 1994-1996 that the panel would not have made the same findings had it disposed of the 1994-1996 facts.

6.111 With respect to the major third-country operators (i.e. Chiquita, Dole, Del Monte and Noboa), the European Communities contends that the allocations of licences for the importation of third-country and non-traditional ACP bananas to these operators increased by 35 per cent between 1994

[214] In calculating estimates for third-country service suppliers in their entirety, Ecuador submits that under the previous regime, Category A primary importers obtained 37.905 per cent of the reference quantities under the previous regime (i.e. 57 per cent of 66.5 per cent). With respect to customs clearers, Ecuador assumes that two-thirds of the customs clearers were of non-ACP third-country origin, whereas one-third was of EC/ACP origin. Accordingly, 6.65 per cent of customs clearance reference quantities (i.e. 10 per cent of 66.5 per cent) went to third-country operators. This results in an overall licence entitlement of 44.6 per cent of the quantities physically imported for non-ACP third-country operators under the previous regime.

under the previous regime and 1999 under the revised regime.[215] According to the European Communities, this occurred because of two reasons: investments and licence transfers.

6.112 First, there were investments by third-country operators in EC/ACP operators. The European Communities mention investments in Compagnie Fruitière and CDB/Durand by Dole and Chiquita, respectively, and concludes that reference quantities based on EC/ACP operations for major third-country operators doubled between 1993 and 1996.[216] The European Communities further point out that the original panel found that there was no *de iure* discrimination, based on an operator's origin, with respect to the access to the activity of ripening which entitled operators to licence allocations and thus to reap quota rents under the previous regime. However, the original panel had found that *de facto* less favourable conditions of competition existed for third-country suppliers of wholesale services because ripeners in the European Communities were predominantly EC owned or controlled[217] and thus licence allocations and quota rents accrued largely to service suppliers of EC origin. Before this Panel, the European Communities emphasizes that, based on 1994 to 1996 statistics, three out of the four biggest ripeners are now non-EC owned and that these alone represent around 20 per cent of the total ripening capacity of the European Communities.

6.113 The second reason why licence allocations to third-country operators have increased is that there have been licence transfers under conditions that allow these operators to claim reference quantities under the revised regime. In the EC's view, this could explain why there has been a decline in the number of operators receiving licences. According to the European Communities, under the previous regime 1568 Category A and B operators were registered, whereas under the revised regime the number of traditional operators has decreased to 629 operators. For the European Communities, this shows that the mainly EC-owned operators that received licences in the past without being engaged in actual importation were *ipso facto* excluded from the allocation of licences by the introduction of the revised regime, i.e. mainly ripeners and EC producer organizations.

6.114 In response to Ecuador's argument that the new regime carries forward the old regime's allocation of licences in that the non-EC operators receive an amount of only 44.6 per cent of the licences they should, the European Communities argues that the correct "base" figure is 50.35 per cent if certain adjustments are made.[218] The European Communities then increases the "base" figure by

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[215] The European Communities also submits that licence allocations to these major third-country operators were as follows: 1994: 598,857; 1995: 651,266; 1996: 726,782; changes: 1994-1995: 8.8 per cent; 1995-1996: 11.6 per cent; 1994-1996: 21.4 per cent.

[216] EC figures: 1989: 21,305 (reference quantities in tonnes); 1990: 30,514; 1991: 45,532; 1992: 72,592; 1993: 132,614; 1994: 267,511; 1995: 276, 804; 1996: 272,822.

[217] In the original dispute, the panel drew this conclusion on the basis that the average estimated volume ripened by EC-owned ripeners was, according to the complainants, 83.7 per cent of the overall ripening volume in the European Communities. The European Communities stated that between 20 and 26 per cent of the ripening capacity in the European Communities were foreign-owned, i.e. mainly by Chiquita, Dole and Del Monte. Panel reports on *Bananas III*, footnote 514.

[218] The EC accepts Ecuador's figures for primary importation and customs clearance, but recalculates Ecuador's figures concerning the distribution of reference quantities for ripening activities as follows. For purposes of breaking down ripening activities by third-country and EC/ACP origin, the ripening activities of both Category A and B operators were subdivided using a ratio of 78.5 per cent for EC/ACP operators and 21.5 per cent for non-ACP third-country operators. This results for Category A operators in 4 per cent for third-country operators and in 14.6 per cent for EC/ACP operators of the 18.6 per cent which represent the licence allocation for Category A ripening activities (i.e. 28 per cent of 66.5 per cent). For Category B operators this results in 1.8 per cent for third-country operators and in 6.6 per cent for EC/ACP operators of the 8.4 per cent which represent the licence allocation for Category B ripening activities (i.e. 28 per cent of 30 per cent). Consequently, in calculating the total share of reference quantities for non-ACP third-country wholesalers, the European Communities adds 4 per cent and 1.8 per cent for ripening activities effectuated by Category A and B operators of non-ACP third-country origin to Ecuador's estimate of 37.9 and 6.65 per cent so that the overall

35 per cent (see paragraph 6.111) to conclude that non-EC operators are now getting some 68 per cent of licence allocations. Since 8 per cent of allocations go to newcomers, only 24 per cent go to EC/ACP service suppliers. The European Communities suggests that the licences have been legitimately allocated to EC/ACP service suppliers under the revised regime since these operators actually imported Latin American bananas under the previous regime.

6.115 The European Communities also makes three more general arguments. In the first instance, the European Communities insists that GATS does not guarantee any particular market shares over time, i.e. there are no provisions for grandfather rights. Second, the European Communities argues that it has a right to choose "actual imports" as a basis for licence allocation. In particular, the European Communities refers to Article 3.5(j) of the Import Licensing Agreement,[219] pursuant to which consideration should be given to "full utilisation of licenses" as a criterion for future allocations. In the EC's view, the only objective and indisputable way of proving the "effective" importation is the payment of duties, either directly or through a customs agent on a fee or contract basis, i.e. the system chosen by Regulation 2362/98. Third, the European Communities argues that the fact that Noboa exports to the European Communities more than it imports to the European Communities means that it is primarily an exporter and not an importer and that the two businesses are different.

(f) The Panel's Analysis of the Claim

6.116 In analyzing whether the new EC regime is *de facto* discriminatory, we will first consider the three general EC arguments set out in the preceding paragraph and thereafter evaluate the evidence presented by the parties on actual licence allocations and consider its relevance to Ecuador's claim. We will then consider the regime's structure and the extent to which it is based on or related to the previous regime found to be inconsistent with Articles XVII and II in *Bananas III*.

(i) General EC arguments

6.117 As to the EC argument that there are no grandfather rights in the GATS or guarantees of market shares, we agree, but note that this does not rule out the possibility that *de facto* less favourable conditions of competition may be found and prolonged in violation of GATS rules.

6.118 As to the EC's claimed right to choose "actual imports" as a basis for licence allocation, here again, we agree that the European Communities is not precluded from basing licence allocation on past usage. However, we note that the Import Licensing Agreement's provision that "consideration should be given" to full utilisation of licences does not rule out the possibility that the choice of how to assure that may be limited where *de facto* discrimination has been found in the past, and where reliance on licence usage may result in a prolongation of the results of a violation of GATS rules. The availability of the past performance allocation method, which is an option and not required by the Import Licensing Agreement, would not justify such a violation. In other words, even if Members are normally free to base licence allocation on past usage, that does not mean they are free to do so without regard to their GATS obligations. Moreover, we note that proof of payment of customs duties, directly or through a representative or customs agent, does not necessarily prove licence usage by a particular operator.

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estimate for the share of licence entitlements of non-ACP third-country operators increases from Ecuador's estimate of 44.6 per cent to the EC's estimate of 50.35 per cent.

[219] Article 3.5(j) of the Agreement on Import Licensing Procedures provides that: "… consideration should be given as to whether licences issued to applicants in the past have been fully utilised during a recent representative period".

6.119 As to the EC's argument that Noboa is principally an exporter and not an importer, we note that Noboa is an Ecuadorian service supplier commercially present in the European Communities that provides wholesale services in respect of bananas. Therefore, it is irrelevant for purposes of this case whether Noboa is primarily an exporter or importer. In our view, what matters for purposes of Articles XVII and II, is whether Noboa is adversely affected in its conditions of competition as a wholesale service supplier under the revised regime because import licences are allocated based on the 1994-1996 reference period when the GATS-inconsistent allocation criteria were in force.

(ii) Licence allocations under the revised regime

6.120 In examining the evidence on licence allocations under the revised regime, we note that we based our original findings on the facts available at the time. Our findings explicitly foresaw that one of the effects of the previous regime would be to encourage service suppliers of non EC/ACP origin to invest in EC/ACP banana production and marketing and to acquire licences from EC/ACP service suppliers. Although these effects were anticipated, our findings were based on the fact that the previous EC regime modified the conditions of competition in violation of Articles XVII and II.[220]

6.121 As to Noboa, we note that the parties generally agree on the evidence concerning the level of Noboa's exports and licence allocations. The European Communities challenges Ecuador's arguments that its service suppliers had to enter into unfavourable contractual arrangements. It notes, for instance, that an example of such a contract cited by Ecuador was a proposed contract, not an actual one. We are not generally persuaded by this EC argument, however, as there is evidence of such arrangements even if the extent of their use is unclear. The licence allocation data for 1999 support Ecuador's claim that in general Noboa did not obtain licences for imports in a manner that would allow it to claim reference quantities under the revised regime for its export interest.

6.122 As to the evidence presented by the European Communities concerning the increase in licence allocations to non-EC suppliers as a result of their investments in ACP operators, we note that there is evidence from third parties that raises some questions as to whether at least one of these investments was sufficient to make these firms non-EC controlled for purposes of GATS.[221] According to Cameroon and Côte d'Ivoire, 60 per cent of Compagnie Fruitière, the principal exporter in each country, remains in the control of a French family. In this regard, we recall that, according to Article XXVIII(n) of GATS, a service supplier in the form of a legal person has the origin of a WTO Member if it is owned by more than 50 per cent by natural or juridical persons of that Member, or if it is controlled by those persons in the sense that they have the power to name the majority of directors. Moreover, in respect of investments in ripeners and licence transfers, we note that the EC's evidence was not comprehensive, which means that we are not in a position to ascertain the extent to which these factors have led to a change in licence allocations compared to the previous regime.

6.123 As to the EC argument that there were 1568 Category A and B operators registered under the previous regime, but that there are only 629 traditional operators under the revised regime, we note that the European Communities did not include information on ownership or control of these remaining traditional operators. Therefore, we are not in a position to ascertain whether the decline in the number of registered operators had an impact on the competitive conditions of non-ACP third-country service suppliers.

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[220] Panel reports on *Bananas III*, paragraphs 7.341, 7.353, 7.368, 7.393, 7.397.

[221] According to Article XXVIII(n) of GATS, a juridical person is:

(i) 'owned' by persons of a Member if more than 50 per cent of the equity interest in it is beneficially owned by persons of that Member;

(ii) 'controlled' by persons of a Member if such persons have the power to name a majority of its directors or otherwise to legally direct its actions.

6.124 Even if the precise extent is uncertain, however, it is clear to us that an increase in licence allocations to non-EC/ACP operators has occurred. Indeed, such an increase would be in line with our considerations in the original dispute, that increases in licence allocations to non-ACP third-country suppliers during the period when the previous regime was in force could be the result of the "cross-subsidization" effect that induced such service suppliers who were previously engaged in the non-ACP third-country market segment into entering the EC/ACP market segment, or to engage in the ripening and customs clearance activities in order to qualify for licence allocations in the future.

6.125 In our view, it is not particularly relevant for purposes of this case to what extent precisely licence allocations to Noboa or other third-country suppliers of wholesale services increased under the revised regime in comparison to the previous low level. An increase only indicates that the carry-on effect of the revised regime is less than 100 per cent. The evidence submitted by Ecuador shows that in Noboa's attempts to supply wholesale trade services in the European Communities, in respect of part of its business it must purchase or lease licences from or otherwise enter into contractual arrangements with those who have access to licences but who do not wish to distribute bananas in the European Communities under the revised regime. Given the structure of the previous regime, those licence holders would be in the group of service suppliers in favour of which the previous EC regime altered competitive conditions. Thus, Noboa and other third-country service suppliers are faced with a competitive disadvantage that is not equally inflicted on service suppliers of EC/ACP origin. While we cannot ascertain the precise extent of this carry-on effect, it appears to be not unsubstantial, particularly in respect of Noboa. Therefore, an increase, even if it is within the order of the EC estimates, may not be considered as evidence that conditions of competition for non-ACP third-country suppliers are not less favourable than for like EC/ACP suppliers under the revised regime.

6.126 Therefore, we conclude that the ACP/EC operators who continue to get licences on the basis of the revised regime, remain in a competitively advantaged position compared to non-EC operators and that advantage comes from the "carry on" effects of the GATS-inconsistent aspects of the previous regime. Even if such ACP/EC operators do deal in Latin American bananas and do not simply sell or lease their licences, they are able to compete on more favourable conditions in the market for distribution of bananas than their non-EC competitors because of the licence allocations that are derived from the previous discriminatory regime. In this way, the revised regime carries forward the *de facto* discrimination of the previous regime.

(iii) The structure of the revised regime

6.127 We also examine the structure of the revised regime because the Appellate Body has noted in the past, in *Japan - Alcoholic Beverages*[222], that a measure's "protective application can most often be discerned from the design, the architecture and the revealing structure of a measure". Although the dispute on *Japan - Alcoholic Beverages* concerned claims under the GATT, we believe that this approach may also give some guidance in analyzing whether there is *de facto* discrimination under the GATS.

6.128 In our examination of the structure of Regulation 2362/98, we start from the proposition that if, in its new licensing regime, the European Communities had simply provided that licences would be issued to those to whom licences had been issued in the 1994-1996 period when those aspects of the previous licence allocation procedures which were found to be WTO-inconsistent in the original dispute by the panel and the Appellate Body, were in force, we would find that such a revised regime did not remove the GATS inconsistencies of the old regime, even if technically different rules for licence allocation had been implemented. This would be so because the less favourable conditions of competition for Ecuadorian (and other) service suppliers would continue to exist. The revised regime

[222] Appellate Body report on *Japan - Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted on 1 November 1996, page 29.

is not, however, based on license issuance during the 1994-1996 period, but rather on licence usage and payment of customs duties during that period. According to Article 4 of Regulation 2362/98, the reference quantities for 1999 of "traditional operators" under the revised regime are calculated on the basis of the average quantity of bananas actually imported during the 1994-1996 period.

6.129 The choice of the years from 1994 to 1996 as the reference period is explained in Recital 3 of Regulation 2362/98 as follows:

> "[W]hereas, for the purpose of implementing the new arrangements in 1999, it is advisable, in the light of *available knowledge on the de facto patterns of importation*, to determine the rights of traditional operators in accordance with their actual imports during the three-year period 1994 – 1996". (emphasis added).

In this context, we also note that the Commission Working Document "Determination of Reference Quantities from 1995 Onwards"[223] acknowledges that licence allocation on the basis of the "licence usage method" would "maintain the same pattern of licence allocation between different types of operators as is seen at present" and "fossilize licence allocation in its current form. Traders could not obtain more quota by expanding their business; the only way to do so would be by buying licences from another operator, or by taking over another company".[224]

6.130 We acknowledge, however, that where Ecuadorian service suppliers entered into contractual arrangements with initial licence holders under conditions where they are able to present proof of actual payment of customs duties and of licence usage, there is no carry-on effect. However, in cases where the contractual arrangements between initial licence holders and Ecuadorian service suppliers do not allow them to prove actual payment of customs duties and licence usage during the 1994-1996 reference period (e.g. licence buy-back arrangements or licence "pooling"), they cannot claim reference quantities as "traditional operators" for licence allocations from 1999 onwards.

6.131 In the latter case, the revised licensing regime facilitates the continuance of past patterns of licence allocation based on WTO-inconsistent elements of the previous allocation. In particular e.g. where former Category B operators and/or ripeners are able to prove licence usage and payment of customs duties for imports made with such licences during the 1994-1996 period, such operators are able to claim reference quantities for 1999 regardless of whether they imported in fact.

6.132 In conclusion of our examination of the structure of the revised regime, we note that licence allocations under the revised regime are based on licence usage (and payment of customs duties), which according to the cited Commission Document is likely to "fossilize" or "maintain the same pattern of" past licence allocations. We further note that the base period (1994-1996) is one in which the rules for licence allocation had been in certain aspects found to be WTO-inconsistent in *Bananas III*. On its face, the choice of the 1994-1996 reference period in combination with the licence usage/actual tariff payment criteria would seem likely to continue at least in part the less favourable conditions of competition for foreign service suppliers found under the previous licensing regime. Consequently, in our view, the EC's revised licence allocation system, which reflects licence usage during the 1994-1996 period, displays *de facto* discriminatory structure. While this is not in

[223] Exhibit 15 to Ecuador's First Submission of the panel in the original dispute of 9 July 1996, referred to again in Ecuador's First Submission to the reconvened Panel of 2 February 1999.

[224] Commission Working Document "Determination of Reference Quantities from 1995 Onwards" of 6 October 1993". The document further notes "… *Obviously the licence usage method can only be used for the years when the common market organization was in place*. Thus if it is decided to adopt this method there would be three years (1995-97) when both methods [i.e. licence usage and operator categories/activity functions] would have to be applied." (emphasis added).

itself sufficient to find the new regime to be inconsistent with Articles XVII and II, it usefully informs our analysis.

(iv) Overall evaluation

6.133 In light of all these considerations, we conclude that Ecuador has established a presumption[225] that the revised licence allocation system prolongs - at least in part - less favourable treatment in the meanings of Articles II and XVII for wholesale service suppliers of Ecuadorian origin. Ecuador has also shown that its service suppliers do not have opportunities to obtain access to import licences on terms equal to those enjoyed by service suppliers of EC/ACP origin under the revised regime and carried on from the previous regime. Accordingly, it was for the EC to adduce sufficient evidence to rebut this presumption. In light of our evaluation of the factual and legal arguments presented, we conclude that the European Communities has not succeeded in doing so. This result is consistent with our conclusion that the revised licence allocation system reflecting licence usage and payment of customs duties during the 1994-1996 period displays *de facto* discriminatory structure.

6.134 **Accordingly, we find that under the revised regime Ecuador's suppliers of wholesale services are accorded *de facto* less favourable treatment than EC/ACP suppliers of those services in violation of Articles II and XVII of GATS.**

(g) The "Single Pot" Licence Allocation

6.135 Regulation 1637/98 introduced a so-called "single pot" licence allocation system under which reference quantities claimed under the tariff quota of 2,553,000 tonnes are pooled with those claimed under the quantity of 857,700 tonnes reserved for traditional ACP imports. Thus, under the revised regime, a traditional operator may use its reference quantities based on past imports of traditional ACP bananas to apply for licences to import third-country bananas and *vice versa*.

6.136 Ecuador alleges that this "single pot" solution for calculating reference quantities aggravates the carry-on *de facto* discrimination from the previous regime and further erodes the licence allocations to Ecuadorian service suppliers. Specifically, Ecuador submits that less than 60 per cent of licence applications by Noboa and its subsidiaries granted in the quarterly licence allocation procedures due to oversubscription and the application of reduction coefficients with respect to Ecuador's country allocation. In Ecuador's view, these results are due to the "single pot" licence allocation under the revised regime.

6.137 The European Communities contends that, in compliance with the DSB rulings, it has abolished the different licensing procedures of the previous regime for traditional ACP imports, on the one hand, and for third-country and non-traditional ACP imports, on the other. It has introduced a single licensing regime for banana imports from all sources of supply and has created a "single pot" or "pool" for purposes of calculating reference quantities under the revised regime. The European Communities emphasizes that there cannot be a protection of "grandfather" rights as to licence entitlements, especially not in the transition from the previous to the revised regime.

6.138 We note the results of the quarterly two-round licence allocation procedures for the first and the second quarter of 1999. Due to the oversubscription of available licence quantities during the first

[225] "… [T]he burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defense. If that party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption." Appellate Body report on *United States - Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, adopted on 23 May 1997, WT/DS33/AB/R, page 14.

round of the licence allocation procedures for the first quarter of 1999[226], reduction coefficients of 0.5793, 0.6740 and *0.7080* were applied to applications for licences for imports from Colombia, Costa Rica and *Ecuador*, respectively. While licence quantities of 77,536.711 tonnes and 41,473.846 tonnes for imports from Panama and "other" (i.e. non-substantial third-country and non-traditional ACP supplier countries) were transferred to the second round, these quantities were exhausted in the second round, when reduction coefficients of 0.9701 and 0.7198 were applied to applications for licences allowing imports from Panama and "other", respectively.[227] Licence quantities for 148,128.046 tonnes of traditional ACP imports were not applied for in the first round, and apparently also not exhausted in the second round. In the first round of the allocation procedure for the second quarter of 1999[228], reduction coefficients of 0.5403, 0.6743 and *0.5934* were applied to applications for licences allowing imports from Colombia, Costa Rica and *Ecuador*, respectively. However, licence quantities for 120,626.234 tonnes and 7,934.461 tonnes of imports from Panama and from other third-country and non-traditional ACP sources, respectively, were transferred to the second round of the allocation procedure for the second quarter of 1999.

6.139 The parties agree that the so-called "single pot" solution is not *de iure* discriminatory. We agree also. The pooling of reference quantities claimed under the tariff quota of 2,553,000 tonnes with those under the quantity of 857,700 tonnes reserved for traditional ACP imports in a single licensing regime can be expected to intensify competition between the operators who apply for licences in the quarterly allocation procedures. Given that it is more profitable to market Latin American bananas than ACP bananas, it is evident that profit-maximizing operators have an incentive to apply in the two-round quarterly licence allocation procedures first for low-cost Latin American sources of supply. This obvious effect is confirmed by the fact that in the first two quarterly licence allocation procedures under the revised regime, available licences for most Latin American sources were oversubscribed in the first round (i.e. country-allocations for the substantial suppliers Ecuador, Colombia and Costa Rica), and the remaining licences for imports from Latin America (i.e. Panama and "other" non-substantial suppliers) were exhausted in the second round. However, licence applications for imports within the quantity of 857,700 tonnes reserved for traditional ACP suppliers were generally made in the second round and this quantity was not exhausted.

6.140 We next examine whether the alleged *de facto* discriminatory effects of pooling third-country and traditional ACP licences in a "single pot" derive from the fact that under the revised regime reference quantities are calculated based on the 1994-1996 period when those allocation criteria that were found to be GATS-inconsistent were in force. We recall that the previous regime provided for two separate sets of licensing procedures for traditional ACP imports, on the one hand, and for third-country and non-traditional ACP imports, on the other. Under the latter licensing system, Category B operators, based on reference quantities for marketing traditional ACP or EC bananas, were allocated 30 per cent of the licences required for the importation of third-country and non-traditional ACP bananas reserved for those B operators *in addition* to the right to continue importing traditional ACP bananas. Likewise, ripeners were allocated 28 per cent of the third-country import licences. Under the revised, single licensing regime, there is no comparable reservation of licence quantities for former Category B operators or for ripeners.

6.141 However, to the extent that former Category B operators and ripeners may prove licence usage and payment of customs duties with respect to imports carried out during the 1994-1996 reference period with licences obtained from the GATS-inconsistent quantities reserved for those operators under the previous regime, these operators are able to claim reference quantities under the revised regime for licence allocations from 1999 onwards. Therefore, former Category A service suppliers of Ecuadorian origin who have not benefited from licence allocations based on GATS-

[226] Regulation (EC) No. 2806/98 of 23 December 1998, O.J. L 349/32 of 24 December 1998.
[227] Regulation (EC) No. 102/99 of 15 January 1999, O.J. L 11/16 of 16 January 1999.
[228] Regulation (EC) No. 608/99 of 19 March 1999, O.J. L 75/18 of 20 March 1999.

inconsistent criteria under the previous regime enjoy *de facto* less favourable opportunities to obtain access to import licences under the revised regime than those EC/ACP service suppliers who, as former Category B operators or ripeners, may prove payment of customs duties and licence usage for licences obtained on the basis of GATS-inconsistent allocation rules.

6.142 We note that the so-called single pot solution does not in itself raise problems of WTO inconsistency. On the contrary, it would seem at least in theory to provide for equal conditions of competition between wholesale service suppliers, against a background of varying degrees of economic incentive to import bananas from varying sources. However, it may well be that, when a single pot solution relies on a skewed reference period (i.e. 1994-1996), combined with certain criteria for licence allocation (such as actual importer/payment of customs duties), the *de facto* less favourable conditions of competition for Ecuadorian service suppliers are aggravated through the carry-on effects of the previous regime.

3. The Rules for "Newcomer" Licences

6.143 Ecuador alleges that (i) the enlargement of the licence quantity reserved for "newcomers" from 3.5 per cent in the previous regime to 8 per cent in the revised regime (i.e. licences for up to 272,856 tonnes of imports) and (ii) the criteria for demonstrating competence in order to acquire "newcomer" status under the revised regime result in less favourable treatment for Ecuadorian wholesale service suppliers and thus are inconsistent with the EC's obligations under Article XVII of GATS.

6.144 The European Communities responds that the enlargement of the licence quantity reserved for "newcomers" is *de iure* and *de facto* non-discriminatory for foreign service suppliers. It indicates that EC licence allocation procedures for other EC products have set aside quantities as high as 20 per cent for "newcomers". As regards the criteria for demonstrating competence in order to acquire "newcomer" status, the European Communities argues that there is no distinction in Regulation 2362/98 between EC and non-EC service suppliers, on the one hand, and between non-EC service suppliers of different origins, on the other hand. It points out that importers of fruits and vegetables established in the European Communities are not necessarily EC-owned or EC-controlled service suppliers, nor does Regulation 2362/98 preclude companies newly established in the European Communities in, e.g. 1998, from applying as a "newcomer". The European Communities also submits that the figure of 400,000 Euro of declared customs value was chosen because it represented the size of a company which would have sufficient capacity to be viable in the sector. It adds that there are third country-owned companies which have qualified as "newcomers" under the revised regime.

6.145 We recall that Article 7 of Regulation 2362/98 provides:

> "…'*newcomers*' shall mean economic agents established in the European Community who, at the time of registration:
>
> (a) have been *engaged independently* and *on their own account* in *the commercial activity of importing fresh fruit and vegetables* falling within chapters 7 and 8, of the Tariff and Statistical Nomenclature and the Common Customs Tariff, or products under Chapter 9 thereof if they have also imported products falling within Chapters 7 and 8 *in one of the three years immediately preceding the year in respect of which registration is sought*; and
>
> (b) by virtue of this activity, have undertaken imports to a *declared customs value of ECU 400 000* or more during the period referred to in point (a)." (emphasis added).

6.146 We do not see how the enlargement of the licence quantity to 8 per cent of the tariff quotas and the traditional ACP quantities[229] in itself could create less favourable conditions of competition for service suppliers of third-country origin.

6.147 In respect of the criteria for acquiring "newcomer" status, we note that the parties agree that Article 7 of Regulation 2362/98 does not contain conditions which discriminate *de iure* against service suppliers on the basis of their foreign as opposed to EC origin. However, we note that potential "newcomers" must have a certain degree of ongoing relationship to the European Communities because they need to be established within the European Communities and they must have been engaged in the commercial activity of importing fruits or vegetables in one of the three years immediately preceding the year for which registration as "newcomer" is sought. More importantly, service suppliers of other Members may prove expertise with respect to the commercial activity of importing fresh fruit and vegetables only through imports carried out to the European Communities but not through the same type of commercial activity of trading in fruits or vegetables with other countries. If it is indeed the level of experience that this criterion is designed to ensure, in our view, experience with trade in fruit or vegetables in or to other countries should equally be deemed sufficient to ensure a requisite level of expertise. If it is the commercial viability of the enterprise in question that is at issue, we believe that it should also be possible to establish that viability on the basis of commercial activity outside the European Communities.

6.148 Thus, while any potential service supplier originating in third countries is not *de iure* precluded from acquiring "newcomer" status, in our view, the criteria for demonstrating the requisite expertise in order to qualify as an importer of bananas as "newcomer" create in their overall impact less favourable conditions of competition for service suppliers of Ecuador or other Members than for like service suppliers of EC origin. In this respect, we recall the Appellate Body's statement in *Japan - Alcoholic Beverages*[230] that a measure's "protective application can most often be discerned from the design, the architecture and the revealing structure of a measure".

6.149 **In light of these considerations, we find that the criteria for acquiring "newcomer" status under the revised licensing procedures accord to Ecuador's service suppliers *de facto* less favourable conditions of competition in the meaning of Article XVII than to like EC service suppliers.**

4. General observations

6.150 We wish to emphasize that our findings do not deprive any WTO Member of its right to choose WTO-consistent licence allocation methods based on, e.g. first-come, first-served, auctioning, or past trade performance. In principle, the WTO agreements leave Members a significant degree of discretion to choose the beneficiaries of licence allocations. We note that while, e.g. the Agreement on Import Licensing Procedures aims to ensure that licensing procedures do not constitute an additional restriction on trade in goods, the objectives of the GATS non-discrimination clauses are different. Articles XVII and II of GATS aim at ensuring that service suppliers of other Members are accorded conditions of competition no less favourable than those accorded to like service suppliers of national origin or of any other Member. However, the fact that the agreements under Annex 1A to the WTO Agreement and the GATS provide for different requirements, address different issues and pursue different objectives, does not imply that they are incompatible.

6.151 If a Member chooses an import regime which necessarily generates quota rents, such as a tariff quota, the requirement to ensure for service suppliers of other Members no less favourable

[229] Article 2.1(b) of Regulation 2362/98.

[230] Appellate Body report on *Japan - Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted on 1 November 1996, page 29.

treatment than for like service suppliers of national origin or of any other Member may have consequences on the choice of allocation criteria and the selection of licence beneficiaries under a licensing system that is based on past trade performance. However, we also recall that the obligation to accord no less favourable treatment under the GATS non-discrimination clauses requires a WTO Member to provide service suppliers of other Members with at least equal opportunities to compete with suppliers of national origin or of any other Member, regardless of the results which such opportunities might produce in terms of particular trade volumes or market shares.

6.152 The EC stresses that there cannot be a presumption of non-compliance with the requirements of Articles II and XVII of GATS if, statistically, the number of domestic importers or beneficiaries of licence allocations happened to be higher than the number of service suppliers of other Members who obtain licence allocations. In principle, we agree with that statement. If one of the WTO-consistent licence allocation methods is introduced in a market situation where service suppliers of national origin and those of other Members enjoy equal opportunities to benefit from licence allocations (and thus equal opportunities to reap quota rents generated by a WTO-consistent tariff quota), service suppliers of other Members presumably enjoy no less favourable treatment. However, where in a pre-existing market situation, a licence allocation system is introduced (or maintained) which involves allocation criteria that accord more favourable opportunities for service suppliers of national origin or of certain other Members to benefit from licence allocations, competitive conditions are modified to the detriment of like service suppliers of other Members.

6.153 In the present case, the supply of wholesale services is affected by conditions of access to available import licences.[231] If less favourable opportunities to obtain access to licence allocations adversely affect the conditions of competition for service suppliers of another Member, ensuring no less favourable treatment requires equal opportunities to obtain access to licence allocations. As discussed in detail above, under the revised regime service suppliers of Ecuadorian origin continue to be subject to less favourable conditions of competition for a number of reasons. In light of these considerations, we found that the revised licence allocation procedures accord less favourable treatment for Ecuador's service suppliers than for like service suppliers of EC/ACP origin. Thus we consider that EC licence allocation procedures should allow service suppliers of other Members equal competitive opportunities to expand their wholesale business as like EC/ACP suppliers of those services.

F. SUGGESTIONS ON IMPLEMENTATION

6.154 Ecuador requests this Panel to make specific suggestions to the European Communities on how it might implement our findings in this proceeding under Article 21.5 of the DSU. In this regard, we recall Article 19.1 of the DSU, which provides:

> "Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement. In addition to its recommendations, the panel or Appellate Body *may suggest ways* in which the Member concerned *could implement* the recommendations." (Emphasis added, footnotes omitted.)

Panels have not often made suggestions pursuant to Article 19.1. While Members remain free to choose how they implement DSB recommendations and rulings, it seems appropriate, after one

[231] The Appellate Body notes that "obviously, a wholesaler must obtain the goods by some means in order to resell them. In this case, for example, it would be difficult to resell bananas in the European Communities if one could not buy them or import them in the first place." Appellate Body report on *Bananas III*, paragraph 226.

implementation attempt has proven to be at least partly unsuccessful, that an Article 21.5 panel make suggestions with a view toward promptly bringing the dispute to an end.

6.155 In light of our findings and conclusions with respect to Articles I and XIII of GATT, the requirements of the Lomé Convention and the coverage of the Lomé waiver, above, in our view, the European Communities has at least the following options for bringing its banana import regime into conformity with WTO rules.

6.156 First, the European Communities could choose to implement a tariff-only system for bananas, without a tariff quota. This could include a tariff preference (at zero or another preferential rate) for ACP bananas. If so, a waiver for the tariff preference may be necessary unless the need for a waiver is obviated, for example, by the creation of a free-trade area consistent with Article XXIV of GATT. This option would avoid the need to seek agreement on tariff quota shares.

6.157 Second, the European Communities could choose to implement a tariff-only system for bananas, with a tariff quota for ACP bananas covered by a suitable waiver.

6.158 Third, the European Communities could maintain its current bound and autonomous MFN tariff quotas, either without allocating any country-specific shares or allocating such shares by agreement with all substantial suppliers consistently with the requirements of the chapeau to Article XIII:2. The MFN tariff quota could be combined with the extension of duty-free treatment (or preferential duties) to ACP imports. In respect of such duty-free treatment, the European Communities could consider with the ACP States whether the Lomé Convention can be read to "require" such treatment within the meaning of the Lomé waiver. We recall that some important preferences found by the original panel and Appellate Body reports to be required by the Lomé Convention cannot be implemented consistently with WTO rules (the most important being the quantitative protections foreseen in Protocol 5). If such a view of the Lomé Convention is challenged, a waiver covering such duty-free treatment could be sought. The MFN tariff quota could also be combined with a tariff quota for ACP imports, whether traditional or not, provided an appropriate waiver of Article XIII is obtained. We note that waivers for duty-free treatment for developing country exports have been granted on several occasions by Members.[232] In this context, some action may be required soon in respect of the Lomé waiver since it expires on 29 February 2000.

6.159 We make no specific suggestions in respect of licence allocation, but note that licences would not be needed at all in a tariff-only regime.

G. SUMMARY

6.160 **In respect of Article XIII of GATT, we find that the 857,700 tonne limit on traditional ACP imports is a tariff quota and therefore Article XIII applies to it. We further find that the reservation of the quantity of 857,700 tonnes for traditional ACP imports under the revised regime is inconsistent with paragraphs 1 and 2 of Article XIII of GATT. We also find that the country-specific allocations to Ecuador as well as to the other substantial suppliers are not consistent with the requirements of Article XIII:2.**

6.161 **In respect of Article I of GATT, we find that the level of 857,700 tonnes for duty-free traditional ACP imports can be considered to be required by the Lomé Convention because it appears to be based on pre-1991 best-ever exports and not on allowances for investments. However, we also find that it is not reasonable for the European Communities to conclude that**

[232] See WT/L/104 (United States – Caribbean Basin Economic Recovery Act); WT/L/183 (United States – Former Trust Territory of the Pacific Islands); WT/L/184 (United States - Andean Trade Preferences Act); WT/L/185 (Canada – CARICAN).

Protocol 5 of the Lomé Convention requires a collective allocation for traditional ACP suppliers. Therefore, duty-free treatment of imports in excess of an individual ACP State's pre-1991 best-ever export volumes is not required by Protocol 5 of the Lomé Convention. Accordingly, absent any other applicable requirement of the Lomé Convention, those excess volumes are not covered by the Lomé waiver and the preferential tariff thereon is therefore inconsistent with Article I:1.

6.162 **Also in respect of Article I of GATT, we find that in respect of preferences for non-traditional ACP imports, it is not unreasonable for the European Communities to conclude that (i) non-traditional ACP imports at zero tariff within the "other" category of the tariff quota and (ii) the tariff preference of 200 Euro per tonne for out-of-quota imports, are required by Article 168 of the Lomé Convention. Therefore, we find that the violations of Article I:1, as alleged by Ecuador in respect of preferences for non-traditional ACP imports, are covered by the Lomé waiver.**

6.163 **In respect of GATS, we define the range of wholesale trade services and find that (i) under the revised regime Ecuador's suppliers of wholesale services are accorded *de facto* less favourable treatment in respect of licence allocation than EC/ACP suppliers of those services in violation of Articles II and XVII of GATS and (ii) the criteria for acquiring "newcomer" status under the revised licensing procedures accord to Ecuador's service suppliers *de facto* less favourable conditions of competition than to like EC service suppliers in violation of Article XVII of GATS.**

H. CONCLUDING REMARK

6.164 We recall that the fundamental principles of the WTO and WTO rules are designed to foster development, not impede it. As illustrated by our suggestions on implementation above, the WTO system is flexible enough to allow, through WTO-consistent trade and non-trade measures, appropriate policy responses in a wide variety of circumstances across countries, including countries that are heavily dependent on the production and commercialization of bananas.

VII. CONCLUSIONS

7.1 The Panel concludes that for the reasons outlined in this Report aspects of the EC's import regime for bananas are inconsistent with the EC's obligations under Articles I:1 and XIII:1 and 2 of GATT 1994 and Articles II and XVII of GATS. We therefore conclude that there is nullification or impairment of the benefits accruing to Ecuador under the GATT 1994 and the GATS within the meaning of Article 3.8 of the DSU.

7.2 The Panel recommends that the Dispute Settlement Body request the European Communities to brings its import regime for bananas into conformity with its obligations under the GATT 1994 and the GATS.

ANNEX 1
"Pre-1991 best-ever" Imports of Bananas into the European Communities from Traditional ACP Supplying Countries

Country	Best year	Tonnes
Belize	1989	26,580
Cameroon	1962	127,171
Cape Verde	1970	4,766
Côte d'Ivoire	1972	135,189
Dominica	1988	70,322
Grenada	1977	14,017
Jamaica	1965	201,000
St Lucia	1990	127,225
St Vincent & the Grenadines	1990	81,536
Madagascar	1976	5,986
Somalia	1965	121,537
Suriname	1975	37,610
Total		**952,939**

Source: 1962-75 UN Comtrade.
1976-1990 Eurostat (Comext) and member States (Annex 1 Commission report on the functioning of the regime in the banana sector SEC(95) 1595 final).
Note: Table provided by the European Communities.

ANNEX II

Chart 1: Ecuador's Share of Total EC Banana Imports from all Sources

Year	Per cent	Year	Per cent
1989	11.77	1994	16.12
1990	12.77	1995	19.95
1991	19.96	1996	21.09
1992	21.84	1997	23.63
1993	19.67		

Source: European Commission. (Chart submitted by Ecuador.)

Chart 2: Ecuador's Share of World Exports

Year	World exports	Ecuador exports	Ecuador exports as per cent of world exports (%)
1990	9,334,529	2,156,617	23.10
1991	10,380,249	2,662,750	25.65
1992	10,601,392	2,682,831	25.30
1993	11,127,156	2,563,223	23.03
1994	12,525,825	3,007,925	24.01
1995	13,422,197	3,665,182	27.30
1996	13,914,285	3,866,079	27.78
1997	13,990,158	4,462,099	31.89

Source: FAO Statistical Database (visited 29 January 1999) (http:\\www.fao.org). (Chart submitted by Ecuador.)

Chart 3: Ecuador's Share of World Banana Exports other than to the EC

Year	World exports minus EC imports	Ecuador's exports minus exports to the EC	Ecuador's proportion of world exports minus exports to the EC (%)
1990	6,037,561	1,804,417	29.29
1991	6,703,507	2,084,550	31.1
1992	6,399,039	2,008,331	31.4
1993	7,451,371	1,958,023	26.3
1994	8,988,806	1,458,525	27.4
1995	9,991,793	3,032,982	30.4
1996	10,323,065	3,201,479	31.0
1997	10,828,638	3,733,599	34.5

Source: FAO and EUROSTAT and Statistical Offices: Austria, Sweden, Finland. (Chart submitted by Ecuador.)

ANNEX III

Prior EC System: Operator Categories under the Tariff Quota for Third-Country/Non-Traditional ACP Imports

Operator category definition	Allocation of import licences allowing the importation of bananas at in-quota rates (%)	Basis of determining operator entitlement
Category A: operators that have marketed third-country and/or non-traditional ACP bananas.	66.5	Average quantities of third-country and/or non-traditional ACP bananas marketed in a three-year reference period.
Category B: operators that have marketed EC and/or traditional ACP bananas.	30	Average quantities of traditional ACP and/or EC bananas marketed in a three-year reference period.
Category C: operators who started marketing bananas other than EC and/or traditional ACP bananas in 1992 or thereafter ("newcomers").	3.5	Divided pro rata among applicants.

Source: Article 19, Council Regulation (EEC) 404/93. (Submitted by Ecuador.)

Prior EC System: Activity Functions under the Tariff Quota for Third-Country/Non-Traditional ACP Imports

Activity functions	Definitions	Weighting coefficients (%)
Activity (a): "primary importer"	"the purchase of green third-country bananas and/or ACP bananas from the producers, or where applicable, the production, consignment and sale of such products in the Community"	57
Activity (b): "secondary importer or customs clearer"	"as owners, the supply and release for free circulation of green bananas and sale with a view to their subsequent marketing in the Community"	15
Activity (c): "ripener"	"as owners, the ripening of green bananas and their marketing within the Community"	28

Source: Article 3, Commission Regulation (EEC) 1442/93 of 10 June 1993. (Submitted by Ecuador.)