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

Second Recourse to Article 21.5 of the DSU by Ecuador

Report of the Panel

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EC – Approval and Marketing of Biotech Products	Panel Report, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R, Corr.1 and Add.1, 2, 3, 4, 5, 6, 7, 8 and 9, adopted 21 November 2006
EC – Bananas III	Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted 25 September 1997, DSR 1997:II, 591
EC – Bananas III (Ecuador)	Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas, Complaint by Ecuador*, WT/DS27/R/ECU, adopted 25 September 1997, as modified by Appellate Body Report, WT/DS27/AB/R, DSR 1997:III, 1085
EC – Bananas III (Guatemala and Honduras)	Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas, Complaint by Guatemala and Honduras*, WT/DS27/R/GTM, WT/DS27/R/HND, adopted 25 September 1997, as modified by Appellate Body Report, WT/DS27/AB/R, DSR 1997:II, 695
EC – Bananas III (Mexico)	Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas, Complaint by Mexico*, WT/DS27/R/MEX, adopted 25 September 1997, as modified by Appellate Body Report, WT/DS27/AB/R, DSR 1997:II, 803
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EC – Bananas III	Award of the Arbitrator, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Arbitration under Article 21.3(c) of the DSU*, WT/DS27/15, 7 January 1998, DSR 1998:I, 3
EC – Bananas III (Article 21.5 – EC)	Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS27/RW/EEC and Corr.1, 12 April 1999, unadopted, DSR 1999:II, 783
EC – Bananas III (Article 21.5 – Ecuador)	Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 of the DSU by Ecuador*, WT/DS27/RW/ECU, adopted 6 May 1999, DSR 1999:II, 803
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EC – Chicken Cuts (Thailand)	Panel Report, *European Communities – Customs Classification of Frozen Boneless Chicken Cuts, Complaint by Thailand*, WT/DS286/R, adopted 27 September 2005, as modified by Appellate Body Report, WT/DS269/AB/R, WT/DS286/AB/R
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EC – Export Subsidies on Sugar	Appellate Body Report, *European Communities – Export Subsidies on Sugar*, WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R, adopted 19 May 2005
EC – Export Subsidies on Sugar (Australia)	Panel Report, *European Communities – Export Subsidies on Sugar, Complaint by Australia*, WT/DS265/R, adopted 19 May 2005, as modified by Appellate Body Report, WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R
EC – Export Subsidies on Sugar (Brazil)	Panel Report, *European Communities – Export Subsidies on Sugar, Complaint by Brazil*, WT/DS266/R, adopted 19 May 2005, as modified by Appellate Body Report, WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R
EC – Export Subsidies on Sugar (Thailand)	Panel Report, *European Communities – Export Subsidies on Sugar, Complaint by Thailand*, WT/DS283/R, adopted 19 May 2005, as modified by Appellate Body Report, WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R
EC – Poultry	Appellate Body Report, *European Communities – Measures Affecting the Importation of Certain Poultry Products*, WT/DS69/AB/R, adopted 23 July 1998, DSR 1998:V, 2031
EEC – Apples I (Chile)	GATT Panel Report, *EEC Restrictions on Imports of Apples from Chile*, adopted 10 November 1980, BISD 27S/98
EEC – Import Restrictions	GATT Panel Report, *EEC – Quantitative Restrictions Against Imports of Certain Products from Hong Kong*, adopted 12 July 1983, BISD 30S/129

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EEC – Newsprint	GATT Panel Report, *Panel on Newsprint*, adopted 20 November 1984, BISD 31S/114
India – Autos	Panel Report, *India – Measures Affecting the Automotive Sector*, WT/DS146/R, WT/DS175/R and Corr.1, adopted 5 April 2002, DSR 2002:V, 1827
India – Patents (US)	Appellate Body Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R, adopted 16 January 1998, DSR 1998:I, 9
India – Quantitative Restrictions	Panel Report, *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, WT/DS90/R, adopted 22 September 1999, upheld by Appellate Body Report, WT/DS90/AB/R, DSR 1999:V, 1799
Indonesia – Autos	Panel Report, *Indonesia – Certain Measures Affecting the Automobile Industry*, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R and Corr.1, 2, 3 and 4, adopted 23 July 1998, DSR 1998:VI, 2201
Japan – Alcoholic Beverages II	Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, 97
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US – Gasoline	Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, 3
US – Line Pipe	Panel Report, *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/R, adopted 8 March 2002, as modified by Appellate Body Report, WT/DS202/AB/R, DSR 2002:IV, 1473
US – Non-Rubber Footwear	GATT Panel Report, *United States – Countervailing Duties on Non-Rubber Footwear from Brazil*, adopted 13 June 1995, BISD 42S/208
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US – Section 301 Trade Act	Panel Report, *United States – Sections 301-310 of the Trade Act of 1974*, WT/DS152/R, adopted 27 January 2000, DSR 2000:II, 815
US – Shrimp	Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, 2755
US – Softwood Lumber IV (Article 21.5 – Canada)	Appellate Body Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada – Recourse by Canada to Article 21.5 of the DSU*, WT/DS257/AB/RW, adopted 20 December 2005

Short Title	Full Case Title and Citation
US – Softwood Lumber VI (Article 21.5 – Canada)	Appellate Body Report, *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada*, WT/DS277/AB/RW and Corr.1, adopted 9 May 2006
US – Softwood Lumber VI (Article 21.5 – Canada)	Panel Report, *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada*, WT/DS277/RW, adopted 9 May 2006, as modified by Appellate Body Report, WT/DS277/AB/RW
US – Steel Plate	Panel Report, *United States – Anti-Dumping and Countervailing Measures on Steel Plate from India*, WT/DS206/R and Corr.1, adopted 29 July 2002, DSR 2002:VI, 2073
US – Sugar Waiver	GATT Panel Report, *United States – Restrictions on the Importation of Sugar and Sugar-Containing Products Applied under the 1955 Waiver and under the Headnote to the Schedule of Tariff Concessions*, adopted 7 November 1990, BISD 37S/228

TABLE OF ABBREVIATIONS AND SYMBOLS USED IN THIS REPORT

ACP	Africa, Caribbean and Pacific countries, signatories of the Cotonou Agreement
Bananas Annex	Annex to the Doha Waiver Decision approved in November 2001 by the WTO Ministerial Conference
BFA	Bananas Framework Agreement originally negotiated in 1994 by the European Communities with Colombia, Costa Rica, Nicaragua and Venezuela
Bananas Understanding	Understanding on Bananas, signed between the European Communities and Ecuador in April 2001
DSB	Dispute Settlement Body
DSU	Dispute Settlement Understanding
EC	European Communities
FAO	Food and Agriculture Organization of the United Nations
GATT	General Agreement on Tariffs and Trade
GATT 1947	General Agreement on Tariffs and Trade 1947
GATT 1994	General Agreement on Tariffs and Trade 1994
HS	Harmonised Commodity Description and Coding System
MFN	Most-Favoured Nation
mt	Metric Ton
TRQ	Tariff-rate Quota
WCO	World Customs Organization
WTO	World Trade Organization
WTO Agreement	Marrakesh Agreement establishing the World Trade Organization

I. INTRODUCTION

1.1 On 28 November 2006, Ecuador requested consultations with the European Communities, under Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) and Article XXII of the General Agreement on Tariffs and Trade 1994 (GATT 1994), regarding measures taken by the European Communities allegedly to comply with the recommendations and rulings of the Dispute Settlement Body (DSB) in the dispute *European Communities – Regime for the Importation, Sale and Distribution of Bananas* (*EC – Bananas III*). According to the request, the measures identified (i.e., those contained in Council Regulation (EC) No. 1964/2005 and its associated implementing regulations), are inconsistent with the obligations of the European Communities under Articles I, II and XIII of the GATT 1994.[1] Consultations were held on 14 December 2006, but failed to resolve the disagreement between the parties.[2]

1.2 On 23 February 2007, Ecuador requested the establishment of a panel pursuant to Article 21.5 of the DSU concerning the alleged inconsistency of the measures adopted by the European Communities to comply with the rulings and recommendations of the DSB in the dispute *EC – Bananas III* and subsequent related rulings.[3]

1.3 At its meeting on 20 March 2007, the DSB decided, in accordance with Article 21.5 of the DSU, to refer to the original Panel, if possible, the matter raised by Ecuador in document WT/DS27/80.[4] The Panel's terms of reference were the following:

> "To examine, in the light of the relevant provisions of the covered agreements cited by Ecuador in document WT/DS27/80, 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."[5]

1.4 On 5 June 2007, Ecuador requested the Director-General to determine the composition of the Panel, pursuant to paragraph 7 of Article 8 of the DSU.[6] On 15 June 2007, the Director-General composed the Panel as follows:

Chairperson: Mr Christian Häberli

Members: Mr Kym Anderson
Mr Yuqing Zhang[7]

1.5 Belize, Brazil, Cameroon, Colombia, Côte d'Ivoire, Dominica, the Dominican Republic, Ghana, Jamaica, Japan, Madagascar, Nicaragua, Panama, St. Lucia, St. Vincent and the Grenadines, Suriname and the United States reserved their third-party rights to participate in the Panel's proceedings.[8] At the request of some third parties, the Panel decided that third parties would have, in addition to the rights provided for under the DSU, the following additional rights: (i) the right to be present during the entirety of the substantive meeting of the Panel with the parties and the third parties;

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[1] *EC – Bananas III (Article 21.5 – Ecuador II)*, Request for Consultations (WT/DS27/65), 20 November 2006.
[2] *EC – Bananas III (Article 21.5 – Ecuador II)*, Request for the Establishment of a Panel (WT/DS27/80) 26 February 2007.
[3] Ibid.
[4] *EC – Bananas III (Article 21.5 – Ecuador II)*, Constitution of the Panel (WT/DS27/82), 18 June 2007, para. 1.
[5] Ibid., para. 2.
[6] Ibid., para. 3.
[7] Ibid., para. 4.
[8] Ibid., para. 5.

(ii) the right to receive copies of the Parties' first written submissions and rebuttals, as well as copies of the questions posed by the Panel to the parties and to the other third parties and copies of parties' and third parties' responses to such questions; and, (iii) the right to ask oral questions to the parties during the course of the substantive meeting, although the parties would be under no obligation to respond to those questions.

1.6 On 18 June 2007, the Panel addressed a communication to the parties (Ecuador and the European Communities), submitting draft Working Procedures and the timetable that the Panel proposed to follow in these proceedings and inviting them to an organizational meeting in order to receive the views of the parties. The organizational meeting was held with the parties on 21 June 2007. On 29 June 2007, the Panel notified the parties (Ecuador and the European Communities) and the third parties of the adopted Working Procedures and timetable.

1.7 On 29 June 2007, the United States (US) requested the establishment of a panel pursuant to Article 21.5 of the DSU concerning the alleged inconsistency of the measures adopted by the European Communities to comply with the recommendations and rulings of the DSB in the dispute *EC – Bananas III* and subsequent related rulings.[9]

1.8 On 6 July 2007, in a communication addressed to the Panel, the European Communities requested a modification of the timetable in these proceedings, in order to take into account the timetable of the proceedings of the compliance panel requested by the United States. The European Communities requested that the deadline for its first written submission to this Panel be postponed until after the United States had filed its own first written submission in the compliance panel proceedings initiated by the United States. The European Communities cited its concern that, were the United States to file its first written submission after the European Communities had filed its own, this would amount "to a de facto reversal of the order in which first written submissions should be submitted" and "create "very serious due process problems".[10] When asked by the Panel to comment on the European Communities' request, in a communication dated 9 July 2007, Ecuador strongly objected to any delay in the proceedings. In Ecuador's view, the timetable in the proceedings "is already much more protracted than the 90 days called for in Article 21.5" and "Ecuador would be prejudiced by a further delay, which [would] only [favour] the interests of the EC as the defending Party".[11] Ecuador additionally noted that the European Communities had only filed its request "after Ecuador had submitted its first submission" and more than a week after the European Communities had received copy of the United States' request for the establishment of a compliance panel.[12] Also on 9 July 2007, the United States sent a communication to the Panel, providing comments to the European Communities' request for the Panel's consideration. The United States noted that the European Communities had received a copy of the United States' request for the establishment of a compliance panel on 29 June 2007. In the view of the United States, the European Communities "does not appear to have identified any 'very serious due process problems' that would arise if the current timetable were maintained in the present proceeding".[13] On 10 July 2007, the Panel notified the parties that it did "not find it necessary, at this point, to amend the timetable for its proceedings fixed on 29 June". The Panel informed the parties that it would "follow closely developments relating to the US request for the establishment of an Article 21.5 panel regarding the EC's compliance in the *EC – Bananas III* case [and in] the eventuality of a DSB decision to establish such an Article 21.5

[9] *EC – Bananas III (Article 21.5 – US)*, Request for the Establishment of a Panel (WT/DS27/83) 2 July 2007.

[10] Communication by the European Communities to the Panel, dated 6 July 2007.

[11] Communication by Ecuador to the Panel, dated 9 July 2007.

[12] Ibid.

[13] Communication by the United States to the Panel, dated 9 July 2007.

panel, [it would] promptly consult with the parties in order to decide whether the new developments should affect the timetable in the current proceedings."[14]

1.9 At its meeting on 12 July 2007, the DSB decided, in accordance with Article 21.5 of the DSU, to refer to the original Panel, if possible, the matter raised by the United States in document WT/DS27/83.[15] The Panel's terms of reference were the following:

> "To examine, in the light of the relevant provisions of the covered agreements cited by the United States in document WT/DS27/83, the matter referred to the DSB by the United States 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."[16]

1.10 On 3 August 2007, the United States requested the Director-General to determine the composition of the Panel, pursuant to paragraph 7 of Article 8 of the DSU.[17] On 13 August 2007, the Director-General composed the Panel as follows:

Chairperson: Mr Christian Häberli

Members: Mr Kym Anderson
Mr Yuqing Zhang[18]

1.11 On 15 August 2007, the Panel addressed a communication to the parties (Ecuador and the European Communities), regarding the possibility of harmonizing the timetable in these proceedings with that of the panel requested by the United States. The Panel also consulted the parties on the possibility of introducing adjustments to the Working Procedures in these proceedings. In its communication, the Panel invited the parties to a meeting on 20 August 2007, to be followed by a separate organizational meeting of the compliance Panel requested by the United States to be held in the presence of the parties to that case.[19]

1.12 On 20 August 2007, the Panel held a meeting with the parties (Ecuador and the European Communities) and received their comments regarding the possibility of harmonizing the timetable in these proceedings with those of the panel requested by the United States, as well as on the possibility of introducing adjustments to the Working Procedures. On the same date, the Panel held a separate organizational meeting with the parties to the compliance Panel requested by the United States.

1.13 On 23 August 2007, the Panel notified the parties (Ecuador and the European Communities) that, after consideration of the comments received from both parties, the timetable originally established remained unchanged. The Panel also notified the parties of the amendments incorporated into the Working Procedures, in order to allow for the possibility of holding panel meetings in joint sessions of both the proceedings requested by Ecuador and those requested by the United States and to allow the Panel to copy its communications to the parties in both cases.[20]

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[14] Communication by Panel to the parties, dated 10 July 2007.

[15] *EC – Bananas III (Article 21.5 – US)*, Constitution of the Panel, Note by the Secretariat (WT/DS27/84), 13 August 2007, para. 1.

[16] Ibid., para. 2.

[17] Ibid., para. 3.

[18] Ibid., para. 4. Belize, Brazil, Cameroon, Colombia, Côte d'Ivoire, the Dominican Republic, Ecuador, Jamaica, Japan, Mexico, Nicaragua, Panama and Suriname reserved their third-party rights to participate in the proceedings of the compliance Panel requested by the United States. Ibid., para. 5.

[19] Communication by Panel to the parties, dated 15 August 2007.

[20] Communication by Panel to the parties, dated 23 August 2007.

1.14 In accordance with the timetable approved by the Panel, Ecuador filed its first written submission on 6 July 2007 and the European Communities on 20 July 2007. Ecuador filed its rebuttal on 1 August 2007 and the European Communities on 13 August 2007. The Panel received third party submissions from Colombia, Nicaragua, Panama, and the United States, as well as a joint third party submission from Belize, Cameroon, Côte d'Ivoire, Dominica, the Dominican Republic, Ghana, Jamaica, Madagascar, St. Lucia, St. Vincent and the Grenadines, and Suriname.

1.15 The Panel met with the parties and third parties on 18 and 19 September 2007.

1.16 On occasion of its oral statement at the meeting of the Panel with the parties and third parties, the European Communities again requested a modification of the timetables of these proceedings. At the end of the meeting the Panel communicated to the parties that it had looked into the matter and decided that, notwithstanding the Panel's initial intentions to either harmonize the timetable of both proceedings or totally separate both cases, it could not at that point in time find a better alternative for the timetable of proceedings. This despite the fact that the Panel was aware that the approved timetable implied a considerable burden of work, peaking at particular moments for the parties, as well as for the Panel and the Secretariat.

1.17 On 4 October 2007, parties and third parties submitted replies to questions posed by the Panel. On 5 October 2007, the European Communities requested that the deadline for submitting comments to replies to questions be delayed until 22 October 2007. After having considered the views of both parties, the Panel extended the deadline for submission of comments to replies until 16 October 2007. On 16 October 2007, parties and third parties submitted comments on the replies to questions.

1.18 The Panel issued the descriptive sections of the draft report to the parties to the dispute on 12 November 2007. On the same date, the Panel issued the relevant sections with their respective arguments to each of the third parties. On 15 November 2007, the Panel received comments from both parties regarding the descriptive sections of the draft report and from the ACP third parties, Brazil and Japan regarding the relevant section with its own arguments.

1.19 The Panel submitted its interim report to the parties on 27 November 2007. Issuance of the interim report had been originally scheduled for 23 November, but was delayed by the Panel in order to ensure that replies to questions and comments on replies in the proceedings requested by the United States had been received by that panel, before the interim report in the current proceedings was issued. The Panel issued its final report to the parties on 10 December 2007.

II. FACTUAL ASPECTS

A. BACKGROUND

1. Object of the current dispute

2.1 This dispute concerns measures adopted by the European Communities (EC) with the alleged purpose of complying with the rulings and recommendations of the Dispute Settlement Body (DSB) in the case *European Communities – Regime for the Importation, Sale and Distribution of Bananas* (*EC – Bananas III*) and with subsequent related rulings and recommendations. Parties disagree as to whether these measures are in conformity with the European Communities' obligations under the WTO covered agreements.

2. Basic chronology

2.2 At its meeting on 25 September 1997, the DSB adopted the Appellate Body Report on *EC – Bananas III* (WT/DS27/AB/R) and the four panel reports on the same case (WT/DS27/R/ECU, WT/DS27/R/GTM-WT/DS27/R/HND, WT/DS27/R/MEX and WT/DS27/R/USA), as modified by the Appellate Body's Report.[21] Pursuant to these reports, the DSB requested the European Communities to bring its banana regime, as found to be inconsistent with the General Agreement on Tariffs and Trade 1994 (GATT 1994), the General Agreement on Trade in Services (GATS) and the Agreement on Import Licensing Procedures (Import Licensing Agreement), into conformity with its obligations under those Agreements.

2.3 On 7 January 1998, the arbitral award requested by Ecuador, Guatemala, Honduras, Mexico and the United States (US), pursuant to Article 21.3(c) of the DSU, was circulated. The Arbitrator concluded that the "reasonable period of time" for the European Communities to implement the rulings and recommendations of the DSB adopted on 25 September 1997 in *EC – Bananas III*, would be the period from 25 September 1997 to 1 January 1999.[22]

2.4 On 18 December 1998, Ecuador requested the DSB to re-establish the original panel in order to examine the consistency of the measures adopted by the European Communities to implement the rulings and recommendations adopted by the DSB in September 1997.[23] On 12 January 1999, the DSB decided, in accordance with Article 21.5 of the DSU, to refer to the original panel the matter raised by Ecuador in document WT/DS27/41.[24] The report issued by the compliance Panel requested by Ecuador was adopted by the DSB on 6 May 1999.

2.5 On 23 June 2000, the European Communities and certain developing countries concluded a partnership agreement in Cotonou of Benin (the "Cotonou Agreement"). The Cotonou Agreement provided that the European Communities would allow the importation of products originating from beneficiary developing countries free of customs duties and charges having equivalent effect (or, at least, at preferential terms), until 31 December 2007. In the sector of bananas, this trade preference is applied in the form of an annual importation into the European Communities of up to 775,000 mt of bananas subject to zero duty.[25]

2.6 Through a communication dated 22 June 2001, the European Communities notified the DSB that it had:

> "[R]eached, with the United States of America and Ecuador, a mutually satisfactory solution within the meaning of Article 3.6 of the DSU regarding the implementation by the EC of the conclusions and recommendations adopted by the DSB in the dispute 'Regime for the importation, sale and distribution of bananas' (WT/DS27)."[26]

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[21] *EC – Bananas III*, Appellate Body Report and Panel Reports, Action by the Dispute Settlement Body (WT/DS27/12), 10 October 1997.

[22] *EC – Bananas III*, Arbitration under Article 21.3(c) of the Understanding on Rules and Procedures Governing the Settlement of Disputes, Award of the Arbitrator (WT/DS27/15), 7 January 1998. See also *EC – Bananas III*, Arbitration under Article 21.3(c) of the Understanding on Rules and Procedures Governing the Settlement of Disputes (WT/DS27/16), 7 January 1998.

[23] *EC – Bananas III (Article 21.5 – Ecuador)*, (WT/DS27/41), 18 December 1998.

[24] *EC – Bananas III (Article 21.5 – Ecuador)*, Constitution of the Panel, Note by the Secretariat (WT/DS27/44), 18 January 1999.

[25] European Communities' first written submission paras. 11 and 13.

[26] *EC – Bananas III*, Notification of Mutually Agreed Solution (WT/DS27/58), 2 July 2001.

2.7 Through a communication dated 26 June 2001 and addressed to the DSB, the United States referred to the understanding reached with the European Communities on 11 April 2001.[27] In its communication, the United States stated that the understanding:

> "[I]dentifies the means by which the long-standing dispute over the EC's banana import regime can be resolved, but, as is obvious from its own text, it does not in itself constitute a mutually agreed solution pursuant to Article 3.6 of the DSU. In addition, in view of the steps yet to be taken by all parties, it would also be premature to take this item off the DSB agenda."[28]

2.8 Through a communication dated 3 July 2001 and addressed to the DSB, Ecuador referred to the understanding reached with the European Communities on 30 April 2001.[29] In its communication, Ecuador stated that the understanding:

> "[I]dentifies means by which a long-standing dispute can be resolved. However, the Understanding also comprises of the execution of two phases and requires the implementation of several key features, which demands the collective action of the WTO membership ... [T]he Understanding reached with the EC refers to the current banana import regime in force as of 1 July 2001 as one of a transitory nature since, beginning at the latest on 1 January 2006, a new and definitive Tariff Only regime will be in force ... Since the new EC banana import regime which is currently in force still requires that several steps be taken in the context of the DSB and other WTO bodies, it would be premature to take this item off the DSB agenda which considers this issue at every regular meeting pursuant to Article 21.6 of the DSU ... In light of the above and although Ecuador sees the Understanding as an agreed solution which can contribute to an overall, definite and universally accepted solution, it must be made clear that the provisions of Article 3.6 of the DSU are not applicable in this case."[30]

2.9 On 14 November 2001, the WTO Ministerial Conference decided to waive Article I:1 of the GATT 1994:

> "[U]ntil 31 December 2007, to the extent necessary to permit the [EC] to provide preferential tariff treatment for products originating in ACP States as required by Article 36.3, Annex V and its Protocols of the ACP-EC Partnership Agreement,[31] without being required to extend the same preferential treatment to like products of any other member".[32]

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[27] *EC – Bananas III*, Communication from the United States (WT/DS27/59), 2 July 2001.

[28] Ibid.

[29] *EC – Bananas III*, Understanding on Bananas between Ecuador and the EC (WT/DS27/60), 9 July 2001.

[30] Ibid.

[31] (*footnote original*) Any reference to the Partnership Agreement in this Decision shall also include the period during which the trade provisions of this Agreement are applied on the basis of transitional measures adopted by the ACP-EC joint institutions.

[32] Ministerial Conference, European Communities, The ACP – EC Partnership Agreement, Decision of 14 November 2001 (WT/MIN(01)/15), 14 November 2001.

2.10 While in principle this waiver was to be valid until 31 December 2007[33], in regard to bananas this was subject to the terms and conditions set out in the text of the Decision, which include the additional provisions contained in the Annex to the Doha Waiver Decision (Bananas Annex).[34]

2.11 Also on 14 November 2001, the WTO Ministerial Conference decided to waive Article XIII:1 and XIII:2 of the GATT 1994:

> "With respect to the EC's imports of bananas, as of 1 January 2002, and until 31 December 2005 ... with respect to the EC's separate tariff quota of 750,000 tonnes for bananas of ACP origin."[35]

2.12 On 21 January 2002, the European Communities addressed a communication to the DSB, concerning its progress in the implementation of the DSB's recommendations and rulings in the *EC – Bananas III* dispute. The European Communities informed the DSB that Regulation (EC) No. 2587/2001 had been adopted by the Council on 19 December 2001 and published in the Official Journal of the European Communities L 345 of 29 December 2001.[36] It stated that:

> "By this Regulation, the EC has implemented Phase 2 of the Understandings with the United States and Ecuador (circulated as document WT/DS27/58 of 2 July 2001)[37]

2.13 On its session of 1 February 2002, the DSB considered a report submitted by the European Communities concerning its progress in the implementation of the DSB's recommendations regarding its bananas import regime. At the meeting, the European Communities expressed its view that "this matter should now be withdrawn from the DSB agenda".[38] The European Communities stated that it had implemented on schedule the second phase of the Understandings on Bananas concluded with the United States and Ecuador in April 2001, and had complied with its international obligations. The European Communities added that the regime set out in Regulation (EC) No. 2587/2001, adopted on 19 December 2001, would be applicable until the time the EC's banana import regime would become a tariff-only regime. This would take place by 1 January 2006 at the latest, following the negotiations under Article XXVIII, which in principle would begin in 2004. In response, at the same meeting, Ecuador stated that "like other countries, [it] also considered that this item should no longer appear on the agenda of future DSB meetings". Ecuador added that the bilateral understanding signed with the European Communities on 30 April 2001:

> "[C]onstituted a sound basis for the EC to implement a transitional banana import regime so that by 1 January 2006, at the latest, a WTO-compatible tariff-only regime would be put into place. The transitional regime contained various phases, stages and elements to be implemented. One element was to obtain waivers from Articles I and XIII of the GATT 1994. However, the decision to grant these waivers included new stages which would have to be carried out in order to ensure a proper transition to a tariff-only banana import regime, as from 1 January 2006. Accordingly, insofar as the EC continued to implement the DSB's recommendations by meeting its commitments, Ecuador wished to reserve its rights under Article 21 of the DSU.

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[33] Ministerial Conference, European Communities, The ACP – EC Partnership Agreement, Decision of 14 November 2001 (WT/MIN(01)/15), 14 November 2001, p. 2, para. 1.

[34] Ibid., p. 3, para. 3bis.

[35] Ministerial Conference, European Communities, Transitional Regime for the EC Autonomous Tariff Rate Quotas on Imports of Bananas, Decision of 14 November 2001 (WT/MIN(01)/16), 14 November 2001.

[36] *EC – Bananas III*, Status Report by the European Communities, Addendum ("WT/DS27/51/Add.25), 21 January 2002.

[37] Ibid.

[38] Dispute Settlement Body, Minutes of Meeting held in the Centre William Rappard on 1 February 2002 (WT/DSB/M/119), 6 March 2002, para. 3.

> Therefore if there was any disagreement concerning the measures applied by the EC, the matter could be referred to the original Panel pursuant to Article 21.5 of the DSU."[39]

2.14 On 19 January 2004, the European Communities, in view of the enlargement of the European Union, resulting from the accession of Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, the Slovak Republic and Slovenia, notified, within the framework of procedures laid down in Article XXIV GATT 1994, and in particular Article XXIV:6, the withdrawal on 1 May 2004 of the commitments in Schedules CXL of the EC-15, and in the Schedules of Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, the Slovak Republic and Slovenia. The European Communities added that it was ready to enter into Article XXIV and Article XXVIII GATT 1994 procedures, including tariff negotiations or consultations, to address compensatory adjustments provided for under Article XXIV:6 of the GATT 1994. The European Communities also stated that, pending the completion of the procedures under Article XXIV and Article XXVIII of the GATT 1994, and the creation of a new schedule valid for the EC-25, the commitments in Schedule CXL would be fully respected and that the new member States of the European Communities intended to align their Schedules with those of the European Communities on 1 May 2004.[40]

2.15 On 15 July 2004, the European Communities announced, in a communication to WTO Members, that it intended to modify, in accordance with the provisions and procedures of Article XXVIII:5 of the GATT 1994, its concessions with respect to tariff item 0803 00 19 (bananas) included in the EC Schedule CXL.[41]

2.16 On 31 January 2005, the European Communities notified the WTO Members that it intended to replace its concessions on tariff item 0803 00 19 (bananas) included in the EC Schedule CXL with a bound duty of €230/mt.[42] It also indicated that the communication constituted:

> "[T]he announcement under the terms of the Annex to the Decision of the WTO Ministerial Conference of 14 November 2001 concerning the ACP-EC Partnership Agreement (WT/MIN(01)/15)."[43]

2.17 On 30 March 2005, Colombia, Costa Rica, Ecuador, Guatemala, Honduras and Panama, followed by Venezuela and Nicaragua on 31 March 2005 and Brazil on 1 April 2005, notified the WTO that they were requesting arbitration pursuant to the procedures contained in the Annex to the Doha Waiver, in order to determine whether the envisaged rebinding on the European Communities' tariff on bananas (at €230/mt), announced under the Annex to the Waiver, fulfilled the requirements of the Waiver Decision.[44] The Arbitrator's award was circulated on 1 August 2005.[45] The Arbitrator concluded that:

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[39] Dispute Settlement Body, Minutes of Meeting held in the Centre William Rappard on 1 February 2002 (WT/DSB/M/119), 6 March 2002, paras. 4-5.

[40] Article XXIV:6 Negotiations, Enlargement of the European Union: Communication from the European Communities (G/SECRET/20), 30 January 2004.

[41] Article XXVIII:5 Negotiations, Schedule CXL – European Communities (G/SECRET/22), 2 August 2004.

[42] Article XXVIII:5 Negotiations, Schedule CXL – European Communities (G/SECRET/22/Add.1), 1 February 2005.

[43] Ibid.

[44] European Communities, The ACP – EC Partnership Agreement, Recourse to Arbitration Pursuant to the Annex to the Decision of 14 November 2001 (WT/L/607), 1 April 2005. See also, European Communities, The ACP – EC Partnership Agreement, Recourse to Arbitration Pursuant to the Annex to the Decision of 14 November 2001, *Communication from Colombia*, Addendum (WT/L/607/Add.1), 1 April 2005;

> "[T]he European Communities' envisaged rebinding on bananas would not result in at least maintaining total market access for MFN banana suppliers, taking into account all EC WTO market-access commitments relating to bananas".[46]

2.18 On 13 September 2005, the European Communities notified the interested parties that it had revised its proposal to provide as from 1 January 2006 for an MFN tariff for bananas at €187/mt and a tariff quota for ACP countries of 775,000 mt per year at zero duty.[47]

2.19 In a communication dated 26 September 2005, the European Communities notified the Arbitrator that, after consultations with the interested parties, there was at that point no basis for even seeking a mutually satisfactory solution within a timeframe that would allow for implementation of the new European Communities' banana regime by 1 January 2006. The European Communities therefore requested that the matter be referred back to the same Arbitrator, in accordance with the Annex to the Doha Waiver.[48] The Arbitrator's award was circulated on 27 October 2005.[49] The Arbitrator concluded that:

> "[T]he European Communities' proposed rectification, consisting of a new MFN tariff rate on bananas of €187 per metric ton and a 775,000 mt tariff quota on imports of bananas of ACP origin, would not result 'in at least maintaining total market access for MFN banana suppliers', taking into account 'all EC WTO market-access commitments relating to bananas'. Consequently... the European Communities has failed to rectify the matter, in accordance with the fifth tiret of the Annex to the Doha Waiver."[50]

2.20 On 27 September 2006, the European Communities, noting the enlargement of the European Union, resulting from the accession of Bulgaria and Romania that would take place from 1 January 2007, notified, within the framework of procedures laid down in Article XXIV GATT 1994, and in particular Article XXIV:6, the modification of the EC Schedule, as well as the fact that the two new members of the European Union would be subject to the EC Schedules from 1 January 2007 and, consequently the commitments in the Schedules of Bulgaria and Romania would be withdrawn from that date.[51]

Communication from Costa Rica, Addendum (WT/L/607/Add.2), 1 April 2005; *Communication from Ecuador*, Addendum (WT/L/607/Add.3), 1 April 2005; *Communication from Guatemala*, Addendum (WT/L/607/Add.4), 1 April 2005; *Communication from Honduras*, Addendum (WT/L/607/Add.5), 1 April 2005; *Communication from Panama*, Addendum (WT/L/607/Add.6), 1 April 2005; *Communication from Nicaragua*, Addendum (WT/L/607/Add.7), 4 April 2005; *Communication from Venezuela*, Addendum (WT/L/607/Add.8), 4 April 2005; and, *Communication from Brazil*, Addendum (WT/L/607/Add.9), 4 April 2005.

[45] European Communities, The ACP – EC Partnership Agreement, Recourse to Arbitration Pursuant to the Decision of 14 November 2001, Award of the Arbitrator (WT/L/616), 1 August 2005. See also, European Communities, The ACP – EC Partnership Agreement, Recourse to Arbitration Pursuant to the Annex to the Decision of 14 November 2001, *Communication from the Secretariat* (WT/L/607/Add.13), 5 September 2005.

[46] Award of the Arbitrator, *EC – The ACP-EC Partnership Agreement*, para. 94.

[47] See Award of the Arbitrator, *EC – The ACP-EC Partnership Agreement II*, para. 7.

[48] European Communities, The ACP – EC Partnership Agreement, Recourse to Arbitration Pursuant to the Annex to the Decision of 14 November 2001, Addendum, *Communication from the European Communities* (WT/L/607/Add.14), 28 September 2005.

[49] Award of the Arbitrator, *EC – The ACP-EC Partnership Agreement II*. See also, European Communities, The ACP – EC Partnership Agreement, Recourse to Arbitration Pursuant to the Annex to the Decision of 14 November 2001, *Communication from the Chairman of the General Council* (WT/L/607/Add.15), 28 October 2005.

[50] Award of the Arbitrator, *EC – The ACP-EC Partnership Agreement II*, para. 127.

[51] Article XXIV:6 Negotiations, Enlargement of the European Union: Communication from the European Communities (G/SECRET/26), 28 September 2006.

B. PRODUCT DESCRIPTION

2.21 Under the Harmonized Commodity Description and Coding Systems (Harmonized System or HS) developed by the World Customs Organization (WCO), bananas are classified under the HS Code 0803.00 which also includes plantains, fresh or dried. The European Communities applies a "combined nomenclature" (CN) comprised of the harmonized system nomenclature and the Community subdivisions.[52] The European Communities' combined nomenclature is revised on an annual basis. The revised version entered into force 1 January 2007 as a result of Commission Regulation (EC) No. 1549/2006 of 17 October 2006 amending Annex I to Council Regulation (EEC) 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff.[53] This EC Commission Regulation establishes that the CN code for "bananas, including plantains, fresh or dried," is 0803 00 with the following sub-divisions[54]: 0803 00 11 for Fresh- Plantains; 0803 00 19[55] for Fresh- Other (bananas);[56] 0803 00 90 for Dried (bananas, including plantains).[57] The Panel notes, however that, in some documents, including in its WTO Schedules LXXX and CXL, the European Communities refers to fresh bananas under tariff item 0803 00 12.

2.22 The Food and Agriculture Organization of the United Nations (FAO) considers bananas to be the world's most exported fruit in terms of volume and second in terms of value. According to the FAO, bananas represent a substantial source of income and employment for several tropical countries.[58]

C. EUROPEAN COMMUNITIES' LEGAL FRAMEWORK FOR BANANAS IMPORTS

1. European Communities' WTO commitments regarding bananas

2.23 The European Communities' commitments under the WTO with respect to trade in goods were established in Schedule LXXX, which was incorporated to the results of the Uruguay Round on 15 April 1994.[59] On 15 December 1994, the European Communities announced its intention to withdraw Schedule LXXX, effective from 1 January 1995, due to the accession of Austria, Finland and Sweden into the Communities.[60] On this occasion, the European Communities declared that, pending the submission of the new Schedule, it would continue to respect the commitments established in Schedule LXXX.

[52] Council Regulation (EEC) No. 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff, OJ L 256, 7.9.1987, p.1-675.

[53] The Combined Nomenclature is annually updated on October 31. This Commission Regulation refers to the version, published on the Official Journal of the European Union, 31 October 2006.

[54] Commission Regulation (EC) No. 1549/2006 of 17 October 2006 amending Annex I to Council Regulation (EEC) 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff, Official Journal of the European Union, 31 October 2006, p. 87.

[55] In Exhibit EC-1 Schedule CXL- European Communities, fresh bananas appear under the CN Code 0803 00 12. The same applies to Schedule LXXX- European Communities, which is also part of Exhibit EC-1.

[56] Annex 7 "WTO Tariff quotas to be opened by the competent Community Authorities" of the Council Regulation (EEC) No. 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff refers to CN Code 0803 00 19 Bananas. Official Journal of the European Union, 31 October 2006, p. 853.

[57] Commission Regulation (EC) No. 1549/2006 of 17 October 2006 amending Annex I to Council Regulation (EEC) 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff, Official Journal of the European Union, 31 October 2006, p. 87

[58] Available at: http://www.fao.org/DOCREP/006/Y4343E/y4343e06.htm (as of 6 November 2007).

[59] European Communities' first written submission, para. 5.

[60] Ibid., para. 5.

2.24 The European Communities submitted its proposed new Schedule CXL to the WTO on 14 March, 1996. However, this schedule has not been certified, following objections by WTO Members.[61]

2.25 For all practical purposes, with respect to tariff heading 0803, Part I, Section I.A (Tariffs) of EC Schedule LXXX and EC Schedule CXL have identical provisions.[62] The relevant text in this section reads:

Tariff item number	Description of products	Base rate of duty	Bound rate of duty	Special safeguard
1	**2**	**3**	**4**	**6**
0803 00	Bananas, including plantains, fresh or dried:			
0803 00 1	- Fresh:			
0803 00 11	-- Plantains	20.0%	16.0%	
0803 00 12	-- Other	850ECU/T	680ECU/T	SSG
0803 00 90	- Dried	20.0%	16.0%	

2.26 Likewise, Part I, Section I.B (Tariff quotas) of EC Schedule LXXX and EC Schedule CXL have identical provisions for tariff line 0803.00.12. The text reads:

Description of product	Tariff item number(s)	Initial quota quantity and in-quota tariff rate	Final quota quantity and in-quota tariff rate	Implemen-tation period from/to	Initial negotiating right	Other terms and conditions
1	**2**	**3**	**4**	**5**	**6**	**7**
Fresh bananas, other than plantains	0803 00 12	2.200.000 t 75 ECU/t	2.200.000 t 75 ECU/t			As indicated in the Annex

2.27 The Annex referred to in both EC Schedule LXXX and EC Schedule CXL is the so-called "Framework Agreement on Bananas" (Bananas Framework Agreement or BFA). The Bananas Framework Agreement was originally negotiated in 1994 by the European Communities with the following GATT Contracting Parties: Colombia, Costa Rica, Nicaragua and Venezuela.[63] Under the Bananas Framework Agreement:

> "1. The global basic tariff quota is fixed at 2.100.000 t for 1994 and at 2.200.000 t for 1995 and the following years, subject to any increase resulting from the enlargement of the Community.
>
> This quota is divided up into specific quotas allocated to the following countries:

[61] European Communities' first written submission para. 6.
[62] See Exhibit EC-1.
[63] See Panel Report on *EC – Bananas III (Ecuador)*, para. 3.30.

Country	Percentage of the global quota
Costa Rica	23.4
Colombia	21.0
Nicaragua	3.0
Venezuela	2.0
Dominican Republic and other ACP concerning non-traditional quantities	90.000 t
Others	46.32% (1994) – 46.15% (1995)

... 7. The in-quota tariff rate shall be 75 Ecus tonne.

8. The agreed system will be operational by 1 October 1994 at the latest, without prejudice to any provisional or transitional measures to be examined for the year 1994.

9. This agreement shall apply until 31 December 2002. Full consultations with the Latin American suppliers that are GATT Members should start no later than in year 2001.

The functioning of the agreement will be reviewed before the end of the third year, with full consultation of GATT Member Latin American suppliers.

10. This agreement will be incorporated into the Community's Uruguay Round Schedule.

11. This agreement represents a settlement of the dispute between Colombia, Costa Rica, Venezuela, Nicaragua and the Community on the Community's banana regime. The parties to this agreement will not pursue the adoption of the GATT panel report on this issue."

2.28 The panel notes that, as a result of the replacement of the currency unit "ECU" by the "Euro" (€), on a one to one basis,[64] the European Communities' commitments contained in the respective Schedules would have to be read accordingly.

2.29 As noted above, on 19 January 2004, the European Communities announced the withdrawal from 1 May 2004 of the commitments in Schedule CXL, due to the accession of ten new member States into the European Union.[65] At this moment, the negotiations under Article XXIV and Article XXVIII of the GATT have not been concluded and the European Communities has not submitted a new Schedule.

[64] Enlargement of the European Union: Rectification and Modification of Schedule CXL - European Communities, Addendum (G/L/Rev.1/Add.3), 23 November 1998.

[65] Article XXIV:6 Negotiations, Enlargement of the European Union: Communication from the European Communities (G/SECRET/20), 30 January 2004. See also, European Communities' first written submission, para. 7.

2. European Communities' banana import regime

2.30 European Communities' Council Regulation (EEC) No. 404/93 of 13 February 1993[66] established the common organization of the banana market. This regulation established the free circulation of bananas within the common market, it regulated the domestic production of bananas, and established the regime for the importation of bananas into the European Communities. Regulation 404/93 accorded different treatment to bananas depending on their origin. It divided the system into community bananas, which were the bananas produced within the European Communities; traditional ACP bananas, which were bananas originated in any of 12 ACP countries within the quantities established in the annex;[67] non-traditional ACP imports, which referred to the quantities of imported bananas in any of the ACP countries that exceeded the quantity established in the Annex; and bananas imported from non-ACP third countries.[68] Regulation 404/93 established a quota of 854,000 mt for Community bananas[69] and of 857,700 mt for traditional ACP bananas as established in the annex. A tariff quota of two million mt was opened each year for imports of third country bananas and non-traditional ACP bananas.[70] Within this tariff quota, third country bananas were subject to an in-quota tariff of 100 ECU/mt, while imports from non-traditional ACP countries were subject to zero duty.[71] The out-of-quota tariff was 750 ECU/mt for non-traditional ACP-bananas and 850 ECU/mt for out-of-quota third country bananas.[72] Imports from both the non-ACP third country bananas and non-traditional ACP countries were subject to import licences granted in the following proportions: (a) 66.5 per cent to operators established in third country and non traditional ACP bananas; (b) 30 per cent to operators established in the European Communities or traditional ACP bananas; and, (c) 3.5 per cent to operators established in the European Communities that marketed bananas other than community and traditional ACP bananas from 1992.[73] The Regulation also provided that, no later than the end of the third year after the entry into force of this Regulation, the Commission had to submit a report to the European Parliament and the Council on the operation of the Regulation. The report had to contain among other things "an analysis of the development of Community, third-country and ACP banana marketing flows since the implementation of these arrangements." The same provision also established that the "Commission shall again report to the European Parliament and the Council by 31 December 2001 on the operation of this Regulation and make appropriate proposals concerning new arrangements to apply after 31 December 2002."[74]

2.31 Commission Regulation (EEC) No. 1442/93 of 10 June 1993[75] complemented Council Regulation (EEC) No. 404/93 by laying down detailed rules for the application of the arrangements for importing bananas into the European Communities. Regulation 1442/93 established the licensing procedures for imports from traditional ACP and non traditional ACP and third country bananas. Applications for traditional ACP imports were required to be accompanied by a certificate of origin

[66] Council Regulation (EEC) No. 404/93 of 13 February 1993 on the common organization of the market in bananas, Official Journal L 047, 25/02/1993 P.0001-0011.

[67] The Annex of the Council Regulation (EEC) No. 404/93 established the following traditional quantities of bananas from ACP states: Cote d'Ivoire 155 000, Cameroon 155 000, Suriname 38 000, Somalia 60 000, Jamaica 105 000, St Lucia 127 000, St Vincent and the Grenadine 82 000, Dominica 71 000, Belize 40 000, Cape Verde 4 800, Grenada 14 000, Madagascar 5 900 for a total of 857 700 tonnes.

[68] Council Regulation (EEC) No. 404/93 of 13 February 1993, Article 15.

[69] Ibid., Article 12.

[70] Ibid., Article 18.1.

[71] Ibid., Article 18.1.

[72] Ibid., Article 18.2.

[73] Ibid., Articles 17 and 19.1.

[74] Ibid., Article 32.

[75] Commission Regulation (EEC) No. 1442/93 of 10 June 1993 laying down detailed rules for the application of the arrangements for importing bananas into the Community, Official Journal L142, 12/06/1993 P.0006-0015.

testifying the status as traditional ACP bananas.[76] Import licences for non traditional bananas and third country bananas were subject to several cumulatively procedures. These applicable procedures included: "(i) allocation of licences based on three operator categories; (ii) allocation of licences according to three activity functions; (iii) export certificate requirements for imports from Costa Rica, Colombia and Nicaragua; and (iv) a two-round quarterly procedure to administer licence applications."[77]

2.32 Council Regulation (EC) No. 3290/94 of 22 December 1994 on the Adjustments and Transitional Arrangements Required in the Agricultural Sector in order to Implement the Agreements Concluded during the Uruguay Round of Multilateral Trade Negotiations,[78] modified Council Regulation (EEC) No. 404/93 and incorporated into EC Law the European Communities' banana import commitments established in Schedule LXXX and the Bananas Framework Agreement. In this regard, a tariff quota of 2.2 million mt was opened to third country bananas and non traditional ACP bananas. Within the framework of this quota, imports of third country bananas were subject to a duty of 75 ECU/mt and imports of non-traditional ACP bananas were subject to a zero duty. Non-traditional ACP bananas imported outside this quota were subject to the custom duty specified in the European Communities' Common Customs Tariff, less 100 ECU/mt.

2.33 Commission Regulation (EC) No. 478/95 of 1 March 1995[79] established additional rules for the application of Regulation 404/93 as regards the tariff quotas arrangements for imports of bananas. Regulation 478/95 incorporated country-specifîc shares allocated to the countries mentioned in the Bananas Framework Agreement, as well as the other provisions established in this agreement. Therefore, tariff quotas for imports of bananas from third countries and non-traditional ACP bananas were subject to the following distribution: Costa Rica 23.4 per cent; Colombia 21 per cent; Nicaragua 3 per cent; Venezuela 2 per cent; non-traditional ACP countries and other ACP countries and others were allocated up to 90,000 mt.

2.34 Regulation 404/93 and its subsequent EC rules were reviewed in the *EC – Bananas III* case. The Panel and Appellate Body Report found that certain aspects of these regulations were inconsistent with Articles I:1, III:4, X:3 and XIII:1 of the GATT 1994, Article 1.2 of the Licensing Agreement and Articles II and XVII of the GATS.[80]

2.35 Council Regulation (EC) No. 1637/98 of 20 July 1998 amended Regulation 404/93.[81] Regulation 1637/98 maintained the tariff quota for imports of third countries and non-traditional ACP bananas at 2.2 million mt.[82] The in-quota tariff imports from third country bananas were subject to a duty of 75 ECU/mt, while imports from non-traditional ACP countries were free of duty.[83] As a result of the European Communities' enlargement in 1995, an additional tariff quota of 353,000 mt was opened for imports of third countries and non-traditional ACP bananas. Under this quota, imports of

[76] Panel Report on *EC – Bananas III*, para. 6.18

[77] Ibid., para. 6.20.

[78] Council Regulation (EC) No. 3290/94 of 22 December 1994 on the adjustments and transitional arrangements required in the agricultural sector in order to implement the agreements concluded during the Uruguay Round of multilateral trade negotiations, Official Journal L349, 31/12/1994, P.0105-0200.

[79] Commission Regulation (EC) No. 478/95 of 1 March 1995 on additional rules for the application of Council regulation (EEC) 404/93 as regards the tariff quotas arrangements for imports of bananas into the Community and amending Regulation (EEC) No. 1442/93, Official Journal L049, 04/03/1995 P.0013-0017.

[80] Panel Report on *EC – Bananas III*, para. 9.1, as modified by the Appellate Body Report on *EC – Bananas III*, paras. 255-256.

[81] Council Regulation (EC) No. 1637/98 of 20 July 1998 amending Regulation (EEC) No. 404/93 on the common organization of the market in bananas, Official Journal of the European Communities L210/28, 28/7/98.

[82] Council Regulation (EC) No. 1637/98 of 20 July 1998, Article 18.1.

[83] Ibid., Article 18.1.

bananas from third countries were subject to 75 ECU/mt, while imports of non-traditional ACP bananas were free of duty. [84] No import duty was charged on banana imports from traditional ACP origin.[85] All bananas imports to the European Communities were subject to import licences.[86] Regulation 1637/98 also established that, if there was no reasonable possibility of securing the agreement of all WTO Members with a substantial interest in the supply of bananas, the European Communities' Commission could proceed to allocate the tariff quotas for traditional and non-traditional ACP bananas and for third country bananas.[87] The out-of-quota tariff for non-traditional ACP bananas was reduced by ECU200.[88] Regulation 1637/98 also abolished the operator categories.

2.36 Commission Regulation (EC) No. 2362/98 of 28 October 1998[89] repealed Commission Regulation (EEC) No. 1442/93 as amended by Regulation (EC) No. 702/95 and it laid down detailed rules for the implementation of Council Regulation (EEC) No. 404/93 regarding imports of bananas into the European Communities. According to Regulation 2362/98, the tariff quotas and the traditional ACP quantities were to be allocated taking into account traditional trade flows, in the following way: 92 per cent to traditional operators and 8 per cent to newcomers.[90] Annex I of Regulation 2362/98 established the distribution of the tariff quota for third country imports in the following way: Ecuador 26.17 per cent; Costa Rica 25.61 per cent; Colombia 23.03 per cent; Panama 15.76 per cent; and, "Other" 9.43 per cent. The quantity for traditional ACP bananas remained at 857,700 mt.

2.37 Council Regulation (EC) No. 1637/98 and Commission Regulation (EC) No. 2362/98 were challenged by Ecuador in its first recourse to a compliance proceeding under Article 21.5 of the DSU in the *EC – Bananas III* dispute. The compliance Panel found certain aspects of these Regulations inconsistent with the European Communities' obligations under Article I:1 and XIII:1 and 2 of the GATT 1994 and under Articles II and XVII of the GATS.[91]

2.38 Council Regulation (EC) No. 216/2001 of 29 January 2001[92] further amended Regulation (EEC) No. 404/93 on the common organization of the European Communities' market in bananas. Regulation 216/2001 opened a third autonomous tariff quota of 850,000 mt for bananas of all origins (quota C) subject to a customs duty of €300/mt.[93] This quota was in addition to the first tariff quota of 2.2 million mt at a rate of €75/mt bound in the WTO (or quota A) and a second tariff quota of 353,000 mt due to the enlargement of the European Communities in 1995 (or quota B).[94] All of these tariff quotas were opened for imports of products originating in all third countries. ACP bananas under and outside the tariff quotas were subject to a tariff preference of €300/mt.[95] Regulation 216/2001 established that the Commission, on the basis of an agreement with the WTO Members with a substantial interest in the supply of bananas, would allocate tariff quotas A and B among supplier countries. According to Regulation 216/2001, imports under tariff quota A and B were subject to a

[84] Ibid., Article 18.2.
[85] Ibid., Article 18.3.
[86] Ibid., Article 17.
[87] Council Regulation (EC) No. 1637/98 of 20 July 1998, Article 18.4.
[88] Ibid., Article 18.5
[89] Commission Regulation (EC) No. 2362/98 of 28 October 1998 laying down detailed rules for the implementation of Council Regulation (EEC) No. 404/93 regarding imports of bananas into the Community, Official Journal of the European Communities, L293/32, 31/10/98.
[90] Ibid., Article 2.1.
[91] Panel Report on *EC – Bananas III (Article 21.5 – Ecuador)*, para.7.1.
[92] Council Regulation (EC) No. 216/2001 of 29 January 2001 amending Regulation (EEC) No. 404/93 on the common organization of the market in bananas, Official Journal of the European Communities, L31/2, 2/2/2001.
[93] Ibid., Article 18.1.
[94] Ibid., Article 18.1.
[95] Ibid., Article 18.4.

custom duty of €75/mt, while imports under the tariff quota C were subject to a duty of €300/mt.[96] Regulation 216/2001 also established that the tariff quotas would be administered by taking into account the traditional trade flows ("traditionals"/"newcomers") or through other methods.[97]

2.39 Council Regulation (EC) No. 2587/2001 of 19 December 2001[98] further amended Regulation (EEC) No. 404/93 on the common organization of the European Communities' market in bananas. Regulation 2587/2001 changed the quotas in the following way: Quota A of 2.2 million mt for imports from third countries subject to a customs duty of €75/mt; Quota B of 453,000 mt for imports from third countries subject to a tariff duty of €75/mt; Quota C of 750,000 mt open to imports from ACP countries subject to a zero duty.[99] A tariff preference of €300/mt was established for imports originating in ACP countries.[100]

3. European Communities' current banana import regime

2.40 The current regime for imports of bananas to the European Communities has been established in Council Regulation (EC) No. 1964/2005 of 29 November 2005.[101] Regulation 1964/2005 entered into force on 1 January 2006 and established a tariff rate of €176/mt for bananas (tariff item 0803 00 19).[102] Regulation 1964/2005 also established a tariff quota for bananas originating in ACP countries pursuant to the European Communities' commitments under the ACP-EC partnership Agreement, also known as the Cotonou Agreement.[103] The Cotonou Agreement allows imports originating from participating developing countries (ACP countries) to enter the European Communities free of customs duties and charges having equivalent effect, or under preferential terms, until 31 December 2007.[104] Regulation 1964/2005 grants an annual autonomous tariff quota of 775,000 mt subject to a zero-duty rate to imports of bananas originating in ACP countries.[105]

2.41 In addition to the preferences under the Cotonou Agreement, bananas originating in least developed countries (LDCs) also enjoy duty-free access to the European Communities' market from a generalized tariff preferences scheme known as the Everything But Arms (EBA) arrangement, which is laid down in Council Regulation (EC) No. 980/2005 of 27 June 2005.[106]

2.42 Implementing regulations have been adopted by the European Communities subsequent to Regulation 1964/2005. According to the European Communities, these regulations are: Commission Regulation (EC) No. 2015/2005 of 9 December 2005, on imports during January and February 2006

[96] Ibid., Article 18.2 and 18.3.
[97] Ibid., Article 19.1.
[98] Council Regulation (EC) No. 2587/2001 of 19 December 2001 amending Regulation (EEC) No. 404/93 on the common organization of the markets in bananas, Official Journal of the European Communities, L345/13, 29/12/2001.
[99] Ibid., Article 18.1, 18.2, 18.3.
[100] Ibid., Article 18.4.
[101] Exhibit ECU-1.
[102] Exhibit ECU-1, Article 1.1 of Council Regulation (EC) No. 1964/2005.
[103] Exhibit ECU-1, para. (6) of Council Regulation (EC) No. 1964/2005.
[104] European Communities' first written submission, para. 13.
[105] Exhibit ECU-1, Article 1.2 of Council Regulation (EC) No. 1964/2005.
[106] Council Regulation (EC) No. 980/2005 of 27 June 2005. European Communities' response to question 53 paras. 109-112. Regulation 980/2005 establishes that the common customs tariff duties on tariff item 0803 00 19 (bananas) would be reduced by 20 per cent annually from 1 January 2002 and would be entirely suspended as from 1 January 2006. European Communities' response to question 53, para. 110. Ecuador clarified that within the period 1999-2007 its bananas exports to the EC have not beneficiated from any preferential system. Ecuador's response to panel question No. 33. However, according to the information provided by the European Communities, all least developed countries that could enjoy tariff preferences under the EBA arrangement already benefited from the Cotonou Agreement trade preferences. European Communities' comments to the draft descriptive sections of the Panel's Report.

of bananas originating in ACP countries; Commission Regulation (EC) No. 219/2006 of 8 February 2006, on imports of bananas from ACP countries for the period 1 March to 31 December 2006; and, Commission Regulation (EC) No. 1789/2006 of 5 December 2006, on imports of bananas from ACP countries for the period 1 January to 31 December 2007.[107]

2.43 Besides those identified by the European Communities, Ecuador has mentioned other implementing regulations[108], such as Commission Regulation (EC) No. 2014/2005 of 9 December 2005[109]; Commission Regulation (EC) No. 2149/2005 of 23 December 2005[110]; Commission Regulation (EC) No. 325/2006 of 23 February 2006[111]; Commission Regulation (EC) No. 566/2006 of 6 April 2006[112]; Commission Regulation (EC) No. 966/2006 of 29 June 2006[113]; Commission Regulation (EC) No. 1261/2006 of 23 August 2006[114]; Commission Regulation (EC) No. 34/2007 of 16 January 2007[115]; and Commission Regulation (EC) No. 47/2007 of 19 January 2007.[116]

2.44 In addition to these regulations, Commission Regulation (EC) No. 1549/2006 of 17 October 2006[117] amending Annex I to Council Regulation (EEC) No. 2658/87 on the tariff and statistical nomenclature and the Common Customs Tariff, shows under tariff item 0803 00 19 (bananas) a conventional rate duty of €176/mt subject to footnote 1 which indicates a WTO tariff quota explained in Annex 7.[118] This annex refers to the "WTO Tariff quotas to be opened by the competent Community authorities - qualifications for these quotas is subject to conditions laid down in the relevant Community provisions." According to this annex, tariff item 0803 00 19 (bananas) appears with a quota quantity of 2.2 million mt to a rate of duty €75/mt.[119] The general rules concerning duties laid down in this regulation provide that when autonomous rates of duty are lower than

[107] European Communities' response to question 3, para. 5.

[108] Ecuador's response to question 3.

[109] Commission Regulation (EC) No. 2014/2005 of 9 December 2005 on licences under the arrangements for importing bananas into the Community in respect of bananas released into free circulation at the common customs tariff rate of duty (OJ L 324, 10.12.2005, p. 3.

[110] Commission Regulation (EC) No. 2149/2005 of 23 December 2005 fixing the reduction coefficients to be applied to applications for import licences for bananas originating in the ACP countries for the months of January and February 2006.

[111] Commission Regulation (EC) No. 325/2006 of 23 February 2006 fixing the reduction coefficient to be applied to applications for import licences for bananas originating in the ACP countries for the period 1 March to 31 December 2006.

[112] Commission Regulation (EC) No. 566/2006 of 6 April 2006 amending and derogating from Regulation (EC) 2014/2005 on licences under the arrangements for importing bananas into the Community in respect of bananas released into free circulation at the common customs tariff rate of duty and amending Regulation (EC) No. 219/2006 opening and providing for the administration of the tariff quota for bananas falling under CN code 0803 00 19 originating in ACP countries for the period 1 March to 31 December 2006.

[113] Commission Regulation (EC) No. 966/2006 of 29 June 2006 amending Regulation (EC) No. 219/2006 opening and providing for the administration of the tariff quota for bananas falling under CN code 0803 00 19 originating in ACP countries for the period 1 March to 31 December 2006.

[114] Commission Regulation (EC) No. 1261/2006 of 23 August 2006 amending Regulation (EC) 219/2006 opening and providing for the administration of the tariff quota for bananas falling under CN code 0803 00 19 originating in ACP countries for the period 1 March to 31 December 2006.

[115] Commission Regulation (EC) No. 34/2007 of 16 January 2007 fixing the allocation coefficient to be applied to applications for import licences for bananas originating in the ACP countries for the period to 31 December 2007.

[116] Commission Regulation (EC) No. 47/2007 of 19 January 2007 amending Regulation (EC) No. 34/2007 fixing the allocation coefficient to be applied to applications for import licences for bananas originating in the ACP countries for the period to 31 December 2007.

[117] Commission Regulation (EC) No. 1549/2006 of 17 October 2006 amending Annex I to Council Regulation (EEC) No. 2658/87 on the tariff and statistical nomenclature and the Common Customs Tariff, Official Journal of the European Union, 31/10/2006.

[118] Ibid., page 87.

[119] Ibid., page 853.

conventional rates of duty, the autonomous duties (shown by means of a footnote) would be applicable. On 9 June 2007, a corrigendum to Regulation 1549/2006 was published, deleting the reference to the tariff quota for tariff item 0803 00 19 (bananas).[120]

2.45 The following table summarizes the main aspects of the different import regimes for bananas.

EC's Different Banana Import Regimes

EC Regulation (applicable from)	Beneficiaries	Quotas (tonnes net weight)	Tariff (ECU/€ per metric tonne)	
			in-quota	out-of quota
Council Regulation (EEC) No 404/93 (1 July 1993)	▪Traditional ACP (country specific allocations)	857 700	zero duty	
	▪Non- traditional ACP	2 000 000	zero duty	ECU750
	▪Third Country		ECU100	ECU850
Council Regulation (EC) No 3290/94 (1 July 1995)	▪Traditional ACP (country specific allocations)	857 700	zero duty	
	▪Non- traditional ACP	2 200 000*	zero duty	ECU100 tariff preference**
	▪Third Country		ECU75	
Commission Regulation (EC) No 478/95 (5 March 1995)	▪Traditional ACP (country specific allocations)	857 700	zero duty	
	▪Non- traditional ACP (country specific allocation)	90 000	zero duty	
	▪Third Country (country specific allocation)	2 200 000	ECU75	
Council Regulation (EC) No 1637/98 (1 January 1999)	▪Traditional ACP (elimination country specific allocations)	857 700	zero duty	
	▪Non-traditional ACP (elimination country specific allocations)	2 200 000	zero duty	ECU200 tariff preference**
	▪Third Country (country specific allocations)		ECU75	ECU737
	▪Non-traditional ACP (elimination country specific allocations)	353 000	zero duty	ECU200 tariff preference**
	▪Third Country (country specific allocations)		ECU75	ECU737

[120] Corrigendum to Commission Regulation (EC) No. 1549/2006 of 17 October 2006 amending Annex I to Council Regulation (EEC) No. 2658/87 on the tariff and statistical nomenclature and the Common Customs Tariff, Official Journal of the European Union, 9/06/2007.

Council Regulation (EC) No 216/2001 (1 April 2001)	▪Quota A ACP Third Country	2 200 000	zero duty € 75	€300 tariff preference**
	▪Quota B ACP Third Country	353 000	zero duty € 75	€300 tariff preference**
	▪Quota C ACP Third Country	850 000	€ 300 with a € 300 tariff preference € 300	€300 tariff preference**
Council Regulation (EC) No 2587/2001 (1 January 2002)	▪Quota A ACP Third Country	2 200 000	zero duty €75	€300 tariff preference
	▪Quota B ACP Third Country	453 000	zero duty €75	€300 tariff preference
	▪Quota C ACP	750 000	zero duty	€300 tariff preference
Council Regulation (EC) No 1964/05 (1 January 2006)	Bananas of all origin		€176	€176
	ACP	775 000	zero duty	€176

* In 1994 this tariff quota was 2 100 000t. In 1 January 1995 it was increased to 2 200 000t.
** This tariff preference is deducted from the rate of duty established in the Common Customs Tariff that was in force at that time. Council Regulation (EC) No 3290/94, Articles 15.1 and 18.2.

D. EUROPEAN COMMUNITIES' BANANAS MARKET

1. European Communities' bananas production

2.46 According to the available data provided by the parties, the European Communities' domestic banana production comes from Greece (Crete), Spain (Canary Islands), Cyprus, Portugal (continental Portugal, Madeira, and the Azores) and France (overseas territories of Martinique and Guadeloupe).[121] In 2006, the European Communities' domestic banana production amounted to 641,754 mt. According to information provided by the European Communities, domestic production for 2007 is expected to be lower than the previous year, since banana plantations were damaged by the passage of Hurricane Dean through the territories of Martinique and Guadeloupe.[122]

[121] Exhibit EC 16. See also Nicaragua and Panama's response to question 108.
[122] European Communities ' response to question 51(a).

2.47 There are no exports of bananas from the European Communities, as all production is destined for domestic consumption.[123]

2. European Communities' bananas consumption

2.48 Due to factors such as the European Communities' successive enlargements and the operation of a European single market with free movement of goods among the different countries, the Panel has no available data on the consumption volumes of bananas for each of the European Communities member States. However, statistical information provided by the European Communities shows total domestic sales of bananas.[124]

Total Sales of Bananas in the EU (mt)
(figures provided by the EC in Exhibit EC-17)

Origin	1999	2000	2001	2002	2003	2004	2005	2006
EU	742,804	790,675	777,068	801,122	765,416	758,206	648,375	641,754
(share of total)	18.8%	16.9%	17.1%	17.4%	16.3%	16.4%	14.8%	13.3%
ACP Countries	688,707	771,857	748,779	739,825	799,896	784,427	763,675	891,218
(share of total)	17.4%	16.5%	16.5%	16.0%	17.0%	17.0%	17.5%	18.5%
non-LDC	688,158	771,451	748,181	739,483	798,538	783,810	763,675	891,133
LDC-other	549	406	598	342	1,358	617	0	85
Non-ACP LDCs	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
MFN	2,521,823	3,119,605	3,015,474	3,073,124	3,143,631	3,078,430	2,963,745	3,293,679
(share of total)	63.8 %	66.6%	66.4%	66.6%	66.8%	66.6%	67.7	68.2%
Ecuador (Eurostat)	696,789*****	1,042,350	1,043,306	1,089,019	1,081,787	993,825	1,062,735	1,027,209
(share of total)	17.6%	22.3%	23.0%	23.6%	23.0%	21.5%	24.3%	21.3%
Total	**3,953,334**	**4,683,137**	**4,541,321**	**4,614,071**	**4,708,943**	**4,621,063**	**4,375,795**	**4,826,651**

***** For the amount of Ecuador's exports to the EC in 1999 there is a difference between the figures provided by the EC and those provided by Ecuador. Exhibit ECU-9 shows that the amount of bananas exported by Ecuador to the European Communities in 1999 was of 1,074,407 representing 24.8% of the EU sales for that year. This figure assumes that the higher volume of trade from Ecuador leads to an increase in the MFN total for 1999 to 2,889,441 and an increase in the total amount of sales in the EU for 1999 to 4,330,952.

Source: Figures provided by the EC in Exhibit EC-17. Imports from non-ACP LDCs provided by Eurostat (2007) "Intra- and extra- EU trade data, CD-ROM," ISSN: 1725-3365. Figures from Eurostat refer to EC25.

3. European Communities' bananas imports

2.49 The European Communities is the world's biggest export market for bananas, followed by the United States.[125] Bananas in the European Communities' market are mainly imported from MFN or so-called "Dollar Zone" countries and to a lesser extent from ACP countries. The term MFN bananas is generally used by both parties to indicate bananas originating in WTO Members that are not signatories of the Cotonou Agreement.

2.50 For the year 2006, the main MFN countries that exported bananas to the European Communities were Ecuador, Colombia, Costa Rica, Panama, Brazil, Guatemala, Peru, Honduras, Venezuela, Mexico, and Nicaragua.[126] Among the ACP countries exporting bananas to the European Communities were Cameroon, Côte d'Ivoire, Dominican Republic, Belize, Suriname, Saint Lucia, Jamaica, Ghana, Saint Vincent and the Grenadines, and Dominica.[127]

[123] European Communities ' response to question 51(b).
[124] Exhibit EC-17, Table 15.
[125] Exhibit EC-20.
[126] Exhibit EC-17. See also Exhibit EC-3.
[127] Exhibit EC-17. See also Exhibit EC-8.

2.51 According to information provided by Cameroon, some natural, economic and human factors make ACP bananas less competitive than MFN bananas.[128] Among these factors would be scarcity of land appropriate for growing bananas; poor quality of the ground in which bananas are grown; higher input costs; impossibility of achieving economies of scale due to limited size of production volumes; and higher shipping costs.[129]

2.52 With respect to imports under the European Communities' EBA preference scheme[130], the European Communities mentioned that since 2000 only four LDCs (Rwanda, Uganda, Somalia and Cape Verde[131]) have benefited from the EBA preference and in limited quantities.[132] The European Communities considers that this is because only a limited number of LDCs have the capacity to export bananas.[133] According to information provided by Ecuador[134], EBA imports to the EC-25 in 2006 amounted to 1,187 mt. The European Communities has contested this figure.[135]

4. European Communities' bananas imports under Council Regulation 1964/2005

2.53 Since 1 January 2006, the European Communities has been applying the €176/mt tariff to all bananas of MFN origin and to ACP origin bananas in excess of the 775,000 mt duty free quota. According to information provided by the European Communities, in 2006 the aggregate volume of bananas imported into the European Communities was 4,184,897 mt.[136] The €176/mt tariff was applied to 3,409,897 mt[137] and a zero duty was applied to the 775,000 mt of ACP Bananas.[138] The information provided by the European Communities reflected that its tariff revenue for 2006 was of €600,141,907, from which €579,687,363 corresponded to duties paid by trading companies importing bananas from Latin American countries and €20,454,544 represented the out-of-quota exports from ACP countries.[139] In 2005, under the previous system with an in-quota €75/mt tariff, trading companies importing bananas from Ecuador paid €79,705,148 on tariff duties to the European Communities. Following the introduction of the new system on 1 January 2006 with the €176/mt tariff duty, the amount paid by trading companies importing bananas from Ecuador rose to €180,788,696 in 2006.[140] This calculation does not take into consideration the costs borne by trading companies before 2006, in order to acquire import licences. Following the elimination of the licence system for MFN imports on 1 January 2006, these costs have ceased to exist. Ecuador and the European Communities did not submit any data that would allow the Panel to accurately estimate these costs.

[128] Cameroon's response to question 86.
[129] Ibid.
[130] See para. 2.41 above.
[131] However, Exhibit EC-17 Table 15 shows that Cape Verde has not been exporting bananas to the EC since 2001.
[132] European Communities ' response to question 53, para. 111. But see the statement in the study by the Centre for International Economics, provided by Nicaragua and Panama, that "from 2008 onwards Latin American access will decline sharply, and under some scenarios, by 2010, ACP/EBA exports to the EU could exceed those of Latin America." Centre for International Economics, "The detrimental effects of a €176 per tonne ACP banana tariff preference on MFN suppliers" (August 2007), in Exhibit N-2 and Exhibit P-2.
[133] European Communities' response to question 53, para. 111.
[134] Exhibit ECU-6.
[135] Exhibit ECU-6 shows banana imports from Uganda in 2006 to be 1,128 mt. According to Exhibit EC-19, the EC imported only 28mt of bananas from Uganda.
[136] European Communities ' response to question 2.
[137] This amount is different to the one presented by Ecuador in response to question 2. According to Ecuador the volume of imports subject to the €176/mt tariff was 3,473, 521mt of which 116, 190 mt were ACP over quota imports.
[138] European Communities' response to question 2, para. 4.
[139] Exhibit EC-14
[140] Ecuador's response to question 35. See also Exhibit ECU-8 in response to Panel's Question 29(d).

2.54 Banana import conditions to the European Communities have also been affected by the European Communities enlargement that took place on 1 May 2004, increasing the number of European Communities member States from 15 to 25. In this regard, for the period between 1 May and 31 December 2004, the European Communities opened an autonomous tariff quota of 300,000 mt subject to the in-quota tariff of €75/mt. In 2005, the tariff quota was extended to 460,000 mt.[141] Before the 2004 enlargement, MFN suppliers exported "from 560,000 to 570,000 mt of bananas per annum to the 10 new Member States."[142] Ecuador's share in the autonomous tariff quota for imported bananas into the 10 new member States was 58.2 per cent.[143]

2.55 With respect to Romania and Bulgaria, which acceded to the European Communities in January 2007, in 2005 Romania imported approximately 143,000 mt of Latin American bananas, subject to a tariff of 16 per cent *ad valorem*, and Bulgaria imported 55,000 mt subject to a tariff of 11.2 per cent *ad valorem*.[144] Since enlargement, MFN banana imports into Romania and Bulgaria have been subject to the €176/mt tariff duty.[145]

2.56 Parties do not agree on the impact that Regulation 1964/2005 has had on European Communities' banana imports. For the European Communities, following the introduction of the €176/mt tariff duty, there has been a significant increase in the volumes of bananas imported into the European Communities from all groups of exporting developing countries[146]; new developing countries have started or have increased bananas exports to the European Communities;[147] and there has been relative stability in wholesale prices for bananas of all origins.[148]

2.57 According to the European Communities, the 3.28 million mt of bananas imported from MFN countries into the European Communities in 2006[149] is the "highest annual volume of bananas imported into the European Communities from MFN countries since 1999 and represents an increase of 10.7 per cent in comparison with 2005".[150] However, Ecuador notes that "ACP exports increased by 16.70%, which is higher than the raise of exports [of] Latin American banana suppliers during this year (11%)."[151] Ecuador, Nicaragua and Panama pointed out that between 1999 and 2006, ACP banana exports to the European Communities have systematically increased by around 30 per cent.[152] On the other hand, Ecuador's exports towards the European Communities have increased by more than 25 per cent during the same period.[153]

2.58 The European Communities also argues that its 2006 banana import regime has allowed new market access opportunities, since new developing countries such as Brazil, Guatemala and Peru have started to increase their exports to the European Communities.[154] Also, countries like Bolivia,

[141] European Communities' response to question 54.
[142] Ecuador's response to question 34.
[143] Ibid.
[144] Ibid. and Exhibit ECU-10.
[145] Ecuador's response to question 34.
[146] European Communities' first written submission, paras. 38-39.
[147] Ibid., para. 40.
[148] Ibid., para. 41.
[149] Ibid., para. 43.
[150] Ibid. As noted by the European Communities, the increase in the quantity of bananas imported from MFN countries in 2007, with respect to 2006, is bigger than the growth of total sales of bananas from every origin in the European Communities during the same period. See Exhibit EC-17 and European Communities' first written submission, para. 49.
[151] Ecuador's response to question 31.
[152] Ibid. See also, Exhibit ECU-9. Nicaragua and Panama response to question 104 and Exhibit N/P-3.
[153] See table in para. 2.45 above.
[154] Ibid., paras. 54-55.

Thailand and Sri Lanka have started to export bananas to the European Communities.[155] However, Ecuador notes that, while MFN exporters like Brazil and Peru recorded significant increases in exports in 2006, other countries like Venezuela, Mexico and Honduras experienced important decreases in sales to the European Communities.[156]

2.59 According to Ecuador, Regulation 1964/2005 has more than doubled the MFN tariff from €75/mt to €176/mt, while also reducing by more than half the ACP out-of-quota tariff from €380/mt to €176/mt and increasing the zero tariff quota for bananas from ACP countries from 750,000 mt to 775,000 mt.[157]

5. Ecuador's banana exports to the European Communities

2.60 Ecuador is the leading MFN exporter of bananas to the European Communities. In 2006, Ecuador exported to the European Communities 1,026,447 mt of bananas.[158] Ecuador's exports represented 24.5 per cent of the European Communities' bananas market.[159] This amount represents a decrease from the quantity exported by Ecuador to the European Communities in 2005, which was 1,059,269 mt.[160]

2.61 According to the European Communities, the decline in Ecuador's banana exports to the European Communities is not related to the 176 €/mt tariff duty imposed in 2006. Difficulties faced by Ecuador's banana industry, such as adverse climatic conditions (drought at the end of 2005 and heavy rain at the beginning of 2006); the eruption of the Tungurahua volcano in August 2006; and administrative measures introduced by the Government of Ecuador, would instead explain this decline.[161] The European Communities identified two administrative measures in particular: the Ecuadorian decree providing that the fruits should be inspected at the plantation and not at the port; and an administrative measure which "imposed a minimum price of US$3.25 per box and obliged exporters to pay producers via the Central Bank."[162]

2.62 Ecuador has responded that the volcano eruptions affected only 108,000 mt of production, and that the administrative measures did not affect the growth of total Ecuadorian exports in 2006.[163] Ecuadorian exports of bananas to all destinations increased from 4,331,300 mt in 2005 to 4,402,390 mt in 2006 (an increase of 71,090 mt).[164] In recent years, Ecuador has increased banana exports to countries such as Russia and Ukraine.[165]

2.63 Ecuador has also stated that, although the quantities of Latin American banana exports to the European Communities increased in 2006, the total value of those exports was lower than that registered in 2005.[166] In 2005 the value for Latin American bananas was €1,907,502 million in comparison with that of 2006, which was €1,903,244 million. According to the calculations provided

[155] European Communities' first written submission, paras. 54-55.
[156] Ecuador's response to question 31.
[157] Ibid.
[158] Ecuador's response to question 29.
[159] Exhibit EC-18, Table 16, and Ecuador response to question 29 (c).
[160] This is according to the statistics provided by Ecuador in response to question 29. According to the statistics provided by the European Communities in Exhibit- EC 17, the amount of Ecuador exports to the European Communities in 2005 was 1,062,735 mt and 1,027,209 mt in 2006.
[161] European Communities' first written submission, para. 50.
[162] Ibid., para. 50(iii)
[163] Ecuador's response to question 32.
[164] Ibid.
[165] Ibid. See also, European Communities' comments to Ecuador's response to question 32 and Exhibit EC-23.
[166] Ecuador's response to question 31.

by both parties[167], the average unit price for bananas from Ecuador increased by approximately 5.7 to 6.7 per cent in 2006, with respect to 2005, in US dollars/mt. The same prices, however, when estimated in €/mt, decreased by 4.8 per cent over the same period.[168]

E. PANEL AND APPELLATE BODY FINDINGS IN THE ORIGINAL PROCEEDINGS

1. Measures subject to the original proceedings

2.64 The original panel and Appellate Body proceedings concerned the European Communities' common market organization for bananas, as established through Council Regulation (EEC) No. 404/93 (Regulation 404/93), introduced on 1 July 1993, and implemented, supplemented and amended through subsequent European Communities' legislation, regulations and administrative measures.[169]

2. Panel and Appellate Body main findings in the original proceedings

2.65 With regard to the challenged European Communities' measures, the original panel made the following main substantive findings:

(a) The European Communities' allocation of tariff quota shares by agreement and by assignment to some Members not having a substantial interest in supplying bananas to the European Communities (including Nicaragua, Venezuela and certain ACP countries in respect of traditional and non-traditional exports) but not to other Members (such as Guatemala) and the tariff quota reallocation rules of the Bananas Framework Agreement, were inconsistent with the requirements of Article XIII:1 of the GATT 1994.[170]

(b) To the extent that the Panel had found that the European Communities had acted inconsistently with the requirements of Article XIII:1 of the GATT 1994, the Lomé waiver waived that inconsistency with Article XIII:1, to the extent necessary to permit the European Communities to allocate shares of its banana tariff quota to specific traditional ACP banana supplying countries in an amount not exceeding their pre-1991 best-ever exports to the European Communities.[171]

(c) Neither the negotiation of the Bananas Framework Agreement and its inclusion in the European Communities' Schedule, including the Bananas Framework Agreement tariff quota shares, nor the Agreement on Agriculture permitted the European Communities to act inconsistently with the requirements of Article XIII of the GATT 1994.[172]

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[167] See Ecuador's response to Panel question No. 29 and Exhibit EC-11.

[168] See Ecuador's response to Panel question No. 29.

[169] Panel Report on *EC – Bananas III (Ecuador)*, paras. 3.1 and 3.4.

[170] Ibid., paras. 7.90 and 7.399; Panel Report on *EC – Bananas III (Guatemala and Honduras)*, paras. 7.90 and 7.399; Panel Report on *EC – Bananas III (Mexico)*, paras. 7.90 and 7.399; Panel Report on *EC – Bananas III (US)*, paras. 7.90 and 7.399.

[171] Panel Report on *EC – Bananas III (Ecuador)*, paras. 7.110 and 7.399; Panel Report on *EC – Bananas III (Guatemala and Honduras)*, paras. 7.110 and 7.399; Panel Report on *EC – Bananas III (Mexico)*, paras. 7.110 and 7.399; Panel Report on *EC – Bananas III (US)*, paras. 7.110 and 7.399.

[172] Panel Report on *EC – Bananas III (Ecuador)*, paras. 7.118, 7.127 and 7.399; Panel Report on *EC – Bananas III (Guatemala and Honduras)*, paras. 7.118, 7.127 and 7.399; Panel Report on *EC – Bananas III (Mexico)*, paras. 7.118, 7.127 and 7.399; Panel Report on *EC – Bananas III (US)*, paras. 7.118, 7.127 and 7.399.

(d) To the extent that the European Communities' preferential tariff treatment of non-traditional ACP bananas was inconsistent with its obligations under Article I:1 of the GATT 1994, those obligations had been waived by the Lomé waiver.[173]

(e) 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 was inconsistent with the requirements of Article III:4 of the GATT 1994.[174]

(f) The application in general of operator category rules in respect of the importation of third-country and non-traditional ACP bananas at in-quota tariff rates, in the absence of the application of such rules to traditional ACP imports, and in particular 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, were inconsistent with the requirements of Article I:1 of the GATT 1994.[175]

(g) The Lomé waiver did not waive the European Communities' obligations under Article I:1 of the GATT 1994 in respect of licensing procedures applied to third-country and non-traditional ACP imports, including those related to operator category rules.[176]

(h) The application of operator category rules in respect of the importation of third-country and non-traditional ACP bananas at in-quota tariff rates, in the absence of the application of such rules to traditional ACP imports, was inconsistent with the requirements of Article X:3(a) of the GATT 1994.[177]

(i) The use of activity functions in connection with the allocation of licences allowing the importation of third-country and non-traditional ACP bananas at in-quota tariff rates was not inconsistent with the requirements of Article III:4 of the GATT 1994.[178]

(j) The application of activity function rules in respect of the importation of third-country and non-traditional ACP bananas at in-quota tariff rates, in the absence of the application of such rules to traditional ACP imports, was inconsistent with the requirements of Article I:1 of the GATT 1994.[179]

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[173] Panel Report on *EC – Bananas III (Ecuador)*, paras. 7.136 and 7.399; Panel Report on *EC – Bananas III (Guatemala and Honduras)*, paras. 7.136 and 7.399; Panel Report on *EC – Bananas III (Mexico)*, paras. 7.136 and 7.399; Panel Report on *EC – Bananas III (US)*, paras. 7.136 and 7.399.

[174] Panel Report on *EC – Bananas III (Ecuador)*, paras. 7.182 and 7.399; Panel Report on *EC – Bananas III (Guatemala and Honduras)*, paras. 7.182 and 7.399; Panel Report on *EC – Bananas III (Mexico)*, paras. 7.182 and 7.399; Panel Report on *EC – Bananas III (US)*, paras. 7.182 and 7.399.

[175] Panel Report on *EC – Bananas III (Ecuador)*, paras. 7.195 and 7.399; Panel Report on *EC – Bananas III (Guatemala and Honduras)*, paras. 7.195 and 7.399; Panel Report on *EC – Bananas III (Mexico)*, paras. 7.195 and 7.399; Panel Report on *EC – Bananas III (US)*, paras. 7.195 and 7.399.

[176] Panel Report on *EC – Bananas III (Ecuador)*, paras. 7.204 and 7.399; Panel Report on *EC – Bananas III (Guatemala and Honduras)*, paras. 7.204 and 7.399; Panel Report on *EC – Bananas III (Mexico)*, paras. 7.204 and 7.399; Panel Report on *EC – Bananas III (US)*, paras. 7.204 and 7.399.

[177] Panel Report on *EC – Bananas III (Guatemala and Honduras)*, paras. 7.212 and 7.399; Panel Report on *EC – Bananas III (Mexico)*, paras. 7.212 and 7.399; Panel Report on *EC – Bananas III (US)*, paras. 7.212 and 7.399.

[178] Panel Report on *EC – Bananas III (Guatemala and Honduras)*, paras. 7.219 and 7.399; Panel Report on *EC – Bananas III (Mexico)*, paras. 7.212 and 7.399.

[179] Panel Report on *EC – Bananas III (Ecuador)*, paras. 7.223 and 7.399; Panel Report on *EC – Bananas III (Guatemala and Honduras)*, paras. 7.223 and 7.399; Panel Report on *EC – Bananas III (US)*, paras. 7.223 and 7.399.

(k) The application of activity function rules in respect of the importation of third-country and non-traditional ACP bananas at in-quota tariff rates, in the absence of the application of such rules to traditional ACP imports, was inconsistent with the requirements of Article X:3(a) of the GATT 1994.[180]

(l) The requirement to match European Communities import licences with Bananas Framework Agreement export certificates was inconsistent with the requirements of Article I:1 of the GATT 1994.[181]

(m) The issuance of hurricane licences exclusively to European Communities producers and producer organizations or operators including or directly representing them was inconsistent with the requirements of Article III:4 of the GATT 1994.[182]

(n) The issuance of hurricane licences exclusively to traditional ACP producers and producer organizations or operators including or directly representing them was inconsistent with the requirements of Article I:1 of the GATT 1994.[183]

(o) The issuance of hurricane licences exclusively to ACP and European Communities producers and producer organizations or operators including or directly representing them was inconsistent with the requirements of Article 1.3 of the Import Licensing Agreement.[184]

(p) To the extent that specific aspects of the European Communities licensing procedures were found not to be in conformity with Articles I, III or X of the GATT 1994, an inconsistency was necessarily also found with the requirements of Article 1.2 of the Import Licensing Agreement.[185]

(q) 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 the General Agreement on Trade in Services (hereinafter "GATS").[186]

(r) The allocation to ripeners of 28 per cent of the 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

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[180] Panel Report on *EC – Bananas III (Ecuador)*, paras. 7.231 and 7.399; Panel Report on *EC – Bananas III (Guatemala and Honduras)*, paras. 7.231 and 7.399; Panel Report on *EC – Bananas III (Mexico)*, paras. 7.231 and 7.399.

[181] Panel Report on *EC – Bananas III (Ecuador)*, paras. 7.241 and 7.399; Panel Report on *EC – Bananas III (Guatemala and Honduras)*, paras. 7.241 and 7.399; Panel Report on *EC – Bananas III (Mexico)*, paras. 7.241 and 7.399; Panel Report on *EC – Bananas III (US)*, paras. 7.241 and 7.399.

[182] Panel Report on *EC – Bananas III (Guatemala and Honduras)*, paras. 7.250 and 7.399; Panel Report on *EC – Bananas III (Mexico)*, paras. 7.250 and 7.399.

[183] Panel Report on *EC – Bananas III (Guatemala and Honduras)*, paras. 7.256 and 7.399.

[184] Ibid., paras. 7.263 and 7.399; Panel Report on *EC – Bananas III (Mexico)*, paras. 7.263 and 7.399; Panel Report on *EC – Bananas III (US)*, paras. 7.263 and 7.399.

[185] Panel Report on *EC – Bananas III (Ecuador)*, paras. 7.271 and 7.399; Panel Report on *EC – Bananas III (Mexico)*, paras. 7.271 and 7.399.

[186] Panel Report on *EC – Bananas III (Ecuador)*, paras. 7.341, 7.353 and 7.399; Panel Report on *EC – Bananas III (Mexico)*, paras. 7.341, 7.353 and 7.399; Panel Report on *EC – Bananas III (US)*, paras. 7.341, 7.353 and 7.399.

Complainants' origin and was therefore inconsistent with the requirements of Article XVII of the GATS.[187]

(s) The exemption of Category B operators of European Communities origin from the requirement to match European Communities import licences with Bananas Framework Agreement export certificates created less favourable conditions of competition for like service suppliers of Complainants' origin and was therefore inconsistent with the requirements of Article XVII of the GATS.[188]

(t) The exemption of Category B operators of ACP origin from the requirement to match European Communities import licences with Bananas Framework Agreement export certificates created less favourable conditions of competition for like service suppliers of Complainants' origin and was therefore inconsistent with the requirements of Article II of the GATS.[189]

(u) The allocation of hurricane licences exclusively to operators who include or directly represent European Communities producers created less favourable conditions of competition for like service suppliers of Complainants' origin and was therefore inconsistent with the requirements of Article XVII of the GATS.[190]

(v) The allocation of hurricane licences exclusively to operators who include or directly represent ACP producers created less favourable conditions of competition for like service suppliers of Complainants' origin and was therefore inconsistent with the requirements of Article II of the GATS.[191]

2.66 In summary, the original panel found that the challenged measures were inconsistent with the European Communities' obligations under Articles I:1, III:4, X:3 and XIII:1 of the GATT 1994, Articles 1.2 and 1.3 of the Import Licensing Agreement and Articles II and XVII of the GATS.

2.67 In turn, the Appellate Body decided to:

(a) Uphold the Panel's conclusion that the Agreement on Agriculture did not permit the European Communities to act inconsistently with the requirements of Article XIII of the GATT 1994;[192]

(b) Uphold the Panel's finding that the allocation of tariff quota shares, whether by agreement or by assignment, to some, but not to other, Members not having a substantial interest in supplying bananas to the European Communities was inconsistent with Article XIII:1 of the GATT 1994;[193]

[187] Panel Report on *EC – Bananas III (Ecuador)*, paras. 7.368 and 7.399; Panel Report on *EC – Bananas III (US)*, paras. 7.368 and 7.399.
[188] Panel Report on *EC – Bananas III (Ecuador)*, paras. 7.380 and 7.399; Panel Report on *EC – Bananas III (US)*, paras. 7.380 and 7.399.
[189] Panel Report on *EC – Bananas III (Ecuador)*, paras. 7.385 and 7.399; Panel Report on *EC – Bananas III (Mexico)*, paras. 7.385 and 7.399; Panel Report on *EC – Bananas III (US)*, paras. 7.385 and 7.399.
[190] Panel Report on *EC – Bananas III (Ecuador)*, paras. 7.393 and 7.399; Panel Report on *EC – Bananas III (US)*, paras. 7.393 and 7.399.
[191] Panel Report on *EC – Bananas III (Ecuador)*, paras. 7.397 and 7.399; Panel Report on *EC – Bananas III (Mexico)*, paras. 7.397 and 7.399; Panel Report on *EC – Bananas III (US)*, paras. 7.397 and 7.399.
[192] Appellate Body Report on *EC – Bananas III*, para. 158.
[193] Ibid., para. 162.

(c) Uphold the Panel's finding that the tariff quota reallocation rules of the Bananas Framework Agreement were inconsistent with Article XIII:1 of the GATT 1994, and to modify the Panel's finding by concluding that the Bananas Framework Agreement tariff quota reallocation rules were also inconsistent with the chapeau of Article XIII:2 of the GATT 1994;[194]

(d) Reverse the Panel's finding that the Lomé Waiver waived any inconsistency with Article XIII:1 of the GATT 1994 to the extent necessary to permit the European Communities to allocate tariff quota shares to traditional ACP States;[195]

(e) Uphold the Panel's conclusions that the European Communities activity function rules and the Bananas Framework Agreement export certificate requirement were inconsistent with Article I:1 of the GATT 1994;[196]

(f) Uphold the Panel's finding that the European Communities practice with respect to hurricane licences was inconsistent with Article III:4 of the GATT 1994;[197]

(g) Uphold the Panel's conclusions 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 was inconsistent with Articles II and XVII of the GATS;[198]

(h) Uphold the Panel's conclusions that the allocation to ripeners of a certain portion of the Category A and B licences allowing the importation of third-country and non-traditional ACP bananas at in-quota tariff rates was inconsistent with Article XVII of the GATS; and,[199]

(i) Uphold the Panel's conclusions that the European Communities practice with respect to hurricane licences was inconsistent with Articles II and XVII of the GATS.[200]

3. Panel findings in the first compliance proceedings

2.68 The compliance panel requested by Ecuador made the following main substantive findings:

(a) Imports from different *non-substantial* supplier countries were not similarly restricted in the meaning of Article XIII:1 of the GATT 1994. Moreover, the allocation of a collective tariff quota for traditional ACP States did 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 the GATT 1994. Therefore, the reservation of the quantity of 857,700 mt for traditional ACP imports under the revised regime is inconsistent with paragraphs 1 and 2 of Article XIII of the GATT 1994.[201]

(b) While Members have a degree of discretion in choosing a previous representative period, the period 1994-1996 was not a "representative period". Accordingly, the

[194] Appellate Body Report on *EC – Bananas III*, para. 163.
[195] Ibid., para. 188.
[196] Ibid., paras. 206-207.
[197] Ibid., para. 214.
[198] Ibid., para. 244.
[199] Ibid., para. 246.
[200] Ibid., para. 248.
[201] Panel Report on *EC – Bananas III (Article 21.5 – Ecuador)*, para. 6.29.

country-specific allocations assigned by the European Communities to Ecuador, as well as to the other substantial suppliers, were not consistent with the requirements of Article XIII:2 of the GATT 1994.[202]

(c) On the basis of the data offered by the European Communities, it was not unreasonable for the European Communities to conclude that the level of 857,700 mt for duty-free traditional ACP exports could be considered to be required by the Lomé Convention because it appeared to be based on pre-1991 best-ever exports and not on allowances for investments.[203]

(d) It was not reasonable for the European Communities to conclude that Protocol 5 of the Lomé Convention required 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 was not required by Protocol 5 of the Lomé Convention. Absent any other applicable requirement of the Lomé Convention, those excess volumes were not covered by the Lomé waiver and the preferential tariff thereon was therefore inconsistent with Article I:1 of the GATT 1994.[204]

(e) It was 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 was required by Article 168 of the Lomé Convention. Therefore, the violation of Article I:1 of the GATT 1994, as alleged by Ecuador, was waived by the Lomé waiver.[205]

(f) It was not unreasonable for the European Communities to conclude that including the tariff preference of 200 Euro per mt for out-of-quota imports of non-traditional ACP bananas was within the scope of what the European Communities was required to accord to non-traditional ACP supplies by virtue of the Lomé Convention. Therefore, the violation of Article I:1 of the GATT 1994, as alleged by Ecuador, was covered by the Lomé waiver.[206]

(g) Under the revised regime, Ecuador's suppliers of wholesale services were accorded *de facto* less favourable treatment than European Communities/ACP suppliers of those services in violation of Articles II and XVII of the GATS.[207]

(h) The criteria for acquiring "newcomer" status under the revised licensing procedures accorded *de facto* less favourable conditions of competition, in the meaning of Article XVII of the GATS, to Ecuador's service suppliers than to like European Communities service suppliers.[208]

2.69 The compliance panel requested by Ecuador concluded that:

(a) The reservation of the quantity of 857,700 mt for traditional ACP imports under the revised regime was inconsistent with paragraphs 1 and 2 of Article XIII of the GATT 1994. Additionally, the country-specific allocations to Ecuador, as well as to the

[202] Panel Report on *EC – Bananas III (Article 21.5 – Ecuador)*, para. 6.50.
[203] Ibid., para. 6.65.
[204] Ibid., para. 6.69.
[205] Ibid., para. 6.78.
[206] Ibid., para. 6.80.
[207] Ibid., para. 6.134.
[208] Ibid., para. 6.149.

other substantial suppliers, were not consistent with the requirements of Article XIII:2 of the GATT 1994.[209]

(b) The level of 857,700 mt for duty-free traditional ACP imports could be considered to be required by the Lomé Convention because it appeared to be based on pre-1991 best-ever exports and not on allowances for investments. However, it was not reasonable for the European Communities to conclude that Protocol 5 of the Lomé Convention required 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 was not required by Protocol 5 of the Lomé Convention. Accordingly, absent any other applicable requirement of the Lomé Convention, those excess volumes were not covered by the Lomé waiver and the preferential tariff thereon was therefore inconsistent with Article I:1 of the GATT 1994.[210]

(c) In respect of preferences for non-traditional ACP imports, it was 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 €/mt for out-of-quota imports, were required by Article 168 of the Lomé Convention. Therefore, the violations of Article I:1 of the GATT 1994, as alleged by Ecuador in respect of preferences for non-traditional ACP imports, were covered by the Lomé waiver.[211]

(d) Under the revised regime, Ecuador's suppliers of wholesale services were accorded *de facto* less favourable treatment in respect of licence allocation than European Communities/ACP suppliers of those services in violation of Articles II and XVII of the GATS.[212]

(e) The criteria for acquiring "newcomer" status under the revised licensing procedures accorded to Ecuador's service suppliers *de facto* less favourable conditions of competition than to like European Communities service suppliers in violation of Article XVII of the GATS.[213]

2.70 In its report, pursuant to the request made by Ecuador, the compliance panel found appropriate to make suggestions on how the European Communities could bring its banana import regime into conformity with WTO rules. In the panel's view, the European Communities had at least the following options:

> "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.
>
> 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.

[209] Panel Report on *EC – Bananas III (Article 21.5 – Ecuador)*, para. 6.160.
[210] Ibid., para. 6.161.
[211] Ibid., para. 6.162.
[212] Ibid., para. 6.163.
[213] Ibid.

> 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.[214] In this context, some action may be required soon in respect of the Lomé waiver since it expires on 29 February 2000."[215]

F. MEASURES CHALLENGED BY ECUADOR IN THIS DISPUTE

2.71 The measures challenged by Ecuador through this recourse to Article 21.5 of the DSU are the following:

(a) The tariff quota, with a current volume of 775,000 mt, which allows bananas of ACP origin to enter the European Communities market duty-free; and,

(b) The European Communities' tariff, currently set at €176/mt, which applies to all European Communities imports of bananas, except those benefiting from access to the zero-duty TRQ.[216]

2.72 These measures are contained in the Council Regulation (EC) 1964/2005 (hereinafter "Regulation 1964")[217] and its associated implementing regulations, including the European Communities' autonomous tariff provisions.[218]

G. SPECIAL AND DIFFERENTIAL TREATMENT

2.73 Pursuant to Article 12.11 of the DSU:

> "[W]here one or more of the parties is a developing country Member, the panel's report shall explicitly indicate the form in which account has been taken of relevant provisions on differential and more-favourable treatment for developing country

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[214] (*footnote original*) 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).

[215] Panel Report on *EC – Bananas III (Article 21.5 – Ecuador)*, paras. 6.156-6.158.

[216] *EC – Bananas III (Article 21.5 – Ecuador II)*, Request for the Establishment of a Panel (WT/DS27/80) 26 February 2007, p. 4. See also, Ecuador's first submission, para. 21.

[217] Council of the European Union, *Council Regulation (EC) No. 1964/2005 of 29 November 2005 on the tariff rate for bananas*, *Official Journal of the European Union*, 2 December 2005, L 316/1.

[218] *EC – Bananas III (Article 21.5 – Ecuador II)*, Request for the Establishment of a Panel (WT/DS27/80) 26 February 2007, p. 4. See also, Ecuador's first submission, para. 21.

> Members that form part of the covered agreements which have been raised by the developing country Member in the course of the dispute settlement procedures."

2.74 In addition, the DSU provides in Article 12.10 that:

> "[I]n examining a complaint against a developing country Member, the panel shall accord sufficient time for the developing country Member to prepare and present its argumentation."

2.75 The Panel notes that Ecuador is a developing country Member. However, in the course of these Panel proceedings Ecuador did not raise any specific provisions on differential and more-favourable treatment for developing country Members that would require additional consideration, nor do we find that these specialized provisions are relevant for the resolution of the specific matter brought before this Panel.

2.76 In any event, during the Panel proceedings, the Panel took into account the complainant's status as a developing country Member when preparing and revising the timetable for the proceedings. The Panel also took into account the complainant's status as a developing country Member, and its interest in a prompt decision, when considering the European Communities' repeated requests for the proceedings to be delayed.

III. PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

3.1 Ecuador has requested that the Panel find that the European Communities has failed to implement the rulings and recommendations of the DSB in the original dispute and continues to be in breach of its obligations as a WTO Member. More specifically, Ecuador has requested that the Panel find that the EC measures are inconsistent with the following obligations contained in the WTO agreements:

(a) Article I of the GATT 1994, because the European Communities applies different and more favourable duties to bananas originating in ACP countries than those applied to bananas originating in Ecuador and most or all other WTO members;

(b) Article II of the GATT 1994, because the European Communities applies a tariff (currently €176/mt) on the import of bananas originating in Ecuador (and other WTO Members) that is above the EC bound rate of duty under Article II, which is €75/mt; and,

(c) Article XIII:1 and 2 of the GATT 1994, because the European Communities continues to provide a tariff rate quota system reserved exclusively for bananas of ACP origin, while Ecuador is denied any share of the preferential quota, let alone the share to which it is entitled under Article XIII.

3.2 The European Communities raises two preliminary issues. First, the European Communities argues that Ecuador should not be allowed to challenge the European Communities' current import regime for bananas, including the preference for ACP countries. The European Communities contends that the Understanding on Bananas, signed by Ecuador and the European Communities in April 2001 (Bananas Understanding)[219], is a mutually agreed solution to the banana dispute.[220]

[219] See Understanding on Bananas between the EC and Ecuador of 30 April 2001, in *EC – Bananas III*, Notification of Mutually Agreed Solution (WT/DS27/58), 2 July 2001; and *EC – Bananas III*, Understanding on Bananas between Ecuador and the EC (WT/DS27/60), 9 July 2001.

[220] European Communities' first written submission, paras. 61-65. See also European Communities' second written submission, paras. 7-18.

The European Communities adds that, even if it was to be assumed that the Bananas Understanding is not a "mutually agreed solution" for purposes of the DSU, it would still constitute a bilateral agreement that must be taken into consideration in analysing the rights and obligations of the parties to this dispute.[221]

3.3 As a second preliminary issue, the European Communities argues that Ecuador's complaint against the Cotonou Preference under Article XIII of the GATT 1994 should be rejected, because in effect Ecuador is challenging a suggestion made by the first compliance panel requested by Ecuador.[222] According to the European Communities, such suggestion can be challenged only through recourse to appellate review, but not through a compliance panel.[223]

3.4 The European Communities has not made any specific arguments to contest Ecuador's claim that the preference granted to bananas of ACP origin would be inconsistent with Article I of the GATT 1994.[224] The European Communities argues, however, that this preference is covered by a waiver from Article I:1 of the GATT 1994, the Doha Waiver.[225] According to the European Communities, the duration of that waiver is not linked to the number of arbitrations lost by the European Communities, but rather depends on whether the new import regime for bananas it introduced on 1 January 2006 at least maintains total market access for MFN suppliers.[226]

3.5 As regards Ecuador's claim under Article XIII of the GATT 1994, in addition to its second preliminary objection, the European Communities requests the Panel to reject Ecuador's claims in regard to both paragraphs 1 and 2 of Article XIII, arguing in part that its current banana import regime cannot violate both Articles I and XIII of the GATT 1994 at the same time.

3.6 Finally, the European Communities responds that Ecuador's claims under Article II of the GATT 1994 are "completely unfounded"[227] because:

> "[T]he bound tariff for bananas in the 'GATT schedule of concessions' of the European Communities is €680 per ton and the tariff applied since January 1, 2006 is €176 per ton".[228]

IV. ARGUMENTS OF THE PARTIES

4.1 The arguments presented by the parties in their written submissions and oral statements are reflected below.[229] The parties' answers to questions and comments on each other's responses are reproduced in Annex D to this report.

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[221] Final written version of the European Communities' closing oral statement at the substantive meeting of the Panel with the parties and third parties, para. 4.

[222] See European Communities' first written submission, paras. 79-86.

[223] See European Communities' second written submission, paras. 19-35.

[224] European Communities' response to panel question No. 61, para. 125. See also, Ecuador's second written submission, para. 16; and written version of Ecuador's oral statement during substantive meeting with the parties and third parties, para. 34.

[225] Ministerial Conference, European Communities, The ACP – EC Partnership Agreement, Decision of 14 November 2001 (WT/MIN(01)/15), 14 November 2001.

[226] European Communities' first written submission, paras. 67 and 69.

[227] Ibid., para. 112.

[228] Ibid.

[229] The summaries of the parties' arguments are based on the executive summaries submitted to the Panel by the parties. All footnotes in this section are original, unless otherwise specified.

A. ECUADOR

1. First written submission of Ecuador

(a) The measures of the European Communities that are subject to this challenge

4.2 In this submission, the Government of Ecuador is challenging the conformity with Articles I, II and XIII of the General Agreement on Tariffs and Trade 1994 (GATT 1994) of certain measures taken by the European Communities to conform with the rulings and recommendations of this Panel in its Report on *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, 22 May 1997, WT/DS27/R/ECU (hereinafter "Panel Report"), as modified by the Appellate Body in its Report on *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, 9 September 1997, WT/DS27/AB/R (hereinafter "Appellate Body Report").[230]

4.3 The challenged EC measures are contained in EC Council Regulation No. 1964/2005 ("Regulation 1964")[231] and its associated implementing regulations, including the European Communities' autonomous tariff provisions. These measures include:

- A tariff-rate quota, with a current volume of 775,000 mt, exclusively reserved for bananas of ACP origin. Bananas of ACP origin enter the EC duty-free up to a quantity of 775,000 mt, while bananas of Ecuadorian origin and any other non-ACP origin, as well as ACP origin bananas in excess of 775,000 mt are currently charged a duty of €176/mt. Ecuador does not get any share of this tariff-rate quota, let alone receive the share required under Article XIII, as confirmed by prior rulings of the Panel, the Appellate Body, and the previous Article 21.5 Panel.

- The European Communities applies a tariff at €176/mt to EC imports of bananas of Ecuadorian origin and to all other bananas except those bananas of ACP origin that are favourably treated as described above.

4.4 The measures at issue in this dispute are similar to, but far less complex than, those considered by the Panel and the Appellate Body in *EC – Bananas III* and by the Article 21.5 Panel in 1999. The original EC regime, and the revised regime considered (and found inconsistent with the European Communities' obligations) in those proceedings involved two tariff rate quotas, separate country allocation regimes, and complex import licensing measures. The current measures involve only a single tariff-rate quota that is reserved entirely for ACP countries and from which Ecuador and other countries are excluded, and a tariff applied above the European Communities' bound rate to bananas from Ecuador as well as to all other bananas not benefiting from the zero duty tariff quota.

[230] At the DSB meeting of 20 March 2007, the EC argued that Article 21.5 does not apply to this dispute because the EC considered that its current banana regime is not taken to comply with the prior DSB rulings and recommendations, which the EC said had been "implemented" in 2001. Dispute Settlement Body - Minutes of Meeting of 20 March 2007, WT/DSB/M/228, 2 May 2007. Article 21.5 contains no time limitation on when its procedures may be invoked, and the admittedly long period of time since the prior invocation of Article 21.5 is, in this case, readily explained by the Agreements reached by the Parties in 2001, and supported by the waivers granted that same year. In effect, the Agreement allowed the EC a prolonged period to phase in a system that would remove the inconsistencies with the WTO found by successive DSB rulings, with the cover of appropriate waivers for the temporary and conditional phase-in period in which the EC measures would continue not to conform with its obligations. This agreement does not cut off Ecuador's right to invoke Article 21.5 when Ecuador considers that the European Communities' replacement measures have failed to achieve the conformity from which the EC was excused on a conditional and time-limited basis. Ecuador reserves the right to comment further if the EC pursues this argument.

[231] Council Regulation (EC) No. 1964/2005 of 29 November 2005, *Official Journal of the European Union* of 2 December 2005, L 316/1 on the tariff rates for bananas.

4.5 As discussed below, the simplification of the EC measures has not remedied the inconsistency with WTO obligations and the discrimination against non-ACP bananas.

(b) The EC measures are inconsistent with the General Agreement on Tariffs and Trade 1994

(i) Tariff preferences contrary to Article I

4.6 Article I:1 of the GATT provides, in part:

> "With respect to customs duties and charges of any kind imposed on or in connection with importation ..., any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties."

4.7 The EC banana tariff preferences, while less complex than those examined in *EC – Bananas III* and by the first Article 21.5 Panel, nevertheless are plainly inconsistent with the European Communities' obligations under Article I of the GATT 1994, in according tariff preferences to bananas of ACP origin that are not accorded to bananas originating in Ecuador or other non-ACP countries. There is no dispute that all bananas are like products, nor that the European Communities accords bananas of ACP origin duty-free treatment up to the 775,000 mt tariff quota, while bananas of Ecuadorian origin (as well as other bananas not benefiting from the duty-free tariff quota) are subject to a duty of €176/mt. Absent some applicable exception or waiver, it could not seriously be asserted that Article I permits a WTO member to grant a duty preference limited to one group of WTO members, and excluding others.

4.8 In WTO discussions, the European Communities has argued that the tariff discrimination was justified by the waiver that the European Communities was granted in 2001 at the ministerial conference.[232] The burden is on the European Communities if it wishes to claim that it still has a valid waiver with respect to bananas, and that this waiver covers the EC measures at issue. Ecuador notes that, even if the burden were on Ecuador to prove the lack of an applicable waiver, the record is clear in this matter. The European Communities failed to meet the conditions of the Article I waiver for it to continue past 1 January 2006. The European Communities was supposed to have withdrawn its prior banana concessions and, observing Article XXVIII requirements and procedures, to have rebound its banana duty at a level meeting the standards expressed in the waiver. Notably, the European Communities had two opportunities to satisfy an arbitrator, under the conditions of the waiver, that the level at which it proposed to rebind its banana duty would meet the standards of the waiver. The European Communities failed in both opportunities. In 2005, the European Communities twice proposed a new MFN rate for bananas that was, in each case, challenged by substantial suppliers and rejected by Arbitrators as not meeting the standards of the Article I waiver.[233] The European Communities, nevertheless, proceeded to impose a new MFN duty at

[232] *European Communities – The ACP-EC Partnership Agreement*, WT/MIN(01)/15, 14 November 2001.

[233] *European Communities – The ACP-EC Partnership Agreement*, WT/MIN(01)/15, 14 November 2001. The Article I Waiver included an Annex on bananas requiring that the European Communities' future tariff-only regime "result in at least maintaining total market access for MFN banana suppliers," taking into account "all EC WTO market-access commitments relating to bananas..." In the event of disagreement over whether the proposed regime met the conditions of the Annex, the Annex provided for arbitration. If the EC was found by the Arbitrator twice to have failed to satisfy the terms of the Annex standard, the waiver of Article I with respect to bananas would expire. *Id* at Annex, tirets 3 and 4.

€176/mt, with a tariff rate quota for ACP countries at a zero duty for 775,000mt., notwithstanding the termination of the Article I waiver with respect to bananas.[234]

4.9 The waiver did not and does not give the European Communities the opportunity to keep proposing duties that it considers appropriate, while continuing to apply GATT-inconsistent measures on bananas. The European Communities in fact has met none of the conditions required for continuation of the waiver for bananas under Article I past 1 January 2006. Should the European Communities claim otherwise, Ecuador reserves the right to respond.

(ii) Allocation of Tariff Rate Quota contrary to Article XIII

4.10 As the original Panel[235] found, and the Appellate Body[236] affirmed in *EC – Bananas III*, and as again affirmed in the first Article 21.5 Panel,[237] Article XIII of the GATT applies to tariff-rate quotas as well as other quotas. The European Communities was granted a conditional waiver of its obligations under Article XIII, but this waiver expired by its own terms on 31 December 2005.[238] Notwithstanding the expiration of that waiver, the European Communities now imposes a tariff rate quota on bananas in which only ACP countries have access to the duty free quota, while Ecuador and all other countries are excluded from that quota.

4.11 The EC measures are inconsistent with Article XIII:1 in that Ecuadorian (and other non-ACP) bananas cannot be considered "similarly restricted" in comparison to ACP bananas, when Ecuadorian (and other non-ACP) bananas are simply excluded from access to the duty free tariff quota.[239]

4.12 The EC measures are also inconsistent with Article XIII:2. The Panel in *EC – Bananas III* noted the general rule that, if Members apply 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".[240] This interpretation, not surprisingly, was also affirmed by the Appellate Body in that case.[241]

4.13 Though the EC system has eliminated the country allocations that previously existed as between non-ACP countries, the discrimination remains as between ACP and non-ACP bananas. The Appellate Body in *EC – Bananas III* vigorously condemned this discrimination.[242]

4.14 The allocation of the duty free quota exclusively to ACP countries bears no relation to trading patterns in the world or EC markets. As it was shown in the charts submitted by Ecuador on 6 July 2006, Ecuador is a pre-eminent exporter of bananas to the world market. Further, Ecuador and several other countries that are excluded from the zero duty quota, are substantial suppliers to the European Communities, while ACP countries, many of whom are minor suppliers at best, are allowed to ship duty free under the tariff quota.

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[234] Award of the Arbitrator, *EC – The ACP-EC Partnership Agreement*, para. 94; Award of the Arbitrator, *EC – The ACP-EC Partnership Agreement II*, para. 127.

[235] Panel Report at para. 7.68.

[236] Appellate Body Report at para. 160.

[237] Panel Report at para. 6.160.

[238] *European Communities – Transitional Regime for the EC Autonomous Tariff Rate Quotas on Imports of Bananas*, WT/MIN(01)/16, 14 November 2001, para. 7.

[239] Panel Report at para. 7.69; Appellate Body Report at para. 160.

[240] Panel Report at para. 7.68.

[241] Appellate Body Report at para. 161.

[242] Appellate Body Report at paras. 190 and 191.

(iii) Applied duty of €176/mt contrary to EC binding under Article II

4.15 The EC duty on bananas was not previously subject to challenge, except for its discriminatory aspect. However, in replacing its previous measures with a tariff-rate quota with a single duty rate applicable to bananas not benefiting from the zero duty tariff-rate quota, the European Communities has breached its tariff binding on bananas. The EC tariff on bananas (HTS 0803.00.12) remains bound in the EC GATT schedule of concessions (Schedule CXL of the EC – 15) at a level of €75/mt, subject to the annexed Agreement on Bananas, which elaborates the tariff rate quota regime. Article II of the GATT forbids imposition of duties in excess of bound rates in a schedule.

4.16 The inconsistency with other GATT provisions of the Agreement annexed to the EC bananas concession does not release the European Communities from its binding nor does it entitle the European Communities unilaterally to determine to apply a duty well in excess of the bound rate, which was not itself found inconsistent with EC obligations. Article II does not contain any such exception, nor has the European Communities followed provisions of Article XXVIII to withdraw its concessions. Accordingly, the EC applied duty of €176/mt must be held inconsistent with the European Communities' obligations under Article II of the GATT and the EC Schedule of Concessions.

(c) Conclusion

4.17 For the reasons set forth above, the EC measures taken to conform with the rulings and recommendations of the DSB in *EC – Bananas III* do not comply with the European Communities' obligations under the WTO. Ecuador, a developing country, continues to be deprived of the competitive opportunities in the EC market to which Ecuador is entitled as a WTO Member. Neither the factual nor legal issues are complex in this dispute. Ecuador asks that the Panel proceed fairly and promptly to its decisions, as called for under Article 21.5.

2. Second written submission of Ecuador

(a) Argument

(i) The EC-Ecuador Understanding on Bananas is not a bar to this Article 21.5 proceeding

4.18 The European Communities argues as a "preliminary matter" that Ecuador's claims in this Article 21.5 proceeding should all be dismissed because the European Communities considers that: the Ecuador-EC "Understanding on Bananas"[243] constitutes "a mutually agreed solution" in the sense of Article 3 of the DSU in 2001;[244] the solution contemplated a preference for ACP bananas; and Ecuador's challenge to the preferences now granted by the European Communities constitutes "question[ing] a mutually agreed solution";[245] which "goes against" Article 3.7 and 3.10, of the DSU.

4.19 The European Communities' argument must be rejected on several independent grounds. First, even if the Understanding on Bananas were considered a "mutually agreed solution", Articles 3.7 and 3.10 do not preclude a dispute settlement challenge to any measures.

[243] *See European Communities – Regime for the Importation, Sale, and Distribution of Bananas – Understanding on Bananas between the European Communities and Ecuador*, WT/DS27/60, 9 July 2001 ("EC – Ecuador Understanding").

[244] European Communities' first written submission, at para. 64.

[245] European Communities' first written submission, at para. 64.

4.20 Second, the Understanding on Bananas might have turned out to be "a mutually accepted solution," but unfortunately, the European Communities did not comply with the requirements of the last phase of the Agreement. A mutually agreed solution is not a solution without compliance.

4.21 Third, Article 3.7 provides that the solution to be "preferred" is not merely "mutually accepted" but also "consistent with the covered agreements." That is consistent with the requirement in Article 3.5 that "[a]ll solutions to matters formally raised under the consultation and dispute settlement provisions of the covered agreements ... shall be consistent with those agreements ..."

4.22 Fourth, Ecuador does not agree that the EC measures at issue are covered by the Doha Waiver. The Understanding did not commit Ecuador to accept whatever preferences or "tariff only" scheme that the European Communities might decide to apply as of 1 January 2006, regardless of whether the measures were covered by the waiver or conformed with the European Communities' obligations under the WTO Agreement.

4.23 In this proceeding, Ecuador is challenging the conformity of EC measures with the European Communities' obligations under the WTO Agreement. The European Communities cannot claim immunity from this challenge of its measures because it alleges that the challenged measures fell within what the European Communities unilaterally conceives to be its rights and Ecuador's obligations under the Understanding.

4.24 For each and all of the above reasons, the European Communities' "preliminary" challenge should be dismissed.

(ii) The EC tariff preferences infringe Article I and are not covered by the Doha Waiver

4.25 The European Communities does not contest that it grants preferences that are contrary to Article I, but argues that the preferences it grants to bananas of ACP origin are covered by the Doha Waiver through 31 December 2007. The essence of the dispute under Article I is that Ecuador considers that the Doha Waiver of Article I for bananas expired following the Arbitrator's rejection of both of the tariff rebinding proposals made by the European Communities. while the European Communities, in effect, contends that the waiver allowed it to implement unilaterally a third regime (or any other regime) that the European Communities considers to meet the standard that the "envisaged rebinding would result in at least maintaining total market access for MFN banana suppliers, taking into account the EC's commitments".[246] The European Communities then argues that its current applied regime meets that standard as the European Communities conceives it. The European Communities concedes that it has not rebound its duties or fulfilled the requirements with respect to Article XXVIII as also required by the waiver, but the European Communities claims that this is a matter of "good faith" out of deference to the views of Ecuador.

4.26 The European Communities' arguments should be rejected. In accordance with the Doha Waiver, having failed in its two opportunities to envisage a tariff rebinding that would meet the waiver standard, the European Communities cannot claim the protection of the waiver for the system it then established unilaterally. Ecuador does not consider that the current EC banana measures, had they been proposed as the second EC proposal prior to 2006, would have been found to meet the requirements of the waiver. However, that is irrelevant to the task of this Panel, because, the terms of the waiver did not grant the EC banana regime the continued protection of the waiver for this or any other regime it might establish unilaterally.

[246] Doha Waiver Annex, fourth tiret.

4.27 Applying the principles of treaty interpretation of the Vienna Convention[247], it is apparent that the European Communities' argument is not supported by the terms of the waiver, read in their context and in light of the object and purpose of the WTO and this waiver.

4.28 The European Communities has not disputed that the Arbitrator found that both the European Communities' initial "envisaged rebinding" and the European Communities' proposed "rectification," did not meet the standards of the waiver.

4.29 Nevertheless, the European Communities proceeded, effective 1 January 2006, unilaterally to institute the measures that are the subject of Ecuador's present challenge, without withdrawing the existing binding or binding the new system, with a duty of €176/mt, and a tariff quota of 775,000 mt at a zero duty, available exclusively to bananas of ACP origin.

4.30 The Doha Waiver of Article I expired on 1 January 2006, following the Arbitrator's determinations that neither the initial nor the second "envisaged rebinding" met the requirements of the waiver. The second arbitration award explicitly found that the European Communities had "failed to rectify the matter." The terms of the fifth tiret explicitly provide that following the second arbitration award:

> "If the EC has failed to rectify the matter, this waiver shall cease to apply to bananas upon entry into force of the new EC tariff regime."[248]

This sentence, in the context of the waiver, can only mean that the Arbitrator having found that the European Communities had failed to rectify the matter, the waiver ceased to apply on 1 January 2006, when the current EC measures entered into force.

4.31 The European Communities' arguments to the contrary are unpersuasive. First, the European Communities argues that Ecuador's interpretation of the waiver "would lead to unreasonable conclusions". On the contrary, it would de-stabilize the entire premise of the WTO tariff system if concessions were to be adjusted according to whether the concessions had the result contemplated at the time that the concession was granted. The terms of the Doha Waiver itself refute the European Communities' argument. The waiver makes explicit that the Arbitrator had to assess the European Communities' "envisaged rebindings" to determine whether they met the "at least maintain" standard *before* the European Communities would be permitted to implement the envisaged rebinding and therefore obviously before it could be known based on experience what the actual effect of the rebinding would be.

4.32 The European Communities argues that the reference to having "failed to rectify the matter" in the fifth tiret means that the European Communities was "obliged to introduce a new import regime that would maintain total market access for MFN suppliers in *reality* and not in theory", and that the assessment as to whether this standard is met can only be determined "based on an analysis of the real effects of the new import regime on the banana market".[249] The European Communities does not explain how such a detailed rule for its conduct could be derived from those four words of that sentence. The logical reading is that the reference to failure to rectify the matter is precisely a reference to the European Communities having failed a second time to establish a proper rebinding. Had the WTO Members wished to establish the rule that the European Communities struggles to extract from these words, the waiver could simply have provided that the European Communities could institute the system of its choosing, provided that it at least preserved access for MFN suppliers.

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[247] Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331.
[248] Doha Waiver Annex, fifth tiret.
[249] European Communities' first written submission, at para. 70.

4.33 The European Communities goes on to argue that the provision of the fifth tiret that the waiver ceases to apply "upon entry into force of the new EC tariff regime" should be interpreted to mean that:

> "The Doha Waiver would cease to apply only if the European Communities implemented the exact import regime analyzed by the Arbitrator and found not to satisfy the standard of the Doha Waiver. If the European communities introduced a *different* import regime... and that import regime did indeed maintain the total market access of the MFN suppliers, then the Doha Waiver would continue to apply."[250]

4.34 The plain language of that sentence, even viewed in isolation, does not support the European Communities' view that "the new tariff regime" means only the exact regime that was disapproved by the Arbitrator may not be implemented. To the contrary, the measures examined by the Arbitrator are never referred to by the term "the new tariff regime". The matter examined by the Arbitrator is described as "the envisaged rebinding of the EC tariff on bananas,"[251] or, in shorthand as "the rebinding", while the second arbitration simply refers to a determination "whether the European Communities has rectified the matter".[252] "The new tariff regime" is not even the same term as the "EC tariff only regime," which is the term used in the first and fifth tirets when the waiver is referring to a regime that has met or will have met the waiver requirements for a tariff only system that will continue to benefit from the waiver, i.e. one that is tariff only, with a tariff level that either has been agreed upon by interested parties or has been approved by the Arbitrator applying the waiver standard.

4.35 The structure, context and object of the waiver also supports Ecuador's understanding of the waiver and conflicts with that of the European Communities. First, both the first tiret of the Annex, as well as the last sentence of the last tiret, clearly require as a condition of the waiver that the processes be concluded and the agreed upon or approved tariff-only system be in place by 1 January 2006. Second, the creation of special and expedited dispute settlement procedures show both that WTO members wanted to ensure that the European Communities was not free to act unilaterally, and that the WTO members wanted a dispute settlement system that would provide results quickly, in keeping with the requirement that there would be certainty whether the European Communities had established a system meeting the standards of the waiver by 1 January 2006, an essential prerequisite for the waiver of Article I for bananas to continue past that date.

4.36 The penultimate clause of the preamble to the Doha Waiver supports Ecuador's interpretation of the Annex, explicitly noting that the Parties to the Cotonou Agreement "accept a multilateral control on the implementation" of the commitment to at least maintain market access for MFN suppliers of bananas.[253]

4.37 By contrast, the European Communities' interpretation would make a nullity of most of the provisions of the Doha Waiver's Annex. The dispute settlement provisions would provide no control over European Communities' unilateral actions because the only consequence of a negative finding of the Arbitrator would be to preclude the precise scheme that was ruled on. The European Communities could then apply whatever scheme it unilaterally chose (other than the two that had been found to fail the standard) and maintain the waiver, subject to possible challenge under the relatively lengthy dispute settlement processes of the DSU, with the European Communities enjoying the benefit of an undeserved waiver all the time that the dispute settlement processes were pending. Furthermore, a successful challenge would likely result only in the European Communities

[250] European Communities' first written submission, at para. 71.
[251] First Arbitration Award, at para. 8.
[252] Second Arbitration Award, at para. 23.
[253] Doha Waiver, at 2.

unilaterally imposing yet another non-compliant regime that would have to be taken through dispute settlement processes again – in short, precisely the sort of endless pattern of non-compliance that the waiver was intended finally to stop.

4.38 The European Communities also failed to meet other requirements of the Doha Waiver. The European Communities has not concluded the Article XXVIII process, nor has it withdrawn its prior bindings and rebound at a new level.

(iii) Allocation of Tariff Rate Quota is contrary to Article XIII

4.39 The European Communities does not contest that it applies a zero duty tariff quota of 775,000 mt exclusively open to bananas of ACP origin. As Ecuador explained in its first submission, such a tariff quota is a patent violation of Article XIII:1 of the GATT 1994, in that Ecuador (and other MFN suppliers) are restricted from any duty free access to the EC market, while ACP bananas are not similarly restricted. The EC measures infringe Article XIII:2, in that the allocation of the duty free tariff quota exclusively to bananas of ACP origin, while Ecuador and most of the rest of the world's largest suppliers are excluded, in no sense could be considered to result in shares of the duty-free quota that approached what Ecuador and other members could expect to obtain in absence of restrictions on duty free access.

4.40 The European Communities, in its first submission, attempts various defenses, all without merit.

The European Communities' preliminary issue on Article XIII

4.41 First, the European Communities argues as another "preliminary issue" that the tariff quota without an Article XIII waiver is implementing the suggestion of the Article 21.5 Panel in *EC – Bananas III* that the European Communities could "implement a tariff only system for bananas, with a tariff quota for ACP bananas covered by a suitable waiver."[254] The European Communities then asserts that, in its view, the reference to a "suitable waiver" meant only a waiver of Article I, because the Panel did not explicitly say that the suitable waiver would include a waiver of Article XIII, whereas an alternative suggestion of the Panel did explicitly refer to a waiver of Article XIII.

4.42 The European Communities did in fact obtain a waiver of Article XIII which applied *exclusively* to the tariff quota limited to bananas of ACP origin, and which expired on 31 December 2005. Further, in its second award, the Arbitrator, in agreeing to consider the tariff quota for ACP countries along with the envisaged rebinding of €187/mt, noted that the European Communities "also intends to seek a waiver of its obligations under Article XIII of GATT 1994 to implement its proposed tariff quota," and that the European Communities had applied for such a waiver.[255]

4.43 The European Communities also ignores the findings of *EC – Bananas III* with regard to Article XIII. The Appellate Body sustained the Panel finding that "Articles I:1 and XIII apply to the relevant EC regulations, irrespective if there is one or more 'separate regimes' for the importation of bananas."[256] When the European Communities attempted to preserve a tariff quota reserved exclusively for bananas of ACP origin, the first Article 21.5 Panel in *EC – Bananas III* again found

[254] European Communities' first written submission, at para. 79 (quoting Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 of the DSU by Ecuador*, WT/DS27/RW/ECU, 12 Apr. 1999, at para. 6.157).

[255] Second Arbitration Award, at para. 33.

[256] Ibid., at para. 191.

that the EC measure was inconsistent with the European Communities' obligations under Article XIII.[257]

4.44 The European Communities then goes on to contend that "claims challenging the consistency with the covered agreements of the measures *suggested* by the Panel cannot be brought before an Article 21.5 Panel," because this would be contrary to the principle of *res judicata* that the European Communities says is embodied in Article 19.1 of the DSU (permitting panels to make suggestions) and of Article 17.14 (dealing with adoption of Appellate Body reports).[258] The European Communities is wrong on all counts. The Panel never suggested or even implied that the European Communities would not require a waiver of Article XIII to implement a tariff quota reserved for ACP countries. Further, none of the provisions of the DSU would have precluded this challenge of the conformity of the European Communities' measures taken to comply with the Panel Report, even if the particular measures had been suggested by the Panel. Finally, it is not necessary to challenge before the Appellate Body the suggestions of a panel in order to preserve the right to make a challenge under Article 21.5.

The absence of nullification or impairment

4.45 The European Communities next contends that its tariff quota does not cause nullification or impairment to Ecuador by limiting the quantity of duty free bananas of ACP origin that may be imported into the EC market. The European Communities, however, completely misses the point. The violation of Article XIII is the denial of Ecuador's right to participate in the zero-duty quota. It is obvious that, if allowed to participate in that quota, Ecuador could reasonably expect to benefit substantially, based on its efficiency and large share of world trade in bananas. The issue is not whether the quota results in less harm than an unrestricted preference for ACP countries, but rather the harm that Ecuador suffers by reason of being excluded from the favourable quota.

The European Communities' erroneous interpretation of Article XIII

4.46 The European Communities, in its first submission, goes on at great length in its effort to defend itself based on a series of false premises, most of which relate to the European Communities' contention that Ecuador is not restricted by the European Communities' tariff quota because Ecuador is excluded from that quota and therefore, in the European Communities' view "not subject to *any* quantitative restrictions."[259] This is patently false and turns on its head what is restricted by a quota or a tariff quota. The restricted products are those that are denied access, outside the preferential tariff quota. A zero share of the preferential quota is a worse violation of Article XIII than a disproportionately small share.

4.47 The European Communities' argument that Article XIII:2 does not apply fails for similar reasons. The European Communities contends that Ecuador is not subject to restrictions other than the tariff, and therefore cannot complain about rules that apply when "applying import restrictions." To the contrary, the European Communities' tariff quota does apply restrictions – total exclusion – from access under the tariff quota, and it obviously does so inconsistently with Article XIII:2, as explained in Ecuador's first submission.

[257] Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 by Ecuador*, WT/DS27/RW/ECU, 12 Apr. 1999, at para. 6.29.
[258] European Communities' first written submission, para. 85.
[259] Ibid., para. 98.

4.48 The *US – Line Pipe* Panel did not hold otherwise.[260] The Panel found that the US quota allocation system favoured small over large exporters by allocating identical shares of low duty quota to countries with different shares of the world and US markets.[261]

(iv) Breach of tariff bindings under Article II

4.49 Ecuador demonstrated in its first submission that the EC duty of €176/mt applied to all bananas originating in Ecuador or other MFN countries was in breach of the EC binding duty of €75/mt, as contained in Schedule CXL. In its first submission, the European Communities defends its applied tariff level on two grounds, both unfounded. The European Communities argues that:

> "(1) The European Communities no longer has a binding at €75/mt for any quantity of bananas because the European Communities now contends that that bound tariff quota expired on 31 December 2002, under the terms of the Framework Agreement on Bananas ('BFA')[262], leaving in effect only the upper level binding at the essentially prohibitive level of €680/mt duty; and
>
> (2) Even if the €75/mt concession did not expire with the termination of the BFA, that duty concession 'automatically' disappeared with the elimination of the Tariff quota of 2.2 million mt to which it was 'attached'."
>
> <u>The European Communities' GATT binding at €75/mt was not limited in time by the Framework Agreement on Bananas</u>

4.50 The EC Uruguay Round schedule for its tariff quota provides for an initial and final concession of €75/mt for a quantity of 2.2 million mt, as provided in columns 3 and 4 of the schedule. under column 7 – "other terms and conditions" – it states "[a]s indicated in the Annex". The Annex simply sets out the BFA, which provides for matters such as the allocation of quotas, allocation of shortfalls in the quota shares, and management of the tariff quotas, by licensing and export certificates. Many, if not all of these terms of the BFA were found inconsistent with the European Communities' obligations and became moot or were superseded as a result of the *EC – Bananas III* rulings and of the actions that the European Communities agreed to undertake in the Understanding on Bananas and under the terms of the Doha Waiver.

4.51 The European Communities' first argument is based on the European Communities' new premise that the BFA does not merely set other terms and conditions for the bound tariff quota, but also that the existence of the concession is entirely dependent on the continuation in force of the BFA.

4.52 Neither the terms of the tariff quota concession nor its context and history support the European Communities' position that the €75/mt concession for 2.2 million mt was made subject to the continued existence of the Annex or the BFA. Paragraph 9 of the BFA provides that "this agreement" (the BFA) applies until the end of 2002, but it does not provide that the European Communities' GATT tariff quota concession expires at any time. The duty and quantity of the tariff concession does not depend on the other terms and conditions as set out in the Annex, but rather is laid out in the schedule itself. Had the Parties intended to bind the tariff quota only for so long as the BFA applied – which would have been an extraordinary step, contrary to normal practice and the

[260] Panel Report, *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/R, 29 Oct. 2001 ("*US – Line Pipe*").

[261] *US – Line Pipe*, at paras. 7.53, 7.54 and 7.55.

[262] Annex to Schedules CXL and LXXX of the European Communities, "Framework Agreement on Bananas."

modalities of the Uruguay Round – they would have specified the limited duration of the *concession* in the BFA.

4.53 Several factors support the view that the tariff quota concession did not terminate with the expiration date of the BFA. First, it is scarcely likely that the negotiators of the BFA would consider a satisfactory solution a system that, as of 2003, would leave all their banana exports to the European Communities subject to an essentially prohibitive duty of €680/mt. Second, a time limited tariff quota concession would have been grossly inconsistent with the Uruguay Round modalities, because it would leave the European Communities with the WTO right to apply an essentially prohibitive duty on all bananas.

4.54 Third, throughout the many chapters of the banana dispute, all parties, the Arbitrators and the WTO members acting collectively in the Doha Waiver have proceeded on the justifiable basis that the €75/mt binding for the tariff quota would not expire until withdrawn and replaced with a rebound duty through the Doha Waiver process, or some other valid WTO procedure such as Article XXVIII or a new round of negotiations. There are many examples on the record, and Ecuador will refer to just a few.

The European Communities' Article XXVIII:5 notifications

4.55 First, the Doha Waiver required conclusion of Article XXVIII negotiations for the rebinding of the tariff that could comply with the terms of the waiver. The European Communities filed Article XXVIII:5 notifications in August 2004, and again in February 2005.[263] Both notifications explicitly referred to the European Communities' intention to withdraw "concessions" (in the plural) on bananas. Its second notification announced the European Communities' intention to replace its "concessions" with a bound duty of €230/mt. If €680/mt was the European Communities' only bound rate as of January 1, 2003, the European Communities would never even have issued an Article XXVIII notification in the first instance, much less referred to its concessions in the plural. No Member would invoke Article XXVIII:5 procedures to *lower* its bound rate.

4.56 In the Arbitration proceedings, conducted in 2005, the European Communities made clear that it considered that the tariff quota was binding. For example the European Communities stated:

> "The EC also has a bound tariff rate quota of 2,200,000 tonnes, with an in-quota rate of €75/t."[264]

4.57 The first award of the Arbitrator in 2005 reflects the common understanding that tariff quota remained bound in Schedule CXL.[265] Even the European Communities' own first submission to this Panel continues to assume that the European Communities needs to comply with Article XXVIII to rebind its tariff at the current applied rate.[266]

4.58 For all the above reasons, the Panel should emphatically reject the European Communities' unfounded and unsavory attempt to avoid its responsibilities under its bound tariff quota.

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[263] *Article XXVIII:5 Negotiations: Schedule CXL – European Communities*, G/SECRET/22, 2 August 2004; *Article XXVIII:5 Negotiations: Schedule CXL – European Communities – Addendum*, G/SECRET/22/Add.1, 1 February 2005.

[264] Communication by the European Communities, *Arbitration under the Annex to the Doha Ministerial Decision of the ACP-EC Partnership Agreement*, 13 May 2005, para. 9. Available at the European Commission – External Trade I Centre through (http://trade.ec.europa.eu).

[265] Ibid.,at para. 18.

[266] European Communities' first written submission, at paras. 30, 35.

The binding at €75/mt did not expire with the elimination of the volume limit

4.59 The European Communities makes a second, equally groundless, defense; the European Communities contends that, even if the binding continued past the expiration of the BFA, the binding at €75/mt nevertheless "automatically" disappeared when the European Communities eliminated the 2.2 million mt tariff quota and replaced it with its current regime, consisting of an autonomous duty at €176/mt, together with a tariff quota exclusively for bananas of ACP origin.

4.60 Nothing in the waiver and nothing in the suggestions of the Article 21.5 Panel in any way suggested that the European Communities could escape its tariff bindings by unilaterally replacing the bound tariff quota at €75/mt ton with an autonomous MFN duty of €176/mt. Such a proposition is contrary to the obligations of a tariff concession and the principles of good faith.

4.61 If the European Communities wishes to eliminate the quota element limiting a tariff quota, it may do so. Equally, it may maintain one or more tariff quotas so long as it does so consistent with its obligations under Article XIII and its schedule of concessions. However, autonomously eliminating the volume restraint element of a tariff quota does not authorize ignoring the tariff binding. If that was the case, the hundreds of tariff quotas introduced by all WTO members could be expunged by the simple expedient of declaring an end to their existence.

(b) Conclusions

4.62 Ecuador, in its first submission proved that the EC measures at issue were inconsistent with Articles I, II and XIII of the GATT 1994. For reasons discussed above, the European Communities has failed to provide any valid defence for the breaches of Articles I, II and XIII.

3. Oral statement of Ecuador

4.63 Ecuador's per capita GDP for 2005 was about 8 per cent of the per capita average of the European Communities, and also is less than that of many of the ACP countries. Last year, the European Communities' tariff on bananas required the payment of additional tariffs for Ecuador in the order of €103 million more than the previous year as a result of the European Communities' unilateral "tariff only" scheme. The European Communities, meanwhile, is giving more than 200 million euros in subsidies to the EC producers of bananas, so the increased duties on Ecuadorian bananas in effect finances half of the EC subsidies to its own banana producers.

4.64 Ecuador is a developing country, but it has one of the most efficient banana producing industries in the world.

4.65 The task of an Article 21.5 panel is to determine whether measures that the defending party has taken to conform with the rulings and recommendations of the DSB are consistent with that Party's obligations under the WTO agreements.

4.66 The European Communities has not contested, indeed has insisted, that the measures challenged by Ecuador in this Article 21.5 proceeding were taken to conform with the rulings and recommendations of the DSB in *EC – Bananas III*. In light of that, and of the short explanation provided by Ecuador in its first submission, Ecuador does not see merit to the ACP's objections in this regard.

4.67 Ecuador's claims are that these EC measures are inconsistent with the anti-discrimination provisions of both Articles I and XIII of the GATT 1994, and that the duty of €176/mt applied to all bananas of Ecuadorian and other MFN origin also violates the European Communities' tariff bindings under Article II of the GATT, in particular the €75/mt tariff quota bound in the EC Schedule.

(a) Response to the European Communities' preliminary objections

(i) The EC-Ecuador Understanding on bananas is not a bar to this Article 21.5 proceeding

4.68 The European Communities raises a "preliminary objection" that the EC-Ecuador Understanding bars Ecuador from complaining about preferences that the European Communities grants on bananas to the ACP countries. The European Communities' premises are: (1) that the Understanding is a mutually agreed solution of the bananas dispute; (2) that the measures at issue were "accepted" by Ecuador in the Understanding; and (3) that allowing Ecuador to challenge the conformity of these measures with the WTO rules is contrary to the preference for mutually agreed solutions under the DSU.

4.69 Ecuador set out in its second submission the reasons that this European Communities' preliminary objection is unfounded. Ecuador stands behind the position it expressed in the second submission.

4.70 To summarize, this European Communities' argument fails on a few independent grounds.

4.71 First, a mutually agreed solution by the terms of Article 3 of the DSU must conform with the WTO agreements. It would be illogical to exempt measures from challenge to their consistency with WTO rules on grounds that they were part of a mutually agreed solution which, by definition, must conform with those rules. As the European Communities has conceded, Ecuador did not agree that the Understanding was a mutually agreed solution in the sense of Article 3.6, though Ecuador believed and hoped that proper implementation of the various phases of the agreement would result in a mutually satisfactory and permanent solution, consistent with the rules.

4.72 Second, the European Communities did not comply with the Understanding. The Understanding plainly requires a waiver of Article I (for which Ecuador agreed to lifts its reserve) and a waiver of Article XIII, which Ecuador committed to promote to permit the European Communities' tariff quota for ACP countries until 1 January 2006. Ecuador did its part regarding the waivers and for the most part in the early years, the EC complied regarding the gradual liberalization of its measures, which would have been illegal but for the waivers, as the *EC – Bananas III* case had established.

4.73 However, the European Communities then failed to comply with the terms of the waiver of Article I, causing it to expire at the same time that the Article XIII waiver expired by its own terms. The European Communities squandered its opportunity to propose a proper rebinding, proposing instead levels that would vastly increase the preference for ACP bananas. When Ecuador and other countries would not agree to those proposals and the Arbitrator found that in each case the European Communities failed to meet the waiver standards, the European Communities nevertheless proceeded unilaterally to implement the measures that are now before this panel. The European Communities also, did not follow the Article XXVIII process required as a condition of the waiver. The European Communities thus tries to claim protection under an Understanding with which it does not comply.

4.74 Third, the European Communities does says it is a breach of Ecuador's obligations for Ecuador to challenge the WTO consistency of measures that are inconsistent with the waiver and the Understanding.

4.75 In the Understanding, Ecuador did not commit not to bring a WTO dispute against any EC measures, and there is nothing in the WTO rules or in the Understanding that could justify implying such a limitation.

(ii) The Panel's suggestions also do not bar Ecuador's claims

4.76 The European Communities also argues that its measures conform to a "suggestion" of the Article 21.5 Panel. On that basis, and because Ecuador did not appeal the Panel's suggestion and because the Panel report was adopted, the European Communities argues that Ecuador should be barred from challenging the EC measures that conform to the Panel's suggestion.

4.77 Ecuador disagrees, again on several grounds. First, the Panel suggestion in question was that the European Communities could adopt a "tariff only system for bananas, with a tariff quota for ACP bananas covered by a suitable waiver". That suggestion might have been implemented in a way consistent with WTO obligations, but of course the European Communities failed to get a suitable waiver that would cover the actions that the European Communities took. This Panel, of course, will be making rulings on whether the EC system does conform with EC obligations. Ecuador is confident that the first Article 21.5 Panel did not view its suggestions as conveying any suggestion or authorization of WTO-illegal measures.

4.78 Ecuador would also urge the panel to reject the European Communities' argument. WTO rules prevent a party from making an argument previously rejected by a Panel report that was not appealed. Indeed, the European Communities is doing just that in this proceeding. The European Communities' proposed rule would force needless appeals of Panel suggestions in any case where a suggestion might be open to imprecise interpretation by the defending party. Further, it is wholly unnecessary to create such a rule, even if Panels had that authority, since in fact Article 21.5 panels, who preferably are composed of the same members as the original panel, are certainly well equipped to determine whether the measures that a party has taken indeed are consistent with the WTO rules, which any panel suggestion must be.

(b) Article I

4.79 The European Communities does not contest the rather obvious point that its Cotonou tariff preferences are inconsistent with Article I if not covered by the Doha Waiver. Rather, the European Communities argues that the preferences it grants to bananas of ACP origin are covered by the Doha Waiver through 31 December 2007. Ecuador disagrees.

4.80 The essence of the dispute is that Ecuador considers that the Doha Waiver of Article I for bananas expired following the Arbitrator's rejection of both of the European Communities' tariff rebinding proposals, when the European Communities unilaterally put into force the so-called tariff only system that is before you. The European Communities, in effect, contends that the waiver allowed it to implement unilaterally a regime that the European Communities considers to meet the standard that the "envisaged rebinding would result in at least maintaining total market access for MFN banana suppliers, taking into account the EC's commitments".[267] The European Communities then argues that its current applied regime meets that standard as the European Communities conceives it. The European Communities concedes that it has not rebound its duties or fulfilled the requirements with respect to Article XXVIII as also required by the waiver, but the European Communities claims that this is a matter of "good faith" out of deference to the views of Ecuador.

4.81 The European Communities continues to argue that the waiver remains in effect despite the failure to propose a rebinding acceptable to interested parties or to the Arbitrator, so long as the European Communities' system allows access for MFN countries at least equivalent to previous access.

[267] Doha Waiver Annex, fourth tiret.

4.82 The European Communities' argument illustrates why MFN countries, including Ecuador, were insistent that the continuation of the waiver be subject to the establishment of a bound MFN duty rate by 1 January 2006 that was either agreed or had been approved by the Arbitrator.

4.83 It was no part of the waiver that, having failed to satisfy the Arbitrator, and having failed to reach agreement with Ecuador and other interested parties, the European Communities could unilaterally impose the regime of its choosing on 1 January 2006.

4.84 The European Communities argues that the Panel should ignore the European Communities' failure to conclude Article XXVIII proceedings because Ecuador has not brought a claim under Article XXVIII in this proceeding. However, Ecuador has raised Article XXVIII not as a separate claim, but rather to point out that the European Communities' failing is another respect in which the European Communities did not comply with the requirements for a continuation of the waiver for bananas after 31 December 2005.

4.85 Ecuador expresses its wish to associate its delegation with the helpful additional arguments put forward by Latin American third parties in this proceeding as to why the European Communities is wrong that the waiver continued after 1 January 2006. It is evident that the European Communities is arguing as if it got the waiver it wanted rather than the waiver that was granted and to which it agreed.

(c) Article XIII

4.86 The existence of the European Communities' tariff quota on bananas is not in dispute, nor is the fact that Ecuador and other MFN suppliers are entirely excluded from that quota, nor that the previous waiver of Article XIII has expired.

4.87 Ecuador's claim is, first, that the European Communities' tariff quota violates Article XIII.1, because it restricts Ecuadorian and other bananas by depriving them of any access to the duty-free tariff quota, while bananas of ACP origin, which do have access to this tariff quota, are not similarly restricted. Second, the tariff quota, by excluding bananas of Ecuadorian and other origin, plainly does not meet the requirements of Article XIII:2.

4.88 The European Communities had a waiver of Article XIII for its tariff quota, but that waiver expired on 31, December 2005. The European Communities sought a renewal of the waiver, but it was not granted.

4.89 The European Communities tries to argue that Article XIII does not apply to exclusion from a tariff quota, at least when it is a single tariff quota rather than two or more tariff quotas.

4.90 The European Communities' argument is that denying Ecuador access to the tariff quota means that Ecuador is not restricted by the tariff quota. Plainly that is not true, as Ecuador's exports are restricted by the high duty compared to those who participate in the zero duty quota. The only difference between a straight quota and a tariff quota in this regard is that exclusion from a straight quota means no access, while exclusion from a tariff quota means access restricted by the higher duty that applies to imports not benefiting from the tariff quota, which may be prohibitive in effect. The European Communities would presumably not find it difficult to see the violation of Article XIII if it were denied participation in a quota of another member in regard to a product of which it was a principal supplier. Likewise, outside of the time when the European Communities is arguing in this proceeding, we are reasonably confident that the European Communities would think that denying it a share of a favourable tariff quota of another member is no less a violation of Article XIII.

4.91 The European Communities argues that its tariff quota regime confers a benefit on MFN countries, because it would be worse for them if there were no quantitative limit on duty free entry of bananas of ACP origin. It is true that unlimited preferences for ACP bananas would be worse than the tariff quota only for ACP countries, but exclusion from the tariff quota is more restrictive of Ecuador and other members than if they were allowed to participate in the zero duty tariff quota as they are entitled under Article XIII.

4.92 This is also the response to the European Communities' argument that there is no nullification or impairment to Ecuador because the tariff quota is better for Ecuador than if the ACP countries had unlimited preferential access. Leaving aside that nullification or impairment does not have to be proven in cases of violation, the harm to Ecuador is the exclusion from participation in the tariff quota.

4.93 The European Communities says that applying Article XIII:1 would have the effect of requiring benefits for non-member countries. That is not true. Granting fair access to all WTO members would fully satisfy Article XIII:1, because the obligation extends only to fellow members. On the other hand, if the European Communities, for example, gave access to a non-member that was not accorded to a member, then the member would have grounds for complaint because the member was restricted more than the non-member. This is no less true of a straight quota than a tariff quota, so it is no basis for distinguishing tariff quotas.

4.94 The European Communities argues that applying Article XIII to exclusion from a tariff quota could make Article XIII duplicative of Article I. However, the underlying assumption of the European Communities - that there must be no overlap in what is prohibited by different WTO rules – is plainly wrong. In this instance, the exclusion from a tariff quota does breach both Article XIII and Article I, but there are many examples of this in the WTO rules. The European Communities' successful challenge of Canada in the *Automotive Products* case is just one example of a single regime violating multiple rules. The overlap of local content prohibitions in the GATT, TRIMS, and the SCMA is another example.

4.95 The European Communities argues that the previous rulings in Bananas III are not applicable, because those rulings were dealing with a situation that involved more than one tariff quota. We see nothing in those rulings or in the text of Article XIII to justify such a distinction, nor did the DSB in *EC – Bananas III*.

4.96 It is a fact that the restriction in a tariff quota is achieved by means of a tariff – the higher duty applied to products imported outside the quota than inside the quota. That is not a problem because Article XIII specifically applies to any tariff quota, and, unlike Article XI the reference to restrictions in Article XIII does not exclude taxes, duties or other charges.

(d) Article II: I (a) and (b)

4.97 Ecuador considers that almost everybody, including in the European Communities, was startled to read that the European Communities, at least for purposes of its defence here, considers that it has not been bound by the €75/mt tariff quota since either 2002 or alternatively 2006. As a result, the European Communities considers that its only binding is and has been at a level of 680€/mt.

4.98 The European Communities first argues that the 75 ecu tariff quota expired in 2002. The European Communities concession setting out this tariff quota concession as both the initial and final rate also includes under column 7 – "other terms and conditions" – "[a]s indicated in the Annex." The Annex in turn simply provides a copy of the Banana Framework Agreement (BFA) between the

European Communities and Colombia, Costa Rica, Venezuela, Nicaragua. Paragraph 9 of the BFA provides that the BFA "shall apply until 31 December 2002."

4.99 The European Communities argues that, because the BFA expired at the end of 2002, therefore so did the European Communities' entire concession, leaving only the ceiling binding at 680€/mt.

4.100 Ecuador considers that the provision of an expiration date in the BFA did not imply expiration of the WTO concession. Ecuador does not doubt that a concession can be limited in time, but the BFA itself and the schedule do not provide that the concession was meant to terminate with the termination of the BFA. In instances where a concession has been found limited in time, the condition was explicit. Further, the European Communities' own words and actions, as well as those of the WTO members as a whole, make clear that the concession was not and is not limited in time.

4.101 The European Communities does not deny that a time-limited concession would have been inconsistent with the agreed Uruguay Round modalities, but the European Communities complains that those modalities should be ignored because they were not to be used as a basis for dispute settlement. Ecuador is not making a claim that the European Communities is violating the modalities, but only pointing out that the modalities were such that, if the European Communities intended or was thought by anyone to have made a time limited access commitment on a product as important as bananas, it is inconceivable that it would have passed unnoticed.

4.102 The European Communities argues that the BFA would not have been referenced in column 7 if the parties had not intended to limit the concession in time. However, this disregards the various other conditions of the BFA pertaining to quota allocation, albeit most of these have since been superseded.

4.103 The European Communities stresses that the BFA provides for consultations among its limited parties in 2001, which the European Communities says was included as a term of the BFA because the European Communities had undertaken to negotiation a replacement system. That would not explain why those countries would agree that in the absence of a new agreement, the concession would simply expire, leaving an essentially prohibitive binding at €680/mt.

4.104 Ecuador has pointed out that the inclusion of a requirement to make the waiver subject to compliance with Article XXVIII, and the European Communities' conduct in that regard, is further evidence that all WTO members, including the European Communities, considered that the €75 tariff quota was not limited in time by the BFA. If the only binding that was effective after 2002 (or after 2005) was €680, then there was no need for Article XXVIII negotiations, since applying a lower duty than the bound rate does not infringe the rights of other members. As Nicaragua and Panama have pointed out, the *Newsprint* case does not imply to the contrary. Article XXVIII has frequently been used where a party is going to undertake a change of form of duty, such as from specific to ad valorem duties, because otherwise suppliers could claim a violation of bindings whenever, as a result of market forces, an intended neutral conversion resulted in a duty higher than specified in the schedule. The notion is absurd that a party would invoke article XXVIII to reduce a duty from €680 to some much lower level specific duty.

4.105 The European Communities dismisses the many examples in the Arbitrator awards in which the European Communities argues and the Arbitrator accepts that the European Communities has a tariff quota binding at €75/mt. Nicaragua and Panama have provided additional examples. The European Communities dismisses these as "arguments made in the heat of litigation". With respect, the European Communities seems in the current proceeding to have been consumed with the "heat of litigation."

4.106 The European Communities probably realizes the implausibility of its newly contrived view that its concession expired at the end of 2002, and so argues in the alternative that the €75/mt concession expired when the European Communities eliminated the quota to which it was "attached". A member cannot escape its tariff quota bindings by unilateral action on grounds that it is eliminating the quota element, so of course it get to eliminate the favourable tariff along with the quota, all for free.

4.107 Tariff quota concessions can be withdrawn, but the withdrawing member must follow Article XXVIII procedures which the Doha Waiver required and the European Communities failed to do. There is accordingly no basis for this alternative argument of the European Communities.

B. EUROPEAN COMMUNITIES

1. First written submission of the European Communities

(a) The facts of the case

4.108 The history of the facts shows that the EC bound rate for bananas is €680 per ton, and that the Cotonou preference granted to ACP countries amounts currently to 775 000 tons. It also highlights that the previous Article 21.5 Panel initiated by Ecuador provided three suggestions whereby the European Communities could comply with WTO rules, among which the second was to implement a tariff only system with a tariff quota for ACP bananas (Panel Report, paragraph 6.157), provided that a suitable (Article I) waiver be granted to the European Communities.

4.109 To comply with this suggestion, the European Communities introduced a tariff only system with a duty free tariff quota of 775 000 tons on 1 January 2006, having secured the necessary WTO waiver through the negotiation and conclusion of an "Understanding on bananas", which entered into force between Ecuador and the European Communities on 30 April 2001.

4.110 This understanding committed the European Communities to continue importing MFN countries' bananas at the tariff rate of €75 par ton, until the implementation, by 1 January 2006 at the latest, of a definitive import regime complying with the 1999 Panel conclusions.

4.111 The counterpart for this understanding was the granting to the European Communities of WTO waivers for the interim import regime applied between 1 July 2001 and 1 January 2006 and for the subsequent tariff only system applied from 1 January 2006.

4.112 The first "Doha Waiver" related to GATT Article XIII related to the interim all-tariff-quota import regime applied until 1 January 2006, since it was comparable to a quota regime according to the findings of the Panel; since the terms and conditions applied to different groups of countries were different, a waiver from the application of GATT Article XIII paragraphs 1 and 2 was then necessary; the second waiver to GATT Article 1 was sought in relation to the preferences granted under the Cotonou agreement to ACP countries; the duration of this waiver is commensurate to the duration of these preferences, to be found under Article 37 of the Cotonou Agreement, i.e. 31 December 2007.

4.113 In the terms contained in the Annex to the relevant Doha Waiver (WT/L/436), the European Communities accepted to negotiate a rebinding of its tariff for bananas imports that would result in "at least maintaining total market access for MFN bananas suppliers", subject to an arbitration mechanism in case of disagreement. This waiver would expire either on 31 December 2007 or would cease to apply upon the entry into force of an EC regime that would have been found by the second Arbitrator award as not satisfying the standard of "maintaining total market access for MFN bananas suppliers", taking into account all EC WTO market-access commitments relating to bananas. The

European Communities has complied with all the conditions contained in the waiver and this fact is not disputed by Ecuador.

4.114 The situation of the bananas import market since 1 January 2006 confirms the positive effect of the EC tariff only regime in general, for all groups of developing exporting countries in particular. It triggered an increase of import from developing countries which had no or little exports of bananas into the European Communities, while not affecting the relative stability in wholesale prices.

4.115 More importantly for the present case even, the total volume of imports from MFN countries increased to a record 3.28 million tons, the highest since at least 1999, increasing by 10.7% from 2005. This trend is confirmed by market data for the first quarter of 2007, with a further 10.1% increase from the preceding year, and this evidence alone suffices to establish that the new regime more than maintain total market access for MFN suppliers.

4.116 For the sake of completeness, the EC submission evidences the reasons why Ecuador's banana industry could not fully benefit from this trend for reasons unrelated to the new regime. Firstly, the objective increase in the market access opportunities provided to all MFN countries is evidenced by the fact that the increase in imports from that group in 2006 (10,7%) in greater than the total growth of the market (10,3%).

4.117 Secondly, there is ample evidence of autonomous difficulties experienced by Ecuador's industry during this period: adverse climatic conditions, a volcanic eruption damaging approximately 35% of the plantations in the Los Rios province, which produces about a third of Ecuador's total production, new administrative measures encouraging traders to source bananas from other countries. It should be noted that these difficulties impacted the export potential of Ecuador also toward the USA.

4.118 Thirdly, the exports of ACP countries followed similar patterns as those of the MFN countries group: although the group as a whole could increase their exports, some countries (Jamaica, Belize, Surinam or Ivory Coast) have experienced significant reductions unrelated to the implementation of the new tariff only regime.

4.119 Finally, it appears that the new regime triggered new market access opportunities for countries which had little exports to the European Communities, such as Guatemala, Peru and Brazil, or no exports at all, such as Bolivia, Thailand and Sri Lanka. This positive trend observed in 2006 is confirmed during the first quarter of 2007.

(b) The legal analysis

(i) Preliminary issues

4.120 As a preliminary matter, it must be recalled that Ecuador entered with the European Communities into the Understanding on bananas, which is pursuant to its own terms "a mutually agreed solution to the banana dispute". Notwithstanding the subsequent ambiguous and unilateral declaration that "the provisions of Article 3.6 of the DSU are not applicable in this case", the Understanding is a binding international agreement in its own right which commit its parties, and which must be taken into account in analysing the rights and obligations of the parties to this dispute, in accordance with the Vienna Convention on the Law of Treaties (Article 31.3.c).

4.121 The legally binding nature of this instrument is confirmed by the fact that both parties implemented the terms and conditions of the Understanding, the European Communities through the implementation of a tariff only regime in particular, Ecuador through the support it gave to the adoption of the Doha Waivers requested by the European Communities.

4.122 On this basis, Ecuador should not be allowed to challenge the preference granted by the European Communities for ACP bananas, using Article 21.5 of the DSU for challenging a mutually agreed solution between the parties, in violation of Articles 3:7 and 3:10 of the DSU, which provides that mutually agreed solutions should be preferred to resorting to dispute settlement procedures, and the corresponding Ecuador's claims should be dismissed in their entirety.

(ii) There is no violation of GATT Article I

4.123 Accepting Ecuador's interpretation of the Doha Waiver's Annex (i.e. that the duration of the Doha Waiver for Article I concerning bananas should be based on the findings of the arbitration mechanism provided for in that Annex, rather than on the European Communities *actually* "rectifying the matter" *de facto*, as provided for by the text), would lead to absurd results.

4.124 For instance, the Arbitrator in such an instance could find the defendant formally in compliance, when the facts would demonstrate that total market access of the MFN suppliers as a whole would not be maintained. In such a case, the waiver would continue to protect a non compliant system. Alternatively, the Arbitrator could have ruled in favour of an interim EC regime prior to 1 January 2006, while the system introduced as from that date would be blatantly inconsistent, and would still be operable under a waiver unduly sustained by the Arbitrator's ruling.

4.125 For the European Communities, it is clear that the WTO Ministerial Conference could not have linked the operation of such a major exemption to a basic WTO rule to the number of arbitration results reached on the basis of theoretical analyses and arithmetic calculations, such a standard being in "clinical isolation" from the real effects of the import regime in the real world.

4.126 Indeed, the text of the Doha Waiver itself provide in the Annex that it would cease to apply if the European Communities "failed to rectify the matter"; this means for the European Communities that it was due to introduce a new regime that would maintain total market access for MFN suppliers in reality and not merely in theory. This assessment must be made on the basis of the real effects of the system on actual market access for the group of MFN suppliers, i.e. assessing the regime "as applied", pursuant to the terms of the First Arbitration Award.

4.127 Further, the text of the Annex provide that the waiver would cease to apply "upon entry into force of *the* new EC tariff regime"; this means "the" regime that was submitted to the Arbitrator and found by him inconsistent. Pursuant to these terms of the Annex and to a negative finding in the second Arbitration Award, the European Communities must have retained the discretion to review its plans and to introduce a different new tariff regime so as to comply with such findings. This is exactly what the European Communities did.

4.128 To avoid repetition on this evidence provided in the previous section of its submission, the European Communities draws the attention of the Panel on three mere points: firstly, the volume of imports of bananas from MFNB countries has increased significantly, exceeding even the growth of the bananas market as a whole; this demonstrates that MFN suppliers have more than maintained their total market access opportunities. Secondly, as highlighted in the First Arbitration Award, *maintaining total market access* "is not a guarantee for any particular volume of trade or price" (para.37), and refers to "the entirety of the opportunity actually afforded the MFN suppliers" (para. 33), definitely not guaranteeing a particular level of trade for any single MFN supplier such as Ecuador. Thirdly, the trends in the export of any particular country cannot by themselves be used to determine whether total market access is being maintained for the group of countries concerned.

(iii) There is no violation of Article XIII

Preliminary Issues

4.129 The European Communities recalls the terms of the Panel's findings presenting the three options found to allow for the European Communities to remedy the situation (paras 6.155 to 6.158): (1) to introduce a tariff only system without a tariff quota and with a tariff preference for ACP bananas, and with either a waiver for the tariff preference or the creation of a free trade area; (2) to introduce a tariff only system with a tariff quota for ACP bananas covered by a suitable waiver; (3) to maintain the previous system of MFN tariff quota either without allocation or with negotiated allocations consistently with Article XIII.2, which could be combined with an ACP tariff quota covered with an appropriate Article XIII waiver.

4.130 The European Communities has fully implemented the second Panel's suggestion, covered by a "suitable" Article I waiver, since it is a tariff only regime with a preferential treatment for ACP bananas. This interpretation of what "suitable" means in this context is supported by the language used by the Panel for formulating its suggestions, and by the consistent explanations and behaviour of the European Communities, notwithstanding the EC request for an Article XIII waiver.

4.131 The European Communities notes that Ecuador does not claim that the European Communities failed to take the measures suggested by the Panel in its second option, or that such measures were implemented incorrectly; Ecuador merely claims that a tariff only import regime with a preferential tariff quota would violate Article XIII.

4.132 Thus the European Communities submits that Ecuador's claims are in reality a challenge to the measures *suggested* by the Panel, rather than to the measures *actually taken* by the European Communities. Such claims are inconsistent with the terms of Article 21.5 DSU, whereby a Party can bring claims against "measures taken to comply" wit the findings of the Panel, and not against the measures suggested by the Panel. Were Ecuador to take issues with these suggestions, it should have appealed pursuant to Article 17 DSU. In the absence of such action, Ecuador is bound by *res judicata*, pursuant to Article 19, paragraph 1 and 17, paragraph 14 of the DSU.

Absence of nullification or impairment of a benefit accruing to Ecuador

4.133 The European Communities recalls that pursuant to the Cotonou agreement, it has an obligation to grant a preference for banana trade to ACP countries. It also undertook in the context of the Doha Waiver to "maintain total market access for MFRN suppliers". In interpreting the above condition, the Arbitrator found that the European Communities had to ensure that the new system would maintain the "entirety of the opportunity actually afforded to MFN suppliers", by the "conditions of entry to the EC market" existing under the import regime that was in place before 1 January 2006. Thus, the capping of the ACP preference under the new 2006 regime effectively ensured that this standard was respected.

4.134 In light of these facts, the European Communities respectfully submits that the limit on the quantities of ACP bananas that can be imported into the European Communities free of duty does not cause any nullification or impairment of any benefit accruing to Ecuador, in the meaning of GATT Article XXIII and Article 3.8 of the DSU.

The European Communities' tariff treatment of bananas from Ecuador and other MFN countries does not infringe GATT Article XIII

4.135 The European Communities notes that the texts of the provisions of Article I and Article XIII have a very important difference. GATT Article I: 1 obliges each Member to extend to all Members

the exact same advantage that it grants to one single Member. In contrast, Article XIII:1 obliges each Member not to impose a restriction on a single Member, unless it imposes the same restriction on all other Members.

4.136 The difference in the titles and texts of these two provisions demonstrate the intention of the drafters to give them different purposes, and that certain types of measures may violate GATT Article I without violating Article XIII:1.

4.137 In addition, a claim of violation of Article XIII:1 requires the meeting of two conditions: (i) the allegedly offending Member imposes a prohibition or restriction which establishes a nullification or impairment of a right accruing to the complaining Member, and (ii) this prohibition or restriction is not imposed on the like products originating from all other countries. The application of these principles to the facts of the present case shows that the Cotonou Preference does not constitute a violation of Article XIII, for a number of reasons.

4.138 Firstly, bananas imports from Ecuador and other MFN suppliers are not subject to any quantitative restriction, and thus none of the two conditions for invoking Article XIII:1 can thus be fulfilled.

4.139 Secondly, in the present case, if one tries to apply the conditions of GATT Article XIII:1 on the countries that actually are subjected to a restriction (the ACP group), the provision becomes inoperable: the MFN countries are then the "all third countries", whose position should be taken as a basis in order to determine whether the ACP countries are treated "worse" than them. But not being subject to any quantitative restriction, there is nothing on which the comparison can be based. Moreover, even assuming arguendo that there is a quantitative restriction imposed on the ACP countries, Ecuador cannot successfully challenge it, because this quantitative restriction does not result in any nullification or impairment of any benefit accruing to Ecuador; quite to the contrary.

4.140 Thirdly, the facts that the ACP countries enjoy a trade preference and that there is a "cap" imposed on this preference may be relevant for purposes of GATT Article I, but are completely irrelevant for the application of GATT Article XIII. Unlike Article I, paragraph 1, the provisions of Article XIII:1 do not impose on a Member the obligation to extend to all other Members a tariff preference granted to some Members only. Article XIII:1 obliges each Member simply not to impose a quantitative restriction on another Member, unless it imposes a similar quantitative restriction on all Members.

4.141 In the present case, this means that GATT Article XIII:1 does not oblige the European Communities to extend to all Members the tariff preference granted to the ACP countries, but simply obliges the European Communities not to impose a quantitative restriction on Ecuador, unless a similar quantitative restriction was imposed on all other WTO Members.

4.142 Fourthly, Ecuador cannot legitimately claim that the European Communities is involved in a "discriminatory administration of quantitative restrictions", unlike the situation analysed by the Appellate Body in the *EC – Bananas III* case. Ecuador's exports are subject to a simple and ordinary tariff, and it is clear, both textually and contextually, that GATT Article XIII does not apply to tariffs.

4.143 The European Communities draws support for this point from the report of the Appellate Body in *EC – Bananas III*, where it found that the European Communities was indeed involved in a "discriminatory administration of quantitative restrictions" in violation of GATT Article XIII:1, and found that the restriction imposed on certain countries through the allocation of the "Other" quota was not "similar" to the restriction imposed on the products of the countries to which country-specific quotas were allocated. This finding shows that GATT Article XIII:1 covers only situations where a Member applies tariff quotas with different terms to different groups of countries in a market where

all imports are made under tariff quotas, and consequently, GATT Article XIII:1 does not apply to a tariff only import regime.

4.144 For the same reasons, the current import regime of the European Communities does not violate GATT Article XIII:2. The text of the chapeau starting with "In applying import restrictions" shows that paragraph 2 like paragraph 1 is solely concerned with quantitative restrictions, and does not regulate the relationship between quantitative restrictions and other measures, notably simple tariffs, that a Member may be applying.

4.145 The context also provides support for this interpretation, as the same limited scope of the Article can be seen in the way that the four sub-paragraphs of Article XIII:2 are entirely focused on the scope and internal distribution of the quota, and disregard any trade that falls outside the quota.

4.146 Given that GATT Article XIII:2 is directed at the administration of quantitative restrictions and tariff quotas, it does not extend to the EC banana import regime in so far as that concerns Ecuador and the other MFN countries, because their exports are not subject to any non-tariff restrictions or tariff quotas. The European Communities draws support for this interpretation from the panel's report in *US – Line Pipe*. In that case, the United States had imposed a safeguard measure in the form of a tariff quota. The panel invoked GATT Article XIII:2 only as regards the internal division of the tariff quota and the setting of the total amount of imports permitted at a lower tariff rate (Panel Report, *US – Line Pipe*, paras. 7.54 and 7.58).

(iv) There is no violation of GATT Article II

4.147 Ecuador claims are completely unfounded both in fact and in law. The bound tariff for bananas in the EC schedule is €680 per ton and the tariff applied since 1 January 2006 is €176 per ton.

The European Communities' concession of a tariff quota for 2.2 million tons of bananas at a rate of €75 per ton expired at the end of 2002

4.148 As mentioned in the Facts section of the submission, Schedule CXL and its predecessor Schedule LXXX provide that the bound tariff rate for bananas is €680 per ton. Both Schedules also included an additional concession in the form of a tariff quota for 2.2 million tons of bananas at a rate of €75 per ton, but the Schedules expressly provided that this additional concession applied "as indicated in the Annex". The European Communities notes with satisfaction that Ecuador accepts this fact in paragraph 33 of its first written submission, and observes that the Annex, which is an integral part of the Schedules, provides that this tariff quota would expire on December 31, 2002. Therefore since 1 January 2003, the only bound rate for bananas in the Schedules of concessions of the European Communities is €680 per ton.

4.149 It is settled law that WTO Members can lawfully grant concessions subject to "terms, conditions or qualifications", and that a time limitation in the duration of the concession, qualifies as such. Moreover, such time limitations do not even need to be expressly provided for in the Schedules, and can simply result from a link between the duration of the concession and the existence (or duration) of some domestic legislation or other measure, as exemplified in the *US – Sugar Waiver* case (See the GATT Panel Report in United States-Restrictions on the importation of sugar and sugar containing products applied under the 1955 waiver and under the headnote to the schedule of the tariff concessions, dated 22 January 1990, L/6631-37S/228, at paragraph 5.8.). The European Communities respectfully submits that the case for the legality of its own time limitation for the tariff quota of bananas is even stronger than for the measures examined by the Panel in the *US – Sugar Waiver* case since it has incorporated the time limitation and the date of expiry of the concession into the body of the Schedule itself.

4.150 The fact that the European Communities continued to allow significant imports of bananas at a tariff rate of €75 per ton even after the expiration of the relevant concession in its Schedules on 31 December 2002, does not in any way imply that the European Communities considered itself bound by the expired concession, or that it acted in a way that is inconsistent with the arguments presented before this Panel. As already mentioned, within the context of the Doha Waiver granted in 2001, the European Communities undertook to allocate to MFN countries a quota at this low tariff until the introduction of the new import regime on 1 January 2006. The European Communities undertook the same obligation in the Understandings with Ecuador and the United States. The European Communities' good faith compliance with the conditions of the Doha Waiver and the Understandings cannot have any broader legal significance, especially when considering that the European Communities duly discontinued this practice on the date provided for in the Doha Waiver and the Understanding (i.e. 1 January 2006).

4.151 It may be noted that the expiration of this concession was not fully discussed in the two Arbitration Awards that were issued in 2005. This is due to the fact that the purpose of the Arbitration was to determine the "total market access" enjoyed by MFN suppliers prior to the introduction of the new import regime, based on the actual import opportunities enjoyed by MFN suppliers. The fact that the binding for 2.2 million tons in the Schedules had expired was not relevant for the Arbitration.

The abolition of the tariff quota for 2.2 million tons results in the automatic abolition of the tariff rate of €75 per ton

4.152 In light of the preceding section, it is clear that the concession in question expired However, even if that concession had not expired at the end of 2002, it is clear that it was lawfully terminated on 1 January 2006, when the European Communities introduced the tariff only import regime. There are two considerations underpinning this conclusion.

4.153 Firstly, the tariff rate of €75 was not a simple and unconditional "bound tariff rate", as Ecuador appears to imply in paragraph 33 of its first written submission. As with any tariff quota in the WTO system, the tariff rate of €75 was attached to the quota of 2.2 million tons and its existence depended upon the existence of that quota.

4.154 Secondly, the Panel had strongly suggested that the European Communities abolish its tariff quota system and replace it with a tariff-only import regime, which would inevitably bring the automatic abolition of the tariff quota for the 2.2 million tons of bananas, was also a condition in the Doha Waiver and in the Understandings that the European Communities entered into with Ecuador and the United States.

4.155 On the basis of these considerations, it is clear that (a) the European Communities legitimately abolished the quota for 2.2 million tons of bananas on 1 January 2006, in compliance with the suggestions of the Panel and the conditions of the Doha Waiver and the Understanding, and (b) the abolition of this quota led to the automatic abolition of the corresponding tariff of €75 per ton.

(c) Conclusion

4.156 In light of the facts and argument presented above, the European Communities respectfully requests the Panel to dismiss all of Ecuador's claims.

2. Second written submission of the European Communities

(a) The Cotonou Preference

(i) Preliminary objections

The Understanding

4.157 Ecuador accepts the principle that a "mutually agreed solution" entered into between two WTO members must be taken into consideration in order to determine those parties' mutual rights and obligations within the WTO legal order. Therefore, it is uncontested that bilateral agreements between two WTO members, such as the Understanding, form part of the "applicable rules of law" between the parties to the dispute, as defined in the Vienna Convention.

4.158 The application of the principles of Articles 3.7 and 3.10 of the DSU on the facts of this case leads to the conclusion that Ecuador is barred from challenging the Cotonou Preference, because (i) Ecuador has already contractually accepted the existence of the Cotonou Preference and (ii) Ecuador has already been compensated for accepting the existence of the Cotonou Preference. Both the language used in Article 3.10 of the DSU and its nature as a general principle of law, make clear that the principle of good faith runs through the entire DSU and defines the outer limits of the application of all rights recognized by the DSU to WTO Members. The European Communities has fully complied with all its obligations under the Understanding and Ecuador does not explain which of its obligations the European Communities has allegedly failed to implement. Ecuador cannot escape its obligations by claiming that they are not compliant with the WTO rules, because Ecuador has already accepted the legality of the Understanding, by initially complying with its provisions and does not explain why and how the Understanding has suddenly become "inconsistent with the covered agreements". Moreover, the application of the principle of good faith bars this Ecuador objection, because Ecuador has already drawn the benefits of the Understanding and had full knowledge of the legal status of the Understanding when it entered into it. The Understanding does not provide that the new import regime, or the Cotonou Preference should have any specific characteristics and, therefore, Ecuador cannot claim that the lack of these undefined characteristics allow it to escape its obligations. Finally, Ecuador's position if accepted would create important "systemic" problems for the WTO legal order.

The findings and suggestions of the Article 21.5 Panel

4.159 Ecuador is barred from challenging the Cotonou Preference under Article XIII, because this amounts to a challenge to a suggestion made by the Panel (and consequently a ruling adopted by the DSB) that is binding on Ecuador. Ecuador's arguments to the contrary should be rejected. Panel reports that have been adopted by the DSB are binding for both the complaining and the defending parties to the dispute. A panel's suggestions are not binding for the defending party, but this does not mean that suggestions are entirely devoid of legal significance. With the suggestion the Panel is indicating that such action is lawful and its implementation will lead to the defending party's compliance with its obligations. Following the adoption of the panel's report by the DSB there is a presumption of legality covering the suggestions which makes them binding on the complaining party. If the defending party decides to implement the measures suggested by the panel, the complaining party may not challenge the conformity of these measures with the WTO rules in an Article 21.5 procedure, because this way the complaining party would not "unconditionally accept" the report. To hold otherwise would create an undue legal uncertainty for the defending party, seriously compromise the credibility of panels and of the DSB and would render Article 19.1 of the DSU inoperative.

4.160 Allowing a complaining party to initiate an Article 21.5 procedure in order to challenge the suggestions of a panel, even where it has not challenged these suggestions before the Appellate Body would also open the door for an abuse of Article 21.5 of the DSU, as well as of Article 16.4 of the DSU and of Article 17 of the DSU. There should be no confusion between the roles of the Appellate Body and Article 21.5 panels. To hold otherwise would amount to giving complaining parties the right to "bypass" the strict procedural requirements for appellate review and "replace" the procedures before the Appellate Body with procedures before Article 21.5 panels.

4.161 Finally, the implementation of the specific Panel suggestion required an Article I waiver and not an Article XIII waiver. This can be seen from the textual differences between paragraphs 6.157 and 6.158 of the Article 21.5 Panel report and the differences in the import regime that each of these paragraphs provided for. The Second Arbitration Award does not support Ecuador's position. The Arbitrator took it as a given that the proposed import regime would be compatible with Article XIII either by itself or through a waiver and did not decide the issue. The Bananas III jurisprudence does not support Ecuador's position. The system analysed by the Appellate Body and the Article 21.5 Panel has nothing to do with the current import regime of the EC.

(ii) There is no violation of GATT Article I

4.162 The evidence submitted by the European Communities establishes that the total market access enjoyed by MFN suppliers prior to 1 January 2006 has been more than maintained with the current import regime of the European Communities. Ecuador's second written submission chooses to ignore completely the market reality.

4.163 The Doha Waiver's objective was that Ecuador and the MFN countries would allow the ACP countries to benefit from the Cotonou Preference until the end of 2007, in exchange for the EC' ensuring that the MFN countries' total market access would be maintained. It is a well established fact that the current import regime more than maintains the market access of Ecuador and the other MFN countries. If Ecuador manages to succeed in these proceedings, it will have achieved a result that was not envisaged by the Doha Waiver's arrangement: it will have *both* maintained its access opportunities into the market of the European Communities *and* abolish the Cotonou Preference.

4.164 The proper interpretation of the Doha Waiver is that the waiver would continue to apply until the end of 2007, provided that the European Communities introduced an import regime that (i) actually maintained the total market access of the MFN suppliers and (ii) was different to the regime that the Arbitrators had found not likely to maintain such market access. Ecuador's formalistic argumentation to the contrary should be rejected. Ecuador accepts that its position leads to unreasonable conclusion, but still invites the Panel to reach findings that produce unreasonable results, so that Ecuador can earn more than what the Doha Waiver's arrangement was intended to provide it with. Ecuador's insistence that the termination of the Doha Waiver depended exclusively on the entry into force of <u>any</u> "*new tariff regime*", without any reference to that regime's characteristics, leads to the unreasonable conclusion that the European Communities would have been able to prolong the duration of the Doha Waiver by <u>not</u> introducing any new tariff regime and simply continuing to apply the old import regime.

4.165 The Doha Waiver's provisions on the Arbitrations cannot be used to support a formalistic and unreasonable interpretation of the waiver's terms. The Doha Waiver provided that the interested parties would enter into good faith negotiations to agree on an import regime that would strike a balance between the interests of all banana exporters. The Arbitrations were included in order to ensure that these negotiations would indeed take place. This is precisely what has happened.

4.166 Ecuador argues that the Doha Waiver terminated because the European Communities has breached Article XXVIII. Ecuador's claims under Article XXVIII should be rejected, because Ecuador has not included any Article XXVIII claims in its request for the establishment of the Panel.

(iii) There is no violation of GATT Article XIII

Absence of nullification or impairment of a benefit accruing to Ecuador

4.167 The limitation of the Cotonou Preference to specific quantities does not cause the nullification or impairment of any benefit accruing to Ecuador. This limitation is to Ecuador's advantage, because, in its absence, the preference given to ACP countries would have been even more important. Ecuador accepts the factual accuracy of the point raised by the European Communities. The only injury that Ecuador may suffer stems from the fact that it cannot benefit from the Cotonou Agreement's trade preference, which is compatible with Article I. The limitation on the quantities of this preference neither results in any other injury for Ecuador, nor adds anything to any injury that the trade preference itself may already cause to Ecuador.

The European Communities' tariff treatment of bananas from Ecuador and other MFN countries does not infringe GATT Article XIII

4.168 Article XIII is concerned with quantitative measures. Provisions explicitly designed for dealing with quantitative measures give rise to difficulties of interpretation when applied to tariffs. There are important differences between "prohibitions and restrictions" and tariff quotas. "Prohibitions and restrictions" are prejudicial to the trade of the affected WTO Member, while tariff quotas may in certain circumstances be beneficial. A rule which is designed to constrain measures that are disadvantageous to WTO Members produce odd results if it is applied without further consideration to measures that confer benefits. One odd result would be that WTO Members would be required to confer benefits on non-WTO Members, because paragraph 1 would be taken to say that a tariff quota could be conferred on one WTO Member only if similar tariff quotas had been conferred on "all other countries" and not just on WTO Members. A protection for WTO Members would be converted into a benefit for non-WTO Members.

4.169 Having strict regard to the wording of paragraph 1, there is no way in which this provision can be applied in circumstances such as those being considered in the present dispute. Even regarding a "prohibition or restriction" as including a tariff quota, it cannot be said that any such measure is applied to the imports from MFN countries: such imports are merely subject to a tariff. Ecuador attempts to argues that "*the products not quantitatively restricted are those that are within the quota, while the restricted products are those that are denied access*". The European Communities does not see how it can be that products *within a quota* are those that are "*not quantitatively restricted*". Ecuador in effect claims that alongside the real tariff quota of X tons at zero tariff there is a notional tariff quota of *zero* tons at zero tariff, so the two tariff quotas are not "similarly restricted". The truth is that there is no tariff quota of zero tonnes at zero duty. Imports from MFN countries are not subject to any tariff quota. Ecuador's interpretation is also in conflict with the object and purpose of the GATT. It would lead to Article XIII:1 effectively duplicating Article I:1. Situations of straightforward tariff discrimination could be artificially presented as involving notional tariff quotas which would fall within the ambit of Article XIII. The distinction between obligations regarding tariffs and obligations regarding quantitative measures can be maintained only if a tariff quota relates to a positive quantity or value of goods. It cannot have unlimited or zero scope.

4.170 Ecuador's analysis of paragraph 2 presents the same legal fiction, but in a slightly different way, describing as a "restriction" a "total exclusion" of imports from MFN countries from access under the tariff quota given to ACP products. Ecuador in giving a meaning to the term "restriction" which is entirely different from the one found in Article XIII (or in any of Articles XI to XIV). The

term "restriction" is something that can be identified without reference to the actions taken against other Members or products. It is a quantitative limit on the volume of goods. Ecuador is saying that the discrimination constitutes the "restriction". On this logic an unduly small tariff quota within a system of tariff quotas would be a restriction twice over, firstly because it was a tariff quota and secondly because it was excluded from its fair share of the tariff quota. Similarly, Ecuador could also make a claim that the failure to accept any MFN country products at the ACP tariff-quota rate would constitute an infringement of Article XI: 1 because it would amount to a forbidden prohibition or restriction. These bizarre consequences of Ecuador's interpretation of the term "restriction" serve to underline its falseness.

4.171 Article XIII is intended to deal with discrimination in quantitative limitations and is not aimed at tariff discrimination, as seen by its heading and the text of all its paragraphs. It is hardly likely that a single phrase in paragraph 5 was intended to transform the Article into one that could also be targeted at tariff discrimination. Moreover, the wording of paragraph 5 says that the "provisions of this Article shall apply to any tariff quota instituted or maintained" by a Member, suggesting that it is the tariff quota itself, and not its relationship with other import arrangements, at which the application of GATT Article XIII is directed.

4.172 In a scenario of simple tariff discrimination, subject to any exception that might be applicable, the situation would constitute a breach of Article I:1. If a limit is placed on the goods that may benefit from the lower tariff, the effect is to limit the extent of the discrimination, an action that would surely lessen the seriousness of the breach. However, according to Ecuador, the action would actually increase the level of infringement of GATT because now an infringement of Article XIII:1 would be added to that of Article I:1. While the harm caused to other Members was lessened, the GATT inconsistency would be aggravated. The very perversity of this result is a further argument against Ecuador's claims.

4.173 The provisions of paragraph 5 can be applied to those aspects of tariff quotas that involve quantitative restrictions. If tariff quotas are assigned to a number of countries, paragraph 1 will require that the restrictions placed on the one tariff quota are similar to those applied to other tariff quotas. The precise way in which that similarity would be achieved is elaborated in paragraph 2.

(b) The applied tariff does not violate GATT Article II

4.174 Ecuador seems to imply that the European Communities is still obliged to operate a tariff quota system, allocating to Ecuador a part of the old 2.2 million tons quota at €75 per ton. This would mean that Ecuador wishes to have the European Communities reinstate the old tariff quota system. However, it was Ecuador itself that negotiated into the Understanding and the Doha Waiver the abolition of the tariff quota system and the introduction of the tariff only system as of 1 January 2006. If Ecuador does not seek a return to the old tariff quota system, it wishes to influence the negotiations on the banana tariffs that are held in parallel with the general negotiations in the Doha Development Round. By initiating these proceedings Ecuador implicates this Panel in the tariff negotiations between the European Communities and the banana exporting countries.

(i) The expiration of the concession for 2.2 million tons of bananas

4.175 The Annex to Section I-B of Schedule CXL sets the start date and the end date for the existence and operation of that tariff quota.

4.176 Ecuador invokes the "Modalities Paper" published in 1993 and argues that it is inconsistent with the expiration date. Ecuador is attempting to use the Modalities Paper as a "basis for dispute settlement" in the current proceedings against the Paper's own provisions, which have been upheld by the Appellate Body. Ecuador's arguments should be disregarded. Moreover, the Marrakesh

Agreements constituted a fresh start in the process of accumulating obligations from the schedules and, as a consequence, the EC' concessions in its Uruguay Round Schedule must be read as they stand, without any reference to earlier concessions and without any reference to the Modalities Paper.

4.177 Ecuador interprets the column "other terms and conditions" as not being capable of including time limitations on the concessions. However, the fact that the title reads "other terms and conditions" does not mean that a WTO Member cannot insert in that column time limitations, or other limitations on its concessions. To hold otherwise would disrupt numerous carefully negotiated concessions and limitations found in the GATT schedules of all WTO Members.

4.178 Ecuador states that the time limitation should be "laid out in the Schedule itself", and not in the Annex. But the Annex is part of the Schedule and Ecuador itself accepts this fact. The Panel should not give an unwarranted legal significance to the space limitations of page 9 of Section I-B in Schedule CXL.

4.179 Ecuador attempts to draw an argument from the fact that the Annex uses the word "agreement" instead of "concession". However, Ecuador does not explain why the parties would set an expiration date in the agreement, if it did not also cover the tariff quota concession which was the main object of the agreement. Ecuador also does not explain why the parties would incorporate the agreement together with the expiration clause into the Schedule of Concessions of the European Communities. If their intention was to establish a perpetual concession for the 2.2 million tons, they would simply include in the Schedule the concession and would not incorporate the Annex which limits the concession's duration. Moreover, Ecuador ignores the fact that the Annex provides that "full consultations with the Latin American suppliers that are GATT Members should start no later than in year 2001". This means that the parties had agreed to negotiate the system that would replace the concession for the 2.2 million tons in view of its expiration and that these negotiations should commence well in advance of the concession's expiration, which was agreed for the end of 2002.

4.180 Ecuador's argument that the MFN parties could not have agreed to such terms is wrong because it ignores the fact that the parties had agreed to negotiate a new banana import system as of 2001, i.e., one year before the expiration of the concession for the 2.2 million tons. Therefore, the banana exporting countries had ensured that they would have an important quantity exported at a low tariff until the end of 2002 and that before the expiration of this concession they would have the opportunity to negotiate new concessions.

4.181 The fact that the European Communities did not argue in previous dispute settlement procedures that the concession for the 2.2 million tons of bananas expired at the end of 2002 is irrelevant. This the first time that the European Communities is accused of having breached Article II by applying a tariff that is above the concessions in its Schedules and its tariff concessions are the main subject matter of the dispute.

4.182 The reference to Article XXVIII negotiations in the Doha Waiver is irrelevant. Ecuador itself had negotiated into the Understanding the Article XXVIII negotiations. The Doha Waiver simply repeats the terms of the Understanding that was signed earlier. Ecuador's assertion that the European Communities would have been in a strong negotiating position is wrong. At the time, the European Communities had already lost the Article 21.5 Panel and was seeking a waiver for the entire Cotonou Agreement, to the grant of which Ecuador had reached reservations.

4.183 Ecuador cannot claim a breach of GATT Article XXVIII in these proceedings, because it has not included such a claim in its request for the establishment of this Panel.

4.184 Ecuador argues that no member would invoke Article XXVIII:5 procedures to lower its bound rate. The European Communities was obliged to initiate Article XXVIII:5 negotiations both by

the Understanding and the Doha Waiver. The Annex in Schedule CXL also provided for negotiations for the import regime that would replace the concession after its expiration at the end of 2002. Therefore, the initiation and continuation of the Article XXVIII negotiations does not amount to a supposedly de facto "rebinding" of that tariff quota. Moreover, it is not clear that Ecuador's interpretation of Article XXVIII is correct, although the Panel does not need to decide on this point in this case.

4.185 The Arbitration Awards' description of the European Communities' import regime is not relevant for the present procedure. The Arbitration was not held within the context of the DSU. The subject matter of the Arbitration was not to determine what were the concessions bound in Schedule CXL. Therefore, any relevant statements in the Arbitration Awards should be treated as simple dicta. The same applies to any relevant arguments advanced by the parties at the time.

(ii) The abolition of the tariff quota on 1 January 2006

4.186 Ecuador attempts to raise an Article XXVIII claim, which should be rejected because it was not included in the request for the establishment of this Panel.

4.187 Ecuador argues that once a tariff quota is granted, the tariff part becomes obligatory and perpetual, while the quota part may be freely eliminated. Ecuador should explain why the rule that it proposes should not be the other way round, i.e., that the "tariff element" of a tariff quota may be freely amended, while the "quota element" should be treated as obligatory and perpetual. Moreover, there is no legal basis for this argument.

(c) Conclusion

4.188 The European Communities requests the Panel to reject Ecuador's challenge to its banana import regime.

3. Oral statement of the European Communities

(a) The timing of these proceedings is unfortunate

4.189 The first point the European Communities would like to make is that these proceedings are taking place at the wrong time. As already mentioned in its written submissions, the European Communities and the MFN banana producers are currently negotiating new tariffs for bananas. The European Communities remains committed to reaching an agreement in the pending negotiations, despite the fact that the proceedings initiated by Ecuador are presenting a big impediment to the successful conclusion of the discussions.

(b) The challenge to the Cotonou Preference

4.190 The European Communities has been wanting to close the chapter of the banana dispute for many years. And this is why it reached a deal with the complainants in 2001. The deal was that the complainants would not object to the ACP countries having their trade preference in bananas until the end of 2007. In exchange, the European Communities would ensure that the MFN exporters would maintain their access to the European market under the new import regime that would be introduced in 2006. The European Communities even accepted to negotiate with the MFN suppliers the level of its bound banana tariffs, just to get them to agree to the ACPs' having their preference extended for an extra two years. This fact alone shows how committed the European Communities is to supporting the development efforts of the ACP countries. At the same time, the procedural safeguards offered to the MFN countries shows how committed the European Communities is in reaching a solution that addresses their concerns.

4.191 The year is 2007. It is now possible to verify whether the European Communities has kept its promise and whether the MFN exporters' access to the European market has been maintained. There is ample market data and statistics, hard figures showing what is really happening in the market. The European Communities has provided some of it in its two written submissions. What does the market data show? It shows a clear fact. Without any doubt, clearly and unequivocally, the group of MFN exporters has more than maintained its market access. The group of MFN banana suppliers had never exported so many bananas into the European Communities as it did in 2006.

4.192 The European Communities has updated its figures and it is now possible to see the results for the first six months of 2007 (relevant table attached as Exhibit EC-10). What can be seen? Even more growth in the quantities of MFN bananas coming into Europe. And that is not all. The MFN growth is bigger than the growth of the total market for bananas in the European Communities. And that is not all either. The MFN growth is bigger than the ACP growth in 2007. And again that is not all. We have calculated the average f.o.b. prices paid to Ecuadorian and Colombian producers for every year between 2004 and 2007 (relevant table attached as Exhibit EC-11). And what can be seen? That the plantation owners in Ecuador and Colombia received in 2006 and are receiving in 2007 better prices than in 2005 and 2004.

4.193 Larger quantities and higher prices for MFN suppliers. What does this mean? It means that the MFN producers are much better off than before. It means that the European Communities has done more than simply maintaining the market access of the group of MFN suppliers. The European Communities has actually helped increase the income of the MFN banana producers.

4.194 All of this shows that the European Communities has kept its promises. The European Communities has respected its part of the deal.

4.195 The European Communities regrets to say that these proceedings show that the complainants do not intend to keep their part of the deal. They do not wish to allow the ACP countries to have their trade preference until the end of this year. The European Communities finds this regrettable. And it invites the Panel to preserve the arrangement that it had reached with the complainants in the context of the Doha Waiver and to reject the complainants' claims in their entirety. The European Communities has explained in its written submissions the legal bases justifying this result.

4.196 The third party submissions of Nicaragua and Panama include certain statements alluding that the European Communities does not really care about the development needs of the developing countries, but about its own "Treasury". The European Communities believe that the facts are clear and establish that these allusions are not correct. First of all, this very proceeding is a challenge to a development friendly trade preference. More importantly, the European Communities grants more than €500 million every year to Latin America in the form of development aid and it plans to spend more than €2.7 billion of development aid during the next 5 years. Another €2.5 billion will come from the European Investment Bank for the financing of projects in Latin America. And this does not take into consideration the trade development aid, which would bring the figure to €one billion per year. In light of the power of these facts, the European Communities invites the Panel not to take these allusions into consideration.

4.197 Coming back to the legal claims of the complainants, the European Communities notes that their entire case is based on the interpretation of the text of the Doha Waiver. The complainants argue that it did not matter whether the European Communities would actually put in place an import regime that would maintain the market access of the MFN countries. What mattered was whether the European Communities could convince the Arbitrators that its tariff calculations were correct. In other words, the Doha Waiver was not based on market reality. It was based on "virtual reality".

4.198 The European Communities disagrees. The European Communities believes that the Doha Waiver was meant to achieve a certain situation in the market, namely maintaining the MFN market access for the duration of the Cotonou Preference. The European Communities does not believe that the Doha Waiver was meant to be based solely on predictions for the future. The European Communities does not believe that the Doha Waiver was meant to disregard the reality of the present. The European Communities has explained in its written submissions what it considers to be the proper application of the GATT rules and of the terms of the Understanding and the Doha Waiver on the facts of this case. The European Communities invites the Panel not to take a formalistic interpretation of the texts. The legal interpretation of the words in a document can be meaningful only if it is based on market reality. In this case, the reality of the market leads to a single conclusion: that the complainants must respect their deal with the European Communities, the way the European Communities has respected its deal with them.

(c) The Article XIII claims

4.199 The complainants have tried to use the GATT provisions on quantitative restrictions in Article XIII in order to challenge the Cotonou Preference. The European Communities disagrees for a number of reasons.

4.200 First of all, the banana import regime of the European Communities has exactly the characteristics suggested by this Panel in 1999. There is a single tariff and the ACP countries have a preference. There must be a presumption of legality covering the solutions suggested by a Panel. Otherwise the defending parties would be completely lost when they try to implement their compliance measures.

4.201 But the fact that this import regime is exactly the import regime suggested by this Panel is not the only reason for which the complainants' claims should be rejected. Ecuador's interpretation of Article XIII and its application on the facts of this case leads to absurd results. The European Communities offers a trade preference to the ACP countries. This preference takes the form of a lower tariff. This might be tariff discrimination, but this is an issue to be dealt with under Article I of the GATT. The fact that the Cotonou Preference is subject to a "cap" does not, by some kind of magic, transform this preference into an Article XIII issue. If this was the case, then what would be the reason to have a separate Article I and a separate Article XIII?

4.202 The complainants attempt to draw some analogy with the regimes analysed by this Panel in 1997 and 1999. This is not correct. Following the abolition of the tariff-quota-based system in 2006, the current regime is so different to those of the 1990s that no analogy can be drawn.

4.203 But what is really astonishing is that the complainants are basing their claims on a measure that has been put in place in order to protect their market access. This the best illustration of the absurd results to which the complainants' position leads. What they are saying is that if the Cotonou Preference did not have any limit and the ACP countries had the right to export as many bananas as they wanted free of duty, then the import regime of the European Communities would be fully compatible with Article XIII of the GATT. The fact that the European Communities has tried to protect the complainants by imposing a "cap" on the ACP preference somehow makes the system illegal! Does this mean that the complainants wanted the European Communities to offer to the ACP countries an unlimited preference?

4.204 The European Communities still fails to understand what is the nullification or impairment that the "cap" on the Cotonou Preference causes to the complainants. Indeed, if the European Communities were to abolish this limit on the ACP preference, would the complainants be in a better position?

(d) The challenge to the European Communities' applied tariff.

4.205 The last claim of the complainants relates to the tariff applied by the European Communities. As already mentioned, the European Communities is negotiating with the MFN countries new tariffs for bananas. These negotiations are being held in a transparent way, in accordance with the provisions of Article XXVIII of the GATT. This is what the European Communities had promised to do when it entered into the Understanding in 2001, and this is exactly what the European Communities is doing. And in the middle of the negotiations, Ecuador decides to bring this case. In light of how this case has developed, it is difficult to avoid suspicion that its objective is to influence these negotiations. The dispute settlement system should not be used for such tactics. The European Communities does not think that panels should be dragged into tariff negotiations between WTO Members.

4.206 In any event, the challenge to the European Communities' applied tariff is baseless. The provisions of the European Communities' Schedule are clear. The concession for the tariff quota of 2.2 million tons of bananas terminated at the end of 2002. The fact that the European Communities decided to continue to import bananas at a lower applied tariff does not mean that the tariff was rebound. If every WTO Member was bound by its applied tariff and not by its officially bound rate, then the whole GATT system would collapse.

4.207 The complainants have also come up with the argument that the two elements of a tariff quota, that is to say the tariff and the quantity, are completely separable and that a country can only abolish the quantity, but not the tariff. We believe the Panel should reject this argument. There is no legal basis or precedent that would justify a panel finding that the tariff "part" of a tariff quota is perpetual, while the "quantity" part is not. And it is not clear what the repercussions for the entire GATT and WTO system would be, if the Panel were to create such a new rule in this case.

4.208 The European Communities does not understand what is the import regime that the complainants would like the European Communities to have. Are they saying that the European Communities is still bound to have a tariff quota based system? Do they want the European Communities to undo the reform of 2006, in disregard of the Understanding of 2001?

(e) Conclusion

4.209 In concluding its statement, the European Communities would like to invite the Panel to contribute to a definitive solution to this dispute by confirming two things. First, that the Cotonou Preference can be maintained until the end of this year. And, second, that the tariff applied by the European Communities is consistent with its Schedule of concessions.

4. Closing statement of the European Communities

4.210 The first point the European Communities wishes to address is the assertion advanced by Ecuador, Nicaragua and Panama that the Understanding is not a "mutually agreed solution" for purposes of the DSU. The European Communities has already explained in it written submissions that the text itself of the Understanding provides that it is a "mutually agreed solution". Ecuador's accepting to have its retaliation rights terminated provides further support to this conclusion. In any event, even if it was to be assumed that the Understanding is not a "mutually agreed solution" for purposes of the DSU, which the European Communities does not consider to be the case, it cannot be denied that it is a bilateral agreement that must be taken into consideration in analysing the rights and obligations of the parties to this dispute. Through the Understanding Ecuador accepted that the Cotonou Preference would continue until the end of 2007. The European Communities considers that this bars Ecuador from challenging the operation of the Cotonou Preference to the end of this year. The European Communities also considers that the principle of good faith, which covers the entire

DSU, bars Ecuador from escaping its obligations by asserting the alleged non-compliance of the Understanding with the WTO rules.

4.211 The second point is the assertion advanced by Ecuador, Nicaragua and Panama that the Doha Waiver terminated at the end of 2005, because the Arbitrators had found that the import systems proposed by the European Communities at that time failed to meet the waiver standards. The European Communities considers that this interpretation is wrong. The Doha Waiver states that it would terminate if "the EC has failed to rectify the matter". If the Doha Waiver wanted to say what Ecuador, Nicaragua and Panama are arguing, the text should have read that the waiver would terminate "if the *Arbitrator concludes* that the EC has failed to rectify the matter". The Doha Waiver does not say so. This shows that the crucial factor was whether the import regime actually implemented by the European Communities maintains the MFN countries' market access.

4.212 Nicaragua and Panama have tried to use the negotiating history of the Doha Waiver to support their position. Their effort has failed. The truth is that the negotiating history of the Doha Waiver supports the interpretation of the European Communities. Indeed, the draft dated 2 November 2001, which Nicaragua has attached to its Third Party submission as Exhibit N-1, provided that the Doha Waiver would be terminated automatically within two months from the notification of the arbitration award to the General Council. However, this provision was not included in the final version of the Doha Waiver. The link between the awards of the Arbitrator and the termination of the Doha Waiver was abandoned. This shows that the parties agreed that the termination of the Doha Waiver would not be linked to the outcome of the arbitration awards, but on whether the European Communities actually "rectified the matter".

4.213 Moreover, the Doha Waiver provides that it would terminate "upon the entry into force of the new EC tariff regime". As we have already explained in our written submissions, this means that the Doha Waiver would terminate if the European Communities implemented the tariff regime that the Arbitrators had found not to satisfy the standard of maintaining the MFN countries' market access.

4.214 The European Communities would like to draw the attention of the Panel to two important facts. First, the import regime implemented by the European Communities in 2006 is not the import regime that the Arbitrators found not to meet the waiver's standards. Second, it has been established that the import regime of the European Communities maintains the MFN countries' total market access. Therefore, the European Communities "rectified the matter" and the condition for the continued application of the Doha Waiver has been satisfied.

4.215 As regards Article XIII, it is not the European Communities' intention to repeat the arguments that it has already presented to the Panel. However, in its opening statement Ecuador has made a number of assertions regarding this Article that require a response. Behind some of these assertions lies unwillingness on the part of Ecuador to understand the fundamental distinction made by the GATT between tariff and non-tariff measures. Thus, in its statement it seeks to confuse the notion of a "restriction" (the term used in Articles XI and XIII of the GATT) with that of the level of tariffs, saying that Ecuador's exports are "restricted by the high duty". Later in its statement Ecuador claimed that "the reference to restrictions in Article XIII does not exclude taxes, duties and other changes." This is an interpretation for which there is no basis in the GATT or GATT jurisprudence. Such an interpretation would remove any need for Article I:1 in the GATT. Parties alleging tariff discrimination would simply have to invoke Article XIII:1 to claim that the tariff in question was not "similar" to that imposed on goods from another country. Furthermore, on such an interpretation of "restrictions" it would hardly have been necessary for the drafters to insert in paragraph 5 an explicit rule on tariff quotas.

4.216 The fundamental GATT distinction between tariff and non-tariff measures is an important element in this case. Tariff measures are subject to Articles I and II, and non-tariff measures are

governed by Articles XI and XIII. The European Communities is unaware of any instance in which a single measure has been found to be in breach of both Article I and Article XIII. The fact that, as Ecuador observes in its Statement, other WTO provisions may overlap in their application detracts in no way from this fundamental GATT principle.

4.217 Finally, Ecuador, Nicaragua and Panama have tried to show that the Schedule of concessions of the European Communities does not say what it clearly says. They ask the Panel to disregard the language in the Annex to the Schedule, which provides that the tariff quota for the 2.2 million tons would expire at the end of 2002, and to try to determine what might have been logical for the parties to the Banana Framework Agreement to agree in the early 1990s. It is noted that this argument does not seem to be very consistent with the position they are taking in the interpretation of the terms of the Doha Waiver. The European Communities also notes the continued efforts of the complainants to rely on the modalities paper, despite the fact that the modalities paper states that it cannot be used in dispute settlement proceedings. The European Communities considers that the situation with its bound tariffs is clear and that the tariff quota for the 2.2 million tons expired at the end of 2002 in accordance with its terms.

V. ARGUMENTS OF THE THIRD PARTIES

5.1 The arguments presented by Belize, Brazil, Cameroon, Colombia, Côte d'Ivoire, Dominica, Dominican Republic, Ghana, Jamaica, Japan, Madagascar, Nicaragua, Panama, St Lucia, St Vincent and the Grenadines, Suriname and the United States in their written submissions and oral statements are reflected in the summaries below.

A. BELIZE, CAMEROON, CÔTE D'IVOIRE, DOMINICA, DOMINICAN REPUBLIC, GHANA, JAMAICA, MADAGASCAR, SAINT LUCIA, SAINT VINCENT AND THE GRENADINES, AND SURINAME

1. Written submission of the ACP third parties

5.2 Belize, Cameroon, Côte d'Ivoire, Dominica, Dominican Republic, Ghana, Jamaica, Madagascar, Saint Lucia, Saint Vincent and the Grenadines, and Suriname, referred to as "the ACP third parties", respectfully request the Panel to reject as inadmissible and unfounded Ecuador's claim against the new EC banana import regime which entered into force on 1 January 2006.

5.3 By way of introduction, the ACP third parties underline that Ecuador's complaint is an attempt to use dispute settlement proceedings as a tool to increase Ecuador's leverage in the still pending GATT Article XXVIII negotiations with the aim of forcing down the EC tariff and, with it, undermine and reduce the ACP preference. Ecuador clearly disregards the fact that the new regime against which its complaint is directed has actually improved total market access for MFN suppliers and has fully complied with the letter and spirit of the "Understanding on Bananas" agreed between Ecuador and the European Communities. Ecuador purposefully ignores the delicate balance which this new regime seeks to achieve between the legitimate interests of the MFN and ACP countries. In order to accomplish this, Ecuador raises a number of formalistic arguments relating to the Doha Waiver, GATT Article XIII and the EC Schedule of Concessions.

(a) Ecuador cannot challenge the new EC banana import regime pursuant to Article 21.5 of the DSU

5.4 The ACP third parties submit that Ecuador cannot challenge the new EC banana import regime by Article 21.5 proceedings as a measure taken to comply with the rulings in the original *EC – Bananas III* case, due to the fact that the mutually agreed solution between Ecuador and the European Communities in the form of an "Understanding on Bananas" has settled that dispute and therefore

constitutes a bar to Article 21.5 proceedings. If Ecuador considers that the new EC banana import regime is inconsistent with its WTO obligations, it should start new dispute settlement proceedings.

5.5 The issues involved in the present dispute are radically different from those examined in the original *EC –Bananas III* dispute. What the Panel is required to analyse in the present case is the WTO consistency of the new banana import regime which is a tariff-only regime adopted by the European Communities under the provisions of the waiver granted at Doha in order to enable it to implement the Cotonou Agreement and the Understandings on Bananas with Ecuador and the US, i.e. legal instruments which came into existence after the original dispute. These issues are fundamentally different from those examined in the framework of the original *EC – Bananas III* case and the subsequent Article 21.5 Panel which examined a tariff quota regime under which different quotas were allocated to various groups of suppliers. The issues raised in the present case cannot therefore be challenged via a compliance panel but require that they be examined through new dispute settlement proceedings.

5.6 Authorizing Ecuador to challenge the new EC banana import regime in a compliance proceeding would adversely affect the ACP third parties' interests and rights. Indeed, the importance for the ACP third parties of preserving their rights and the possibility of fully participating in the proceedings as third parties is essential in the context of the present dispute which may have grave consequences for them. The expedited nature of compliance proceedings and, in particular, the very strict deadlines within which parties must make their views known, adversely affect the possibility for the ACP third parties to defend their interests. This would not be the case in original panel proceedings.

(b) There is no violation of GATT Article I because the Doha Waiver still applies

5.7 Ecuador's argument that the European Communities no longer enjoys the Doha Waiver is based on the view that the existence of two arbitration awards concluding that the European Communities' rebinding proposals were not such as to maintain total market access for MFN suppliers has automatically led to the waiver ceasing to apply upon entry into force of the new EC tariff regime. Ecuador's argument must be rejected as it is refuted by the facts evidenced by the sustained growth in MFN imports and ignores the object and purpose of the Doha Waiver.

5.8 The purpose of the Doha Waiver is to allow the implementation of the Cotonou Agreement and, in particular, of the preferential tariff treatment granted by the European Communities to products originating in ACP countries until 31 December 2007. The specific procedures with respect to bananas contained in the Annex to the Doha Waiver confirm the application of the waiver with respect to bananas until 31 December 2007, even if they also allow for the possibility of the waiver ceasing to apply prior to that date. However, this possibility would only occur if the European Communities has failed to implement a new banana import regime which at least maintains total market access for MFN suppliers.

5.9 This is not the case. Indeed, all available market data indisputably demonstrate that the competitive position of MFN bananas on the EC market has improved both as far as volumes and prices are concerned since the introduction of the new EC banana import regime on 1 January 2006. The import volume of MFN bananas significantly increased in 2006 and even more in 2007. Cost savings arising from the abolition of the quota licensing system and the reduction of the out of tariff rate quota tariff of €680 per tonne to the new flat tariff of €176 per tonne more than outweighed the cost of the perceived increase in the in quota rate of €75 euro, an improvement in the terms of access that has led both to higher import volumes and improved prices paid to producers in Ecuador.

5.10 In light of the object and purpose of the Doha Waiver, it is not possible to cogently argue that the waiver has ceased to apply on purely procedural grounds as submitted by Ecuador, since the new

regime which has actually been implemented more than maintains total market access for MFN suppliers.

5.11 In addition, ACP countries were not allowed to fully participate in the arbitration proceedings. This significantly reduced their opportunities to defend their positions. The fact that in the first arbitration the Arbitrator ignored crucial ACP arguments had an unfortunate effect on the way the issues were addressed in the second arbitration and hence may have had a decisive impact on its final outcome. The finding in the second arbitration that the European Communities had not rectified the matter should not override the undeniable fact that the new implemented import regime effectively improves total MFN market access.

(c) There is no violation of GATT Article XIII

5.12 Ecuador's contention that the new EC banana import regime violates GATT Article XIII because it imposes a tariff rate quota to which only ACP countries have access but not Ecuador and other countries, is not valid.

5.13 First, the cap on the amount of bananas which can be imported duty-free from ACP countries into the European Communities has been put in place in order to address MFN suppliers' concerns with respect to an unlimited preferential access granted to ACP countries. Such limitation is therefore beneficial to Ecuador. As a result, there is no nullification or impairment of Ecuador's benefits within the meaning of GATT Article XXIII.

5.14 Second, there cannot be any violation of GATT Article XIII:1 and 2 since, in the new EC banana import regime, there is no prohibition or restriction within the meaning of GATT Article XIII:1 and *a fortiori*, none imposed on Ecuador or MFN suppliers.

5.15 What Ecuador is challenging is not the limitation placed on the quantity of duty-free banana imports from ACP countries but the preferential duty which is granted to these countries. However, this is not the object of GATT Article XIII but of GATT Article I. Ecuador's interpretation would have the effect of blurring the distinction between GATT Article I and GATT Article XIII.

5.16 The new banana import regime implemented by the European Communities, complies with the second suggestion of the compliance panel in the original *EC – Bananas III* dispute. The fact that no Article XIII waiver is necessary for the implementation of the new EC banana import regime is confirmed by the fact that an express reference to an Article XIII waiver is only made in the context of the third option, which covers a tariff quota regime under which different quotas are allocated to various groups of suppliers.

(d) There is no violation of GATT Article II

5.17 Ecuador's argument that the EC tariff of €176 per tonne breaches GATT Article II because it would exceed the European Communities' binding must be rejected because a proper reading of the EC Schedule of Concessions shows that the binding to grant a tariff rate quota of 2.2 million tonnes at €75 per tonne expired at the end of 2002.

5.18 In any case, the tariff of €75 per tonne is necessarily linked to the quota. Therefore, the abolition of the quota necessarily implies the termination of the corresponding tariff.

5.19 In conclusion, on the basis of the above arguments, the ACP third parties respectfully request the Panel to reject Ecuador's challenge to the European Communities' new banana import regime.

B. CAMEROON

1. Oral statement of Cameroon

(a) Introduction

5.20 The dispute before you is crucial to the ACP countries, inasmuch as Ecuador's purpose in this case is no more and no less than to challenge the import regime for bananas provided for by the Cotonou Agreement, whereas the fact is that, without that regime, the ACP producers would be unable to export their bananas.

5.21 The ACP States are deeply concerned by Ecuador's attack on the preferences granted under the Cotonou Agreement. It should be recalled that Ecuador has repeatedly accepted the principle that a preference for ACP bananas was justified. This is clear from the Understanding on Bananas reached by Ecuador and the European Communities on 30 April 2001. Ecuador also supported at Doha the European Communities' request for a waiver covering the ACP preference. Moreover, when the bananas dispute was placed on the agenda of the WTO Ministerial Conference in Hong Kong in December 2005, Ecuador challenged neither the waiver nor, by extension, the preference itself. On the contrary, it even agreed to participate in the monitoring system put in place to determine, under the responsibility of Mr Store, the Norwegian Minister for Foreign Affairs, whether market access was maintained for MFN bananas under the new EC regime for the importation of bananas.

5.22 Obviously, Ecuador's support had a price. Indeed, the European Communities granted a number of concessions to Ecuador in exchange for its consent to the maintenance of the waiver until 31 December 2007. Thus, the European Communities agreed to increase the tariff quota for MFN bananas and committed itself to putting in place a tariff-only regime as of 1 January 2006. The Panel will recall that tariff quota B, open to MFN producers, was increased by 100,000 tonnes, from 353,000 to 453,000 tonnes. This increase was introduced at the expense of the ACP countries, whose quota was reduced from 850,000 to 750,000 tonnes. Furthermore, this reduced quota, which had originally been reserved for the 12 traditional ACP supplier countries, now had to be shared with the non-traditional ACP suppliers, bearing in mind that imports of non-traditional ACP bananas had previously been included under the MFN quota. The resulting transfer had the effect of increasing the quota available to the MFN producers by 100,000 tonnes at the expense, of course, of the ACP countries.

5.23 The European Communities and the ACP countries thus had to pay a heavy price in order to be able to maintain the ACP preference until the end of this year, especially since the reduction of the ACP quota by 200,000 tonnes as a result of the Understanding on Bananas and the Doha Waiver drove a number of banana producers and exporters in our countries out of business. The ACP countries are therefore extremely concerned by Ecuador's current attempt to eliminate the ACP preference after it has itself reaped major benefits from the Understanding and the waiver.

5.24 The ACP countries accordingly consider that Ecuador's claim against the new EC banana import regime, which entered into force on 1 January 2006, is both inadmissible and unfounded. Inadmissible because Ecuador's claim does not concern a compliance issue which would justify recourse to a panel established under Article 21.5; unfounded because the new EC banana import regime has considerably improved access to the EC market for MFN bananas and is in full-compliance with the European Communities' WTO obligations.

5.25 Lastly, Ecuador's claim deliberately ignores or feigns to ignore the delicate balance which this new regime has sought to achieve between the legitimate interests of both the ACP and the MFN countries, that is to say a tariff-only system which maintains total market access for MFN bananas, while at the same time offering viable preferential access to ACP producers. In this

connection, it is curious and surprising that Ecuador completely disregards the fact that the disputed regime has in fact more than adequately maintained total market access for MFN suppliers and has fully complied with the letter and the spirit of the Understanding on Bananas reached by Ecuador and the European Communities. It is obvious that Ecuador, by challenging the already limited preferential access enjoyed by the ACP banana producers, is quite simply seeking to capture the market share currently held by the ACP producers which would be unable to survive without the preference regime.

(b) Ecuador cannot challenge the new EC banana import regime under Article 21.5 of the DSU

5.26 Cameroon, on behalf of the ACP countries, would like to draw the Panel's attention to the fact that Ecuador cannot challenge the new EC banana import regime under Article 21.5 of the DSU.

5.27 The ACP countries consider that Ecuador cannot bring this case before an Article 21.5 panel because the disputed measure is not a compliance measure related to the original *Bananas III* dispute.

5.28 This is a completely new and different import regime, one which was adopted, not as a result of the original *Bananas III* dispute, but in the framework of the mutually agreed solution and the Doha Waiver. It would in any event be unreasonable for Ecuador to use the dispute settlement system to challenge the new banana import regime as if it were a compliance issue.

5.29 The distinguished Minister of Agriculture of Suriname, Mr Raghoebarsing, will shortly go into greater detail on this issue, which the ACP countries regard as crucially important.

(c) The new EC banana import regime has not only maintained but has significantly improved market access for MFN bananas

5.30 Market data show that the new EC banana import regime has not only maintained but has significantly improved market access for MFN bananas. To recall, this is a completely new tariff regime which complies with the commitments undertaken by the European Communities in its Understanding with Ecuador and in the Doha Waiver. As provided by the Doha Waiver, the new regime should, at the very least, maintain total market access for MFN banana suppliers. This condition has been fulfilled.

5.31 Ecuador ignored this fact in its written submissions as well as in its oral statement of this morning, as we all observed. This is all the more surprising since Ecuador has always maintained that market access was the benchmark or, indeed, the criterion – to take the expression used by the Chairman yesterday – against which the new EC regime had to be assessed.

5.32 Unless it can provide proof to the contrary, which is the burden incumbent on Ecuador in this case, all the available statistical data show that the competitive position of MFN bananas on the EC market has improved in terms of both export volumes and prices paid to MFN producers ever since the EC banana import regime was introduced.

5.33 First, the import volume of MFN bananas increased significantly in 2006, by 325,270 tonnes in fact, compared with 2005, bringing the share of MFN bananas in total EC banana imports to 80 per cent.

5.34 The first six months of 2007 show the same upward trend, with a further increase of 144,203 tonnes compared to the same period in 2006 (according to the figures provided yesterday by the European Communities). This is evidence, if any were needed, that the new EC import regime has improved market access for MFN bananas.

5.35 It is at the same time interesting to note, on the basis of a detailed analysis of the statistics, that most MFN suppliers have reduced the volume of their exports to the United States while increasing exports to the European market. The representative of Côte d'Ivoire, Ambassador Guy Alain Emmanuel Gauze, will have an opportunity to return to this point in a moment.

5.36 Secondly, the wholesale prices of MFN bananas have remained the same or have even decreased following the introduction of the new regime. It is clear, therefore, that the introduction of the duty of €176 per tonne, without any restriction on volume, has not had the effect of excluding MFN bananas from the EC market. Moreover, price movements during the year have been similar to price movements in previous years. This shows that the new tariff has not had a disruptive effect on market price trends.

5.37 Finally, the liberalization brought about by the abolition of the import licensing system has created new opportunities for MFN exporters. For example, Guatemala, Peru and Brazil, which had supplied only small quantities in recent years, sharply increased their exports to the EC market once the new regime entered into force.

5.38 Interestingly, the main beneficiaries of the new EC regime are actually the small local MFN exporters, who have repeatedly expressed their satisfaction with the new opportunities offered by this regime. Indeed, for the first time they are no longer dependent on a small number of intermediaries exercising control over import licences. Several examples of such statements have been included in the ACP submissions. They include, among others, the following statement by the President of the El Oro chamber of banana producers:

> "El cambio del sistema de exportacion, que comenzó el 1 de enero pasada y que reemplazó las licencias por un arancel de 176 euros por tonelada cambia las reglas de juego del negocio y trae a nuevos actores. La diversificación de los importadores va acompañada de una racha de buenos precios. […] Segun Julio Ullauri, presidente de la camara de Productores de Banano de El Oro, el nuevo sistema rompe el monopolio de las exportadoras tradicionales y saca del juego a los famosos 'cuperos'."[268]

5.39 The opening of the market to new importers and the increased competition for the available bananas between buyers have also enabled MFN producers to charge higher prices for their products. As a result, the price paid to producers in Ecuador reached its highest ever level in 2006. Moreover, the differential with the official minimum price set by the Ecuadorian Government had never been so great.

5.40 All the aforementioned market data lead to only one conclusion: the new EC banana import regime has significantly improved MFN access to the EC market thanks to the elimination of the tariff quota and, hence, the quota rent.

5.41 The substantive conditions for maintaining in force the Doha Waiver covering the ACP banana preferences until 31 December 2007 have thus been met.

[268] In English: "The change in the export system which started on 1 January and which replaced licences by an import duty of €176 per tonne changes the rules of the game and brings new players to the table. Importer diversification coincides with a period of good prices. […] According to Julio Ullauri, President of the El Oro chamber of banana producers, the new system breaks the monopoly of the traditional importers and has put the famous '*cuperos*' out of business." See Exhibit ACP-5, press clipping from *El Comercio* dated 15 January 2006, "El importador toca la puerta del pequeño productor".

(d) The preference granted to ACP countries is the expression of a long-standing commitment to offer viable trading opportunities to ACP banana producers in a market dominated by MFN producers

5.42 Cameroon would like at this stage to emphasize that the preference granted to the ACP countries is the expression of a long-standing commitment to offer viable trading opportunities to ACP banana producers in a market dominated by MFN producers.

5.43 The banana sector is essential for the economic and social development of the ACP countries, and the long-term survival of the sector depends on the continued existence of preferential access to the EC market.

5.44 Bananas account for a major share of ACP agricultural exports. Hundreds of thousands of jobs have been created. The introduction of regular shipping services to transport bananas to the European Communities on a weekly basis has significantly reduced the economic isolation of these countries. The existence of these regular maritime services has enabled the ACP countries to export other goods to Europe and, in return, to import goods essential to the development and daily life of their inhabitants. The banana sector thus plays a major role in the fight against poverty, particularly in rural areas.

5.45 For more than 40 years, the European Communities has sought to promote the banana sector as an important tool for the economic and social development of the ACP countries. Providing preferential access to the EC market has always been the best way of achieving that objective. However, as mentioned earlier, this preferential access has increasingly been eroded in order to accommodate Ecuador and other MFN countries. Several banana producers in the ACP countries are experiencing serious economic and social difficulties and some of these countries, which previously exported to the European Communities, no longer do so.

5.46 WTO Members have repeatedly recognized the legitimacy of this development objective and of preferential tariff treatment as a tool for achieving it. Many WTO Members use tariff preferences to foster development objectives, and the WTO Agreements expressly provide for this possibility. Similarly, under the EC Generalized System of Preferences (GSP), the MFN countries benefit from improved preferential access in sectors where they are not the dominant producers. The Cotonou Agreement, and the banana import regime in particular, have been and must be considered in this light as providing trading opportunities for the weakest market players like the ACP banana producers.

5.47 The importance of the Cotonou Agreement to the ACP producers was accepted by the WTO Members in their Decision on the *ACP-EC Partnership Agreement* adopted at the Doha Ministerial Conference on 14 November 2001. The Decision grants a waiver enabling the European Communities to accord preferential tariff treatment to products originating in ACP countries, and this waiver covers not only bananas but practically all agricultural and industrial products exported by the ACP countries to the European Communities. Such preferential access is of particular importance for the survival of the ACP banana producers.

5.48 It is a well known fact that ACP banana producers are less competitive than MFN producers. Compared to the latter, ACP producers have higher production costs. For historical and geographical reasons, they do not enjoy the same economies of scale as the MFN producers. As a result, ACP producers can only compete with MFN producers in markets where they enjoy preferential access. This is evidenced by the fact that even the Caribbean ACP countries, despite their proximity to the United States, are unable to compete with the MFN countries on the US market, given that the lack of preferential access and their higher cost structure make access to that market impossible. Since the European Communities is the only major banana market offering trading opportunities to

ACP banana producers, the ACP countries are entirely dependent on the EC market. All the other developed markets are completely dominated by MFN suppliers.

(e) Conclusion

5.49 To conclude, Ecuador has one objective in instituting this proceeding, namely to challenge the preferential access granted by the Communities to ACP bananas. Ecuador does not hesitate to abuse the dispute settlement system by presenting this case as if it concerned a compliance issue in relation to the original *Bananas III* dispute. Moreover, Ecuador has relied on a whole range of formalistic arguments in order to attack the new EC banana import regime. Not only are these unfounded, but they do not take into account the benefits that have accrued to the MFN producers under the new regime.

5.50 In 2006 alone, imports of MFN bananas increased by more than 10 per cent. Many new smaller producers, no longer hampered by a licensing system monopolized by a few large companies, have in consequence been able to enter the EC market, thus contributing to the diversification of its sources of supply. Moreover, they have seen their income increase. European consumers have also benefited from the new regime. Prices have remained stable or even declined, thus ensuring that bananas remain the cheapest fruit available to European consumers.

5.51 Prices paid to MFN producers are higher, import quantities have increased, and wholesale prices on the EC market have fallen slightly despite a rise in the customs duty. There is a single incontrovertible explanation for these seemingly contradictory phenomena: the few large-scale operators which previously held import licences are no longer able to abuse their position in order to obtain extraordinary profits. All these elements show that the European Communities was in full compliance with its obligations when it introduced the new banana import regime on 1 January 2006.

5.52 Mr Chairman, members of the Panel, you will agree that developments in the EC banana market have demonstrated that the abolition of the quota system and the introduction of a single tariff of €176 per tonne has done more than simply maintain market access for MFN bananas. The market has done what statistical projections and econometric models could not achieve during the arbitration proceedings, by demonstrating beyond a shadow of a doubt that the replacement of a quota system by a tariff-only system has worked to the benefit of both MFN producers and European consumers.

5.53 The ACP countries wish to express their confidence in the multilateral trading system and, of course, their confidence in the dispute settlement system. Our representation at the political level attests to the importance we attach to the WTO system in general and the banana dossier in particular. In any event, the ACP countries attach high hopes to the decision or recommendations you will be adopting.

C. CÔTE D'IVOIRE

1. Oral statement of Côte d'Ivoire

5.54 In its decision of 14 November 2001 granting a waiver for the ACP–EU Partnership Agreement, the Doha Ministerial Conference stated that "in the field of trade, the provisions of the ACP–EC Partnership Agreement requires preferential tariff treatment by the EC of exports of products originating in the ACP States", and that "the Agreement is aimed at improving the standard of living and economic development of the ACP States".

5.55 The Ministerial Conference also considered that "the preferential tariff treatment for products originating in the ACP States as required by Article 36.3, Annex V and its protocols of the Agreement is designed to promote the expansion of trade and economic development of beneficiaries in a manner

consistent with the objectives of the WTO and with the trade, financial and development needs of the beneficiaries and not to raise undue barriers or to create undue difficulties for the trade of other Members".

5.56 In the context of this waiver and the management of the new EC regime for the importation of bananas, what was the situation of ACP and MFN banana suppliers in 2006?

5.57 The Côte d'Ivoire notes that in the course of 2006, European banana imports from the ACP countries reached a total of 906,000 tonnes, and the level of imports at the end of June 2007 confirms this stability: imports from the ACP countries had increased by only 6,000 tonnes as compared to 2006. This figure of approximately 900,000 tonnes should come as no surprise, since it corresponds to the actual capacity of the ACP countries which, unfortunately, was masked by the poor production conditions in 2005, the reference year, and by the concessions made by the EC to the United States and Ecuador in April 2001 as a result of the Lamy-Zoellick Agreement:

- Under this Agreement, the ACP quota, which until then had been set on the basis of historical records at 850,000 tonnes, was to be reduced by 100,000 tonnes while the autonomous quota B of the MFN countries would be increased from 353,000 tonnes to 453,000 tonnes, i.e. an additional 100,000 tonnes.

- The Agreement also provides that the ACP quota, which until then had been reserved for the EU's 12 traditional ACP banana suppliers, would be extended to cover all of the non-traditional ACP suppliers. At that time, these countries exported approximately 100,000 tonnes to Europe through MFN quotas A and B. Access by these ACP countries to the ACP quota and their exclusion from MFN quotas A and B has increased the quantities available to the MFN countries by 100,000 tonnes and reduced the amounts available to the ACP by the same amount.

- Thus, the two measures combined have resulted in a 200,000 tonne increase in MFN access to the European market, and conversely, a 200,000 tonne decrease in ACP access. The 906,000 tonnes exported to Europe by the ACP countries in 2006 fall short of the 950,000 tonnes that the ACP could have exported to Europe had these two major concessions not been made.

- Moreover, the first-come first-served quota management system, announced too late under the new system, has inevitably caused ACP exporters to export more than the allocated quota of 775,000 tonnes of bananas to Europe and to pay an import duty of €176 per tonne for the excess which, in 2006, amounted to 131,000 tonnes.

  Indeed, under the first-come first-served system, it is not possible to ensure that the quota volume is not exceeded if the exportable quantities are higher than the quota volume. An exporter cannot decide on its own to reduce its exports, because unless there is an understanding among all of the exporters (which would of course be unethical), the volume that it refrains from exporting will be taken up by other ACP suppliers.

  In addition, because the ripeners require a regular supply of referenced quality bananas, exporters have to deliver regularly on a weekly basis throughout the year. This leads to the importation of bananas with payment of the tariff during the periods in which the zero tariff quota has come to an end – which is why in 2006, ACP producers exported volumes corresponding to their capacity of 900,000 tonnes, even though it meant taking a loss.

5.58 Also, at the same time, or conversely, European banana imports from the MFN countries experienced an overall increase of more than 325,000 tonnes in 2006 as compared to 2005, reaching 3,290,000 tonnes. This upward trend has continued at the same pace in 2007: indeed, during the first six months of the year, the MFN countries increased their exports to the European market by 144,000 tonnes as compared to 2006, in contrast to the stability of the ACP supply. In other words, the MFN countries have more than maintained their access to the European market, and the objective set by the Ministers in Doha has clearly been achieved through the implementation of the new European banana importation regime.

5.59 These statistical data show that most of the MFN countries have reduced their supply to the American market, of which they are the exclusive suppliers, in order to increase their shipments to the European market. For example:

- In 2006, Columbia increased its exports to the European Union by 59,000 tonnes compared to 2005, and decreased its exports to the US market by 40,000 tonnes.

- Costa Rica increased its exports to the European Union by some 200,000 tonnes, and its exports to the United States by 105,000 tonnes.

- Panama also preferred to increase its shipments to the European market by 29,000 tonnes, while increasing its exports to the United States by only 5,500 tonnes.

- Peru doubled its exports to the European Union with a 22,400 tonne increase, while its exports to the United States increased by only 2,700 tonnes.

5.60 These figures are all the more interesting in that in terms of volume, purchasing power and consumer habits, the American market is similar to the European market. For the Latin American producers it has the geographical advantage of being much closer than the European market, so that the logistical costs are obviously lower; added to which, no duties are levied on bananas from the MFN countries. And yet in spite of these advantages, many MFN countries, including some of the leading ones, have preferred to step up their exports to the European market which is geographically more remote, and pay the customs duty that they are now challenging – oddly enough.

5.61 It therefore seems clear that this duty, which was established with the introduction of the new European banana importation regime on 1 January 2006, has not been an obstacle to exports from the Latin American countries, but on the contrary, has encouraged them to export even greater volumes to Europe.

5.62 Other MFN countries have apparently adopted different strategies, and have exported less to the European market for internal reasons: for example Ecuador, which in 2006 increased its exports to the United States by 90,000 tonnes while decreasing its exports to the EU by 40,000 tonnes.

5.63 The Côte d'Ivoire questions the reasons for these contradictions:

- Can it be linked to Ecuador's geographical situation and to the difficulties it may have encountered in using the Panama canal?

- Or is it because Ecuador preferred to develop its exports towards new markets, such as Russia, which have experienced rapid growth?

- Or finally, is this situation not attributable to the internal production difficulties that Ecuador has experienced?

5.64 The Côte d'Ivoire cannot answer for Ecuador; but it is clear that Ecuador's relative underperformance in exporting bananas to Europe cannot and must not be attributed to the customs duty. This reduction of a mere 40,000 tonnes represents less than 4 per cent of Ecuador's total exports in 2005, which amounted to 1,026,000 tonnes.

5.65 The Côte d'Ivoire is of the view that this statistical overview reflects actual market figures resulting from 18 months of operation of the new banana importation regime in the European Union.

5.66 In spite of this irrefutable reality, certain MFN countries continue to claim that with a preference of €176 per tonne, Europe's ACP banana suppliers will considerably increase their exports in the future. Panama, for example, has presented the conclusions of a study carried out on its behalf by an Australian consultancy firm, the Centre for International Economics (CIE), according to which important investments can be expected in the banana sector, in particular among the African LDCs.

5.67 As far back as the arbitration hearings of 2005, the author of this study, Mr Borell, went to great lengths to demonstrate to the arbitrators that African exports to Europe would be growing very rapidly. Since the actual figures proved him wrong, he now claims that the weak growth in ACP exports was due to poor climatic conditions both in Côte d'Ivoire and Cameroon. But, he claimed, in Cameroon, Angola and Mozambique, for example, investors would be quick to seize the opportunity offered by this preference to invest massively.

5.68 Without wishing to spark a controversy, it is worth noting that Mozambique is not in a particularly good position to develop the production of bananas for export to Europe, if only because the long sea journey is incompatible with the preservation of the quality of the fruit.

5.69 Finally, to illustrate the difficulty for the African countries to compete with MFN bananas, Côte d'Ivoire attaches to this statement the interview given by the President of Chiquita Europe to Eurofruit Magazine last July. In that interview, he states that as a prerequisite to any new developments, the competitiveness of the African banana sector will have to be improved, notwithstanding the preference granted to them.

5.70 According to Côte d'Ivoire, a model based on scientific reasoning, whether mathematical or econometric, must be verifiable within a reasonable time-frame. If not, it becomes a mere prediction or prophecy. In its submission, Panama has suggested that once again reliance is placed on the Bananarama model of the Centre for International Economics. In August 2007, Mr Borell is still predicting hellfire for Latin American producers, but for 2012 this time, if not 2014.

5.71 This same forecaster, using the same variables in his mathematical analyses, has already predicted:

- In 2004, that "the results of the Bananarama model showed that with a duty of €187 per tonne:
    - The Latin Americans would see their market access reduced because the ACP quota would be exceeded and because of the development of production in the least developed countries (LDCs), and this even in the case of the most optimistic scenarios*;*

- the average loss for the Latin American producers would be more than a million tonnes."[269]

5.72 Cote d'Ivoire notes that the decline predicted as soon as the tariff of more than €75 per tonne was introduced actually turned into an increase of more than 300,000 tonnes in 2006, and probably as much in 2007, i.e. 600,000 tonnes more in two years.

- In 2005, Mr Borell announced that "the development of the ACP countries and LDCs would cause a million tonnes of bananas to be displaced from the developing countries of Latin America."[270]

5.73 Although they have had unlimited access at a zero duty rate since 1 January 2006, not a single exporter among the least developed countries has appeared on the European market. So where are the investments which, according to the Centre for International Economics, were supposed to be so profitable?

5.74 In 2007, the Centre for International Economics pushed its predictions forward to 2014 in order to cover up the failure of its forecasting model. Projects are allegedly under way in Mozambique and Angola. Côte d'Ivoire questions why there is a wait until 2014 to see the results[271] when less than a year suffices to produce and export bananas.

5.75 Côte d'Ivoire prefers to keep its intervention brief and will therefore avoid talking about the numerous basic errors already reported during the arbitration, which suggest that the model of the Centre for International Economics was merely the reflection of a determination to push the ACP producers out of the European market for once and for all.

5.76 Before concluding, Côte d'Ivoire would like to recall once again the actual market data which show to what extent the statements of some MFN countries conceal their single objective of supplying the entire world market alone, with still one small exception in Asia.

5.77 It has been clearly established that the MFN countries dominate the world banana market. According to the FAO, in 2005 they exported some 9.5 million tonnes of bananas: 3,800,000 tonnes to the United States, where they are the only suppliers, and 3 million tonnes to the European market where they already account for more than 80 per cent of total imports.

5.78 The MFN countries also supply much of the rest of the world. The Russian market has developed considerably over the past few years, and now represents one million tonnes. The MFN countries, thanks to their lower production costs, export to all countries in the world. They even compete with regional producers in Asia and Oceania in spite of the high logistical costs involved. A single figure sums up the situation: from 1993 to 2004, banana exports from Ecuador alone increased by 1.5 million tonnes, i.e. close to 60 per cent.

5.79 Côte d'Ivoire repeats and stresses that contrary to the MFN suppliers, the ACP countries have only one outlet for their exports: the territory of the European Union.

5.80 At the end of the day, it is the MFN exporters that really have the capacity and the powerful means needed to eliminate the ACP suppliers on the European market, and not the contrary. The

[269] EU banana drama: Not Over Yet – CIE March 2004.
[270] Latin American will suffer crippling access losses under the European Communities' €176/t tariff and other increased tariff rates – CIE December 2005.
[271] Annex 2 to Panama's submission.

900,000 tonnes from the ACP countries cannot possibly represent a threat to the 10 million tonnes from the Latin American suppliers.

5.81 Let us approach the problems of world trade in bananas intelligently and bear in mind that the equivalent of the total exports of all the ACP countries is supplied by a single Ecuadorian exporter. This should give an idea of what is really at stake and of the injustices surrounding this dispute.

5.82 Côte d'Ivoire points out that while the ACP countries reputed to be "preferential" are confined to their zero duty tariff quota without any real prospects for growth in their production and in their exports to the European Communities, the MFN countries, which until recently were marginal producers, have doubled or even tripled their production in the space of three years from 50,000 to 100,000 and even 150,000 tonnes.

5.83 After all, Brazil became the fifth MFN supplier with a continuous and steadily increasing supply over the past four years:

- 13,120 tonnes during the first six months of 2004;
- 20,800 tonnes in 2005;
- 28,500 tonnes in 2006;
- 30,000 tonnes in 2007.

5.84 Preference here is not a barrier, nor does it limit production, let alone access, of MFN bananas to the Community market.

5.85 The statistics show that access by new exporters to the European market and the increase in the exports of certain MFN countries would appear to answer the concerns expressed by Colombia with respect to improvement of the conditions of competition.

D. DOMINICAN REPUBLIC

1. Oral statement of the Dominican Republic

5.86 The Dominican Republic wants to underline the importance and the priority of the present case for the Dominican Republic, particularly for the survival of its banana producers, who are struggling so hard to maintain this sector.

5.87 The preferential system given to the ACP countries by the European Union has allowed a solid banana industry to develop in the Dominican Republic, guaranteeing a livelihood to thousands of poor producers and making a major economic and social contribution. Consequently, the banana sector is a catalyst for development in the Dominican Republic.

5.88 It is therefore a matter of deep concern to the Government of the Dominican Republic that Ecuador is questioning this system through the current procedure and, as stated by other colleagues from ACP countries, it should not be allowed. Firstly, Ecuador's complaints do not refer to any issue of non-compliance, which is the basis for Article 21.5 of the Dispute Settlement Understanding (DSU) and secondly because the data show that with the new regime the European Union has substantially improved access for MFN suppliers and has met its commitments at the WTO.

5.89 The Dominican Republic hopes that the Panel will take its arguments into account in such a way that this preferential EU scheme for ACP countries for the marketing of bananas is not modified, thus enabling its producers to survive.

E. JAMAICA

1. Oral statement of Jamaica

5.90 The case at hand is of paramount importance to Jamaica and to banana exporting countries within the ACP Group. It underscores the challenges faced by developing countries within the multilateral trading system as illustrated by the fact that the issue of ACP banana exports within the framework of the EC banana regime has accounted for a disproportionate share of the cases that have been brought within the ambit of the dispute settlement regime.

5.91 Jamaica and other ACP third parties affirm that there is no *justifiable* interest for Ecuador in the present proceedings. The purpose of the dispute settlement system is to ensure prompt settlement of situations in which a Member considers that any *benefit* accruing to it directly or indirectly under the WTO Agreements is *being impaired by measures* taken by another Member.

5.92 Ecuador is ostensibly seeking to demonstrate that the European Communities' Article I waiver ended on 1 January 2006 and is doing so in proceedings that are unlikely to be completed near the end of the period for which the Doha Waiver was granted, i.e. 31 December 2007. It is apparent, however, that Ecuador's sole purpose in bringing this claim forward is to exert pressure on the European Communities in the ongoing tariff negotiations. By initiating Article 21.5 compliance proceedings, Ecuador is seeking to accelerate the procedure in order to be able to use the Panel's findings during the ongoing negotiations with the European Communities. This is a clear misuse of the dispute settlement provisions.

5.93 The proceedings initiated by Ecuador are also very surprising, given that country's explicit commitment via the Understanding on Bananas concluded with the European Communities, to support a waiver of GATT Article I in order to enable the European Communities to grant preferential tariff treatment, until the end of 2007, to the ACP states which are Parties to the Cotonou Agreement. The timing of Ecuador's latest action therefore calls into question the principle of good faith on which the Understanding was constructed.

5.94 The Understanding on Bananas and the Doha Waiver have enabled ACP exporters to maintain a presence in the European market but the attendant reduction in the ACP tariff quota has also put several local banana growers and exporters out of business. They suffered both from the reduction in the ACP quota of 100,000 tonnes and from the inclusion within this reduced quota of non-traditional ACP suppliers which previously had preferential access within the MFN quota. This vividly applies to the Jamaican banana industry which is dominated by small-scale producers, who rely almost exclusively on market access to the EU for their livelihoods and those of the communities in which they operate. It is clear that after securing all the benefits at our expense, Ecuador now wishes to renege on the Understanding and in the process, completely eliminate Jamaican producers from the EU market. Ecuador should therefore not be allowed to use Article 21.5 procedures to challenge the implementation of the final phase of a mutually agreed solution, after it has gained the advantages given to it by the Understanding concerned.

5.95 Bananas represent a major share of total ACP agricultural exports and in Jamaica's case, ranks among the top five export items. The industry is a prime contributor to rural development, job creation and poverty reduction. It is also extremely vulnerable to natural disasters, particularly hurricanes, which in recent years have wreaked havoc on long term production and export earnings.

5.96 Caribbean banana producers are not the only ones affected by natural disasters and Jamaica readily acknowledges that a number of the MFN suppliers are also impacted, even by the same hurricanes that pass through the Caribbean region. In terms of the scope for recovery and the resumption of export earnings, however, MFN suppliers have a distinct advantage given that they have access to a global market for their exports whereas Jamaica and nearly all ACP exporters are restricted to the EU market.

5.97 The case under consideration could be construed as an attack on the development prospects of ACP banana exporting countries particularly as the elimination of the preferential arrangements for bananas in the EU market will have a negative and far-reaching impact on the scope for economic growth and development in the ACP. Jamaica submits that this is not a desired objective of the multilateral trading system which continues to champion special and differential treatment for developing countries, particularly the small and vulnerable among them. Both the European Communities and the ACP have delivered sound arguments regarding the inappropriateness of the instant case and Jamaica therefore looks forward to a ruling that will contribute to the long term growth and development of the ACP banana industry.

F. SAINT LUCIA

1. Oral statement of Saint Lucia

5.98 St Lucia recalls several years ago in a meeting of the DSB noting that "[a]lthough we did not negotiate the solution [referring to the Ecuador/EC and US/EC accords] we accept it as a reasonable settlement. … [T]he time has now come to consider the matter closed and move on. With the removal of sanctions the dispute has now been resolved and the item should be removed from subsequent agendas." The attempt to now invoke Article 21.5 compliance proceedings in this case is simply an abuse of process. It is merely a cynical tactic to gain leverage to force the European Communities to reduce the level of its tariff, using vulnerable ACP countries as pawns.

5.99 After all that St Lucia's farmers have gone through in recent years to be back here before a dispute panel that has the power to decide whether or not my country will be able to continue the export of bananas to Europe is a real disappointment for all of our people who depend on this vital industry for their livelihood. Ever since the 1950s when Saint Lucia made the switch from sugar cane to bananas, this fruit grown exclusively for export to the United Kingdom and the industry has been the bedrock of St Lucia's economy. It transformed St Lucia's society and created an independent peasantry that for the first time owned their small farms on which they worked. St Lucia has in the past already stressed how important bananas are for it, not only economically, socially and politically, but also because they give St Lucia a real chance to achieve sustainable development. For this west Lucia appreciates that economic diversification will be necessary but this can only be successful in the context of the stability of income and employment that the banana industry provides.

5.100 The successive reforms that have been made to the EC banana import regime since the 1990s have been most damaging to St Lucia and resulted in the undermining of our market access and deterioration of prices received by our farmers. St Lucia was not able to prevent those changes but instead has consistently sought to secure an accommodation of the legitimate interests of both ACP and MFN suppliers. In April 2001 Ecuador concluded an accord with the European Communities that gave it and MFN suppliers, new advantages whilst further disadvantaging us. As a result many of St Lucia's farmers were driven out of business and rural poverty increased, but at least some farmers were able to continue. Part of that deal initiated by Ecuador was that the MFN quotas would have been tariffied by 2006. The deal was that the TRQ would be replaced by a single tariff that would keep the conditions of competition unchanged for the MFN, i.e. that they would be no worse off. That Ecuadorian deal was incorporated into the Annex on Bananas of the Doha Declaration. In 2005 WTO Ministers in Hong Kong accepted the tariffication proposal in which the TRQ was replaced by a

single tariff of €176 per tonne. Indeed, the Ecuadorian delegation was the leading campaigner for this change and Minister Store of Norway was charged with monitoring trade flows that would indicate if the change had in fact disadvantaged MFN suppliers. Saint Lucia accepted the Annex and the 2005 Ministerial decision on bananas because it was merely one of tariffication. There was no intention that it would reduce the effective level of our preference and therefore our ability to access the EC market (after all, we are not so naive and would not have consented to a deal that would undermine the viability of our industry).

5.101 Following the arbitrations on the proposed level of the tariff, the second arbitration award was notified to the Ministerial Conference in Hong Kong. At that meeting St Lucia clearly stated its position. "Should countries seek to use WTO rulings as a ploy to deprive Saint Lucia of its rights, they would be calling into question not only their own good faith, but undermining any residual illusions that the system existed to advance the interests of all, and not just some, of its Members."[272]

5.102 It is completely unreasonable for Ecuador, having obtained what it sought for both in 2001 and 2005 to now seek to exact, through misinterpretation and distortion the reduction, indeed, the removal of ACP preferences that would result in Saint Lucia's exclusion from the market.

5.103 St Lucia asks the Panel to reject this procedural manoeuvre. The mutually agreed solution which the European Communities has implemented in good faith cannot now be thrown out in Article 21.5 proceedings by the party which has already gained the most from successive reforms of the EC banana market which it designed, demanded, and St Lucia paid for. This is even more so, where it is clear and has been demonstrated by those before us that the European Communities has "rectified the matter" and indeed, had in fact already done so in its second proposal to the Arbitrator.

5.104 This can clearly be seen from the way the market has developed. With a tariff of €176/tonne MFN exports to the European Communities rose by about ten per cent (10%) in 2006 and they have continued to rise in 2007. In its written submission Colombia argues that these figures are irrelevant because market access is not the same as the volume of imports. Indeed, the Arbitrator said that it relates to market opportunities not a guarantee of a particular level or volume or price. Certainly it isn't a guarantee. Many factors can influence the availability of bananas for export. But this does not make irrelevant the plain fact that EC imports from MFN countries have actually increased, and increased significantly. They could not have done so if the <u>opportunity</u> of improved access was not there.

5.105 Indeed, the Understanding on the Interpretation of Article XXVIII of GATT 1994, paragraph 6, provides WTO rules for comparing the access provided by a tariff quota with that provided by a flat tariff. According to these rules, if a member wishes to change a flat tariff to a tariff quota it must set the volume of the tariff quota at the average levels of imports in the most recently available reference period plus ten per cent . The ten per cent represents compensation for the loss of future opportunity to increase exports to that member. The European Communities has moved in the opposite direction as it was required to do by the Understandings with the US and Ecuador. It has moved from a tariff quota to a flat tariff. So by deduction from the Understanding on the Interpretation of Article XXVIII one can say that even if initially exports under the flat tariff had been somewhat lower than those that occurred under the TRQ, this could still have constituted equivalent access, because a flat tariff provides a possibility of future growth. But in reality MFN imports under the flat tariff rose immediately by ten per cent in 2006 and they are still rising in 2007.

5.106 The factual evidence of the way the market has developed provides more certainty than price gap analysis which is inevitably subject to a margin of uncertainty because it is never possible to

[272] See WT/MIN(05)/SR/4, p. 21, remarks of the Representative of Saint Lucia at the formal plenary meeting

ascertain and demonstrate the exact level of the internal or external price. Market facts are undoubtedly far more eloquent than forecasts based on theoretical models and projections. And what the market is showing us is not only that €176/tonne more than maintains MFN access but also that €187/tonne would also have done so.

5.107 Exactly the same point arises in relation to what the Arbitrator said about terms of competition. Certainly, he identified terms of competition as a relevant criterion. But he did not by so doing reject the use of market data. An abstract examination of terms of competition is subject to uncertainties of detail and interpretation. Market data shows the real effect of real conditions of competition.

5.108 St Lucia is not asking the Panel to review the awards of the Arbitrator. The Panel's task is to consider whether the claims now made by Ecuador are well founded and, in particular, whether the Article I waiver disappeared on 1 January 2006 when the European Communities applied the flat tariff regime. The wording of the waiver is clear on this. The loss of the waiver depends on whether the European Communities has "rectified the matter", not directly on the awards of the arbitrator. And "rectifying the matter" means preserving MFN market access. The increase in MFN imports since January 2006, incontestably shows that a tariff of €176/tonne more than meets this test. But Ecuador argues that this is irrelevant because the European Communities was allowed only one shot at "rectifying the matter". St Lucia trusts that the Panel will reject this narrow and self-serving reading of the waiver – a reading that even Ecuador did not share when it agreed to join the monitoring group that kept under review the actual effects on import volumes of the tariff of €176/tonne. There is nothing in the wording of the waiver that makes the ending of the waiver directly dependent on the second award. What matters, is whether the European Communities did rectify the matter, and this it most assuredly did from 1 January 2006. This would have been achieved, both with the proposed tariff of €187/tonne and even more so with the lower tariff of €176/tonne that was actually applied.

5.109 These proceedings are taking place at a highly symbolic time for us. Sir John Compton the long serving Prime Minister of St Lucia, who had for decades been a leading defender of the Windward Island and ACP banana exports to Europe, was buried yesterday. Sir John, that most respected Caribbean Statesman, said that "without bananas we have no boats and without boats no trade", which means no future. St Lucia trusts that these deliberations taking place here on the other side of the Atlantic will not put the final nail in the coffin of the industry for which he fought so vigorously for and so long and on which so many left behind depend.

G. SURINAME

1. Oral statement of Suriname

5.110 In its oral statement, Suriname submits that Ecuador should not be allowed to bring the present case under Article 21.5 of the DSU. In support, Suriname raises two issues of particular importance to the ACP third parties and which are of a systemic nature. .

5.111 The first issue is the fact that Ecuador has already concluded with the European Communities in April 2001 an Understanding on Bananas. This Understanding on Bananas which constitutes a mutually agreed solution to the *Bananas III* dispute has settled that dispute and therefore constitutes a bar to Article 21.5 proceedings.

5.112 It is indisputable that the "Understanding on Bananas" was reached by the European Communities and Ecuador in order to resolve the original *Bananas III* dispute. This Understanding is an agreement under public international law which is binding upon its parties. This Understanding constitutes a mutually agreed solution to the original *Bananas III* dispute. Once a mutually agreed

solution has been reached, it is not admissible to challenge the consistency of subsequent measures with the recommendations and ruling of the original Panel pursuant to Article 21.5 of the DSU. Article 21.5 provides a mechanism for dispute resolution "where there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings". In this case there can be no doubt that a *mutually agreed* solution exists. Therefore, there cannot be any *disagreement* in the sense of Article 21.5 of the DSU. The existence of the mutually agreed solution constitutes a bar to a subsequent Article 21.5 proceeding.

5.113 The fact that Ecuador cannot bring its claim as a compliance issued is further supported by the fact that, after the Understanding was agreed, the DSB took the *Bananas III* case off its agenda as an issue which has been "resolved" in accordance with Article 21.6 of the DSU.

5.114 If Ecuador considers that the new EC banana import regime is inconsistent with its WTO obligations, it should start new dispute settlement proceedings. To allow Ecuador to challenge the new EC banana import regime in the framework of Article 21.5 proceedings would be equivalent to ignoring the legal effects of the mutually agreed solution reached between Ecuador and the European Communities. This would create a very dangerous precedent since it would undermine the clear preference given by Article 3.7 of the DSU to negotiated solutions to disputes.

5.115 The second reason why Ecuador should not be allowed to bring this case before a compliance panel is the fact that the measures now being challenged are not measures taken to comply with the recommendations and rulings in the original *Bananas III* dispute.

5.116 What the Panel is required to analyse in the present case is the WTO consistency of the new EC banana import regime which is a tariff-only regime adopted by the European Communities under the provision of the waiver granted at Doha in order to enable it to implement the Cotonou Agreement and the Understandings on Bananas with Ecuador and the United States. This new regime is completely different from the quota regime examined in the original *Bananas III* case. Also, the legal framework, namely the Understanding and the Doha Waiver, is entirely new. The Doha Waiver and the Understanding on Bananas were negotiated after the DSB adopted its recommendations and rulings in the original *Bananas III* case. These two instruments constitute new secondary WTO law and create an entirely new legal framework for the issues that are now pending before the Panel. This legal framework did not exist at the time the original dispute was examined. The issues raised in the present case cannot therefore be challenged via a compliance Panel.

5.117 Suriname also submits that Ecuador cannot challenge the preference it has accepted in the mutually agreed solution. Indeed, each party to the Understanding on Bananas has made concessions and obtained concessions in return. It would be totally unfair if Ecuador was now allowed to call into question the Understanding on Bananas from which it has already reaped the benefits. This would also amount to denying any legally binding effect to the Understanding and would be contrary to Article 3.7 of the DSU which necessarily implies that mutually agreed solutions have legal effects in subsequent proceedings.

H. BRAZIL

1. Oral statement of Brazil

5.118 The European Communities claims that the parties to a mutually agreed solution would be precluded from challenging elements of such an agreement through recourse to the dispute settlement mechanism because, according to the European Communities' understanding, Articles 3.7 and 3.10 of the DSU provide that mutually negotiated solutions should be preferred to resorting to dispute resolution procedures.

5.119 For Brazil, this is partially true. Article 3.7 of the DSU should be interpreted in its integrality, with due account of all the provisions contained therein, that is to say the preference for negotiated solutions and the conformity with the WTO agreements. Those two elements permit to draw the conclusion that compliance with the covered agreements has precedence over negotiated solutions and that parties to an agreed solution are not authorized by such instrument to circumvent their obligations under the multilateral trading rules.

5.120 Therefore, the fact that the DSU favours negotiated solutions over the litigation avenue does not allow concluding that ***any*** negotiated solution is preferred by the DSU. The negotiated solution must be compatible with the covered agreements.

5.121 The European Communities also argues that the mere fact that a Member chooses to adopt and implement a suggestion made by a panel would automatically establish that this Member has complied with the obligations it was found to be in breach of.

5.122 In Brazil's opinion, by solely declaring, unilaterally, that the current import regime is compatible with the WTO rule because it derives from a suggestion made by the panel, the European Communities is not supporting its claim. Brazil concurs with the European Communities on the binding nature of the panel and Appellate Body reports. However, the European Communities abruptly jumps to the flawed conclusion that because the Member has chosen to implement a suggestion by the panel such Member would always be in compliance with its obligations under the covered agreements. In the European Communities' view, the implementation of a suggestion contained in a panel report would lead to automatic compliance with the covered agreements, regardless of the means chosen and the effects achieved.

5.123 In no provision does the DSU grant Members certainty as to the "lawfulness" of a measure taken to comply just because such measure is intended to implement a suggestion made by a panel. To the contrary, Article 21.5 sets forth the Members' right to resort to a panel where there is disagreement as to the consistency with covered agreements of the measures taken to comply.

5.124 Whether or not a Member's intention to comply meets the test of consistency with covered agreements is an assessment that should be left to a panel. That is so because even in the case a Member chooses to implement a suggestion by the panel, such a measure is still subject to an Article 21.5 review.

5.125 If the European Communities' arguments were to prevail, they would lead to absurd results. If accepted, they would render Article 21.5 devoid of any significance, for the reason that any measure based on a panel's suggestion would automatically escape the test of consistency with the covered agreements. Thereby it would give the implementing Member a blanket waiver from proving that it has met its obligations and depriving the complaining party of any surveillance of the implementation process.

5.126 In addition, according to the European Communities, by resorting to an Article 21.5 panel, Ecuador would be using the current proceedings as an appeal procedure. In Brazil's opinion, it is crystal clear that Ecuador's claims relate to the conformity of the EC measures with its obligations under Articles I, II and XIII of the GATT 1994. Therefore, Ecuador is neither challenging the suggestions of the panel nor the terms of the Understanding. Rather, the thrust of the case addresses the consistency of the measures taken by the European Communities to comply with the covered agreements, in accordance with the mandate of Article 21.5.

5.127 To Brazil's knowledge there is nothing in the DSU that precludes a Member from challenging under Article 21.5 any kind of measure taken by the defending party to comply with the recommendations and rulings of the DSB. In Brazil's view, a Member is not exempted from

discharging its burden of proof as regards the compliance of the new measures with the DSB recommendations and rulings even if such measures are intended to implement a suggestion by the panel.

I. COLOMBIA

1. Written submission of Colombia

(a) The preferential tariff treatment accorded to ACP bananas is not justified under the Article I Doha Waiver

(i) The Article I Doha Waiver has ceased to apply to bananas as of 1 January 2006, and the European Communities was no longer entitled to "rectify the matter"

5.128 The Waiver Annex contemplates that the determination at the Second Arbitration that the European Communities "has failed to rectify the matter" would have definite legal consequences. These consequences are that following a negative determination, the Article I Doha Waiver ceases to apply to bananas upon the entry into force of the new EC tariff regime, and the European Communities has no additional legal opportunity to "rectify the matter".

5.129 In the light of the fifth *tiret* of the Waiver Annex, and based on the determination "that the European Communities ha[d] failed to rectify the matter", Colombia submits that the Article I Doha Waiver ceased to apply to bananas as of 1 January 2006. Colombia agrees with Ecuador that the Arbitrator's determination in this regard is a matter of the record that no party has disputed.

5.130 Thus, following the adverse finding in the Second Award, the European Communities was not entitled to any additional opportunity to "rectify the matter", and the Article I Doha Waiver ceased to apply to bananas as of 1 January 2006.

(ii) Assuming, arguendo, that the European Communities had the opportunity to "rectify the matter", the tariff level of €176/tonne does not comply with the Tariff Level Standard.

The European Communities has not discharged its burden of showing compliance with the elements required under the Waiver Annex

5.131 To prove compliance with all the terms and conditions of the Waiver Annex, the European Communities should have addressed the three elements referred to by the Arbitrator, against which that compliance must be assessed: (i) whether there is a rebinding of the European Communities' tariff on bananas; (ii) whether any such rebound tariff would result in at least maintaining total market access for MFN suppliers; and (iii) whether the rebound tariff takes into account all EC WTO market-access commitments relating to bananas. However, the European Communities has failed to address the first and the third elements and has not been able to demonstrate compliance with the second element.

5.132 With respect to the first element, while the European Communities submits that the introduction of a different import regime than the one analyzed by the Arbitrator "… maintain[s] the total market access of the MFN suppliers", the European Communities has failed to indicate what is the "envisaged rebinding of the EC tariff on bananas" within the meaning of the Waiver Annex. An *applied* tariff of €176/tonne does not constitute a "rebinding". With respect to the third element, the European Communities has failed to explain how it has taken into account all its WTO market-access commitments relating to bananas in designing its current import regime. The European Communities has referred in its submissions only to the second element, on which it confines itself to a conclusion

of law – that the second element contemplates a quantity- or volume- based standard – and has not even presented arguments to substantiate that conclusion of law.

The European Communities' quantity- or volumes-based analysis is contrary to the Tariff Level Standard

5.133 According to the European Communities, "the volume of total imports of bananas from MFN countries has increased significantly since the introduction of the new import regime … This shows that MFN suppliers have maintained the market access opportunities they had before the introduction of the new system." In effect, the European Communities asserts that the determination of compliance with the Tariff Level Standard requires a volumes-based (or quantity-based) assessment. In other words, the European Communities argues that the Tariff Level Standard contemplates a tariff level that would result in at least maintaining the export *volumes* of MFN banana suppliers.

5.134 Agreeing with the European Communities, the Arbitrator rejected the contention that "market access" should be assessed in terms of trade volumes. In its Rebuttal Submission at the first arbitration, the European Communities asserted that "market access in the WTO is a legal concept which enshrines the level of protection or liberalization. The extent to which trade flows, or one Member has a particular market share, has never been part of the WTO understanding of market access". Then the European Communities added: "In the WTO the phrase 'market access' is not to be understood as a measurement of the volume of imports or of market share (between either MFN suppliers or between MFN and other suppliers)". Thus, the notion of *volumes* as the benchmark for purposes of compliance with the Tariff Level Standard was thoroughly discussed and squarely rejected in the First Arbitration.

5.135 Accordingly, there is no legal basis for a volumes-based assessment for purposes of determining compliance with the Tariff Level Standard. It is irrelevant that MFN export volumes have increased.

The applied tariff of €176/tonne does not result in at least maintaining total market access for MFN banana suppliers

5.136 In its First Arbitration, the Arbitrator noted that a determination of the conditions of competition between MFN bananas and both EC bananas and ACP bananas was necessary to determine compliance with the Tariff Level Standard.

5.137 Colombia submits that, even if bound, a tariff of 176€/tonne does not maintain the conditions of competition between either (i) MFN bananas and EC bananas or (ii) MFN bananas and ACP bananas. Using the methodology, reference period and figures endorsed by the Arbitrator a tariff of €176/tonne does not maintain conditions of competition between either (i) MFN bananas and EC bananas or (ii) MFN bananas and ACP bananas.

5.138 With respect to conditions of competition between *MFN bananas and EC bananas*, the Arbitrator found that the price-gap methodology "would accurately reflect the level of protection accorded to domestic or EC growers from foreign competitors."

5.139 Regarding the appropriate reference period, the Arbitrator found that "the use of the most recent representative period minimizes the need for ad hoc adjustments to be made to the data and corresponds as closely as possible to the trade regime as applied." The Arbitrator determined that the appropriate reference period was the period 2002-2004.

5.140 With respect to the figures for the *internal* price for bananas, at the Second Arbitration, the European Communities presented and relied on figures based on data derived from Sopisco News.

The Arbitrator found that it "does not consider that the European Communities' use of Sopisco News data to estimate the internal price of bananas on the EC market was inappropriate."

5.141 With respect to the figures for the *external* price for MFN bananas, at the First Arbitration, the European Communities relied on Eurostat c.i.f. price data. The appropriateness of the European Communities' use of Eurostat data to establish the external price was not disputed by any of the interested parties.

5.142 Thus, using the methodology that was used by the European Communities, endorsed by the Arbitrator, and based on statistics from sources relied upon by the European Communities (Sopisco News) or generated by the European Communities' agencies (Eurostat), and which were also endorsed by the Arbitrator, it is evident that a tariff of 176€/tonne does not maintain conditions of competition between *MFN bananas and EC bananas*.

5.143 Based on the figures provided by the European Communities, the Sopisco-based weighted average *internal* price for bananas in the EC-25 during the reference period 2002-2004 was €702/tonne. Based on Eurostat statistics, the weighted average external price for MFN bananas in the EC-25 during the reference period 2002-2004 was €605/tonne. The price gap for MFN bananas during the reference period was, therefore, €97/tonne. In short, the tariff level that would result in at least maintaining the conditions of competition between *MFN bananas and EC bananas* cannot be more than €97/tonne.

5.144 In the course of the First Arbitration, the Arbitrator emphasised that a tariff meeting the Tariff Level Standard also needed to take into account conditions of competition between *MFN and ACP bananas*. Based on Eurostat statistics, the weighted average external price for ACP bananas in the EC-25 during the reference period 2002-2004 was €616/tonne. Deducting this external price from the Sopisco-based weighted average internal price in the EC-25 during the same period, as provided by the European Communities of €702/tonne, the price gap for ACP bananas during the reference period was €86/tonne.

5.145 Accordingly, the tariff level that would result in at least maintaining the conditions of competition between *MFN bananas and ACP bananas* is the difference between the price gap for MFN bananas (€97/tonne) and the price gap for ACP bananas (€86/tonne), or €11/tonne.

5.146 Hence, a tariff of 176€/tonne in no way maintains the conditions of competition between *MFN bananas and ACP bananas* and, just as it does with respect to the conditions of competition between *MFN bananas and EC bananas*, fails the Tariff Level Standard.

(b) The Preferential Tariff Rate Quota accorded to ACP bananas is inconsistent with Article XIII of the GATT 1994

5.147 Colombia recalls that the Appellate Body in *EC – Poultry* stated that:

> "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 with the various Members might be expected to obtain in the absence of such restrictions."

5.148 The TRQ granted by the European Communities to ACP bananas clearly does not conform to this standard. While MFN bananas must always bear a tariff, ACP bananas do not, because of the preferential intra-quota zero tariff. It can hardly be argued that such a distribution of trade complies with the standard set out in Article XIII:2 of aiming "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".

5.149 Likewise, Colombia believes that the TRQ granted by the European Communities to the ACP countries excludes all MFN bananas from the zero-duty quota, and in doing so, violates Article XIII:1 of the GATT 1994. This discriminatory treatment denies other WTO Members the right to participate in the European Communities' TRQ, and thereby to improve their access to the EC banana market.

(c) Conclusion

5.150 In light of the foregoing, Colombia respectfully requests the Panel to find that the measures at issue is inconsistent with Article I of the GATT 1994, or alternatively, does not comply with the terms and conditions of the Article I Doha Waiver, and is inconsistent with Article XIII of the GATT 1994.

2. Oral statement of Colombia

5.151 The dispute on bananas is the longest dispute in the history of GATT/WTO. Regrettably, this Panel proceeding is the tenth since 1992 examining the EC banana import regime. Fifteen years on, in 2007, that regime is still not in conformity with WTO law.

5.152 Bananas are a product of paramount importance for the Colombian economy. They are the main source of employment in rural areas crucial for our national security, and are also one of Colombia's main export products.

5.153 In its third-party written submission, Colombia establishes why the EC banana import regime is inconsistent with Articles I and XIII of the GATT. Colombia will take this opportunity to emphasize the most salient aspects of that submission.

5.154 It is evident that the preferential tariff treatment granted to ACP bananas is inconsistent with the MFN obligation in Article 1:1 of the GATT. The Article I Doha Waiver temporarily justifying this treatment was granted *subject to* an EC obligation to rebind the EC MFN tariff on bananas at a level that results in at least maintaining total market access for MFN banana suppliers, taking into account all EC WTO market-access commitments relating to bananas. The process of rebinding of the EC tariff contemplated a two-stage arbitration procedure and a waiver-termination provision.

5.155 The fifth tiret of the Annex to the Article I Doha Waiver provided for a second arbitration to determine "whether the EC has rectified the matterll and that "[i]f the EC has failed to rectify the matter, this waiver shall cease to apply to bananas upon entry into force of the new EC tariff regime". The European Communities reads this provision to mean that if the European Communities introduced a different import regime than the one analyzed in the second arbitration, and that import regime did indeed maintain the total market access of the MFN suppliers. then the Article I Doha Waiver would continue to apply. Colombia cannot agree with this interpretation.

5.156 The structure of fifth tiret of the Annex clearly indicates that the European Communities had only one opportunity to rectify. If the first arbitration award resulted in a determination that the rebinding would not result in at least maintaining total market access. an opportunity was given for the parties to reach a mutually satisfactory solution. Thereafter, a *last* opportunity to rectify the matter was contemplated. This created a powerful incentive for the parties to seek a negotiated solution. An additional opportunity to rectify the matter would nullify this incentive to negotiate.

5.157 Furthermore, had the European Communities an additional opportunity to rectify the matter, and unilateral authority to judge whether or not that import regime maintained the total market access of MFN suppliers, the purpose and rationale of the banana-specific dispute settlement mechanism in the waiver would be defeated. The MFN suppliers would have never granted the Article I Doha Waiver for bananas were this the case.

5.158 In any event, assuming *arguendo* that the European Communities had an additional opportunity to "rectify the matter", the applied tariff of €176/ton does not meet the terms and conditions of the Article I Doha Waiver.

5.159 First, an applied tariff of €176/ton does not constitute a "rebinding". Second, the European Communities has failed to take into account all its WTO market-access commitments relating to bananas.

5.160 Third, and of greatest concern to Colombia, the applied tariff €176/ton does not meet the tariff level standard of "at least maintaining total market access for MFN banana suppliers".

5.161 Yesterday, the Panel asked the parties in these proceedings whether it should approach the question of whether the EC tariff meets the tariff level standard in the same manner as the Arbitrator in the banana tariff arbitrations.

5.162 The European Communities invited the Panel not be too formalistic and asserted that the assessment of whether the new import regime does indeed maintain total market access for MFN suppliers can only be based on an analysis of the real effects of the new import regime on MFN bananas. For the European Communities, this requires a volumes-based assessment.

5.163 Colombia has provided a detailed argument in paragraphs 18 to 24 of its third party written submission for why compliance with the tariff level standard ought to be assessed in the same manner as the Arbitrator and therefore in terms of conditions of competition between MFN bananas and both EC and ACP bananas.

5.164 In this statement, Colombia simply highlights that a volumes based assessment is *contrary* to the position put forward by the European Communities in the banana tariff arbitrations where it argued that the "legal notion of market access can only guarantee the legal conditions of imports, not the actual imports" and the "EC therefore urges the Arbitrators to reject the argument that market access should be measured in trade volumes or market shares".

5.165 It is also *contrary* to the rulings of the Arbitrator. The Arbitrator squarely rejected the contention that "market access" should be assessed in terms of trade volumes. It noted that "total market access *for* MFN banana suppliers" is "not a guarantee of any particular level or volume of trade or price. Rather, it relates to the opportunity for MFN suppliers to enter and compete on the EC banana market". Instead, the Arbitrator endorsed a tariff level standard based on conditions of competition.

5.166 A test based on conditions of competition rather than actual trade *flows* is consistent with a long line of GATT and WTO jurisprudence and reflects the practical reality that it is impossible to isolate the impact of a measure *from* the myriad of other factors in the real world that constantly affect fluctuations in international trade. It is clear, then, that a quantity or volume based analysis is contrary to the tariff level standard and should be rejected.

5.167 Colombia also submits that, even if bound, a tariff of €176/ton does not maintain the conditions of competition between either (i) MFN bananas and EC bananas or (ii) MFN bananas and ACP bananas.

5.168 The Arbitrator endorsed the price gap methodology which, using correct prices, would produce an estimate of the tariff equivalent that would confer the same level of protection to domestic producers as the border measures being replaced by the tariff equivalent. The Arbitrator also endorsed the following elements of the price gap methodology:

- The period 2002-2004 as the appropriate reference period.
- The Sopisco-based weighted average internal price of €702/ton in the EC-25.
- The Eurostat weighted average external price of €605/ton for MFN bananas in the EC-25.
- The Eurostat weighted average external price of €616/ton for ACP bananas in the EC-25.

5.169 Therefore, the price gap for MFN bananas during the reference period was €97/ton. In short, the tariff level that would result in at least maintaining the conditions of competition between MFN bananas and EC bananas cannot be more than €97/ton.

5.170 Furthermore, the price gap *for* ACP bananas during the reference period was €86/ton. Thus, the tariff level that would result in at least maintaining the conditions of competition between MFN bananas and ACP bananas is €11/ton.

5.171 Hence, a tariff of €176/ton – even if bound – in no way maintains the conditions of competition between MFN bananas and EC bananas or between MFN bananas and ACP bananas and, therefore, fails to comply with the tariff level standard.

5.172 For all the above reasons, Colombia submits that the Article I Doha Waiver cannot justify the preferences granted by the European Communities.

5.173 Colombia also asserts that the preferential tariff-rate quota accorded to ACP bananas is inconsistent with Articles XIII:1 and XIII:2 of the GATT.

5.174 The essence of GATT Article XIII, and, therefore Article XIII:1 is that like products should be treated equally irrespective of their origin. Article XIII:1, as applied to tariff quotas, prohibits the European Communities from establishing duty-free quantities for some Members, but not others, and from denying equal treatment to banana imports of all origins.

5.175 Furthermore, given that the European Communities' tariff-rate quota is reserved exclusively for ACP bananas it does not comply with the standard set out in Article XIII:2 of the GATT. This standard requires that "in applying import restrictions to any product, Members shall aim at a distribution of trade in such product as closely as possible the shares which the various Members might be expected to obtain in the absence of such restrictions. While MFN bananas must always bear a tariff, ACP bananas do not, because of the preferential intra-quota zero tariff. It can hardly be argued that such a distribution of trade complies with the standard set out in Article XIII:2.

5.176 In the light of the foregoing, Colombia respectfully requests the Panel to find that the measures at issue are inconsistent with Articles I and XIII of the GATT.

J. JAPAN

1. Written submission of Japan

(a) The EC-Ecuador Understanding on Bananas does not preclude Ecuador from resorting to this Article 21.5 proceeding

5.177 The European Communities preliminarily argues that the Ecuador's challenge to the current banana import regime of the European Communities should be dismissed entirely because bringing

such a challenge is not allowed due to the Understanding.[273] The European Communities considers that Ecuador's challenge to the said European Communities' import regime goes against Articles 3.7 and 3.10 of the DSU since Ecuador has accepted in the Understanding that the import regime taken by the European Communities on and after 1 January 2006 will include a preference for bananas imported from African, Caribbean and Pacific ("ACP") countries.[274]

5.178 Ecuador primarily contends on the above-mentioned European Communities' argument that it is not barred by the Understanding to refer the European Communities' current import regime of bananas to this panel established under Article 21.5 proceeding because "Articles 3.7 and 3.10 [of the DSU] do not preclude a challenge to measures based on the contention of the defending party that the measures have been 'accepted' in a mutually agreed solution."[275]

5.179 As to the legal status and the effect of mutually agreed solutions, the panel in *India – Autos* has given some useful indication. The panel has noted that there is no such provision in the DSU that precludes parties to the mutually agreed solutions from resorting to subsequent dispute settlement procedures.[276] Regarding this absence of such provision, the panel, on one hand, has mentioned that "it could not be lightly assumed in what particular circumstances the drafters of the DSU might have indicated [the rights of the Members to bring a dispute] to be foregone"; on the other hand, however, the panel has also indicated that "it could not be lightly assumed that those drafters intended mutually agreed solutions… to have no meaningful legal effect in subsequent proceedings", recognizing that "[mutually agreed solutions] are expressly referred to and supported by the DSU".[277] In this regard, Japan particularly would like to take a note of the panel's following observation presented in a precedent paragraph in its report:

> "It is certainly reasonable to assume, particularly on the basis of Article 3 of the DSU … that these agreed solutions are intended to reflect a settlement of the dispute in question, which both parties expect will bring a *final conclusion* to the relevant proceedings."[278] (Emphasis added.)

5.180 Japan agrees with the panel's observation in *India – Autos*.

5.181 However, Japan believes that the Understanding between the European Communities and Ecuador in this banana dispute[279] does not affect Ecuador's right to challenge the European Communities' current import regime in the course of this Article 21.5 proceeding for the following reasons.

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[273] Japan notes that the European Communities argues that Ecuador's challenge to the preference for ACP bananas for another reason; Ecuador should not challenge a measure which is the implementation of the recommendations and rulings contained in the adopted panel report. Please see para. 5.185, below, with respect to this argument.

[274] European Communities' first written submission, para. 64; European Communities' second written submission, para. 8.

[275] Ecuador's second written submission , para. 8.

[276] Panel Report, *India – Autos*, para. 7.113.

[277] Ibid., para. 7.115.

[278] Ibid., para. 7.113.

[279] With regard to the nature of the Understanding, although Ecuador does not clearly states so, there seems to be a disagreement between the parties: the EC alleges that the Understanding constitutes a "mutually agreed solution" in the sense of Article 3 of the DSU while Ecuador sees it contrary by declaring that the "provisions of Article 3.6 of the DSU are not applicable in this case. " Japan is not a party to the Understanding and it refrains from commenting on whether the Understanding constitutes a "mutually agreed solution" for the purpose of Article 3 of the DSU or not. However, as Ecuador bases its arguments on an assumption that the Understanding is a "mutually agreed solution" for the purpose of Article 3 of the DSU (see paras. 8-13 of its second written submission), Japan argues on the basis of the same assumption in this submission.

5.182 As pointed out by Ecuador in its Second Written Submission, it has to be made clear that any solutions which serve the purpose of Article 3 of the DSU should be consistent with the WTO rules[280] and the terms of the agreement should be observed[281]. Concerning the European Communities' current banana import regime, the European Communities claims that the import regime is the exact measure agreed between the European Communities and Ecuador under the Understanding to be taken by the European Communities on and after 1 January 2006, since the Understanding clearly prescribes that such a measure should have two characteristics, namely, "tariff only" and "granting preference to ACP countries."[282] Japan believes, however, in addition to these two characteristics, implementation of the measure prescribed in the Understanding, by definition, requires at least one more element to be satisfied, that is, to maintain a valid waiver from Article I of the GATT. Since the said regime explicitly grants a preference to bananas imported from ACP countries over those from non-ACP countries, implementation of the regime would plainly violate Article I:1 of the GATT but for a valid waiver from it. As stated at the beginning of this paragraph, a mutually agreed solution needs to be consistent with WTO rules and to be adhered to. Therefore, in Japan's view, in order for the European Communities to claim that its current import regime is implemented as prescribed in the Understanding, it is indispensable for the European Communities to implement the regime with a valid relevant waiver because such a wavier is in the nature of a mutually agreed solution for the purpose of Article 3 of the DSU.

5.183 Then, the question comes down to the issue whether the European Communities maintains a valid waiver from GATT Article I or not, which waiver is necessary for the European Communities' current import regime to be implemented in line with the mutually agreed solution. As the condition for the application of the waiver has been set in the subsequent arrangement, the "Doha Waiver",[283] it is therefore necessary to examine if the European Communities has satisfied the condition for the application of the Doha Waiver. In this regard, as both the European Communities and Ecuador recognize, there is a disagreement between them regarding the application of the waiver: the European Communities asserts that it "has fully satisfied the condition for the continued application of the Doha Waiver"; in contrary, Ecuador contends that the waiver expired on 1 January 2006, following the second arbitration award finding that the European Communities had "failed to rectify the matter", which is a condition of the waiver to cease its application.[284]

5.184 The validity of the waiver, and, the European Communities' current import regime's compliance with the Understanding, may, as indicated by the European Communities in its second written submission[285], require the examination of relevant facts. Japan, however, understands the point here to be that the fact that the European Communities' current import regime is the measure taken in accordance with the Understanding, that is, a mutually agreed solution, itself was not established at the time when Ecuador initiated this panel proceeding.[286] Therefore, even if European Communities' argument concerning the validity of the Doha Waiver for Article I of the GATT is justified in the later proceeding, and thus the European Communities' current import regime is established to be in compliance with the mutually agreed solution, there is still a merit in bringing this claim to the panel under Article 21.5 of the DSU.

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[280] Second written submission of Ecuador, para. 12.

[281] Ibid., para. 11.

[282] The Understanding, point B.

[283] *European Communities – The ACP-EC Partnership Agreement*, WT/MIN(01)/15, 14 November 2001; European Communities – Transitional Regime for the EC Autonomous Tariff Rate Quotas on Imports of Bananas, WT/MIN(01)/16, November 14, 2001.

[284] Ecuador's second written submission, para. 24.

[285] European Communities' second written submission, paras. 36-38.

[286] In this regard, Japan notes that the European Communities argues in its second written submission that "[i]t is a well established fact that the current import regime more than maintains the market access of Ecuador… and Ecuador already *knew* this fact when it initiated the current proceedings" (para. 38). Japan is not aware of statements in the parties' submissions which confirm this European Communities' argument, though.

5.185 Moreover, Japan recognizes that the European Communities further argues in its second written submission that Ecuador is barred from challenging the preference existed in European Communities' measure "because it amounts to a challenge to a suggestion made by the panel."[287] Japan considers that European Communities' assertion here does not stand, either. The panel in *EC – Bananas III (Article 21.5 – Ecuador)* has indicated possible measures that the European Communities may take to comply with the recommendations and rulings. It is important to note that the panel suggested the European Communities to take those measures with relevant waiver, if necessary.[288] Thus, Japan believes that the European Communities needs to implement the current import regime with a necessary valid waiver in order to claim that it is implementing the regime as suggested in the panel report, for the same reason stated so far, since it is not considered that the panel in *EC – Bananas III (Article 21.5 – Ecuador)* has suggested that the European Communities may take a measure inconsistent with WTO rules.

5.186 For the above reasons, Japan believes that, even if the Understanding constitutes a "mutually agreed solution" under Article 3 of the DSU, it does not become an obstacle for Ecuador to bring a case under this Article 21.5 proceeding. Therefore, Japan considers that European Communities' preliminary argument should be rejected to this extent.

K. NICARAGUA

1. Written submission of Nicaragua

(a) Introduction

5.187 The European Communities' latest banana measures, a more-than-doubled MFN tariff and duty-free ACP quota, represent yet another instalment of recurring EC non-compliance in the *Bananas* dispute. They are again the outgrowth of an internal negotiating mandate that primarily aims to guarantee a tariff-only arrangement under which "Community production is maintained and [EC] producers are not put in a less favourable situation as before the entering into force of the import quota regime in 1993." Like Ecuador, Nicaragua considers that the measures introduced by the European Communities on 1 January 2006 to fulfil its internal protectionist mandate are properly before the Panel for review, and constitute prima facie violations of GATT Articles I:1, XIII:1 and 2, and II:1.

(b) The European Communities' banana measures are properly before the Panel for review

5.188 The European Communities' first and second written submissions concede that its current measures were taken for the purpose of trying to comply with the rulings of *EC – Bananas III* and *EC – Bananas III (Article 21.5 – Ecuador)*. Since the European Communities would also have to concede that a "disagreement" exists as to whether its current measures are in conformity with the European Communities' compliance obligations, all elements needed for an Article 21.5 review are present.

(c) The European Communities' ACP Tariff Preference is inconsistent with GATT Article I:1

5.189 GATT Article I:1 requires that any customs advantage granted to the product of one Member must be accorded immediately and unconditionally to the like product of another Member. The European Communities is granting ACP bananas a zero-duty tariff preference within a 775,000 mt ACP tariff quota, while subjecting all MFN bananas to a €176/mt rate. Its ACP tariff preference is, therefore, inconsistent with GATT Article I:1.

[287] European Communities' second written submission, para. 19.
[288] Panel Report, *EC – Bananas III (Article 21.5 – Ecuador)*, paras. 6.155-6.158.

5.190 The European Communities does not contest that GATT Article I inconsistency, but wrongly asserts that the inconsistency continues to be covered by its GATT Article I waiver. Under the European Communities' interpretation, the waiver and its special banana Annex required it to subject its pre-2006 tariff proposals to successive arbitration reviews under defined terms of reference, but then allowed the European Communities, after it lost twice in arbitration, to impose whatever 2006 regime it unilaterally determined would satisfy the terms of reference for those proceedings. Properly interpreted, the waiver requires that once the Second Arbitration determined that the European Communities "has failed to rectify the matter", the waiver automatically terminated for bananas upon implementation of the European Communities' 2006 regime, making any ACP banana preference granted thereafter inconsistent with Article I.

5.191 As the ordinary meaning of the chapeau and five tirets of the waiver Annex make clear, the Annex establishes pre-2006 approval requirements governing "tariff only". Under those requirements, the European Communities' waiver for bananas was only authorized to continue beyond 2006 if the European Communities received a First Arbitration determination that its "envisaged rebinding ... would result in at least maintaining total market access for MFN banana suppliers, taking into account ... all EC WTO market access commitments"; *or* "rectified the matter" by reaching a "mutually satisfactory solution" with the interested parties; *or* "rectified the matter" by receiving a Second Arbitration determination that the European Communities "has rectified the matter". Because none of these pre-requisites was fulfilled, the waiver automatically lapsed on 1 January 2006, upon implementation of the current EC "tariff only" regime.

5.192 The European Communities seeks to override the textually-mandated termination of the waiver by highlighting what it refers to as the "real world and ... real situation in the banana market." As concerned as Nicaragua is about the *actual* detrimental MFN effects of the current regime, those effects have *no legal relevance* to the conditions attaching to the continuation of the European Communities' waiver for bananas. Nevertheless, as confirmed in a recently updated market analysis published by the Centre for International Economics ("CIE"), the €176/mt tariff preference and 775,000 mt duty-free ACP quota regime are already eroding access for the developing countries of Latin America, which damage will grow substantially worse over time.

(d) The European Communities' ACP Tariff Quota is inconsistent with GATT Articles XIII:1 and XIII:2

5.193 Paragraph one of GATT Article XIII sets forth an uncategorical prohibition against discriminatory quantitative restrictions. Paragraph 5 of GATT Article XIII extends that prohibition to tariff quotas. The *EC – Bananas III* Panel Report carefully analyzed the text of Article XIII:1 and affirmed that, consistent with its text, the like products of all Members must be similarly restricted, finding that "*a Member may not limit the quantity of imports from some Members but not from others [and] [a] Member may not restrict imports from some Members using one means and restrict them from another using another means*". In upholding the Panel's findings, the *EC – Bananas III* Appellate Body added that the "essence" of GATT Article XIII, and, therefore Article XIII:1, "is that like products should be *treated equally, irrespective of their origin*". The European Communities is applying its current zero-duty tariff quota to bananas of ACP origin, but not to bananas of MFN origin. Bananas from Nicaragua and other MFN origins are subject, instead, to a €176/mt tariff. As its tariff quota is not "similarly restricting" or "treating equally" all EC banana imports, it is facially inconsistent with GATT Article XIII:1.

5.194 The chapeau of Article XIII:2, made applicable to tariff quotas through paragraph 5, establishes an equally strict companion requirement governing the distribution of any tariff quota applied by a Member. In its interpretation of that chapeau text, the *EC – Bananas III* Panel found that if tariff quotas are used, and a Member wishes to allocate shares of a tariff quota to some Members without a substantial interest, then shares must be allocated to all Members to be consistent with the

"similarly restricted" requirement of Article XIII:1. The European Communities' current zero-duty tariff quota has been distributed in its entirety to the non-substantial supplying interests of the ACP. Nicaragua, which like the ACP countries, is a non-substantial supplier of bananas to the EC market, is receiving no share whatsoever of that tariff quota. The European Communities' ACP tariff quota is, thus, also inconsistent with Article XIII:2.

5.195 The European Communities seeks to escape Article XIII review by essentially reformulating three defenses it previously attempted in earlier *EC – Bananas III* proceedings. All three of those arguments were expressly rejected in the *EC – Bananas III* and *EC – Bananas III (Article 21.5 – Ecuador)* reports, and are equally groundless today. First, the European Communities proposes, as it did in *EC – Bananas III (Article 21.5 – Ecuador)*, that prior findings confirm the ACP tariff quota is covered only by Article I, not Article XIII. The *EC – Bananas III (Article 21.5 – Ecuador)* panel directly rejected this argument and would not have issued a "suggestion" that nullified its own findings. Its use of the words "suitable waiver" meant only that all necessary coverage would need to be pursued under Articles I and XIII, and that the European Communities had the drafting option under WTO practice of consolidating the necessary coverage into a single waiver decision if it so chose.

5.196 Second, the European Communities argues that Article XIII is not applicable to its ACP tariff quota because Article XIII does not "regulate the relationship between quantitative restrictions [an ACP tariff quota] and other measures [a MFN tariff regime]." Its effort to divide the EC market into different types of regimes to escape Article XIII review is an obvious variation of its prior "separate regimes" argument, which was also decisively rejected in the *EC – Bananas III* and *EC – Bananas III (Article 21.5 – Ecuador)* reports. The panels and Appellate Body in those proceedings affirmed that, if Article XIII could be bypassed by assigning a tariff quota to one set of countries [ACP suppliers] and an entirely different import measure to others [MFN suppliers], as the European Communities proposes, tariff-quota discrimination would proliferate, and Article XIII would be "eviscerated".

5.197 Third, the European Communities reasserts its old argument that "even if there is a quantitative restriction imposed on ACP countries" subject to GATT Article XIII, this "cap" is a "benefit" to MFN countries because it limits the quantity of ACP imports entering the Community at zero duty. Article XIII does not require a showing of nullification or impairment to sustain a claim under its provisions. In any case, MFN suppliers are being denied the benefit of zero-duty access within a protected quota. Moreover, as found in prior *EC – Bananas III* rulings, a quantitative limit reserved only for preferred suppliers enables various beneficiaries of the tariff preference "*to compete more effectively than [they] would [under] the tariff preference alone*," and "will have *repercussions on the import performance* of other substantial or non-substantial supplier countries."

(e) The European Communities' €176/mt tariff is inconsistent with its GATT Article II concessions

5.198 GATT Article II:1 prohibits a Member from treating imported product *less favourably* than provided in its Schedule and forbids the imposition of tariffs *in excess of* the bound rates set out in a Member's Schedule. The European Communities is applying a tariff of €176/mt on all MFN banana imports, a rate more than double the €75/mt in-quota bound rate. As the application of an ordinary customs duty far in excess of €75/mt to all imports of MFN bananas constitutes treatment obviously less favourable than the concessions provided for in the European Communities' Schedule, the European Communities' €176/mt "autonomous" rate is inconsistent with GATT Article II:1.

5.199 The European Communities disingenuously asserts, for the *first* time in this decade-long dispute, that its €75/mt concession lapsed as of 31 December 2002 by reason of the BFA annexed to its Schedule. It incorrectly argues in the alternative that even if the €75/mt binding did not expire at the end of 2002, it was "lawfully" terminated on 1 January 2006 because the abolition of the MFN

tariff quota would "inevitably bring along the abolition of the corresponding tariff". As demonstrated by Ecuador, the ordinary meaning, context, and object of the European Communities' Uruguay Round banana concessions, in combination with the European Communities' own conduct, make clear that the €75/mt binding continues to have legal effect and did not, as alleged by the European Communities, terminate in 2002.

5.200 By its terms, the 1994 BFA was a free-standing "settlement" agreement between the European Communities, on the one hand, and Nicaragua, Colombia, Costa Rica, and Venezuela, on the other. When the BFA stated that "this *agreement* shall apply until 31 December 2002", it meant just that, i.e., that the European Communities' agreement *with the four BFA Latin American countries*, not the Uruguay Round concessions applicable to all WTO Members, would terminate at the end of 2002. Insofar as the European Communities' WTO statements, legal instruments, and internal communications repeatedly acknowledge the continuing validity of the €75/mt binding, it is in no position now to argue otherwise. Likewise, it cannot argue that its move from a MFN tariff quota to "tariff-only" "automatically" dissolved all GATT Article II obligations attaching to its €75/mt binding. The very purpose of GATT Article II is to preserve the value of a Member's tariff concessions and prohibit the "automatic abolition" of those concessions. Indeed, the European Communities has itself officially acknowledged the continuing bound commitment of €75/mt under Article II upon discontinuation of the MFN tariff quota.

(f) Conclusion

5.201 To ensure that this decade-long dispute does not culminate in discrimination and restrictions equal to or worse than those already condemned in prior WTO reviews, Nicaragua joins Ecuador in urging a prompt determination that the measures now before the Panel are inconsistent with GATT Articles I:1, XIII:1 and XIII:2, and II.

L. PANAMA

1. Written submission of Panama

(a) Introduction

5.202 The European Communities' latest banana measures, a more-than-doubled MFN tariff and duty-free ACP quota, represent yet another instalment of recurring EC non-compliance in the *Bananas* dispute. They are again the outgrowth of an internal negotiating mandate that primarily aims to guarantee a tariff-only arrangement under which "Community production is maintained and [EC] producers are not put in a less favourable situation as before the entering into force of the import quota regime in 1993". Like Ecuador, Panama considers that the measures introduced by the European Communities on 1 January 2006 to fulfil its internal protectionist mandate are properly before the Panel for review, and constitute prima facie violations of GATT Articles I:1, XIII:1 and 2, and II:1.

(b) The European Communities' banana measures are properly before the Panel for review

5.203 The European Communities' first and second written submissions concede that its current measures were taken for the purpose of trying to comply with the rulings of *EC – Bananas III* and *EC – Bananas III (Article 21.5 – Ecuador)*. Since the European Communities would also have to concede that a "disagreement" exists as to whether its current measures are in conformity with the European Communities' compliance obligations, all elements needed for an Article 21.5 review are present.

(c) The European Communities' ACP Tariff Preference is inconsistent with GATT Article I:1

5.204 GATT Article I:1 requires that any customs advantage granted to the product of one Member must be accorded immediately and unconditionally to the like product of another Member. The European Communities is granting ACP bananas a zero-duty tariff preference within a 775,000 mt ACP tariff quota, while subjecting all MFN bananas to a €176/mt rate. Its ACP tariff preference is, therefore, inconsistent with GATT Article I:1.

5.205 The European Communities does not contest that GATT Article I inconsistency, but wrongly asserts that the inconsistency continues to be covered by its GATT Article I waiver. Under the European Communities' interpretation, the waiver and its special banana Annex required it to subject its pre-2006 tariff proposals to successive arbitration reviews under defined terms of reference, but then allowed the European Communities, after it lost twice in arbitration, to impose whatever 2006 regime it unilaterally determined would satisfy the terms of reference for those proceedings. Properly interpreted, the waiver requires that once the Second Arbitration determined that the European Communities "has failed to rectify the matter," the waiver automatically terminated for bananas upon implementation of the European Communities' 2006 regime, making any ACP banana preference granted thereafter inconsistent with Article I.

5.206 As the ordinary meaning of the chapeau and five tirets of the waiver Annex make clear, the Annex establishes pre-2006 approval requirements governing "tariff only". Under those requirements, the European Communities' waiver for bananas was only authorized to continue beyond 2006 if the European Communities received a First Arbitration determination that its "envisaged rebinding ... would result in at least maintaining total market access for MFN banana suppliers, taking into account ... all EC WTO market access commitments;" *or* "rectified the matter" by reaching a "mutually satisfactory solution" with the interested parties; *or* "rectified the matter" by receiving a Second Arbitration determination that the European Communities "has rectified the matter." Because none of these pre-requisites was fulfilled, the waiver automatically lapsed on 1 January 2006, upon implementation of the current EC "tariff only" regime.

5.207 The European Communities seeks to override the textually-mandated termination of the waiver by highlighting what it refers to as the "real world and ... real situation in the banana market." As concerned as Panama is about the *actual* detrimental MFN effects of the current regime, those effects have *no legal relevance* to the conditions attaching to the continuation of the European Communities' waiver for bananas. Nevertheless, as confirmed in a recently updated market analysis published by the Centre for International Economics ("CIE"), the €176/mt tariff preference and 775,000 mt duty-free ACP quota regime are already eroding access for the developing countries of Latin America, which damage will grow substantially worse over time.

(d) The European Communities' ACP tariff quota is inconsistent with GATT Articles XIII:1 and XIII:2

5.208 Paragraph one of GATT Article XIII sets forth an uncategorical prohibition against discriminatory quantitative restrictions. Paragraph 5 of GATT Article XIII extends that prohibition to tariff quotas. The *EC – Bananas III* Panel Report carefully analyzed the text of Article XIII:1 and affirmed that, consistent with its text, the like products of *all* Members must be similarly restricted, finding that "*a Member may not limit the quantity of imports from some Members but not from others [and] [a] Member may not restrict imports from some Members using one means and restrict them from another using another means*". In upholding the Panel's findings, the *EC – Bananas III* Appellate Body added that the "essence" of GATT Article XIII, and, therefore Article XIII:1, "is that like products should be *treated equally, irrespective of their origin*". The European Communities is applying its current zero-duty tariff quota to bananas of ACP origin, but not to bananas of MFN origin. Bananas from Panama and other MFN origins are subject, instead, to a €176/mt tariff. As its

tariff quota is not "similarly restricting" or "treating equally" all EC banana imports, it is facially inconsistent with GATT Article XIII:1.

5.209 The chapeau of Article XIII:2, made applicable to tariff quotas through paragraph 5, establishes an equally strict companion requirement governing the distribution of any tariff quota applied by a Member. In its interpretation of that chapeau text, the *EC – Bananas III* Panel found that if tariff quotas are used, and a Member wishes to allocate shares of a tariff quota to some Members without a substantial interest, then shares must be allocated to all Members to be consistent with the "similarly restricted" requirement of Article XIII:1. The European Communities' current zero-duty tariff quota has been distributed in its entirety to the non-substantial supplying interests of the ACP. Panama, which like Ecuador, has been recognized by the European Communities as a principal supplier of bananas to the EC market, is receiving no share whatsoever of that tariff quota. The European Communities' ACP tariff quota is, thus, also inconsistent with Article XIII:2.

5.210 The European Communities seeks to escape Article XIII review by essentially reformulating three defenses it previously attempted in earlier *EC – Bananas III* proceedings. All three of those arguments were expressly rejected in the *EC – Bananas III* and *EC – Bananas III (Article 21.5 – Ecuador)* reports, and are equally groundless today. First, the European Communities proposes, as it did in *EC – Bananas III (Article 21.5 – Ecuador)*, that prior findings confirm the ACP tariff quota is covered only by Article I, not Article XIII. The *EC – Bananas III (Article 21.5 – Ecuador)* panel directly rejected this argument and would not have issued a "suggestion" that nullified its own findings. Its use of the words "suitable waiver" meant only that all necessary coverage would need to be pursued under Articles I and XIII, and that the European Communities had the drafting option under WTO practice of consolidating the necessary coverage into a single waiver decision if it so chose.

5.211 Second, the European Communities argues that Article XIII is not applicable to its ACP tariff quota because Article XIII does not "regulate the relationship between quantitative restrictions [an ACP tariff quota] and other measures [a MFN tariff regime]." Its effort to divide the EC market into different types of regimes to escape Article XIII review is an obvious variation of its prior "separate regimes" argument, which was also decisively rejected in the *EC – Bananas III* and *EC – Bananas III (Article 21.5 – Ecuador)* reports. The panels and Appellate Body in those proceedings affirmed that, if Article XIII could be bypassed by assigning a tariff quota to one set of countries [ACP suppliers] and an entirely different import measure to others [MFN suppliers], as the European Communities proposes, tariff-quota discrimination would proliferate, and Article XIII would be "eviscerated".

5.212 Third, the European Communities reasserts its old argument that "even if there is a quantitative restriction imposed on ACP countries" subject to GATT Article XIII, this "cap" is a "benefit" to MFN countries because it limits the quantity of ACP imports entering the Community at zero duty. Article XIII does not require a showing of nullification or impairment to sustain a claim under its provisions. In any case, MFN suppliers are being denied the benefit of zero-duty access within a protected quota. Moreover, as found in prior *EC – Bananas III* rulings, a quantitative limit reserved only for preferred suppliers enables various beneficiaries of the tariff preference "*to compete more effectively than [they] would [under] the tariff preference alone*," and "will have *repercussions on the import performance* of other substantial or non-substantial supplier countries".

(e) The European Communities' €176/mt tariff is inconsistent with its GATT Article II concessions

5.213 GATT Article II:1 prohibits a Member from treating imported product *less favourably* than provided in its Schedule and forbids the imposition of tariffs *in excess of* the bound rates set out in a Member's Schedule. The European Communities is applying a tariff of €176/mt on all MFN banana imports, a rate more than double the €75/mt in-quota bound rate. As the application of an ordinary

customs duty far in excess of €75/mt to *all* imports of MFN bananas constitutes treatment obviously less favourable than the concessions provided for in the European Communities' Schedule, the European Communities' €176/mt "autonomous" rate is inconsistent with GATT Article II:1.

5.214 The European Communities disingenuously asserts, for the *first* time in this decade-long dispute, that its €75/mt concession lapsed as of 31 December 2002 by reason of the BFA annexed to its Schedule. It incorrectly argues in the alternative that even if the €75/mt binding did not expire at the end of 2002, it was "lawfully" terminated on 1 January 2006 because the abolition of the MFN tariff quota would "inevitably bring along the abolition of the corresponding tariff." As demonstrated by Ecuador, the ordinary meaning, context, and object of the European Communities' Uruguay Round banana concessions, in combination with the European Communities' own conduct, make clear that the €75/mt binding continues to have legal effect and did not, as alleged by the European Communities, terminate in 2002.

5.215 By its terms, the 1994 BFA was a free-standing "settlement" agreement between the European Communities, on the one hand, and Nicaragua, Colombia, Costa Rica, and Venezuela, on the other. When the BFA stated that "this *agreement* shall apply until 31 December 2002", it meant just that the European Communities' agreement *with the four BFA Latin American countries*, not the Uruguay Round concessions applicable to all WTO Members, would terminate at the end of 2002. Insofar as the European Communities' WTO statements, legal instruments, and internal communications repeatedly acknowledge the continuing validity of the €75/mt binding, it is in no position now to argue otherwise. Likewise, it cannot argue that its move from a MFN tariff quota to "tariff-only" "automatically" dissolved all GATT Article II obligations attaching to its €75/mt binding. The very purpose of GATT Article II is to preserve the value of a Member's tariff concessions and prohibit the "automatic abolition" of those concessions. Indeed, the European Communities has itself officially acknowledged the continuing bound commitment of €75/mt under Article II upon discontinuation of the MFN tariff quota.

(f) Conclusion

5.216 To ensure that this decade-long dispute does not culminate in discrimination and restrictions equal to or worse than those already condemned in prior WTO reviews, Panama joins Ecuador in urging a prompt determination that the measures now before the Panel are inconsistent with GATT Articles I:1, XIII:1 and XIII:2, and II.

2. Combined oral statement by Panama and Nicaragua

5.217 Panama begin this morning with brief comments on what the European Communities' renewed WTO violations, and enduring history of non-compliance, have meant for the people of Panama. Nicaragua, will then briefly discuss the European Communities' inequitable access treatment from the standpoint of her own country. Finally, the legal advisor to the Governments of Panama and Nicaragua, will explain why the European Communities' banana measures are plainly in violation of GATT Articles I, II, and XIII, and fail to bring the European Communities into compliance with prior DSB rulings.

5.218 Thirteen years ago, Panama was negotiating its accession to the WTO. Then, as now, bananas were Panama's principal agricultural export and an indispensable source of income for the poorest rural populations. Then, as now, the European Communities restricted access to bananas from Panama and other Latin American countries in obviously discriminatory ways. Although the accession process was not an easy one for Panama, Panama promised its people that in exchange for accession sacrifices, Panama would be part of a rule-based system that would finally help it protect its trading interests against unfair restrictions and discrimination on products like bananas.

5.219 Once Panama's accession was finalized in 1997, Panama was procedurally foreclosed from joining *Bananas III*, but spent substantial time and resources in Geneva and at the 2001 Doha Ministerial helping to lead the GATT Article I waiver negotiations relating to bananas. As the record of those negotiations makes perfectly clear, Panama and other Latin American suppliers declined to accept the European Communities' waiver request for many months until strict Arbitration controls, and the "two strikes and you're out" rule in particular, were built into the waiver's text. Upon receiving those commitments, Panama returned from the Doha Ministerial meeting once again promising its people that the multilateral controls of the Annex were certain to safeguard its banana interests.

5.220 These various rule-related promises, which initially gave the people of Panama such comfort, have now sadly given way to reality. Shaken first by the European Communities' extended *Bananas III* non-compliance in 1999, they have now been all but shattered by the European Communities' obviously non-compliant transition to "tariff-only."

5.221 Two years ago, during the 2005 Arbitration hearing, Panama listened with dismay and alarm as the European Communities defended its high-tariff discrimination using justifications that would dismantle the protections of the Annex word-by-word. Panama heard the European Communities insist then:

- that it had done the right and responsible thing in "balancing all interests" by increasing the €75 tariff by several multiples;
- that the Arbitrator should not read the words of the waiver Annex with "mechanistic" formality, meaning it should ignore the words as they were written;
- that the Arbitrator should not consider the preferential treatment accorded to ACP suppliers, which the European Communities claimed was separate and apart from the MFN arrangement;
- that MFN access should be reduced to the €75 tariff for 2.2 million tonnes of bananas scheduled in the Uruguay Round, although MFN access had grown considerably since then; and
- that the European Communities was entirely within its right to structure its banana-access arrangement primarily to protect its subsidized banana producers.

5.222 In listening to the vigour with which those arguments were made, it was hard for Panama to find any comfort that the European Communities would faithfully respect the Annex as of 2006. Indeed, it did not.

5.223 After losing twice in Arbitration, and without so much as a single negotiation with Latin America, the European Communities enacted in haste a new arrangement virtually identical to the one already condemned in Arbitration, with ACP preferences that were no longer allowed under the waivers of Article I and XIII. The European Communities presented its 2006 arrangement to us as a *fait accompli*, explained that its effects would be "monitored" in the "real world."

5.224 So, today, Panama is here again to protect its rural producers and communities that depend on this product, Panama hopes you will understand its deep sense of injustice and disappointment. Even now, in ways both disturbingly familiar and strangely contradictory, Panama hears the European Communities argue:

- that it has struck a successful balance between all interests involved, which would "not be in the interest of any country involved ... to undo;"

- that the Panel must avoid a "formalistic" reading of the Annex, meaning it should ignore the words of the text as they were written;

- that the relationship between the MFN and the ACP treatment cannot be compared; and

- that the €75 tariff is not even bound, despite its insistence throughout Arbitration that its Uruguay Round concessions (€75/mt for 2.2 million tonnes) were the *only* effective commitments the Arbitrator could use to measure "market access."

5.225 What should Panama make of a dispute in which after over a decade of successful multilateral challenges, extensive panel and Appellate Body findings against the European Communities, compliance and suspension actions, and two WTO arbitration determinations against the European Communities, the European Communities is still unilaterally installing discrimination that it defends with the same failed claims? The frustrations felt by those who worked hard to accomplish accession for Panama are nothing compared to the concerns of Panama's banana producers, whose livelihood is inseparably linked to a successful, non-discriminatory resolution of this dispute.

5.226 Panama knows there is nothing that can be done to restore the hundreds of millions of dollars in lost revenues, and nothing that can be done to restore the thousands of lost jobs Panama has already suffered from years of EC banana discrimination. All Panama can respectfully seek is a ruling against the European Communities on all counts that is timely, decisive, and leaves no room for European Communities misinterpretation. A ruling of that nature will hopefully enable Panama, as a principal banana supplier to the EC market, to negotiate acceptable access reforms that finally accord its producers the opportunity to trade in a market run according to the rules. Only then can Panama's banana producers prosper and have a legitimate opportunity to trade their way out of poverty.

5.227 Like Panama, Nicaragua finds the circumstances of these proceedings to be most disappointing. The bananas issue is by no means new to us either. In virtually all of the many litigation proceedings that have occurred over bananas since the early 1990s, Nicaragua has been a participant.

5.228 Nicaragua's reason for remaining engaged in the dispute is a simple one. Bananas are one of the agricultural sectors in Nicaragua that offers the people economic hope. As this Panel knows, Nicaragua is a severely indebted country. Its annual Gross National Income of $910 is below the GNIs of several LDCs and well behind the GNIs of most ACP countries. Bananas are one of Nicaragua's major agricultural crops and generate thousands of jobs across its agricultural departments. An additional 30,000 Nicaraguans are working on banana farms elsewhere in Central America, making the health of the entire Latin American banana industry important to large portions of our population.

5.229 Nicaragua's banana production has good competitive advantages: fertile soil, ample labor, the latest technologies, excellent quality, and reasonable proximity to ports. Because of its structural advantages, this is a sector that should be able to raise the economic standards of Nicaragua's most vulnerable regions if it is given a fair opportunity to compete.

5.230 Although the European Communities has said in this proceeding, and in all prior banana proceedings, that it is committed to assisting developing countries overcome their economic problems through trade, it is hard to see how this is so in the case of Nicaragua's banana industry. Nicaragua's opportunities to compete in the European Communities' banana trade have essentially vanished.

5.231 When the dispute first began years ago, Nicaragua was able to market 60,000 mt of bananas annually to the northern European markets that now represent the European Communities. Access was possible because those markets were encumbered by a simple tariff of 20% *ad valorem* and, in the case of Germany, no tariff at all. The 20 per cent tariff, which was the European Communities' scheduled banana concession from 1963-1994, was the equivalent of about €80 per tonne. Thereafter in 1994, Nicaragua was one of the Banana Framework Agreement countries that helped negotiate the European Communities' €75 in-quota concession, a rate subsequently scheduled by the European Communities in the Uruguay Round. Under that scheduled arrangement, Nicaragua was still able to maintain reasonable EC imports, although the signs of discrimination were becoming more pronounced.

5.232 Today, after years of "winning" multilateral challenges against the European Communities' banana policies, this long dispute has left Nicaragua with measures more discriminatory than those first challenged at the outset of the dispute years ago. Nicaragua, like other developing countries of Latin America, faces an insurmountable duty of €176 (or $4.33/box), a rate several multiples higher than the rates we relied on to enter our bananas over the course of more than four decades. To make matters worse, Nicaraguan producers are denied all access to the European Communities' duty-free quota, which is reserved for suppliers that in most cases are economically far better situated than Nicaragua.

5.233 By favouring its own subsidized producers and certain developing countries over Nicaraguan suppliers, the European Communities has come close to defeating our banana industry. Today, Nicaraguan banana shipments to the European Communities are non-existent. Until the European Communities opens its market on an equitable basis to all suppliers irrespective of origin, Nicaragua sees no prospect of ever again shipping to this once-promising market.

5.234 Nicaragua, like Ecuador, seeks the Panel's help in clarifying to the European Communities and its member States that equitable market access, consistent with the EC schedule, is not a matter of EC discretion. It is unconditionally mandated by Articles I, II, and XIII, and is long overdue.

5.235 Before handing over to Nicaragua and Panama's legal advisor to discuss the various details of law, Nicaragua would like to share two negotiating realities, about which it is quite clear because of Nicaragua's direct participation on these matters.

5.236 Nicaragua, like Panama, actively negotiated the GATT Article I waiver Decision in the months and days leading up to November 2001. That waiver's negotiating history is a matter of record and uncontestable. It shows that the European Communities tried for nearly two years to get open-ended discretionary authority for its 2006 regime, but was explicitly denied a waiver on that basis. It was only after the negotiators built into the waiver an express commitment that *any* future tariff would be subject to WTO arbitration and that the waiver would terminate in the event of two failed arbitrations that a multilateral consensus was possible. Absent those strict controls, the waiver would not have been granted.

5.237 The story is an equally clear one in the case of the Banana Framework Agreement, to which Nicaragua was a signatory. The Government of Nicaragua was seeking in that Agreement improved EC access in exchange for a *Bananas II* "peace clause". Nicaragua never once discussed revoking all current access opportunities as of 2003, would obviously have never agreed to such a revocation, and would certainly never have considered ourselves authorized to revoke access commitments on a plurilateral basis that were otherwise required on a multilateral basis.

5.238 These two EC notions – that the BFA signatories would have agreed to a *Bananas II* peace clause in exchange for a virtual ban on access as of 2003, and that the Latin American negotiators would have lifted their two-year banana waiver reservation in exchange for EC unilateralism as of

2006 – defy everything those two agreements stood for. They are arguments, Nicaragua is sorry to say, reminiscent of countless comparable EC arguments in the past that have contributed to chronic EC non-compliance over the years and have placed such an intolerable resource burden on a country like Nicaragua to defend its basic WTO rights.

5.239 In almost all of the proceedings that have ever occurred on bananas, the WTO reviewing bodies have closed with a common reflection. They have made the point that whatever policy priority the European Communities may assign to protecting its subsidized producers and ACP suppliers, the fundamental principles of the WTO are designed to foster the development of all countries, not just some, and must be fulfilled through WTO-consistent trade and non-trade measures.

5.240 In keeping with that same immutable WTO principle, and the ample demonstration of non-compliance now on the record, Nicaragua respectfully asks the Panel to uphold Ecuador's case on all claims. With your strong support, lasting EC compliance may finally be possible.

5.241 The legal advisor to the Governments of Panama and Nicaragua will now explain why the European Communities' banana measures are inconsistent with its WTO obligations and fail to bring the European Communities into compliance with DSB rulings.

5.242 Rather than repeating Ecuador's affirmative case, with which Panama and Nicaragua fully agrees, Panama and Nicaragua will put principal emphasis this morning on the European Communities' flawed defences and certain issues raised in yesterday's session.

5.243 In the ten GATT and WTO proceedings involving this product, EC compliance problems under GATT Articles I, II, and XIII have all come up before. So as not to be later arguing, once again, retried versions of failed EC defenses – some of which are already in their third generation – Panama and Nicaragua believe that clarity is needed on all three claims, and that no one of these claims should be subordinate to another.

(a) The inconsistency with GATT Article I

5.244 In the case of the European Communities' tariff preference, which violates GATT Article I, the European Communities opens its defence with the unwarranted "preliminary objection" that Ecuador's claim should be dismissed because Article 21.5 can not be used to question a "mutually agreed solution" between the parties. This objection tries to mire you in a systemic question when the necessary predicate of that question, a proper DSU Article 3 "solution," is not even present.

5.245 Under the clear terms of DSU Articles 3.5 and 3.7, there can be no "solution" to a dispute, including a "mutually agreed solution," unless it is "consistent with the covered agreements." As the European Communities has already acknowledged, the Understanding, in and of itself, was not WTO-consistent. It was a "means" to a solution involving phased steps, each of which would not become consistent with the covered agreements unless waivers of GATT Article I and GATT Article XIII were achieved, and the conditions of those waivers were then met. When it came to the final phase of the Understanding, "tariff only," the European Communities never met the terms of the Article I waiver or its other WTO obligations. It was the European Communities, through its own illegal actions, that obstructed a solution consistent with the covered agreements. The European Communities cannot be allowed to prevent a consistent Article 3 solution by reverting to non-compliance, and then deprive Ecuador of its ability to challenge these renewed illegalities in DSU non-compliance procedures.

5.246 In fact, to try to prevent this very problem, when the European Communities requested that the matter be withdrawn from the DSB agenda in February 2002, the minutes confirm that Ecuador and other countries were only willing to accept its removal from the agenda on a conditional basis.

As expressed by Ecuador, because "these waivers included new stages which would have to be carried out in order to ensure a proper transition to a tariff-only banana regime … if there was any disagreement concerning the measures applied by the European Communities, the matter could be referred to the original Panel pursuant to Article 21.5."[289] Other countries made comparable reservations. The European Communities' effort to block Ecuador's reserved right would amount to double jeopardy, finds no support anywhere in the DSU, and should itself be dismissed.

5.247 The European Communities' substantive Article I defence is equally baseless. As argued by the European Communities, the Doha waiver continues to excuse its Article I violation because even after it lost twice in arbitration, the waiver still allowed it to implement another regime of its own choosing so long as it simply asserted that its definition of the waiver access standard had been met. There is literally nothing in the words, architecture, purpose, or negotiating history of the waiver that lends support to that claim.

5.248 This waiver took nearly two years to approve precisely because of bananas. Having suffered the "long-standing banana dispute," not a single Latin American banana supplier was willing to leave the 2006 banana regime to the European Communities' discretion. The European Communities' second submission readily acknowledges the waiver difficulties the European Communities faced on bananas.[290] As confirmed by its eleventh recital, this waiver was only able to receive the collective endorsement of the Membership after the European Communities committed in the Annex to a strict "multilateral control" on "*any* rebinding."

5.249 The words finally reflected in the Annex – inserted at the insistence of the Latin American banana suppliers – narrowly limited the extension of the waiver for bananas beyond 2006 to three carefully controlled circumstances: the European Communities could prevail in the first arbitration, it could prevail in the second arbitration, or it could reach a "mutually satisfactory solution" with the MFN suppliers. Whichever option the European Communities took, the plain words of the Annex required the process to be concluded, in its entirety, before the 2006 arrangement took force. This left no room for unilateral EC discretion from 2006 forward. To make unmistakably clear that EC discretion was not allowed, the European Communities' penalty for failing the Annex controls, a lapsed waiver, was framed to take effect automatically "upon entry into force" of the new regime, and not a day later.

5.250 These waiver provisions – the time-delineated arbitration controls; the prospective orientation of the Annex standard; the "upon entry into force" termination language; the "shall be concluded before the entry into force" language, and the other supportive passages of the Annex – would have no meaning whatsoever if the European Communities still had the right as of 2006 to install whatever regime it wanted to. No one would have bothered with an Annex or two arbitration procedures if this were so.

5.251 The European Communities asks the Panel to reject this "formalistic" reading of the Annex in favour of what it calls a "real world" analysis. This is its euphemism for asking the Panel to ignore the Vienna Convention, the rules for interpreting waivers, the words of the Annex, the ample negotiating history, and the very purpose of these multilateral controls in favour of an approach under which there are no real Latin American protections nor penalties for EC non-compliance of any kind. Here is how the European Communities' approach would work in practice. As here, the European Communities would set the tariff wherever it wanted to and wait for a DSB challenge. If the DSB panel erroneously revisited the defunct waiver access standard and confirmed what the Arbitrator's prior analytical framework makes obvious – that a 135 per cent increase in the MFN tariff, and ACP and EBA margin of preference, definitionally fails to result "in at least maintaining" MFN conditions

[289] Minutes of DSB Meeting of 1 February 2002, WT/DSB/M/119, 6 March 2002, para. 5.
[290] European Communities' second written submission, para. 83.

of competition into the future – the European Communities would be undeterred. It would simply do what it did in late 2005. It would reduce its tariff by only a few digits and call the matter "rectified". If the Latin American suppliers then returned to the same panel, the European Communities could merely continue the same sequence for as long as it needed to, reducing its tariff by miniscule amounts, digit-by-digit, until the Partnership Agreement expired by its own terms.

5.252 After so many years of banana discord, that EC unilateralism is exactly what the Latin American negotiators were unwilling to accept in the waiver negotiations, and exactly why they insisted on pre-2006 controls and a "two-strikes-and-you're-out" termination provision before granting their approval.

5.253 The European Communities has lost its waiver for bananas, making its ACP banana preference illegal under Article I.

(b) The inconsistency with GATT Article XIII

5.254 The European Communities' Article XIII violation, arising from its discriminatory ACP tariff quota, is likewise inexcusable.

5.255 Here, the European Communities begins its defence with another "preliminary objection." Under this one, its three-part contention is: (i) that the simple use of the phrase "suitable waiver" in the "MFN tariff and ACP tariff-quota *suggestion*" of the first Article 21.5 panel must be read to mean that Article XIII is *per se* inapplicable to all tariff and tariff-quota arrangements; (ii) that this EC-defined meaning of the suggestion should be elevated to a binding determination of law; and (iii) that because Ecuador never contested these multi-layered EC presumptions, it is terminally barred from challenging any tariff and tariff-quota arrangement under Article XIII. For all the reasons Ecuador summarized yesterday, this is a tortured reading of the panel report and DSU.

5.256 The panel's second suggestion never absolved *any* discriminatory ACP tariff quota from the obligations of Article XIII, however the larger import regime might be structured. To the contrary, the panel, only paragraphs before, found the European Communities' exclusive ACP tariff quota, *by its own specific shape and nature*, to be a quantitative restriction covered by Article XIII:5 that failed to treat like products "equally, irrespective of origin," in violation of Article XIII. No subsequent compliance suggestion can be read to nullify that *actual* finding of law.

5.257 The only credible reading of the panel's second suggestion emerges from the structure and syntax of the recommendations themselves. The first clause of the second suggestion, relating to a MFN tariff, did not address the Article I waiver requirements simply because those requirements had just been addressed in the first pure-tariff-only suggestion. The ACP tariff quota was the new element differentiating suggestion two from suggestion one, explaining why the panel would add the clause, "with a tariff quota for ACP bananas covered by a suitable waiver." It was that added tariff quota that needed a "suitable waiver," as distinguished from the tariff-related waiver already discussed in suggestion one.

5.258 The fiction the European Communities creates in its preliminary objection is further belabored in its "substantive" defence. It insists that while Article XIII does regulate arrangements under which all imports are entered under tariff quotas, it does not regulate those under which some sources are entered under quantitative restrictions and others not. This is its old, failed "separate regime" argument. The *Bananas III* panel and Appellate Body already expressly found that Article XIII, including Article XIII:5, applies to *all* bananas irrespective of origin and irrespective of the regulatory means by which those bananas are entered. If the unconditional obligations of Article XIII were interpreted otherwise, any Member could apply a discriminatory tariff quota with impunity, so long as one or more suppliers were regulated by other means.

5.259 The European Communities' second substantive Article XIII defence is another failed relic of prior *Bananas III* proceedings. Its essence is that because the tariff quota is a "cap" on ACP imports, it "benefits" MFN suppliers. While the European Communities can no doubt find any number of ways to make its banana import arrangement more discriminatory, and certainly has over the years, that possibility does nothing to excuse the dissimilar Article XIII restrictions, nor to rebut the presumption of nullification and impairment created by that discrimination. This is a measure that shields all ACP suppliers from competition within the quota, guarantees them sole access to a discriminatory portion of the EC market, allows certain ACP suppliers to compete more effectively in the European Communities than would otherwise have been the case absent the discriminatory reserve, and denies all MFN suppliers equivalent access to the zero-duty allocation. No one can credibly consider this a "benefit" to MFN suppliers.

5.260 The European Communities itself appears to recognize that its Article XIII defences are not convincing. Why else would it still have a request pending for a renewed Article XIII waiver to cover its exclusive ACP tariff quota under an arrangement in which MFN bananas would separately be entered under a flat tariff? At least in this respect the European Communities is right. Absent a waiver, its exclusive ACP tariff quota is a patent violation of Article XIII.

(c) The inconsistency with GATT Article II

5.261 As Ecuador stated yesterday, the European Communities' Article II defences are, in some ways, the most dismaying EC claims of all. Unlike its other defences, many of which have been heard for years, these are a 180° reversal of prior EC statements, which have been documented again and again in EC legal instruments, internal communications, WTO notifications, and prior WTO proceedings.

5.262 For the first time ever in this very long dispute, the European Communities asserts that its €75/mt concession expired at the end of 2002 under the BFA language annexed to its Schedule. To accept that proposition, one would have to ignore:

- the current-access rules of the Uruguay Round, which informed these concessions and required all current-access opportunities to continue over time;
- the European Communities' 1994 corrigendum, which specifically confirms that its in-quota concession of 75 ECU/mt for 2.2 million tonnes is its "*final*" bound "current access quota;"
- the BFA's termination provision, which speaks only of the "agreement" reached by the five parties, and nowhere of the multilateral "concessions" the European Communities was independently required to schedule as its final Uruguay Round bound rates;
- the European Communities' original Uruguay Round proposal on bananas, a 100 ECU/mt in-quota concession for an unlimited period, which the BFA sought to improve, not cancel altogether as of 2003;
- the *Bananas III* panel report, which explicitly validates the €75/mt concession, as the European Communities itself has acknowledged;
- the 2005 Arbitration Award, which equally validates that concession;
- the European Communities' official 2004 and 2005 Article XXVIII notifications, which in both cases refer to "concessions" in the plural, not the singular; and
- a series of other EC statements and documents, too numerous to recount, that confirm the continuing bound effect of its €75/mt rate.

5.263 The European Communities now appears especially discomforted by its adamant confirmation of the €75/mt bound rate during Arbitration. To try to reconcile that awkward inconsistency, it argues that the bound rates were never really at issue in Arbitration. Members of the Panel, with due respect, the European Communities made its in-quota Uruguay Round concessions

the *centerpiece* of its entire Arbitration argument, insisting that its 2006 market-access arrangement should only have to approximate its bound €75/mt tariff for 2.2 million tonnes. It is disingenuous and fundamentally disheartening for the European Communities now to pretend that those concessions disappeared years ago.

5.264 For the European Communities to argue, alternatively, that the €75/mt binding "lawfully terminated" with the abolition of its MFN tariff quota is no less disingenuous. Here, too, there is an ample paper trail of EC acknowledgements that its €75/mt concession would have to be accorded Article II protection in the European Communities' move to "tariff only."

5.265 The European Communities' €176/mt tariff on all MFN bananas represents far less favourable treatment than the concessions provided for in the European Communities' Schedule in violation of Article II:1(a) and far exceeds those in-quota concessions in violation of Article II:1(b).

5.266 When the European Communities closes its case by contending that its current arrangement "balances" the interests of all involved, Panama and Nicaragua, like Ecuador, must take issue. This is a regime that was shaped primarily to protect its subsidized Community production; that was installed without so much as a single consultation with MFN interests; that replicates measures plainly disallowed by previous *Banana* rulings; that, perhaps more than any other WTO case, has eroded confidence in the dispute settlement mechanisms of this institution; and that, yes, in EC tariff payments alone, is drawing almost $1 billion annually out of the developing countries of Latin America. No WTO objective is served by this illegal regime.

5.267 Panama and Nicaragua join Ecuador in urging the promptest possible determination that these banana measures are inconsistent with the European Communities' obligations under GATT Articles I, XIII, and II, and fail to bring the European Communities into compliance.

M. UNITED STATES

1. Written submission of the United States

5.268 The United States agrees with Ecuador that the European Communities' import regime for bananas is inconsistent with Articles I and XIII of the General Agreement on Tariffs and Trade 1994. The United States reserves the right to elaborate further on its views in a statement at the meeting of the Panel with the parties and third parties.

2. Oral statement of the United States

5.269 The United States believes that Ecuador is on solid legal ground in challenging the European Communities' revised banana regime. The United States will first address the preliminary objections raised by the European Communities in this proceeding before turning to our view on the merits.

(a) Preliminary objections

5.270 The European Communities argues that Ecuador should be precluded from having recourse to DSU Article 21.5 on two grounds: one, because the EC-Ecuador Understanding on Bananas constitutes a "mutually agreed solution" through which Ecuador has allegedly agreed to the current EC banana regime, including the preference granted to the ACP countries; and, two, because a WTO Member cannot challenge a measure that was "suggested" by a WTO panel. These arguments are groundless and should be rejected.

(b) Mutually agreed solution

5.271 The EC-Ecuador Understanding on Bananas (and a similar understanding between the United States and the European Communities) described a phased series of steps to be taken by the European Communities over several years, in combination with certain waivers, for the purpose of bringing itself into compliance with its WTO obligations. The series of steps would culminate with a "tariff only regime" by 1 January 2006, not a "tariff-rate-quota-only-for-some" regime. The European Communities and Ecuador disagree whether as a matter of fact their Understanding constitutes a mutually agreed solution for purposes of Article 3.6 of the DSU. But in the end this is irrelevant since the Understanding in any event does not preclude this dispute.

5.272 Article 1.1 of the DSU restricts the application of the DSU to the "covered agreements" listed in Appendix 1 to the DSU. The Understanding is not a "covered agreement". Accordingly, the DSU cannot be used to settle a dispute as to the meaning or effect of the Understanding, and the DSU cannot enforce the Understanding by blocking a party to the Understanding from recourse to the DSU. It is worth noting that, during the *India – Autos* proceeding, the European Communities also held that view that a mutually agreed solution could not prevent recourse to the DSU: "Even if the 1997 [EC-India] Agreement had settled the matter in dispute in the present case, that would still not preclude the European Communities from bringing this dispute. The 1997 Agreement was not a 'covered agreement' in the sense of Article 1.1 of the DSU. Therefore, the rights and obligations of the parties under the 1997 Agreement were not enforceable under the DSU."

5.273 The European Communities argues that "using Article 21.5 ... to question a mutually agreed solution between the Parties, goes against Article 3.7 and 3.10 of the DSU." But nothing in those provisions bars recourse to dispute settlement where one party claims to have a mutually agreed solution with the other party. Article 3.7 expresses a clear preference for mutually agreed solutions, but it does not prohibit recourse to procedures under Article 21.5 or any other provision of the DSU.

5.274 Further, the European Communities' proposed approach is directly contrary to Article 3.5 of the DSU. Article 3.5 specifically requires mutually agreed solutions to be consistent with the covered agreements. Yet the European Communities would bar the dispute settlement system from examining whether a measure alleged to be adopted pursuant to a mutually agreed solution is consistent with the covered agreements. And the United States agrees with Ecuador's statement that Article 3.10 "contains nothing remotely prohibiting resort to dispute settlement procedures."

5.275 The European Communities stretches its argument further by arguing that Ecuador is barred from challenging the ACP preference because "it is uncontested that bilateral agreements between two WTO members form part of the 'applicable rules of law' between the parties to the dispute, as defined by the Vienna Convention." The European Communities is referring to Article 31.3(c) of the Vienna Convention. The European Communities has advanced this argument, as a responding party, in a number of recent disputes, and the United States is not aware that it has yet been successful. For example, this argument was raised by the European Communities in *EC – Approval and Marketing of Biotech Products* and rejected by that panel. The United States urges this Panel to do likewise.

5.276 Nothing in the customary rules of interpretation of public international law reflected in Article 31.3(c) of the Vienna Convention supports the European Communities' claim that the Understanding acts as a procedural defense for the European Communities. Article 31.3(c) of the Vienna Convention deals with interpretation of the covered agreements. The European Communities is not arguing that the Understanding indicates a particular interpretation of any term in any covered agreement, rather the European Communities is claiming the Understanding is a jurisdictional bar to this dispute. Article 31.3(c) does not deal with jurisdiction.

5.277 Furthermore, Article 31.3(c) of the Vienna Convention provides for the taking into account, in the interpretation of a treaty, "any relevant rules of international law applicable in the relations between the parties". The *EC – Approval and Marketing of Biotech Products* panel found that "the rules of international law" that are to be "taken into account" in the interpretation of the WTO Agreements "are those which are applicable in the relations between the WTO Members". The panel expressly rejected the notion that the "rules of international law" could be those applicable only to the disputing parties. Since the Understanding is a bilateral agreement between only the parties to this dispute, not all Members of the WTO, it cannot be considered part of any "applicable rules of law" that could inform the panel's interpretation of the covered agreements.

(c) Suggestion by the Panel

5.278 The European Communities argues that claims challenging the consistency of measures suggested by a panel cannot be brought before an Article 21.5 panel and that, Ecuador not having appealed those suggestions, it is supposedly bound by "res judicata", pursuant to Article 19.1 and 17.14 of the DSU. These arguments completely miss the status of a panel "suggestion" and the scope of an Article 21.5 panel proceeding. EC Regulation 1964, which implemented the latest import regime for bananas, is a measure taken by the European Communities to come into compliance after *Bananas III*. That this regime may fit the description of one of three suggestions made by the *Bananas III* 21.5 panel is irrelevant. Contrary to the European Communities' assertions, implementation by a Member of suggestions made by panels does not have a *res judicata* effect, nor could it render that Member's measures *per se* compatible with WTO rules. Nothing in the DSU, in particular Article 19.1, can be interpreted to lead to that result. That a Member chooses to implement a suggestion made by a panel does not relieve the Member from ensuring that it does in a manner consistent with its WTO obligations.

(d) Article I waiver

5.279 Turning to the merits, the European Communities does not contest that the granting of preferences to ACP bananas is in breach of Article I of the GATT 1994. Instead, it argues that the ACP Article I waiver is still valid with respect to bananas. The United States agrees with Ecuador's analysis that the Article I waiver terminated with respect to bananas once the European Communities implemented the new regime in 1 January 2006.

5.280 Under the express terms of the Annex, the European Communities had two opportunities to propose a regime that would "result in at least maintaining total market access for MFN suppliers." In 2005, pursuant to the Annex arbitration mechanism, two WTO arbitrators determined that the two proposals made by the European Communities did not meet those conditions. The phrase "[i]f the EC has failed to rectify the matter", at the beginning of the fifth sentence in tiret 5 of the Annex can only refer back to the determination made by the second arbitrator following the European Communities' effort to "rectify the matter". Therefore, as required by the fifth sentence, the waiver "shall cease to apply to bananas upon entry into force of the new EC tariff regime".

5.281 The European Communities seems to be claiming that Members decided that, after the European Communities had twice failed to provide the type of regime required under the Annex, the European Communities was allowed to unilaterally institute any regime, whether it met the conditions of the Annex or not, and still retain the cover of the waiver. This approach finds no basis in the Annex.

(e) Article XIII

5.282 Article XIII applies with respect to the current tariff rate quota regime, just as it did with respect to the European Communities' prior banana import regimes. In *EC – Bananas III (Article 21.5*

– *Ecuador)*, the panel explained that "by definition, a tariff quota is a quantitative limit on the availability of a specific tariff rate". The Panel in *Bananas III* explained that GATT Article XIII:1 requires that "no import restriction shall be applied to one Member's products unless the importation of like products from other Members is similarly restricted". According to the Appellate Body, the "essence" of GATT Article XIII, and therefore Article XIII:1, "is that like products should be treated equally, irrespective of origin".

5.283 The European Communities is maintaining a tariff rate quota under which MFN-origin bananas are neither "treated equally" nor restricted "similarly" to "like" ACP-origin bananas. ACP bananas receive preferential, protected access under the EC's banana regime, entering the EC market duty-free up to a quantity of 775,000 tons. No MFN supplier receives any such tariff rate quota treatment. By using a tariff rate quota on ACP imports, and an entirely different means to restrict MFN imports, the European Communities is in violation of GATT Article XIII:1.

5.284 Furthermore, the *Bananas III* panel found that GATT Article XIII:2 requires that "[i]f quantitative restrictions are used ... they are to be used in the least trade-distorting manner possible". Any tariff rate quota allocations must attempt to "approximate ... the trade shares that would have occurred in the absence of the regime". In addition, if a Member allocates tariff rate quota shares to Members not having a substantial interest in supplying the product, then shares must be allocated to *all* suppliers. The European Communities' exclusive 775,000 ton ACP tariff rate quota fails to distribute *any* share whatsoever to MFN suppliers, let alone a share they would have expected to obtain in the absence of restrictions. This, despite the fact that many of the excluded MFN suppliers are principal or substantial suppliers of bananas to the European Communities, and leading exporters of bananas to the world. For all these reasons, we agree with Ecuador that the European Communities' tariff rate quota for ACP origin bananas established through Regulation 1964 is inconsistent with Articles XIII:1 and XIII:2. The European Communities has no Article XIII waiver currently in force – its last waiver having expired on its own terms on 31 December 2005.

VI. INTERIM REVIEW

6.1 On 27 November 2007, the Panel submitted its interim report to the parties. On 4 December 2007, the European Communities submitted a written request for the review of precise aspects of the interim report. On the same date, Ecuador stated that it had no comments on the interim report.

6.2 The Panel modified aspects of its report in light of the European Communities' comments where it considered that appropriate, as explained below. The Panel has also made some minor editorial adjustments to the text and footnotes, as explained below. References to paragraph numbers and footnotes in this Section refer to those in the interim report, except as otherwise noted.

(a) Waivers adopted by the WTO Ministerial Conference

6.3 The Panel has amended paragraph 2.9 of the interim report, as requested by the European Communities.

(b) Corrigendum to the European Communities' Commission Regulation (EC) 1549/2006

6.4 Paragraph 2.44 of the interim report referred to the European Communities' Commission Regulation (EC) No. 1549/2006 of 17 October 2006 amending Annex I to Council Regulation (EEC) No. 2658/87 on the tariff and statistical nomenclature and the Common Customs Tariff.[291] In its

[291] Commission Regulation (EC) No. 1549/2006 of 17 October 2006 amending Annex I to Council Regulation (EEC) No. 2658/87 on the tariff and statistical nomenclature and the Common Customs Tariff, Official Journal of the European Union, 31/10/2006.

comments on the interim report, the European Communities states that this paragraph was wrong and noted that a corrigendum to Regulation 1549/2006, deleting the reference to the tariff quota for tariff item 0803 00 19 (bananas) was published on 9 June 2007. The Panel has noted the adoption of this corrigendum to Regulation 1549/2006 and adjusted paragraph 2.44 of the interim report accordingly.

(c) Factual description of the European Communities' bananas market

6.5 In its comments on the interim report, the European Communities requests the Panel to make changes to several paragraphs in Section II.D, entitled "European Communities' bananas market". In the European Communities' view, the description of the arguments of the parties in specific paragraphs of that section is not accurate. The Panel has noted the European Communities' request and has incorporated changes into paragraphs 2.53, 2.57 and 2.63, as explained below. Preliminarily, however, the Panel must start by noting that the purpose of Section II of the report, entitled "Factual aspects", of which Section II.D.4 is a part, is not to provide a description of the arguments of the parties. The arguments of the parties are mainly reflected in Section IV of the report, entitled "Arguments of the parties", and reproduced in other sections of the report, as appropriate. The purpose of Section II of the report, entitled "Factual aspects", is rather to provide a description of the relevant facts, as supported by the evidence on record. In those specific aspects where the description of the facts made by each of the parties differed, and there was no sufficient evidence on record for the Panel to make a factual determination, the Panel has described such parties' views on the relevant facts and any discrepancies between those views.

Alleged increase in prices paid to Ecuadorian banana producers

6.6 The European Communities requests the Panel to note "the fact that the prices paid to Ecuadorian banana producers increased by 6.7% after the introduction of the new import regime". The Panel notes that, according to the calculations provided by both parties[292], the average unit price for bananas from Ecuador increased by approximately 5.7 to 6.7 per cent in 2006, with respect to 2005, in US dollars/mt. The same prices, however, when estimated in €/mt, decreased by 4.8 per cent over the same period.[293] The Panel has adjusted paragraph 2.63 of the interim report and footnote 165, in order to note this fact.

Increase in imports of bananas from MFN countries, compared to growth of European Communities' bananas market

6.7 The European Communities requests the Panel to note "the fact that the increase in the quantity of bananas imported from MFN countries in 2006 and 2007 is bigger than the increase of the total market for bananas in the European Communities during the same period". The Panel notes that, indeed, according to the data available on record[294], the percentage of increase in the quantity of bananas imported from MFN countries in 2006 from those imported in 2005 is greater than the percentage of increase in the quantity of bananas from all origins sold in the European Communities over the same period[295]. The Panel has noted this fact in a footnote to paragraph 2.57 of the report. There is, however, no definitive information on record with regard to the year 2007 that would allow the Panel to make any determination comparing the data for that year with that for the year 2006.

[292] See Ecuador's response to Panel question No. 29 and Exhibit EC-11.
[293] See Ecuador's response to Panel question No. 29.
[294] See Exhibit EC-17.
[295] See also European Communities' first written submission, para. 49.

Increase in imports of bananas from MFN countries, compared to increase in imports of bananas from ACP countries

6.8 The European Communities requests the Panel to note "the fact that the increase in the quantity of bananas imported from MFN countries in 2007 is bigger than the increase in the quantity of bananas imported from ACP countries during the same period". The European Communities has provided market information corresponding to the first six months of 2007. The information provided by the European Communities, however, does not allow the Panel to make any finding comparing the data for the whole year 2007 with that for the year 2006. Accordingly, the Panel has not modified in this respect the language contained in paragraph 2.57 of the interim report.

Increase in imports of bananas from Ecuador between 1999 and 2006

6.9 The European Communities requests the Panel to note "the fact that the quantity of bananas imported from Ecuador increased by more than 25% between 1999 and 2006". Based on the data available on record, as reflected in the table included in paragraph 2.57 of the interim report, the Panel has adjusted paragraph 2.57 of the interim report accordingly.

Decrease in imports of bananas from ACP countries

6.10 The European Communities requests the Panel to note "the fact that many ACP countries have seen significant reductions in the quantities of the bananas they export to the European Communities following the introduction of the new import regime, just like some MFN countries". The Panel notes that, according to the data available on record[296], most ACP countries (with the exception of Cameroon, Belize and Somalia) increased their exports of bananas to the European Communities in the year 2006, following the introduction of the new import regime, as compared to the previous year 2005. There is no definitive information on record with regard to the year 2007 that would allow the Panel to make any determination comparing the data for that year with that for the year 2006. Accordingly, the Panel has not modified in this respect the language contained in paragraph 2.57 of the interim report.

(d) Costs for import licences

6.11 Paragraph 2.53 of the interim report notes *inter alia* that, following the introduction of the European Communities' new banana import system on 1 January 2006, with the €176/mt tariff duty, the amount paid by trading companies importing bananas from Ecuador had increased. In its comments on the interim report, the European Communities states that this description of the effects of the new import regime on the cost of importing bananas was misleading. The European Communities notes that, under the old regime, banana trading companies had to incur the cost of acquiring an import licence, in addition to the duties paid upon importation. Following the introduction of the new system and the abolition of import licences, these import licence costs have ceased to exist. The Panel has noted this fact and adjusted paragraph 2.53 of the interim report accordingly.

(e) European Communities' aguments concerning Ecuador's claim under Article XIII of the GATT 1994

6.12 In its comments on the interim report, the European Communities requests that the structure of Section VII.D.3 of the interim report be amended. The European Communities states that certain of its arguments, summarised in Section VII.D.3 of the interim report, had been mistakingly qualified as a preliminary objection, whereas these arguments were actually part of the European Communities'

[296] See Exhibit EC-17.

defence on substantive claims advanced by Ecuador under Article XIII of the GATT 1994. The Panel has amended Section VII.D of the interim report accordingly.

(f) Additional revisions and corrections

6.13 In Section III, entitled "Parties' requests for findings and recommendations", the Panel included references to the European Communities' arguments that had been already described at length in other parts of the interim report. The new language is to be found in paragraphs 3.2 to 3.6 of the final report. The Panel corrected some references in the table of cases cited in the report. The Panel also made some editorial changes in paragraphs 2.76, 5.75, 7.7, 7.9, 7.340, 7.362, 7.376 and 7.429 and in several footnotes of the report.

VII. FINDINGS

A. ATTEMPTS AT HARMONIZING THE TIMETABLES

7.1 In the present proceedings the Panel is faced with an unprecedented situation. The matter before this compliance Panel, requested by Ecuador on 23 February 2007, is closely related to the matter that was raised by the United States in its request for the establishment of a panel on 2 July 2007. However, despite repeated attempts, the Panel was unable to harmonize the timetable of the current proceedings with the timetable of the compliance panel requested by the United States.

7.2 Both disputes concern measures adopted by the European Communities with the alleged purpose of complying with the rulings and recommendations of the DSB in the dispute *European Communities – Regime for the Importation, Sale and Distribution of Bananas* (*EC – Bananas III*). In both disputes, the parties disagree whether these measures are in conformity with the European Communities' obligations under the WTO covered agreements.

7.3 In their complaints, Ecuador and the United States each challenge the same specific measures adopted by the European Communities. Namely:

(a) The tariff quota, with a current volume of 775,000 mt, which allows bananas of ACP origin to enter the European Communities market duty-free; and,

(b) The European Communities' tariff, currently set at €176/mt, which applies to all European Communities imports of bananas, except those benefiting from access to the zero-duty TRQ.[297]

7.4 The claims in each of the two cases are very similar. Both Ecuador and the United States claim that the challenged measures are inconsistent with Article I:1 and Article XIII, paragraphs 1 and 2, of the GATT 1994. Additionally, Ecuador claims in this dispute that these measures are inconsistent with Article II of the GATT 1994.

7.5 The Panel is aware that, according to Article 9.3 of the DSU:

> "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 as panelists on each of the separate panels and the timetable for the panel process in such disputes shall be harmonized."

[297] *EC – Bananas III (Article 21.5 – Ecuador II)*, Request for the Establishment of a Panel (WT/DS27/80) 26 February 2007, p. 4. See also, Ecuador's first submission, para. 21.

7.6 During the course of the proceedings, the Panel received a number of requests from the European Communities to extend the deadlines and to harmonize the timetable for this case with that of the panel requested by the United States. These requests were made through written communications on 6 July and 20 August 2007, as well as orally, during the substantive meeting of the Panel with the parties and third parties, on 18 September 2007. In all instances, the Panel considered, both the European Communities' request and the views expressed by Ecuador, the complaining party.

7.7 Harmonization of the timetable in both cases was made particularly difficult because of the two-month period that elapsed between the dates on which the two panels began their respective work. The Panel requested by Ecuador was composed by the WTO Director-General on 18 June. In turn, the panel requested by the United States, which was established on 12 July 2007, was composed on 13 August by the WTO Director-General. This two-month difference between the disputes was particularly significant, since compliance proceedings, by their very nature, are intended to be brief.

7.8 In all cases, when asked, Ecuador as the complaining party, strongly objected to any changes in the timetable that would result in extending the proceedings further beyond the 90-day period envisaged in Article 21.5 of the DSU.

7.9 As noted in the factual aspects section of this Report, Ecuador's status as a developing country Member, and its interest in a prompt decision of the matter, were additional factors taken into account by the Panel when preparing and revising the timetable for its proceedings.

7.10 In the light of these considerations, and notwithstanding the Panel's initial intention to harmonize the timetable of both the proceedings requested by Ecuador and those requested by the United States, the Panel was unable to find a better alternative for the timetable that was eventually adopted in these proceedings. This despite the fact that the Panel was aware that the approved timetable implied a considerable burden of work, peaking at particular moments for the parties, as well as for the Panel and the Secretariat.[298]

B. PRELIMINARY ISSUES RAISED BY THE EUROPEAN COMMUNITIES

1. Summary of the two preliminary issues

7.11 The European Communities raises two preliminary issues.

7.12 First, the European Communities argues that Ecuador should not be allowed to challenge the European Communities' current import regime for bananas, including the preference for ACP countries. The European Communities contends that the Understanding on Bananas, signed by Ecuador and the European Communities in April 2001 (Bananas Understanding)[299], is a mutually agreed solution to the banana dispute, "in which it is provided that the current import regime of the European Communities would include a preference for ACP bananas".[300] According to the European Communities, Articles 3.7 and 3.10 of the DSU prevent Ecuador from challenging, through an Article 21.5 compliance panel, a mutually agreed solution reached by the parties.[301]

[298] As noted above, however, issuance of the interim report was delayed by the Panel in order to ensure that replies to questions and comments on replies in the proceedings requested by the United States had been received by that panel, before the interim report in the current proceedings was issued.

[299] See Understanding on Bananas between the EC and Ecuador of 30 April 2001, in *EC – Bananas III*, Notification of Mutually Agreed Solution (WT/DS27/58), 2 July 2001; and *EC – Bananas III*, Understanding on Bananas between Ecuador and the EC (WT/DS27/60), 9 July 2001.

[300] European Communities' first written submission, para. 64.

[301] Ibid., paras. 61-65. See also European Communities' second written submission, paras. 7-18.

7.13 As a supplementary argument under the same preliminary issue, the European Communities adds that:

> "[E]ven if it was to be assumed that the [Bananas] Understanding is not a 'mutually agreed solution' for purposes of the DSU, ... it cannot be denied that it is a bilateral agreement that must be taken into consideration in analysing the rights and obligations of the parties to this dispute. Through the Understanding Ecuador accepted that the Cotonou Preference would continue until the end of 2007. The European Communities considers that this bars Ecuador from challenging the operation of the Cotonou Preference to the end of this year. The European Communities also considers that the principle of good faith, which covers the entire DSU, bars Ecuador from escaping its obligations by asserting the alleged non-compliance of the Understanding with the WTO rules."[302]

7.14 As a second preliminary issue, the European Communities argues that Ecuador's complaint against the Cotonou Preference under Article XIII of the GATT 1994 should be rejected, because in effect Ecuador is challenging a suggestion made by the first compliance panel requested by Ecuador.[303] According to the European Communities, such suggestion can be challenged only through recourse to appellate review, but not through a compliance panel.[304]

2. Order of analysis of the two preliminary issues

7.15 The first preliminary issue raised by the European Communities relates more generally to whether Ecuador can bring this dispute under Article 21.5 of the DSU. Therefore, the Panel addresses that first preliminary issue in this part of its report, in order to decide whether there is a need to proceed to assess the substantive claims by Ecuador.

7.16 The second preliminary issue raised by the European Communities relates exclusively to the claim made by Ecuador under Article XIII of the GATT 1994. Therefore, the Panel intends to address it as a preliminary issue in the context of Ecuador's claim under Article XIII, provided that the analysis of that claim is deemed warranted in the light of the Panel's findings on the European Communities' first preliminary objection.

3. First preliminary issue raised by the European Communities

(a) Arguments of the parties

(i) Main arguments by the European Communities

7.17 The European Communities points out that on 30 April 2001 it signed with Ecuador the Bananas Understanding. The European Communities argues that, "in accordance with its terms, [the Bananas Understanding] is a 'mutually agreed solution to the banana dispute'[305] and 'identified the means by which the long standing dispute over the European Communities' banana import regime can be resolved'.[306]"[307]

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[302] Final written version of the European Communities' closing oral statement at the substantive meeting of the Panel with the parties and third parties, para. 4.
[303] See European Communities' first written submission, para. 79-86.
[304] See European Communities' second written submission, paras. 19-35.
[305] (*footnote original*) See the Understanding, at point G.
[306] (*footnote original*) See the Understanding, at point A.
[307] European Communities' first written submission, para. 61.

7.18 In regard to the content of the Bananas Understanding, the European Communities asserts that:

> "Through the Understanding, Ecuador accepted that the banana import regime that the European Communities would implement after January 1, 2006, would have two main characteristics. First, it would be tariff only.[308] Second, there would be a preference granted to bananas coming from the ACP countries. This is made clear by the fact that Ecuador undertook to actively support the grant of a waiver from GATT Article I for these preferences.[309]"[310]

7.19 According to the European Communities, the Bananas Understanding is "binding"[311] on both Parties, including Ecuador, as confirmed by both sides' compliance "with the obligations undertaken in the Understanding".[312]

7.20 In particular, the European Communities argues that it "has fully complied with all [three] obligations [set out in the Bananas Understanding]"[313], namely: "(i) to implement an interim import regime until January 1, 2006; (ii) to initiate negotiations under GATT Article XXVIII, recognizing Ecuador as the principal supplier in these negotiations; and (iii) to introduce a tariff only import regime on January 1, 2006."[314] First, the European Communities argues that, before the introduction of the tariff only regime on 1 January 2006, it had accepted increased quantities of bananas from Ecuador and other MFN countries at a tariff of €75/mt, and had introduced a corresponding decrease in the volume of preferential banana exports from ACP countries.[315] Second, according to the European Communities, "Ecuador was recognised as a principal supplier in the GATT Article XXVIII negotiations".[316] Third, the European Communities claims that on 1 January 2006 it introduced a tariff-only regime, as foreseen by the Understanding[317], since:

> "The Understanding does not provide that this tariff only regime should have any particular characteristics and, indeed, the import regime introduced by the European Communities does not have any special features: there is a single tariff applicable to all banana imports, with a preference granted to the ACP countries limited to certain quantities only. This is the type of regime that the Article 21.5 Panel had described as 'tariff only' in paragraph 6.157 of its report."[318]

7.21 As regards Ecuador's compliance, the European Communities argues that "Ecuador had initially complied with the obligations undertaken in the Understanding"[319] by supporting the adoption of the waivers from Articles I and XIII of the GATT 1994, as provided in the Bananas Understanding.[320]

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[308] (*footnote original*) See the Understanding, at point B.
[309] (*footnote original*) See the Understanding at point F.
[310] European Communities' first written submission, para. 63.
[311] Ibid., para. 61.
[312] Ibid., para. 62.
[313] European Communities' second written submission, para. 13.
[314] Ibid., para. 13.
[315] See European Communities' first written submission, para. 28.
[316] European Communities' second written submission, para. 13.
[317] See European Communities' first written submission, para. 29.
[318] European Communities' second written submission, para. 16.
[319] Ibid., para. 15.
[320] See European Communities' first written submission, para. 29.

7.22 Concerning Ecuador's communication on the Bananas Understanding to the DSB that the "provisions of Article 3.6 of the DSU are not applicable in this case"[321], the European Communities claims that such a "subsequent unilateral ... declaration cannot alter the binding nature of the Understanding between the parties to this dispute."[322] According to the European Communities, "the analysis of the legal status and effect of the Understanding should be primarily based on its content and not on any unilateral statements issued by the signatories after its signing."[323] The European Communities points out that "the Bananas Understanding (i) describes in great detail the characteristics of the two banana import regimes that the European Communities should implement by July 1, 2001 and by January 1, 2002 respectively and (ii) expressly provides that Ecuador's right to retaliate will be terminated."[324]

7.23 The European Communities also supports the argument made by a number of ACP third parties (namely Belize, Cameroon, Côte d'Ivoire, Dominica, the Dominican Republic, Ghana, Jamaica, Madagascar, St. Lucia, St. Vincent and the Grenadines, and Suriname) that, with Ecuador's explicit agreement[325], "the banana dispute was taken off the agenda of the DSB in accordance with Article 21.6 of the DSU ... at the DSB meeting held on 1 February 2002[326]"[327]. In this regard, the European Communities argues that:

> "Given that ... Article [21.6 of the DSU] provides that the issue of implementation 'shall remain on the DSB's agenda until the issue is solved', the removal of the item from the agenda of the DSB supports the argument that Ecuador considered that the issue was solved with the introduction in 2002 of the new tariff-quota-based import regime as envisaged in the Understanding."[328]

7.24 Nevertheless, in response to a question by the Panel concerning that specific statement by ACP third parties, at a later stage in the proceedings the European Communities stated that it "has not argued that the withdrawal of the issue on the implementation of the DSB rulings and recommendations from the agenda of the DSB has any particular legal significance."[329]

7.25 The European Communities also contends that, since the Bananas Understanding constitutes a mutually agreed solution, it "must be taken into consideration in analysing the rights and obligations of the parties towards each other, as provided by the Vienna Convention on the Law of Treaties, at Article 31, paragraph 3(c)."[330] According to the European Communities, "[b]ilateral agreements between two WTO members form part of the 'applicable rules of law' between the parties to the dispute, as defined in the Vienna Convention"[331], and, therefore, "a party that has entered into a

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[321] *EC – Bananas III*, Understanding on Bananas between Ecuador and the EC (WT/DS27/60), 9 July 2001, p. 1.

[322] European Communities' first written submission, para. 61.

[323] European Communities' response to Panel question No. 94.

[324] Ibid.

[325] See joint third-party submission of Belize, Cameroon, Côte d'Ivoire, Dominica, the Dominican Republic, Ghana, Jamaica, Madagascar, St. Lucia, St. Vincent and the Grenadines, and Suriname, para. 37.

[326] (*footnote original*) Minutes of the DSB meeting held on 1 February 2002, WT/DSB/M/119, 6 March 2002, at point 1 (a).

[327] Joint third-party submission of Belize, Cameroon, Côte d'Ivoire, Dominica, the Dominican Republic, Ghana, Jamaica, Madagascar, St. Lucia, St. Vincent and the Grenadines, and Suriname, para. 37.

[328] European Communities' response to Panel question No. 6.

[329] European Communities' response to Panel question No. 59.

[330] European Communities' first written submission, para. 62.

[331] European Communities' second written submission, para. 7.

'mutually agreed solution', such as the Understanding, [is] bound by the obligations it has undertaken".[332]

7.26 In particular, the European Communities maintains that, "[g]iven that Ecuador has entered into a mutually agreed solution with the European Communities, in which it is provided that the current import regime of the European Communities would include a preference for ACP bananas, ... Ecuador should not be allowed to now challenge this preference."[333] The European Communities requests "the Panel to dismiss the relevant Ecuador claims in their entirety"[334], arguing that "using Article 21.5 of the DSU to question a mutually agreed solution between the Parties, goes against Articles 3.7 and 3.10 of the DSU, which provide that mutually negotiated solutions should be preferred to resorting to dispute resolution procedures."[335]

7.27 The European Communities contends that "these provisions [of the DSU] are the corollary in the WTO legal order of the principles of good faith and '*pacta sunt servanda*', which are well established in customary international law."[336] In particular, according to the European Communities:

> "[I]t is wrong to assume that the principle of good faith does not cover Article 21.5 of the DSU, as asserted in paragraph 9 of Ecuador's second submission. Both the language used in Article 3.10 of the DSU (i.e., '*all Members will engage in these procedures in good faith*') and its nature as a general principle of law, make clear that the principle of good faith runs through the entire DSU and defines the outer limits of the application of all rights recognized by the DSU to WTO Members."[337]

7.28 In response to a question by the Panel, the European Communities also addresses the argument by the United States that:

> "The Understanding [on Bananas] is not a 'covered agreement' – it is not listed in Appendix 1. Accordingly, the DSU cannot be used to settle a dispute as to the meaning or effect of the Understanding, and the DSU cannot enforce the Understanding by blocking a party to the Understanding from recourse to the DSU. The EC itself has in fact conceded that there is no bar to proceeding with dispute settlement even in the face of a mutually agreed solution. It is worth noting that, during the *India – Autos* proceeding (which, like the negotiation of the Bananas Understandings, took place in the spring of 2001), the EC also held that view that a mutually agreed solution could not prevent recourse to the DSU..."[338]

7.29 In response to that argument by the United States, the European Communities asserts that "*India – Autos* was an ordinary Article XXIII dispute whereas the present dispute is a 'compliance' case under DSU Article 21.5."[339] Further, according to the European Communities:

> "In effect, the mutually agreed settlement is an acceptance that the respondent has complied with the DSB recommendations and rulings, since it must be in accordance with WTO rules. It would therefore be perverse to allow the complainant to commence proceedings that explicitly denied this. By respecting the Understanding

[332] European Communities' second written submission, para. 8.
[333] European Communities' first written submission, para. 64.
[334] Ibid., para. 65.
[335] Ibid., para. 64.
[336] European Communities' second written submission, para. 11.
[337] Ibid., para. 12.
[338] Final written version of the United States' oral statement at the substantive meeting of the Panel with parties and third parties, para. 4.
[339] European Communities' response to Panel question No. 60.

the panel would be doing what is required of it in the DSU, which is of course a covered agreement."[340]

7.30 Moreover, the European Communities notes:

> "[T]hat the report of the panel in the *India – Autos* case states in paragraph 7.113:
>
> > '[…] such agreements are expressly referred to and supported by the DSU. It is certainly reasonable to assume, particularly on the basis of Article 3 of the DSU […] that these agreed solutions are intended to reflect a settlement of the dispute in question, which both parties expect will bring a final conclusion to the relevant proceedings.'[341]"[342]

7.31 The European Communities also argues that:

> "[T]he [*India – Autos*] panel found in paragraph 7.115 of its report that 'it may also be the case that it cannot be lightly assumed that those drafters intended mutually agreed solutions, expressly promoted by the DSU, to have no meaningful legal effect in subsequent proceedings'. These statements confirm that the panel in *India – Autos* considered it possible that a mutually agreed solution could bar a party from commencing dispute settlement proceedings."[343]

7.32 Thus, the European Communities concludes that:

> "Granting to WTO members the right to renege on the agreements with which they reach mutually agreed solutions to their disputes would seriously compromise the effectiveness of these mutually agreed solutions and would foster the 'contentious' character of the dispute resolution system. This would be inconsistent with the purpose of the DSU, as reflected in Article 3.10, and with the principles enshrined in Article 3.7 (where it is stated that mutually agreed solutions are to be preferred)."[344]

7.33 In addition to claiming that the Bananas Understanding is a mutually agreed solution for the purposes of WTO dispute settlement, the European Communities advances the supplementary argument that, "even if it was to be assumed that the Understanding is not a 'mutually agreed solution' for purposes of the DSU, ... it cannot be denied that it is a bilateral agreement that must be taken into consideration in analysing the rights and obligations of the parties to this dispute."[345] Accordingly, if the Bananas Understanding were deemed not to be a mutually agreed solution, the European Communities reaches the conclusion that Ecuador should still be:

> "[B]arred from challenging the Cotonou Preference, because (i) Ecuador has already contractually accepted the existence of the Cotonou Preference and (ii) Ecuador has already been compensated for accepting the existence of the Cotonou Preference."[346]

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[340] European Communities' response to Panel question No. 60.

[341] (*footnote original*) See the report of the panel in *India – Measures affecting the automotive sector*, dated December 21, 2001, ("*India – Autos*"), paragraph 7.113.

[342] European Communities' response to Panel question No. 60.

[343] Ibid.

[344] European Communities' second written submission, para. 18.

[345] Final written version of the European Communities' closing oral statement at the substantive meeting of the Panel with parties and third parties, para. 4.

[346] European Communities' second written submission, para. 11.

(ii) Main arguments by Ecuador

7.34 While arguing that that "the EC 'preliminary' challenge should be dismissed"[347], in response to a question posed by the Panel, Ecuador confirms that it "signed the Understanding on Bananas with the EC on 30 April 2001".[348] However, Ecuador also argues that it:

> "[W]as, and is, quite certain regarding what it agreed to under the Understanding – a transitional regime comprised of several phased steps to be taken by the EC to ultimately bring about a resolution to the dispute, not an immediate end to the dispute. Both the text of the Understanding and Ecuador's communication confirm this interpretation."[349]

7.35 Referring to its communication to the DSB concerning the Bananas Understanding[350], Ecuador adds that:

> "Immediately after the EC's communication [to the DSB concerning the Bananas Understanding], Ecuador clarified that the Understanding identified a '*means* by which a long-standing dispute *can* be resolved,'[351] comprised of 'the execution of two phases' and 'the implementation of several key features, which demands the collective action of the WTO membership.' Ecuador viewed the EC's approach to the Understanding (as a mutually agreed solution within the meaning of Article 3.6) as denying the transitional nature of the Understanding."[352]

7.36 When asked by the Panel about the purpose of Ecuador's communication to the DSB and the sentence therein that "the provisions of Article 3.6 of the DSU are not applicable in this case"[353], Ecuador responded that:

> "[W]hat prompted [its] July 2001 communication to the DSB, was the EC's portrayal of the Understanding to the DSB in June 2001 – as a mutually satisfactory solution within the meaning of DSU Article 3.6 and an end to the Bananas dispute.[354] Ecuador did not, and to this day does not, share the EC's interpretation."[355]

7.37 Ecuador also adds that:

> "[E]specially because of the EC purported notification, [Ecuador] came to realize that the EC might try to use the Understanding as means to restrict WTO control and Ecuador's rights under WTO dispute settlement rights. Ecuador wished to make clear to the EC and WTO members generally, despite Ecuador's commitment to and hope

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[347] Ecuador's second written submission, para. 15.
[348] Ecuador's response to Panel question No. 37.
[349] Ibid.
[350] See *EC – Bananas III*, Understanding on Bananas between Ecuador and the EC (WT/DS27/60), 9 July 2001, p. 1.
[351] (*footnote original*) *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Understanding on Bananas between the European Communities and Ecuador*, WT/DS27/60, 9 July 2001("Ecuador Communication"), quoting EC-Ecuador Understanding, paragraph A.
[352] Ecuador's response to Panel question No. 37.
[353] *EC – Bananas III*, Understanding on Bananas between Ecuador and the EC (WT/DS27/60), 9 July 2001, p. 1.
[354] (*footnote original*) *See* Notification of Mutually Agreed Solution, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/58, 2 July 2001.
[355] Ecuador's response to Panel question No. 37.

> for the Understanding, it was not a mutually satisfactory solution in the sense of Article 2 [sic] of the DSU."[356]

7.38 As to the legal effects of the Bananas Understanding in the context of the WTO, Ecuador states that, "[a]s is evident [from] ... the different notifications that were made, the parties did not have the same view of the significance and effect of the respective agreements."[357] In particular, according to Ecuador, there is a difference between the legal status of waivers and bilateral agreements, such as the Bananas Understanding:

> "[T]he Doha waiver, which was granted by the WTO membership on a time-limited and conditional basis, does affect rights and obligations of WTO members. A waiver granted by WTO Members in accordance with the rules can modify those rules for WTO purposes. However, the Understanding was between Ecuador and the EC, and is not an agreement that can modify rights and obligations of anyone under the WTO."[358]

7.39 In regard to the European Communities' arguments about compliance with the Bananas Understanding, Ecuador argues that, even if the Bananas Understanding might eventually have come to be considered as a mutually agreed solution, "[its] terms ... were not adhered to by the EC"[359]:

> "The Understanding, together with the waivers that were granted, laid out a path that was supposed to result in a system by January 1, 2006, that would be consistent with the EC's obligations without the need for a waiver of any obligation except those under Article I, and then to further actions that, by January 1, 2008 would enable the system to operate fairly without any waiver at all. ... [T]hough the system operated with reasonable success in its early years, in the end the EC did not comply with the last phase. A mutually agreed solution is not a solution without compliance."[360]

7.40 Ecuador adds that it:

> "[D]oes not agree that the EC measures at issue are covered by the Doha Waiver. The Understanding did not commit Ecuador to accept whatever preferences or 'tariff only' scheme that the EC might decide to apply as of January 1, 2006, regardless of whether the measures were covered by the waiver or conformed with the EC's obligations under the WTO Agreement."[361]

7.41 Further, in Ecuador's view:

> "The EC squandered its opportunity to propose a proper rebinding, proposing instead levels that would vastly increase the preference for ACP bananas. When Ecuador and other countries would not agree to those proposals and the Arbitrator found that in each case the EC failed to meet the waiver standards, the EC nevertheless proceeded unilaterally to implement the measures that are now before this panel. The EC also, as part of its same non-compliant behavior, did not follow the Article XXVIII process

[356] Ecuador's response to Panel question No. 38.
[357] Ibid.
[358] Ecuador's response to Panel question No. 92.
[359] Ecuador's second written submission, para. 11.
[360] Ibid. See also Ecuador's response to Panel question No. 41.
[361] Ecuador's second written submission, para. 13.

> required as a condition of the waiver. The EC thus tries to claim protection under an Understanding with which it does not comply."[362]

7.42 While arguing that it had "complied with its obligations under the Understanding"[363], Ecuador also argues that, in any event:

> "Compliance with the terms of the bilateral Understanding does not remotely mean that Ecuador cannot complain under the WTO about measures that the EC never would have applied if the EC had complied with the bilateral Understanding. ... The intention of the parties that the Understanding result in a durable mutually satisfactory solution does not make the Understanding such a mutually satisfactory solution..."[364]

7.43 In response to the argument advanced by some third parties that "the banana dispute was taken off the agenda of the DSB in accordance with Article 21.6 of the DSU ... at the DSB meeting held on 1 February 2002[365]"[366], and that "Ecuador agreed [to that] by stating that it 'also considered that this item should no longer appear on the agenda of future DSB meeting [sic]'"[367], Ecuador responds that it "agreed to the withdrawal of the item from the DSB agenda, subject to an explicit reservation of rights to bring a complaint under Article 21.5"[368], made at the same DSB meeting. Also, "Ecuador was clear that the Understanding involved staged obligations over several additional years, and that Ecuador was reserving Article 21.5 rights precisely because of concern that the terms might not be followed in subsequent years."[369]

7.44 Ecuador cites the following part from the minutes of the DSB meeting held on 1 February 2002, reflecting the statement made by Ecuador before the issue was taken off the DSB agenda:

> "During the dispute settlement process, Ecuador had demonstrated patience and flexibility and had, in this spirit, signed a bilateral Understanding on Bananas with the EC on 30 April 2001. This Understanding constituted a sound basis for the EC to implement a transitional banana import regime so that by 1 January 2006, at the latest, a WTO-compatible tariff-only regime would be put into place. The transitional regime contained various phases, stages and elements to be implemented. One element was to obtain waivers from Articles I and XIII of the GATT 1994. However, the decision to grant these waivers included new stages which would have to be carried out in order to ensure a proper transition to a tariff-only banana import regime, as from 1 January 2006. Accordingly, insofar as the EC continued to implement the DSB's recommendations by meeting its commitments, Ecuador wished to reserve its rights under Article 21 of the DSU. Therefore if there was any disagreement concerning the measures applied by the EC, the matter could be referred to the original Panel pursuant to Article 21.5 of the DSU. Ecuador, like other

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[362] Final written version of Ecuador's oral statement at the substantive meeting of the Panel with parties and third parties, para. 27.

[363] Ecuador's response to Panel question No. 39.

[364] Ibid.

[365] (*footnote original*) Minutes of the DSB meeting held on 1 February 2002, WT/DSB/M/119, 6 March 2002, at point 1 (a).

[366] Joint third-party submission of Belize, Cameroon, Côte d'Ivoire, Dominica, the Dominican Republic, Ghana, Jamaica, Madagascar, St. Lucia, St. Vincent and the Grenadines, and Suriname, para. 37.

[367] Ibid.

[368] Ecuador's response to Panel question No. 6.

[369] Ibid.

> countries, also considered that this item should no longer appear on the agenda of future DSB meetings."[370]

7.45 Ecuador adds that "[t]here was no objection to this reservation, and similar reservations were expressed by other [Member]s."[371]

7.46 In Ecuador's view, as underscored by Article 3.7 of the DSU, mutually agreed solutions are not exempt from the requirement in Article 3.5 of the DSU that all solutions to matters formally raised under the consultation and dispute settlement provisions of the covered agreements shall be consistent with those agreements.[372] Therefore, Ecuador argues that, "even if [it] had wanted to agree to measures inconsistent with the covered agreements, that would not be a mutually satisfactory solution in the sense of Article 3 because of the lack of conformity with covered agreements."[373]

7.47 As to the argument of the European Communities that the Bananas Understanding, as a mutually agreed solution, would prevent Ecuador from bringing this case, Ecuador points out that it "is not challenging or questioning the EC-Ecuador Understanding on Bananas, but rather is challenging the conformity of EC measures with the EC's obligations under the WTO Agreement".[374] Further, Ecuador argues that "[i]n the [Bananas] Understanding, Ecuador did not commit not to bring a WTO dispute against any EC measures, and there is nothing in the WTO rules or in the Understanding that could justify implying such a limitation."[375] In particular, in Ecuador's view:

> "There is no provision of the DSU that precludes bringing a complaint under Article 21.5 simply on the basis that the challenged measure complied or was alleged to comply with an agreement alleged to constitute a mutually agreed solution. The DSU encourages mutually agreed solutions, but carefully does not provide anywhere that a mutually agreed solution precludes or limits the right to bring dispute settlement proceedings. The DSU drafters were wise not to provide that a mutually agreed solution limits any DSU rights, for any such limitation would be a disincentive for parties to try to negotiate solutions. This is graphically illustrated in this dispute, where the EC is attempting to avoid scrutiny of it[s] flagrant violations of the WTO on grounds that the Understanding constituted a *sub silencio* waiver of Ecuador's WTO rights. The DSU authorizes and requires Panels to determine compliance with covered agreements. The DSU does not authorize a Panel to forego or limit its responsibilities because the defending party in the dispute alleges that the complaining party waived its WTO rights in a bilateral agreement. Despite their protests, the EC and ACP countries are urging the Panel out of expediency in this dispute to fabricate rules regarding mutually agreed solutions that would make dispute parties, especially complaining parties, reluctant ever to enter into a mutually agreed solution, since that would cost them their WTO rights. The WTO Agreements do not provide such a rule, and it would be bad policy and bad law to try to contrive one."[376]

7.48 Ecuador adds that, even if the Bananas Understanding was to be considered a mutually agreed solution, "Articles 3.7 and 3.10 [of the DSU] do not preclude a challenge to measures based on the

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[370] Minutes of the Meeting of the Dispute Settlement Body Held at the Centre William Rappard on 1 February 2002, WT/DSB/M/119 of 6 March 2002, para. 5.

[371] Ecuador's response to Panel question No. 6.

[372] See Ecuador's second written submission, para. 12.

[373] Ibid.

[374] Ibid, para. 14.

[375] Final written version of Ecuador's oral statement at the substantive meeting of the Panel with parties and third parties, para. 29.

[376] Ecuador's response to Panel question No. 40.

contention of the defending party that the measures have been 'accepted' in a mutually agreed solution."[377] In particular, Ecuador considers that Article 3.7 of the DSU "is not a prohibition of invoking the dispute settlement procedures, nor does it purport to override Article 21.5 or the other provisions of the DSU that make clear the right to invoke dispute settlement procedures of the DSU."[378] Further, Ecuador argues that Article 3.10 of the DSU "contains nothing remotely prohibiting resort to dispute settlement procedures."[379] According to Ecuador, "[i]t would be illogical to exempt measures from challenge to their consistency with WTO rules on grounds that they were part of a mutually agreed solution which, by definition, must conform with those rules."[380]

(b) Panel's analysis

7.49 To establish its approach to this preliminary issue, the Panel will analyse first the nature and scope of this preliminary objection of the European Communities, in particular in regard to Article 21.5 of the DSU. Subsequently, the Panel will apply the approach established in order to assess the European Communities' preliminary objection.

(i) The scope of this preliminary issue and Article 21.5 of the DSU

7.50 In its first preliminary objection, the European Communities calls into question Ecuador's right to contest the ACP preference, both in general in the context of WTO dispute settlement[381] and particularly in a compliance dispute.[382] This Panel is bound by the terms of reference approved by the Dispute Settlement Body, at its meeting on 20 March 2007, which refer to the matter raised by Ecuador in its request for the establishment of a panel made under Article 21.5 of the DSU.[383] Accordingly, the Panel will limit its consideration of the preliminary issue raised by the European Communities to whether Ecuador is prevented, as a result of the Bananas Understanding, from bringing a *compliance* dispute pursuant to Article 21.5 of the DSU. An additional and more general consideration of whether Ecuador is barred by the Bananas Understanding from bringing any dispute under the WTO dispute settlement system, including a *non-compliance* dispute, would be unnecessary for the resolution of this dispute, and for the assessment of this preliminary issue in particular.

7.51 The issue of whether the Bananas Understanding can prevent Ecuador from bringing a compliance dispute is closely related to the scope of compliance disputes. In relevant part, Article 21.5 of the DSU provides that:

> "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."

[377] Ecuador's second written submission, para. 9.
[378] Ibid.
[379] Ibid., para. 10.
[380] Final written version of Ecuador's oral statement at the substantive meeting of the Panel with parties and third parties, para. 25.
[381] See European Communities' first written submission, para. 64; and European Communities' second written submission, paras. 6 and 11.
[382] Ibid.
[383] See *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, Recourse to Article 21.5 by Ecuador, Constitution of the Panel (WT/DS27/82), 18 June 2007, paras. 1-2.

7.52 In the context of this preliminary issue, neither of the parties argues that the matter before this Panel would fall outside of the scope of Article 21.5 of the DSU.[384] Ecuador has brought this dispute under Article 21.5 of the DSU, by making the following request:

> "As there continues to be a disagreement between Ecuador and the EC over the WTO-consistency of the EC banana measures taken to comply with *Bananas III* and *Bananas-DSU Article 21.5 (Ecuador)* and subsequent related rulings, Ecuador respectfully requests that this matter be referred to a Panel, if possible the original panel, in accordance with Article 21.5 of the DSU."[385]

7.53 As for the European Communities, in response to a question from the Panel on whether the European Communities was arguing that the Panel had no jurisdiction to hear Ecuador's claims, the European Communities stated that it "does not challenge the Panel's jurisdiction with this preliminary objection, but rather Ecuador's right to bring these claims."[386] In its claim under Article 21.5 of the DSU, Ecuador challenges an EC measure under which, according to the European Communities:

> "There is a single tariff applicable to all banana imports, with a preference granted to the ACP countries limited to certain quantities only. This is the type of regime that the [previous] Article 21.5 Panel [in this dispute] had described as 'tariff only' in paragraph 6.157 of its report [when making suggestions for implementing the recommendations under Article 19 of the DSU]."[387]

7.54 Accordingly, there is no need for the Panel to fully consider, in the context of the European Communities' first preliminary objection, whether this is properly a compliance dispute under Article 21.5 of the DSU. Rather, the Panel will focus on the more narrow issue of whether the Bananas Understanding bars Ecuador from bringing this compliance challenge, in the light of parties' arguments in that specific regard.

(ii) Is Ecuador barred by the Bananas Understanding from bringing this compliance challenge?

Panel's approach

7.55 Turning to the issue whether Ecuador is barred by the Bananas Understanding from bringing this compliance challenge, the Panel notes that the European Communities makes the following proposal on how the Panel might assess this first preliminary issue:

> "[T]he Panel should first find that Ecuador is bound by the terms of the Understanding. Then, the Panel should find that, through the Understanding, Ecuador accepted that the Cotonou Preference would continue to exist for the entire duration of the waiver that the European Communities had requested at the time the Understanding was signed and the grant of which Ecuador accepted to support in the Understanding. Finally, the Panel should find that Ecuador must now comply with its undertakings and, therefore, that Ecuador cannot challenge the Cotonou Preference."[388]

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[384] This issue is raised by the European Communities only in the specific context of its second preliminary objection, and will be addressed in that context, if necessary.

[385] See *EC – Bananas III (Article 21.5 – Ecuador II)*, Request for the Establishment of a Panel (WT/DS27/80) 26 February 2007, p. 5.

[386] European Communities' response to Panel question No. 58.

[387] European Communities' second written submission, para. 16.

[388] European Communities' response to Panel question No. 58.

7.56 As indicated above, the European Communities appears to be making a two-pronged argument under its first preliminary objection.[389] First, the European Communities argues that the Bananas Understanding constitutes a mutually agreed solution providing for the ACP preference, and therefore Ecuador is prevented from contesting the conformity of the European Communities' current banana import regime in a compliance dispute. Second, the European Communities makes a similar, residual argument if "it was to be assumed that the [Bananas] Understanding is not a 'mutually agreed solution' for purposes of the DSU"[390]. If that were the case, the European Communities argues that the Bananas Understanding is a legally binding bilateral agreement, which provides for the ACP preference, and therefore similarly prevents Ecuador from challenging such preference.

7.57 As the above suggestion by the European Communities confirms, there seem to be three common elements in the two prongs of the European Communities' arguments under the first preliminary issue:

(a) The alleged legally binding nature of the Bananas Understanding on Ecuador, whether or not such Understanding qualifies as a mutually agreed solution;

(b) That, as the European Communities puts it, "through the [Bananas] Understanding, Ecuador accepted that the Cotonou Preference would continue to exist for the entire duration of the waiver that the European Communities had requested at the time the Understanding was signed and the grant of which Ecuador accepted to support in the Understanding"[391]; and,

(c) That, based on this, Ecuador could not challenge the Cotonou Preference.

7.58 These three questions are potentially relevant for addressing this preliminary objection by the European Communities. The Panel will first assess whether the Bananas Understanding bars Ecuador from bringing this compliance challenge, by first looking at the language of the Understanding. Only if the Panel was to find that the Bananas Understanding bars Ecuador from bringing this dispute, would the Panel then turn to assessing, as suggested by the European Communities, whether the Understanding indeed qualifies as a mutually agreed solution or an agreement binding on Ecuador for the purposes of WTO dispute settlement.

7.59 The Panel will follow the approach of the panel in *India – Autos* in that it will conduct a case-specific analysis of the preliminary issue raised by the European Communities. Indeed, in the *India – Autos* dispute, in which the question of whether a mutually agreed solution can prevent a party from bringing a dispute was raised, the panel noted that:

> "Without clear guidance in the DSU, this question raises an important systemic issue. ... There may be significant differences between the provisions of mutually agreed solutions from case to case, which may ... make it difficult to draw general conclusions as to the relevance of [mutually agreed] solutions to subsequent proceedings other than on a case by case basis."[392] (footnote omitted)

7.60 Further, the panel in *India – Autos* found that it "need[ed] to consider… the terms of the MAS"[393] because "[u]ltimately, it is the terms of the MAS that are the only possible source of any

[389] See summary of the European Communities' main arguments under this preliminary issue above.
[390] Final written version of the European Communities' closing oral statement at the substantive meeting of the Panel with parties and third parties, para. 4.
[391] European Communities' response to Panel question No. 58.
[392] Panel Report on *India – Autos*, para. 7.116.
[393] Ibid., para. 7.117.

restriction on our jurisdiction."[394] The Panel agrees with the European Communities' argument in these proceedings that "the analysis of the legal status and effect of the Understanding should be primarily based on its content ... ."[395]

7.61 While the Panel intends to duly assess the preliminary issue raised by the European Communities in the context of this dispute, it does not consider it necessary for the resolution of this dispute to assess the more systemic issue of whether or not mutually agreed solutions or legally binding agreements between parties to a dispute that might not qualify as a mutually agreed solution may prevent parties to such instruments from bringing compliance disputes. The Panel agrees with the panel in *India – Autos* that "this issue is not expressly addressed in the DSU".[396] The Panel also recalls that, under Article 3.2 of the DSU, the WTO dispute settlement system "serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law." Further, under the same provision, "[r]ecommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements."

7.62 With regard to the method of assessment, the panel in *India – Autos* recognized that "[a]s [an] MAS is not a covered agreement, it is not expressly subject to the DSU requirement to utilise customary rules of interpretation of international law." [397] Nevertheless, that panel also stated that:

> "[S]ince [the MAS in question] is an agreement among States, the Panel finds it appropriate to address the terms of this agreement in accordance with the customary rules of interpretation of international law. It will therefore consider the ordinary meaning of the terms of the MAS in light of their context and taking into account their object and purpose."[398]

7.63 In the light of that statement by the panel in *India – Autos* and given the argument of the European Communities that the Bananas Understanding would qualify as a mutually agreed solution, this Panel will analyse the terms of the Bananas Understanding in accordance with the customary rules of interpretation of international law, as expressed in Articles 31 and 32 of the Vienna Convention on the Law of Treaties to establish whether the Bananas Understanding prevents Ecuador from bring this compliance dispute. This is without prejudice to the actual legal status of the Bananas Understanding, which, as stated earlier, the Panel will not address at this stage.

The terms and main elements of the Bananas Understanding

7.64 Turning to the analysis of the terms of the Bananas Understanding, the Panel notes that the Understanding provides that "[t]he EC and Ecuador consider that th[e] Understanding constitutes a mutually agreed solution to the banana dispute."[399] Further, the Understanding states in its first

[394] Panel Report on *India – Autos*, para. 7.117.
[395] European Communities' response to Panel question No. 94.
[396] Panel Report on *India – Autos*, para. 7.114.
[397] Ibid., para. 7.118.
[398] Ibid., para. 7.118.
[399] *EC – Bananas III*, Notification of Mutually Agreed Solution (WT/DS27/58), 2 July 2001, para. G; and *EC – Bananas III*, Understanding on Bananas between Ecuador and the EC (WT/DS27/60), 9 July 2001, para. G.

paragraph that "[t]he European Commission and Ecuador have identified the means by which the long-standing dispute over the EC's banana import regime can be resolved."[400]

7.65 The Bananas Understanding sets out various future steps to be taken by its parties, who are also the parties to the dispute before this Panel. The Understanding first addresses the three distinct steps to be taken by the European Communities following the adoption of the Understanding. First, the Understanding identifies the last, third step:

> "In accordance with Article 16(1) of Regulation No. (EC) 404/93 (as amended by Regulation No. (EC) 216/2001), *the European Communities (EC) will introduce a Tariff Only regime for imports of bananas no later than 1 January 2006*. GATT Art XXVIII negotiations shall be initiated in good time to that effect, recognizing Ecuador as the principal supplier in these negotiations."[401] (emphasis added)

7.66 Subsequently, the Bananas Understanding identifies the initial two steps to be implemented by the European Communities in the following terms:

> "In the interim, the EC will implement an import regime on the basis of historical licensing as follows:
>
> 1. Effective 1 July 2001, the EC will implement an import regime on the basis of historical licensing as set out in Annex 1.
>
> 2. Effective as soon as possible thereafter, subject to Council and European Parliament approval and to adoption of the Article XIII waiver referred to in paragraph F, the EC will implement an import regime on the basis of historical licensing as set out in Annex 2. The Commission will seek to obtain the implementation of such an import regime as soon as possible."[402]

7.67 As for Ecuador, the Bananas Understanding prescribes one main step:

> "Ecuador will lift its reserve concerning the waiver of Article I of the GATT 1994 that the EC has requested for preferential access to the EC of goods originating in ACP States signatory to the Cotonou Agreement; and will actively work towards promoting the acceptance of an EC request for a waiver of Article XIII of the GATT 1994 needed for the management of quota C under the import regime described in paragraph C(2) until 31 December 2005."[403]

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[400] *EC – Bananas III*, Notification of Mutually Agreed Solution (WT/DS27/58), 2 July 2001, para. A; and *EC – Bananas III*, Understanding on Bananas between Ecuador and the EC (WT/DS27/60), 9 July 2001, para. A.

[401] *EC – Bananas III*, Notification of Mutually Agreed Solution (WT/DS27/58), 2 July 2001, para. B; and *EC – Bananas III*, Understanding on Bananas between Ecuador and the EC (WT/DS27/60), 9 July 2001, para. B.

[402] *EC – Bananas III*, Notification of Mutually Agreed Solution (WT/DS27/58), 2 July 2001, para. C; and *EC – Bananas III*, Understanding on Bananas between Ecuador and the EC (WT/DS27/60), 9 July 2001, para. C.

[403] *EC – Bananas III*, Notification of Mutually Agreed Solution (WT/DS27/58), 2 July 2001, para. F; and *EC – Bananas III*, Understanding on Bananas between Ecuador and the EC (WT/DS27/60), 9 July 2001, para. F.

The importance of providing a positive solution and effective settlement to WTO disputes, in conformity with the covered agreements

7.68 Without addressing the legal status of the Bananas Understanding, the Panel agrees with European Communities that, as Article 3.7 of the DSU provides, mutually agreed solutions constitute the "clearly preferred" solution to WTO disputes. Also, the Panel recognizes the systemic importance of mutually agreed solutions for WTO dispute settlement, and the importance of parties reaching a specific mutually agreed solution to comply with the terms of such mutually agreed solution.

7.69 Nevertheless, the Panel reaches a different conclusion on Article 3.7 of the DSU than the European Communities as to whether the Bananas Understanding can bar Ecuador from bringing this compliance challenge.

7.70 Article 3.7 of the DSU also provides that "[t]he aim of the [WTO] dispute settlement mechanism is to secure a *positive solution* to a dispute". (emphasis added)

7.71 Further, under Article 3.2 of the DSU, "the dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system", and one of the objectives of the WTO dispute settlement system is "to preserve the rights and obligations of Members under the covered agreements".

7.72 Also, under Article 3.3 of the DSU,

> "The *prompt settlement* of situations 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 WTO and the maintenance of a proper balance between the rights and obligations of Members*." (emphasis added)

7.73 Finally, pursuant to Article 3.4 of the DSU, "[r]ecommendations or rulings made by the DSB shall be aimed at achieving a *satisfactory settlement* of the matter in accordance with the rights and obligations under [the DSU]". (emphasis added)

7.74 Accordingly, the Panel considers that any alleged solution to WTO disputes must first and foremost "secure a positive solution" to the dispute in the sense of Article 3.7 of the DSU. This requirement also applies to a solution that is alleged to be a "clearly preferred" or a legally binding one, as the European Communities argues in regard to the Bananas Understanding. Further, given the emphasis in the DSU on the prompt settlement of disputes, on the security and predictability of the multilateral trading system, and on the "central" role of WTO dispute settlement in providing such security and predictability, any solution to a WTO dispute, including an alleged mutually agreed solution or other legally binding agreement, can lead to a positive resolution of a dispute only if the solution provides a satisfactory and effective settlement to the dispute in question in the sense of Article 3.4 of the DSU.

7.75 Consequently, the Panel is of the view that the Bananas Understanding can legally bar Ecuador from bringing this compliance challenge only if that Understanding constitutes a positive solution and effective settlement to the dispute in question.

7.76 The Panel considers that that is not the case here – for the following three reasons *taken together*:

(a) the Bananas Understanding provides only for a means, i.e. a series of future steps, for resolving and settling the dispute;

(b) the adoption of the Bananas Understanding was subsequent to recommendations, rulings and suggestions by the DSB; and,

(c) parties have made conflicting communications to the WTO concerning the Bananas Understanding.

7.77 Before turning to these three issues, the Panel recalls that one of the main arguments of the European Communities under this preliminary issue is that the Bananas Understanding is a mutually agreed solution or a legally binding agreement for the purposes of WTO dispute settlement. The Panel does not address that argument at this point; however, the Panel does note that, assuming that the Bananas Understanding qualifies as a mutually agreed solution or a legally binding agreement for the purposes of WTO dispute settlement, there is a clear requirement for it to be consistent with the covered agreements.

7.78 Article 3.7 of the DSU not only expresses a "clear preference" for mutually agreed solutions, it also provides that "[a] solution mutually acceptable to the parties to a dispute *and consistent with the covered agreements* is clearly to be preferred." (emphasis added) Article 3.5 of the DSU confirms this requirement of conformity in regard to all solutions, not only mutually agreed solutions, by stipulating that:

> "All solutions to matters formally raised under the consultation and dispute settlement provisions of the covered agreements, including arbitration awards, shall be consistent with those agreements and shall not nullify or impair benefits accruing to any Member under those agreements, nor impede the attainment of any objective of those agreements."

7.79 This obligation of conformity is closely related to the requirement that an alleged mutually agreed solution or legally binding agreement can prevent Ecuador from bringing this compliance challenge *only* if such alleged mutually agreed solution or legally binding agreement provides a positive solution and effective settlement of the dispute. It is not clear how an alleged mutually agreed solution or legally binding agreement could provide a positive solution or effective settlement for the purposes of WTO dispute settlement without being in conformity with the covered agreements.

> The Bananas Understanding provides only for a means for resolving and settling the dispute

7.80 As the analysis of the terms and main elements of the Bananas Understanding shows, the essence of the Understanding is a series of staged future steps that both sides agreed to take over a period of several years following the adoption of the Understanding.

7.81 The Panel notes that, by its terms, the Bananas Understanding "identified the *means by which* the long-standing dispute over the European Communities' banana import regime *can be resolved*."[404] (emphasis added) In the light of that language and the various subsequent steps set out in the Bananas Understanding, it is difficult to see how the Bananas Understanding, even if it was an alleged mutually agreed solution or a binding agreement, could be an effective *solution* to a dispute in the absence of parties' full compliance with all the steps set out therein.

7.82 Also, as indicated earlier, the Panel considers that one of the main functions of the Bananas Understanding, if it were a mutually agreed solution or a binding agreement, as the

[404] *EC – Bananas III*, Notification of Mutually Agreed Solution (WT/DS27/58), 2 July 2001, para. A; and *EC – Bananas III*, Understanding on Bananas between Ecuador and the EC (WT/DS27/60), 9 July 2001, para. A.

European Communities argues, would be to provide an effective settlement to the dispute in question. The Panel agrees with the panel in *India – Autos*, which was considering a mutually agreed solution providing for future steps by its parties, that:

> "It is certainly reasonable to assume, particularly on the basis of Article 3 of the DSU, ... that [mutually] agreed solutions are intended to reflect a settlement of the dispute in question, which both parties expect will bring a final conclusion to the relevant proceedings."[405]

7.83 The same panel added that:

> "This does not necessarily resolve the issue of what can be done if, despite the agreed solution, a subsequent disagreement emerges relating to the scope of the solution or to compliance with it. This is not an issue expressly addressed in the DSU."[406]

7.84 The Panel considers that an alleged mutually agreed solution or binding agreement that essentially serves to provide for future steps by its parties, like the Bananas Understanding, can only "secure a positive solution" in the sense of Article 3.7 of the DSU after implementation, because it is inseparably linked to those future steps and to full compliance by the parties with each of those steps.

7.85 The Panel does not assess whether there is the possibility to enforce, under the DSU, the steps set out in an alleged mutually agreed solution or other legally binding agreement between the parties to a dispute. Nevertheless, the Panel considers that, for the purposes of providing a positive solution and effective settlement to the dispute in question, the full effect of the Bananas Understanding will be realized only after parties' compliance with all the steps set out in the Understanding.

7.86 The Panel considers that one of the reasons for the "clear preference" for mutually agreed solutions under Article 3.7 of the DSU, would seem to be that, by virtue of the mutual agreement of the parties that they involve, such solutions are supposed to provide the most effective solution and settlement to the dispute in question.

7.87 The Panel recalls the importance of the requirement of consistency with the covered agreements of all solutions to WTO disputes. Without assessing the legal status of the Bananas Understanding, the Panel considers that that requirement is twofold in regard to an alleged mutually agreed solution or legally binding solution, like the Bananas Understanding, that provides for a series of staged future steps by its parties.

7.88 First, pursuant to Articles 3.7 and 3.5 of the DSU, any mutually agreed solution shall be consistent with the covered agreements. By virtue of Article 3.5 of the DSU, the same requirement of consistency with the covered agreements applies to an alleged legally binding agreement that is intended to provide an effective solution to a particular dispute.

7.89 Second, by virtue of the close link between Bananas Understanding and the future steps set out therein, to the extent that the Bananas Understanding provides for future steps by its parties, such steps shall also be consistent with the covered agreements. The Panel does not see how conformity of an alleged mutually agreed solution or legally binding agreement providing for future steps by its parties may be achieved in a meaningful way without making sure that the actual future steps enshrined in such mutually agreed solutions are also in conformity with the covered agreements. For the same reason, the Panel does not see how an alleged mutually agreed solution or legally

[405] Panel Report on *India – Autos*, para. 7.113.
[406] Ibid., para. 7.114.

binding agreement providing for future steps can be a positive solution or an effective settlement without conformity with the covered agreements.

7.90 This link between on the one hand, alleged mutually agreed solutions or legally binding agreements and, on the other hand, the steps set out in such solutions or agreements, in the context of compliance with the covered agreements, is perhaps more obvious for alleged mutually agreed solutions or legally binding agreements recording the implementation of past steps agreed upon by the parties. However, despite the different time perspective, the same link is equally valid in the context of alleged mutually agreed solutions or legally binding agreements setting out future steps.

7.91 In the light of that paramount requirement of conformity with the covered agreements, the Panel remains convinced that a complainant must have the possibility of having recourse to WTO dispute settlement in order to review the conformity with the covered agreements of a measure purportedly taken by the respondent to implement a step set out in an alleged mutually agreed solution or other legally binding agreement.

> The adoption of the Bananas Understanding subsequent to recommendations and suggestions by the DSB

7.92 The Panel considers that the fact that the parties adopted the Bananas Understanding subsequent to a series of reports in this dispute by panels and the Appellate Body establishing inconsistency with the covered agreements constitutes relevant context for assessing the European Communities' first preliminary objection.

7.93 The Dispute Settlement Body adopted the relevant reports with recommendations that the European Communities bring its measures into compliance, and suggestions as to how the European Communities might do that.[407] Through these recommendations and suggestions, the DSB thus repeatedly tried to promote a resolution of this dispute.

7.94 The Panel notes that the European Communities argues that its current banana import regime, introduced on 1 January 2006, is the tariff-only regime foreseen by the Bananas Understanding[408], since "[t]he Understanding does not provide that this tariff only regime should have any particular characteristics and, indeed, the import regime introduced by the European Communities does not have any special features: there is a single tariff applicable to all banana imports, with a preference granted to the ACP countries limited to certain quantities only."[409] For this latter reason, the European Communities also argues that its current banana import regime "is the type of regime that the [first] Article 21.5 Panel [requested by Ecuador] had described as 'tariff only' in paragraph 6.157 of its report."[410] Further, the European Communities notified the Bananas Understanding with the following communication:

> "The European Communities (EC) wish to notify the Dispute Settlement Body (DSB) that they have reached, with the United States of America and Ecuador, a mutually satisfactory solution within the meaning of Article 3.6 of the DSU *regarding the implementation by the EC of the conclusions and recommendations adopted by the*

[407] See Minutes of the Meeting of the Dispute Settlement Body Held in the Centre William Rappard on 25 September 1997, WT/DSB/M/37 of 4 November 1997, p. 27; and Minutes of the Meeting of the Dispute Settlement Body Held in the Centre William Rappard on 6 May 1999, WT/DSB/M/61 of 30 June 1999, p. 6.

[408] See European Communities' first written submission, para. 29.

[409] European Communities' second written submission, para. 16.

[410] Ibid.

DSB in the dispute "Regime for the importation, sale and distribution of bananas" (WT/DS27)."[411] (emphasis added)

7.95 Thus, the European Communities establishes a close link between each of the following: (i) the DSB recommendations and suggestions made previously in this dispute; (ii) the third, final step foreseen by the Bananas Understanding; and, (iii) the measures contested by Ecuador before this Panel.

7.96 As mentioned earlier, the Panel does not intend to assess whether – beyond the possibility of having alleged implementation steps reviewed under the DSU – there is also the possibility to enforce, under the DSU, the steps to be taken by parties under an alleged mutually agreed solution or legally binding agreement. The Panel considers that the close link that the European Communities establishes between the Bananas Understanding and the recommendations and suggestions of the DSB underscores the relevance of the Bananas Understanding for the resolution and settlement of this dispute. At the same time, the close link that the European Communities establishes between the DSB recommendations and suggestions made previously in this dispute, the third, final step foreseen by the Bananas Understanding, and the measures contested by Ecuador before this Panel confirms that the Bananas Understanding in itself cannot prevent Ecuador from bringing this compliance dispute.

7.97 Given that close link, parties' compliance with all future steps set out in the Bananas Understanding is an even more important precondition of a positive solution and an effective settlement of the dispute. However, there is no recognition by the complainant that the European Communities has implemented all three steps set out in the Bananas Understanding. In particular, while Ecuador recognizes the European Communities' compliance with the first two steps under the Bananas Understanding[412], Ecuador contests[413] whether the European Communities has complied with the third step: "to introduce a Tariff Only regime for imports of bananas no later than 1 January 2006".[414] Further, in its compliance challenge, Ecuador contests that the current EC banana import regime is in conformity with the covered agreements.

Parties' conflicting communications to the WTO concerning the Bananas Understanding

7.98 Article 3.6 of the DSU provides that:

> "Mutually agreed solutions to matters formally raised under the consultation and dispute settlement provisions of the covered agreements shall be notified to the DSB and the relevant Councils and Committees, where any Member may raise any point relating thereto."

7.99 In addition to conformity with the covered agreements, notification is the other main requirement with regard to mutually agreed solutions under the DSU. The Panel notes that Article 3.6 of the DSU uses the passive voice, and it does not specify whether the parties shall notify a mutually agreed solution separately or jointly, or whether notification by one of the parties to a mutually agreed solution is sufficient, and if yes, whether the complainant or the respondent shall make the notification.

[411] *EC – Bananas III*, Notification of Mutually Agreed Solution (WT/DS27/58), 2 July 2001, p. 1.
[412] Ecuador's second written submission, para. 11.
[413] Ibid.
[414] *EC – Bananas III*, Notification of Mutually Agreed Solution (WT/DS27/58), 2 July 2001, para. B; and *EC – Bananas III*, Understanding on Bananas between Ecuador and the EC (WT/DS27/60), 9 July 2001, para. B.

7.100 Accordingly, the Panel does not address whether the Bananas Understanding was notified appropriately under Article 3.6 of the DSU or whether, as a result, it could qualify as a mutually agreed solution. At the same time, the Panel considers that the explicit notification requirement under Article 3.6 of the DSU is evidence of the importance that the DSU attaches to the notification of mutually agreed solutions to the WTO. Thus, for the purposes of WTO dispute settlement, the reaching of an alleged mutually agreed solution between parties to a dispute needs to be complemented with notifying such agreement to all WTO Members. The indispensability of this latter, multilateral element of mutually agreed solutions is underscored by the requirement, under Article 3.6 of the DSU, of notifying mutually agreed solutions not only to one WTO body or to the WTO in general but to the "DSB and the relevant Councils and Committees", and also by the explicit provision in Article 3.6 that in those bodies "any Member may raise any point relating thereto."

7.101 The Panel recalls in this context that Article 3.5 of the DSU, the provision immediately preceding Article 3.6, sets out two basic requirements for "[a]ll solutions to matters formally raised under the consultation and dispute settlement provisions of the covered agreements": (i) they "shall be consistent with [the covered] agreements"; and, (ii) they "shall not nullify or impair benefits accruing to any Member under [the covered] agreements, nor impede the attainment of any objective of those agreements."

7.102 The fulfilment of these two basic requirements of Article 3.5 of the DSU is an indispensable multilateral element of "[a]ll solutions to matters formally raised under the consultation and dispute settlement provisions of the covered agreements", including any alleged mutually agreed solution or legally binding agreement that is intended to provide a positive solution and effective settlement to a dispute. Notification is an additional multilateral element specific to mutually agreed solutions because, unlike other solutions to disputes, mutually agreed solutions are usually not developed multilaterally.

7.103 It is a matter of fact that in this dispute the European Communities sent to the DSB a communication, dated 22 June 2001 entitled "Notification of a Mutually Agreed Solution".[415] That EC communication stated that "[t]he European Communities (EC) wish to notify the Dispute Settlement Body (DSB) that they have reached, with ... Ecuador, a mutually satisfactory solution within the meaning of Article 3.6 of the DSU"[416], and it reproduced the text of the Bananas Understanding. This communication by the respondent was closely followed by a separate communication from the complainant, dated 3 July 2001, stating that, "although Ecuador sees the [Bananas] Understanding as an agreed solution which can contribute to an overall, definite and universally accepted solution, it must be made clear that the provisions of Article 3.6 of the DSU are not applicable in this case."[417]

7.104 The Panel notes that this latter communication by Ecuador also reproduced the text of the Bananas Understanding, with the same language as the Bananas Understanding annexed to the EC communication. Also, Ecuador acknowledges that it signed the Bananas Understanding.[418] Without assessing whether the Bananas Understanding is a mutually agreed solution or legally binding agreement, the Panel notes that these circumstances seem to show that the Bananas Understanding created an important bilateral link between Ecuador and the European Communities. At the same time, these circumstances also show that almost immediately after the European Communities' attempt to try to accord a potential multilateral element to the

[415] See *EC – Bananas III*, Notification of Mutually Agreed Solution (WT/DS27/58), 2 July 2001, p. 1.
[416] See Ibid., p. 1.
[417] *EC – Bananas III*, Understanding on Bananas between Ecuador and the EC (WT/DS27/60), 9 July 2001, p. 1.
[418] See Ecuador's response to Panel question No. 37.

Bananas Understanding, Ecuador called into question the multilateral status of that Understanding and its role in definitively resolving the dispute.

7.105 The Panel does not need to assess whether the Bananas Understanding was notified appropriately under Article 3.6 of the DSU or whether, as a result, the Understanding could qualify as a mutually agreed solution. However, the Panel notes that, under Article 3.6 of the DSU, so far nearly all mutually agreed solutions have been notified by the respondent and the complainant (whether jointly or separately), with two exceptions where the mutually agreed solution was notified by the complainant only.[419] The Panel interprets this practice as illustrating the importance of the complainant's involvement in, or at least its consent to, not only the bilateral but also the multilateral element, i.e. the notification to the DSB and relevant Councils and Committees, of any alleged mutually agreed solution.

7.106 As mentioned earlier, under Article 3.5 of the DSU, "[a]ll solutions to matters formally raised under the consultation and dispute settlement provisions of the covered agreements ... shall not nullify or impair benefits accruing to any Member under [the covered] agreements". If a solution to a dispute potentially affects the benefits accruing to WTO Members, it is first and foremost the benefits accruing to the complainant in the dispute that might be affected. This is particularly true for an alleged mutually agreed solution or legally binding agreement that the respondent argues would bar the complainant from bringing a challenge against a measure allegedly implementing a step set out in such alleged mutually agreed solution or legally binding agreement.

7.107 Irrespective of whether the Bananas Understanding was properly notified under Article 3.6 of the DSU, which the Panel does not assess, in the light of the multilateral requirement set out in Article 3.5 of the DSU for all solutions, it is difficult for the Panel to see how the Bananas Understanding could provide a positive solution and effective settlement to the dispute when, immediately following the respondent's communication of the Understanding to the WTO, the complainant in the dispute contested the multilateral status of the Understanding and its role in definitively resolving the dispute.

7.108 It would seem appropriate to assume that an alleged mutually agreed solution or legally binding agreement that could bar the complainant from bringing a subsequent compliance dispute, would need to provide a solution to the dispute for both parties, including in particular for the complainant, and especially after the DSB established the inconsistency with the covered agreement of measures adopted by the respondent.

Remaining key arguments raised under this preliminary issue

7.109 The Panel will now turn to the remaining key arguments raised under this preliminary issue, namely:

(a) whether, through the Bananas Understanding, Ecuador accepted the existence of the ACP preference beyond 2005;

(b) the EC arguments concerning parties' compliance with the Bananas Understanding;

(c) the European Communities' arguments on contentiousness, *pacta sunt servanda* and good faith; and,

[419] See *Mexico – Certain Pricing Measures for Customs Valuation and Other Purposes*, Communication from Guatemala (WT/DS298/2), 1 September 2005; and *Colombia – Customs Measures on Importation of Certain Goods from Panama*, Notification of a Mutually Agreed Solution (WT/DS348/10), 7 December 2006.

(d) the withdrawal of the matter from the DSB agenda.

Did Ecuador accept, through the Bananas Understanding, the existence of the ACP preference beyond 2005?

7.110 As noted earlier, one of the key arguments of the European Communities under this preliminary issue is that:

> "[T]hrough the [Bananas] Understanding, Ecuador accepted that the Cotonou Preference would continue to exist for the entire duration of the waiver that the European Communities had requested at the time the Understanding was signed and the grant of which Ecuador accepted to support in the Understanding."[420]

7.111 For the purposes of this compliance dispute, the relevant period is the one starting on 1 January 2006, when the European Communities introduced its current banana import regime, contested by Ecuador. Accordingly, the question is whether the European Communities makes a prima facie case that, through the Bananas Understanding, Ecuador has accepted the extension of the ACP preference beyond 2005.

7.112 The Bananas Understanding does not specify its period of applicability. While the Understanding prescribes a step to be taken by the European Communities "no later than 1 January 2006"[421], it does not explicitly prescribe any steps to be taken by Ecuador with effect beyond 2005.

7.113 In arguing that, through the Bananas Understanding, Ecuador has accepted the ACP preference, the European Communities must be making reference to the following step prescribed in the Understanding for Ecuador:

> "Ecuador will lift its reserve concerning the waiver of Article I of the GATT 1994 that the EC has requested for preferential access to the EC of goods originating in ACP States signatory to the Cotonou Agreement; and will actively work towards promoting the acceptance of an EC request for a waiver of Article XIII of the GATT 1994 needed for the management of quota C under the import regime described in paragraph C(2) until 31 December 2005."[422]

7.114 While this language in the Bananas Understanding might reflect an indirect acceptance of the ACP preference until the end of 2005, it does not appear to mention any acceptance of the ACP preference by Ecuador beyond 2005. Indeed, the second element in the Understanding with Ecuador referred to in the preceding paragraph, relating to the waiver under Article XIII of the GATT 1994 is explicitly limited to the end of 2005. In other words, it cannot extend to the period after 2005. Further, the first element of the step to be taken by Ecuador, relating to the waiver under Article I of the GATT 1994, requires Ecuador to lift its reserve in the context of a waiver requested by the European Communities.

7.115 The acceptance of that waiver request, like any waiver request, does not depend only on one Member, Ecuador, but on all WTO Members. As Ecuador notes in its communication to the DSB

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[420] European Communities' response to Panel question No. 58.

[421] *EC – Bananas III*, Notification of Mutually Agreed Solution (WT/DS27/58), 2 July 2001, para. B; and *EC – Bananas III*, Understanding on Bananas between Ecuador and the EC (WT/DS27/60), 9 July 2001, para. B.

[422] *EC – Bananas III*, Notification of Mutually Agreed Solution (WT/DS27/58), 2 July 2001, para. F; and *EC – Bananas III*, Understanding on Bananas between Ecuador and the EC (WT/DS27/60), 9 July 2001, para. F.

concerning the Bananas Understanding, "the Understanding also comprises of the execution of two phases and requires the implementation of several key features, which demands the collective action of the WTO membership."[423]

7.116 Since Ecuador could have accepted the ACP preference only indirectly through committing to lifting its reserve concerning a waiver request, the period for which Ecuador might have indirectly accepted the ACP preference depends ultimately on the waiver being adopted partly as a result of Ecuador's step under the Bananas Understanding.

7.117 The waiver ultimately adopted, namely the Doha Waiver from Article I:1 of the GATT 1994[424], does not provide that it would unconditionally apply beyond 2005 in regard to bananas. Even the European Communities accepts that the Doha Waiver sets out conditions for its applicability to bananas in the period between 1 January 2006 and the overall expiration of the waiver on 31 December 2007.

7.118 In the light of the above, the Panel finds that the European Communities has not made a prima facie case for one of its central arguments under this preliminary issue, namely that Ecuador would have accepted, through the Bananas Understanding, the extension of the ACP preference beyond 2005. As a consequence, the Panel fails to see how, as argued by the European Communities, Ecuador would be prevented from bringing this compliance dispute against the ACP preference during the period starting on 1 January 2006.

7.119 This is underscored by the fact that one of the main points of contention between the parties to this compliance dispute concerns the conditions of the validity of the Doha Waiver from Article I:1 of the GATT 1994 to bananas in 2006-2007, and in particular the question whether the European Communities effectively complied with the final step envisaged in the Bananas Understanding and what implications that might have for the validity of the waiver for bananas in 2006-2007.

> Arguments by the European Communities concerning parties' compliance with the Bananas Understanding

7.120 The Panel sees the European Communities' contextual argument about parties' compliance with the Bananas Understanding as having limited relevance for assessing whether the Bananas Understanding prevents Ecuador from bringing this compliance dispute.

7.121 The Panel notes that neither of the parties contests having undertaken the above steps through the Bananas Understanding. Further, Ecuador recognizes that the European Communities has complied with its obligations for the first two interim phases set out in the Understanding[425], and the European Communities recognizes that Ecuador has complied with its main obligation under the Understanding.[426]

7.122 At the same time, both parties seem to suggest that compliance with Bananas Understanding remained partial. Ecuador openly contests whether the European Communities has complied with the third phase set out in the Understanding.[427] The European Communities' request that the Panel

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[423] *EC – Bananas III*, Understanding on Bananas between Ecuador and the EC (WT/DS27/60), 9 July 2001, p. 1.

[424] See Ministerial Conference, European Communities, The ACP – EC Partnership Agreement, Decision of 14 November 2001 (WT/MIN(01)/15), 14 November 2001.

[425] See Ecuador's second written submission, para. 11.

[426] See European Communities' first written submission para. 62.

[427] See Ecuador's second written submission, para. 11.

enforce the Bananas Understanding because "Ecuador must now comply with its undertakings"[428] under the Understanding implies that even the European Communities sees compliance with the Understanding as being limited, at least on Ecuador's side.

Arguments by the European Communities on contentiousness, pacta sunt servanda and good faith

7.123 As mentioned earlier, the European Communities argues that Articles 3.7 and 3.10 of the DSU "are the corollary in the WTO legal order of the principles of good faith and '*pacta sunt servanda*', which are well established in customary international law."[429] In particular, according to the European Communities:

> "[I]t is wrong to assume that the principle of good faith does not cover Article 21.5 of the DSU, as asserted in paragraph 9 of Ecuador's second submission. Both the language used in Article 3.10 of the DSU (i.e., '*all Members will engage in these procedures in good faith*') and its nature as a general principle of law, make clear that the principle of good faith runs through the entire DSU and defines the outer limits of the application of all rights recognized by the DSU to WTO Members."[430]

7.124 Further, the European Communities argues that:

> "Granting to WTO members the right to renege on the agreements with which they reach mutually agreed solutions to their disputes would seriously compromise the effectiveness of these mutually agreed solutions and would foster the 'contentious' character of the dispute resolution system. This would be inconsistent with the purpose of the DSU, as reflected in Article 3.10, and with the principles enshrined in Article 3.7 (where it is stated that mutually agreed solutions are to be preferred)."[431]

7.125 The European Communities makes reference to Article 3.10 of the DSU, which, in relevant part, provides that:

> "It is understood that requests for conciliation and the use of the dispute settlement procedures should not be intended or considered as contentious acts and that, if a dispute arises, all Members will engage in these procedures in good faith in an effort to resolve the dispute."

7.126 As regards the contentious nature of disputes, the Panel reads Article 3.10 of the DSU to exclude on its plain terms the interpretation accorded to it by the European Communities. In particular, in the light of the language of Article 3.10 of the DSU, the Panel does not see how the European Communities could consider the current dispute settlement proceeding as a contentious act.

7.127 As to *pacta sunt servanda*, the Panel does not address the more systemic issue of whether a Member may waive, under a bilateral agreement and for the purposes of WTO dispute settlement, its rights to action pursuant to the DSU. The Panel merely notes that the Bananas Understanding does not explicitly provide anywhere that Ecuador would forego its rights to bring a compliance dispute. The following provision of the Bananas Understanding is clearly not on point here, as it does not specifically address Ecuador's right to bring a compliance dispute:

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[428] European Communities' response to Panel question No. 58.
[429] European Communities' second written submission, para. 11.
[430] Ibid., para. 12.
[431] Ibid., para. 18.

> "Upon implementation of the import regime described in paragraph C, Ecuador's right to suspend concessions or other obligations of a level not exceeding US$201.6 million per year vis-à-vis the EC will be terminated."[432]

7.128 Finally, as to the arguments of the European Communities on good faith, the Panel notes that Ecuador points out that it "is not challenging or questioning the EC-Ecuador Understanding on Bananas, but rather is challenging the conformity of EC measures with the EC's obligations under the WTO Agreement".[433] The Panel recalls that Article 3.2 of the DSU provides that the dispute settlement system of the WTO "serves to preserve the rights and obligations of Members under the covered agreements." Also, as mentioned above, the Panel attaches great importance to the conformity of an alleged mutually agreed solution or legally binding agreement, including the future steps set out therein, with the covered agreements, as well as to the possibility of the complainant to have recourse to WTO dispute settlement to review the issue of conformity. Nowhere in the Understanding has Ecuador accepted that it would forego its right to challenge the conformity with the covered agreements of any measure that the European Communities might take to implement a step set out in the Bananas Understanding.

7.129 The Panel notes that in *US – Offset Act (Byrd Amendment)* the Appellate Body stated that "there is a basis for a dispute settlement panel to determine, in an appropriate case, whether a Member has not acted in good faith"[434]. However, the Appellate Body added that:

> "Nothing ... in the covered agreements supports the conclusion that simply because a WTO Member is found to have violated a substantive treaty provision, it has therefore not acted in good faith. In our view, it would be necessary to prove more than mere violation to support such a conclusion."[435]

7.130 Interpreting those considerations by the Appellate Body, the panel in *Argentina – Poultry Anti-Dumping Duties* stated that:

> "[T]wo conditions must be satisfied before a Member may be found to have failed to act in good faith. First, the Member must have violated a substantive provision of the WTO agreements. Second, there must be something 'more than mere violation'.[436]

7.131 Article 3.10 of the DSU provides in relevant part that "if a dispute arises, all Members will engage in these procedures in good faith in an effort to resolve the dispute." It does not seem that the European Communities has succeeded in making a prima facie case for the alleged violation of that provision, let alone also for something "more than mere violation".

7.132 In light of the above, the Panel rejects the European Communities' arguments on contentiousness, *pacta sunt servanda* and good faith.

Withdrawal of the banana dispute from the DSB agenda

7.133 Finally, the Panel refrains from considering in detail the contextual argument, raised by a number of ACP third parties that, with Ecuador's explicit agreement[437], "the banana dispute was taken

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[432] *EC – Bananas III*, Notification of Mutually Agreed Solution (WT/DS27/58), 2 July 2001, para. E; and *EC – Bananas III*, Understanding on Bananas between Ecuador and the EC (WT/DS27/60), 9 July 2001, para. E.

[433] Ecuador's second written submission, para. 14.

[434] Appellate Body Report on *US – Offset Act (Byrd Amendment)*, para. 297.

[435] Ibid., para. 298.

[436] Panel Report on *Argentina – Poultry Anti-Dumping Duties*, para. 7.36.

[437] See joint third-party submission of Belize, Cameroon, Côte d'Ivoire, Dominica, the Dominican Republic, Ghana, Jamaica, Madagascar, St. Lucia, St. Vincent and the Grenadines, and Suriname, para. 37.

off the agenda of the DSB in accordance with Article 21.6 of the DSU ... at the DSB meeting held on 1 February 2002[438]".[439]

7.134 Indeed, it is unclear to what extent the European Communities wishes to use this as a legal argument. While at one point the European Communities argued that that such withdrawal was supportive of its preliminary objection in this dispute[440], at a later point the European Communities explicitly stated that it "has not argued that the withdrawal of the issue on the implementation of the DSB rulings and recommendations from the agenda of the DSB has any particular legal significance."[441]

(iii) Conclusion

7.135 In the light of the foregoing analysis of the terms and context of the Bananas Understanding, the Panel concludes that, even if the Bananas Understanding qualified as a mutually agreed solution or a legally binding agreement, it would not prevent Ecuador from bringing this compliance dispute. The Panel therefore does not need to assess whether the Bananas Understanding indeed qualifies as a mutually agreed solution or a legally binding agreement, as argued by the European Communities. In particular, there is no need to assess the arguments by the European Communities that the Bananas Understanding would constitute applicable rules of law for WTO dispute settlement.

7.136 In the light of the relevant arguments raised by the European Communities, the Panel concludes that the European Communities has not succeeded in making a prima facie case in favour of its preliminary objection. Accordingly, the Panel rejects the European Communities' first preliminary objection, and turns to assess Ecuador's substantive claims in this dispute.

C. ECUADOR'S CLAIM UNDER ARTICLE I OF THE GATT 1994

1. Ecuador's claim

7.137 Ecuador argues that the European Communities' import regime for bananas and, more specifically, the tariff quota, which allows a specified yearly volume of 775,000 mt of bananas of ACP origin to enter the EC market duty-free, is inconsistent with Article I of the GATT 1994. Ecuador considers that this regime "[accords] tariff preferences to bananas of ACP origin that are not accorded to bananas originating in Ecuador or other non-ACP countries".[442] Ecuador adds that the preferences granted to bananas of ACP origin are not covered by the waiver from Article I:1 of the GATT 1994, the ACP-EC Partnership Agreement waiver (Doha Waiver), which was granted to the European Communities by the WTO Ministerial Conference in Doha on 14 November 2001.[443]

7.138 In Ecuador's view:

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[438] (*footnote original*) Minutes of the DSB meeting held on 1 February 2002, WT/DSB/M/119, 6 March 2002, at point 1 (a).

[439] Joint third-party submission of Belize, Cameroon, Côte d'Ivoire, Dominica, the Dominican Republic, Ghana, Jamaica, Madagascar, St. Lucia, St. Vincent and the Grenadines, and Suriname, para. 37.

[440] See European Communities' response to Panel question No. 6.

[441] European Communities' response to Panel question No. 59.

[442] Ecuador's first written submission, para. 25.

[443] Ministerial Conference, European Communities, The ACP – EC Partnership Agreement, Decision of 14 November 2001 (WT/MIN(01)/15), 14 November 2001. See Ecuador's second written submission, paras. 16-36, , and written version of Ecuador's oral statement during substantive meeting with the parties and third parties, paras. 34-44.

> "There is no dispute that all bananas are like products, nor that the EC accords bananas of ACP origin duty-free treatment up to the 775,000 mt tariff quota, while bananas of Ecuadorian origin (as well as other bananas not benefiting from the duty-free tariff quota) are subject to a duty of €176/mt. Absent some applicable exception or waiver, it could not seriously be asserted that Article I permits a WTO member to grant a duty preference limited to one group of WTO members, and excluding others."[444]

7.139 Ecuador contends that, if the European Communities was to argue that its breach of Article I of the GATT 1994 is covered by an appropriate waiver, the burden would then fall on the EC to demonstrate "that it still has a valid waiver with respect to bananas, and that this waiver covers the ... measures at issue."[445]

7.140 Ecuador adds that, in any event, the European Communities' preference for bananas of ACP origin is no longer covered by the Doha Waiver. In Ecuador's view, the European Communities failed to meet the conditions of the waiver, which would have allowed the waiver to continue to apply beyond 31 December 2005.[446] In particular, Ecuador argues that:

> "In accordance with the Doha Waiver, having failed in its two opportunities to envisage a tariff rebinding that would meet the waiver standard, the EC cannot claim the protection of the waiver for the system it then established unilaterally"[447]

2. The European Communities' response

7.141 The European Communities has not made any specific arguments to contest Ecuador's claim that the preference granted to bananas of ACP origin would be inconsistent with Article I of the GATT 1994.[448]

7.142 The European Communities argues, however, that this preference continues to be covered by a waiver from Article I:1 of the GATT 1994, the Doha Waiver. According to the European Communities, the duration of that waiver is not linked to the number of arbitrations lost by the European Communities, but rather depends on whether the new import regime for bananas it introduced on 1 January 2006 at least maintains total market access for MFN suppliers.[449]

7.143 The European Communities also argues that, in accordance with the language contained in the Doha Waiver, this waiver would only cease to apply to bananas "upon entry into force of the new EC tariff regime", which the European Communities considers to mean "the tariff regime that was presented to the Arbitrator and on which the Arbitrator made a pronouncement in its Award."[450]

7.144 In the European Communities' view:

> "The European Communities has fully satisfied the condition for the continued application of the Doha waiver ... . The European Communities introduced on

[444] Ecuador's first written submission, para. 25.
[445] Ibid., para. 26.
[446] Ibid.
[447] Ecuador's second written submission, para. 17. See also, Ecuador's first written submission, para. 26.
[448] European Communities' response to panel question No. 61, para. 125. See also, Ecuador's second written submission, para. 16; and written version of Ecuador's oral statement during substantive meeting with the parties and third parties, para. 34.
[449] European Communities' first written submission, paras. 67 and 69.
[450] Ibid., para. 71.

> January 1, 2006 a different import regime than the one analysed by the Arbitrator. Moreover, the evidence derived from the real operation of this import regime clearly establishes that it maintains total market access for MFN suppliers."[451]

7.145 In conclusion, the European Communities argues that, since the preference granted to imported bananas originating in ACP countries continues to be covered by the Doha Waiver, the Panel should reject Ecuador's claim under Article I:1 of the GATT 1994.[452]

3. Article I:1 of the GATT 1994

7.146 Under Article I:1 of the GATT 1994:

> "With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III ... any advantage, favour, privilege or immunity granted by any contracting party [Member] to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties [Members]."[453]

7.147 In *Canada – Autos*, the Appellate Body explained the object and purpose of Article I:1 of the GATT 1994 as follows:

> "Th[e] object and purpose [of Article I:1] is to prohibit discrimination among like products originating in or destined for different countries. The prohibition of discrimination in Article I:1 also serves as an incentive for concessions, negotiated reciprocally, to be extended to all other Members on an MFN basis."[454]

7.148 In *Indonesia – Autos*, referring to the Appellate Body's ruling in *EC – Bananas III*, the panel explained how to carry out the examination of a measure under Article I:1 of the GATT 1994:

> "The Appellate Body, in *Bananas III*, confirmed that to establish a violation of Article I, there must be an advantage, of the type covered by Article I and which is not accorded unconditionally to all 'like products' of all WTO Members."[455]

4. Panel's analysis

7.149 The Panel starts by recalling that the European Communities has chosen not to contest Ecuador's claim that the preference granted to bananas of ACP origin is inconsistent with Article I of the GATT 1994.

7.150 Following the approach set out by the Appellate Body in *EC – Bananas III*, as described by the panel in *Indonesia – Autos*, the Panel will nevertheless consider the arguments and evidence presented by Ecuador, in order to determine whether they are sufficient to establish a prima facie case of inconsistency with Article I of the GATT 1994. If this were determined to be the case, the Panel

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[451] European Communities' first written submission, para. 72. See also, Ibid., para. 71; and European Communities' second written submission, para. 36.

[452] European Communities' first written submission, paras. 34-37 and 68-73.

[453] *Ad* note omitted.

[454] Appellate Body Report on *Canada – Autos*, para. 84.

[455] Panel Report on *Indonesia – Autos*, para. 14.138.

would then turn to assessing whether the European Communities has made a prima facie case that such inconsistency is covered by the Doha Waiver granted by the WTO Ministerial Conference on 14 November 2001.

(a) Is the ACP preference inconsistent with Article I:1 of the GATT 1994?

7.151 As noted above, in order to analyse a claim under Article I:1 of the GATT 1994, the Panel needs to determine first whether the measure challenged constitutes an advantage (or favour, privilege or immunity), of the type covered by Article I. If that were the case, the Panel would then turn to the issues of the likeness of products and the immediate and unconditional extension of such advantage.

(i) Whether the preference granted by the European Communities constitutes an advantage of the type covered by Article I of the GATT 1994

7.152 The following facts are not in dispute:

(a) Under the terms of Council Regulation (EC) No. 1964/2005 of 29 November 2005, and in accordance with the European Communities' commitments under the ACP-EC partnership Agreement, also known as the Cotonou Agreement, the European Communities allows a volume of 775,000 mt of bananas to enter the EC market free of tariff duties;

(b) This duty-free treatment is only available to imports of bananas originating in ACP countries, and not to like bananas originating in other Members; and,

(c) Imported bananas originating in other Members, as well as imports of bananas originating in ACP countries beyond the annual volumes prescribed in the tariff quota, are subject to a specific tariff of €176/mt.[456]

In other words, access eligibility to this preference depends on the origin of the bananas, as only ACP bananas qualify.

7.153 The Panel notes that the term "advantage", under Article I:1 of the GATT 1994, has traditionally been given a broad scope by GATT and WTO panels, as well as by the Appellate Body.[457] In this regard, the Panel concludes that the duty-free treatment available to imports of bananas originating in ACP countries, solely because of their origin, constitutes an advantage, when compared to the ordinary treatment accorded to bananas of all other origins, which are subject to a specific tariff of €176/mt.

(ii) Whether the relevant products in this dispute are like products

7.154 As to whether the relevant products in this dispute are "like products", the Panel notes that the original panel in this dispute already "consider[ed] whether bananas from the EC, ACP countries, BFA countries and other third countries are 'like' products for purposes of the claims made in respect of Articles I, III, X and XIII of GATT"[458], and found that:

[456] See tariff regime for imports of bananas to the EC, in Council Regulation (EC) No. 1964/2005 of 29 November 2005, Exhibit ECU-1. See also, Ecuador's first written submission, para. 21, and European Communities' first written submission, paras. 13 and 15.

[457] "[A] broad definition has been given to the term 'advantage' in Article I:1 of the GATT 1994 by the panel in *United States – Non-Rubber Footwear*." Appellate Body Report on *EC – Bananas III*, para. 206, quoting GATT Panel Report on *US – Non-Rubber Footwear*, para. 6.9.

[458] Panel Report on *EC – Bananas III (Ecuador)*, para. 7.62.

> "The factors commonly used in GATT practice to determine likeness, such as, for example, customs classification, end-use, and the properties, nature and quality of the product, all support a finding that bananas from these various sources should be treated as like products.[459] Moreover, all parties and third parties to the dispute have proceeded in their legal reasoning on the assumption that all bananas are 'like' products in spite of any differences in quality, size or taste that may exist.
>
> We find that bananas are 'like' products, for purposes of Article I, III, X, and XIII of GATT, irrespective of whether they originate in the EC, in ACP countries, in BFA countries or in other third countries."[460]

7.155 Similarly, in the original proceedings the Appellate Body stated that:

> "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 categorizes or subdivides these imports for administrative or other reasons."[461]

The Appellate Body concluded that "[i]n the present case, the non-discrimination obligations of the GATT 1994, specifically Articles I:1 and XIII[462], apply fully to all imported bananas irrespective of their origin ..."[463]

7.156 The Panel agrees with Ecuador that, similar to the earlier proceedings in this dispute, "[t]here is no dispute that all bananas are like products"[464] for the purposes of the proceedings before this Panel. This is not contested by the European Communities.

7.157 Accordingly, and in the light of the relevant findings in earlier proceedings in this dispute, the Panel confirms that the relevant products in this dispute, fresh bananas (corresponding to tariff item 080300 12 or 080300 19) originating in ACP countries, are like products to fresh bananas originating in other WTO Members.

(iii) Whether the preference granted by the European Communities is immediately and unconditionally extended

7.158 Finally, it is not contested between the parties that the preference granted by the European Communities to bananas of ACP origin is not extended to like bananas originating in the territories of any other WTO Members.

7.159 As this advantage is not extended to the like products of any other WTO Members, it is necessarily not extended "immediately", nor "unconditionally". This is notwithstanding the fact that the Panel notes that, in addition to the preferences granted to bananas of ACP origin under the

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[459] (*footnote original*) For a general discussion of relevant factors for determining the likeness of products, see Panel Report on "Japan – Taxes on Alcoholic Beverages", adopted on 1 November 1996, WT/DS8/R, WT/DS10/R & WT/DS11/R, pp. 111-114, paras. 6.20-6.23, as modified by, Appellate Body Report on "Japan – Taxes on Alcoholic Beverages", adopted on 1 November 1996, WT/DS8/AB/R, WT/DS10/AB/R & WT/DS11/AB/R, pp. 19-21.

[460] Panel Report on *EC – Bananas III (Ecuador)*, paras. 7.62-7.63.

[461] Appellate Body Report on *EC – Bananas III*, para. 190.

[462] (*footnote original*) We do not agree with the Panel's findings that Article X:3(a) of the GATT 1994 and Article 1.3 of the *Licensing Agreement* preclude the imposition of different import licensing systems on like products when imported from different Members. See our Findings and Conclusions, paras. (l) and (m).

[463] Appellate Body Report on *EC – Bananas III*, para. 191.

[464] Ecuador's first written submission, para. 25.

Cotonou Agreement, the European Communities also grants autonomous duty-free access to its market to bananas originating in Least Developed Countries (LDCs) under the Everything But Arms (EBA) arrangement.[465]

(iv) Preliminary conclusion regarding Ecuador's claim under Article I:1 of GATT 1994

7.160 For the reasons indicated above, the Panel finds that Ecuador has successfully made a prima facie case that the preference granted by the European Communities to an annual duty-free tariff quota of 775,000 mt of imported bananas originating in ACP countries constitutes an advantage for this category of bananas, which is not accorded unconditionally to like bananas originating in non-ACP WTO Members. The Panel therefore finds that this preference is inconsistent with Article I:1 of GATT 1994.

(b) Is the preference covered by a waiver?

7.161 Having found that the preference granted by the European Communities to imported bananas originating in ACP countries is inconsistent with Article I:1 of the GATT 1994, the Panel will now turn to the issue of whether this preference is covered by the Doha Waiver.

(i) Terms and conditions of the Doha Waiver and the Bananas Annex

7.162 In examining the terms of conditions contained in the Doha Waiver, the Panel recalls the words of the Appellate Body in its *EC – Bananas III* report:

> "Although the WTO Agreement does not provide any specific rules on the interpretation of waivers, Article IX of the WTO Agreement and the Understanding in Respect of Waivers of Obligations under the General Agreement on Tariffs and Trade 1994, which provide requirements for granting and renewing waivers, stress the exceptional nature of waivers and subject waivers to strict disciplines. Thus, waivers should be interpreted with great care."[466]

7.163 While in principle the Doha Waiver was to be valid until 31 December 2007[467], in regard to bananas this was subject to the terms and conditions set out in the text of the Decision by which the WTO Ministerial Conference adopted this waiver. Those terms and conditions include the additional provisions contained in the Annex to the Doha Waiver Decision (the Bananas Annex).[468]

7.164 Under the terms and conditions set out in the Bananas Annex, the European Communities was to announce a proposed rebinding of its tariff on bananas.[469] Within a 60-day period following the announcement by the European Communities of its intentions concerning the rebinding of the tariff on bananas, any WTO Member exporting bananas on an MFN basis could request that an arbitrator determine "whether the envisaged rebinding of the EC tariff on bananas would result in at least

[465] Council Regulation (EC) No. 980/2005 of 27 June 2005. European Communities' response to Panel question No. 53 paras. 109-112. See para. 2.41 above.

[466] Appellate Body Report on *EC – Bananas III*, para. 185. See also GATT Panel Report on *US – Sugar* Waiver, para. 5.9. See also, Nicaragua's third party written submission, para. 22, and Panama's third party written submission, para. 22. See additionally, Ecuador's response to panel question No. 12, European Communities' response to panel question No. 12, para. 28, and No. 14, paras. 32-34, and European Communities' comments on Ecuador's response to panel question No. 12, paras. 3-7.

[467] Ministerial Conference, European Communities, The ACP – EC Partnership Agreement, Decision of 14 November 2001 (WT/MIN(01)/15), 14 November 2001, p. 2, para. 1.

[468] Ibid, p. 3, para. 3bis. The Bananas Annex is an integral part of the Doha Waiver.

[469] Bananas Annex, tirets 1, 2 and 5.

maintaining total market access for MFN banana suppliers".[470] Should the arbitrator find that this was not the case, according to the first sentence in the fifth tiret of the Bananas Annex, the European Communities was to "rectify the matter". In this case, the second sentence in the fifth tiret of the Bananas Annex provides that the European Communities was to enter into consultations with those interested parties that had requested the arbitration. According to the third sentence in the fifth tiret of the Bananas Annex, if, notwithstanding these consultations, no mutually satisfactory solution was agreed, the same arbitrator could be called upon again, this time to determine "whether the EC had rectified the matter". If the arbitrator found that the European Communities had failed to rectify the matter, the fifth sentence in the fifth tiret of the Bananas Annex provides that the waiver would "cease to apply to bananas upon entry into force of the new EC tariff regime". Pursuant to the sixth sentence in the fifth tiret of the Bananas Annex, the entirety of this process had to be conducted in such a manner that the "negotiations and the arbitration procedures [should] be concluded before the entry into force of the new EC tariff only regime on 1 January 2006".[471]

7.165 Whether the Doha Waiver covers the European Communities' current banana import regime may accordingly depend on whether or not, under the Bananas Annex, the Doha Waiver expired with the introduction of the "new EC tariff regime" on 1 January 2006. Indeed, whether or not the Doha Waiver expired on this date is the main issue of contention between the parties to this dispute.

(ii) Uncontested facts

7.166 The following facts are uncontested:

(a) On 31 January 2005, the European Communities notified the WTO Members that it intended to replace its tariff concessions on tariff item 0803 00 19 (bananas) included in the European Communities' Schedule CXL, with a bound duty of €230/mt. In its notification, the European Communities indicated that its communication constituted the announcement under the terms of the Bananas Annex to the Doha Waiver.[472]

(b) In March and April 2005, a number of WTO Members, including Ecuador, the complainant in these proceedings, requested arbitration, pursuant to the Bananas Annex.[473]

(c) In August 2005, the arbitrator delivered its first award pursuant to the Bananas Annex, concluding that:

> "[T]he European Communities' envisaged rebinding on bananas would not result in at least maintaining total market access for MFN

[470] Bananas Annex, tirets 2-4.
[471] Ibid., tiret 5.
[472] Article XXVIII:5 Negotiations, Schedule CXL – European Communities, Addendum (G/SECRET/22/Add.1), 1 February 2005. See para. 2.16 above.
[473] European Communities, The ACP – EC Partnership Agreement, Recourse to Arbitration Pursuant to the Annex to the Decision of 14 November 2001 (WT/L/607), 1 April 2005. See also, European Communities, The ACP – EC Partnership Agreement, Recourse to Arbitration Pursuant to the Annex to the Decision of 14 November 2001, *Communication from Colombia*, Addendum (WT/L/607/Add.1), 1 April 2005; *Communication from Costa Rica*, Addendum (WT/L/607/Add.2), 1 April 2005; *Communication from Ecuador*, Addendum (WT/L/607/Add.3), 1 April 2005; *Communication from Guatemala*, Addendum (WT/L/607/Add.4), 1 April 2005; *Communication from Honduras*, Addendum (WT/L/607/Add.5), 1 April 2005; *Communication from Panama*, Addendum (WT/L/607/Add.6), 1 April 2005; *Communication from Nicaragua*, Addendum (WT/L/607/Add.7), 4 April 2005; *Communication from Venezuela*, Addendum (WT/L/607/Add.8), 4 April 2005; and, *Communication from Brazil*, Addendum (WT/L/607/Add.9), 4 April 2005. See para. 2.17 above.

> banana suppliers, taking into account all EC WTO market-access commitments relating to bananas".[474]

(d) On 13 September 2005, the European Communities notified the interested parties its revised proposal to provide from 1 January 2006 for an MFN tariff for bananas at €187/mt and a tariff quota for ACP countries of 775,000 mt per year at zero duty.[475]

(e) On 26 September 2005, the European Communities requested arbitration, under the Bananas Annex, on its revised proposal.[476]

(f) In October 2005, the arbitrator delivered its second award pursuant to the Bananas Annex, concluding that:

> "[T]he European Communities' proposed rectification ... would not result 'in at least maintaining total market access for MFN banana suppliers', taking into account 'all EC WTO market-access commitments relating to bananas' [and that] consequently ... the European Communities has failed to rectify the matter, in accordance with the fifth tiret of the Annex to the Doha Waiver [the Bananas Annex]".[477]

(g) On 1 January 2006, the European Communities put into force a new regime for the importation of bananas, through Council Regulation (EC) No. 1964/2005, which includes a €176/mt MFN tariff, as well as a 775,000 mt duty-free tariff-rate quota for ACP bananas.[478]

(iii) Issue contested between the parties

7.167 As mentioned above, the main issue that is the object of contention between the parties is whether, under the terms of the Bananas Annex, the Doha Waiver expired with regard to bananas on 1 January 2006. Each of the parties suggests an alternative approach:

(a) Ecuador argues that, with regard to bananas, the Doha Waiver expired automatically upon the entry into force of the new European Communities' tariff regime, inasmuch as two successive arbitrations determined that the European Communities' proposed rebinding of its tariff on bananas would not result in at least maintaining total market access for MFN suppliers; and,

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[474] European Communities, The ACP – EC Partnership Agreement, Recourse to Arbitration Pursuant to the Decision of 14 November 2001, *Award of the Arbitrator* (WT/L/616), 1 August 2005, para. 94. See also, European Communities, The ACP – EC Partnership Agreement, Recourse to Arbitration Pursuant to the Annex to the Decision of 14 November 2001, *Communication from the Secretariat* (WT/L/607/Add.13), 5 September 2005. See para. 2.17 above.

[475] European Communities, The ACP – EC Partnership Agreement, Second Recourse to Arbitration Pursuant to the Decision of 14 November 2001, *Award of the Arbitrator* (WT/L/625), 27 October 2005, para. 7. See para. 2.18 above.

[476] European Communities, The ACP – EC Partnership Agreement, Recourse to Arbitration Pursuant to the Annex to the Decision of 14 November 2001, Addendum, *Communication from the European Communities* (WT/L/607/Add.14), 28 September 2005. See para. 2.19 above.

[477] European Communities, The ACP – EC Partnership Agreement, Second Recourse to Arbitration Pursuant to the Decision of 14 November 2001, *Award of the Arbitrator* (WT/L/625), 27 October 2005, para. 127. See para. 2.19 above.

[478] Exhibit ECU-1, Council Regulation (EC) No. 1964/2005. See para. 2.40 above.

(b) The European Communities argues instead that, with regard to bananas, the Doha Waiver would expire after all the procedural steps envisaged in the Bananas Annex had been completed, but only if the European Communities put into force an identical regime to that analysed by the arbitrator or a new regime that would also fail to result in at least maintaining total market access for MFN suppliers.

7.168 Indeed, Ecuador argues that:

> "[T]he Doha Waiver of Article I expired on January 1, 2006, following the Arbitrator's determinations that neither the initial nor the second 'envisaged rebinding' met the requirements of the waiver ... [T]he Arbitrator having found that the EC had failed to rectify the matter, the waiver ceased to apply on January 1, 2006, when the current EC measures entered into force."[479]

7.169 The European Communities responds that, under the terms of the Doha Waiver, it was:

> "[O]bliged to introduce a new import regime that would maintain total market access for MFN suppliers in *reality* and not in theory. The assessment of whether the new import regime does indeed maintain total market access for MFN suppliers can only be based on an analysis of the real effects of the new import regime on the banana market ... [Furthermore,] the Doha waiver would cease to apply only if the European Communities implemented the *exact* import regime analysed by the Arbitrator and found not to satisfy the standard of the Doha waiver. If the European Communities introduced a *different* import regime than the one analysed by the Arbitrator and that import regime did indeed maintain the total market access of the MFN suppliers, then the Doha waiver would continue to apply."[480]

7.170 In other words, Ecuador asks the Panel to note the expiration of the Doha Waiver by noting the completion of the procedural steps identified in the Bananas Annex, namely, two negative arbitral awards and the introduction of a new EC tariff regime for bananas.[481] Conversely, the European Communities argues that the Panel can establish the expiration of the Doha Waiver before the end of 2007 only if, in addition to those procedural steps, it determines that the current EC regime for bananas is the exact regime that was analysed by the arbitrator under the procedures in the Bananas Annex[482] and if the Panel further establishes that the European Communities' current regime for the importation of bananas has not resulted in at least maintaining total market access for MFN banana suppliers, taking into account the relevant EC commitments.[483]

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[479] Ecuador's second written submission, para. 24.

[480] European Communities' first written submission, paras. 70-71. See also, European Communities' second written submission, para. 39, and European Communities' response to panel question No. 4, paras. 6-9, No. 10, paras. 20-21, and No. 67, para. 132. But see, Ecuador's comment on the European Communities' response to panel question No. 13.

[481] Ecuador's second written submission, para. 17.

[482] European Communities' first written submission, paras. 71-72. See also, European Communities' second written submission, para. 41, and , and European Communities' response to panel question No. 4, paras. 6-8.

[483] European Communities' first written submission, paras. 70, 72 and 73-77. See also, European Communities' second written submission, paras. 36-37.

(iv) Conditions envisaged in the Bananas Annex

7.171 As noted above, the completion of the intermediate procedural steps envisaged in the terms and conditions set out in the Bananas Annex, i.e., the two negative arbitral awards, is an uncontested matter of fact. Indeed, two successive arbitrations, as envisaged respectively in the fourth and fifth tirets of the Bananas Annex, reached the conclusion that the European Communities' proposed rebinding of its tariff on bananas would not result in at least maintaining total market access for MFN suppliers.[484] Furthermore, on 1 January 2006, the European Communities put into force a new regime for the importation of bananas, which was different from the one previously applied.[485]

7.172 As noted above, however, the European Communities argues that its current regime for the importation of bananas is not to be considered as "the new EC tariff regime" in the terms contained in the Bananas Annex. Additionally, the European Communities argues that its current regime for the importation of bananas results in at least maintaining total market access for MFN banana suppliers, taking into account the relevant EC commitments.

7.173 The European Communities' arguments in this regard raise two main questions:

(a) Whether the European Communities' current regime for the importation of bananas is to be considered as "the new EC tariff regime" in the sense of the terms contained in the Bananas Annex; and,

(b) Whether, the Bananas Annex links the expiration of the Doha Waiver in regard to bananas to the mere entry into force of such new regime or whether, under the Bananas Annex, only a new tariff regime that does *not* at least maintain total market access would result in such expiration of the waiver.

7.174 The Panel will accordingly consider the European Communities' arguments in this regard.

(v) Is the European Communities' current bananas regime "the new EC tariff regime"?

7.175 The first issue raised by the European Communities is whether the European Communities' current regime for the importation of bananas is to be considered as "the new EC tariff regime" under the terms contained in the fifth sentence of the fifth tiret of the Bananas Annex.

7.176 Under the fifth tiret of the Bananas Annex:

> "The second arbitration award will be notified to the General Council. If the EC has failed to rectify the matter, this waiver shall cease to apply to bananas *upon entry into force of the new EC tariff regime*" (emphasis added).

7.177 As noted above, the European Communities argues that:

> "[T]he phrase '*the new EC tariff regime*' can only refer to the tariff regime that was presented to the Arbitrator and on which the Arbitrator made a pronouncement in its Award. In other words, the Doha waiver would cease to apply only if the European Communities implemented the *exact* import regime analysed by the Arbitrator and found not to satisfy the standard of the Doha waiver. If the European Communities introduced a *different* import regime than the one analysed by the Arbitrator and that

[484] See above, paras. 2.17 and 2.19.
[485] See above, para. 2.40.

> import regime did indeed maintain the total market access of the MFN suppliers, then the Doha waiver would continue to apply."[486]

7.178 The European Communities then concludes that, since it "introduced on January 1, 2006 a different import regime than the one analysed by the Arbitrator", it "has fully satisfied the condition for the continued application of the Doha waiver".[487]

7.179 The Panel agrees with the European Communities that its current bananas import regime is different from the ones analysed by the arbitrators under the Bananas Annex. However, the Panel fails to see how the terms of the Bananas Annex support the conclusion drawn from that fact by the European Communities, namely that the European Communities has satisfied the condition for the continued application of the Doha Waiver. More specifically, the Panel disagrees with the European Communities that the phrase "the new EC tariff regime" can only refer to the tariff regime that was presented to the arbitrator and on which the arbitrator made a pronouncement in its award. Indeed, the terms of the Doha Waiver do not support the interpretation of the expression "the new EC tariff regime" proposed by the European Communities.

7.180 The ordinary meaning of the word "new" suggests something that is "[n]ot existing before; now made or existing for the first time ... Different from a thing previously existing, known, etc."[488] Taking into account this ordinary meaning of the word "new", the expression the "new EC tariff regime" for bananas, in the context in which it is used in the fifth tiret of the Bananas Annex, should be read as nothing else than a regime adopted by the European Communities that is different from the one previously in existence.

7.181 As noted by Ecuador,

> "[T]he measures examined by the Arbitrator are never referred to [in the Bananas Annex] by the term 'the new tariff regime'. The matter examined by the Arbitrator is described as 'the envisaged rebinding of the EC tariff on bananas,' or, in shorthand as 'the rebinding', while the second arbitration simply refers to a determination of 'whether the EC has rectified the matter'."[489]

7.182 In any event, the European Communities' current tariff regime is clearly different from the one previously in existence. Furthermore, the sixth sentence of the fifth tiret of the Bananas Annex provides that "[t]he Article XXVIII negotiations and the arbitration procedures shall be concluded before *the entry into force of the new EC tariff only regime on 1 January 2006*." (emphasis added) The European Communities' current banana import regime entered into force exactly on that date.

7.183 Consequently, the Panel is not persuaded that the expression "the new EC tariff regime" used in the fifth sentence of the fifth tiret of the Bananas Annex does not apply to the bananas import regime instituted by the European Communities from 1 January 2006, through Council Regulation (EC) No. 1964/2005.

(vi) Is the maintenance of total market access for MFN banana suppliers a relevant consideration for extending the Doha Waiver in regard to bananas?

7.184 The Panel now turns to the second question raised by the European Communities, namely, whether the European Communities' current regime for the importation of bananas results in at least

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[486] European Communities' first written submission, para. 71.
[487] Ibid., para. 72. But see, Ecuador's response to panel question No. 4.
[488] *The New Shorter Oxford English Dictionary*, fifth edition (Clarendon Press, 2002), Vol. II, p. 1914.
[489] Ecuador's second written submission, para. 29.

maintaining total market access for MFN banana suppliers, taking into account the relevant EC commitments. In order to address this argument, however, the Panel needs first to verify whether, under the terms set out in the Bananas Annex, the Panel is required and has the authority to determine if the European Communities' current regime for the importation of bananas results in at least maintaining total market access for MFN banana suppliers.

7.185 If the Panel were to verify that, under the terms set out in the Bananas Annex, it is required to make such a finding and that it has the authority to do so and if the Panel further found that, indeed, the European Communities' current regime for the importation of bananas results in at least maintaining total market access for MFN banana suppliers, the question would then be whether such a determination implies that the Doha Waiver, as it applies to bananas, has remained in force.

7.186 The Panel notes in this regard the European Communities' argument that:

> "The Doha waiver states that it would terminate if 'the EC has failed to rectify the matter'. If the Doha waiver wanted to say what Ecuador, Nicaragua and Panama are arguing, the text should have read that the waiver would terminate 'if the *Arbitrator concludes* that the EC has failed to rectify the matter'. The Doha waiver does not say so. This shows that the crucial factor was whether the import regime actually implemented by the European Communities maintains the MFN countries' market access."[490]

7.187 However, this argument is not persuasive. The text of the fifth tiret of the Bananas Annex is clear enough:

> "If *the arbitrator determines* that the rebinding would not result in at least maintaining total market access for MFN suppliers, the EC shall rectify the matter. Within 10 days of the notification of the arbitration award to the General Council, the EC will enter into consultations with those interested parties that requested the arbitration. In the absence of a mutually satisfactory solution, the *same arbitrator will be asked to determine ... whether the EC has rectified the matter*. The second arbitration award will be notified to the General Council. *If the EC has failed to rectify the matter*, this waiver shall cease to apply to bananas upon entry into force of the new EC tariff regime" (emphasis added).

7.188 In our view, the expression "*If the EC has failed to rectify the matter*, this waiver shall cease to apply" used in the last full sentence of the fifth tiret cannot be read in isolation from the expression "In the absence of a mutually satisfactory solution, the *same arbitrator will be asked to determine ... whether the EC has rectified the matter*." The Panel agrees in this regard with the United States' third party statement that:

> "The phrase '[i]f the EC has failed to rectify the matter', at the beginning of the fifth sentence in tiret 5 of the Annex can only refer back to the determination made by the second arbitrator following the EC's effort to 'rectify the matter'."[491]

7.189 Under the terms contained in the Bananas Annex, the authority to determine whether the European Communities' proposed regime for the importation of bananas would result "in at least

[490] Written version of the European Communities' closing statement during substantive meeting with the parties and third parties, para. 5.

[491] Written version of the United States' oral statement during substantive meeting with the parties and third parties, para. 21.

maintaining total market access for MFN banana suppliers" fell on the arbitrator and not on any other WTO body.

7.190 The Bananas Annex contemplated two successive rounds of examination by which the arbitrator would examine, first the European Communities' original proposed rebinding of the EC tariff on bananas to determine whether it would maintain total market access for MFN banana suppliers, and then, if such were the case, the revised proposal, to determine whether it had rectified the matter (i.e., if it would result in maintaining total market access for MFN banana suppliers, to the extent that the previous proposal had failed such test).

7.191 The terms contained in the Bananas Annex do not envisage any further examination after the introduction of the new measure, which would in practice amount to a third round of examination beyond the two arbitrations provided in the Bananas Annex. Nor do those terms entrust to this Panel the authority to review the findings made by the arbitrator. If the intention of WTO Members had been to contemplate such additional round of examination, the Bananas Annex would have included a provision to that effect. In the absence of such language, the Panel fails to see how it could introduce such new step.

7.192 The European Communities argues that the duration of the Doha Waiver was not linked to the number of arbitrations lost by the European Communities before the new import regime was introduced, but rather it depended on whether the new import regime actually maintains total market access for MFN suppliers.[492] In the European Communities' view, the WTO Members would not have linked the duration of such an important waiver:

> "[T]o the number of arbitration results reached on the basis of theoretical analyses and arithmetic calculations, in 'clinical isolation' from the real effects of the new import regime on the bananas market."[493]

7.193 The Panel concurs with the European Communities' statement that any determination regarding the continued existence of the Doha waiver should not be based on a purely "formalistic approach".[494] However, under the terms of the Bananas Annex, it was the arbitrator, and not a dispute settlement compliance panel, that had the authority to conduct a substantive analysis in order to determine whether the European Communities' proposed regime for the importation of bananas would result in maintaining total market access for MFN banana suppliers. Moreover, under the terms of the Bananas Annex, it was the European Communities that had the burden to either propose a rebinding of its tariff on bananas that would result in maintaining total market access for MFN banana suppliers or, if it had failed to do so through its original proposal, to rectify the matter to the satisfaction of the same arbitrator through a second examination.

7.194 The European Communities raises the issue of what would have happened if the arbitrator had found that the European Communities' proposed regime for the importation of bananas would result in maintaining market access for MFN banana suppliers and the European Communities had then implemented a different system from that examined by the arbitrator or if the actual operation of the system did not in fact maintain market access for bananas.[495] However, this counterfactual argument does not change the terms actually contained in the Bananas Annex. In any event, even if

[492] European Communities' first written submission, paras. 67 and 69.
[493] Ibid., para. 69.
[494] European Communities' second written submission, para. 39, and written version of the European Communities' oral statement during substantive meeting with the parties and third parties, paras. 14-15. See also, Joint third party written submission by Belize, Cameroon, Côte d'Ivoire, Dominica, the Dominican Republic, Ghana, Jamaica, Madagascar, St. Lucia, St. Vincent and the Grenadines, and Suriname (ACP Countries' third party written submission), paras. 54-55 and 61-64.
[495] European Communities' first written submission, para. 68.

the arbitrator had made such a finding and the European Communities later implemented a different system from that examined by the arbitrator, there is nothing in the Bananas Annex that would have prevented any WTO Member from having recourse to dispute settlement procedures, as in the present case, in order to challenge whether in those circumstances the system ultimately imposed by the European Communities was inconsistent with the WTO agreements and whether the Doha Waiver was still in effect.

7.195 On the other hand, it is undoubtedly true that, since the arbitrator was expected to base its findings on a proposed regime, the actual operation of such regime in the future could result in effects on the bananas market different from those estimated by the arbitrator.[496] This is of course an inherent limitation of any prospective determination, such as the one that, under the terms of the Bananas Annex, the arbitrator was to conduct regarding the European Communities' proposed regime. The arbitrator based its determination on the terms of the European Communities' proposal, including through the use "of theoretical analyses and arithmetic calculations", and availing itself of the best available information at the time. In any event, even if this was to be regarded as a shortcoming of the rules contained in the Bananas Annex, it would not change the terms of that text, nor would it insert new additional steps that were not provided for or even intended by the WTO membership.

7.196 For the reasons explained above, the Panel notes that the Bananas Annex contemplated two successive rounds of examination by which the arbitrator would determine, first whether the European Communities' original proposed rebinding of the EC tariff on bananas would maintain market access for MFN banana suppliers, and then, if that was found not to be the case, whether the revised proposal made by the European Communities had rectified the matter. No further examination was contemplated in the Bananas Annex after the European Communities had introduced its new import regime for bananas, nor did the terms of the Bananas Annex entrust any authority to a dispute settlement panel to review the findings made by the arbitrator.

7.197 The Panel also notes that, under the terms contained in the Bananas Annex, the authority to determine whether the European Communities' proposed regime for the importation of bananas would result "in at least maintaining total market access for MFN banana suppliers" fell on the arbitrator and could not be decided by a WTO dispute settlement compliance panel, or by any other WTO body.

7.198 In view of the preceding analysis, the Panel concludes that the maintenance of total market access for MFN banana suppliers is not a relevant consideration for extending the Doha Waiver in regard to bananas beyond the date of its expiration on 1 January 2006. While the Panel notes the European Communities' arguments that its current bananas import regime would maintain total market access for MFN suppliers[497], it finds that this fact, even if found true, is irrelevant for assessing whether the Doha Waiver continued to apply to bananas beyond 1 January 2006.

7.199 In consequence, the Panel finds that it does not have the authority to determine whether the European Communities' current regime for the importation of bananas results in at least maintaining total market access for MFN banana suppliers, for the purposes provided in the Bananas Annex.

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[496] Cf. Ecuador's second written submission, paras. 25-27.

[497] See, *inter alia*, European Communities' first written submission, paras. 72-77, European Communities' second written submission, para. 36, written version of the European Communities' oral statement during substantive meeting with the parties and third parties, paras. 8-10, European Communities' response to panel question No. 1, paras. 1-2, No. 8, paras. 15.-16, and No. 68, para. 133, and European Communities' comments on Ecuador's response to panel question No. 31, paras. 22-25, and No. 32, paras. 26-28.. See also, ACP Countries' third party written submission, paras. 69-83. But see also, Colombia's third party written submission, paras. 12-40, and Ecuador's response to panel questions Nos. 1, 8, 31 and 32.

(vii) Conclusion regarding the Doha Waiver

7.200 For the reasons indicated above, with the completion of the different intermediate procedural steps envisaged in the terms and conditions set out in the Bananas Annex, and upon the entry into force of the bananas import regime instituted by the EC through Council Regulation (EC) No. 1964/2005, the Doha Waiver cannot extend to the EC banana regime introduced from 1 January 2006. The European Communities has failed to make a prima facie case that, since the entry into force of the new EC tariff regime, on 1 January 2006, a waiver from Article I:1 of GATT 1994 has been in force to cover the preference granted by the European Communities to imported bananas originating in ACP countries.

5. General conclusion

7.201 For the reasons indicated in this section, the Panel finds that the preference granted by the European Communities to an annual duty-free tariff quota of 775,000 mt of imported bananas originating in ACP countries constitutes an advantage for this category of bananas, which is not accorded to like bananas originating in non-ACP WTO Members. The Panel therefore finds that this preference is inconsistent with Article I:1 of GATT 1994. The Panel further finds that, with the expiration of the Doha Waiver from 1 January 2006 as it applied to bananas, there is no evidence that, during the period that is relevant for this Panel's findings, that is, from the time of the establishment of the Panel until the date of this Report, any waiver from Article I:1 of GATT 1994 has been in force to cover such preference.

D. ECUADOR'S CLAIM UNDER ARTICLE XIII OF THE GATT 1994

1. Introduction

(a) Summary of parties' arguments

(i) Ecuador's claim

7.202 Ecuador has requested the Panel to find that the European Communities' current banana import regime is inconsistent with paragraphs 1 and 2 of Article XIII of the GATT 1994.[498]

7.203 Ecuador argues that, "[a]s the original Panel[499] found, and the Appellate Body[500] affirmed in *Bananas III*, and as again affirmed in the first Article 21.5 Panel[501], Article XIII of the GATT applies to tariff-rate quotas as well as other quotas."[502]

7.204 Ecuador adds that:

> "The EC was granted a conditional waiver of its obligations under Article XIII, but this waiver expired by its own terms on December 31, 2005.[503] Notwithstanding the expiration of that waiver, the EC now imposes a tariff rate quota on bananas in which

[498] Ecuador's first written submission, paras. 29-30.
[499] (*footnote original*) Panel Report at para. 7.68.
[500] (*footnote original*) Appellate Body Report at para. 160.
[501] (*footnote original*) Panel Report at para. 6.160.
[502] Ecuador's first written submission, para. 28.
[503] (*footnote original*) *European Communities – Transitional Regime For The EC – Autonomous Tariff Rate Quotas On Imports Of Bananas*, WT/MIN(01)/16, 14 November 2001, para. 7.

> only ACP countries have access to the duty free quota, while Ecuador and all other countries are excluded from that quota."[504]

7.205 In Ecuador's view, on the one hand:

> "The EC measures are inconsistent with Article XIII:1 in that Ecuadorian (and other non-ACP) bananas cannot be considered 'similarly restricted' in comparison to ACP bananas, when Ecuadorian (and other non-ACP) bananas are simply excluded from access to the duty free tariff quota.[505]"[506]

7.206 On the other hand, Ecuador maintains that:

> "The EC measures are also inconsistent with Article XIII:2. The Panel on *Bananas III* noted the general rule that, if Members apply 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.'[507]"[508]

7.207 Ecuador adds that "[t]hough the EC system has eliminated the country allocations that previously existed as between non-ACP countries, the discrimination remains as between ACP and non-ACP bananas"[509], and "[t]he Appellate Body in *Bananas III* vigorously condemned this discrimination."[510]

7.208 Finally, in Ecuador's view the challenged measures are also inconsistent with Article XIII:2(d) of the GATT 1994 because:

> "The allocation of the duty free quota exclusively to ACP countries bears no relation to trading patterns in the world or EC markets. As can be seen in the charts annexed as Exhibits ECU-2 and ECU-3, Ecuador is a preeminent exporter of bananas to the world market. Further, Ecuador and several other countries that are excluded from the zero duty quota, are substantial suppliers to the EC, while ACP countries, many of whom are minor suppliers at best, are allowed to ship duty free under the tariff quota."[511]

(ii) The European Communities' arguments

7.209 The European Communities has raised a preliminary objection in the context of Article XIII of the GATT 1994. As mentioned earlier[512], the European Communities has argued that Ecuador's complaint against the Cotonou preference under Article XIII should be rejected because "Ecuador's claims are in reality a challenge on the measures *suggested* by the [first compliance] Panel [requested by Ecuador], rather than on the measures *actually taken* by the European Communities."[513]

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[504] Ecuador's first written submission, para. 28.
[505] (*footnote original*) Panel Report at para. 7.69; Appellate Body Report at para. 160.
[506] Ecuador's first written submission, para. 29.
[507] (*footnote original*) Panel Report at para. 7.68.
[508] Ecuador's first written submission, para. 30.
[509] Ibid., para. 31.
[510] Ibid.
[511] Ibid., para. 32.
[512] See para. 7.14 above.
[513] European Communities' first written submission, para. 84.

According to the European Communities, such suggestion could only be challenged through recourse to appellate review, but not through a compliance panel.[514]

7.210 In addition to that preliminary objection to Ecuador's claims under Article XIII, the European Communities explicitly requests the Panel to reject Ecuador's claims in regard to both paragraphs 1 and 2 of Article XIII. In particular, the European Communities argues that Article XIII is not applicable to the measure challenged by Ecuador because that measure would fall within the scope of Article I of the GATT 1994 given the "different purpose and different field of application [of those two provisions of the GATT 1994]."[515] In particular, according to the European Communities:

> "Ecuador's exports are subject to a simple and ordinary tariff. And it is clear that GATT Article XIII does *not* apply to tariffs. Textually, this is made clear from the title of GATT Article XIII. Contextually, it is made clear by the fact that if GATT Article XIII was to also cover ordinary tariffs, then there would be no more meaning or reason of existence for GATT Article I, paragraph 1."[516]

7.211 According to the European Communities' view, the current EC banana import regime is not inconsistent with Article XIII:1 of the GATT 1994 because:

> "[T]he Members on whose imports the quantitative restriction is imposed are the ACP countries. The MFN countries, including Ecuador, are the 'all third countries', whose position should be taken as a basis in order to determine whether the ACP countries are treated 'worse' than them. However, the MFN countries are not subject to any tariff quota, or other quantitative restriction. As a consequence, there is nothing on which the comparison can be based."[517]

7.212 The European Communities adds that:

> "GATT Article XIII, paragraph 1 does not oblige the European Communities to extend to all Members (including Ecuador and the other MFN suppliers) the tariff preference granted to the ACP countries. GATT Article XIII, paragraph 1 simply obliges the European Communities not to impose a quantitative restriction on Ecuador, unless a similar quantitative restriction was imposed on all other WTO Members."[518]

7.213 According to the European Communities:

> "[E]ven assuming *arguendo* that there is a quantitative restriction imposed on the ACP countries, Ecuador cannot successfully challenge it, because this quantitative restriction imposed on the ACP countries does not result in any nullification or impairment of any benefit accruing to Ecuador. Quite to the contrary, this 'cap' to the preference afforded to the ACP countries protects the interests of Ecuador and the other MFN countries, because it limits the quantities of ACP bananas that can be imported into the European Communities at zero duty."[519]

7.214 Further, referring to the report of the Appellate Body in *EC – Bananas III*, the European Communities argues that:

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[514] See European Communities' second written submission, paras. 19-35.
[515] European Communities' first written submission, para. 94.
[516] Ibid., para. 104.
[517] Ibid., para. 100.
[518] Ibid., para. 103.
[519] Ibid., para. 101.

> "GATT Article XIII, paragraph 1 covers only situations where a Member applies tariff quotas with different terms to different groups of countries in a market where all import are made under tariff quotas. Consequently, GATT Article XIII, paragraph 1 does not apply to a tariff only import regime where there are no different tariff quotas allocated to different groups of countries, such as the current import regime of the European Communities."[520]

7.215 As regards Article XIII:2 of the GATT 1994, the European Communities contends that "[f]or the same reasons, the current import regime of the European Communities does not violate GATT Article XIII, paragraph 2."[521] In the European Communities' view,

> "The ... limited ... scope of ... Article [XIII] is seen in the way that the four sub-paragraphs of GATT Article XIII, paragraph 2 are entirely focused on the scope and internal distribution of the quota. They disregard any trade that falls outside the quota (or tariff quota)".[522]

7.216 Also, according to the European Communities, "[t]he text '*In applying import restrictions*' shows that paragraph 2 (like paragraph 1) is solely concerned with quantitative restrictions, and does not regulate the relationship between quantitative restrictions and other measures, notably simple tariffs, that a Member may be applying."[523]

(b) Order of analysis

7.217 The Panel will assess first the European Communities' preliminary objection concerning Article 21.5 of the DSU. If that preliminary objection was rejected, the Panel would turn to Ecuador's claim under Article XIII:1 and 2 of the GATT 1994.

7.218 In that latter context, the Panel intends to start its analysis with addressing the European Communities' systemic arguments concerning the interrelation of Articles I and XIII of the GATT 1994 and the latter's applicability to the European Communities' banana import regime, as well as Ecuador's response to those arguments. If the European Communities' arguments in that context were rejected, the Panel would address Ecuador's substantive claim under both paragraphs 1 and 2 of Article XIII. In the alternative, there would be no need to assess Ecuador's substantive claim under Article XIII:1 and 2 of the GATT 1994.

2. The European Communities' preliminary objection

(a) Parties' main arguments

(i) The European Communities' arguments

7.219 In its preliminary objection, the European Communities argues that it "complied with the findings of the [first compliance] Panel [requested by Ecuador] by implementing one of the suggestions put forward by [that panel]"[524], namely that "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."[525]

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[520] European Communities' first written submission, para. 105.
[521] Ibid., para. 106.
[522] Ibid., para. 108.
[523] Ibid., para. 107.
[524] Ibid., para. 23.
[525] Panel Report on *EC – Bananas III (Article 21.5 – Ecuador)*, para. 6.157.

7.220 On the one hand, according to the European Communities, "on January 1, 2006, the European Communities introduced a tariff only system and the Cotonou Preference took the form of a tariff quota for certain volumes of bananas coming from Cotonou beneficiary developing countries, as suggested by the Panel in paragraph 6.157 of its Report."[526] On the other hand, "prior to the introduction of this new import regime, the European Communities received a suitable waiver from the application of GATT Article I, again as suggested by the Panel in the same paragraph of its Report."[527]

7.221 According to the European Communities:

> "[I]t is clear that, in the second suggestion of the Panel, 'suitable waiver' meant a waiver from the application of GATT Article I. The reason for this is that the suggested import regime would be a tariff-only system with a preferential treatment granted to the ACP countries. This interpretation is supported by the language used by the Panel in its third suggestion. The third suggestion provided for the continuation of an all-tariff-quota import regime, with different quotas allocated to different groups of countries. The Panel expressly mentioned that a waiver from the application of GATT Article XIII would be needed in the context of such an all-tariff-quota system.[528]"[529]

7.222 Further, the European Communities contends that:

> "[U]nder Article 21.5 of the DSU a party can bring claims on the 'consistency with a covered agreement of a measure *taken* to comply' with the findings of the panel. Therefore, the European Communities submits that claims challenging the consistency with the covered agreements of the measures *suggested* by the panel cannot be brought before an Article 21.5 Panel. If Ecuador disagreed with the Panel's suggestions, it should have filed an appeal with the Appellate Body, pursuant to the terms of Article 17 of the DSU. Given that Ecuador did not file such an appeal, Ecuador is now bound by *res judicata*, pursuant to Article 19, paragraph 1 and Article 17, paragraph 14 of the DSU."[530]

(ii) Ecuador's response

7.223 Ecuador argues that it is "obviously [a] false assertion that Ecuador has not challenged measures actually taken by the EC."[531] Further, Ecuador contends that "[t]he Panel never suggested or even implied that the EC would not require a waiver of Article XIII to implement a tariff quota reserved for ACP countries"[532]:

> "The EC has no basis for assuming that the Panel in any sense was suggesting that a suitable waiver would be limited to Article I. To the contrary, it is apparent in the Panel's alternative suggestion that it considers that a tariff quota confined to bananas of ACP origin would require an Article XIII waiver. What the EC purports to view as a Panel determination that a waiver of Article XIII for duty free treatment of developing countries is required only if there is more than one tariff quota in the system can only be reasonably interpreted as in fact a further explanation of the need

[526] European Communities' first written submission, para. 23.
[527] Ibid.
[528] (*footnote original*) See the Panel report, at paragraph 6.158.
[529] European Communities' first written submission, para. 81.
[530] Ibid., para. 85.
[531] Ecuador's second written submission, para. 43.
[532] Ibid., para. 44.

for a waiver. It borders on insulting to the Panel to argue otherwise, and it would be inconsistent with the Panel's own rulings that confirmed the application of Article XIII to all tariff quotas."[533]

7.224 Ecuador adds that:

"[N]one of the provisions of the DSU would have precluded this challenge of the conformity of the EC's measures taken to comply with the Panel Report, even if the particular measures had been suggested by the Panel. [Also,] it is not necessary to challenge before the Appellate Body the suggestions of a panel in order to preserve the right to make a challenge under Article 21.5."[534]

(b) Panel's analysis

(i) Relevance of Article 21.5 of the DSU in this dispute

7.225 Article 21.5 of the DSU provides in relevant part that:

"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."

7.226 Further, the measure contested by Ecuador in this compliance dispute has been identified in Ecuador's request for the establishment of a panel in the following terms:

"The challenged EC measures are contained in EC Council Regulation No. 1964/2005 ('Regulation 1964')[535] and its associated implementing regulations, including the EC's autonomous tariff provisions. These measures include:

– A tariff-rate quota, with a current volume of 775,000 mt, exclusively reserved for bananas of ACP origin. ACP bananas within the quota enter duty-free, quantities above the TRQ paying a current duty of 176 €/mt. The 775,000 mt ACP tariff quota volume is subject to import licenses and allocation. Ecuador does not get any share of this tariff rate quota or related measures, let alone receive the share required under Article XIII.

– An EC tariff, currently at 176 €/mt to EC imports of bananas, that applies to all bananas of Ecuadorian origin and to all other bananas except those benefiting from access to the zero-duty TRQ."[536]

7.227 As also indicated in Ecuador's request for the establishment of a panel, Ecuador contends that "[t]hese measures are not justified under the Understandings or any agreed settlement, and are not

[533] Ecuador's second written submission, para. 40.
[534] Ibid., para. 44.
[535] (*footnote original*) Council of the European Union, *Council Regulation (EC) No. 1964/2005 of 29 November 2005 on the tariff rate for bananas*, OJL 316/1, 2 December 2005.
[536] Request for the Establishment of a Panel by Ecuador, *EC – Bananas III (Article 21.5 – Ecuador II)*, 26 February 2007, WT/DS27/80, p. 4.

covered by any waiver of EC obligations"[537]; moreover, "Ecuador considers that the EC measures are inconsistent with [certain] obligations of the WTO Agreements."[538]

7.228 Ecuador is, therefore, asking this Panel to assess the conformity with the covered agreements of the European Communities' current banana import regime, i.e., of the *measure* the European Communities alleges it has taken in line with the suggestions of the first compliance panel requested by Ecuador. Ecuador is not asking this compliance Panel to assess the conformity with the covered agreements of the *suggestions* of the first compliance panel requested by Ecuador.

7.229 Since the European Communities argues in this dispute that its current banana import regime corresponds to the second suggestion of the first compliance panel requested by Ecuador[539], it would seem difficult for the European Communities to contest that that regime should be considered properly as a "measure taken to comply with the recommendations and rulings [of the DSB]" for the purposes of Article 21.5 of the DSU. Indeed, the European Communities states that "[i]n suggesting a particular course of action, the Panel is indicating that such action is lawful and that *the implementation of this suggestion will lead to the defending party's compliance with the obligations found to have been infringed*."[540] (emphasis added)

7.230 Under Article 21.5 of the DSU, compliance panels are required to assess "measures taken to comply with the recommendations and rulings" of the DSB. In *Canada – Aircraft (Article 21.5 – Brazil)*, the Appellate Body held that:

> "Proceedings under Article 21.5 do not concern just *any* measure of a Member of the WTO; rather, Article 21.5 proceedings are limited to those 'measures *taken to comply* with the recommendations and rulings' of the DSB. In our view, the phrase 'measures taken to comply' refers to measures which have been, or which should be, adopted by a Member to bring about compliance with the recommendations and rulings of the DSB."[541]

7.231 The Panel recalls that in its request for the establishment of the first compliance panel, Ecuador explicitly asked that panel to issue suggestions pursuant to Article 19.1 of the DSU.[542] In its request Ecuador argued that:

> "It considers that it is necessary to invoke Article 19 of the Understanding on Rules and Procedures Governing the Settlement of Disputes to ensure that the Panel, in addition to issuing its rulings, *suggests how the European Communities might implement its recommendations*."[543] (emphasis added)

7.232 In turn, the first compliance panel requested by Ecuador noted that "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*." (emphasis added)

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[537] Request for the Establishment of a Panel by Ecuador, *EC – Bananas III (Article 21.5 – Ecuador II)*, 26 February 2007, WT/DS27/80, p. 4.

[538] Ibid.

[539] See European Communities' first written submission, para. 80.

[540] European Communities' second written submission, para. 23.

[541] Appellate Body Report on *Canada – Aircraft (Article 21.5 – Brazil)*, para. 36. See also Appellate Body Report on *Mexico – Corn Syrup (Article 21.5 – US)*, paras. 78-79.

[542] Panel Report on *EC – Bananas III (Article 21.5 – Ecuador)*, para. 6.154.

[543] Recourse to Article 21.5 of the DSU by Ecuador, *EC – Bananas III (Article 21.5 – Ecuador)*, 18 December 1998, WT/DS27/41, p. 3.

7.233 The first compliance panel requested by Ecuador in this dispute issued its suggestions pursuant to Article 19.1 of the DSU, which provides that:

> "Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned[544] bring the measure into conformity with that agreement.[545] In addition to its recommendations, the panel or Appellate Body may suggest ways in which the Member concerned could *implement the recommendations*." (emphasis added)

7.234 Through its last three words, Article 19.1 establishes a close link between suggestions and the recommendations of panels and the Appellate Body. In issuing its suggestions pursuant to that Article 19.1, the first compliance panel requested by Ecuador in *EC - Bananas III* also emphasised that link:

> "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 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*."[546] (emphasis added)

7.235 The reports of the panel and the Appellate Body as well as the report of the first compliance panel requested by Ecuador in the *EC – Bananas III* dispute were adopted by the DSB.[547] Thus, to the extent that the suggestions of the first compliance panel requested by Ecuador are linked to the recommendations and rulings of those panels and the Appellate Body, they are also closely linked to the relevant DSB recommendations and rulings.

7.236 In *US – Softwood Lumber IV (Article 21.5)* the Appellate Body found that the term "measures taken to comply" in Article 21.5 of the DSU refers to measures "taken in the direction of, or for the purpose of achieving, compliance"[548]:

> "In examining the meaning of 'measures taken to comply' in Article 21.5, we begin with the word 'taken'. There is a wide range of dictionary meanings of the word 'taken', which is the past participle of the verb 'take'. The meanings of 'take' include, for example, '[b]ring into a specified position or relation'; '[s]elect or use for a particular purpose.'[549] The preposition 'to' is '[u]sed in verbs ... in the sense of 'motion, direction, or addition to', or as the mark of the infinitive.'[550] ... [T]he word 'comply' is defined as 'accommodate oneself to (a person, circumstances, customs, etc.) ... Act in accordance with or *with* a request, command, etc.'[551] The French and,

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[544] (*footnote original*) The "Member concerned" is the party to the dispute to which the panel or Appellate Body recommendations are directed.

[545] (*footnote original*) With respect to recommendations in cases not involving a violation of GATT 1994 or any other covered agreement, see Article 26.

[546] Panel Report on *EC – Bananas III (Ecuador – Article 21.5)*, para. 6.154.

[547] See Minutes of the Meeting of the Dispute Settlement Body Held in the Centre William Rappard on 25 September 1997, WT/DSB/M/37 of 4 November 1997, p. 27; and Minutes of the Meeting of the Dispute Settlement Body Held in the Centre William Rappard on 6 May 1999, WT/DSB/M/61 of 30 June 1999, p. 6.

[548] Appellate Body Report on *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 66.

[549] (*footnote original*) *Shorter Oxford English Dictionary*, 5th edn, W.R. Trumble, A. Stevenson (eds) (Oxford University Press, 2002), Vol. 2, p. 3170.

[550] (*footnote original*) *Ibid*., Vol. 2, p. 3284.

[551] (*footnote original*) United States' appellant's submission, para. 30 (quoting *The New Shorter Oxford English Dictionary*, *supra*, footnote 37, p. 461 (original italics) (Exhibit US-15 submitted by the United States to the Panel)).

> in particular, Spanish versions of this phrase ('mesures prises pour se conformer' and 'medidas destinadas a cumplir', respectively) also imply that relevant measures are associated with the objective of complying. On its face, therefore, the phrase 'measures taken to comply' seems to refer to measures taken *in the direction of*, or *for the purpose of achieving*, compliance."[552]

7.237 The first compliance panel requested by Ecuador made its suggestions "for [the EC to] bring ... its banana import regime into conformity with WTO rules."[553] Further, as noted earlier, Ecuador is asking this Panel to assess the conformity with the covered agreements of the European Communities' current banana import regime, which the European Communities alleges to have taken to implement a suggestion made, pursuant to Article 19.1 of the DSU, by the first compliance panel requested by Ecuador.

7.238 In the light of the above, to the extent that the European Communities argues that it has implemented such a suggestion, this Panel is not prevented from conducting, under Article 21.5 of the DSU, the assessment requested by Ecuador in this dispute.

(ii) The European Communities' arguments on res iudicata

7.239 As to whether this Panel would be nevertheless prevented from carrying out such assessment under Article 21.5 because the European Communities would be implementing a suggestion by the first compliance panel requested by Ecuador, the Panel notes that the European Communities invokes the concept of "*res judicata*, pursuant to Article 19, paragraph 1 and Article 17, paragraph 14 of the DSU."[554]

7.240 Article 19.1 of the DSU provides that:

> "Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned[9] bring the measure into conformity with that agreement.[10] In addition to its recommendations, the panel or Appellate Body may suggest ways in which the Member concerned could implement the recommendations.
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> [9] The 'Member concerned' is the party to the dispute to which the panel or Appellate Body recommendations are directed.
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> [10] With respect to recommendations in cases not involving a violation of GATT 1994 or any other covered agreement, see Article 26."

7.241 In turn, Article 17.14 of the DSU stipulates that:

> "An Appellate Body report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body report within 30 days following its circulation to the Members.[8] This adoption procedure is without prejudice to the right of Members to express their views on an Appellate Body report.
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[552] Appellate Body Report on *US– Softwood Lumber IV (Article 21.5 – Canada)*, para. 66.
[553] Panel Report on *EC – Bananas III (Ecuador – Article 21.5)*, para. 6.155.
[554] European Communities' first written submission, para. 85.

[8] If a meeting of the DSB is not scheduled during this period, such a meeting of the DSB shall be held for this purpose."

7.242 The European Communities also invokes Article 16.4 of the DSU[555], which provides that:

"Within 60 days after the date of circulation of a panel report to the Members, the report shall be adopted at a DSB meeting[7] unless a party to the dispute formally notifies the DSB of its decision to appeal or the DSB decides by consensus not to adopt the report. If a party has notified its decision to appeal, the report by the panel shall not be considered for adoption by the DSB until after completion of the appeal. This adoption procedure is without prejudice to the right of Members to express their views on a panel report.

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[7] If a meeting of the DSB is not scheduled within this period at a time that enables the requirements of paragraphs 1 and 4 of Article 16 to be met, a meeting of the DSB shall be held for this purpose."

7.243 Finally, the European Communities also refers to Article 21.1 of the DSU, which provides that "[p]rompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members."[556]

7.244 On the basis of those provisions of the DSU, the European Communities argues that:

"[S]uggestions [pursuant to Article 19.1 of the DSU] are [not] entirely devoid of legal significance. ... [A] suggestion contains a significant legal ruling. In suggesting a particular course of action, the Panel is indicating that such action is lawful and that the implementation of this suggestion will lead to the defending party's compliance with the obligations found to have been infringed."[557]

7.245 The European Communities adds that:

"[I]f the complaining party does not appeal the suggestions made by the panel, then following the adoption of the panel's report by the DSB there is a presumption of legality covering these suggestions which makes them binding on the complaining party. This means that if the defending party decides to implement the measures suggested by the panel, the complaining party may not challenge the conformity of these measures with the WTO rules in an Article 21.5 procedure. Allowing such a challenge would be inconsistent with Article 17.14 of the DSU read together with the other DSU provisions mentioned above, because it would mean that the complaining party does not 'unconditionally accept' the panel's report. To hold otherwise would create an undue legal uncertainty for the defending party as to the course of action that it should follow. It would also seriously compromise the credibility of panels and of the DSB, because it would create the possibility for Article 21.5 Panels to reverse decisions taken by the DSB. This would curtail the panels' ability to make suggestions and would render the relevant provisions of Article 19.1 of the DSU inoperative."[558]

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[555] European Communities' second written submission, footnote 5.
[556] Ibid., footnote 7.
[557] Ibid., para. 23.
[558] Ibid., para. 24.

7.246 As noted earlier, in line with Article 21.5 of the DSU, the Panel will assess the conformity with the covered agreements of the *measure* taken by the European Communities allegedly to implement a suggestion of the first compliance panel requested by Ecuador. This Panel is not requested by Ecuador to assess the conformity with the covered agreements of the *suggestions* made by that first compliance panel, as endorsed by the DSB, and this Panel will not conduct such an assessment of the *suggestions*.

7.247 The Panel does not need to assess whether the provisions invoked by the European Communities in this context, namely Articles 16.4, 17.14, 19.1 and 21.1 of the DSU, can be read as establishing an automatic link between the alleged binding nature of a suggestion pursuant to Article 19.1 of the DSU and a measure purportedly taken by a Member to implement such suggestion. While suggestions are issued by panels or the Appellate Body under Article 19.1, any measure to implement such suggestion is taken by a Member, and the conformity with the covered agreements of such measures will depend on the actual implementation of the suggestion by the Member in question.

7.248 The Panel notes that Article 19.1 states that suggestions encompass "ways in which the Member concerned *could* implement the recommendations." (emphasis added) The first compliance panel requested by Ecuador issued three alternative suggestions[559], introducing those with the following words:

> "In light of our findings and conclusions with respect to Articles I and XIII of GATT ..., in our view, the European Communities has *at least the following options* for bringing its banana import regime into conformity with WTO rules."[560] (emphasis added)

7.249 Also, the same compliance panel explicitly recognized that "Members remain free to choose how they implement DSB recommendations and rulings."[561]

7.250 In the light of the language in Article 19.1, the Panel underlines that Members' freedom to choose how they implement DSB recommendations and rulings is in no way diminished as a result of there being specific "suggestions" in a particular dispute. The Panel agrees in this respect with the panel on *US - Steel Plate*, which stated that "while a panel may suggest ways of implementing its recommendation, the choice of means of implementation is decided, in the first instance, by the Member concerned".[562] The Panel notes that the European Communities does not contest this; indeed, the European Communities:

> "[A]cknowledges that a panel's suggestions as to how the defending party may put itself in compliance with the WTO rules *are not binding for the defending party*: the defending party enjoys the freedom to choose any of the various options that may exist to bring about compliance.[563],[564] (emphasis added)

7.251 None of the DSU provisions invoked by the European Communities in this context, namely Articles 16.4, 17.14, 19.1 and 21.1, indicates that the fact that a Member adopts a measure to implement a suggestion pursuant to Article 19.1 would prevent another Member from challenging, pursuant to Article 21.5, the compliance of such measure with the covered agreements. Even if there

[559] See Panel Report on *EC – Bananas III (Ecuador – Article 21.5)*, paras. 6.156-6.158.
[560] Ibid., para. 6.155.
[561] Ibid., para. 6.154.
[562] Panel Report on *US – Steel Plate*, para. 8.8.
[563] (*footnote original*) See, for example, the relevant reference in the "Handbook on the WTO Dispute Settlement System, A WTO Secretariat Publication prepared for publication by the Legal Affairs Division and the Appellate Body", published in 2004, on page 58.
[564] European Communities' second written submission, para. 23.

was a presumption of the legality of measures taken to implement a suggestion pursuant to Article 19.1, there is nothing in the DSU suggesting that the alleged legality of such measures could not be reviewed by a compliance panel pursuant to Article 21.5.

7.252 Any alternative reading of the DSU would make Article 21.5 of the DSU and Members' rights under that provision irrelevant. The Panel recalls in this context that Article 21.5 applies in all situations "where there is disagreement as to the ... consistency with a covered agreement of measures taken to comply with the recommendations and rulings." Further, Article 21.5 provides that "*such dispute shall be decided through recourse to these dispute settlement procedures*, including wherever possible resort to the original panel." (emphasis added)

7.253 As the words "where" and "shall" indicate, Article 21.5 creates an unconditional requirement that any dispute resulting from "disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings" can be decided through WTO dispute settlement, and in particular in compliance proceedings pursuant to Article 21.5.

7.254 Further, even under the European Communities' logic, for this preliminary objection to be successful, the EC measure in question would need to implement a suggestion pursuant to Article 19.1. The European Communities argues that it implemented the second suggestion of the first compliance panel requested by Ecuador[565], namely that "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."[566]

7.255 A core element of this argument is that the current EC measure would be tariff only. The Panel notes that Ecuador contests whether the current EC regime indeed shows that characteristic:

> "The EC contends accurately that it was supposed to provide a tariff only system and therefore eliminate tariff quotas, but fails to mention that this was to be done in conjunction with the elimination of all tariff quotas and the establishment of a bound tariff in compliance with the requirements of the waiver and in conformity with Article XXVIII."[567]

Ecuador disagrees that the term "suitable waiver" in the above suggestion is limited to a waiver under Article I.[568]

7.256 In the light of the fact that Ecuador disagrees that the current EC banana import regime implements the suggestion of the first compliance panel requested by Ecuador, it would seem an unwarranted diminution of Ecuador's rights under the covered agreements, in particular Article 21.5 of the DSU, to now prevent Ecuador from challenging the conformity of that measure with the covered agreements.

7.257 Given the unconditional language of Article 21.5 of the DSU, mere allegation by a Member that its measure taken to comply exists or is consistent with the covered agreements clearly cannot be sufficient to establish *eo ipso* the existence of such measure taken to comply or its conformity with the covered agreements, especially when another Member, in this case the complainant, disagrees with that.

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[565] See European Communities' first written submission, para. 80.
[566] Panel Report on *EC – Bananas III (Article 21.5 – Ecuador)*, para. 6.157.
[567] Ecuador's second written submission, para. 68.
[568] See Ibid., para. 40.

7.258 As a matter of principle, the existence of a measure taken to comply or the compliance of a measure with the covered agreements is not a matter of self-declaration by the Member taking the measure in question. If that were the case, WTO dispute settlement, the role of adjudicators and the rights of Members under the covered agreements, in particular the DSU, would in such a situation be reduced to redundancy.

7.259 As to the relevance of the absence of an appeal by Ecuador, the Panel reads the DSU and in particular Article 21.5 as not excluding a compliance dispute subsequent to a panel report adopted by the DSB merely because the panel report in question included suggestions pursuant to Article 19.1 and the respondent is now alleging that it has implemented one of those suggestions.

7.260 There is nothing in the DSU preventing a compliance dispute following a non-appealed panel report adopted by the DSB. Indeed, compliance procedures have been conducted under Article 21.5 of the DSU on several occasions, even though in the original proceedings the DSB adopted the panel's report without any appeal by the complainant.[569]

7.261 Further, the absence of an appeal by the complainant against a panel report with suggestions adopted by the DSB cannot mean *eo ipso* acceptance by the complainant of the measures that the respondent takes in order to comply. A measure taken by the respondent allegedly to implement a suggestion made under Article 19.1 is necessarily subsequent to the adoption by the DSB of the report of the panel in question and, if there has been an appeal, of the report of the Appellate Body, including of the suggestions set out therein. Accordingly, when the DSB adopts the suggestions, the complainant cannot assess – but at best may expect – the adoption of such implementing measures by the respondent and their consistency with the covered agreements.

7.262 Once the respondent has taken the measure allegedly to implement a suggestion under Article 19.1, to the extent that the complainant contests the existence of such measures or their conformity with the covered agreements, existence and conformity with the covered agreements may be verified, if requested by the complainant, by a compliance panel pursuant to Article 21.5.

(iii) Conclusion

7.263 As noted earlier, to the extent that the European Communities argues that it has implemented a suggestion pursuant to Article 19.1 of the DSU, this Panel is not prevented from conducting, under Article 21.5 of the DSU, the assessment requested by Ecuador in this dispute. Also, the Panel finds that the arguments of the European Communities on *res iudicata* are not convincing as objections to the compliance proceeding requested by Ecuador under Article 21.5 against the measure that the European Communities alleges it has taken to implement a suggestion of the first compliance panel requested by Ecuador.

7.264 In the light of the foregoing, the Panel rejects the European Communities' first preliminary objection in the context of Article XIII of the GATT 1994.

7.265 The Panel notes that, in addressing the European Communities' first preliminary objection, the Panel does not need to assess whether the European Communities has effectively implemented any of the suggestions of the first compliance panel requested by Ecuador. Therefore, the Panel does not need to address, in the context of the European Communities' first preliminary objection, whether the EC has fulfilled the two parts of the second suggestion of that compliance panel, in particular

[569] See Panel Report on *US – DRAMS (Article 21.5 – Korea)*; Panel Report on *Australia – Automotive Leather II (Article 21.5 – US)*; Panel and Appellate Body Reports on *Mexico – Corn Syrup (US – Article 21.5)*; and Panel and Appellate Body Reports on *US – Softwood Lumber VI (Article 21.5 – Canada)*.

whether the term "suitable waiver" refers to a waiver from only Article I or also from Article XIII of the GATT 1994.

3. Ecuador's claims under paragraphs 1 and 2 of Article XIII of the GATT 1994

7.266 As mentioned earlier, in the context of Ecuador's claims under Article XIII of the GATT 1994, the Panel intends to start its analysis with addressing the European Communities' systemic arguments concerning the interrelation of Articles I and XIII of the GATT 1994 and the latter's applicability to the EC banana import regime, as well as Ecuador's response to those arguments. If the European Communities' arguments in that context were rejected, the Panel would address Ecuador's substantive claim under both paragraphs 1 and 2 of Article XIII. In the alternative, there would be no need to assess Ecuador's substantive claim under Article XIII:1 and 2 of the GATT 1994.

(a) The interrelation of Articles I and XIII of the GATT 1994 and the latter's applicability to the EC banana import regime

(i) Parties' main arguments

The European Communities' arguments

7.267 In this context, the European Communities has argued that Article XIII of the GATT 1994 is not applicable to the measure challenged by Ecuador because that measure would fall within the scope of Article I of the GATT 1994 because of the "different purpose and different field of application [of those two provisions of the GATT 1994]."[570]

7.268 The European Communities does not contest that in principle, Article I:1 of the GATT 1994 might apply to the European Communities' current banana import regime. Also, the European Communities does not call into question that Article XIII of the GATT 1994 is in principle applicable to tariff quotas. Rather, the European Communities argues that "[t]he crucial issue facing the Panel is the *way* in which *paragraphs 1 and 2 of GATT Article XIII apply to tariff quotas, in accordance with paragraph 5*"[571] (emphasis added):

> "'[O]rdinary meaning' of [Article XIII:5] ... is of limited direct help in the present context. The statement in paragraph 5 that the provisions of GATT Article XIII ('apply to any tariff quota') does not give any guidance as to *how* they apply, which is the issue facing the Panel."[572]

7.269 The European Communities does not contest that its current banana import regime includes a tariff quota. Indeed, Article 1.2 of Council Regulation (EC) No. 1964/2005 of 29 November 2005 provides that:

> "Each year from 1 January, starting from 1 January 2006, an autonomous *tariff quota* of 775000 tonnes net weight subject to a zero-duty rate *shall be opened for imports of bananas (CN code 08030019) originating in ACP countries*."[573] (emphasis added)

[570] European Communities' first written submission, para. 94.
[571] European Communities' second written submission, para. 49.
[572] Ibid., para. 53.
[573] Council Regulation (EC) No 1964/2005 of 29 November 2005 on the tariff rates for bananas, *OJ L/316 , 2 February 2005, pp. 1-2, Article 1.2.*

Further, as mentioned earlier, the European Communities has argued that its current banana import regime implements the second suggestion of the first compliance panel[574], namely that "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."[575] (emphasis added)

7.270 While noting that "in creating a zero-rate tariff quota for those bananas the European Communities conferred to the ACP countries a benefit, since those imports would otherwise have been subject to duty"[576], the European Communities argues that:

> "Ecuador's (and the other MFN countries') exports are not subject to *any* tariff-quota, quota or other quantitative restriction of any type or form. Ecuador's exports are subject to a simple and ordinary tariff. And it is clear that GATT Article XIII does not apply to tariffs. Textually, this is made clear from the title of GATT Article XIII. Contextually, it is made clear by the fact that if GATT Article XIII was to also cover ordinary tariffs, then there would be no more meaning or reason of existence for GATT Article I, paragraph 1."[577]

7.271 In particular, the European Communities argues that "GATT Article XIII is concerned with quantitative measures and, with the sole exception of the reference in paragraph 5 to tariff quotas, has nothing to say about tariffs"[578]:

> "[T]he texts of the provisions of Article I, paragraph 1 and Article XIII, paragraph 1 of the GATT have a very important difference. GATT Article I, paragraph 1 obliges each Member to extend to all Members the exact same advantage that it grants to one single Member. In contrast, GATT Article XIII, paragraph 1 obliges each Member not to impose a restriction on a single Member, unless it imposes the same restriction on all other Members. In other words, GATT Article I obliges Member A to treat Member B at least as 'well' as it treats any other Member. In contrast, GATT Article XIII obliges Member A *not* to treat Member B 'worse' than the way it treats *all* other Members.
>
> This important textual difference is underlined by the titles of the two Articles. The title of GATT Article I is 'General Most Favoured Nation Treatment'. In contrast, the title of GATT Article XIII is 'Non-discriminatory Administration of Quantitative Restrictions'. These different titles confirm that the intention of the drafters of the GATT was to make clear that each Article has the different purpose and different field of application identified in the preceding paragraph of this submission."[579]

7.272 Further, while the European Communities concedes that both Articles I and XIII of the GATT 1994 deal with non-discrimination, the European Communities argues that "GATT Article XIII ... is intended to deal with discrimination in quantitative limitations and is not aimed at tariff discrimination."[580] In particular, according to the European Communities:

> "The text of GATT Article XIII repeatedly refers to quantitative issues. The heading speaks of 'Non-discriminatory administration of Quantitative Restrictions'.

[574] See European Communities' first written submission, para. 80.
[575] Panel Report on *EC – Bananas III (Article 21.5 – Ecuador)*, para. 6.157.
[576] European Communities' second written submission, para. 51.
[577] European Communities' first written submission, para. 104.
[578] European Communities' second written submission, para. 50.
[579] European Communities' first written submission, paras. 93-94.
[580] European Communities' second written submission, para. 62.

> Paragraph 1 refers exclusively to 'prohibitions and restrictions'. Paragraph 2 addresses how 'import restrictions' are to be distributed, and talks about the 'shares' which Members might obtain. It provides for the allocation of quotas, and for the use of licences. Paragraph 3 has more to say about licences and quota allocation. Quota allocation is also the subject of paragraph 4."[581]

7.273 The European Communities adds that:

> "Bearing in mind this total concentration on quantitative issues it hardly seems likely that a single phrase in paragraph 5 was intended to transform the Article into one that could also be targeted at tariff discrimination. Nor is there anything in the wording of this paragraph that would encourage such a conclusion. It says that the 'provisions of this Article shall apply to any tariff quota instituted or maintained' by a Member. This text suggests that it is the tariff quota itself, and not its relationship with other import arrangements, at which the application of GATT Article XIII is directed."[582]

7.274 The European Communities also argues that:

> "The 'tariff only' nature of the [European Communities'] new [banana] import regime cannot be disputed. The fact that there is a limit on the quantity of ACP bananas that can be imported free of duty does not change this fact. The GATT itself recognises that tariff quotas are tariff measures and not ordinary quotas. This is seen from the fact that GATT Article XIII, paragraph 5 expressly provides that the rules of GATT Article XIII 'shall also apply' to tariff quotas. If tariff quotas were quantitative restrictions, then there would be no need for GATT Article XIII, paragraph 5 at all. Moreover, the fact that tariff quotas are tariff measures and not quotas has also been expressly recognised in the context of the bananas dispute: the Arbitrator confirmed that 'tariff quota commitments constitute, in the WTO context, a variant of a tariff concession rather than a non-tariff measure per se.'[583] This point is also confirmed in the report of this Panel, where it is stated that the European Communities could adopt a 'tariff only system with a tariff quota for ACP bananas'.[584],[585]

7.275 Further, the European Communities contends that "the existence and operation of the Cotonou Preference in the form of a limit on the quantities of ACP bananas that can be imported into the European Communities free of duty does not cause any nullification or impairment of any benefit accruing to Ecuador, in the meaning of GATT Article XXIII and Article 3.8 of the DSU"[586]:

> "[W]hen the European Communities introduced its new, tariff only system on January 1, 2006, it imposed a limit on the quantities of ACP bananas that could take advantage of the Cotonou Preference. This was precisely aimed at protecting Ecuador's and the other MFN countries' interests and ensuring that the total market access that MFN suppliers enjoyed up to January 1, 2006 would be maintained, as required by the Doha waiver. Therefore, the quantitative limit imposed on the

[581] European Communities' second written submission, para. 62.
[582] Ibid., para. 63.
[583] (*footnote original*) See the First Arbitration Award, at paragraph 60. The Arbitrator found that the economic effect of the particular tariff quotas applied at that time by the European Communities was comparable to a quota regime (non-tariff measure), because virtually all imports were being effected through these quotas.
[584] (*footnote original*) See the report of the Panel, at paragraph 6.157.
[585] European Communities' first written submission, para. 24.
[586] Ibid., para. 89.

> Cotonou Preference protects the interests of MFN suppliers' including Ecuador and does not harm them."[587]

7.276 The European Communities also argues that:

> "[T]his analysis of GATT Article XIII does not take away the utility of the reference to tariff quotas in paragraph 5. Its provisions can be applied straightforwardly to those aspects of tariff quotas that involve quantitative restrictions. If tariff quotas are assigned to a number of countries (such as under the arrangements that were examined in *EC – Bananas III*), paragraph 1 will require that the restriction placed on the tariff quota given to Member A is similar to that applied to the tariff quotas given to other Members."[588]

7.277 In response to Ecuador's references to earlier findings in the *EC – Bananas III* dispute, the European Communities argues that those are not relevant in these proceedings:

> "Ecuador's references to the *Bananas III* jurisprudence, in paragraph 42 of its second written submission, are simply wrong. As already mentioned, the Appellate Body analysed an import regime that was the equivalent of a 'quota regime', because all imports were made pursuant to tariff quotas. Moreover, each tariff quota was administered in a different way. The Appellate Body concluded that a 'quota regime' with these characteristics was not compatible with GATT Article XIII. However, the system analysed by the Appellate Body in *Bananas III* in 1997 has nothing to do with the current import regime of the European Communities. Therefore, the Appellate Body's assessment of the 1997 regime does not have any relevance for this Panel's assessment of the European Communities' current import regime."[589]

7.278 The European Communities contends also that:

> "The import regime analysed by the Article 21.5 Panel was a 'quota regime' (just like the one analysed by the Appellate Body in 1997), which has nothing to do with the current import regime of the European Communities. Moreover, the measure found by the Article 21.5 Panel to violate GATT Article XIII has nothing to do with the current import regime of the European Communities, which is tariff only and where imports from MFN countries are not subject to any quantitative restrictions. Therefore, paragraph 6.29 of the Article 21.5 Panel report has no relevance for the current Panel procedures."[590]

7.279 The European Communities adds that in 2005, "the [second] Arbitrator had noted the disagreement between the European Communities and Ecuador and had not concluded whether the Cotonou Preference would need a waiver from GATT Article XIII."[591],[592]

7.280 The European Communities argues also that the earlier findings in the *EC — Bananas III* dispute would support the European Communities' arguments in regard to Article XIII of the GATT 1994 in these proceedings:

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[587] European Communities' first written submission, para. 88.
[588] European Communities' second written submission, para. 65
[589] Ibid., para. 33.
[590] Ibid., para. 34.
[591] (*footnote original*) See the Second Arbitration Award, at paragraphs 34 and 36.
[592] European Communities' first written submission, para. 82. See also European Communities' second written submission, para. 32.

> "[I]n *EC-Bananas III* ..., the Appellate Body found that the European Communities was indeed involved in a 'discriminatory administration of quantitative restrictions' in violation of GATT Article XIII, paragraph 1, because (i) all imports of bananas were effected through the allocation of tariff quotas,[593] (ii) each group of suppliers was allocated a tariff quota with different terms, (iii) some groups of countries were allocated country specific tariff quotas, while some MFN countries were only allocated the general 'Other' tariff quota. With these facts in mind, the Appellate Body found that the restriction imposed on those countries through the allocation of the 'Other' quota was not 'similar' to the restriction imposed on the products of the countries to which country-specific quotas were allocated.[594] This finding of the Appellate Body shows that GATT Article XIII, paragraph 1 covers only situations where a Member applies tariff quotas with different terms to different groups of countries in a market where all import are made under tariff quotas. Consequently, GATT Article XIII, paragraph 1 does not apply to a tariff only import regime where there are no different tariff quotas allocated to different groups of countries, such as the current import regime of the European Communities."[595]

Ecuador's arguments

7.281 As regards the EC arguments on the interrelation of Articles I and XIII of the GATT 1994 and the latter's applicability to the EC banana import regime, Ecuador argues that:

> "The EC ... ignores the findings of *Bananas III* with regard to Article XIII. The Appellate Body explicitly rejected the EC argument, initially upheld by the Panel, that the waiver of Article I implicitly waived Article XIII to the extent necessary to apply quantitative limits on imports from ACP countries at the preferential duty rate.[596] The Appellate Body sustained the Panel finding that 'Articles I:1 and XIII apply to the relevant EC regulations, irrespective if there is one or more "separate regimes" for the importation of bananas.'[597] When the EC attempted to preserve a tariff quota reserved exclusively for bananas of ACP origin, the first Article 21.5 Panel in Bananas III again found that the EC measure was inconsistent with the EC's obligations under Article XIII.[598],[599]

7.282 Ecuador adds that "[t]hough the EC system has eliminated the country allocations that previously existed as between non-ACP countries, the discrimination remains as between ACP and non-ACP bananas."[600] Ecuador argues that "[t]he Appellate Body in Bananas III vigorously condemned this discrimination"[601], and quotes the following paragraphs:

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[593] (*footnote original*) As already mentioned, only 0.3% of total imports were effected out-of-tariff-quota.

[594] (*footnote original*) See the Appellate Body report in *EC – Regime for the importation, sale and distribution of bananas*, at paragraph 161.

[595] European Communities' first written submission, para. 105.

[596] (*footnote original*) Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R 9 Sept. 1997, at paras. 183-188.

[597] (*footnote original*) *Id.*, at para. 191.

[598] (*footnote original*) Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 by Ecuador*, WT/DS27/RW/ECU, 12 Apr. 1999, at para. 6.29.

[599] Ecuador's second written submission, para. 42.

[600] Ecuador's first written submission, para. 31.

[601] Ibid., para. 31.

> "The issue here is not whether the European Communities is correct in stating that two separate import 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 categorizes 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 agreements, if these provisions apply only *within* regulatory regimes established by that Member.
>
> Non-discrimination obligations apply to all imports of like products, except when these obligations are specifically waived or are otherwise not applicable as a result of the operation of specific provisions of the GATT 1994, such as Article XXIV.[602] In the present case, the non-discrimination obligations of the GATT 1994, specifically Articles I:1 and XIII[603], apply fully to all imported bananas irrespective of their origin, except to the extent that these obligations are waived by the Lomé Waiver. We, therefore, uphold the findings of the Panel[604] that the non-discrimination provisions of the GATT 1994, specifically, Articles I:1 and XIII, apply to the relevant EC regulations, irrespective if there is one or more 'separate regimes' for the importation of bananas."[605]

7.283 As to the European Communities' arguments on nullification and impairment, Ecuador contends that:

> "The violation of Article XIII is the denial of Ecuador's right to participate in the zero-duty quota. It is obvious that, if allowed to participate in that quota, Ecuador could reasonably expect to benefit substantially, based on its efficiency and large share of world trade in bananas. The issue is not whether the quota results in less harm than an unrestricted preference for ACP countries, but rather the harm that Ecuador suffers by reason of being excluded from the favorable quota."[606]

7.284 Ecuador adds that:

> "If [it] established a quota, for example in a safeguard action, and provided that only products originating in the southern hemisphere would be admitted under the quota, the countries of Europe would swiftly complain that they were denied access contrary to Article XIII. The fact that such countries were excluded from the quota would not mean that those countries are not restricted, but rather that those countries were even

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[602] (*footnote original*) *Panel on Newsprint*, adopted 20 November 1984, BISD 31S/114.

[603] (*footnote original*) We do not agree with the Panel's findings that Article X:3(a) of the GATT 1994 and Article 1.3 of the *Licensing Agreement* preclude the imposition of different import licensing systems on like products when imported from different Members. See our Findings and Conclusions, paras. (l) and (m).

[604] (*footnote original*) Panel Reports, paras. 7.82 and 7.167.

[605] Appellate Body Report on *EC – Bananas III*, paras. 190-191.

[606] Ecuador's second written submission, para. 45.

more restricted contrary to Article XIII than if they had been allotted some small share of the quota, but rather would mean that they were completely restricted.

The same is true of a tariff quota. Ecuador and other MFN suppliers are completely restricted by the EC's tariff quota, in the sense that the MFN suppliers have no access to the duty-free quota. A zero share of the preferential quota is a worse violation of Article XIII than a disproportionately small share."[607]

(ii) Panel's analysis

Relevance of Article XIII of the GATT 1994 to tariff quotas in agriculture

7.285 At the outset, the Panel notes that Article XIII was originally drafted in the GATT 1947 to address the administration of quantitative restrictions, in particular country quotas and any other quotas. As a result of the Uruguay Round of Multilateral Trade Negotiations, quantitative restrictions in agriculture were to be abolished and tariffied. As the panel on *Turkey – Textiles* stated in the context of Articles XI and XIII of the GATT 1994:

"The prohibition on the use of quantitative restrictions forms one of the cornerstones of the GATT system. A basic principle of the GATT system is that tariffs are the preferred and acceptable form of protection. Tariffs, to be reduced through reciprocal concessions, ought to be applied in a non-discriminatory manner independent of the origin of the goods (the 'most-favoured-nation' (MFN) clause). ... The prohibition against quantitative restrictions is a reflection that tariffs are GATT's border protection 'of choice'. Quantitative restrictions impose absolute limits on imports, while tariffs do not. In contrast to MFN tariffs which permit the most efficient competitor to supply imports, quantitative restrictions usually have a trade distorting effect, their allocation can be problematic and their administration may not be transparent.

Notwithstanding this broad prohibition against quantitative restrictions, GATT contracting parties over many years failed to respect completely this obligation. From early in the GATT, in sectors such as agriculture, quantitative restrictions were maintained and even increased to the extent that the need to restrict their use became central to the Uruguay Round negotiations. … Certain contracting parties were even of the view that quantitative restrictions had gradually been tolerated and accepted as negotiable and that Article XI could not be and had never been considered to be, a provision prohibiting such restrictions irrespective of the circumstances specific to each case. This argument was, however, rejected in an adopted panel report *EEC – Imports from Hong Kong*.[608]

Participants in the Uruguay Round recognized the overall detrimental effects of non-tariff border restrictions (whether applied to imports or exports) and the need to favour more transparent price-based, i.e. tariff-based, measures; to this end they devised mechanisms to phase-out quantitative restrictions in ... agriculture ... .

[607] Ecuador's second written submission, paras. 47-48.

[608] (*footnote original*) Panel Report on *EEC – Quantitative Restrictions Against Imports of Certain Products from Hong Kong*, adopted on 12 July 1983, BISD 30S/129, ("*EEC – Imports from Hong Kong*").

> *This recognition is reflected in ... the Agreement on Agriculture where quantitative restrictions were eliminated*[609] ..."[610] (emphasis added)

7.286 Notwithstanding tariffication, the text of Article XIII of the GATT 1947, including its title, "Non-discriminatory Administration of Quantitative Restrictions", has not been modified in the Uruguay Round. The Panel reads that title as being relevant to maintaining a close link with Article XI of the GATT 1994, entitled "General Elimination of Quantitative Restrictions". The panel on *Turkey – Textiles* stated that:

> "The wording of Articles XI and XIII is clear. Article XI provides that as a general rule (we note the wording of the title of Article XI: "*General Elimination* of Quantitative Restrictions"), WTO Members shall not use quantitative restrictions against imports or exports.
>
> ...
>
> Article XIII provides that if and when quantitative restrictions are allowed by the GATT/WTO, they must, in addition, be imposed on a non-discriminatory basis."[611]

7.287 Following tariffication, Article XIII of the GATT 1994 remains relevant for the agricultural sector. As the Appellate Body stated earlier in this dispute, "[i]f the negotiators had intended to permit Members to act inconsistently with Article XIII of the GATT 1994 [by virtue of the provisions of the Agreement on Agriculture], they would have said so explicitly."[612] In particular, Article XIII of the GATT 1994 is relevant to one of the few remaining permissible practices of with a quantitative dimension in agriculture: tariff quotas. In this context, this Panel notes that the original panel requested by Ecuador in this dispute found, similarly to the panel on *Turkey – Textiles*, that:

> "The wording of Article XIII is clear. If quantitative restrictions are used (as an exception to the general ban on their use in Article XI), they are to be used in the least trade-distorting manner possible."[613]

7.288 The original panel requested by Ecuador in this dispute added that:

> "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 interpreting the terms of Article XIII, it is important to keep their context in mind. Article XIII is basically a provision relating to the administration of restrictions authorized as exceptions to one of the most basic GATT provisions – the general ban on quotas and other non-tariff restrictions contained in Article XI."[614]

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[609] (*footnote original*) Under the Agreement on Agriculture, notwithstanding the fact that contracting parties, for over 48 years, had been relying a great deal on import restrictions and other non-tariff measures, the use of quantitative restrictions and other non-tariff measures was prohibited and Members had to proceed to a "tariffication" exercise to transform quantitative restrictions into tariff based measures.

[610] Panel Report on *Turkey – Textiles*, paras. 9.63-9.65.

[611] Ibid., paras. 9.61-9.62.

[612] Appellate Body Report on *EC – Bananas III*, para. 157. See also Panel Report on *US – Line Pipe*, para. 7.40.

[613] Panel Report on *EC – Bananas III (Ecuador)*, para. 7.68.

[614] Ibid., para. 7.68.

Analysis of Article XIII:5 of the GATT 1994

7.289 The analysis of the European Communities' arguments concerning the interrelation of Articles I and XIII of the GATT 1994, and the applicability of the latter to the EC banana import regime necessarily involves Article XIII:5 of the GATT 1994, which provides that "[t]he provisions of this Article shall apply to any tariff quota instituted or maintained by any contracting party [WTO Member], and, in so far as applicable, the principles of this Article shall also extend to export restrictions." As mentioned earlier, the European Communities does not contest that, in principle, by virtue of Article XIII:5, Article XIII is applicable to tariff quotas.[615]

7.290 First, the Panel looks at the language of Article XIII:5 of the GATT 1994. The words "any" (both before the terms "tariff quota" and "contracting party") and "shall" in Article XIII:5 underscore the absolute and categorical nature of the application of "the provisions of ... Article [XIII]" to tariff quotas. The Panel notes also that Article XIII:5 uses the term "*any tariff quota* instituted or maintained by any [Member]" in the singular. The Panel reads this to mean that Article XIII of the GATT 1994 is also applicable to one single tariff quota, and that this is so irrespective of whether that single tariff quota is part of an import regime with more tariff quotas or is part of an import regime that comprises only one tariff quota.

7.291 In an import regime containing a tariff quota with a preferential in-quota duty (whether or not a zero duty) for some Members, and a higher out-of-quota MFN duty, the in- and out-of-quota duties are two facets of the same preferential tariff quota. As the first compliance panel requested by Ecuador in this dispute stated, "a tariff quota is a quantitative limit on the availability of a specific tariff rate".[616] Citing that statement, the panel on *US – Line Pipe* established that "[it] see[s] no reason to disagree with the United States that a tariff quota involves the '[a]pplication of a higher tariff rate to imported goods after a specified quantity of the item has entered the country at a lower prevailing rate'."[617] (footnote omitted)

7.292 Neither of the parties contest that the European Communities has, under its current banana import regime introduced on 1 January 2006, a preferential zero-duty tariff quota of 775,000 mt per annum reserved for ACP countries, combined with an MFN applied duty of 176 €/mt. The tariff quota represents a quantitative limit on the preference to ACP countries because any ACP banana imports to the European Communities exceeding that quantitative limit are subject to the out-of-quota MFN duty.

7.293 Thus, the European Communities' current banana import regime is a tariff-quota-based import regime, and the in- and out-of-quota duties are inherent parts of that regime. Accordingly, and in the light of Article XIII:5 of the GATT 1994, in principle, Article XIII of the GATT 1994 applies to all aspects of a preferential tariff quota, including the out-of-quota duty.

Interrelation of Articles I and XIII of the GATT 1994

7.294 The European Communities argues that the applicability of Article I of the GATT 1994 to tariff discrimination prevents the applicability of Article XIII of the GATT 1994 to the European Communities' current banana import regime.[618]

[615] See European Communities' second written submission, para. 49.

[616] Panel Report on *EC – Bananas III (Article 21.5 – Ecuador)*, para. 6.20; and Decision by the Arbitrators on *EC - Bananas III (US) (Article 22.6 – EC)*, para. 5.9.

[617] Panel Report on *US – Line Pipe*, para. 7.18.

[618] See European Communities' second written submission, para. 62.

7.295 Article I of the GATT 1994 is entitled "General Most-Favoured-Nation Treatment". Paragraph 1 of Article I stipulates that:

> "With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, any advantage, favour, privilege or immunity granted by any contracting party [WTO Member] to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties [WTO Members]."

7.296 The Panel notes that Members' measures must comply with all relevant provisions of the covered agreements. In regard to the applicability of Article XIII of the GATT 1994 in the specific context of agriculture, as mentioned above, the Appellate Body found earlier in this dispute that "[i]f the negotiators had intended to permit Members to act inconsistently with Article XIII of the GATT 1994 [by virtue of the provisions of the Agreement on Agriculture], they would have said so explicitly."[619]

7.297 Also, as the European Communities argues, Article I of the GATT 1994 covers tariff discrimination.[620] As a result, Article I does not address the quantitative element of the European Communities' current banana import regime, which is covered by Article XIII of the GATT 1994. As elaborated further below[621], the European Communities' current banana import regime contains an important quantitative element, and even if that element is applicable directly to the ACP countries, it results in a restriction for Ecuador within the meaning of Article XIII:1 of the GATT 1994.

7.298 As regards a partial overlap between two provisions in the covered agreements, Article XIII:2(d) of the GATT 1994 and Article 5.2 of the Safeguards Agreement, the panel on *US - Line Pipe* stated that:

> "As noted by the panel in *Turkey – Textiles*, 'the principle of effective interpretation or 'l'effet utile' or in Latin *ut res magis valeat quam pereat* reflects the general rule of interpretation which requires that a treaty be interpreted to give meaning and effect to all the terms of the treaty. For instance one provision should not be given an interpretation that will result in nullifying the effect of another provision of the same treaty.'[622] An interpretation of Article XIII that applies that provision in the context of safeguard measures does not, in our view, nullify any of the provisions of the Safeguards Agreement. All of the provisions of the Safeguards Agreement remain fully applicable. Although there may be some duplication between Article XIII:2(d) and Article 5.2 of the Safeguards Agreement, duplication is not the same as nullification."[623]

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[619] Appellate Body Report on *EC – Bananas III*, para. 157. See also Panel Report on *US – Line Pipe*, para. 7.40.

[620] See European Communities' second written submission, para. 64.

[621] See paras. 7.333 to 7.337 below.

[622] (*footnote original*) *Turkey – Textiles* at footnote 327.

[623] Panel Report on *US – Line Pipe*, para. 7.45.

7.299 Applying the same approach to the interrelation of Articles I and XIII of the GATT 1994, this Panel notes that, even if there was some overlap between those two Articles, giving effect to Article XIII would not nullify the effect of Article I.

7.300 The Panel also notes that in *EC – Bananas III* the European Communities argued, in regard to the Lomé Waiver, that:

> "[W]here aspects of a measure have been found to be covered by the waiver for purposes of Article I, they should not be found to violate another GATT provision imposing MFN-like obligations similar to those that have been waived..."[624]

7.301 The original panel requested by Ecuador in *EC – Bananas III* found, – a finding later reversed by the Appellate Body[625] – that the Lomé Waiver from Article I:1 of the GATT 1994 would extend to Article XIII:1 of the GATT 1994.[626] In this context, that panel also looked into the "close relationship between Articles I and XIII:1".[627]

7.302 The Appellate Body explicitly rejected the original panel's conclusion that the Lomé Waiver from Article I:1 would automatically extend to Article XIII:1 of the GATT 1994.[628] In that context, the Appellate Body noted that "[t]he Panel based its conclusion on the need to give 'real effect'[629] to the Lomé Waiver and on the 'close relationship'[630] between Articles I:1 and XIII:1"[631]; however, the Appellate Body stated that, "although Articles I and XIII of the GATT 1994 are both non-discrimination provisions, *their relationship is not such that a waiver from the obligations under Article I implies a waiver from the obligations under Article XIII.*"[632] (emphasis added)

7.303 The Appellate Body did not elaborate further on the relationship between Articles I and XIII of the GATT 1994. Nevertheless, the rejection by the Appellate Body of the panel's finding on the scope of the Lomé Waiver indicates that Articles I and XIII of the GATT 1994 do not have the same scope, and that an inconsistency with Article XIII is possible irrespective of an inconsistency with Article I.

7.304 Finally, the Panel notes that on two earlier occasions in the *EC – Bananas III* dispute the European Communities made an objection to the applicability of Article XIII of the GATT 1994 to the then 857,700 mt duty-free tariff quota for ACP bananas[633] similar to the objection the European Communities has made in these proceedings regarding the 775,000 mt duty-free tariff quota for ACP bananas. Both the first compliance panel requested by Ecuador and the arbitrator in the

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[624] Panel Report on *EC – Bananas III (Ecuador)*, para. 7.104.

[625] See Appellate Body Report on *EC – Bananas III*, para. 188.

[626] See Panel Report on *EC – Bananas III (Ecuador)*, para. 7.110.

[627] The original panel on *EC- Bananas III* stated that "both [Articles I and XIII:1] prohibit discriminatory treatment. Article I requires MFN treatment in respect of 'rules and formalities in connection with importation', a phrase that has been interpreted broadly in past GATT practice, such that it can appropriately be held to cover rules related to tariff quota allocations. Such rules are clearly rules applied in connection with importation. Indeed, they are critical to the determination of the amount of duty to be imposed. To describe the relationship somewhat differently, Article I establishes a general principle requiring non-discriminatory treatment in respect of, inter alia, rules and formalities in connection with importation. Article XIII:1 is an application of that principle in a specific situation, i.e., the administration of quantitative restrictions and tariff quotas. In that sense, the scope of Article XIII:1 is identical with that of Article I." (footnote omitted) Panel Report on *EC – Bananas III (Ecuador)*, para. 7.107.

[628] See Appellate Body Report on *EC – Bananas III*, para. 188.

[629] (*footnote original*) Panel Reports, para. 7.106.

[630] (*footnote original*) *Ibid*., para. 7.107.

[631] Appellate Body Report on *EC – Bananas III*, para. 182.

[632] Ibid., para. 183.

[633] Panel Report on *EC – Bananas III (Article 21.5 – Ecuador)*, paras. 4.26-4.27, 6.19-6.20; and Decision by the Arbitrators on *EC – Bananas III (US) (Article 22.6 – EC)*, paras. 5.8-5.9.

proceedings requested by the European Communities pursuant to Article 22.6 of the DSU rejected that objection:

> "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."[634]

In the context of the European Communities' objection to the applicability of Article XIII in regard to the European Communities' preferential duty-free tariff quota for ACP countries, the main difference between the European Communities' former and current preferential tariff quota for ACP countries is the level of the quantitative limit: it is currently 775,000 mt instead of 857,000 mt. From the viewpoint of the applicability of Article XIII, that quantitative difference is irrelevant as it does not eliminate the quantitative element of the European Communities' measure. As stated by the compliance panel requested by Ecuador and the arbitrator in the proceedings requested by the European Communities pursuant to Article 22.6 of the DSU, it is the very quantitative limit that establishes the applicability of Article XIII of the GATT 1994 to the European Communities' preferential tariff quota for ACP countries, not the specific level of the quantitative limit, nor whether MFN countries are also subject to a tariff quota or only an MFN tariff.[635] The Panel therefore rejects the argument made by the European Communities that "the fact that the ACP countries enjoy a trade preference and the fact that there is a 'cap' imposed on the quantities of ACP bananas that can benefit from this preference may be relevant for purposes of GATT Article I, but are completely irrelevant for the application of GATT Article XIII."[636]

7.305 In the light of the foregoing, the Panel is justified in addressing the consistency of the European Communities' current banana import regime with Article XIII of the GATT 1994. Accordingly, the Panel will now turn to the substantive claims of Ecuador under Article XIII:1 and 2 of the GATT 1994.

(b) Ecuador's claim under Article XIII:1 of the GATT 1994

(i) Parties' main arguments

Ecuador's arguments

7.306 Ecuador argues that:

> "The EC measures are inconsistent with Article XIII:1 in that Ecuadorian (and other non-ACP) bananas cannot be considered 'similarly restricted' in comparison to ACP bananas, when Ecuadorian (and other non-ACP) bananas are simply excluded from access to the duty free tariff quota."[637],[638]

[634] Panel Report on *EC – Bananas III (Article 21.5 – Ecuador)*, para. 6.20; and Decision by the Arbitrators on *EC – Bananas III (US) (Article 22.6 – EC)*, para. 5.9.

[635] See Panel Report on *EC – Bananas III (Article 21.5 – Ecuador)*, para. 6.20; and Decision by the Arbitrators on *EC – Bananas III (US) (Article 22.6 – EC)*, para. 5.9.

[636] European Communities' first written submission, para. 102.

[637] (*footnote original*) Panel Report at para. 7.69; Appellate Body Report at para. 160.

[638] Ecuador's first written submission, para. 29.

7.307 According to Ecuador,

> "[S]uch a tariff quota is a patent violation of Article XIII:1 of the GATT 1994, in that Ecuador (and other MFN suppliers) are restricted from any duty free access to the EC market, while ACP bananas are not similarly restricted."[639]

7.308 Ecuador also argues that, as a result of the ACP tariff quota, it suffers a restriction in the sense of Article XIII:1 of the GATT 1994, namely "[t]he products that are not quantitatively restricted are those that are within the quota, while the restricted products are those that are denied access."[640] Ecuador adds that "the EC is wrong to argue that Ecuador's bananas are subject only to tariff restrictions[641], when in fact Ecuador's bananas are subject to a zero duty quota on entry of bananas."[642]

The European Communities' arguments

7.309 In the view of the European Communities, there is no inconsistency with Article XIII:1 of the GATT 1994. According to the European Communities:

> "[T]he text of GATT Article XIII, paragraph 1 makes clear that a Member can successfully claim that another Member's measures violate the provisions of GATT Article XIII, only if its [sic!] can show that:
>
> (i) the allegedly offending Member imposes a prohibition or restriction on products originating from the complaining Member and, in principle, there is a nullification and impairment of a benefit accruing to the complaining Member;
> (ii) the allegedly offending Member does not impose a similar prohibition or restriction on the like products originating from *all* other countries."[643]

7.310 Applying the first part of that test to its current banana import regime, the European Communities contends that:

> "Given that Ecuador's imports are not subject to any quantitative restriction, the first condition for the application of GATT Article XIII, paragraph 1, identified in the preceding paragraphs, is not satisfied."[644]

7.311 The European Communities reaches a similar conclusion on the second part of the above test:

> "At the same time, the second condition for the application of GATT Article XIII, paragraph 1, identified above, cannot be satisfied: since imports from Ecuador are not subject to any quantitative restriction, there is no basis that would allow an examination of whether 'similar quantitative restrictions' are also imposed on *all* other Members."[645]

7.312 In particular, in the European Communities' view, there is no inconsistency with Article XIII:1 because:

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[639] Ecuador's second written submission, para. 37.
[640] Ibid., para. 46.
[641] (*footnote original*) First Written Submission of the EC, at para. 104.
[642] Ecuador's second written submission, para. 49.
[643] European Communities' first written submission, para. 96.
[644] Ibid., para. 98.
[645] Ibid., para. 99.

> "[T]he Members on whose imports the quantitative restriction is imposed are the ACP countries. The MFN countries, including Ecuador, are the 'all third countries', whose position should be taken as a basis in order to determine whether the ACP countries are treated 'worse' than them. However, the MFN countries are not subject to any tariff quota, or other quantitative restriction. As a consequence, there is nothing on which the comparison can be based."[646]

7.313 According to the European Communities:

> "[E]ven assuming *arguendo* that there is a quantitative restriction imposed on the ACP countries, Ecuador cannot successfully challenge it, because this quantitative restriction imposed on the ACP countries does not result in any nullification or impairment of any benefit accruing to Ecuador. Quite to the contrary, this 'cap' to the preference afforded to the ACP countries protects the interests of Ecuador and the other MFN countries, because it limits the quantities of ACP bananas that can be imported into the European Communities at zero duty."[647]

7.314 Further, referring to the report of the Appellate Body in *EC – Bananas III*, the European Communities argues that:

> "GATT Article XIII, paragraph 1 covers only situations where a Member applies tariff quotas with different terms to different groups of countries in a market where all import are made under tariff quotas. Consequently, GATT Article XIII, paragraph 1 does not apply to a tariff only import regime where there are no different tariff quotas allocated to different groups of countries, such as the current import regime of the European Communities."[648]

7.315 The European Communities adds that:

> "GATT Article XIII, paragraph 1 does not oblige the European Communities to extend to all Members (including Ecuador and the other MFN suppliers) the tariff preference granted to the ACP countries. GATT Article XIII, paragraph 1 simply obliges the European Communities not to impose a quantitative restriction on Ecuador, unless a similar quantitative restriction was imposed on all other WTO Members."[649]

7.316 The European Communities maintains that:

> "[T]the fact that the ACP countries enjoy a trade preference and the fact that there is a 'cap' imposed on the quantities of ACP bananas that can benefit from this preference may be relevant for purposes of GATT Article I, but are completely irrelevant for the application of GATT Article XIII. The important textual differences of the two Articles, discussed above, show that, unlike GATT Article I, paragraph 1, the provisions of GATT Article XIII, paragraph 1 do not impose on a Member the obligation to extend to all other Members a tariff preference granted to some Members only. Quite to the contrary, GATT Article XIII, paragraph 1 obliges each

[646] European Communities' first written submission, para. 100.
[647] Ibid., para. 101.
[648] Ibid., para. 105.
[649] Ibid., para. 103.

> Member simply not to impose a quantitative restriction on another Member, unless it imposes a similar quantitative restriction on all Members."[650]

7.317 According to the European Communities, "[t]he difference in the texts of these two provisions shows that there are certain types of measures that may violate GATT Article I, paragraph 1, without violating GATT Article XIII, paragraph 1."[651]

7.318 In response to Ecuador's arguments, the European Communities argues that "[it] does not see how it can be that products *within a quota* are those that are '*not quantitatively restricted*'."[652] The European Communities adds that:

> "The GATT distinction between obligations regarding tariffs and obligations regarding quantitative measures can be maintained only if a tariff quota relates to a positive quantity or value of goods. It cannot have unlimited or zero scope. Thus, a 'tariff of 10% with an unlimited-quantity tariff quota at 5%' is simply a 5% tariff. Likewise, a 'tariff of 10% with a zero-quantity tariff quota at 5%' is simply a 10% tariff."[653]

7.319 The European Communities also states that:

> "[I]f Ecuador's arguments were to be accepted they would lead to GATT Article XIII, paragraph 1 effectively duplicating GATT Article I, paragraph 1. Take a simple scenario of tariff discrimination, where imports from Member A are granted a 5% tariff, whereas a higher tariff is imposed on imports from Member B. The situation is precisely the one that GATT Article I, paragraph 1 is intended to address. However, according to Ecuador, one can invent notional tariff quotas in order to bring the situation within the scope of GATT Article XIII. On this logic the situation could be presented as one where Member A had an unlimited-quantity tariff quota at 5%, whereas Member B had a zero-quantity tariff quota at 5%. Consequently the two sets of imports would not be similarly restricted and there would be a breach of GATT Article XIII, paragraph 1. Thus, a situation of straightforward tariff discrimination could be artificially presented as one involving notional tariff quotas which would fall within the ambit of GATT Article XIII."[654]

7.320 The European Communities adds that:

> "[I]f paragraph 1 of GATT Article XIII is applied unthinkingly to the situation of the Cotonou Preference[, o]ne odd result would be that WTO Members would be required to confer benefits on non-WTO Members. This would come about because paragraph 1 would be taken to say that a tariff quota could be conferred on one WTO Member only if similar tariff quotas had been conferred on 'all other countries' and not just on WTO Members. If this interpretation were accepted, what was intended as a protection for WTO Members (i.e., that they would not have restrictions imposed upon them unless similar restrictions were placed on other countries) would be converted into a benefit for non-WTO Members."[655]

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[650] European Communities' first written submission, para. 102.
[651] Ibid., para. 95.
[652] European Communities' second written submission, para. 55.
[653] Ibid., para. 58.
[654] Ibid., para. 57.
[655] Ibid., para. 52.

(ii) Panel's analysis

The relevant language of Article XIII:1 of the GATT 1994 for this dispute

7.321 According to Article XIII:1 of the GATT 1994:

> "No prohibition or restriction shall be applied by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation of any product destined for the territory of any other contracting party, 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."

7.322 Replacing the terms "any contracting party", "any other contracting party" and "all third countries" with the relevant WTO Members involved in this dispute, the Panel understands that Ecuador's claim under Article XIII:1 invokes that provision in the following way:

> "No prohibition or restriction shall be applied by [the European Communities] on the importation of any product of the territory of [Ecuador] ... unless the importation of the like product of [the beneficiaries of the ACP tariff quota] ... is similarly prohibited or restricted."

7.323 The Panel does not find anything in Article XIII of the GATT 1994 or more generally in the WTO agreements to support the European Communities' argument that in this dispute "[t]he MFN countries, including Ecuador, are the 'all third countries', whose position should be taken as a basis in order to determine whether the ACP countries are treated 'worse' than them."[656] This dispute is about Ecuador's claim that the European Communities treats Ecuador 'worse' than the ACP countries. In the context of that claim by Ecuador, the only possible reading of Article XIII:1 is the one provided by the Panel in the preceding paragraph.

7.324 The Panel does not agree with the European Communities that "[i]f this interpretation were accepted, what was intended as a protection for WTO Members (i.e., that they would not have restrictions imposed upon them unless similar restrictions were placed on other countries) would be converted into a benefit for non-WTO Members."[657] In fact, the Panel agrees with the European Communities that the main purpose of Article XIII:1 of the GATT 1994 is that "WTO Members ... [sh]ould not have restrictions imposed upon them unless similar restrictions were placed on other countries". In this dispute, Ecuador, a WTO Member, claims that it should be protected under Article XIII:1 of the GATT 1994. If, accordingly, the term "any other contracting party" in Article XIII:1 is replaced with "Ecuador", and the term "any contracting party" is replaced with "the European Communities" (which the European Communities does not seem to contest), the term "all third countries" may indeed refer to the ACP countries. In that context, the term "all third countries" does not necessarily exclude WTO Members other than the European Communities and Ecuador. Also, even if "all third countries" should be interpreted as referring also to non-Members of the WTO, an issue this Panel does not address, the Panel's above interpretation of the terms of Article XIII:1 does not imply that Article XIII:1 would suddenly be turned into a provision protecting non-Members.

Analysis of the applicability of Article XIII:1 of the GATT 1994

7.325 In the light of that interpretation of the relevant terms of Article XIII:1, the Panel needs to address three issues:

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[656] European Communities' first written submission, para. 100.
[657] European Communities' second written submission, para. 52.

(a) Whether all bananas are like products;

(b) Whether any prohibition or restriction is applied by the European Communities on the importation of bananas of the territory of Ecuador; and,

(c) Whether the importation of the like product of the beneficiaries of the ACP tariff quota is similarly prohibited or restricted.

Whether all bananas are like products

7.326 The Panel has already concluded that the relevant products in this dispute, fresh bananas (corresponding to tariff item 0803 00 12 or 0803 00 19) originating in ACP countries, are like products to those fresh bananas originating in other WTO Members, in terms of Article I of the GATT 1994.[658] Based on the same considerations, the Panel may also consider them to be like products in terms of Article XIII of the GATT 1994.

7.327 Accordingly, for the purpose of consideration of Ecuador's claim under Article XIII of the GATT 1994, the Panel confirms that all fresh bananas are like products, irrespective of their origin, i.e., independently of whether they are produced in ACP or MFN countries, or whether they are subject to the MFN out-of-quota tariff, the preferential in-quota tariff under the ACP tariff quota or to any further preferential import regime of the European Communities.

Whether any prohibition or restriction is applied by the European Communities on the importation of bananas of the territory of Ecuador

7.328 Article XIII:1 of the GATT 1994, entitled "Non-discriminatory Administration of Quantitative Restrictions", can apply in this dispute only if there is a "prohibition or restriction" within the meaning of Article XIII:1 on the importation of bananas from Ecuador to the European Communities. This is the second issue the Panel will address under Article XIII:1, noting that, for the purposes of the analysis, finding either a restriction or a prohibition would be sufficient for the Panel to move to the third element of its analysis under Article XIII:1.

7.329 As regards the existence of any "restriction", the Panel notes that, while panels and the Appellate Body have not looked into the meaning of the term "restriction" specifically under Article XIII of the GATT 1994, traditionally, they have interpreted that term broadly in the context of Article XI of the GATT 1994.[659]

7.330 Also, in the context of Article XI and other non-discrimination provisions of the GATT 1994, it has been found that GATT disciplines on the use of restrictions are not meant to protect "trade flows", but rather the "competitive opportunities of imported products". As the panel on *Argentina – Hides and Leather* stated in the context of Article XI of the GATT 1994:

> "[A]s to whether [the challenged measure] makes effective a restriction, it should be recalled that Article XI:1, like Articles I, II and III of the GATT 1994, protects competitive opportunities of imported products, not trade flows.[660],[661]

[658] See paras. 7.154 to 7.157 above.

[659] See Panel Report on *India – Quantitative Restrictions*, paras. 5.129-5.130. See also Panel Report on *Turkey – Textiles*, para. 9.64; Panel Report on *India – Autos*, paras. 7.320 and 7.322; and Panel Report on *Argentina – Hides and Leather*, para. 11.17.

[660] (*footnote original*) See the Appellate Body Reports on *Japan – Taxes on Alcoholic Beverages* (hereafter "*Japan – Alcoholic Beverages II*"), adopted on 1 November 1996, WT/DS8/AB/R, WT/DS10/AB/R,

7.331 In the light of the above-mentioned close link between Articles XI and XIII of the GATT 1994, the Panel considers that this broad interpretation of the word "restriction" under Article XI is relevant also for Article XIII.

7.332 Given that broad interpretation of the term "restriction", the Panel sees the European Communities' preferential ACP tariff quota as a restriction for Ecuador within the meaning of Article XIII:1 of the GATT 1994. As the European Communities recognizes, its banana import regime confers a benefit, although a quantitatively limited one, to ACP countries, and Ecuador, like other MFN banana suppliers, cannot have access to that quantitatively limited benefit.[662] Any benefit accorded to fresh bananas of only some Members presumably affects the competitive opportunities of like bananas imported from other Members, including from Ecuador, to the European Communities market. By its very nature, such a benefit reserved for some Members generally represents a disadvantage for other Members.

7.333 The European Communities argues that Article XIII only deals with quantitative restrictions and quantitative discrimination, and not tariff restrictions or discrimination. In this context, the Panel notes that the word "quantitative" means "[p]ossessing quantity, magnitude, or spatial extent"; "[t]hat is, or may be, considered with respect to the quantity or quantities involved; estimated or estimable by quantity."[663]

7.334 On its face, the quantity of bananas that Ecuador can export to the European Communities is not restricted by the European Communities' current banana import regime: Ecuador can export as many bananas to the European Communities as it wishes. However, Ecuador can export bananas to the European Communities only at the MFN out-of-quota tariff. Therefore, the quantities Ecuador can export to the European Communities are certainly affected by the fact that, up to the quantitative limit set by the tariff quota, the ACP countries are entitled to export bananas to the European Communities at a zero in-quota duty. As stated by the first compliance panel requested by Ecuador in this dispute, "[a]s 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.*"[664] (emphasis added)

7.335 Further, as mentioned earlier, under the tariff quota, the benefit accorded to ACP countries is determined in a quantitative manner: up to the quantitative limit specified by the tariff quota, ACP countries can export bananas to the European Communities under the preferential in-quota duty; beyond the quantitative limit, ACP banana exports to the European Communities are also subject to the out-of-quota duty.

7.336 As mentioned above, both the first compliance panel requested by Ecuador and the arbitrator in the proceedings requested by the European Communities pursuant to Article 22.6 of the DSU established that it is the very quantitative limit that establishes the applicability of Article XIII to the European Communities' preferential tariff quota for ACP countries[665], not the specific level of the quantitative limit, nor whether MFN countries are also subject to a tariff quota or only to an MFN tariff.

WT/DS11/AB/R, at p.16; *Korea – Taxes on Alcoholic Beverages*, adopted on 17 February 1999, WT/DS75/AB/R, WT/DS84/AB/R, at paras. 119-120 and 127.

[661] Panel Report on *Argentina – Hides and Leather*, para. 11.20.

[662] See European Communities' second written submission, para. 51; and European Communities' first written submission, para. 104.

[663] *The New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993), Vol. II, p. 2439.

[664] Panel Report on *EC – Bananas III (Article 21.5 – Ecuador)*, para. 6.22.

[665] See Panel Report on *EC – Bananas III (Article 21.5 – Ecuador)*, para. 6.20; and Decision by the Arbitrators on *EC - Bananas III (US) (Article 22.6 – EC)*, para. 5.9.

7.337 Having established, for the above-mentioned reasons, that Ecuador's banana imports to the European Communities are restricted within the meaning of Article XIII:1 of the GATT 1994 by the European Communities' preferential tariff quota for ACP countries, the Panel also rejects the European Communities' argument that:

> "[E]ven assuming *arguendo* that there is a quantitative restriction imposed on the ACP countries, Ecuador cannot successfully challenge it, because this quantitative restriction imposed on the ACP countries does not result in any nullification or impairment of any benefit accruing to Ecuador. Quite to the contrary, this 'cap' to the preference afforded to the ACP countries protects the interests of Ecuador and the other MFN countries, because it limits the quantities of ACP bananas that can be imported into the European Communities at zero duty."[666]

7.338 Having established and identified a restriction within the meaning of Article XIII:1 of the GATT 1994 on Ecuador's banana imports to the European Communities, the Panel turns to the third and last aspect of its analysis under Article XIII:1: whether banana imports from ACP countries to the European Communities are similarly restricted.

Whether the importation of bananas from ACP countries is similarly restricted

7.339 As mentioned earlier, similar to the MFN countries, the ACP countries may export bananas to the European Communities at the MFN out-of-quota tariff. However, as the European Communities itself recognizes[667], ACP countries can also export bananas under the lower in-quota duty, which is not available to MFN countries at all. The in-quota duty is zero, while the out-of-quota duty is 176 €/mt. Since MFN countries cannot have access to that preferential tariff quota reserved for ACP countries, on its face, the importation into the European Communities of bananas from ACP countries is not similarly restricted as banana imports from Ecuador.

7.340 The Panel notes in this context that, according to Exhibit EC-17, total European Communities' banana imports from the ACP countries amounted to 891,218 mt in 2006, and to a proportional 439,328 mt during the first half of 2007. In other words, since the introduction of the European Communities' preferential ACP tariff quota, most European Communities banana imports from the ACP countries have taken place under the beneficial zero in-quota duty of 775,000 mt per annum. Consequently, as indicated in Exhibit EC-14, the European Communities has collected €20,454,544 of tariff revenues on the 891,218 mt of total ACP banana imports in 2006, while it collected €579,687,363 of tariff revenues on the 3,293,679 mt total MFN imports in the same year. Thus, in the first year of the application of its current banana import regime, the European Communities has collected about 28 times more tariff revenues on its MFN banana imports for almost four times the amount of imports than for its total banana imports from ACP countries. In other words, in 2006, on average, the European Communities has subjected each quantitative unit of MFN banana import to about seven times more duty than each equal quantitative unit of ACP banana import. These figures illustrate the way in which the European Communities' current banana import regime restricts MFN banana imports, including imports from Ecuador, within the meaning of Article XIII:1 of the GATT 1994; at the same time, it is quite clear that ACP bananas are not similarly restricted.

7.341 This Panel also notes that the original panel requested by Ecuador in this dispute stated that:

> "Article XIII:1 establishes the basic principle that no import restriction shall be applied to one Member's products unless the importation of like products from other

[666] European Communities' first written submission, para. 101.
[667] See European Communities' second written submission, para. 46.

> Members is similarly restricted. Thus, a Member may not limit the quantity of imports from some Members but not from others. But as indicated by the terms of Article XIII (and even its title, 'Non-discriminatory Administration of Quantitative Restrictions'), the non-discrimination obligation extends further. The imported products at issue must be 'similarly' restricted. A Member may not restrict imports from some Members using one means and restrict them from another Member using another means."[668]

7.342 In its ruling in *EC – Bananas III*, the Appellate Body upheld the relevant findings of that original panel in the context of Article XIII:1, by stating that:

> "When th[e] principle of non-discrimination is applied to the allocation of tariff quota shares to Members not having a substantial interest, it is clear that a Member cannot, whether by agreement or by assignment, allocate tariff quota shares to some Members not having a substantial interest while not allocating shares to other Members who likewise do not have a substantial interest. To do so is clearly inconsistent with the requirement in Article XIII:1 that a Member cannot restrict the importation of any product from another Member unless the importation of the like product from all third countries is 'similarly' restricted.
>
> Therefore, ... we conclude that the Panel found correctly that the allocation of tariff quota shares, whether by agreement or by assignment, to some, but not to other, Members not having a substantial interest in supplying bananas to the European Communities is inconsistent with the requirements of Article XIII:1 of the GATT 1994.
>
> The [tariff quota] reallocation rules [of the BFA] allow the exclusion of banana-supplying countries, other than BFA countries, from sharing in the unused portions of a tariff quota share. Thus, imports from BFA countries and imports from other Members are not 'similarly' restricted. We conclude, therefore, that the Panel found correctly that the tariff quota reallocation rules of the BFA are inconsistent with the requirements of Article XIII:1 of the GATT 1994."[669]

7.343 Based on the reasoning of the original panel and the Appellate Body in this dispute, both the first compliance panel requested by Ecuador and the arbitrator in the proceedings requested by the European Communities pursuant to Article 22.6 of the DSU established inconsistency with Article XIII:1 of the GATT 1994, by stating that:

> "[S]ome 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

[668] Panel Report on *EC – Bananas III (Ecuador)*, para. 7.69.
[669] Appellate Body Report on *EC – Bananas III*, paras. 161-163.

> importation of the like product of all third countries … is similarly prohibited or restricted'."[670]

7.344 In the proceedings before this Panel, the European Communities argues that its current banana import regime is different from the previous ones addressed by the Appellate Body and the previous panels in this dispute, primarily because the European Communities' current banana import regime allegedly has only one preferential tariff. As the European Communities argues:

> "[The report of the] Appellate Body [in *EC – Bananas III*] shows that GATT Article XIII, paragraph 1 covers only situations where a Member applies tariff quotas with different terms to different groups of countries in a market where all import are made under tariff quotas. Consequently, GATT Article XIII, paragraph 1 does not apply to a tariff only import regime where there are no different tariff quotas allocated to different groups of countries, such as the current import regime of the European Communities."[671]

7.345 In the original dispute the Appellate Body noted that, in regard to the earlier EC measures before the original panel and the Appellate Body:

> "It ha[d] been argued by the European Communities that there are two separate EC import regimes for bananas, the preferential regime for traditional ACP bananas and the *erga omnes* regime for all other imports of bananas. Submissions made by the European Communities raise the question whether this is of any relevance for the application of the non-discrimination provisions of the GATT 1994 and the other Annex 1A agreements. The European Communities argues, in particular, that the non-discrimination obligations of Articles I:1, X:3(a) and XIII of the GATT 1994 and Article 1.3 of the *Licensing Agreement*, apply only *within* each of these separate regimes. The Panel found that the European Communities has only one import regime for purposes of applying the non-discrimination provisions of the GATT 1994 and Article 1.3 of the *Licensing Agreement*."[672]

7.346 As indicated by Ecuador in these proceedings[673], in response to that argument by the European Communities, the Appellate Body established that:

> "The issue here is not whether the European Communities is correct in stating that two separate import 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 categorizes 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

[670] Panel Report on *EC – Bananas III (Article 21.5 – Ecuador)*, para. 6.26; and Decision by the Arbitrators on *EC - Bananas III (US) (Article 22.6 – EC)*, para. 5.14.
[671] European Communities' first written submission, para. 105.
[672] Appellate Body Report on *EC – Bananas III*, para. 189.
[673] See Ecuador's first written submission, para. 31.

> non-discrimination provisions of the GATT 1994 and the other Annex 1A agreements, if these provisions apply only within regulatory regimes established by that Member."[674]

Accordingly, the Appellate Body "uph[e]ld the findings of the [original] Panel[675] that the non-discrimination provisions of the GATT 1994, specifically, Articles I:1 and XIII, apply to the relevant EC regulations, irrespective if there is one or more 'separate regimes' for the importation of bananas."[676]

7.347 As the original panel requested by Ecuador also noted, "to accept that a Member could establish quota regimes by different legal instruments and argue that they are not as a consequence subject to Article XIII would be, as argued by the Complainants, to eviscerate the non-discrimination provisions of Article XIII."[677]

7.348 Under the European Communities' current banana import regime, there might be no tariff quota applicable to the MFN countries, and the ACP tariff quota might be the only preferential tariff quota. However, that would not reduce the relevance of the statement by the Appellate Body that "[t]he issue here is not whether the European Communities is correct in stating that two separate import 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". As long as the European Communities has a preferential tariff quota reserved for some Members and a higher MFN out-of-quota duty for all other Members, that statement remains relevant. Further, the alleged absence of more than one tariff quota reserved for some WTO Members under the European Communities' current banana import regime makes the following statement by the Appellate Body even more relevant in these proceedings:

> "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 agreements, if these provisions apply only within regulatory regimes established by that Member."[678]

7.349 In the light of the foregoing, despite the European Communities' arguments on the specificity of its current banana import regime and the preferential ACP tariff quota under such regime, the Panel reiterates that ACP banana imports to the European Communities are not similarly restricted as are like banana imports from Ecuador.

7.350 Having found that the current EC banana import regime shows all three elements set out in Article XIII:1, the Panel concludes that the European Communities' current banana import regime, in particular its preferential tariff quota reserved for ACP countries, is inconsistent with Article XIII:1 of the GATT 1994.

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[674] Appellate Body Report on *EC – Bananas III*, para. 190.
[675] (*footnote original*) Panel Reports, paras. 7.82 and 7.167.
[676] Appellate Body Report on *EC – Bananas III*, para. 191.
[677] Panel Report on *EC – Bananas III (Ecuador)*, para. 7.79.
[678] Appellate Body Report on *EC – Bananas III*, para. 190.

(c) Ecuador's claim under Article XIII:2 of the GATT 1994

(i) Parties' main arguments

Ecuador's arguments

7.351 Ecuador maintains that:

> "The EC measures are also inconsistent with Article XIII:2. The Panel in *Bananas III* noted the general rule that, if Members apply 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.'[679],[680]

7.352 Ecuador adds that "[t]hough the EC system has eliminated the country allocations that previously existed as between non-ACP countries, the discrimination remains as between ACP and non-ACP bananas"[681], and "[t]he Appellate Body in *Bananas III* vigorously condemned this discrimination."[682]

7.353 In Ecuador's view there is also an inconsistency with Article XIII:2(d) of the GATT 1994 because:

> "The allocation of the duty free quota exclusively to ACP countries bears no relation to trading patterns in the world or EC markets. As can be seen in the charts annexed as Exhibits ECU-2 and ECU-3, Ecuador is a preeminent exporter of bananas to the world market. Further, Ecuador and several other countries that are excluded from the zero duty quota, are substantial suppliers to the EC, while ACP countries, many of whom are minor suppliers at best, are allowed to ship duty free under the tariff quota."[683]

7.354 In respect of the report of the panel on *US – Line Pipe*, mentioned in these proceedings by the European Communities, Ecuador argues that:

> "In [the *US – Line Pipe*] case, the United States created an unusual tariff quota system, in that each country in the world was allowed to ship an identical quantity of line pipe steel to the United States at a low rate of duty, while other steel imports were subject to stiff new safeguard tariffs. The Panel found that such a system did not respect the distribution of trade in low duty steel that would be expected in the absence of restrictions, in that the system favored small over large exporters by allocating identical shares to countries with different shares of the world and US markets.[684],[685]

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[679] (*footnote original*) Panel Report at para. 7.68.
[680] Ecuador's first written submission, para. 30.
[681] Ibid., para. 31.
[682] Ibid.
[683] Ibid., para. 32.
[684] (*footnote original*) *US – Line Pipe*, at paras. 7.53, 7.54 and 7.55.
[685] Ecuador's first written submission, para. 51.

The European Communities' arguments

7.355 The European Communities contends that "[its] current import regime... does not violate GATT Article XIII, paragraph 2."[686] In the European Communities' view,

> "The ... limited ... scope of ... Article [XIII] is seen in the way that the four sub-paragraphs of GATT Article XIII, paragraph 2 are entirely focused on the scope and internal distribution of the quota. They disregard any trade that falls outside the quota (or tariff quota)".[687]

7.356 According to the European Communities, "[t]he text '*In applying import restrictions*' shows that paragraph 2 (like paragraph 1) is solely concerned with quantitative restrictions, and does not regulate the relationship between quantitative restrictions and other measures, notably simple tariffs, that a Member may be applying."[688]

7.357 The European Communities adds that:

> "The context provides support for this interpretation. Mention has already been made of the inferences to be drawn from the title of GATT Article XIII. The same, limited, scope of the Article is seen in the way that the four sub-paragraphs of GATT Article XIII, paragraph 2 are entirely focused on the scope and internal distribution of the quota. They disregard any trade that falls outside the quota (or tariff quota): sub-paragraph (a) refers to fixing and notifying the total amount of the quota; sub-paragraphs (b) and (c) concern the use of import licences; and sub-paragraph (d) concerns the allocation of quotas by agreement or on the basis of previous import levels."[689]

7.358 Finally, according to the European Communities,

> "Given that GATT Article XIII, paragraph 2 is directed at the administration of quantitative restrictions and tariff quotas, it does not extend to the European Communities' banana import regime in so far as that concerns Ecuador and the other MFN countries, because their exports are not subject to any non-tariff restrictions or tariff quotas.
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> The European Communities draws support for this interpretation from the panel's report in US – Line Pipe. In that case, the United States had imposed a safeguard measure in the form of a tariff quota. The panel invoked GATT Article XIII, paragraph 2 only as regards the internal division of the tariff quota and the setting of the total amount of imports permitted at a lower tariff rate.[690]"[691]

[686] European Communities' first written submission, para. 106.
[687] Ibid., para. 108.
[688] Ibid., para. 107.
[689] Ibid., para. 108.
[690] (*footnote original*) Panel Report, *US – Line Pipe*, paras. 7.54 and 7.58.
[691] European Communities' first written submission, paras. 109-110.

(ii) Panel's analysis

7.359 Ecuador has invoked both the chapeau and subparagraph (d) of Article XIII:2 of the GATT 1994.[692]

Chapeau of Article XIII:2 of the GATT 1994

7.360 Article XIII:2 of the GATT 1994 stipulates in its *chapeau* that:

> "In applying import restrictions to any product, contracting parties [WTO Members] shall aim at a distribution of trade in such product approaching as closely as possible the shares which the various contracting parties [WTO Members] might be expected to obtain in the absence of such restrictions and to this end shall observe the following provisions..."

7.361 The original panel requested by Ecuador in this dispute confirmed that language by stating that "the object and purpose of Article XIII:2 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."[693]

7.362 The Panel notes that Cameroon argues in its statement at the substantive meeting of the Panel with the parties and third parties that:

> "It is a well known fact that ACP banana producers are less competitive than MFN banana producers. Compared to the latter, ACP producers have higher production costs. For historical and geographical reasons, they do not enjoy the same economies of scale as the MFN producers. As a result, ACP producers can only compete with MFN producers in markets where they enjoy preferential access."[694]

7.363 In response to the Panel's request to provide evidence for its assertions, Cameroon adduces evidence to its statement and confirmed the latter by concluding that:

> "As a result of the more limited yields and the higher costs, the banana producers in the ACP countries are less competitive than the banana producers in MFN countries. The less competitive position of ACP banana producers has also been noted by the President of Chiquita Europe in an interview in 2007 which was annexed to Côte d'Ivoire's Oral Statement[695]. The lack of competitiveness is also demonstrated by the fact that the ACP countries from the Caribbean are unable to export to the US market which is geographically much closer than the EC market."[696]

7.364 In response to a question by the Panel relating to Cameroon's above-cited statement, the other main beneficiaries of the European Communities' banana import regime, i.e. the other ACP third parties (Belize, Côte d'Ivoire, Dominica, the Dominican Republic, Ghana, Jamaica, Madagascar,

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[692] See Request for the Establishment of a Panel by Ecuador, *EC – Bananas III (Article 21.5 – Ecuador II)*, 26 February 2007, WT/DS27/80, p. 4; and Ecuador's first written submission, para. 27.

[693] Panel Report on *EC – Bananas III (Ecuador)*, para. 7.68.

[694] Final written version of Cameroon's oral statement at the Panel's substantive meeting with the parties and third parties, paragraph 31. See para. 5.48 above.

[695] (*footnote original*) See also the Italtrend Report on "Etat des lieux et compétitivité des plantations de bananas en Côte d'Ivoire" and the Horus Report on "La banane africaine dans l'Union européenne", which are attached as an Annex to this Reply.

[696] Cameroon's response to question No. 86.

Saint Lucia, Saint Vincent and the Grenadines, and Suriname), "confirm that that they agree with these specific assertions [by Cameroon]".[697]

7.365 Finally, in response to a question by the Panel relating to Cameroon's above-cited statement, the European Communities itself states that "[it] believes that *the facts described by Cameroon are manifestly accurate and correct*."[698] (emphasis added) The European Communities also argues in that context that:

> "However, if these elements could have a certain relevance within an analysis of the WTO compatibility of a regime providing for quantitative restrictions, they are certainly irrelevant in the context of an analysis of a tariff-only regime under Article XIII of the GATT 1994.
>
> In fact, for the reasons explained in the answer to Question 73, above, Article XIII applies to quantitative restrictions and not any kind of trade restriction."[699]

7.366 Having established that the European Communities' current banana import regime subjects Ecuador to a restriction within the meaning of Article XIII:1 of the GATT 1994, the Panel rejects this last argument by the European Communities. Consequently, the Panel also considers that the statement by Cameroon that "ACP producers can only compete with MFN producers in markets where they enjoy preferential access"[700], explicitly confirmed by both the other ACP third parties and by the European Communities, constitutes a recognition by the European Communities and the ACP third parties that the preferential ACP tariff quota regime under the European Communities' current banana import regime is a preferential regime that is indispensable for the very existence of ACP banana imports to the European Communities. It is not necessary to further assess this apparent lack of competitiveness of ACP countries. The above affirmations by the European Communities and the ACP third parties suffice to find that, given that MFN countries are excluded from the European Communities' preferential ACP tariff quota, by definition, the ACP preference cannot and does not "aim at a distribution of trade in [bananas] approaching as closely as possible the shares which the various [Members, including both ACP and MFN countries] might be expected to obtain in the absence of such restrictions." Thus, the Panel also finds that on its face the European Communities' current banana import regime, including its preferential ACP tariff quota, is inconsistent with the chapeau of Article XIII:2 of the GATT 1994.

7.367 The Panel notes that the European Communities argues in the context of Article XIII:2 that:

> "Given that GATT Article XIII, paragraph 2 is directed at the administration of quantitative restrictions and tariff quotas, it does not extend to the European Communities' banana import regime in so far as that concerns Ecuador and the other MFN countries, because their exports are not subject to any non-tariff restrictions or tariff quotas.

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[697] The response of Belize, Côte d'Ivoire, Dominica, the Dominican Republic, Ghana, Jamaica, Madagascar, Saint Lucia, Saint Vincent and the Grenadines, and Suriname to question 86. But see the statement in the study by the Centre for International Economics, provided by Nicaragua and Panama, that "from 2008 onwards Latin American access will decline sharply, and under some scenarios, by 2010, ACP/EBA exports to the EU could exceed those of Latin America." Centre for International Economics, "The detrimental effects of a €176 per tonne ACP banana tariff preference on MFN suppliers" (August 2007), in Exhibit N-2 and P-2.

[698] European Communities' response to question 86.

[699] Ibid.

[700] Final written version of Cameroon's oral statement at the Panel's substantive meeting with the parties and third parties, paragraph 31.

> The European Communities draws support for this interpretation from the panel's report in US – Line Pipe. In that case, the United States had imposed a safeguard measure in the form of a tariff quota. The panel invoked GATT Article XIII, paragraph 2 only as regards the internal division of the tariff quota and the setting of the total amount of imports permitted at a lower tariff rate.[701],[702]

7.368 The Panel recalls that, in line with the Appellate Body's statement in *EC – Bananas III*[703], it has already rejected the European Communities arguments that Article XIII would apply only to separate parts of the European Communities' current banana import regime.[704]

7.369 Despite the arguments of the European Communities, this Panel reads the ruling of the panel on *US – Line Pipe* as confirming this Panel's approach to Article XIII:2 in the current proceedings. As a matter of fact, the safeguard measure reviewed by the panel on *US – Line Pipe* involved identical tariff quotas for various countries.[705] The panel on *US – Line Pipe* stated that:

> "Without setting forth an exhaustive definition of tariff quotas, we consider that an accurate definition must include measures which place a quantitative limit on the application, or availability, of a lower tariff rate (and a higher tariff rate applicable once that quantitative limit has been exceeded), irrespective of whether that quantitative limit is (a) 'overall', (b) 'overall' and further allocated among exporting countries, or (c) country-specific, with no 'overall' limit. ... [T]he 'specified quantity', or 'quantitative limit', referred to in the definitions advanced by the United States, could be overall, overall and further allocated among exporting countries, or simply country-specific. On this basis, we conclude that the line pipe measure at issue is a tariff quota, since there are country-specific limits (9000 short tons) placed on the application, or availability, of the lower tariff rate, and it is these country-specific limits that determine whether or not line pipe from specific countries enters the United States at the lower or higher rate of duty."[706]

7.370 The panel on *US – Line Pipe* found that the US safeguard measure which was not based on historical trade patterns, and did not reflect an intent of approaching the shares that the Members could have been expected to obtain in the absence of the measure, was inconsistent with the *chapeau* of Article XIII:2:

> "*There is nothing in the record before the Panel to suggest that* the line pipe measure was based in any way on historical trade patterns in line pipe, or that *the United States otherwise 'aim[ed] 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' the line pipe measure.* Instead, as noted by Korea, 'the in-quota import volume originating from Korea, the largest supplier historically to the US market, was reduced to the same level as the smallest – or even then non-existent – suppliers to the US market (9,000 short tons)'. *For this reason, we find that the line pipe measure is inconsistent with the general rule contained in the chapeau of Article XIII:2.*"[707] (emphasis added) (footnote omitted)

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[701] (*footnote original*) Panel Report, *US – Line Pipe*, paras. 7.54 and 7.58.
[702] European Communities' first written submission, paras. 109-110.
[703] See Appellate Body Report on *EC – Bananas III*, para. 190.
[704] See paras. 7.339 to 7.349 above.
[705] See Panel Report on *US – Line Pipe*, para. 7.23.
[706] Ibid.
[707] Ibid., para. 7.55.

Subparagraph (d) of Article XIII:2 of the GATT 1994

7.371 Ecuador has also invoked subparagraph (d) of Article XIII:2 of the GATT 1994.[708] That subparagraph provides that:

> "(d) In cases in which a quota is allocated among supplying countries the contracting party applying the restrictions may seek agreement with respect to the allocation of shares in the quota with all other contracting parties having a substantial interest in supplying the product concerned. In cases in which this method is not reasonably practicable, the contracting party concerned shall allot to contracting parties having a substantial interest in supplying the product shares based upon the proportions, supplied by such contracting parties 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. No conditions or formalities shall be imposed which would prevent any contracting party 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."

7.372 As stated by the original panel requested by Ecuador in this dispute,

> "Article XIII's general requirement of non-discrimination is modified in one respect by Article XIII:2(d), which provides for the possibility to allocate tariff quota shares to supplying countries. Any such country specific allocation must, however, 'aim at a distribution of trade ... approaching as closely as possible the shares which Members might be expected to obtain in the absence of such restrictions' (chapeau of Article XIII:2(d)).
>
> Article XIII:2(d) further specifies the treatment that, in case of country-specific allocation of tariff quota shares, must be given to Members with 'a substantial interest in supplying the product concerned'. For those Members, the Member proposing to impose restrictions may seek agreement with them as provided in Article XIII:2(d), first sentence. If that is not reasonably practicable, then it must allot shares in the quota (or tariff quota) to them on the basis of the criteria specified in Article XIII:2(d), second sentence."[709]

7.373 That same original panel addressed the question whether, under Article XIII:2(d), "country-specific shares can also be allocated to Members that do not have a substantial interest in supplying the product and, if so, what the method of allocation would have to be."[710] The panel noted that:

> "As to the first point, we note that the first sentence of Article XIII:2(d) refers to allocation of a quota 'among supplying countries'. This could be read to imply that an allocation may also be made to Members that do not have a substantial interest in supplying the product. If this interpretation is accepted, any such allocation must, however, meet the requirements of Article XIII:1 and the general rule in the chapeau to Article XIII:2(d). Therefore, if a Member wishes to allocate shares of a tariff quota to some suppliers without a substantial interest, then such shares must be allocated to all such suppliers. Otherwise, imports from Members would not be similarly

[708] See Ecuador's first written submission, para. 27.
[709] Panel Report on *EC – Bananas III (Ecuador)*, paras. 7.70-7.71.
[710] Ibid., para. 7.73.

> restricted as required by Article XIII:1.[711] As to the second point, in such a case it would be required to use the same method as was used to allocate the country-specific shares to the Members having a substantial interest in supplying the product, because otherwise the requirements of Article XIII:1 would also not be met."[712]

7.374 On appeal, the Appellate Body stated that:

> "Article XIII:2(d) provides specific rules for the allocation of tariff quotas among supplying countries, but these rules pertain only to the allocation of tariff quota shares to Members 'having a substantial interest in supplying the product concerned'. Article XIII:2(d) does not provide any specific rules for the allocation of tariff quota shares to Members not having a substantial interest. Nevertheless, *allocation to Members not having a substantial interest must be subject to the basic principle of non-discrimination. When this principle of non-discrimination is applied to the allocation of tariff quota shares to Members not having a substantial interest, it is clear that a Member cannot, whether by agreement or by assignment, allocate tariff quota shares to some Members not having a substantial interest while not allocating shares to other Members who likewise do not have a substantial interest.* To do so is clearly inconsistent with the requirement in Article XIII:1 that a Member cannot restrict the importation of any product from another Member unless the importation of the like product from all third countries is 'similarly' restricted."[713] (emphasis added)

7.375 The Panel notes that all MFN countries are excluded from the European Communities' preferential ACP tariff quota, and the group of MFN countries includes both substantial and non-substantial suppliers of bananas to the European Communities. Ecuador has argued that, "Ecuador and several other countries that are excluded from the zero duty quota, are substantial suppliers to the European Communities, while ACP countries, many of whom are minor suppliers at best, are allowed to ship duty free under the tariff quota."[714] The European Communities has not denied the existence of this situation.

7.376 Also, according to Exhibits EC-17 and EC-18, for each year since 1999 Ecuador has had the highest share of European Communities banana imports among all banana suppliers, including ACP and MFN suppliers. Accordingly, Ecuador has a substantial interest in supplying bananas to the European Communities under Article XIII:2(d) of the GATT 1994.

7.377 In the light of the way in which Article XIII:2(d) has been interpreted by the original panel and the Appellate Body in this dispute, a preferential tariff quota that is granted exclusively to some Members and not to others, including a substantial supplier, may not result in a distribution of trade in bananas that would approach as closely as possible the shares which the various Members might be expected to obtain in the absence of such restrictions. Further, the same preferential tariff quota does not comply with the second sentence of Article XIII:2(d) that:

> "In cases in which [agreement with respect to the allocation of shares in the quota with all other contracting parties having a substantial interest in supplying the product concerned] is not reasonably practicable, the contracting party concerned shall allot to

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[711] (*footnote original*) See Panel Report on "EEC Restrictions on Imports of Apples from Chile", adopted on 10 November 1980, BISD 27S/98, 114, 116, paras. 4.11, 4.21.

[712] Panel Report on *EC – Bananas III (Ecuador)*, para. 7.73.

[713] Appellate Body Report on *EC – Bananas III*, para. 161.

[714] Ecuador's first written submission, para. 32.

> contracting parties having a substantial interest in supplying the product shares based upon the proportions, supplied by such contracting parties 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."

7.378 Accordingly, the Panel finds that the European Communities' current banana import regime, including its preferential ACP tariff quota, is inconsistent not only with Article XIII:1 and with the chapeau of Article XIII:2, but also with subparagraph (d) of Article XIII:2 of the GATT 1994.

(d) No applicable waiver

7.379 As the Appellate Body stated in the context of Article XIII earlier in this dispute:

> "Non-discrimination obligations apply to all imports of like products, except when these obligations are specifically waived or are otherwise not applicable as a result of the operation of specific provisions of the GATT 1994, such as Article XXIV.[715] In the present case, the non-discrimination obligations of the GATT 1994, specifically Articles I:1 and XIII[716], apply fully to all imported bananas irrespective of their origin, except to the extent that these obligations are waived ..."[717]

7.380 As Ecuador argues in these proceedings, the waiver from Article XIII:1 and 2 adopted by the Ministerial Conference in Doha[718] "expired by its own terms on December 31, 2005."[719],[720] In the light of the language of that waiver, and noting that the European Communities does not argue that that waiver is still in force, the Panel finds that there is no waiver from Article XIII:1 and 2 of the GATT 1994 that could apply to the European Communities' current banana import regime, introduced on 1 January 2006. Thus, there is no waiver that could exonerate the inconsistencies of the European Communities' current banana import regime with paragraphs 1 and 2 of Article XIII of the GATT 1994.

7.381 Also, for the reasons set out by the Appellate Body earlier in this dispute[721], even if the Doha Article I waiver applied to bananas beyond the end of 2005, which the Panel has already found not to be the case[722], the coverage of that waiver from Article I could not be automatically extended to Article XIII.

4. General conclusion

7.382 For the reasons explained above, the Panel concludes that the European Communities' current banana import regime, in particular its preferential tariff quota reserved for ACP countries, is inconsistent with Article XIII:1 and Article XIII:2(d) of the GATT 1994. The Panel also concludes

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[715] (*footnote original*) *Panel on Newsprint*, adopted 20 November 1984, BISD 31S/114.

[716] (*footnote original*) We do not agree with the Panel's findings that Article X:3(a) of the GATT 1994 and Article 1.3 of the *Licensing Agreement* preclude the imposition of different import licensing systems on like products when imported from different Members. See our Findings and Conclusions, paras. (l) and (m).

[717] Appellate Body Report on *EC – Bananas III*, para. 191.

[718] See Ministerial Conference, European Communities, Transitional Regime for the EC Autonomous Tariff Rate Quotas on Imports of Bananas, Decision of 14 November 2001, (WT/MIN(01)/16), 14 November 2001.

[719] (*footnote original*) *European Communities – Transitional Regime For The EC – Autonomous Tariff Rate Quotas On Imports Of Bananas*, WT/MIN(01)/16, 14 November 2001, para. 7.

[720] Ecuador's first written submission, para. 28.

[721] See Appellate Body Report on *EC – Bananas III*, para. 188.

[722] See para. 7.200 above.

that there is no waiver that could exonerate the inconsistencies of the European Communities' current banana import regime with paragraphs 1 and 2 of Article XIII of the GATT 1994.

E. ECUADOR'S CLAIM UNDER ARTICLE II OF THE GATT 1994

1. Ecuador's claim

7.383 Ecuador argues that the European Communities' measure, consisting of "a tariff-rate quota with a single duty rate applicable to bananas not benefiting from the zero duty tariff-rate quota"[723], "applied to all bananas originating in Ecuador or other MFN countries"[724], constitutes a breach of the European Communities' tariff binding on bananas[725]. More specifically, Ecuador states that "the EC applied duty of €176/mt must be held inconsistent with EC obligations under Article II of the GATT and the EC's schedule of concessions"[726] and, in particular with Article II:1(a) and (b) of the GATT 1994[727].

7.384 In Ecuador's view:

> "The EC tariff on bananas (HTS 0803.00.12) remains bound in the EC GATT schedule of concessions (Schedule CXL of the EC – 15) at a level of €75/mt, subject to the annexed Agreement on Bananas, which elaborates the tariff rate quota regime. Article II of the GATT forbids imposition of duties in excess of bound rates in a schedule."[728]

7.385 Ecuador adds that:

> "With respect to bananas, the EC's schedule consistent with the modalities for agricultural products established in the Uruguay Round, has two elements, a bound tariff quota intended to at least maintain pre-Uruguay Round access for bananas; and a bound upper rate for bananas above the level of the tariff quota ...
>
> The 75 Ecu/mt concession for 2.2 million mt was not made subject to the continued existence of the Annex [to the European Communities' Schedule] or the BFA [the Bananas Framework Agreement]. Paragraph 9 of the BFA provides that 'this agreement' (the BFA) applies until the end of 2002, but it does not provide that the EC's GATT tariff quota concession expires at any time. The duty and quantity of the tariff concession does not depend on the other terms and conditions as set out in the annex, but rather is laid out in the schedule itself. Expiration of the agreement would thus not eliminate the tariff quota concession, which is not subject to the continued effect of the BFA."[729]

7.386 Ecuador concludes that the European Communities' measure, consisting of "a tariff rate quota with a single duty rate applicable to bananas not benefiting from the zero duty tariff-rate quota",[730] applied to "all bananas originating in Ecuador or other MFN countries"[731] constitutes a breach of the

[723] Ecuador's first written submission, para. 33.
[724] Ecuador's second written submission, para. 52.
[725] Ecuador's first written submission, para. 33.
[726] Ibid., para. 34.
[727] Ecuador's response to panel question No. 44.
[728] Ecuador's first written submission, para. 33.
[729] Ecuador's second written submission, paras. 53 and 58.
[730] Ecuador's first written submission, para. 33.
[731] Ecuador's second written submission, para. 52.

European Communities' tariff binding on bananas.[732] More specifically, Ecuador advances the claim that the European Communities' duty of €176/mt is inconsistent with Article II:1(a) and (b) of the GATT 1994.[733]

2. The European Communities' response

7.387 The European Communities responds that Ecuador's claims under Article II of the GATT 1994 are "completely unfounded"[734] because:

> "[T]he bound tariff for bananas in the 'GATT schedule of concessions' of the European Communities is €680 per ton and the tariff applied since January 1, 2006 is €176 per ton".[735]

7.388 The European Communities states that:

> "The European Communities' tariff commitments were initially included in Schedule LXXX, which was incorporated into the legal instruments embodying the results of the Uruguay Round, executed on April 15, 1994. On December 15, 1994, the European Communities announced its intention to withdraw Schedule LXXX as of January 1, 1995, in order to prepare new schedules reflecting the accession of Austria, Finland and Sweden into the European Communities ...
>
> The European Communities submitted to the WTO the new Schedule CXL on March 14, 1996. However, still today, there are certain WTO Members that have not yet lifted all objections necessary for the certification of Schedule CXL in accordance with the GATT Procedures for Modification and Rectification of Schedules of Tariff Concessions.
>
> The European Communities announced its intention to withdraw Schedule CXL on January 19, 2004, in order to prepare new schedules reflecting the accession of ten new member states to the European Communities on May 1, 2004... The relevant negotiations conducted pursuant to GATT Article XXIV and GATT Article XXVIII are still pending. As a result, the European Communities has not yet submitted a new schedule."[736]

7.389 According to the European Communities:

> "Both Schedule CXL and Schedule LXXX contain the same tariff concessions with regard to bananas. In Part I, Section I A, under tariff item number 080300 12, it is provided that the bound rate of duty for bananas is €680 per ton. This is the only bound tariff rate for bananas that currently exists in the Schedules of the European Communities."[737]

7.390 The European Communities states that:

> "Both Schedules [Schedules LXXX and CXL] included an additional concession in the form of a tariff quota for 2.2 million tons of bananas to be imported at a tariff rate

[732] Ecuador's first written submission, para. 33.
[733] Ecuador's response to panel question No. 44.
[734] European Communities' first written submission, para. 112.
[735] Ibid.
[736] Ibid., paras. 5-7 (footnote omitted).
[737] Ibid., para. 8.

of €75 per ton. However, the Schedules expressly provided that this additional concession applied 'as indicated in the Annex' to Part I, Section I B of the Schedules.

The Annex, which is an integral part of the Schedules, provides that this tariff quota would be operational as of October 1, 1994 and that it would expire on December 31, 2002. Therefore, on December 31, 2002, this concession expired in accordance with its terms and as of January 1, 2003, the only bound rate for bananas in the Schedules of concessions of the European Communities is €680 per ton".[738]

7.391 The European Communities adds that:

"[E]ven if that concession [the tariff quota for 2.2 million tons of bananas at a tariff rate of €75/mt] had not expired at the end of 2002, it is clear that it was lawfully terminated on January 1, 2006, when the European Communities introduced the tariff only import regime.

First [because] the tariff rate of €75 was not a simple and unconditional 'bound tariff rate'... [but, a]s with any tariff quota in the WTO system, the tariff rate of €75 was 'attached' to the quota of 2.2 million tons and its existence depended upon the existence of that quota. The abolition of the quota would inevitably bring along the abolition of the corresponding tariff ...

Second [because the EC] was obliged to introduce a tariff only regime (and consequently abolish the tariff quota for the 2.2 million tons of bananas) on January 1, 2006, in order to comply with the suggestions of the Panel [in the original *EC – Bananas III* case] and the conditions of the Understandings and the Doha waiver".[739]

3. Article II:1 of the GATT 1994

7.392 Under Article II:1(a) and (b) of the GATT 1994:

"(*a*) Each contracting party [Member] shall accord to the commerce of the other contracting parties [Members] treatment no less favourable than that provided for in the appropriate Part of the appropriate Schedule annexed to this Agreement.

(*b*) The products described in Part I of the Schedule relating to any contracting party [Member], which are the products of territories of other contracting parties [Members], shall, on their importation into the territory to which the Schedule relates, and subject to the terms, conditions or qualifications set forth in that Schedule, be exempt from ordinary customs duties in excess of those set forth and provided therein. Such products shall also be exempt from all other duties or charges of any kind imposed on or in connection with the importation in excess of those imposed on the date of this Agreement or those directly and mandatorily required to be imposed thereafter by legislation in force in the importing territory on that date."

[738] European Communities' first written submission, paras. 113-114. See also, Ibid., para. 9. See also, European Communities' second written submission, para. 68.

[739] European Communities' first written submission, paras. 122-124.

4. Panel's analysis

7.393 Regarding Ecuador's claim under Article II:1(a) and (b) of the GATT 1994, this Panel is faced with two questions. In the context of Article II:1(a), the issue is whether the European Communities is according to the commerce of Ecuador or other MFN countries a treatment that is less favourable than that provided for in the European Communities' Schedule. In the context of Article II:1(b) of the GATT 1994, the issue is instead whether bananas originated in Ecuador or other MFN countries are being subject to import duties in excess of those that are provided for in the relevant part of the European Communities' Schedule. The term MFN countries is generally used by the parties to refer to WTO Members that are not signatories to the Cotonou Agreement. In turn, MFN bananas are the bananas originating in those countries.[740]

7.394 In its report on *Argentina – Textiles and Apparel*, the Appellate Body elaborated upon the meaning and scope of Article II:1 of the GATT 1994:

> "The terms of Article II:1(a) require that a Member 'accord to the commerce of the other Members treatment no less favourable than that provided for' in that Member's Schedule ... Article II:1(b), first sentence, states, in part: 'The products described in Part I of the Schedule ... shall, on their importation into the territory to which the Schedule relates, ... be exempt from ordinary customs duties in excess of those set forth and provided therein.' Paragraph (a) of Article II:1 contains a general prohibition against according treatment less favourable to imports than that provided for in a Member's Schedule. Paragraph (b) prohibits a specific kind of practice that will always be inconsistent with paragraph (a): that is, the application of ordinary customs duties in excess of those provided for in the Schedule."[741]

7.395 As for the relationship between subparagraphs (a) and (b) of Article II:1 of the GATT 1994, in the same report, the Appellate Body stated that:

> "In accordance with the general rules of treaty interpretation set out in Article 31 of the *Vienna Convention*, Article II:1(b), first sentence, must be read in its context and in light of the object and purpose of the GATT 1994. Article II:1(a) is part of the context of Article II:1(b); it requires that a Member must accord to the commerce of the other Members 'treatment no less favourable than that provided for' in its Schedule. It is evident to us that the application of customs duties *in excess of* those provided for in a Member's Schedule, inconsistent with the first sentence of Article II:1(b), constitutes 'less favourable' treatment under the provisions of Article II:1(a) …"[742]

7.396 In the same report, the Appellate Body further added:

> "Because the language of Article II:1(b), first sentence, is more specific and germane to the case at hand, our interpretative analysis begins with, and focuses on, that provision."[743]

7.397 Following the approach indicated by the Appellate Body, the Panel will begin its analysis regarding Ecuador's claim against the European Communities' duty of €176/mt for bananas from MFN countries with the first sentence of Article II:1(b) of the GATT 1994. In this regard, the Panel

[740] See para.2.49 above.
[741] Appellate Body Report on *Argentina – Textiles and Apparel*, para. 45.
[742] Ibid., para. 47.
[743] Ibid., para. 45.

needs to ascertain: (a) the treatment granted to bananas imported from MFN countries under the challenged measure; (b) the treatment provided for bananas from WTO Members under Part I of the the European Communities' Schedule; and (c) whether the challenged measure results in the imposition on bananas from MFN countries of ordinary customs duties in excess of those set forth and provided in Part I of the European Communities' Schedule. Only then will the Panel turn, if needed, to the issue of whether the duty of €176/mt for bananas accords to the commerce of Ecuador or other WTO Members a less favourable treatment than that provided for in the European Communities' Schedule.[744]

(a) Treatment accorded by the European Communities to bananas from MFN countries

7.398 The basic facts pertaining to the treatment accorded by the European Communities to imports of bananas from MFN countries are not contested between the parties. Under the terms of Council Regulation (EC) No. 1964/2005 of 29 November 2005, since 1 January 2006, the tariff applied by the European Communities to MFN imports of bananas has been set at €176/mt.[745]

7.399 In turn, under the terms of Regulation 1964/2005, and in accordance with the European Communities' commitments under the ACP-EC Partnership Agreement, also known as the Cotonou Agreement, the EC also allows duty-free access into its market to an annual quota of 775,000 mt bananas of ACP origin.[746] In addition, the European Communities allows duty-free access into its market to bananas originating from least developed countries, under a scheme of generalized tariff preferences, the so-called "Everything But Arms" (EBA) arrangement.[747]

7.400 No allowance is made by the European Communities for the maintenance of any tariff quota allowing the importation of bananas from MFN countries at rates below the €176/mt tariff duty.

(b) Treatment provided for bananas from WTO Members under the European Communities' Schedule

(i) Description of the relevant language in the European Communities' Schedule

7.401 The Panel will now turn to the issue of the treatment provided for bananas from WTO Members under the European Communities' Schedule.[748] For the purpose of this dispute, the relevant treatment is the one accorded in the European Communities' Schedule to bananas (corresponding to tariff item 0803 00 19).

7.402 As noted in the factual section of this report, for all practical purposes, with respect to tariff heading 0803, Part I, Section I.A (Tariffs) of the European Communities' Schedule LXXX and Schedule CXL have identical provisions.[749] Under the terms of this section, the tariff rate for bananas (corresponding to tariff item 0803 00 19) is bound at €680/mt.[750]

[744] cf. Panel Report on *EC – Chicken Cuts (Brazil)*, para. 7.65.
[745] See para. 2.40 above.
[746] See para. 2.40 above.
[747] Council Regulation (EC) No. 980/2005 of 27 June 2005. See European Communities' response to panel question No. 53, paras. 109-112. See para. 2.41 above.
[748] Part I, Sections I.A and I.B, of the EC Schedule, as well as the Bananas Framework Agreement, use the terms ECU or ECU/mt. As noted above, as a result of the introduction of the Euro (€), from 1 January 1999 all references to ECU in these documents were replaced by the term Euro (€). See para. 2.28 above.
[749] See para. 2.25 above.
[750] Ibid.

7.403 Likewise, Part I, Section I.B (Tariff quotas) of the European Communities' Schedule LXXX and Schedule CXL have identical provisions for bananas.[751] Under the terms of this section, the European Communities has committed to granting a tariff quota for 2.2 million mt of bananas at a bound in-quota tariff rate of €75/mt. This tariff quota commitment is classified under the subsection entitled "Current Access Quotas" and is qualified by the following terms and conditions: "As indicated in the Annex".[752] The Annex referred to in both the European Communities' Schedule LXXX and Schedule CXL is the so-called "Framework Agreement on Bananas" (Bananas Framework Agreement or BFA).[753]

7.404 The Bananas Framework Agreement contains various provisions pertaining to the operation of the tariff quota for bananas. *Inter alia*, the provisions in the Bananas Framework Agreement confirm the quota quantity and the in-quota tariff rate, allocate the quota between different countries and state that the "agreement will be incorporated into the Community's Uruguay Round Schedule" and that the "agreement shall apply until 31 December 2002".[754]

(ii) The task before this Panel

7.405 The treatment provided for bananas from WTO Members under the European Communities' Schedule must be determined by considering the language contained in Part I, Sections I.A (Tariffs) and I.B (Tariff quotas) of the European Communities' Schedule, as well as in the Bananas Framework Agreement that is an annex to that Schedule. The European Communities' Schedule LXXX was the result of negotiations during the Uruguay Round of Multilateral Trade Negotiations. It was annexed to the Marrakesh Protocol.[755] In turn, the European Communities' Schedule CXL was submitted to the WTO in March 1996.[756] As of 1 May 2004, Schedule CXL was withdrawn by the European Communities, in the light of the European Communities' process of enlargement to 25 member States.[757] As noted, the language with respect to bananas contained in both the European Communities' Schedule LXXX and Schedule CXL is identical.[758]

7.406 After the European Communities withdrew its Schedule CXL as of 1 May 2004, no new Schedule of Concessions has yet been submitted and certified (for the current European Communities of 25 member States) as of the date of this report, as the relevant negotiations under Article XXIV and Article XXVIII of the GATT 1994 are still pending.[759] In a communication dated 15 July 2004, the European Communities informed the WTO Members of its intention to modify concessions on item 0803 00 19 (bananas) included in Schedule CXL.[760] Two new member States subsequently acceded to the European Communities on 1 January 2007[761] and, as of the date of this report, the European Communities is still in the process of concluding the relevant negotiations under Article XXIV and Article XXVIII.[762]

7.407 The language contained in the European Communities' Schedules and described above in its relevant parts is not contested between the parties. Indeed, in spite of the pending negotiations under Article XXIV and Article XXVIII of the GATT 1994, the parties agreed that the Panel should base its

[751] See para. 2.26 above.
[752] Ibid.
[753] See para. 2.27 above.
[754] Ibid.
[755] See para. 2.23 above.
[756] See para. 2.24 above.
[757] See paras. 2.14 and 2.29 above.
[758] See European Communities' response to panel question No. 24, paras. 79-81.
[759] Ibid.
[760] See para. 2.15 above.
[761] See para. 2.20 above.
[762] See para. 2.29 above.

decision on the identical text of the European Communities' Schedule LXXX and Schedule CXL.[763] The main area of contention between the parties is rather whether the European Communities is still bound to maintain a quota of 2.2 million mt of bananas at a bound tariff rate of €75/mt. More specifically, the parties hold opposite views regarding whether the European Communities' binding of the tariff quota was limited in time by the Bananas Framework Agreement.[764]

7.408 Accordingly, the main task before this Panel, regarding the issue of the treatment provided for bananas from WTO Members under the European Communities' Schedule, is to ascertain whether the European Communities' concession to maintain a quota of 2.2 million mt of bananas at a bound tariff rate of €75/mt is still valid after 31 December 2002 or, on the contrary, whether this concession expired as of such date, under paragraph 9 of the Bananas Framework Agreement, leaving the €680/mt bound rate of duty as the only binding commitment for bananas under the European Communities' Schedule. For this purpose, the Panel will interpret the terms contained in the European Communities' Schedule.

(iii) General rules of interpretation

7.409 As noted by the panel on *EC – Chicken Cuts*:

> "Article II:7 of the GATT 1994 provides that the schedules annexed to the GATT 1994 are made an integral part of the GATT 1994. The Appellate Body in *EC – Computer Equipment* clarified that Article II:7 means that the concessions provided for in such schedules are part of the terms of the treaty, namely the GATT 1994.[765] Article II:2 of the WTO Agreement provides that the Agreements contained in the Annexes to the WTO Agreement, which includes the GATT 1994, are integral parts of the WTO Agreement. Therefore, on the basis of Article II:7 of the GATT 1994 and Article II:2 of the WTO Agreement, concessions contained in the EC Schedule are treaty terms of the GATT 1994 and the WTO Agreement."[766]

7.410 Given that the provisions contained in the European Communities' Schedules are to be considered integral parts of the GATT 1994 and the WTO Agreement, as treaty language they must be read "in accordance with customary rules of interpretation of public international law". Indeed, Article 3.2 of the DSU provides that:

> "The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and *to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law*. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements." (emphasis added)

7.411 Articles 31 and 32 of the Vienna Convention on the Law of Treaties (Vienna Convention) codify "customary rules of interpretation of public international law" within the meaning of

[763] See Ecuador's and the European Communities' response to panel question No. 24.

[764] See, in particular, Ecuador's second written submission, paras. 53-67, European Communities' first written submission, paras. 113-121, and European Communities' second written submission, paras. 68-90.

[765] (*footnote original*) Appellate Body Report, *EC – Computer Equipment*, para. 84.

[766] Panel Report on *EC – Chicken Cuts (Brazil)*, para. 7.6.

Article 3.2 of the DSU.[767] These provisions comprise the legal framework within which any interpretative exercise of language contained in the WTO covered agreements must take place.

7.412 Article 31 of the Vienna Convention provides that:

"*General rule of interpretation*

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended."

7.413 In turn, Article 32 of the Vienna Convention provides that:

"*Supplementary means of interpretation*

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable."

7.414 As noted by the Appellate Body in its report on *US – Shrimp*:

[767] See, *inter alia*, Appellate Body Report on *US – Gasoline*, p. 17; Appellate Body Report on *India – Patents (US)*, para. 45; and Appellate Body Report on *US – Shrimp*, para. 114.

> "A treaty interpreter must begin with, and focus upon, the text of the particular provision to be interpreted. It is in the words constituting that provision, read in their context, that the object and purpose of the states parties to the treaty must first be sought. Where the meaning imparted by the text itself is equivocal or inconclusive, or where confirmation of the correctness of the reading of the text itself is desired, light from the object and purpose of the treaty as a whole may usefully be sought."[768]

7.415 In its report on *US – Gasoline*, the Appellate Body had also stated that:

> "One of the corollaries of the 'general rule of interpretation' in the *Vienna Convention* is that interpretation must give meaning and effect to all the terms of a treaty. 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."[769]

7.416 As noted in its report by the panel on *US – Section 301 Trade Act*, the various elements provided for in Article 31 "are to be viewed as one holistic rule of interpretation rather than a sequence of separate tests to be applied in a hierarchical order"[770]. Accordingly, the criteria contained in that provision are not to be applied in isolation of each other. In any event, we note that the purpose of treaty interpretation is "to ascertain the *common* intentions of the parties".[771]

(iv) Interpretation of the European Communities' Schedule as it refers to bananas

Uncontested facts

7.417 As noted above, there is no controversy between the parties that, under Part I, Section I.A (Tariffs) of its Schedule, the European Communities' tariff binding for bananas, other than plantains, is €680/mt. Section I.B (Tariff quotas) of the European Communities' Schedule contains an additional concession for such bananas, namely, a 2.2 million mt quota at a €75/mt in-quota rate. This additional concession is subject to the following qualification specified under the column of "terms and conditions": "As indicated in the Annex". The Annex referred to in the column of "terms and conditions" for bananas is the "Framework Agreement on Bananas" (Bananas Framework Agreement). This Bananas Framework Agreement lays out the conditions for the operation of the tariff quota and, in paragraph 9, specifically provides that: "This agreement shall apply until 31 December 2002."

Ecuador's argument

7.418 We note Ecuador's argument that, while the Bananas Framework Agreement expired on 31 December 2002[772], the tariff quota of 2.2 million mt at a bound tariff rate of €75/mt is still in force[773]:

> "The 75 Ecu/mt concession for 2.2 million mt was not made subject to the continued existence of the Annex or the BFA. Paragraph 9 of the BFA provides that 'this agreement' (the BFA) applies until the end of 2002, but it does not provide that the EC's GATT tariff quota concession expires at any time. The duty and quantity of the tariff concession does not depend on the other terms and conditions as set out in the

[768] Appellate Body Report on *US – Shrimp*, para. 114.
[769] Appellate Body Report on *US – Gasoline*, p. 23.
[770] Panel Report on *US – Section 301 Trade Act*, para. 7.22.
[771] Appellate Body Report on *EC – Computer Equipment*, para. 84.
[772] Ecuador's response to Panel question No. 45.
[773] Ecuador's second written submission, paras. 53-60; and Ecuador's response to Panel questions No. 25, No. 26, No. 27 and No. 45.

> annex, but rather is laid out in the schedule itself. Expiration of the agreement would thus not eliminate the tariff quota concession, which is not subject to the continued effect of the BFA ..."[774]

The European Communities' response

7.419 The European Communities responds to this argument by stating that:

> "The Annex [to Part I, Section I.B of the European Communities' Schedule], which is an integral part of the Schedules,[775] provides that this tariff quota would be operational as of October 1, 1994 and that it would expire on December 31, 2002. Therefore, on December 31, 2002, this concession expired in accordance with its terms and as of January 1, 2003, the only bound rate for bananas in the Schedules of concessions of the European Communities is €680 per ton."[776]

Consideration of all relevant terms contained in the European Communities' Schedule

7.420 The correct interpretation of the European Communities' Schedule requires the consideration of all the relevant terms contained in Part I, Sections I.A and I.B, of that Schedule, as well as those contained in the Bananas Framework Agreement.

7.421 As noted, Part I, Section I.A, of the European Communities' Schedule provides that the tariff rate for bananas (corresponding to tariff item 0803 00 12 or 0803 00 19) is bound at €680/mt. In turn, Part I, Section I.B, of the European Communities' Schedule reflects the European Communities' concession for bananas to maintain a quota of 2.2 million mt at a bound tariff rate of €75/mt, subject to the terms and conditions "indicated in the Annex" (the Bananas Framework Agreement).

7.422 Under Article II:1 (b) of the GATT 1994:

> "The products described in Part I of the Schedule relating to any [Member], which are the products of territories of other [Members], shall, on their importation into the territory to which the Schedule relates, *and subject to the terms, conditions or qualifications set forth in that Schedule*, be exempt from ordinary customs duties in excess of those set forth and provided therein." (emphasis added).

7.423 In other words, Article II:1 (b) of the GATT 1994 specifically allows WTO Members to subject the concessions contained in their schedules to the "terms, conditions or qualifications set forth in that Schedule".

7.424 As specifically provided for under column 7 of Section I.B, Part I, of the European Communities' Schedule, the European Communities' concession regarding bananas, to maintain a quota of 2.2 million mt at a bound tariff rate of €75/mt, is subject to terms, conditions or qualifications defined in the following way: "As indicated in the Annex". This Annex is none other than the Bananas Framework Agreement.

7.425 All elements of the European Communities' tariff quota for bananas are described in the Bananas Framework Agreement, including not only the quota quantity and the in-quota tariff rate but also details pertaining to the operation of the system, such as the allocation of country-specific quotas,

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[774] Ecuador's second written submission, para. 58.

[775] (*footnote original*) See Article 10 of the Annex, which provides that it should be "incorporated into the Community's Uruguay Rounds Schedule".

[776] European Communities' first written submission, para. 114.

the management of the quotas and the duration of the system. As a matter of fact, certain provisions of the Bananas Framework Agreement, such as the allocation of country-specific quota shares, but not the Bananas Framework Agreement as a whole, were found in the original proceedings to be inconsistent with the WTO agreements.[777]

7.426 The European Communities' tariff quota concession for bananas must therefore be understood, under the "terms, conditions or qualifications" set forth in column 7 of Section I.B, Part I, of the European Communities' Schedule, to be subject to what is indicated in the Bananas Framework Agreement. In other words, the European Communities' tariff quota concession for bananas provided for in column 7 of Section I.B, Part I, of the European Communities' Schedule cannot be read in isolation from the terms in the Bananas Framework Agreement.

7.427 Paragraph 9 of the Bananas Framework Agreement states that "[t]his agreement shall apply until 31 December 2002". This provision is, for the reasons stated above, part of the "terms, conditions or qualifications" that apply to the European Communities' tariff quota concession for bananas. As provided in column 7 of Section I.B, Part I, of the EC Schedule, the European Communities' tariff quota concession for bananas is subject to what is indicated in the Bananas Framework Agreement. Accordingly, the expiration of the Bananas Framework Agreement on 31 December 2002 would automatically imply expiration of the European Communities' tariff quota concession under the terms of its Schedule. The European Communities could subsequently, of course, renegotiate any new concession for bananas in its Schedule, subject to the completion of the appropriate procedures, whether or not under Article XXIV of the GATT 1994 in the context of an enlargement of its member States.

7.428 The Panel notes Ecuador's argument that "[t]he duty and quantity of the tariff concession does not depend on the other terms and conditions as set out in the annex [the Bananas Framework Agreement], but rather is laid out in the schedule itself."[778] The Panel reads this statement to mean that, in Ecuador's view, the quota quantity, as well as the in-quota duty, applicable to the European Communities' tariff quota concession for bananas, are laid out in Part I, Section I.B, of the European Communities' Schedule, although both are also mentioned in paragraphs 1 and 7, respectively, of the Bananas Framework Agreement. The European Communities' Schedule as it refers to bananas, however, does not only comprise Part I, Sections I.A and I.B, but also, as we have noted above, the Bananas Framework Agreement.

7.429 However, even if we agree that the quota quantity, as well as the in-quota duty, applicable to the European Communities' tariff quota concession for bananas, are laid out in the European Communities' Schedule, it does not follow that: "Expiration of the agreement would... not eliminate the tariff quota concession, which is not subject to the continued effect of the BFA."[779] Indeed, the European Communities' concession to grant a tariff quota for bananas is specifically subject to the "terms, conditions or qualifications" set forth in the Bananas Framework Agreement. These terms include the fact that the agreement would only apply only until 31 December 2002. As Ecuador itself admits[780], there is nothing in the WTO Agreement that would prevent a Member from qualifying a specific concession in its Schedule by subjecting it to a date of expiry. As noted by the GATT panel on *US – Sugar Waiver*:

> "Although the granting of concessions conditional upon the discretion of the concession-granting government may not be meaningful because of the obvious legal uncertainty thereby created, the General Agreement does not oblige contracting

[777] See paras. 2.65 to 2.67 above.
[778] Ecuador's second written submission, para. 58.
[779] Ibid.
[780] Ecuador's response to Panel question No. 99.

> parties to make concessions and specifically allows them in Article II:1(b) to subject to conditions the concessions they decide to make."[781]

Consideration of the object and purpose of the WTO Agreements

7.430 Under the general customary rule of interpretation of public international law, as codified in Article 31 of the Vienna Convention, the Panel is directed to interpret the terms of a treaty in their context and in the light of the treaty's object and purpose.

7.431 The object and purpose of the WTO Agreement can be deduced from its preamble and from the preambles of the agreements that are annexed to it. The preamble of the WTO Agreement specifies that one of the purposes of the Agreement is to "expand... trade in goods and services". It also states that Members should contribute to the above-mentioned expansion "by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade."

7.432 In this respect, in *EC – Computer Equipment* the Appellate Body stated that:

> "[T]he security and predictability of 'the reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other trade barriers to trade' is an object and purpose of the WTO Agreement, generally, as well as of the GATT 1994."[782]

7.433 This general object and purpose is consistent with the more specific object and purpose of Article II:1(a) and (b) of the GATT 1994. Indeed, the requirement in these provisions that Members shall not accord to the products of other Members a "treatment less favourable than that provided for" in their respective Schedules of Concessions, is compatible with the objective of promoting security and predictability in international trade, through the exchange of concessions that are contained in Schedules that are multilaterally approved and become binding on all WTO Members as integral parts of their commitments under the WTO agreements.

7.434 In the light of the object and purpose of the WTO Agreement and the GATT 1994, concessions made by WTO Members should be interpreted so as to further the general objective of expanding trade in goods and services and reducing barriers to trade, through the negotiation of reciprocal and mutually advantageous arrangements. At the same time, in order to promote security and predictability, such an interpretation is limited by the specific terms, conditions and qualifications contained in the Members' respective Schedules of Concessions.

7.435 Accordingly, a consideration of the terms of the European Communities' Schedule, which takes into account Part I, Sections I.A (Tariffs) and I.B (Tariff quotas) and the Bananas Framework Agreement, is consistent with the object and purpose of the WTO Agreement, the GATT 1994 and, more specifically, of Article II:1(a) and (b) of the GATT.

7.436 In conclusion, in light of the ordinary meaning to be given to the terms of the European Communities' Schedule, taking into account Part I, Sections I.A (Tariffs) and I.B (Tariff quotas), and the Bananas Framework Agreement, in their context and in the light of the treaty's object and purpose, the European Communities' tariff quota concession for bananas was unequivocally intended to expire on 31 December 2002. The alternative reading of the Schedule suggested by Ecuador would reduce to inutility Paragraph 9 and, indeed, the whole Bananas Framework Agreement. It would amount to a partial reading of the European Communities' Schedule, limited to columns 1 to 4 of Section I.B,

[781] GATT Panel Report on *US – Sugar Waiver*, para. 5.8.
[782] Appellate Body Report on *EC – Computer Equipment*, para. 82.

Part I, of the European Communities' Schedule, ignoring the language contained in column 7 and in the Bananas Framework Agreement.

Subsequent agreement between the parties

Treatment of subsequent agreement between the parties

7.437 The Panel has so far noted the terms of the European Communities' Schedule, taking into account Part I, Sections I.A (Tariffs) and I.B (Tariff quotas), and the Bananas Framework Agreement, in their context and in the light of the treaty's object and purpose. However, under the general customary rule of interpretation of public international law, as codified in Article 31 of the Vienna Convention, the Panel is also directed to take into account, together with the context:

> "(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
>
> (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
>
> (c) any relevant rules of international law applicable in the relations between the parties."

7.438 In the light of this rule of interpretation, the Panel must therefore determine whether there is any subsequent agreement between the parties, any subsequent practice in the application of the treaty, or any relevant rules of international law that are relevant for the task of identifying what was the common intention of the WTO Members, regarding the European Communities' tariff quota concession for bananas. The Panel has already noted that, pursuant to Article II:7 of the GATT 1994, the Schedules of Concessions of WTO Members are an integral part of the GATT 1994 and, more generally, an integral part of the WTO Agreement. Consequently, in the context of the interpretation of such Schedules, any subsequent agreement between the *parties*, regarding the European Communities' tariff quota concession for bananas, in the terms of Article 31 of the Vienna Convention, is to be understood as any subsequent agreement between the *WTO Members*.

Evidence of subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions

7.439 Paragraph 9 of the Bananas Framework Agreement states that:

> "This agreement shall apply until 31 December 2002. Full consultations with the Latin American suppliers that are GATT Members should start no later than in year 2001..."[783]

7.440 On its face, the second sentence of paragraph 9 calls for consultations to take place, starting "no later than in year 2001", between the European Communities and the Latin American suppliers, presumably to negotiate the new terms and conditions that the European Communities would apply to imports of bananas after 31 December 2002. The terms of the text do not prejudge the result of the consultations that would take place between the European Communities and the Latin American suppliers. At the same time, those same terms do not exclude the possibility that the concession on bananas could be extended as a result of the consultations. Indeed, the European Communities has stated that, pursuant to the Bananas Framework Agreement, "the parties had agreed to negotiate a new

[783] See also, European Communities' second written submission, para. 78.

banana import system as of 2001", thereby ensuring that, "before the expiration of this concession they would have the opportunity to negotiate new concessions".[784]

7.441 On 14 November 2001, the WTO Ministerial Conference meeting in Doha approved the ACP-EC Partnership Agreement waiver (Doha Waiver).[785] In its preamble to the Doha Waiver, the WTO Members noted, among other things:

> "[T]hat the tariff applied to bananas imported in the 'A' and 'B' quotas shall not exceed 75 €/tonne until the entry into force of the new EC tariff-only regime.
>
> [T]hat the implementation of the preferential tariff treatment for bananas may be affected as a result of GATT Article XXVIII negotiations;
>
> [T]he assurances from the Parties to the Agreement that any re-binding of the EC tariff on bananas under the relevant GATT Article XXVIII procedures should result in at least maintaining total market access for MFN banana suppliers and their willingness to accept a multilateral control on the implementation of this commitment."[786]

7.442 In turn, the Bananas Annex to the Doha Waiver provides, *inter alia*, that:

> "The waiver would apply for ACP products under the Cotonou Agreement until 31 December 2007. In the case of bananas, the waiver will also apply until 31 December 2007, subject to the following, which is *without prejudice to rights and obligations under Article XXVIII*.
>
> The parties to the Cotonou Agreement will initiate consultations with Members exporting to the EU on a MFN basis (interested parties) early enough to finalize the process of consultations under the procedures hereby established at least three months before the entry into force of the new EC tariff only regime.
>
> No later than 10 days after the conclusion of Article XXVIII negotiations, interested parties will be informed of the EC intentions concerning the rebinding of the EC tariff on bananas. In the course of such consultations, the EC will provide information on the methodology used for such rebinding. *In this regard, all EC WTO market-access commitments relating to bananas should be taken into account.*"[787] (emphasis added)

7.443 The Doha Waiver is an agreement reached between the same parties to the Bananas Framework Agreement[788] (i.e., the WTO Members), it is subsequent to the Bananas Framework Agreement, and, like the Bananas Framework Agreement, it deals, *inter alia*, with the European Communities' WTO market-access commitments relating to bananas. Similarly to what is provided for in paragraph 9 of the Bananas Framework Agreement, under the Doha Waiver the European Communities is committed to engage in consultations with WTO Members exporting bananas to the European Communities on an MFN basis. Given these factors, the Doha Waiver, as it relates to the

[784] European Communities' second written submission, para. 80.

[785] Ministerial Conference, European Communities, The ACP – EC Partnership Agreement, Decision of 14 November 2001 (WT/MIN(01)/15), 14 November 2001.

[786] Ibid.

[787] Ibid. (Emphasis added).

[788] Although the Bananas Framework Agreement was originally negotiated in 1994 between the European Communities, Colombia, Costa Rica, Venezuela and Nicaragua (see Panel Report on *EC – Bananas III (Ecuador)*, para. 3.30), it was made an integral part of the WTO agreements, by virtue of its incorporation as an annex to the European Communities Schedule and thus became multilateral in nature.

European Communities' WTO market-access commitments relating to bananas, is a "subsequent agreement between the parties" to the Bananas Framework Agreement (i.e., the WTO Members), regarding the application of the provisions of the WTO agreement as it pertains to such market access commitments. In other words, in order to ascertain the common intentions of the WTO Members, regarding the European Communities' WTO market access commitments relating to bananas, we cannot ignore the agreement reached between the WTO Members through the Doha Waiver.

> The extension of the European Communities' tariff quota concession for bananas beyond the date of expiration in the Bananas Framework Agreement

7.444 As noted above, the Doha Waiver recognizes the WTO Members' common intention that, until the entry into force of the new European Communities' tariff-only regime, the in-quota tariff applied to bananas "shall not exceed 75€/mt", as well as the common intention that any rebinding of the European Communities' tariff on bananas under GATT Article XXVIII procedures "should result in at least maintaining total market access for MFN banana suppliers". The Doha Waiver also provides that, in the case of bananas, the waiver would apply "without prejudice to rights and obligations under Article XXVIII", and that, in the process of Article XXVIII negotiations for the purpose of the rebinding of the European Communities' tariff on bananas, "all EC WTO market-access commitments relating to bananas should be taken into account".[789]

7.445 Under the terms of the Doha Waiver, the European Communities is committed to maintaining its concessions regarding bananas contained in Part I, Section I.A (Tariffs) and Section I.B (Tariff quotas) of the European Communities' Schedule, until the entry into force of the new European Communities' tariff-only regime.[790] Such a tariff-only regime would result from a rebinding of the European Communities' concession on bananas, subsequent to negotiations under GATT Article XXVIII procedures.[791]

7.446 In adopting the Doha Waiver, the WTO Members agreed to extend the duration of the European Communities' tariff quota concession for bananas beyond 31 December 2002, the date of expiration envisaged in the Bananas Framework Agreement. As a result, the European Communities' tariff quota concession for bananas, as contained in Part I, Sections I.A (Tariffs) and I.B (Tariff quotas) of the European Communities' Schedule, would remain in force until the completion of the Article XXVIII negotiations for the purpose of the rebinding of the European Communities' tariff on bananas and the subsequent entry into force of a new European Communities' tariff regime. While some aspects of the European Communities' tariff quota concession for bananas, as described in the Bananas Framework Agreement, had to be modified as a result of the recommendations and rulings adopted by the DSB in the *EC – Bananas III* case, the basic aspects of such concession and, more specifically, the quota quantity and the in-quota tariff rate, as described in column 4 of Section I.B, Part I, of the European Communities' Schedule, are not as such affected by these recommendations and rulings.

7.447 The European Communities has confirmed that Article XXVIII negotiations for the purpose of the rebinding of the European Communities' concession on bananas, as envisaged in the Doha Waiver, have not yet been concluded.[792] There is no provision in the WTO Agreement that would

[789] Ministerial Conference, European Communities, The ACP – EC Partnership Agreement, Decision of 14 November 2001 (WT/MIN(01)/15), 14 November 2001.

[790] Ibid.

[791] Ibid., preamble, recital 11, and Bananas Annex.

[792] See European Communities' first written submission, paras. 6 and 7, European Communities' second written submission, para. 87, and European Communities' response to panel question No. 9, paras. 18-19, No. 24, para. 80, and No. 56, para. 117.

allow a Member to unilaterally modify the concessions contained its Schedule, unless procedures for renegotiation of such Schedule are formally concluded.

7.448 The Panel has noted the European Communities' statement that:

> "[E]ven if that concession [the tariff quota for 2.2 million tons of bananas at a tariff rate of €75/mt] had not expired at the end of 2002, it is clear that it was lawfully terminated on January 1, 2006, when the European Communities introduced the tariff only import regime."[793]

7.449 The Panel reads this argument to mean that, in the European Communities' view, the entry into force of the "new EC import regime" for bananas would be enough to modify the European Communities' concession. However, the final sentence of the fifth tiret of the Bananas Annex to the Doha Waiver expressly provides that:

> "The Article XXVIII negotiations and the arbitration procedures shall be concluded *before the entry into force of the new EC tariff only regime* on 1 January 2006". (emphasis added)

7.450 Furthermore, the chapeau of the Bananas Annex states that the waiver is "without prejudice to rights and obligations under Article XXVIII [of the GATT 1994]"

7.451 Accordingly, the appropriate procedures must be finalized, before the concession can be legitimately modified or withdrawn and replaced with a new one.

7.452 The Panel additionally notes that Article XXVIII of the GATT 1994 (Modification of Schedules) deals with the renegotiation of concessions contained in the Schedule of a WTO Member that is annexed to the GATT 1994. This provision allows Members to modify or withdraw a concession included in the appropriate Schedule annexed to the GATT 1994, but only through negotiation and agreement with Members holding special rights. Once these negotiations are concluded, the Member shall submit a draft reflecting the modifications to be introduced to its schedule resulting from the Article XXVIII negotiations to the Director-General, who will in turn communicate such a draft to the Members. The changes would then be certified, provided no relevant objection is raised by the Members.[794] No withdrawal or modification of the original European Communities' schedule has so far been certified.

7.453 The European Communities argues that:

> "[T]he Panel should disregard Ecuador's claims under Article XXVIII of the GATT, because Ecuador did not include any Article XXVIII claims in its request for the establishment of the Panel and, therefore, an analysis of Article XXVIII issues is not within the Terms of Reference of this Panel."[795]

7.454 The examination of a claim relating to a possible breach of GATT Article XXVIII of the GATT 1994 would be outside the terms of reference of this Panel. Nevertheless, in light of the specific matter before this Panel and because of the numerous references made to Article XXVIII in the Doha Waiver, the Panel cannot totally disregard this provision. The combined reading of Articles II and XXVIII of the GATT 1994 implies that, until negotiations under the latter provision are

[793] European Communities' first written submission, para. 122.
[794] Procedures for Modification and Rectification of Schedules of Tariff Concessions, Decision of 26 March 1980 (L/4962).
[795] See European Communities' response to panel question No. 28, para. 93.

formally concluded, a Member continues to be bound by the concessions contained in its Schedule. This is so even though, as in this case, the concession was originally intended to expire on 31 December 2002.

Conclusion regarding the subsequent agreement between the parties

7.455 In light of the above, and more specifically, of the terms of the Doha Waiver, the common intention of the WTO Members, regarding the European Communities' tariff quota concession for bananas, cannot have been that the concessions for MFN banana suppliers contained in such tariff quota, contained in column 4 of Section 1.B, Part I, of the European Communities' Schedule, would expire on 31 December 2002 upon expiration of the Bananas Framework Agreement. Neither would it have been that, lacking completion of the relevant GATT Article XXVIII procedures, those market access opportunities for MFN banana suppliers would not be preserved.

7.456 On the contrary, the common intention of the WTO Members, as reflected in the text of the Doha Waiver, is that all the European Communities' WTO market-access commitments relating to bananas would be taken into account for the purpose of the rebinding of the European Communities' tariff, in the context of the GATT Article XXVIII negotiations, so that the rebinding of the tariff on bananas would result in at least maintaining total market access for MFN banana suppliers. It is also the common intention of the WTO Members that, pending the completion of the Article XXVIII negotiations for the purpose of the rebinding of the European Communities' tariff on bananas, and the subsequent entry into force of a new European Communities' tariff regime, the European Communities' tariff quota concession for bananas, as contained in Part I, Sections I.A (Tariffs) and I.B (Tariff quotas) of the European Communities' Schedule, would continue to constitute the European Communities' scheduled commitments regarding bananas.

Consideration of supplementary means of interpretation

Treatment of supplementary means of interpretation

7.457 Under the customary rules of interpretation of public international law, as codified in Article 32 of the Vienna Convention, the Panel may also have recourse to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion. In the present case it is useful to have recourse to such supplementary means of interpretation in order to determine whether those instruments confirm the meaning resulting from the application of the general rule of interpretation codified in Article 31 of the Vienna Convention.

7.458 The Panel notes in this regard that parties have provided extensive arguments and factual information that may be relevant as supplementary means of interpretation in order to ascertain the common intention of WTO Members, regarding the European Communities' tariff quota concession for bananas. The Panel accordingly considers these arguments and information advanced by the parties.

Arguments provided by the parties

7.459 Ecuador refers to a number of factors related to the context and history of the European Communities' tariff quota for bananas. Ecuador argues, for example, that, in accordance with the modalities for the agricultural market access negotiations that took place in the Uruguay Round, the tariff quota was "bound at a level intended to preserve pre-Uruguay Round access".[796]

[796] Ecuador's second written submission, paras. 53 and 59.

7.460 The European Communities responds that the Modalities Paper for the Uruguay Round agricultural market access negotiations was issued with the explicit qualification that it would "not be used as a basis for dispute settlement proceedings" under the WTO Agreement. The European Communities consequently asks the Panel to disregard Ecuador's arguments built on such document.[797]

7.461 Ecuador also argues that, "[h]ad the Parties intended to bind the tariff quota only for so long as the [Bananas Framework Agreement] applied... they would have specified the limited duration of the *concession* [rather than of the agreement] in the [Bananas Framework Agreement]."[798] In Ecuador's view:

> "The duty and quantity of the tariff concession does not depend on the other terms and conditions as set out in the annex, but rather is laid out in the schedule itself. Expiration of the agreement would thus not eliminate the tariff quota concession, which is not subject to the continued effect of the BFA ...
>
> [I]t is scarcely likely that the negotiators of the [Bananas Framework Agreement] would [have considered] a satisfactory solution a system that, as of 2003, would leave all their banana exports to the EC subject to an essentially prohibitive duty of €680/mt".[799]

7.462 In response to this argument, the European Communities notes that Ecuador has stated that:

> "It would de-stabilize the entire premise of the WTO tariff system if concessions were to be adjusted according to whether the concessions had the result contemplated at the time that the concession was granted."[800]

7.463 The European Communities adds that "the parties had agreed to negotiate a new banana import system as of 2001" (one year before the expiration of the European Communities' tariff quota concession, an anticipated in the Bananas Framework Agreement), thereby ensuring that "they would have an important quantity exported at a low tariff" until the end of 2002 and that, "before the expiration of this concession they would have the opportunity to negotiate new concessions".[801]

7.464 Ecuador also argues that:

> "If the only EC binding after 2002 were at a level of €680/mt, there would have been no reference to Article XXVIII negotiations [in the Doha Waiver]... Plainly, the waiver called for Article XXVIII negotiations because of the possibility that the EC would seek to rebind its MFN duty at a level above the bound tariff rate quota of 75Ecu/mt."[802]

7.465 In Ecuador's view:

> "If €680/mt was the EC's only bound rate as of January 1, 2003, the EC would never even have issued an Article XXVIII notification [such as those filed in August 2004

[797] European Communities' second written submission, paras. 70-72.
[798] Ecuador's second written submission, para. 58.
[799] Ibid., paras. 58-59.
[800] European Communities' second written submission, para. 79, quoting Ecuador's second written submission, para. 25.
[801] European Communities' second written submission, para. 80.
[802] Ecuador's second written submission, para. 61.

> and February 2005]... No Member would invoke Article XXVIII:5 procedures *to lower* its bound rate."[803]

7.466 To this argument, the European Communities responds that "Ecuador's link between the initiation of negotiations under GATT Article XXVIII and the expiration of the tariff quota for the 2.2 million tons is erroneous and disregards the facts of this case".[804] In the European Communities' view:

> "[The European Communities] was obliged to initiate negotiations in accordance with GATT Article XXVIII both by the [Bananas] Understanding and by the Doha waiver... [and] the initiation of the GATT Article XXVIII negotiations by the [EC] does not amount to a supposedly de facto 'rebinding' of that tariff quota".[805]

7.467 The European Communities also argues that:

> "[T]his Panel does not need to proceed to a full legal analysis of the provisions of GATT Article XXVIII and, in particular, rule on whether the GATT Article XXVIII procedures must be followed only when a WTO Member intends to increase its bound rates, or also when it intends to lower its bindings."[806]

7.468 The European Communities further states that:

> "[G]iven the facts of this case, this Panel does not need to proceed to a full legal analysis of the provisions of GATT Article XXVIII and, in particular, rule on whether the GATT Article XXVIII procedures must be followed only when a WTO Member intends to increase its bound rates, or also when it intends to lower its bindings. Without taking a position on this issue, the European Communities simply notes that the panel report in EEC-Newsprint may support the proposition that 'under long standing GATT practice, even purely formal changes in the tariff schedules of a contracting party which may not affect the GATT rights of other countries, such as the conversion of a specific to an ad valorem duty without an increase in the protective effect of the tariff rate in question, have been considered to require renegotiations'.[807]"[808]

7.469 Ecuador notes that "[t]he first award of the Arbitrator in 2005 reflects the common understanding that tariff quota remained bound in Schedule CXL".[809] In Ecuador's view:

> "[T]he EC, the Arbitrator, and the WTO members as a whole have consistently and repeatedly treated the tariff quota bananas as bound past the expiration date of the [Bananas Framework Agreement]. Indeed, until the EC's submission of July 20 to this Panel, the EC has never argued to the contrary, never objected to any statement to the contrary, never contended that it would not need to go through Article XXVIII to bind a duty above 75 Ecu/mt... Neither has any other WTO Member, Panelist or Arbitrator taken the position that the EC now espouses. This consensus, now

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[803] Ecuador's second written submission, para. 62.
[804] European Communities' second written submission, para. 85.
[805] Ibid., para. 86.
[806] Ibid., para. 88.
[807] (*footnote original*) See the Report of the GATT Panel on Newsprint, dated October 17, 1984 and adopted on November 20, 1984, at paragraph 50.
[808] European Communities' second written submission, para. 88.
[809] Ecuador's second written submission, para. 65.

> breached by the EC, is not surprising, because it is consistent with the language, context and history of the concession."[810]

7.470 To this argument the European Communities responds that it:

> "[C]onsiders that the description of its import regime... and the conclusions of the [Arbitration] Awards on the effects of its import regime on the total market access of MFN suppliers are not correct."[811]

7.471 The European Communities adds that:

> "[T]he descriptions contained in the Arbitration Awards do not have any relevance for the present procedure... First, because the Arbitration was not held within the context of the DSU... Second, because the subject matter of the Arbitration was to determine whether the new import regime of the [European Communities] would maintain total market access for MFN suppliers and not to determine what were the concessions bound in Schedule CXL [and t]herefore, any relevant statements in the Arbitration Awards should be treated as simple *dicta*..."[812]

> Modalities for Uruguay Round agricultural market access negotiations

7.472 The Panel turns to the issue of the so-called "Modalities Paper"[813], which was used during the Uruguay Round negotiations to schedule commitments under the future *Agreement on Agriculture*. The preamble to the Modalities Paper provides the following:

> "The revised text is being re-issued on the understanding of participants in the Uruguay Round that these negotiating modalities shall not be used as a basis for dispute settlement proceedings under the [WTO] Agreement."[814]

7.473 As noted by the panel in *EC – Export Subsidies on Sugar*:

> "[T]he so-called Modalities Paper is not a covered agreement and thus cannot provide for WTO rights and obligations to Members. Nonetheless, it could be relevant when interpreting the *Agreement on Agriculture*, including Members' Schedules."[815]

7.474 In the present case, the Modalities Paper, while having no legal standing of its own in terms of affecting WTO Members' rights and obligations, can be useful as a supplementary means of interpretation, in order to ascertain the common intention of WTO Members, regarding the European Communities' tariff quota concession for bananas.

7.475 Indeed, as a result of the agricultural market access negotiations that took place in the Uruguay Round, Members undertook the commitment to maintain and increase current market access opportunities as part of the so-called "tariffication" process, "on terms at least equivalent to those

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[810] Ecuador's second written submission, para. 66.
[811] European Communities' second written submission, para. 89.
[812] Ibid., para. 90.
[813] Negotiating Group on Market Access, Modalities for the Establishment of Specific Binding Commitments, Note by the Chairman of the Market Access Group (MTN.GNG/MA/W/24), 20 December 1993.
[814] Ibid., p. 1.
[815] Panel Report on *EC – Export Subsidies on Sugar (Brazil)*, para. 7.350. See also, Appellate Body Report on *EC – Export Subsidies on Sugar*, para. 199.

existing" at the time[816]. The maintenance of current market access opportunities was achieved, *inter alia*, through the concession of tariff quotas at rates that were lower than the respective tariff binding.

7.476 In this regard, we note Ecuador's argument that:

> "The tariff quota[s], in accordance with the modalities for the agricultural market access negotiations, were bound at a level intended to preserve pre-Uruguay Round access."[817]

7.477 Ecuador additionally notes that:

> "[A] time limited tariff quota concession would have been grossly inconsistent with the Uruguay Round modalities, because it would leave the EC with the WTO right to apply an essentially prohibitive duty on all bananas. As noted, the Uruguay round modalities called for binding tariff quotas in an amount and at a duty level sufficient to permit access at least equivalent to that existing in the base period".[818]

7.478 This argument in itself is not enough to provide a definitive orientation regarding the common intention of the WTO Members, as it pertains to the European Communities' WTO market-access commitments relating to bananas. Nevertheless, the modalities agreed for the establishment of binding commitments during the agricultural market access negotiations that took place in the Uruguay Round, reflected in the Modalities Paper, confirm the conclusion reached by the Panel regarding the common intention of WTO Members: that the European Communities' tariff quota concession for bananas would remain in force, in its substance, pending any later rebinding of the European Communities' tariff on bananas.

Expectations of the parties when negotiating the Bananas Framework Agreement

7.479 The Panel turns to Ecuador's argument that it is unlikely that the negotiators of the Bananas Framework Agreement would have agreed to a system that, as of 2003, would have left banana exports to the European Communities being subject to a duty of €680/mt and that, if the parties to the Bananas Framework Agreement had intended to bind the tariff quota only for so long as such agreement applied, they would have specified the limited duration of the concession in the text of the Bananas Framework Agreement.

7.480 This argument is not particularly helpful for the following two reasons.

7.481 First, under the customary rules of interpretation of public international law, as codified in the Vienna Convention, when attempting to ascertain the common intentions of the parties we must initially turn to the terms of the treaty, and not to the subjective intentions of one of the parties. Much less may we engage in an exercise to determine whether it is likely or unlikely that the negotiators of the Bananas Framework Agreement would have agreed to a time-limited concession.

7.482 Second, we have already found that, although the date of expiration envisaged in the Bananas Framework Agreement for the European Communities' tariff quota concession for bananas, as listed in the EC Schedule, was modified by a subsequent agreement between the WTO Members contained

[816] Negotiating Group on Market Access, Modalities for the Establishment of Specific Binding Commitments, Note by the Chairman of the Market Access Group (MTN.GNG/MA/W/24), 20 December 1993, paras. 4 and 6, and Annex 3, para. 11.

[817] Ecuador's second written submission, para. 53.

[818] Ibid., para. 59.

in the Doha Waiver, the Bananas Framework Agreement did originally provide that this concession would expire on 31 December 2002.

Negotiations under Article XXVIII of the GATT 1994

7.483 As regards Ecuador's argument relating to Article XXVIII of the GATT 1994, the Panel has already noted the relevance of this provision for the present case.[819]

7.484 The procedures contemplated in the Bananas Annex to the Doha Waiver establish a link with the negotiations under Article XXVIII of the GATT 1994. Indeed, the European Communities has issued notifications and initiated negotiations under Article XXVIII of the GATT 1994, *inter alia* on July 2004 and January 2005[820], for the purpose of rebinding its concession on bananas.

7.485 As Ecuador notes, the process of negotiations under Article XXVIII of the GATT 1994 would become irrelevant if, from 1 January 2003, the European Communities' only binding for bananas were €680/mt. Indeed, if this were the European Communities' only commitment, the application of a tariff of €230/mt, of €187/mt or of €176/mt would all be consistent with a binding at that tariff level and would not require the conclusion of negotiations under Article XXVIII. Indeed, if such were the case, the European Communities would hava been free to reduce its binding on bananas to any level below €680/mt. Furthermore, the inclusion of provisions in the Doha Waiver intended to safeguard the rights of MFN suppliers under Article XXVIII would have been unnecessary, as these suppliers would not have been entitled to compensation. Negotiations under Article XXVIII would instead become necessary before moving the tariff quota on bananas into a tariff-only system.

7.486 The European Communities' argument that it only initiated negotiations under Article XXVIII because it was required to do so under both the Bananas Understanding it signed with Ecuador on April 2001 and the Doha Waiver does not disprove such a conclusion. On the contrary, the requirement contained in both the Bananas Understanding signed between the European Communities and Ecuador on April 2001 and the Bananas Annex to the Doha Waiver is further evidence of the common intention of the WTO Members, including the European Communities, that negotiations under Article XXVIII were necessary for the purpose of rebinding the European Communities' tariff on bananas.

7.487 The Panel notes the European Communities' argument, referring to the GATT panel Report on *EEC – Newsprint*, that procedures under Article XXVIII may be followed even when a WTO Member is not intending to increase its bound rates.[821] The current situation is, however, different from that analysed by the GATT panel in *EEC – Newsprint*. None of the parties argues that the proposed modification of the European Communities' concession on bananas amounts to a "purely formal change in the tariff schedules of" the European Communities, which would "not affect the GATT rights of other [Members]" nor that it is "[t]he conversion of a specific to an ad valorem duty".

7.488 In conclusion, this argument in itself is also not enough to provide a definitive orientation regarding the common intention of the WTO Members, as it pertains to the European Communities' WTO market-access commitments relating to bananas. Nevertheless, the negotiations undertaken by the European Communities under Article XXVIII of the GATT 1994 for the purpose of rebinding its tariff on bananas, and the additional fact that these negotiations were required in both the Bananas Understanding signed between the European Communities and Ecuador on April 2001 and the Bananas Annex to the Doha Waiver, confirm the conclusion reached by the Panel regarding the common intention of WTO Members.

[819] See paras. 7.444 to 7.456 above.
[820] See paras. 2.15 and 2.16 above.
[821] European Communities' second written submission, para. 88.

Statements in the Arbitrator Award issued pursuant to the Bananas Annex

7.489 As noted by Ecuador, the first Arbitrator's award issued pursuant to the procedures in the Bananas Annex to the Doha Waiver contains several statements regarding the European Communities' WTO market-access commitments relating to bananas:

> "Schedule CXL of the EC-15 records commitments by the European Communities detailing a 2.2 million metric ton tariff quota with a bound in-quota tariff of €75 per metric ton and a final bound out-of-quota tariff of €680 per metric ton...
>
> In summary, the existing EC banana import system consists of tariff quotas totalling 3.113 million metric tons open to all suppliers, and a tariff quota of 750,000 metric tons at zero duty open exclusively to preferential suppliers. MFN suppliers are subject to a bound in-quota tariff of €75 per metric ton, whereas all in-quota banana imports from preferential suppliers enter the European Communities at zero duty."[822]

7.490 The Panel notes the European Communities' argument that the description of its import regime made by the Arbitrator is incorrect and has no relevance for the present proceedings.[823]

7.491 In any event, and even if the statements made by the Arbitrator, with respect to the European Communities' WTO market-access commitments relating to bananas, were to be regarded as "simple *dicta*", as suggested by the European Communities, they would not disprove the conclusion reached by the Panel regarding the question at issue, i.e., the common intention of WTO Members.

(v) General conclusion regarding the European Communities' Schedule as it refers to bananas

7.492 In conclusion, for the reasons stated above, the Panel finds that, although under its original terms the tariff quota concession for bananas, as listed in the European Communities' Schedule, was intended to expire on 31 December 2002, the subsequent agreement between the parties resulted in an extension of this concession. Pending the completion of Article XXVIII negotiations for the purpose of rebinding of the European Communities' concession on bananas, the European Communities remains bound by this concession, as contained in Part I, Sections I.A (Tariffs) and I.B (Tariff quotas) of the European Communities' Schedule.

(c) Is the €176/mt tariff on bananas in excess of that provided in the European Communities' Schedule?

7.493 The Panel has already determined the treatment granted to bananas imported from MFN countries (i.e., non-ACP WTO Members) under the challenged measure, as well as the treatment provided for bananas under the terms of Part I of the European Communities' Schedule. Accordingly, it must now determine whether the tariff imposed by the European Communities on bananas from MFN countries results in the imposition of ordinary customs duties in excess of those set forth and provided in Part I of the European Communities' Schedule.

7.494 The Panel has noted that, under terms of Regulation 1964/2005, since 1 January 2006, the tariff generally applied by the European Communities to MFN imports of bananas is set at €176/mt.[824] At the same time, the Panel has also noted that under Part I of its Schedule, the European

[822] European Communities, The ACP – EC Partnership Agreement, Recourse to Arbitration Pursuant to the Decision of 14 November 2001, Award of the Arbitrator (WT/L/616), 1 August 2005, paras. 13 and 18.

[823] See European Communities' second written submission, paras. 89-90. See also, paras. 7.470 to 7.471 above.

[824] See para. 2.40 above.

Communities' commitment with regard to bananas consists in a tariff binding of €680/mt as well as in a tariff quota for 2.2 million mt at a bound in-quota tariff rate of €75/mt. No allowance is made by the European Communities for the maintenance of a tariff quota for the importation of bananas from MFN countries at rates below the €176/mt tariff duty.

7.495 Therefore, the imposition of the tariff generally applied by the European Communities to MFN imports of bananas, set at €176/mt, under the terms of Council Regulation (EC) No. 1964/2005 of 29 November 2005, without consideration of the tariff quota for 2.2 million mt bound at an in-quota tariff rate of €75/mt, must be considered to be an ordinary customs duty in excess of that set forth and provided in Part I of the European Communities' Schedule.

(d) Conclusions regarding Ecuador's claims under Article II:1(a) and (b) of the GATT 1994

7.496 Ecuador raised claims against the European Communities' duty of €176/mt for bananas under Article II:1(a) and (b) of the GATT 1994. The Panel has already noted that it would follow the approach indicated by the Appellate Body in its report on *Argentina – Textiles and Apparel*, and begin its analysis with consideration of the first sentence of Article II:1 (b) of the GATT 1994.

(i) Conclusion regarding the first sentence of Article II:1(b) of the GATT 1994

7.497 The Panel has already noted that, under the first sentence of Article II:1(b) of the GATT 1994:

> "The products described in Part I of the Schedule relating to any contracting party [Member], which are the products of territories of other contracting parties [Members], shall, on their importation into the territory to which the Schedule relates, and subject to the terms, conditions or qualifications set forth in that Schedule, be exempt from ordinary customs duties in excess of those set forth and provided therein..."

7.498 Inasmuch as the tariff applied by the European Communities to MFN imports of bananas, set at €176/mt, without consideration of the tariff quota for 2.2 million mt bound at an in-quota tariff rate of €75/mt, is an ordinary customs duty in excess of that set forth and provided for in Part I of the European Communities' Schedule, it is to be considered inconsistent with the first sentence of Article II:1(b) of the GATT 1994.

(ii) Conclusion regarding Article II:1(a) of the GATT 1994

7.499 The Panel has noted that, under Article II:1(a) of the GATT 1994:

> "Each contracting party [Member] shall accord to the commerce of the other contracting parties [Members] treatment no less favourable than that provided for in the appropriate Part of the appropriate Schedule annexed to this Agreement."

7.500 The Panel has found that the tariff applied by the European Communities to MFN imports of bananas, set at €176/mt, without consideration of the tariff quota for 2.2 million mt bound at an in-quota tariff rate of €75/mt, is an ordinary customs duty in excess of that set forth and provided for in Part I of the European Communities' Schedule, and is therefore to be considered inconsistent with the first sentence of Article II:1(b) of the GATT 1994.

7.501 The Panel recalls the words of the Appellate Body in its report on *Argentina – Textiles and Apparel*:

> "It is evident to us that the application of customs duties *in excess of* those provided for in a Member's Schedule, inconsistent with the first sentence of Article II:1(b), constitutes 'less favourable' treatment under the provisions of Article II:1(a) …"[825]

7.502 Notwithstanding the above, the Panel does not believe that, having found that the tariff applied by the European Communities to MFN imports of bananas is inconsistent with the first sentence of Article II:1(b) of the GATT 1994, an additional finding regarding the same measure under Article II:1(a) of the GATT 1994 would be necessary to resolve the matter at issue.

7.503 Accordingly, under the guidance of the principle of judicial economy, the Panel considers it unnecessary for the resolution of this dispute to address Ecuador's claim that the tariff applied by the European Communities to MFN imports of bananas is inconsistent with Article II:1(a) of the GATT 1994. Therefore, the Panel refrains from making any findings with respect to this particular claim

5. General conclusion

7.504 For the reasons indicated in this section, the Panel finds that the tariff applied by the European Communities to MFN imports of bananas, set at €176/mt, without consideration of the tariff quota for 2.2 million mt bound at an in-quota tariff rate of €75/mt, is an ordinary customs duty in excess of that set forth and provided for in Part I of the European Communities' Schedule, and results in a treatment for the commerce of bananas from MFN countries (i.e., non-ACP WTO Members) that is less favourable than that provided for in Part I of the of the European Communities' Schedule. The Panel therefore finds that this tariff is inconsistent with the first sentence of Article II:1(b) of the GATT 1994.

F. FINAL REMARKS

7.505 In the factual section of this Report, the Panel noted that the complainant in this dispute is a developing country Member. However, as noted above, Ecuador did not invoke any provisions on special and differential treatment for developing country Members. Nor did the Panel find that these provisions were particularly relevant for the resolution of the specific matter that was brought before this Panel.

7.506 In this same proceedings, a significant number of developing and least developed country Members also stated their respective substantial interest in the matter before this Panel.

7.507 Indeed, the Panel is aware of the economic and social effects of the European Communities' measures at issue in this case, particularly for ACP and Latin American banana exporting countries. In recognizing this, as in previous panel proceedings, the Panel decided to grant third parties participatory rights which were substantially broader than those normally afforded to them under the DSU.[826] This was done in the light of the particular circumstances of the present case, and without the intention of setting any type of precedent.

7.508 In any event, the Panel wishes to recall the words of the original panel in the *EC – Bananas III* dispute:

> "The procedures under the DSU serve to ensure the settlement of disputes among WTO Members in accordance with WTO obligations, not to add to or diminish these obligations. Accordingly, our terms of reference are to assist the DSB in reaching

[825] Appellate Body Report on *Argentina – Textiles and Apparel*, para. 47.
[826] cf. Panel Report on *EC – Bananas III (Ecuador)*, para. 8.2.

> conclusions with regard to the legal consistency with WTO rules of the EC's common market organization for bananas. ...
>
> From a substantive perspective, the fundamental principles of the WTO and WTO rules are designed to foster the development of countries, not impede it. Having heard the arguments of a large number of Members interested in this case and having worked through a complex set of claims under several WTO agreements, we conclude that the system is flexible enough to allow, through WTO-consistent trade and non-trade measures, appropriate policy responses in the wide variety of circumstances across countries, including countries that are currently heavily dependent on the production and commercialization of bananas."[827]

VIII. CONCLUSIONS AND RECOMMENDATIONS

8.1 In light of the findings above, the Panel rejects the preliminary issue raised by the European Communities that Ecuador is prevented from challenging the European Communities' current import regime for bananas, including the preference for ACP countries, because of the Understanding on Bananas, signed by both Members in April 2001.

8.2 Accordingly, and after having examined the substantive claims raised by Ecuador as well as the defences invoked by the European Communities, the Panel concludes that:

(a) The preference granted by the European Communities to an annual duty-free tariff quota of 775,000 mt of imported bananas originating in ACP countries constitutes an advantage for this category of bananas, which is not accorded to like bananas originating in non-ACP WTO Members, and is therefore inconsistent with Article I:1 of GATT 1994;

(b) With the expiration of the Doha Waiver from 1 January 2006 as it applied to bananas, there is no evidence that, during the period that is relevant for this Panel's findings, that is, from the time of the establishment of the Panel until the date of this Report, any waiver from Article I:1 of GATT 1994 has been in force to cover the preference granted by the European Communities to the duty-free tariff quota of imported bananas originating in ACP countries;

(c) The European Communities' current banana import regime, in particular its preferential tariff quota reserved for ACP countries, is inconsistent with Article XIII:1, with the chapeau of Article XIII:2, and with Article XIII:2(d) of the GATT 1994;

(d) The tariff applied by the European Communities to MFN imports of bananas, set at €176/mt, without consideration of the tariff quota for 2.2 million mt bound at an in-quota tariff rate of €75/mt, is an ordinary customs duty in excess of that set forth and provided for in Part I of the European Communities' Schedule. This tariff is therefore inconsistent with the first sentence of Article II:1(b) of the GATT 1994; and,

(e) It is unnecessary, for the resolution of this dispute, to make a separate finding on Ecuador's claim under Article II:1(a) of the GATT 1994.

8.3 In consequence, the Panel concludes that, through its current regime for the importation of bananas, established in Council Regulation (EC) No. 1964/2005 of 29 November 2005, including the

[827] Panel Report on *EC – Bananas III (Ecuador)*, paras. 8.1 and 8.3.

duty-free tariff quota for bananas originating in ACP countries and the MFN tariff currently set at €176/mt, the European Communities has failed to implement the recommendations and rulings of the DSB.

8.4 Under Article 3.8 of the DSU, in cases where there is infringement of obligations assumed under a covered agreement, the action is considered prima facie to constitute a case of nullification or impairment of benefits under that agreement. The European Communities has failed to rebut this presumption. Accordingly, we conclude that to the extent that the European Communities has maintained measures inconsistent with different provisions of the GATT 1994, it continues to nullify or impair benefits accruing to Ecuador under that Agreement.

8.5 The Panel recommends that the Dispute Settlement Body request the European Communities to bring the inconsistent measures into conformity with its obligations under the GATT 1994.

ANNEX A

ANNEX A-1

REQUEST FOR THE ESTABLISHMENT OF A PANEL

WORLD TRADE ORGANIZATION

WT/DS27/80
26 February 2007

(07-0829)

Original: English

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

Recourse to Article 21.5 of the DSU by Ecuador

Request for the Establishment of a Panel

The following communication, dated 23 February 2007, from the delegation of Ecuador to the Chairman of the Dispute Settlement Body, is circulated pursuant to Article 21.5 of the DSU.

Upon the instructions of my authorities, I hereby convey the request of the Government of Ecuador for the establishment of a panel under Article 21.5 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU") with respect to *European Communities – Regime for the Importation, Sale, and Distribution of Bananas* (DS27).

Background

On 25 September 1997, the Dispute Settlement Body ("DSB") adopted the Panel and Appellate Body Reports of *European Communities – Regime for the Importation, Sale and Distribution of Bananas* ("*Bananas III*")[1]. The Panel Report, as modified by the Appellate Body and adopted by the DSB, found the tariff, tariff-rate quota, and licensing measures of the European Communities (EC) to be in violation, *inter alia*, of GATT Articles I, III, and XIII, and GATS Articles II and XVII, and recommended that the EC be requested to bring its banana regime into conformity with EC's obligations under the WTO.[2]

Among the EC measures found not to comply with the EC's obligations were the EC's tariff-rate quota regimes on banana imports, which excluded bananas of Ecuadorian (and other) origin completely from the most favorable tariff-rate quota, and which allocated shares of quotas in a way incompatible with the requirements of Article XIII, paragraph 2.

[1] Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/R, adopted 25 September 1997, modified by the Appellate Body Report, WT/DS27/AB/R.

[2] Panel Report, *Bananas III*, para. 9.1; Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted 25 September 1997, para. 255.

The measures also included measures for granting and allocating licenses for the importation, distribution and other banana-related activities. Those measures were found to infringe EC obligations under Article I of the GATT, and Article II and XVII of the GATS, because the EC measures discriminated against bananas, services and service suppliers of some WTO members relative to the treatment that the EC accorded to the bananas, services and service suppliers of the EC and of other WTO members.

On 1 January 1999, in accordance with earlier EC announcements, the EC put into effect a revised regime pertaining to bananas. The EC claimed that its modified regime brought the EC into conformity with the EC's WTO obligations. On 18 December 1998, Ecuador requested the DSB to establish a panel, with the same composition as previously, under Article 21.5 of the DSU to examine the conformity of the measures taken by the EC with the EC's obligations under certain WTO rules. On 14 January 1999, the United States sought authority under Article 22.6 of the DSU to suspend concession against the EC for its failure to conform with the rulings and recommendations of the DSB.

The Article 21.5 Panel found that the EC's modified regime violated GATT Articles I and XIII, and GATS Articles II and XVII.[3] In particular, the Article 21.5 panel found that:

> The EC's 857,700 mt tariff quota disfavored Ecuadorian bananas in violation of GATT Article XIII:1, and failed to represent a distribution of trade that would have prevailed in the absence of restrictions in violation of GATT Article XIII:2.
>
> The EC's quota-licensing treatment accorded more favorable treatment to EC and ACP services and service suppliers than to services and service suppliers of Ecuador and other countries, in breach of GATS Articles II and XVII.[4]
>
> The EC's allocation of the tariff-rate quota for MFN suppliers did not conform with GATT Article XIII:2 in that it was based on an unrepresentative period and did not accord Ecuador (or other substantial suppliers) shares consistent with the requirements of Article XIII:2.
>
> The EC's duty-free treatment for ACP countries was not covered by the EC's then existing Article I waiver insofar as it allowed duty free entry over the required minimum, and the EC was to that extent in violation of GATT Article I.[5]

As in *Bananas III*, the Article 21.5 Panel recommended that the DSB request the EC to bring its regime for bananas into conformity with its obligations under the GATT 1994 and the GATS.[6] These rulings and recommendations were adopted by the DSB.

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[3] Panel Report, *European Communities – Regime for the Importation, Sale, and Distribution of Bananas – Recourse to Article 21.5 of the DSU by Ecuador*, WT/DS27/RW/ECU, adopted 6 May 1999 (hereafter "*Bananas – DSU Article 21.5 (Ecuador)*"), para. 7.1; The Arbitrators decision came to a similar conclusion. Decision by the Arbitrators, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Arbitration by the European Communities Under Article 22.6 of the DSU*, WT/DS27/ARB, 9 April 1999 (hereafter "*Bananas – DSU Article 22.6 (US)*"), paras. 5.33, 5.80.

[4] *Bananas – DSU Article 21.5 (Ecuador)*, paras. 6.160, 6.163; *Bananas – DSU Article 22.6 (US)*, paras. 5.96, 5.97.

[5] *Id*., para. 6.161.

[6] *Id*., para. 7.2.

In April 2001, the EC reached two "Understandings on Bananas," one with the United States[7] and the other with Ecuador.[8] On 2 July 2001, the EC notified the Understandings to the WTO, characterizing both as covering "the implementation by the EC of the conclusions and recommendations adopted by the DSB in the dispute 'Regime for the Importation, Sale and Distribution of Bananas.'"[9] Ecuador (as well as the United States) communicated to the DSB that the Understandings were not a mutually satisfactory settlement under Article 3.6 of the DSU, but rather constituted agreement on a phased series of steps, including a "transitory" regime that would require the EC to take various steps supported by the collective action of the WTO membership, until the EC implemented the final definitive Tariff Only regime.[10] The United States made a similar communication.

The Understandings required that the EC implement a tariff-only regime effective 1 January 2006, and that it takes interim or "transitory" measures in the meantime. Essentially, the EC would adjust its measures in two initial "phases", in a way that would ease the trade problems for Ecuador and others, even though these initial phases did not involve full conformity with the EC's obligations. The Understandings required that Ecuador and the United States "lift their reserves concerning the waiver of Article I of the GATT" for the EC's preferential tariffs for ACP products and "actively work towards promoting the acceptance of an EC request for a waiver of Article XIII of the GATT 1994" for the ACP tariff quota on bananas so as to allow for a temporary period preferences inconsistent with Articles I and XIII of the GATT.[11] These provisions were intended to and did help the EC to obtain waivers from its WTO obligations sufficient to temporarily and conditionally permit measures that would otherwise violate Articles I and XIII of the GATT but which were provided for in the measures to be taken in Phase I and Phase II. At the end of Phase II, the EC was to establish a Tariff Only system that would not require further waivers to conform with EC obligations.

Pursuant to these provisions, suitable GATT Article I and GATT Article XIII waiver conditions applicable to bananas were negotiated and the waivers were granted at the Doha Ministerial in November 2001. The final stage of the Understandings required the EC to introduce "a 'Tariff-Only regime for imports of bananas' no later than 1 January 2006. The waiver of Article I would allow the EC to maintain tariff preferences for two years after 1 January 2006, provided that a suitable MFN duty on bananas had been established by January 1 2006 in accordance with the conditions of the waiver and the provisions of Article XXVIII of the GATT and other WTO obligations."[12] The waiver of Article XIII expired on 31 December 2005, because at that point no more tariff-rate quotas were supposed to be employed.

The Article I Waiver included an annex on bananas requiring that the EC's tariff-only regime "result in at least maintaining total market access for MFN banana suppliers," taking into account "all EC WTO market-access commitments relating to bananas."[13] In the event of disagreement over

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

[8] *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Understanding on Bananas between the European Communities and Ecuador*, WT/DS27/60, 9 July 2001 ("EC-Ecuador Understanding").

[9] Notification of Mutually Agreed Solution, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/58, 2 July 2001.

[10] WT/DS27/60, 3 July 2001.

[11] EC-US Understanding, para. E; EC-Ecuador Understanding, para. F.

[12] *See* Award of the Arbitrator, *European Communities – The ACP-EC Partnership Agreement – Recourse to Arbitration Pursuant to the Decision of 14 November 2001*, WT/L/616, 1 August 2005, paras. 1 and 2.

[13] *European Communities – The ACP-EC Partnership Agreement*, WT/MIN(01)/15, 14 November 2001, Annex, tiret 4.

whether the proposed regime met the conditions of the Annex, the Annex provided for arbitration in accordance with the terms of the Annex. If the EC were found by the Arbitrator twice to have failed to satisfy the terms of the Annex standard for the tariff-only regime, the waiver of Article I expired with respect to bananas.

In 2005, the EC twice proposed a final MFN rate of duty, which Ecuador and other countries challenged under the Annex dispute settlement procedures as not meeting the standard of the Article I waiver. In each arbitration, the arbitrators found that the EC's banana proposals failed the standard of the Annex. As a result the Waiver of GATT Article I with respect to the EC's imports of bananas terminated for the EC on 1 January 2006.[14]

As of 31 December 2005, the EC's waiver of GATT Article XIII for its ACP banana quota of 750,000 mt also expired.[15]

The Measures of the EC that are subject to this Challenge

The challenged EC measures are contained in EC Council Regulation No. 1964/2005 ("Regulation 1964")[16] and its associated implementing regulations, including the EC's autonomous tariff provisions. These measures include:

- A tariff-rate quota, with a current volume of 775,000 mt, exclusively reserved for bananas of ACP origin. ACP bananas within the quota enter duty-free, quantities above the TRQ paying a current duty of 176 €/mt. The 775,000 mt ACP tariff quota volume is subject to import licenses and allocation. Ecuador does not get any share of this tariff rate quota or related measures, let alone receive the share required under Article XIII.

- An EC tariff, currently at 176 €/mt to EC imports of bananas, that applies to all bananas of Ecuadorian origin and to all other bananas except those benefiting from access to the zero-duty TRQ.

These measures are not justified under the Understandings or any agreed settlement, and are not covered by any waiver of EC obligations.

Ecuador considers that the EC measures are inconsistent with the following obligations of the WTO Agreements:

- Article I of the GATT 1994, in that the EC applies different and more favorable duties to bananas originating in ACP countries than the EC applies to bananas originating in Ecuador and most or all other WTO members.

- Article II of the GATT in that the EC applies a tariff (currently 176€ /mt) on import of bananas originating in Ecuador (and other WTO member countries) that is above the EC bound rate of duty under Article II, which is 75€/mt.

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[14] Award of the Arbitrator, *European Communities – The ACP-EC Partnership Agreement – Recourse to Arbitration Pursuant to the Decision of 14 November 2001*, WT/L/616, 1 August 2005, para. 94; Award of the Arbitrator, *European Communities – The ACP-EC Partnership Agreement – Second Recourse to Arbitration Pursuant to the Decision of 14 November 2001*, WT/L/625, 27 October 2005, para. 127.

[15] *European Communities – Transitional Regime for the EC Autonomous Tariff Rate Quotas on Imports of Bananas*, WT/MIN(01)/16, 14 November 2001, para. 1.

[16] Council of the European Union, *Council Regulation (EC) No. 1964/2005 of 29 November 2005 on the tariff rate for bananas*, OJL 316/1, 2 December 2005.

- Article XIII:1 and 2 of the GATT, in that the EC continues to provide a tariff rate quota system reserved exclusively for bananas of ACP origin, while Ecuador is denied any share of the preferential quota, let alone the share to which it is entitled under Article XIII.

REQUEST FOR THE ESTABLISHMENT OF A PANEL

On 28 November 2006, Ecuador requested consultations on the foregoing matter under DSU Article 4 and Article XXII of the GATT.[17] Consultations were held on 14 December 2006, but failed to resolve the disagreement between the parties.

As there continues to be a disagreement between Ecuador and the EC over the WTO-consistency of the EC banana measures taken to comply with *Bananas III* and *Bananas-DSU Article 21.5 (Ecuador)* and subsequent related rulings, Ecuador respectfully requests that this matter be referred to a Panel, if possible the original panel, in accordance with Article 21.5 of the DSU.

Ecuador further asks pursuant to DSU Article 6.1, fn. 5, that a special meeting of the DSB be convened within 15 days for the purpose of considering Ecuador's request for the establishment of a panel.

[17] *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 of the DSU by Ecuador*, WT/DS27/65/Rev.1, 29 November 2006.

ANNEX A-2

WORKING PROCEDURES FOR THE PANEL DATED 29 JUNE 2007

1. In its proceedings the Panel shall follow the relevant provisions of the Dispute Settlement Understanding (DSU). In addition, the following Working Procedures shall apply.

2. The Panel will provide the Parties[1] and Third Parties[2] with a timetable for its proceedings. The timetable may be modified by the Panel as appropriate, after having consulted the Parties.

3. The Panel shall meet in closed session. The Parties, and interested Third Parties, shall be present at the meetings only when invited by the Panel to appear before it.

4. The deliberations of the Panel and the documents submitted to it shall be kept confidential. Nothing in the DSU, nor in these Working Procedures, precludes a Party or a Third Party from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted by another Member to the Panel which that Member has designated as confidential. As provided in Article 18.2 of the DSU, where a Party submits a confidential version of its written submissions to the Panel, it shall also, upon request of the other Party, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public. Non-confidential summaries shall be normally submitted no later than one week after the written submission is presented to the Panel, unless a different deadline is granted by the Panel upon a showing of good cause.

5. Before the substantive meeting of the Panel with the Parties, and in accordance with the timetable approved by the Panel, the Parties shall transmit to the Panel written submissions and subsequently written rebuttals in which they present the facts of the case, their arguments and their counter-arguments, respectively. Third Parties may transmit to the Panel written submissions after the rebuttals of the Parties have been submitted, and in accordance with the timetable approved by the Panel.

6. All Third Parties shall be invited in writing to present their views during the substantive meeting of the Panel with the Parties and the Third Parties. Third Parties may be present during the entirety of that meeting.

7. At its substantive meeting with the Parties, the Panel shall ask Ecuador to present its case first. Subsequently, and still at the same meeting, the European Communities will be asked to present its arguments. At the same meeting, Third Parties will be asked to present their views thereafter. Parties will then be allowed an opportunity for final statements, with Ecuador presenting its statement first.

8. The Panel may at any time put questions to the Parties and to the Third Parties and ask them for explanations either in the course of the substantive meeting or afterwards in writing. Replies to questions shall be submitted in writing by the dates specified by the Panel after consultation with the Parties. In addition, the Parties shall be permitted to ask questions to each other and to Third Parties.

[1] Throughout this document, the term "Party" refers to either Ecuador or European Communities, as appropriate. The term "Parties" refers to both Ecuador and European Communities.

[2] Throughout the document, the term "Third Parties" refers to Belize, Brazil, Cameroon, Colombia, Côte d'Ivoire, Dominica, the Dominican Republic, Ghana, Jamaica, Japan, Madagascar, Nicaragua, Panama, St. Lucia, St. Vincent & the Grenadines, Suriname and the United States.

Third Parties may ask oral questions to the Parties during the course of the substantive meeting, but Parties are under no obligation to respond to those questions.

9. Each Party shall make available to the Panel and to the other Party a written version of its oral statements, preferably at the end of the meeting with the Panel, and in any event no later than the working day following the presentation. Any Third Party that wishes to present its views shall similarly make available to the Panel and to the Parties and other Third Parties a written version of its oral statements, preferably at the end of the meeting with the Panel, and in any event no later than the working day following the presentation. Parties and Third Parties shall provide the Panel and other participants at the respective session with a provisional written version of their oral statements before these statements are made.

10. In the interests of full transparency, oral presentations shall be made in the presence of the Parties. Moreover, each Party's written submissions, including replies to questions put by the Panel, shall be made available to the other Party. Third Parties shall receive copies of the Parties' first written submissions and rebuttals as well as copies of the questions posed by the Panel to the Parties and to the other Third Parties and copies of Parties' and Third Parties' responses to such questions. Parties shall submit all factual evidence to the Panel as early as possible and no later than during the substantive meeting, except with respect to evidence necessary for the answering of questions. Exceptions will be granted by the Panel upon a showing of good cause. In such cases, the other Party shall be accorded a period of time for commenting, as appropriate.

11. Within seven (7) calendar days following the submission of a written submission or presentation of an oral statement to the Panel, the Parties should provide the Panel with an executive summary of the submission or statement. These executive summaries will be used by the Panel only for the purpose of drafting a concise factual and arguments section of the Panel Report so as to facilitate timely translation and circulation of the Panel report to the Members. They shall not serve in any way as a substitute for the submissions of the parties. Each summary to be provided by each Party shall not exceed ten (10) pages in length. Third Parties are invited to also submit an executive summary seven (7) calendar days after delivering their written submission or oral statement. Third Parties' executive summaries shall not exceed three (3) pages in length. The Panel may, in light of further developments, allow the Parties and Third Parties to submit longer summaries.

12. To facilitate the maintenance of the record of the dispute, and to maximize the clarity of submissions, in particular the references to exhibits submitted by Parties, Parties shall sequentially number their exhibits throughout the course of the dispute. For example, exhibits submitted by Ecuador should be numbered ECU-1, ECU-2, etc. If the last exhibit in connection with the first submission was numbered ECU-5, the first exhibit of the next submission thus should be numbered ECU-6. Exhibits submitted by the European Communities should be numbered EC-1, EC-2, etc.

13. The Parties and Third Parties to this proceeding have the right to determine the composition of their own delegations. Delegations may include as representatives of the government concerned, private counsel and advisers. The Parties and Third Parties shall have responsibility for all members of their delegation and shall ensure that all members of their delegation, as well as any other advisers consulted by a Party or Third Party, act in accordance with the rules of the DSU and the Working Procedures of this Panel, particularly in regard to the confidentiality of the proceedings. Parties shall provide a list of the participants of their delegation to the Secretary of the Panel and to each other no later than 5.00 pm, local Geneva time, the working day before any meeting with the Panel.

14. The Panel reserves the right to earmark its communications to enable the identification of possible breaches of confidentiality, especially the Panel's interim report and its final report before the latter's circulation to all Members.

15. Any request for a preliminary ruling (including rulings on jurisdictional issues) to be made by the Panel shall be submitted no later than in a Party's first written submission. If Ecuador requests any such ruling, the European Communities shall submit its response to such a request in its first written submission. If the European Communities requests any such ruling, Ecuador shall submit its response to such a request in its rebuttal submission. Exceptions to this procedure will be granted upon a showing of good cause. The Panel shall inform the Parties promptly of any preliminary rulings it might make in the course of the proceedings. In addition, the Panel may also choose to inform third parties of such preliminary rulings, if it deems it relevant.

16. The following procedures regarding service of documents shall apply:

(a) Each Party shall serve its submissions directly on the other Party. Each Party shall, in addition, serve its first written submission, rebuttals, and its responses to the questions by the Panel and by the other Party on Third Parties. Each Third Party shall serve its submissions on the Parties and other Third Parties. Each Party and Third Party shall confirm in writing, at the time it provides the submission to the Secretariat, that copies have been served as required.

(b) The Parties and Third Parties shall provide their written submissions to the Panel, through the Secretariat, by 5.00 p.m., local Geneva time, on the deadlines established by the Panel.

(c) Parties and Third Parties shall provide the Secretariat with written copies of their oral statements on the first working day following the date of the presentation.

(d) The Parties and Third Parties shall provide the Secretariat with two (2) paper copies of all their submissions as well as an "electronic" copy on a CD-ROM, diskette or as an e-mail attachment, in a format compatible with the Secretariat's software. Paper copies shall be delivered to the Dispute Settlement Registrar, ***** (Room 2150). Electronic copies should be sent by e-mail to ***** at Dsregistry@wto.org; ***** at *****@wto.org; ***** at *****@wto.org; -***** at *****@wto.org; and ***** at *****@wto.org.

(e) The Panel will provide Parties with an electronic version of the descriptive sections of its draft report, the interim report and the final report, as well as of other documents, as appropriate. When the Panel transmits to the Parties or Third Parties both paper and electronic versions of a document, the paper version shall constitute the official version for the purposes of the record of the dispute.

17. These Working Procedures may be modified by the Panel as appropriate, after having consulted the Parties.

ANNEX A-3

REVISED WORKING PROCEDURES FOR THE PANEL DATED 23 AUGUST 2007

1. In its proceedings the Panel shall follow the relevant provisions of the Dispute Settlement Understanding (DSU). In addition, the following Working Procedures shall apply.

2. The Panel will provide the Parties[1] and Third Parties[2] with a timetable for its proceedings. The timetable may be modified by the Panel as appropriate, after having consulted the Parties.

3. The Panel shall meet in closed session. The Parties, and interested Third Parties, shall be present at the meetings only when invited by the Panel to appear before it.

4. The deliberations of the Panel and the documents submitted to it shall be kept confidential. Nothing in the DSU, nor in these Working Procedures, precludes a Party or a Third Party from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted by another Member to the Panel which that Member has designated as confidential. As provided in Article 18.2 of the DSU, where a Party submits a confidential version of its written submissions to the Panel, it shall also, upon request of the other Party, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public. Non-confidential summaries shall be normally submitted no later than one week after the written submission is presented to the Panel, unless a different deadline is granted by the Panel upon a showing of good cause.

5. Before the substantive meeting of the Panel with the Parties, and in accordance with the timetable approved by the Panel, the Parties shall transmit to the Panel written submissions and subsequently written rebuttals in which they present the facts of the case, their arguments and their counter-arguments, respectively. Third Parties may transmit to the Panel written submissions after the rebuttals of the Parties have been submitted, and in accordance with the timetable approved by the Panel.

6. All Third Parties shall be invited in writing to present their views during the substantive meeting of the Panel with the Parties and the Third Parties. Third Parties may be present during the entirety of that meeting.

7. At its substantive meeting with the Parties, the Panel shall ask Ecuador to present its case first. Subsequently, and still at the same meeting, the European Communities will be asked to present its arguments. At the same meeting, Third Parties will be asked to present their views thereafter. Parties will then be allowed an opportunity for final statements, with Ecuador presenting its statement first.

8. The Panel may decide to hold meetings with the Parties jointly with the Panel in the case of *European Communities – Regime for the Importation, Sale and Distribution of Bananas (Recourse to Article 21.5 of the DSU by the United States)*. In that case, the order in which Members will be asked to make their statements will be decided by the Panel.

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[1] Throughout this document, the term "Party" refers to either Ecuador or European Communities, as appropriate. The term "Parties" refers to both Ecuador and European Communities.

[2] Throughout the document, the term "Third Parties" refers to Belize, Brazil, Cameroon, Colombia, Côte d'Ivoire, Dominica, the Dominican Republic, Ghana, Jamaica, Japan, Madagascar, Nicaragua, Panama, St. Lucia, St. Vincent & the Grenadines, Suriname and the United States.

9. The Panel may at any time put questions to the Parties and to the Third Parties and ask them for explanations either in the course of the substantive meeting or afterwards in writing. Replies to questions shall be submitted in writing by the dates specified by the Panel after consultation with the Parties. In addition, the Parties shall be permitted to ask questions to each other and to Third Parties. Third Parties may ask oral questions to the Parties during the course of the substantive meeting, but Parties are under no obligation to respond to those questions.

10. Each Party shall make available to the Panel and to the other Party a written version of its oral statements, preferably at the end of the meeting with the Panel, and in any event no later than the working day following the presentation. Any Third Party that wishes to present its views shall similarly make available to the Panel and to the Parties and other Third Parties a written version of its oral statements, preferably at the end of the meeting with the Panel, and in any event no later than the working day following the presentation. Parties and Third Parties shall provide the Panel and other participants at the respective session with a provisional written version of their oral statements before these statements are made.

11. In the interests of full transparency, oral presentations shall be made in the presence of the Parties. Moreover, each Party's written submissions, including replies to questions put by the Panel, shall be made available to the other Party. Third Parties shall receive copies of the Parties' first written submissions and rebuttals as well as copies of the questions posed by the Panel to the Parties and to the other Third Parties and copies of Parties' and Third Parties' responses to such questions. Parties shall submit all factual evidence to the Panel as early as possible and no later than during the substantive meeting, except with respect to evidence necessary for the answering of questions. Exceptions will be granted by the Panel upon a showing of good cause. In such cases, the other Party shall be accorded a period of time for commenting, as appropriate.

12. Within seven (7) calendar days following the submission of a written submission or presentation of an oral statement to the Panel, the Parties should provide the Panel with an executive summary of the submission or statement. These executive summaries will be used by the Panel only for the purpose of drafting a concise factual and arguments section of the Panel Report so as to facilitate timely translation and circulation of the Panel report to the Members. They shall not serve in any way as a substitute for the submissions of the parties. Each summary to be provided by each Party shall not exceed ten (10) pages in length. Third Parties are invited to also submit an executive summary seven (7) calendar days after delivering their written submission or oral statement. Third Parties' executive summaries shall not exceed three (3) pages in length. The Panel may, in light of further developments, allow the Parties and Third Parties to submit longer summaries.

13. To facilitate the maintenance of the record of the dispute, and to maximize the clarity of submissions, in particular the references to exhibits submitted by Parties, Parties shall sequentially number their exhibits throughout the course of the dispute. For example, exhibits submitted by Ecuador should be numbered ECU-1, ECU-2, etc. If the last exhibit in connection with the first submission was numbered ECU-5, the first exhibit of the next submission thus should be numbered ECU-6. Exhibits submitted by the European Communities should be numbered EC-1, EC-2, etc.

14. The Parties and Third Parties to this proceeding have the right to determine the composition of their own delegations. Delegations may include as representatives of the government concerned, private counsel and advisers. The Parties and Third Parties shall have responsibility for all members of their delegation and shall ensure that all members of their delegation, as well as any other advisers consulted by a Party or Third Party, act in accordance with the rules of the DSU and the Working Procedures of this Panel, particularly in regard to the confidentiality of the proceedings. Parties shall provide a list of the participants of their delegation to the Secretary of the Panel and to each other no later than 5.00 pm, local Geneva time, the working day before any meeting with the Panel.

15. The Panel reserves the right to earmark its communications to enable the identification of possible breaches of confidentiality, especially the Panel's interim report and its final report before the latter's circulation to all Members.

16. Any request for a preliminary ruling (including rulings on jurisdictional issues) to be made by the Panel shall be submitted no later than in a Party's first written submission. If Ecuador requests any such ruling, the European Communities shall submit its response to such a request in its first written submission. If the European Communities requests any such ruling, Ecuador shall submit its response to such a request in its rebuttal submission. Exceptions to this procedure will be granted upon a showing of good cause. The Panel shall inform the Parties promptly of any preliminary rulings it might make in the course of the proceedings. In addition, the Panel may also choose to inform third parties of such preliminary rulings, if it deems it relevant.

17. The following procedures regarding service of documents shall apply:

(a) Each Party shall serve its submissions directly on the other Party. Each Party shall, in addition, serve its first written submission, rebuttals, and its responses to the questions by the Panel and by the other Party on Third Parties. Each Third Party shall serve its submissions on the Parties and other Third Parties. Each Party and Third Party shall confirm in writing, at the time it provides the submission to the Secretariat, that copies have been served as required.

(b) In the light of the particular circumstances of this case, the Panel may decide to copy, as appropriate, the complainant in the case of *European Communities – Regime for the Importation, Sale and Distribution of Bananas (Recourse to Article 21.5 of the DSU by the United States*) on communications directed to the Parties.

(c) The Parties and Third Parties shall provide their written submissions to the Panel, through the Secretariat, by 5.00 p.m., local Geneva time, on the deadlines established by the Panel.

(d) Parties and Third Parties shall provide the Secretariat with written copies of their oral statements on the first working day following the date of the presentation.

(e) The Parties and Third Parties shall provide the Secretariat with two (2) paper copies of all their submissions as well as an "electronic" copy on a CD-ROM, diskette or as an e-mail attachment, in a format compatible with the Secretariat's software. Paper copies shall be delivered to the Dispute Settlement Registrar, ***** (Room 2150). Electronic copies should be sent by e-mail to ***** at DSregistry@wto.org; ***** at *****@wto.org; ***** at *****@wto.org; ***** at ***** @wto.org; and ***** at *****@wto.org.

(f) The Panel will provide Parties with an electronic version of the descriptive sections of its draft report, the interim report and the final report, as well as of other documents, as appropriate. When the Panel transmits to the Parties or Third Parties both paper and electronic versions of a document, the paper version shall constitute the official version for the purposes of the record of the dispute.

18. These Working Procedures may be modified by the Panel as appropriate, after having consulted the Parties.

ANNEX B

ANNEX B-1

NOTIFICATION OF A MUTUALLY AGREED SOLUTION

WORLD TRADE ORGANIZATION

WT/DS27/58
2 July 2001

(01-3276)

Original: English

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

Notification of Mutually Agreed Solution

The following communication, dated 22 June 2001, from the Permanent Delegation of the European Commission to the Chairman of the Dispute Settlement Body, is circulated pursuant to Article 3.6 of the DSU.

The European Communities (EC) wish to notify the Dispute Settlement Body (DSB) that they have reached, with the United States of America and Ecuador, a mutually satisfactory solution within the meaning of Article 3.6 of the DSU regarding the implementation by the EC of the conclusions and recommendations adopted by the DSB in the dispute "Regime for the importation, sale and distribution of bananas" (WT/DS27).

Please find attached the text of the Understandings reached between the EC and the United States and between the EC and Ecuador, respectively on 11 April 2001 and 30 April 2001, which constitute a mutually agreed solution to the bananas dispute.

I would be grateful if you could circulate a copy of this letter with its enclosures to the WTO Members.

Enclosure 1: Understanding on Bananas between the EC and the United States of 11 April 2001

A. The European Commission and the United States have identified the means by which the long-standing dispute over the EC's banana import regime can be resolved.

B. In accordance with Article 16(1) of Regulation No. (EC) 404/93 (as amended by Regulation No. (EC) 216/2001), the European Communities (EC) will introduce a Tariff Only regime for imports of bananas no later than 1 January 2006.

C. In the interim, the EC will implement an import regime on the basis of historical licensing as follows :

1. Effective 1 July 2001, the EC will implement an import regime on the basis of historical licensing as set out in Annex 1.

2. Effective as soon as possible thereafter, subject to Council and European Parliament approval and to adoption of the Article XIII waiver referred to in paragraph E, the EC will implement an import regime on the basis of historical licensing as set out in Annex 2. The Commission will seek to obtain the implementation of such an import regime as soon as possible.

D. With respect to the United States' imposition of increased duties applied to certain EC products as of 19 April 1999 covering trade in an amount of US$191.4 million per year (the "increased duties"):

1. Upon implementation of the import regime described in paragraph C(1), the United States will provisionally suspend its imposition of the increased duties.

2. Upon implementation of the import regime described in paragraph C(2), the United States will terminate its imposition of the increased duties.

3. The United States may reimpose the increased duties if the import regime described in paragraph C(2) does not enter into force by 1 January 2002.

E. The United States will lift its reserve concerning the waiver of Article I of the GATT 1994 that the EC has requested for preferential access to the EC of goods originating in ACP states signatory to the Cotonou Agreement; and will actively work towards promoting the acceptance of an EC request for a waiver of Article XIII of the GATT 1994 needed for the management of quota C under the import regime described in paragraph C(2) until 31 December 2005.

F. The EC and the United States have informed Ecuador and will cooperate in seeking the agreement of all parties.

Annex I

Phase I

1. A bound tariff-rate quota (TRQ) designated as quota "A" will be set at 2,200,000 tonnes. An autonomous TRQ designated as quota "B" will be set at 353,000 tonnes. These TRQs will be managed as one, with the total quota being 2,553,000 tonnes. There is no expectation of allocation of shares of either of these TRQs among country suppliers, and the Commission will not seek to convene a meeting to that effect of the principal supplying countries except upon the joint request of all such countries. The tariff applied to bananas imported in the "A" and "B" quotas shall not exceed 75 euro/tonne.

2. A TRQ designated as quota "C" will be set at 850,000 tonnes.

3. Import licenses for 83% of the "A" and "B" TRQs will be distributed to "traditional" operators based on each qualified "traditional" operator's 1994-96 average annual final reference volume ("reference volume") for the "A/B" quotas. Qualified "traditional" operators will be identified on the basis of the distribution of licenses that occurred under Regulation 404, Article 19.1(a) and Regulation 1442, Article 3.1(a) for "Category A subfunction (a)". Importers will not need to produce new evidence.

4. Licenses for TRQ "C" are intended to be distributed broadly in accordance with the principles to be utilized in managing of licenses for TRQ's "A" and "B" and on the basis of imports of ACP-origin bananas. The European Commission and the United States will consult again within 4 weeks with a view to finalizing the licensing principles for TRQ "C".

5. Within each TRQ, licenses may be used to import bananas from any source. Licenses to import bananas into TRQ "C" cannot be used to import bananas into TRQs "A" or "B", and vice versa.

6. A "non-traditional" operator category will be created with respect to 17% of the quantity of the "A and B" TRQs. Non-traditional operators cannot become traditional operators in subsequent periods. Management of non-traditional imports will be done by simultaneous examination.

7. The licensing regime will be administered in good faith and on a non-discriminatory basis.

8. The Commission will provide the United States as soon as possible the verified statistics confirming the implementation of this phase, taking into account the protection of business confidential information.

Annex II

Phase II

1. During Phase II, the provisions applying to Phase I will continue, except as provided in this Annex.

2. In Phase II, TRQ "B" will be 453,000 tonnes (an increase of 100,000 tonnes). The total for the "A" and "B" TRQs will be 2,653,000 tonnes.

3. The TRQ "C" will be 750,000 tonnes and will be reserved for bananas of ACP origin.

4. The share of import licenses to "traditional" operators for the "A" and "B" TRQs will be allocated in accordance with the procedure in Annex I. Import licenses will be distributed based on each qualified "traditional" operator's 1994-96 reference volume through 31 December 2003. Thereafter, the share of import licenses to "traditional" operators for the "A" and "B" TRQs will be allocated based only on usage of licenses issued under Phase II of this Understanding, through credible documentation.

5. The Commission will provide the United States as soon as possible the verified statistics confirming the implementation of this phase, taking into account the protection of business confidential information.

Enclosure 2: Understanding on Bananas between the EC and Ecuador of 30 April 2001

A. The European Commission and Ecuador have identified the means by which the long-standing dispute over the EC's banana import regime can be resolved.

B. In accordance with Article 16(1) of Regulation No. (EC) 404/93 (as amended by Regulation No. (EC) 216/2001), the European Communities (EC) will introduce a Tariff Only regime for imports of bananas no later than 1 January 2006. GATT Art XXVIII negotiations shall be initiated in good time to that effect, recognizing Ecuador as the principal supplier in these negotiations.

C. In the interim, the EC will implement an import regime on the basis of historical licensing as follows :

1. Effective 1 July 2001, the EC will implement an import regime on the basis of historical licensing as set out in Annex 1.

2. Effective as soon as possible thereafter, subject to Council and European Parliament approval and to adoption of the Article XIII waiver referred to in paragraph F, the EC will implement an import regime on the basis of historical licensing as set out in Annex 2. The Commission will seek to obtain the implementation of such an import regime as soon as possible.

D. Ecuador takes note that the European Commission will examine the trade in organic bananas and report accordingly by 31 December 2004.

E. Upon implementation of the import regime described in paragraph C, Ecuador's right to suspend concessions or other obligations of a level not exceeding US$201.6 million per year vis-à-vis the EC will be terminated.

F. Ecuador will lift its reserve concerning the waiver of Article I of the GATT 1994 that the EC has requested for preferential access to the EC of goods originating in ACP states signatory to the Cotonou Agreement; and will actively work towards promoting the acceptance of an EC request for a waiver of Article XIII of the GATT 1994 needed for the management of quota C under the import regime described in paragraph C(2) until 31 December 2005.

G. The EC and Ecuador consider that this Understanding constitutes a mutually agreed solution to the banana dispute.

Annex I

Phase I

1. A bound tariff-rate quota (TRQ) designated as quota "A" will be set at 2,200,000 tonnes. An autonomous TRQ designated as quota "B" will be set at 353,000 tonnes. These TRQs will be managed as one, with the total quota being 2,553,000 tonnes. There is no expectation of allocation of shares of either of these TRQs among country suppliers, and the Commission will not seek to convene a meeting to that effect of the principal supplying countries except upon the joint request of all such countries. The tariff applied to bananas imported in the "A" and "B" quotas shall not exceed 75 euro/tonne.

2. A TRQ designated as quota "C" will be set at 850,000 tonnes.

3. Import licenses for 83% of the "A" and "B" TRQs will be distributed to "traditional" operators based on each qualified "traditional" operator's 1994-96 average final reference volume ("reference volume") for the "A/B" quotas. Qualified "traditional" operators will be identified on the basis of the distribution of licenses that occurred under Regulation 404, Article 19.1(a) and Regulation 1442, Article 3.1(a) for "Category A subfunction (a)". Importers will not need to produce new evidence.

4. Licenses for TRQ "C" are intended to be distributed broadly in accordance with the principles to be utilized in managing of licenses for TRQ's "A" and "B" and on the basis of imports of ACP-origin bananas.

5. Within each TRQ, licenses may be used to import bananas from any source. Licenses to import bananas into TRQ "C" cannot be used to import bananas into TRQs "A" and "B", and vice versa.

6. A "non-traditional" operator category will be created with respect to 17% of the quantity of the "A and B" TRQs. Non-traditional operators cannot become traditional operators in subsequent periods.

7. Management of non-traditional operators will be done by simultaneous examination, respecting the following conditions:

   (a) the activity period to consider for registration shall be 2 years;

   (b) the minimum annual customs value of imports into the EU to qualify shall be 1.2 million € ;

   (c) traditional importers in Quota C may only qualify as non-traditional importers in Quota A/B when they prove that they imported bananas from third countries other than ACP in the relevant period;

   (d) in application for licenses, the maximum requested quantities for each non-traditional operator shall be not higher than 12.5% of the quantity reserved for non-traditional operators;

   (e) a security of 150€/t shall be required;

(f) a non-traditional operator shall be required to be responsible for shipping bananas to the EU;

(g) simultaneous examination shall be conducted in a pro-rata basis;

(h) dissuasive penalties shall apply in the event that a traditional operator be found to be controlling a non-traditional operator within the same Quota;

(i) transmissibility of licenses between non-traditional operators will be permitted.

8. The licensing regime will be administered in good faith and on a non-discriminatory basis.

Annex II

Phase II

1. During Phase II, the provisions applying to Phase I will continue, except as provided in this Annex.

2. In Phase II, TRQ "B" will be 453,000 tonnes (an increase of 100,000 tonnes). The total for the "A" and "B" TRQs will be 2,653,000 tonnes.

3. The TRQ "C" will be 750,000 tonnes and will be reserved for bananas of ACP origin.

4. The share of import licenses to "traditional" operators for the "A" and "B" TRQs will be allocated in accordance with the procedure in Annex I. Import licenses will be distributed based on each qualified "traditional" operator's 1994-96 reference volume through 31 December 2003. Thereafter, the share of import licenses to "traditional" operators for the "A" and "B" TRQs will be allocated based only on usage of licenses issued under Phase II of this Understanding, through credible documentation.

5. The Commission will provide regularly the verified statistics on the importation of bananas from Ecuador.

ANNEX B-2

COMMUNICATION FROM THE UNITED STATES

WORLD TRADE ORGANIZATION

WT/DS27/59
G/C/W/270
2 July 2001

(01-3275)

Original: English

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

Communication from the United States

The following communication, dated 26 June 2001, from the Permanent Mission of the United States to the Chairman of the Dispute Settlement Body, is circulated at the request of that delegation.

For the information of all Members, please find attached the text of the Understanding reached between the European Communities (EC) and the United States on 11 April 2001.

We have received and reviewed the EC's separate notification of 22 June 2001, to the Dispute Settlement Body (DSB) of our Understanding on bananas. As we have explained to the EC during bilateral discussions last week and indicated at meetings of the DSB, the Understanding identifies the means by which the long-standing dispute over the EC's banana import regime can be resolved, but, as is obvious from its own text, it does not in itself constitute a mutually agreed solution pursuant to Article 3.6 of the DSU. In addition, in view of the steps yet to be taken by all parties, it would also be premature to take this item off the DSB agenda.

The United States very much looks forward to the prospect of a resolution to this long-standing dispute, and we will of course continue to be pleased to consult with the Commission and other interested parties as the EC proceeds with implementing its regulations in accordance with the Understanding.

Understanding on Bananas

A. The European Commission and the United States have identified the means by which the long-standing dispute over the EC's banana import regime can be resolved.

B. In accordance with Article 16(1) of Regulation No. (EC) 404/93 (as amended by Regulation No. (EC) 216/2001), the European Communities (EC) will introduce a Tariff Only regime for imports of bananas no later than 1 January 2006.

C. In the interim, the EC will implement an import regime on the basis of historical licensing as follows :

1. Effective 1 July 2001, the EC will implement an import regime on the basis of historical licensing as set out in Annex 1.

2. Effective as soon as possible thereafter, subject to Council and European Parliament approval and to adoption of the Article XIII waiver referred to in paragraph E, the EC will implement an import regime on the basis of historical licensing as set out in Annex 2. The Commission will seek to obtain the implementation of such an import regime as soon as possible.

D. With respect to the United States' imposition of increased duties applied to certain EC products as of 19 April 1999 covering trade in an amount of US$191.4 million per year (the "increased duties"):

1. Upon implementation of the import regime described in paragraph C(1), the United States will provisionally suspend its imposition of the increased duties.

2. Upon implementation of the import regime described in paragraph C(2), the United States will terminate its imposition of the increased duties.

3. The United States may reimpose the increased duties if the import regime described in paragraph C(2) does not enter into force by 1 January 2002.

E. The United States will lift its reserve concerning the waiver of Article I of the GATT 1994 that the EC has requested for preferential access to the EC of goods originating in ACP states signatory to the Cotonou Agreement; and will actively work towards promoting the acceptance of an EC request for a waiver of Article XIII of the GATT 1994 needed for the management of quota C under the import regime described in paragraph C(2) until 31 December 2005.

F. The EC and the United States have informed Ecuador and will cooperate in seeking the agreement of all parties.

Annex I

Phase I

1. A bound tariff-rate quota (TRQ) designated as quota "A" will be set at 2,200,000 tonnes. An autonomous TRQ designated as quota "B" will be set at 353,000 tonnes. These TRQs will be managed as one, with the total quota being 2,553,000 tonnes. There is no expectation of allocation of shares of either of these TRQs among country suppliers, and the Commission will not seek to convene a meeting to that effect of the principal supplying countries except upon the joint request of all such countries. The tariff applied to bananas imported in the "A" and "B" quotas shall not exceed 75 euro/tonne.

2. A TRQ designated as quota "C" will be set at 850,000 tonnes.

3. Import licenses for 83% of the "A" and "B" TRQs will be distributed to "traditional" operators based on each qualified "traditional" operator's 1994-96 average annual final reference volume ("reference volume") for the "A/B" quotas. Qualified "traditional" operators will be identified on the basis of the distribution of licenses that occurred under Regulation 404, Article 19.1(a) and Regulation 1442, Article 3.1(a) for "Category A subfunction (a)". Importers will not need to produce new evidence.

4. Licenses for TRQ "C" are intended to be distributed broadly in accordance with the principles to be utilized in managing of licenses for TRQ's "A" and "B" and on the basis of imports of ACP-origin bananas. The European Commission and the United States will consult again within 4 weeks with a view to finalizing the licensing principles for TRQ "C".

5. Within each TRQ, licenses may be used to import bananas from any source. Licenses to import bananas into TRQ "C" cannot be used to import bananas into TRQs "A" or "B", and vice versa.

6. A "non-traditional" operator category will be created with respect to 17% of the quantity of the "A and B" TRQs. Non-traditional operators cannot become traditional operators in subsequent periods. Management of non-traditional imports will be done by simultaneous examination.

7. The licensing regime will be administered in good faith and on a non-discriminatory basis.

8. The Commission will provide the United States as soon as possible the verified statistics confirming the implementation of this phase, taking into account the protection of business confidential information.

Annex II

Phase II

1. During Phase II, the provisions applying to Phase I will continue, except as provided in this Annex.

2. In Phase II, TRQ "B" will be 453,000 tonnes (an increase of 100,000 tonnes). The total for the "A" and "B" TRQs will be 2,653,000 tonnes.

3. The TRQ "C" will be 750,000 tonnes and will be reserved for bananas of ACP origin.

4. The share of import licenses to "traditional" operators for the "A" and "B" TRQs will be allocated in accordance with the procedure in Annex I. Import licenses will be distributed based on each qualified "traditional" operator's 1994-96 reference volume through 31 December 2003. Thereafter, the share of import licenses to "traditional" operators for the "A" and "B" TRQs will be allocated based only on usage of licenses issued under Phase II of this Understanding, through credible documentation.

5. The Commission will provide the United States as soon as possible the verified statistics confirming the implementation of this phase, taking into account the protection of business confidential information.

ANNEX B-3

**UNDERSTANDING ON BANANAS
BETWEEN ECUADOR AND THE EC**

WORLD TRADE ORGANIZATION

**WT/DS27/60
G/C/W/274**
9 July 2001
(01-3398)

Original: English

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

Understanding on Bananas between Ecuador and the EC

The following communication, dated 3 July 2001, from the Permanent Mission of Ecuador to the Chairman of the Dispute Settlement Body, is circulated at the request of that delegation.

For the information of all WTO members, please find attached the text of the Understanding on Bananas reached by Ecuador and the European Communities on 30 April 2001.

After a careful analysis on how best to present this Understanding to the membership of the Organization, having reviewed the separate notification made unilaterally by the EC on 22 June 2001 (WT/DS27/58), and bearing in mind the subsequent discussions maintained with the EC after the Understanding was reached, Ecuador considers it necessary to put forward the following comments for the Members' consideration.

1. The Understanding identifies means by which a long-standing dispute can be resolved. However, the Understanding also comprises of the execution of two phases and requires the implementation of several key features, which demands the collective action of the WTO membership. As Ecuador has expressed during the last two meetings of the DSB, it will remain vigilant that these phases and elements be fully implemented and executed.

2. Once the EC has amended its banana import regime - which was found to be WTO inconsistent by the original panel that reviewed the case as a result of Ecuador's recourse to Article 21.5 of the DSU (WT/DS27/RW/ECU) - Ecuador notes that the Understanding reached with the EC refers to the current banana import regime in force as of 1 July 2001 as one of a transitory nature since, beginning at the latest on 1 January 2006, a new and definitive Tariff Only regime will be in force.

3. Since the new EC banana import regime which is currently in force still requires that several steps be taken in the context of the DSB and other WTO bodies, it would be premature to take

this item off the DSB agenda which considers this issue at every regular meeting pursuant to Article 21.6 of the DSU.

In light of the above and although Ecuador sees the Understanding as an agreed solution which can contribute to an overall, definite and universally accepted solution, it must be made clear that the provisions of Article 3.6 of the DSU are not applicable in this case.

We request that you please circulate a copy of this letter with its attachment to all WTO Members and request that the Secretariat provide a copy of these documents to the Council of Trade in Goods.

Understanding on Bananas

A. The European Commission and Ecuador have identified the means by which the long-standing dispute over the EC's banana import regime can be resolved.

B. In accordance with Article 16(1) of Regulation No. (EC) 404\93 (as amended by Regulation No. (EC) 216\2001), the European Communities (EC) will introduce a Tariff Only regime for imports of bananas no later than 1 January 2006. GATT Art XXVIII negotiations shall be initiated in good time to that effect, recognizing Ecuador as the principal supplier in these negotiations.

C. In the interim, the EC will implement an import regime on the basis of historical licensing as follows :

1. Effective 1 July 2001, the EC will implement an import regime on the basis of historical licensing as set out in Annex 1.

2. Effective as soon as possible thereafter, subject to Council and European Parliament approval and to adoption of the Article XIII waiver referred to in paragraph F, the EC will implement an import regime on the basis of historical licensing as set out in Annex 2. The Commission will seek to obtain the implementation of such an import regime as soon as possible.

D. Ecuador takes note that the European Commission will examine the trade in organic bananas and report accordingly by 31 December 2004.

E. Upon implementation of the import regime described in paragraph C, Ecuador's right to suspend concessions or other obligations of a level not exceeding US$201.6 million per year vis-à-vis the EC will be terminated.

F. Ecuador will lift its reserve concerning the waiver of Article I of the GATT 1994 that the EC has requested for preferential access to the EC of goods originating in ACP States signatory to the Cotonou Agreement; and will actively work towards promoting the acceptance of an EC request for a waiver of Article XIII of the GATT 1994 needed for the management of quota C under the import regime described in paragraph C(2) until 31 December 2005.

G. The EC and Ecuador consider that this Understanding constitutes a mutually agreed solution to the banana dispute.

Annex I

Phase I

1. A bound tariff-rate quota (TRQ) designated as quota "A" will be set at 2,200,000 tonnes. An autonomous TRQ designated as quota "B" will be set at 353,000 tonnes. These TRQs will be managed as one, with the total quota being 2,553,000 tonnes. There is no expectation of allocation of shares of either of these TRQs among country suppliers, and the Commission will not seek to convene a meeting to that effect of the principal supplying countries except upon the joint request of all such countries. The tariff applied to bananas imported in the "A" and "B" quotas shall not exceed 75 euro/tonne.

2. A TRQ designated as quota “C” will be set at 850,000 tonnes.

3. Import licenses for 83% of the "A" and "B" TRQs will be distributed to "traditional" operators based on each qualified "traditional" operator’s 1994-96 average final reference volume ("reference volume") for the “A/B” quotas. Qualified “traditional” operators will be identified on the basis of the distribution of licenses that occurred under Regulation 404, Article 19.1(a) and Regulation 1442, Article 3.1(a) for “Category A subfunction (a)”. Importers will not need to produce new evidence.

4. Licenses for TRQ “C” are intended to be distributed broadly in accordance with the principles to be utilized in managing of licenses for TRQs "A" and "B" and on the basis of imports of ACP-origin bananas.

5. Within each TRQ, licenses may be used to import bananas from any source. Licenses to import bananas into TRQ "C" cannot be used to import bananas into TRQs "A" and "B", and vice versa.

6. A "non-traditional" operator category will be created with respect to 17% of the quantity of the “A and B” TRQs. Non-traditional operators cannot become traditional operators in subsequent periods.

7. Management of non-traditional operators will be done by simultaneous examination, respecting the following conditions:

(a) the activity period to consider for registration shall be 2 years;

(b) the minimum annual customs value of imports into the EU to qualify shall be 1.2 million € ;

(c) traditional importers in Quota C may only qualify as non-traditional importers in Quota A/B when they prove that they imported bananas from third countries other than ACP in the relevant period;

(d) in application for licenses, the maximum requested quantities for each non-traditional operator shall be not higher than 12.5% of the quantity reserved for non-traditional operators;

(e) a security of 150€/t shall be required;

(f) a non-traditional operator shall be required to be responsible for shipping bananas to the EU;

(g) simultaneous examination shall be conducted in a pro-rata basis;

(h) dissuasive penalties shall apply in the event that a traditional operator be found to be controlling a non-traditional operator within the same Quota;

(i) transmissibility of licenses between non-traditional operators will be permitted.

8. The licensing regime will be administered in good faith and on a non-discriminatory basis.

Annex II

Phase II

1. During Phase II, the provisions applying to Phase I will continue, except as provided in this Annex.

2. In Phase II, TRQ "B" will be 453,000 tonnes (an increase of 100,000 tonnes). The total for the "A" and "B" TRQs will be 2,653,000 tonnes.

3. The TRQ "C" will be 750,000 tonnes and will be reserved for bananas of ACP origin.

4. The share of import licenses to "traditional" operators for the "A" and "B" TRQs will be allocated in accordance with the procedure in Annex I. Import licenses will be distributed based on each qualified "traditional" operator's 1994-96 reference volume through December 31, 2003. Thereafter, the share of import licenses to "traditional" operators for the "A" and "B" TRQs will be allocated based only on usage of licenses issued under Phase II of this Understanding, through credible documentation.

5. The Commission will provide regularly the verified statistics on the importation of bananas from Ecuador.

ANNEX B-4

**THE ACP-EC PARTNERSHIP AGREEMENT
DECISION OF 14 NOVEMBER 2001**

WORLD TRADE ORGANIZATION

WT/MIN(01)/15
14 November 2001

(01-5786)

MINISTERIAL CONFERENCE
Fourth Session
Doha, 9 - 14 November 2001

EUROPEAN COMMUNITIES – THE ACP-EC PARTNERSHIP AGREEMENT

Decision of 14 November 2001

The Ministerial Conference,

Having regard to paragraphs 1 and 3 of Article IX of the Marrakech Agreement Establishing the World Trade Organisation (the "WTO Agreement"), the Guiding Principles to be followed in considering applications for waivers adopted on 1 November 1956 (BISD 5S/25), the Understanding in Respect to Waivers of Obligations under the General Agreement on Tariffs and Trade 1994, paragraph 3 of Article IX of the WTO Agreement, and Decision-Making Procedures under Articles IX and XII of the WTO Agreement agreed by the General Council (WT/L/93);

Taking note of the request of the European Communities (EC) and of the Governments of the ACP States which are also WTO members (hereinafter also the "Parties to the Agreement") for a waiver from the obligations of the European Communities under paragraph 1 of Article I of the General Agreement with respect to the granting of preferential tariff treatment for products originating in ACP States as required by Article 36.3, Annex V and its Protocols of the ACP-EC Partnership Agreement (hereinafter also referred to as "the Agreement")[1];

Considering that, in the field of trade, the provisions of the ACP-EC Partnership Agreement requires preferential tariff treatment by the EC of exports of products originating in the ACP States;

Considering that the Agreement is aimed at improving the standard of living and economic development of the ACP States, including the least developed among them;

Considering also that the preferential tariff treatment for products originating in ACP States as required by Article 36.3, Annex V and its Protocols of the Agreement is designed to promote the expansion of trade and economic development of beneficiaries in a manner consistent with the

[1] As contained in documents G/C/W/187, G/C/W/204, G/C/W/254 and G/C/W/269).

objectives of the WTO and with the trade, financial and development needs of the beneficiaries and not to raise undue barriers or to create undue difficulties for the trade of other members;

Considering that the Agreement establishes a preparatory period extending until 31 December 2007, by the end of which new trading arrangements shall be concluded between the Parties to the Agreement;

Considering that the trade provisions of the Agreement have been applied since 1 March 2000 on the basis of transitional measures adopted by the ACP-EC joint institutions;

Noting the assurances given by the Parties to the Agreement that they will, upon request, promptly enter into consultations with any interested member with respect to any difficulty or matter that may arise as a result of the implementation of the preferential tariff treatment for products originating in ACP States as required by Article 36.3, Annex V and its Protocols of the Agreement;

Noting that the tariff applied to bananas imported in the "A" and "B" quotas shall not exceed 75 €/tonne until the entry into force of the new EC tariff-only regime.

Noting that the implementation of the preferential tariff treatment for bananas may be affected as a result of GATT Article XXVIII negotiations;

Noting the assurances from the Parties to the Agreement that any re-binding of the EC tariff on bananas under the relevant GATT Article XXVIII procedures should result in at least maintaining total market access for MFN banana suppliers and their willingness to accept a multilateral control on the implementation of this commitment.

Considering that, in light of the foregoing, the exceptional circumstances justifying a waiver from paragraph 1 of Article I of the General Agreement exist;

Decides as follows:

1. Subject to the terms and conditions set out hereunder, Article I, paragraph 1 of the General Agreement shall be waived, until 31 December 2007, to the extent necessary to permit the European Communities to provide preferential tariff treatment for products originating in ACP States as required by Article 36.3, Annex V and its Protocols of the ACP-EC Partnership Agreement,[2] without being required to extend the same preferential treatment to like products of any other member.

2. The Parties to the Agreement shall promptly notify the General Council of any changes in the preferential tariff treatment to products originating in ACP States as required by the relevant provisions of the Agreement covered by this waiver.

3. The Parties to the Agreement will, upon request, promptly enter into consultations with any interested member with respect to any difficulty or matter that may arise as a result of the implementation of the preferential tariff treatment for products originating in ACP States as required by Article 36.3, Annex V and its Protocols of the Agreement; where a member considers that any benefit accruing to it under the General Agreement may be or is being impaired unduly as a result of such implementation, such consultations shall examine the possibility of action for a satisfactory adjustment of the matter.

[2] Any reference to the Partnership Agreement in this Decision shall also include the period during which the trade provisions of this Agreement are applied on the basis of transitional measures adopted by the ACP-EC joint institutions.

3bis With respect to bananas, the additional provisions in the Annex shall apply.

4. Any member which considers that the preferential tariff treatment for products originating in ACP States as required by Article 36.3, Annex V and its Protocols of the Agreement is being applied inconsistently with this waiver or that any benefit accruing to it under the General Agreement may be or is being impaired unduly as a result of the implementation of the preferential tariff treatment for products originating in ACP States as required by Article 36.3, Annex V and its Protocols of the Agreement and that consultations have proved unsatisfactory, may bring the matter before the General Council**,** which will examine it promptly and will formulate any recommendations that they judge appropriate.

5. The Parties to the Agreement will submit to the General Council an annual report on the implementation of the preferential tariff treatment for products originating in ACP States as required by Article 36.3, Annex V and its Protocols of the Agreement.

6. This waiver shall not preclude the right of affected members to have recourse to Articles XXII and XXIII of the General Agreement.

ANNEX

The waiver would apply for ACP products under the Cotonou Agreement until 31 December 2007. In the case of bananas, the waiver will also apply until 31 December 2007, subject to the following, which is without prejudice to rights and obligations under Article XXVIII.

- The parties to the Cotonou Agreement will initiate consultations with Members exporting to the EU on a MFN basis (interested parties) early enough to finalize the process of consultations under the procedures hereby established at least three months before the entry into force of the new EC tariff only regime.

- No later than 10 days after the conclusion of Article XXVIII negotiations, interested parties will be informed of the EC intentions concerning the rebinding of the EC tariff on bananas. In the course of such consultations, the EC will provide information on the methodology used for such rebinding. In this regard, all EC WTO market-access commitments relating to bananas should be taken into account.

- Within 60 days of such an announcement, any such interested party may request arbitration.

- The arbitrator shall be appointed within 10 days, following the request subject to agreement between the two parties, failing which the arbitrator shall be appointed by the Director-General of the WTO, following consultations with the parties, within 30 days of the arbitration request. The mandate of the arbitrator shall be to determine, within 90 days of his appointment, whether the envisaged rebinding of the EC tariff on bananas would result in at least maintaining total market access for MFN banana suppliers, taking into account the above-mentioned EC commitments.

- If the arbitrator determines that the rebinding would not result in at least maintaining total market access for MFN suppliers, the EC shall rectify the matter. Within 10 days of the notification of the arbitration award to the General Council, the EC will enter into consultations with those interested parties that requested the arbitration. In the absence of a mutually satisfactory solution, the same arbitrator will be asked to determine, within 30 days of the new arbitration request, whether the EC has rectified the matter. The second arbitration award will be notified to the General Council. If the EC has failed to rectify the matter, this waiver shall cease to apply to bananas upon entry into force of the new EC tariff regime. The Article XXVIII negotiations and the arbitration procedures shall be concluded before the entry into force of the new EC tariff only regime on 1 January 2006.

ANNEX B-5

TRANSITIONAL REGIME FOR THE EC AUTONOMOUS TARIFF RATE QUOTAS ON IMPORTS OF BANANAS DECISION OF 14 NOVEMBER 2001

WORLD TRADE ORGANIZATION

WT/MIN(01)/16
14 November 2001

(01-5787)

MINISTERIAL CONFERENCE
Fourth Session
Doha, 9 – 14 November 2001

EUROPEAN COMMUNITIES – TRANSITIONAL REGIME FOR THE EC AUTONOMOUS TARIFF RATE QUOTAS ON IMPORTS OF BANANAS

Decision of 14 November 2001

The Ministerial Conference,

Having regard to the Guiding Principles to be followed in considering applications for waivers adopted on 1 November 1956, the Understanding in Respect of Waivers of Obligations under the General Agreement on Tariffs and Trade 1994, and paragraphs 3 and 4 of Article IX of the Marrakesh Agreement Establishing the World Trade Organization (hereinafter "WTO Agreement");

Taking note of the request of the European Communities for a waiver from its obligations under paragraphs 1 and 2 of Article XIII of the GATT 1994 with respect to bananas;

Taking note of the understandings reached by the EC, Ecuador and the United States that identify the means by which the longstanding dispute over the EC's banana regime can be resolved, in particular their provision for a temporary global quota allocation for ACP banana supplying countries under specified conditions;

Taking into account the exceptional circumstances surrounding the resolution of the bananas dispute and the interests of many WTO Members in the EC banana regime;

Recognizing the need to afford sufficient protection to the ACP banana supplying countries, including the most vulnerable, during a limited transition period, to enable them to prepare for a tariff-only regime;

Noting assurances given by the EC that it will, upon request, promptly enter into consultations with any interested member with respect to any difficulty or matter that may arise as a result of the implementation of the tariff rate quota for bananas originating in ACP States;

Considering that, in light of the foregoing, the exceptional circumstances justifying a waiver from paragraphs 1 and 2 of Article XIII of the GATT 1994 with respect to bananas exist;

Decides as follows:

1. With respect to the EC's imports of bananas, as of 1 January 2002, and until 31 December 2005, paragraphs 1 and 2 of Article XIII of the GATT 1994 are waived with respect to the EC's separate tariff quota of 750,000 tonnes for bananas of ACP origin.

2. The EC will, upon request, promptly enter into consultations with any interested member with respect to any difficulty or matter that may arise as a result of the implementation of the separate tariff rate quota for bananas originating in ACP States covered by this waiver; where a Member considers that any benefit accruing to it under the GATT 1994 may be or is being impaired unduly as a result of such implementation, such consultations shall examine the possibility of action for a satisfactory adjustment of the matter.

3. Any Member which considers that the separate tariff rate quota for bananas originating in ACP States covered by this waiver is being applied inconsistently with this waiver or that any benefit accruing to it under the GATT 1994 may be or is being impaired unduly as a result of the implementation of the separate tariff rate quota for bananas originating in ACP States covered by this waiver and that consultations have proved unsatisfactory, may bring the matter before the General Council, which will examine it promptly and will formulate any recommendations that they judge appropriate.

4. This waiver shall not preclude the right of affected members to have recourse to Articles XXII and XXIII of the GATT 1994.

ANNEX C

ANNEX C-1

**ARTICLE XXIV.6 NEGOTIATIONS
ENLARGEMENT OF THE EUROPEAN UNION
COMMUNICATION FROM THE EUROPEAN COMMUNITIES**

WORLD TRADE ORGANIZATION

No. _____

G/SECRET/20
30 January 2004

(04-0350)

Original: English

ARTICLE XXIV:6 NEGOTIATIONS

Enlargement of the European Union

Communication from the European Communities

The following communication, dated 19 January 2004, is being circulated at the request of the Delegation of the European Communities.

Notification
by the European Communities to
the World Trade Organization and its Members
concerning decisions to enter into a customs union, resulting from the

Enlargement of the European Union

by the accession of

The Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic;

Pursuant to the Understanding on the Interpretation of Article XXIV GATT 1994, paragraph 4, incorporating the Guidelines adopted on 10 November 1980 (BISD 27S/26-28), paragraph 1 (the "Guidelines").

Following, *inter alia*, the decision of 14 April 2003 of the Council of the European Union on the admission to the European Union of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and pending the finalisation of ratification procedures, the European Communities have the honour to notify the WTO and its Members that these states have decided to become members of the European Union on

1 May 2004. The Treaty of Accession is published in the *Official Journal of the European Union* L 236 of 23 September 2003. A version subject to a legal disclaimer is published at: http://europa.eu.int/comm/enlargement/negotiations/treaty_of_accession_2003/index.htm.

Accordingly, the European Communities hereby notifies, within the framework of procedures laid down in Article XXIV GATT 1994, and in particular paragraph 6 thereof, the withdrawal on 1 May 2004 of the commitments in Schedule XCII Czech Republic, Schedule CXLIV Republic of Estonia, Schedule CVII Republic of Cyprus, Schedule CXLIII Republic of Latvia, Schedule CL Republic of Lithuania, Schedule LXXI Republic of Hungary, Schedule CXVII Republic of Malta, Schedule LXV Republic of Poland, Schedule XCVI Republic of Slovenia, Schedule XCIII Slovak Republic and Schedule CXL[1] of the European Communities of 15.

The European Communities is ready to enter into Article XXIV and XXVIII GATT 1994 procedures including tariff negotiations or consultations to address compensatory adjustments provided for under Article XXIV.6 GATT 1994.

The data[2] necessary for the purposes of applying Article XXIV.6 GATT 1994, as provided for in the Guidelines, paragraph 2, first and second sentences, is included in the Annex of this notification. In accordance with the Guidelines, paragraph 2, third sentence, and paragraph 3, any proposed modifications or compensatory adjustments will be circulated and communicated separately.

The EC intends to communicate further data in the near future to members having negotiation rights.

Pending the completion of the Article XXIV and XXVIII GATT 1994 procedures and the creation of a new schedule valid for the European Communities of 25, the commitments in the European Communities Schedule CXL will be fully respected. The new members of the European Union intend to align their Schedules with those of the European Communities on 1 May 2004.

Pursuant to the Guidelines, paragraph 1, the European Communities transmits this notification to the Secretariat, and requests the Secretariat to distribute this notification to all other Members in a secret document.

The above-mentioned data are available in **electronic form only** on the WTO Members' Homepage (http://members.wto.org), go to WTO Resources, then Market Access Schedules on Goods (login), and then to Other. Download the zipped database and open using MS Access, choose your country to print the applicable data.

[1] This schedule is a total of the tariff and other commitments of the European Communities of 15 circulated under cover of WTO document G/L/65/Rev.1 of 19 March 1996. It has subsequently been modified by G/MA/TAR/RS/16 of 2 April 1997 (certified WT/Let/156), G/MA/TAR/RS/30 of 13 May 1997 (certified WT/Let/178), G/L/65/Rev.1/Add.2 of 21 October 1997, G/MA/TAR/RS/47 of 10 February 1998 (certified WT/Let/261), G/L/65/Rev.1/Add.2/Corr.1 of 10 February 1998, G/L/65/Rev.1/Add.3 of 23 November 1998, G/L/65/Rev.1/Add.4 of 1 July 1999, and G/L/65/Rev.1/Add.5 of 22 February 2000.

[2] Please see the bottom of the page for more information on how to obtain the data. The data are available in English only.

ANNEX C-2

**ARTICLE XXIV.6 NEGOTIATIONS
ENLARGEMENT OF THE EUROPEAN UNION
COMMUNICATION FROM THE EUROPEAN COMMUNITIES**

WORLD TRADE ORGANIZATION

No. _____

G/SECRET/26
28 September 2006

(06-4638)

Original: English

ARTICLE XXIV:6 NEGOTIATIONS

Enlargement of the European Union

Communication from the European Communities

The following communication, dated 27 September 2006, has been received from the delegation of the European Communities.

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Notification
by the European Communities to
the World Trade Organization and its Members
concerning decisions to enter into a customs union, resulting from the

Enlargement of the European Union

by the accession of

the Republic of Bulgaria and Romania;

Pursuant to the Understanding on the Interpretation of Article XXIV GATT 1994, paragraph 4, incorporating the Guidelines adopted on 10 November 1980 (BISD 27S/26-28), paragraph 1 (the "Guidelines").

Following, *inter alia*, the decision of 25 April 2005 of the Council of the European Union on the admission to the European Union of the Republic of Bulgaria and Romania and pending the finalisation of ratification procedures, leading to the entry into force of the Treaty of Accession, the European Communities have the honour to notify the WTO and its Members that these states have

decided to become members of the European Union on 1 January 2007. The Treaty of Accession is published in the *Official Journal of the European Union* L 157 of 21 June 2005.[1]

Accordingly, the European Communities hereby notifies, within the framework of procedures laid down in Article XXIV GATT 1994, and in particular paragraph 6 thereof, the modification of the Schedule of the European Communities in order to cover these new members of the European Union.

The new members of the European Union will be subject to the Schedules of the European Communities on 1 January 2007. Consequently, the commitments in Schedule CXXXIX of the Republic of Bulgaria and Schedule LXIX of Romania are withdrawn on 1 January 2007.

The data necessary for the purposes of applying Article XXIV.6 GATT 1994, as provided for in the Guidelines, paragraph 2, first and second sentences, is included in the Annex of this notification.[2] In accordance with the Guidelines, paragraph 2, third sentence, and paragraph 3, any proposed modifications or compensatory adjustments will be circulated and communicated separately.

The European Communities is ready to enter into Article XXIV and XXVIII GATT 1994 procedures including tariff negotiations or consultations to address compensatory adjustments provided for under Article XXIV.6 GATT 1994.

The European Communities requests the Secretariat to inscribe an item concerning these notifications on the agenda of the next Council meeting, subject to the rules on inclusion of items on the agenda, so that the Council may take any appropriate actions in this respect.

Pursuant to the Guidelines, paragraph 1, the European Communities transmits this notification to the Secretariat, and requests the Secretariat to distribute this notification to all other Members in a secret document.

Annex: Data for applying Article XXIV.6[2].

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[1] http://eur-lex.europa.eu/JOHtml.do?uri=OJ:L:2005:157:SOM:EN:HTML
[2] The data are available in electronic format and in English only.

ANNEX D

RESPONSES BY THE PARTIES AND THIRD PARTIES TO QUESTIONS POSED BY THE PANEL AFTER THE SUBSTANTIVE MEETING OF THE PANEL

ANNEX D-1

RESPONSES BY ECUADOR TO QUESTIONS POSED BY THE PANEL

QUESTIONS ADDRESSED TO PARTIES

1. (Both Parties) In paragraph 39 of its third party submission, Colombia concludes that "the tariff level that would result in at least maintaining the conditions of competition between *MFN bananas and ACP bananas* is the difference between the price gap for MFN bananas (€97/tonne) and the price gap for ACP bananas (€86/tonne), or €11/tonne." Can the Parties provide a reasoned answer as to whether they agree with the argument raised by Colombia.

First, Ecuador maintains its position that the EC's Article I waiver for bananas lapsed on 1 January 2006 with the implementation of Regulation 1964, eliminating the legal relevance of the waiver's access standard (the "envisaged rebinding ... would result in at least maintaining total market access for MFN banana suppliers ...") to which the Arbitrator applied its price-gap analysis. Ecuador notes that Colombia's third party submission and oral statement support the view that the waiver has lapsed.

Second, as a factual matter, Ecuador agrees with Colombia's statement in paragraph 39 of its third party submission that "the tariff level that would result in at least maintaining the conditions of competition between *MFN bananas and ACP bananas* is the difference between the price gap for MFN bananas (€97/tonne) and the price gap for ACP bananas (€86/tonne), or €11/tonne."

As Colombia rightly mentioned, the Arbitrator, while agreeing with the use of the price gap as an appropriate methodology for the measurement of the level of protection accorded to domestic or EC growers from foreign competitors, also made it clear that the manner in which the EC had applied it "[did] not take into account how the competitive relationship may change between imports from different sources, i.e. MFN and preferential banana suppliers. …"[1]

Ecuador agrees that to determine the competitive relationship between MFN bananas and ACP bananas using the price gap methodology, it is necessary to (i) determine the level of protection accorded to EC ban *vis-à-vis* anas *vis-à-vis* MFN bananas (ii) determine the level of protection accorded to EC bananas *vis-à-vis* ACP bananas, and (iii) determine the competitive relationship between MFN bananas and ACP bananas by comparing the results of the calculations under (i) and (ii). The result of that comparison is the maximum margin of preference between ACP bananas and MFN bananas that would result in at least maintaining conditions of competition between ACP bananas and MFN bananas.

Following this methodology through, Colombia correctly carried out the relevant calculations in the light of the undisputed facts contained in the arbitrations' records – and which were either endorsed by the Arbitrator or submitted by the EC itself. First, Colombia determined in the light of the relevant reference period, the relevant internal price submitted by the EC and the relevant external price, that the tariff level for MFN bananas *vis-à-vis* EC bananas was €97/tonne.[2] Second, Colombia did an analogous calculation to determine the tariff level that would maintain the conditions of competition between ACP bananas and EC bananas, and found that such a tariff was €86/tonne.[3]

[1] Colombia's third party submission, para. 37. First Arbitration Award, *European Communities – The ACP-EC Partnership Agreement, Recourse to Arbitration pursuant to the Decision of 14 November 2001*, WT/L/616, 1 August 2005, para. 69.

[2] Colombia's third party submission, para. 36.

[3] *Id*., para. 38.

The last step of Colombia's calculation was the comparison of (i) the tariff level that would result in at least maintaining the conditions of competition between MFN bananas and EC bananas with (ii) that that would result in at least maintaining the conditions of competition between ACP bananas and EC bananas ACP bananas.[4] The result is the tariff difference of €11/tonne. Ecuador also submits that to comply with the Article I Waiver's mandate, to envisage a tariff rebinding that would result in at least maintaining total market access for MFN banana suppliers, the appropriate MFN tariff could not accord to ACP bananas a preference higher than €11/tonne. Accordingly, by establishing an unbound tariff of €176/tonne, even if the EC had an additional opportunity to "rectify the matter", it has failed to comply with such an standard.

2. (Both Parties) How has the EC been applying the MFN tariff of €176/mt to individual imports? What volume and share of its imports have been subject to that tariff?

It is not contested that the EC applies its €176/mt tariff to all bananas of MFN origin, and to ACP origin bananas in excess of the 775,000 mt ACP duty-free tariff quota. In 2006, the volume of imports subject to the €176/mt tariff was 3,473,521 mt (of which 116,190 mt, or 3%, were ACP over-quota imports). The volume subject to that rate constituted 82% of total EC-25 banana imports, according to the EC's data.[5]

3. (Both Parties) In paragraph 15 of its first written submission, Ecuador states that, subsequent to adopting Council Regulation No. 1964/2005, "the EC has issued implementing regulations ancillary to [such regulation]." Can Parties identify all ancillary or implementing regulations associated with Council Regulation No. 1964/2005 adopted by the EC since November 2005, if any.

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

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

4. (Both Parties) Is the import regime for bananas contained in EC Council Regulation No. 1964/2005, to be considered "the new EC tariff regime", in the sense that the term is used in the Doha Waiver? What is the exact date of entry into force of "the new EC tariff regime"? Has the EC Council Regulation No. 1964/2005 been modified in any way since its entry into force?

Yes. It is the new tariff regime introduced on 1 January 2006. The Council Regulation has not been modified, but additional regulations were issued as described in response to question 4.

[4] *Id*., para. 39.

[5] *See* Exhibit ECU-6. Year-to-date 2007 import data, which appear to run only through June 2007, are distorted by the effects of storm-related damage in Africa.

5. (Both Parties) Ecuador has advanced claims against the preferences granted by the EC to ACP bananas under both Articles I and XIII of the GATT 1994. Do Parties see any particular order in which these two claims should be considered in this dispute? Does Ecuador consider its claim under Article XIII of the GATT 1994 a subsidiary or secondary claim to its claim under Article I? If the preferences granted by the EC to ACP bananas are inconsistent with either Article I or Article XIII of the GATT 1994, on what grounds would Ecuador argue that additional findings regarding the same preferences under the other provision, i.e. Article XIII or Article I of the GATT, respectively, would also be necessary to resolve the matter at issue?

In paragraph 37 of their joint third party submission, Belize, Cameroon, Côte d'Ivoire, Dominica, the Dominican Republic, Ghana, Jamaica, Madagascar, Saint Lucia, Saint Vincent and the Grenadines, and Suriname state that: Ecuador does not believe that it matters what order the Panel considers the claims under Article I and Article XIII. Ecuador does not consider the claim under Article XIII to be subsidiary or secondary to Ecuador's claim under Article I.

If the panel deals first with Article XIII, a finding that the EC measures violate Article XIII would not preclude the EC from granting tariff preferences so long as there was no tariff quota from which Ecuador was excluded or in which Ecuador was not given a fair allocation. If the Panel ruled in favour of Ecuador under Article I, that would resolve some of the dispute, but leave open the question of the ability to use tariff quotas in contexts where tariff discrimination is allowed without the requirement for a waiver, for example in the case of free trade areas. Further, if the Panel finds in favour of the EC under Article I, that still would leave an issue what degree of preference is allowed by the Doha Waiver and whether, as the EC contends, it can use tariff quotas in its system notwithstanding the absence of a waiver of Article XIII.

Regardless, in Ecuador's view, the history of the banana dispute has demonstrated repeatedly that anything not specifically and directly found to violate WTO rules (and some things that are) is likely to emerge in the next EC banana regime, justified as not having been excluded by the Panel. Finally, the Panel's rulings on both Articles are likely to be important to the effort to reach at last a durable solution, consistent with WTO rules.

6. (Both Parties) In paragraph 37 of their joint third party submission, Belize, Cameroon, Côte d'Ivoire, Dominica, the Dominican Republic, Ghana, Jamaica, Madagascar, Saint Lucia, Saint Vincent and the Grenadines, and Suriname state that:

> **"pursuant to the Understanding [on Bananas reached between the EC and Ecuador on 30 April 2001], the banana dispute was taken off the agenda of the DSB in accordance with Article 21.6 of the DSU. Indeed, at the DSB meeting held on 1 February 2002 [footnote omitted], the representative of the EC noted that the EC had implemented the second phase of the Understanding on Bananas which would be applicable until the time the EC's banana import regime became a tariff-only regime i.e. at the latest by 1 January 2006, and that the EC considered that this matter should therefore be withdrawn from the DSB agenda. Ecuador agreed by stating that it '*also considered that this item should no longer appear on the agenda of future DSB meeting*.'"**

Can Parties confirm that the issue of the implementation of the rulings and recommendations of the DSB in the *EC – Bananas III* dispute was withdrawn from the DSB's agenda with the consent of both the EC and Ecuador, in accordance with Article 21.6 of the DSU.

Yes. Ecuador agreed to the withdrawal of the item from the DSB agenda, subject to an explicit reservation of rights to bring a complaint under Article 21.5, as reflected in the following excerpt from the minutes of the DSB meeting. There was no objection to this reservation of rights. It can also be seen that Ecuador was clear that the Understanding involved staged obligations over several additional years, and that Ecuador was reserving Article 21.5 rights precisely because of concern that the terms might not be followed in subsequent years. As the minutes of that meeting summarized (WT/DSB/M/119):

> During the dispute settlement process, Ecuador had demonstrated patience and flexibility and had, in this spirit, signed a bilateral Understanding on Bananas with the EC on 30 April 2001. This Understanding constituted a sound basis for the EC to implement a transitional banana import regime so that by 1 January 2006, at the latest, a WTO-compatible tariff-only regime would be put into place. The transitional regime contained various phases, stages and elements to be implemented. One element was to obtain waivers from Articles I and XIII of the GATT 1994. However, the decision to grant these waivers included new stages which would have to be carried out in order to ensure a proper transition to a tariff-only banana import regime, as from 1 January 2006. Accordingly, insofar as the EC continued to implement the DSB's recommendations by meeting its commitments, Ecuador wished to reserve its rights under Article 21 of the DSU. Therefore if there was any disagreement concerning the measures applied by the EC, the matter could be referred to the original Panel pursuant to Article 21.5 of the DSU. Ecuador, like other countries, also considered that this item should no longer appear on the agenda of future DSB meetings.

There was no objection to this reservation, and similar reservations were expressed by others.

7. (Both Parties) In paragraph 4 of its statement during the substantive meeting with the Panel, Brazil argues that "Article 3.7 of the DSU should be interpreted in its integrality, with due account of all the provisions contained therein, that is to say the preference for negotiated solutions and the conformity with WTO agreements. Those two elements permit us to conclude that compliance with the covered agreements has precedence over negotiated solutions and that parties to an agreed solution are not authorized by such instrument to circumvent their obligations under the multilateral trading rules." Can the Parties provide a reasoned answer as to whether they agree with this statement.

Ecuador agrees with Brazil. While the DSU encourages mutually agreed solutions, that encouragement is subject to the requirement that all solutions must be consistent with the covered agreements.

8. (Both Parties) If the Panel was to examine whether the current EC regime for bananas results "in at least maintaining total market access for MFN banana suppliers", what should be the appropriate criteria to consider? Would the relevant criteria be the same that were considered by the Arbitrator in its Awards of August 2005 and October 2005?

Ecuador notes that the Panel has changed the standard provided in the Doha Waiver from one in which the Arbitrator was charged with determining whether a proposed rebinding "would result" in meeting the standard of "maintaining total market access for MFN banana suppliers" to one in which the "EC Regime … results" in meeting that standard. Therefore, unlike the standard of the waiver, the Panel is asking not for a forward looking projection, but whether in the present tense the Regime, whether or not viewed as a proposed rebinding, is resulting in "at least maintaining total market access for MFN banana suppliers"

Even if the test is considered to be, at any given moment, whether market access is being maintained, Ecuador agrees with the Arbitrator that "market access" cannot be equated with current trade levels or current market shares. Ecuador believes that market access should continue to be measured according to competitive opportunities afforded by the EC's trade measures, compared to the opportunities provided by the measures in existence just prior to 1 January 2006. This means that the tariff only duty would have to provide conditions of competition no less favourable for MFN suppliers than were afforded by the 3.113 million mt tariff quota at €75/mt preference and the zero duty tariff quota for ACP bananas at a quantity of 750,000 mt.

9. (Both Parties) In paragraph 38 of its statement during the substantive meeting with the Panel, Ecuador argues that "[i]t will be recalled that the waiver in any event expires 1 January 2008, but the MFN duty continues, and will be the margin of preference for any preferences that the EC grants inconsistent with WTO rules into the future, past 2007. It will be recalled that the EC had made plain its intent to use not only the 'Everything but Arms' initiative but also WTO-conforming free trade agreements to carry on with preferences past 2007. Further, even if the EC were to grant no future preferences, the duty will restrict future banana imports." Can Ecuador elaborate on these arguments, and can the EC provide a reasoned answer as to whether it agrees.

First, with apologies, the first sentence of the quotation should have said "consistent" rather than "inconsistent" with WTO rules. The point of the sentence was not to assume that the EC would continue to grant preferences in a manner inconsistent with WTO rules. Second, as the next sentence quoted in the question makes clear, there are ways consistent with WTO rules for the EC to continue preferences. A major concern of Ecuador was and is that a high bound rate of duty on bananas would be established, resulting in vastly diminished market access for Ecuadorian bananas if the EC negotiated free trade agreements that conformed with WTO rules, especially with the more efficient of the banana-producing ACP countries. Ecuador and other MFN suppliers in 2001 were willing to allow the EC to continue otherwise illegal preferences under the cover of a waiver for an extended period, provided that by 1 January 2006 the EC would establish a bound MFN duty that would still allow MFN suppliers to at least maintain access, without the use of tariff quotas, even assuming that the EC continued to grant tariff preferences for ACP countries, first under cover of the Doha Waiver (assuming its conditions were met) and then under whatever WTO-consistent means that the EC and ACP countries might arrive at by 1 January 2008. Even if the EC did not continue such preferences, the MFN duty rate would protect EC domestic banana production and would burden banana exports to the EC.

Unfortunately, and to the detriment of Ecuador, the EC failed to comply with the waiver and proceeded unilaterally with the measures that are before the Panel today.

10. (Both Parties) In paragraph 71 of its first written submission, the EC argues that the phrase "the new EC tariff regime" can only refer to the tariff regime that was presented to the Arbitrator and on which the Arbitrator made a pronouncement in its Award. Can Ecuador provide a reasoned answer as to whether it agrees with this statement. Would the EC consider its argument valid even if it was established that the TRQ to which the Banana Framework Agreement (BFA) relates has not expired at the end of 2002? Does the EC refer to the applied system and not the rebinding?

As Ecuador stated in paragraphs 28-30 of Ecuador's second submission, the EC's interpretation of the waiver is wrong. The waiver does not refer to the "tariff regime presented to the Arbitrator", nor would it make any sense to interpret the phrase that was used, "the new EC tariff regime" to mean the regime that the Arbitrator had just found to fail to meet the test of the waiver. It would be absurd to think that WTO members created a waiver giving the EC two opportunities to satisfy on a timely basis either the interested parties or a neutral Arbitrator, but then allowed the EC to keep the benefit if the

waiver for a further two years by the simple expediency of installing any tariff regime that the EC might choose, so long as it was not identical to the one just found unacceptable by both the interested parties and the Arbitrator.

11. (Both Parties) In paragraph 23 of its first written submission, the EC argues that "on 1 January 2006, the European Communities introduced a tariff only system and the Cotonou Preference took the form of a tariff quota for certain volumes of bananas coming from Cotonou beneficiary developing countries". Can the EC provide a reasoned answer as to how can an MFN tariff combined with a tariff-rate quota for ACP countries qualify as a "tariff-only system". Can Ecuador provide a reasoned answer as to whether it agrees with the EC's statement in paragraph 23 and, if not, what would qualify, in its view, as a "tariff-only system".

Insofar as Ecuador is aware, there is no legal definition of a "tariff only" system. Ecuador considers that the ordinary meaning of "tariff only" is a system has no quotas or tariff quotas. The context of the Doha Waiver reinforces this conclusion, because the "tariff only" system is to be something different from that which preceded it, which was a system with tariffs and tariff quotas. Therefore, any preference that is granted is not quantitatively limited, unless, at a minimum, access to that tariff quota is done in compliance with Article XIII, i.e. without excluding or granting an inadequate share to MFN suppliers such as Ecuador.

The fact that the WTO members granted a waiver of Article XIII only through 31 December 2006 reinforces Ecuador's view, because (1) despite the EC's efforts to deny the plain rulings of the Appellate Body and the Article 21.5 panel, it is obvious that all tariff quotas must comply with Article XIII, which does not allow exclusion of MFN suppliers; and (2) it is impossible to think that WTO members would grant a waiver of Article I to the EC if it included a reliance on a second waiver of Article XIII that had not been granted. The Appellate Body in *Bananas III* made clear that a waiver of Article XIII cannot be implied from a waiver of Article I.

12. (Both Parties) In paragraph 26 of its first written submission, Ecuador argues that "[t]he burden is on the EC if it wishes to claim that it still has a valid waiver with respect to bananas, and that this waiver covers the EC measures at issue. [E]ven if the burden were on Ecuador …" Could the Parties develop their legal arguments as to which of them should bear the burden of proving that the Doha Waiver is still valid and whether it covers the EC measure at issue.

Ecuador has proven the violation of Article I. The EC has the burden, if it wishes, to argue that the waiver relieves the EC from the obligation, and that the EC has satisfied the conditions of the waiver. Numerous prior WTO dispute settlement decisions have established that the invocation of any exception to a WTO obligation is the assertion of an affirmative defense, resulting in the burden of proof being placed on the party claiming that exception.[6] In *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries* the Appellate Body explained that:

[6] Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted 23 May 1997 ("*US-Wool Shirts and Blouses (AB)*"), pp. 15-16 and nn.21 and 22 (citing GATT Panel Report, *Canada – Administration of the Foreign Investment Review Act*, BISD 30S/140, adopted 7 February 1984, para. 5.20 (wherein it was found that since Article XX(d) is an exception to GATT, it is up to Canada, as the party invoking the exception, to demonstrate that its measures comply with that exception)); Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R,WT/DS169/AB/R, adopted 10 January 2001, para. 39 (wherein it was found that the party invoking an exception to the General Agreement bears the burden of proof to "demonstrate a *prima facie* case that the measure in question falls within one of the exceptions"); Appellate Body Report, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/AB/R, adopted 20 April 2004 ("*EC – Tariff Preferences (AB)*"), paras. 104-118 (wherein it was found that the EC, as

> the burden of proof for an "exception" falls on ... the party "assert[ing] the affirmative of a particular ... defence." From this allocation of the **burden of proof, it is normally for the respondent, first, to *raise* the defence and, second, to *prove* that the challenged measure meets the requirements of the defence provision**.[7]

Here, Ecuador has demonstrated that the EC's differential treatment of ACP and MFN bananas violates Article I:1 on its face, a proposition which the EC does not and cannot deny. In response, the EC claims that the Doha Waiver remains in force and covers its Article I:1 violation.[8] As the party invoking this defense or exception to compliance with Article I:1, the EC bears the burden of demonstrating that its WTO-inconsistent measure meets every condition of the exception. The EC has failed to do so, and indeed, though it was not Ecudors's burden, Ecuador has proved the contrary.

13. (Both Parties) In paragraph 43 of their respective third party submissions, Nicaragua and Panama argue that the Latin American suppliers insisted on inserting, into the *Bananas Annex* of the Doha Waiver, the sentence "If the EC has failed to rectify the matter, this waiver shall cease to apply to bananas upon entry into force of the new EC tariff regime", which did not appear in the original EC draft. Nicaragua and Panama argue further that the insertion of such sentence is an "explicit penalty for EC unilateralism following two arbitration losses", without which the waiver would not have been approved. Can the Parties provide a reasoned answer as to whether they agree with this statement.

Ecuador agrees that the waiver for bananas expired when the EC introduced its unilateral "tariff only" system on 1 January 2006, without the agreement of Ecuador and other interested parties, and having twice failed to satisfy the standard of the waiver as determined by the Arbitrator. The conditions of the waiver established by the WTO members cannot be disregarded.

14. (Both Parties) Under the fifth tiret of the *Bananas Annex* of the Doha Waiver, can Parties identify the specific conditions listed therein and explain how many of those would have to be fulfilled for the waiver to cease to apply to bananas?

Under Tiret 5, the waiver would cease to apply unless each of the following conditions were met: First, the EC would have to have proposed a rebinding that:

- the Arbitrator approved meeting the standard of the fourth tiret; or failing that,
- the EC rectified the matter in a mutually satisfactory solution, following consultations with interested parties, or failing a mutual satisfactory solution,
- the Arbitrator in a second arbitration determined that that EC has rectified the matter.

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the Member invoking the Enabling Clause as a defense to GATT Article I discrimination, had the burden of establishing the facts necessary to establish the consistency of its measures under the Enabling Clause); Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, adopted 20 April 2005 ("*US-Gambling (AB)*"), paras. 6.77-6.83; Appellate Body Report, *United States – Subsidies on Upland Cotton*, WT/DS267/AB/R, adopted 21 March 2005, para. 644 (quoting *US – Wool Shirts and Blouses(AB)*, p. 14). The Appellate Body found it important to reiterate this rule of general applicability, even though the case before it was to be decided under a "special rule for proof of export subsidies that applies in certain disputes under Articles 3, 8, 9, and 10 of the Agreement on Agriculture."

[7] *EC – Tariff Preferences (AB)*, para. 104 (emphasis added) (quoting *US – Wool Shirts and Blouses (AB)*, p. 14).

[8] *See* EC first written submission, paras. 67-77; EC second written submission, paras. 36-43.

Second, the Arbitration awards must have been issued and the Article XVIII negotiations have been completed prior to the entry into force of the EC's tariff only regime on 1 January 2006.

Neither of these conditions was fulfilled. The EC did not satisfy the Arbitrator with either its initial envisaged rebinding or its proposed rectification, nor did it reach agreement with interested parties. Article XXVII negotiations were likewise not concluded, in large part because of the EC failure to propose a rebinding meeting the waiver criteria.

Under the fifth tiret of the waiver, the conditions that would have to be fulfilled for the waiver to lapse are (i) the Second award of the Arbitrator (following the EC's failure in the first award and the failure to reach agreement) must determine that the EC "has failed to rectify the matter" and (ii) the EC's "new tariff regime" must enter into force. Both conditions have occurred.

15. (Both Parties) On what grounds does the EC argue that the phrase "suitable waiver" in paragraph 6.158 of the report of the first *EC – Bananas III* compliance Panel should be interpreted to mean a waiver from only Article I of the GATT 1994? On what grounds does Ecuador argue that the same term should be interpreted as referring to a waiver to both Articles I and XIII of the GATT 1994?

Ecuador considers that the "suitable waiver" in paragraph 6.158 includes both a waiver of Article I and Article XIII for the reasons explained in paragraphs 40-44 of Ecuador's second submission.

The pertinent suggestions of the first Article 21.5 Panel were as follows:

> 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.[9] In this context, some action may be required soon in respect of the Lomé waiver since it expires on 29 February 2000. [Emphasis added]

It is difficult to see how even the EC could construe these paragraphs other than to show that the Panel considered that a tariff quota restricted to ACP exports would always require a waiver of Article XIII. Paragraph 6.156 shows that the panel considered that a tariff only system with a preference for just ACP bananas but no tariff quota would require a waiver of Article I, unless the preferences were done within some legal exception, such as a free trade agreement. Paragraph 6.157 then provides that the EC in effect could modify its system to include a tariff quota for ACP bananas, covered by a suitable waiver. Paragraph 6.158 starts by saying that the EC could maintain its tariff quotas if they were opened and either not allocated or allocated in accordance with Article XIII. The highlighted portion of paragraph 6.158 makes explicit on its face, especially in light of the foregoing, that a waiver of Article XIII is required for a tariff quota preference limited to ACP countries.

The Panel never suggested that the EC did not need a waiver in a system that had a tariff quota in which only ACP countries could participate in the zero duty quota. It is also most unlikely that the Article 21.5 Panel would make such a suggestion, which also would have contradicted the original findings of *Bananas III*, and have violated Article XIII.

16. (Both Parties) In paragraph 96 of its first written submission, the EC states that "the text of GATT Article XIII, paragraph 1 makes clear that a Member can successfully claim that another Member's measures violate the provisions of GATT Article XIII, only if its can show that... the allegedly offending Member imposes a prohibition or restriction on products originating from the complaining Member and, in principle, there is a nullification and impairment of a benefit accruing to the complaining Member". Can the EC elaborate its arguments in support of each of these propositions, i.e. that in order to make a successful claim under Article XIII:1 of the GATT 1994, the complaining Member must show: (a) that the challenged measure must be a prohibition or restriction *on products originating from the complaining Member*; and, (b) that there is a *nullification and impairment of a benefit* accruing to the complaining Member. Can Ecuador provide a reasoned answer as to whether it agrees with the arguments raised by the EC.

Ecuador disagrees with the EC's interpretation.

Article XIII.1 provides that "no prohibition or restriction shall be applied" on a product of one WTO member unless "importation of like product of all third countries is similarly prohibited or restricted." As previously noted, the restriction of a tariff quota is created by the imposition of a higher duty on over quota imports than is applied to in-quota imports.

The EC's tariff quota applies a €176/mt duty on all bananas of MFN origin. ACP bananas are not similarly restricted, because they benefit from access to the duty-free quota, from which bananas of Ecuadorian origin are totally excluded. As was noted in *Bananas III*:

> Article XIII:1 establishes the basic principle that no import restriction shall be applied to one Member's products unless the importation of like products from other Members is similarly restricted. Thus, *a Member may not limit the quantity of imports from some Members but not from others ... . A Member may not restrict*

[9] 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).

> *imports from some Members using one means and restrict them from another using another means.*[10]

There is likewise no requirement that Ecuador demonstrate the level of nullification or impairment caused by the EC's discriminatory tariff quota as a prerequisite to challenging that measure in dispute settlement.

Article 3.7 of the DSU specifies three possible resolutions to a WTO dispute: a mutually agreed solution consistent with the covered agreements; a withdrawal of the WTO-inconsistent measures; or, if all else fails, suspension of concessions. Neither a mutually agreed solution nor the withdrawal of inconsistent measures hinges on the level of nullification or impairment suffered by the complaining Member. Only the third scenario, the suspension of concessions under DSU Article 22, requires a determination regarding the level of nullification or impairment suffered by the complaining party.[11]

In any event, even if nullification or impairment had to be demonstrated, Ecuador has established that the EC has nullified or impaired Ecuador's interests. In particular, the EC has denied Ecuador (and other MFN suppliers) participation in the zero-duty quota as required by Article XIII.

17. (Both Parties) In paragraph 60 of its second written submission, the EC argued that "[i]n effect, Ecuador is saying that the discrimination constitutes the 'restriction' [within the context of Article XIII:2 of the GATT 1994]. Having created this 'restriction' it then compares it with that on ACP products and comes, *not surprisingly*, to the conclusion that there is discrimination, which it assumes falls within paragraph 2 [of Article XIII]". (Emphasis added) Can Ecuador provide a reasoned answer as to whether it agrees with this statement. Do the words "not surprisingly" in the EC statement mean that, provided that the existence of the restriction mentioned by the EC can be proven, the EC accepts that there would be a violation of Article XIII:2?

Ecuador does not agree. The restriction in the EC's system, as in any tariff quota, is the higher duty applied to over-quota imports – those not benefiting from the lower or zero duty applied to imports within the tariff quota. If the over-quota duty were not considered a restriction, then Article XIII:5 would be a nullity, as the obligations of Article XIII are framed in terms of restrictions. Banana of ACP origin are restricted less than bananas of Ecuadorian origin because the former can be entered duty free within the tariff quota, while Ecuadorian bananas all are restricted by the high duty.

18. (Both Parties) In paragraph 51 of its statement during the substantive meeting with the Panel, Ecuador argues that its "exports are restricted by the high duty compared to those who participate in the zero duty quota. The only difference between a straight quota and a tariff quota in this regard is that exclusion from a straight quota means no access, while exclusion from a tariff quota means access restricted by the higher duty that applies to imports not benefiting from the tariff quota, which may be prohibitive in effect." In paragraph 52 of the same statement, Ecuador adds that "[i]t is true that unlimited preferences for ACP bananas would be worse than the tariff quota only for ACP countries, but exclusion from the tariff quota is more restrictive of Ecuador and other members than if they were allowed to participate in the zero duty tariff quota as they are entitled under Article XIII." Can the EC provide a reasoned

[10] Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Complaints by Ecuador, Guatemala and Honduras, Mexico, and the United States*, WT/DS27/R, adopted 25 September 1997, as modified by Appellate Body Report, WT/DS27/AB/R ("*Bananas III (Panel)*"), para. 7.69 (emphasis added).

[11] *See* Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"), Article 22.4.

answer as to whether it agrees with this statement. Can Ecuador clarify whether it is arguing that any high duty would qualify as a "restriction" under Article XIII of the GATT 1994. If yes, why? Can Ecuador also clarify on what grounds, and according to what criteria, would a tariff be considered to be "prohibitive in effect". In Ecuador's view, does the restriction result from the in-quota tariff or the out-of-quota tariff?

Ecuador is not arguing that every high duty necessarily qualifies as a restriction under Article XIII. Article XIII:5 provides that the provisions of Article XIII apply to any tariff quota. A tariff quota means a quota below which a lower duty applies than to over quota imports of the like product. As noted, in a tariff quota, the restrictive element is the higher duty on over- quota imports. Ecuador does not consider that the concept of a tariff quota is limited to those tariff quotas whose over-quota duty rate is so high as to be de facto prohibitive . That may be the most dramatic form of a tariff quota, but in fact, if a higher duty is applied above a certain quantity than below that quantity, it is a tariff quota even if – unlike the EC measures at issue --the difference is slight and the over-quota duty is not so high as to create a major commercial problem.

The restriction in the EC's system is the over-quota duty that restricts all bananas not allowed to participate in the zero duty quota.

19. (Both Parties) In paragraph 57 of its statement during the substantive meeting with the Panel, Ecuador argues that "[i]t is a fact that the restriction in a tariff quota is achieved by means of a tariff – the higher duty applied to products imported outside the quota than inside the quota. That is not a problem because Article XIII specifically applies to any tariff quota, and, unlike Article XI the reference to restrictions in Article XIII does not exclude taxes, duties or other charges." Can Ecuador elaborate on this argument, and the EC provide a reasoned answer as to whether it agrees with Ecuador's arguments in this context.

Article XI begins "No prohibitions or restrictions other than duties, taxes or other charges…" This makes plain that the drafters thought that prohibitions or restrictions included duties, taxes or other charges (otherwise there would be no need to exclude them), but wanted to exclude them from Article XI. By contrast, no such exclusion was provided in Article XIII, which also uses the term "restrictions" (but without the exclusion) and indeed the drafters explicitly said that the *provisions* of Article XIII apply to "any tariff quota." Article XIII:5 would be a nullity if a tariff is not regarded as a restriction for purposes of Article XIII as applied to tariff quotas.

20. (Both Parties) If, under Article II of the GATT 1994, the EC was bound to a €75/mt tariff rate in-quota duty for 2.2 million metric tons of bananas, in addition to the zero-duty TRQ of 775,000 metric tons for ACP bananas, should such a finding affect the manner in which the Panel conducts its analysis under Article XIII?

In Ecuador's opinion, the EC plainly was and is bound by the a €75/mt tariff rate in-quota duty for 2.2 million metric tons of bananas, but it makes no difference whether the EC has one or multiple tariff quotas; Article XIII applies if there is one tariff quota or more than one tariff quota. The EC has never been able to explain in terms of Article XIII what difference it would make whether the EC had one or more tariff quotas.

21. (Both Parties) In paragraph 19 of its opening statement during the substantive meeting with the Panel, the EC argues that "[t]he complainants attempt to draw some analogy with the regimes analysed by this Panel in 1997 and 1999. This is not correct. Following the abolition of the tariff-quota-based system in 2006, the current regime is so different to those of the 1990s that no analogy can be drawn." Can the EC elaborate on this argument, and Ecuador provide a reasoned answer as to whether it agrees with the same.

Ecuador reserves the right to comment on the EC's answer, but Ecuador notes that the current system, like those examined in the late 1990 has a tariff quota with the zero duty in quota rate reserved for ACP origin bananas..

22. (Both Parties) In paragraph 10 of its statement during the substantive meeting with the Panel, Brazil argues that "the EC abruptly jumps to the flawed conclusion that because the Member has chosen to implement a suggestion by the panel such Member would always be in compliance with its obligations under the covered agreements." In paragraph 11 of the same statement, Brazil adds that "[i]n no provision does the DSU grant Members certainty as to the 'lawfulness' of a measure taken to comply just because such measure is intended to implement a suggestion made by a panel. To the contrary, Article 21.5 sets forth the Members' right to resort to a panel where there is disagreement as to the consistency with covered agreements of the measures taken to comply." Can the Parties provide a reasoned answer as to whether they agree with Brazil's argument.

Ecuador agrees with Brazil. The EC is wrong to contend in this dispute that the EC's current illegal regime was suggested by the Panel. However, if a Panel did suggested measures that a Party thought were inconsistent with WTO rules, there is nothing in the DSU that would bar a challenge to such measures.

23. (Both Parties) The Understanding on Bananas signed by the EC with Ecuador and the US seems to include references, in both Phases I and II, to a bound tariff-rate quota, designated as "quota 'A'", of 2.2 million metric tons with an in-quota tariff rate not exceeding €75/mt, that would possibly extend beyond the end of 2002. Can Parties provide a reasoned answer as to whether they agree with this reading of the Understanding. Can the EC explain how this can be reconciled with its argument that the TRQ expired at the end of 2002, considering that the EC has been arguing for the binding nature of the Understanding on Bananas and that it would constitute a mutually agreed solution?

Ecuador considers that, regardless of the Understanding, the EC tariff was and remains bound (subject to adjustment in Article XXIV:6 negotiations that have yet to be concluded to account for the enlargement of the EC and the extension of the preference regime). The understanding in this sense was not a new commitment but a confirmation.

24. (Both Parties) Irrespective of their differences in the interpretation of the Framework Agreement on Bananas (BFA), can the Parties identify the document that constitutes the legally binding schedules of the European Communities for bananas at the date of the establishment of this Panel on 20 March 2007, indicating its WTO document symbol if any, and specify any changes to that document that might have taken place in regard to bananas.

Schedule CXL is contained in documents G/L/65/Rev.1 and G/L/65/Rev.1/Add.3, and also should be taken into account documents G/SECRET/20; G/SECRET/22; G/SECRET/26.

25. (Both Parties) Paragraph 9 of the Framework Agreement on Bananas (BFA) annexed to the EC Schedules provides that "[t]his *agreement* shall apply until 31 December 2002" (Emphasis added). Could it be concluded from this language that only the Framework Agreement on Bananas annexed to the EC Schedules expired on 31 December 2002, but not Section I B of the EC Schedules, where the tariff rate quota (TRQ) is also indicated? Please provide a reasoned response.

Yes. This interpretation is not only possible, but is compelled by the record. Ecuador's position is explained in paragraphs 53-60 of Ecuador's second submission and in paragraphs 59 to 67 of Ecuador's oral statement**,** and in response to question 45.

26. (Both Parties) Should the expressions "agreed system" used in paragraph 8 of the Framework Agreement on Bananas (BFA) annexed to the EC Schedules, "the agreement" used in paragraph 9, and "this agreement" used in paragraphs 9, 10 and 11, be considered to be equivalent?

The term "the agreement" must be presumed to mean the same thing each time it is used, but the use of the term "agreed system" in the context of paragraph 8 is not especially clear, but could refer to those aspects that refer to the operation of the TRQ system. The Agreement has provisions such as the commitment of parties not to seek adoption of the report and the commitments to consult which are not terms and conditions of a WTO schedule of concession and would not fit within the concept of a tariff quota system.

27. (Both Parties) Should paragraph 9 of the Framework Agreement on Bananas (BFA) be interpreted as a stand-alone provision or by taking into account other parts and sections of the EC's Schedule, as well as the intentions of the parties in all subsequent procedures?

Ecuador thinks that the ordinary meaning of the language establishes that the concession did not terminate upon termination of the BFA, but it is always proper to look at context, object and purpose and where there is ambiguity, other interpretive aids.

28. (Both Parties) In paragraph 69 of its statement during the substantive meeting with the Panel, Ecuador argues that "[t]ariff quota concessions can be withdrawn, but the withdrawing member must follow Article XXVIII procedures which the Doha Waiver required and the European Communities failed to do." Can Ecuador clarify in what specific way the EC has "failed" to follow Article XXVIII procedures and what would be the legal consequences of such failure. Can the EC provide a reasoned answer as to whether it agrees with Ecuador's assertion that it has failed to follow Article XXVIII procedures.

Article XXVIII establishes a process by which a WTO member can withdraw a concession. This process involves announcing an intention to withdraw, and negotiating with principal and substantial suppliers and a host of procedural requirements. Substantively, if agreement is not reached on compensation, the withdrawing party ultimately may proceed, interested party but principal and substantial suppliers than have retaliation rights. In the case of bananas, the objective of "at least maintaining" should have resulted in a duty rate for bananas that would not have involved compensation or retaliation in other products, at least in the main. But Article XXVIII does allow any member simply to start applying a duty in violation of is bindings without following procedural and substantive requirements.

QUESTIONS ADDRESSED TO ECUADOR

29. (Ecuador) Can Ecuador expand on the factual information provided in Chart 1 of its first written submission by providing annual data (and their sources) for each year from 1999 (where "EC" refers from 1999 to 2003 to EC15 and from 2004 to 2006 to EC25, but, if possible, also show separately EC15 from 2004 to 2006; and for the first half of 2007 for EC27) for the following:

(a) Volume, FOB value and average unit value (in Euros/mt and USD/mt) of banana exports from Ecuador to the EC, and to the rest of the world;

VOLUME OF EXPORTS FROM ECUADOR BY COUNTRY OF DESTINATION
1999 to First Semester 2007
(thousand metric tonnes)

YEARS	(1) TOTAL EXPORTS (C=A+B)	(2) EXPORTS TO THE EC (A)	EXPORTS TO OTHER MARKETS (B)
1999 (UE-15)	3,782.58	695.00	3,087.58
2000 (UE-15)	3,993.38	674.00	3,319.38
2001 (UE-15)	3,752.97	705.00	3,047.97
2002 (UE-15)	3,875.92	829.00	3,046.92
2003 (UE-15)	4,212.36	800.00	3,412.36
2004 (UE-25)	4,370.43	993.00	3,377.43
2005 (UE-25)	4,331.30	1,059.00	3,272.30
2006 (UE-25)	4,402.39	1,026.00	3,376.39
2007 (*) (UE-27)	2,423.36	635.45	1,787.91

Sources: ***(1)*** *Asociación de Exportadores de Banano del Ecuador (AEBE / Declaración en Aduanas (bills of ladings)*
(2) *Eurostat.*
(*) *First Semester.*

VOLUME OF EXPORTS FROM ECUADOR TO THE EC
2004 – 2006
(thousand metric tonnes)

YEARS	(1) TOTAL EXPORTS C=A+B	(2) EXPORTS TO THE EC 15 (A)	(2) EXPORTS TO THE EC 10 (B)
2004	992,502.00	797,045.00	195,457.00
2005	1,059,269.00	885,975.00	173,294.00
2006	1,026,447.00	960,897.00	65,550.00

Sources: ***(1)*** *Asociación de Exportadores de Banano del Ecuador (AEBE)/ Declaración en Aduanas (bills of ladings).*
(2) *Eurostat.*

FOB VALUE OF ECUADORIAN EXPORTS
1999 to First Semester 2007

	thousands USD			AVERAGE EXCHANGE RATE 1USD=1€ (1)	thousands EUROS		
	TOTAL (C=A+B)	EC (A)	OTHER MARKETS (B)		TOTAL (D=E+F)	EC (E)	OTHER MARKETS (F)
1999	811,363.41	149,077.50	662,285.91	0.9875	801,221.37	147,214.03	654,007.34
2000	902,703.55	152,357.70	750,345.85	1.0667	962,913.88	162,519.96	800,393.92
2001	928,860.08	174,487.50	754,372.58	1.1226	1,042,738.32	195,879.67	846,858.65
2002	965,685.47	206,545.35	759,140.12	0.9541	921,360.51	197,064.92	724,295.59
2003	1,088,895.06	206,800.00	882,095.06	0.8007	871,878.27	165,584.76	706,293.51
2004	1,067,259.01	242,490.60	824,768.41	0.7337	783,047.93	177,915.35	605,132.58
2005	1,079,143.40	263,849.85	815,293.55	0.8450	911,876.17	222,953.12	688,923.05
2006	1,159,809.65	270,299.70	889,509.95	0.7607	882,267.20	205,616.98	676,650.22
2007 (*)	641,241.97	167,758.80	473,483.17	0.7426 (**)	476,186.29	124,577.68	351,608.60

(1) Sources: AEBE
(*)First Semester
(**) Exchange rate June 2007

FOB VALUE OF EXPORTS FROM ECUADOR TO THE EC
2004 – 2006

		Thousand USD			Thousand euros	
Year	**TOTAL (C=A+B)**	**EC-15 (A)**	**EC-10 (B)**	**TOTAL (D=E+F)**	**EC-15 (E)**	**EC-10 (F)**
2004	242,490.60	194,637.17	47,853.43	177,915.35	142,805.29	35,110.06
2005	263,849.85	220,739.43	43,110.42	222,953.12	186,524.81	36,428.31
2006	270,299.70	209,980.19	60,319.51	205,616.98	159,731.93	45,885.05

Source: AEBE / Banco Central del Ecuador / Eurostat

FOB VALUE/ mt OF EXPORTS (1)
1999 – First Semester 2007
In USD/€

YEARS	USD	EUROS
1999	214.50	211.82
2000	226.05	241.13
2001	247.50	277.84
2002	249.15	237.71
2003	258.50	206.98
2004	244.20	179.17
2005	249.15	210.53
2006	263.45	200.41
2007 (*)	264.00	196.05

(*) *First Semester*
(1) *FOB Value established by Inter-ministerial Agreements Ministeriode Agricultura and Ministerio de Comercio Exterior.*
Source: AEBE / Banco Central del Ecuador.

(b) Share (percentage) of banana exports from Ecuador going to the EC, in volume and value terms;

ECUADOR'S SHARE IN TOTAL IMPORTS BY THE EC 15
thousand metric tonnes and percentage

YEAR	TOTAL IMPORTS BY EC-15	IMPORTS FROM ECUADOR	SHARE (%)
2004	3,403.39	797.04	23.42%
2005	3,322.87	885.97	26.66%
2006	4,085.82	960.89	23.51%

Source: Eurostat

ECUADOR'S SHARE IN TOTAL IMPORTS BY THE EC 10
thousand metric tonnes and percentage

YEAR	TOTAL IMPORTS BY EC-10	IMPORTS FROM ECUADOR	SHARE (%)
2004	455.61	195.45	42.90%
2005	400.13	173.29	43.31%
2006	109.89	65.55	59.41%

Source: Eurostat

SHARE AND ANNUAL VARIATION OF SALES TO THE EC VIS A VIS TOTAL EXPORTS BY ECUADOR
1999 -2006
thousand FOB USD and percentage

YEARS	TOTAL (USD)	TOTAL EC (USD)	SHARE (%)	ANNUAL VARIATION (%)
1999	811,363.41	149,077.50	18.37%	
2000	902,703.55	152,357.70	16.88%	2.20%
2001	928,860.08	174,487.50	18.79%	14.52%
2002	965,685.47	206,545.35	21.39%	18.37%
2003	1,088,895.06	206,800.00	18.99%	0.12%
2004	1,067,259.01	242,490.60	22.72%	17.26%
2005	1,079,143.40	263,849.85	24.45%	8.81%
2006	1,159,809.65	270,299.70	23.31%	2.44%

Source: AEBE / Banco Central del Ecuador

SHARE AND ANNUAL VARIATION OF SALES TO THE EC 15 VIS A VIS TOTAL EXPORTS
2004-2006
thousand FOB USD and percentage

YEAR	TOTAL USD	TOTAL EC 15 (USD)	SHARE (%)	ANNUAL VARIATION (%)
2004	1,067,259.01	194,638.39	18.24%	
2005	1,079,143.40	213,266.17	19.76%	9.57%
2006	1,159,809.65	253,148.31	21.83%	18.70%

Source: AEBE / Banco Central del Ecuador

**SHARE AND ANNUAL VARIATION OF SALES TO THE EC 10
VIS A VIS TOTAL EXPORTS
2004-2006
thousand FOB USD and percentage**

YEAR	TOTAL USD	TOTAL EC-10 (USD)	SHARE (%)	ANNUAL VARIATION (%)
2004	1,067,259.01	47,728.89	4.47%	
2005	1,079,143.40	43,175.20	4.00%	-9.54%
2006	1,159,809.65	17,269.15	1.49%	-60.00%

Source: AEBE /Banco Central del Ecuador

(c) Share (percentage) of total volume of banana exports by Ecuador going to the EC divided by the EC's share of global banana imports; and

**SHARE (PERCENTAGE) OF BANANA EXPORTS FROM ECUADOR
1999 – 2006
thousand metric tonnes**

YEARS	TOTAL IMPORTS EC (1000 MT)	IMPORTS FROM ECUADOR (1000 MT)	SHARE (%)
1999	3,201.00	695.00	21.71
2000	3,288.00	674.00	20.50
2001	3,205.00	705.00	22.00
2002	3,282.00	829.00	25.26
2003	3,366.00	800.00	23.77
2004	3,859.00	993.00	25.73
2005	3,723.00	1,059.00	28.44
2006	4,196.00	1,026.00	24.45

Source: Eurostat

**SHARE (PERCENTAGE) OF BANANA EXPORTS FROM ECUADOR IN EC IMPORTS
2004 – 2006
thousand metric tonnes**

YEARS	TOTAL IMPORTS EC (1000 MT)	IMPORTS EC-15	SHARE (%)	IMPORTS EC-10	SHARE (%)
2004	3,859.00	797.04	20.65%	195.45	5.06%
2005	3,723.00	885.97	23.80%	173.29	4.65%
2006	4,196.00	960.89	22.90%	65.55	1.56%

Source*: Eurostat*

Imports by the EC are calculated including imports from the dollar zone and ACP countries. It does not include imports from the EC's outer and peripheric regions (Canaries, Martinique, Guadaloupe, Madeira, Cyrus and Greece).

(d) Amount of duties paid to the EC for the importation of bananas from Ecuador for each of the years specified above.

Amount of duties paid to the EC
1999 to First Semester 2007
thousand mt and thousand euros

YEARS	VOLUME IMPORTED BY THE EC FROM ECUADOR	DUTIES PAID (EUROS)
1999	695.00	52,125
2000	674.00	50,550
2001	705.00	52,875
2002	829.00	62,175
2003	800.00	60,000
2004	993.00	74,475
2005	1,059.00	79,425
2006	1,026.00	180,576
2007 (*)	635.45	111,839

(*) *First Semester*
Source: *Eurostat / AEBE*

Amount of duties paid to the EC
2004 – 2006
thousand euros

YEARS	DUTIES PAID EC-15 (EUROS)	DUTIES PAID EC-10 (EUROS)
2004	59,778.38	14,696.63
2005	66,448.13	12,976.88
2006	169,117.87	11,458.13

Source: Eurostat / AEBE

30. (Ecuador) Chart II in Exhibit ECU-3 refers to "Imports of Bananas by the EU–27" for the years 2005-2007. In regard to this chart, could Ecuador:

(a) Explain how it calculated the figures for 2005-2006, i.e. before the enlargement of the EU to 27 member States;

EUROSTAT data has been taking into account, which corresponds to imports made by the EC (updated May 2007).

(b) Clarify whether the figures for 2007 are estimates and, if so, explain the calculations involved; and,

Statistical data in Exhibit ECU-3 are provisional. Figures from 2007 correspond to the first quarter and the average that appears in column No 5 corresponds to the first quarter of years 2005 and 2006.

Data starting in column No 7 refers to the market share of each of the supplying countries within the total imports by the EC in 2007. By dividing Ecuador's imports from January to March 2007 (339.328 tonnes) to total de imports made from the dollar zone and ACP countries (1.189.756 tonnes), the result of 28.5% is obtained.

(c) State whether the figures for 2007 need any rectification, in the light of any relevant subsequent events since the submission of Ecuador's first written submission.

As it was already said, data for 2007 are provisional. Below is attached data for the first semester 2007 taken from Eurostat, which are also provisional but show a broader picture.

VOLUME OF IMPORTS OF BANANAS FROM ECUADOR
COMPARATIVE CHART FIRST SEMESTER 2006-2007
thousand metric tonnes/percentage

COUNTRY	2006 VOLUME	ECUADOR'S SHARE IN THE EC MARKET	2007 VOLUME	ECUADOR'S SHARE IN THE EC MARKET	COMPARATIVE VARIATION SEMESTERS 2007/2006
Ecuador	720,270	32.05%	635,459	26.50%	-11.77%

Source*: Eurostat*

31. (Ecuador) In paragraph 46 of its first written submission, the EC mentions that "although the group of MFN countries (to which Ecuador belongs) has seen a spectacular increase in the volumes exported into the European Communities since 1 January 2006, Ecuador has experienced a slight reduction in its own exports: its 2006 volumes were approximately 3.6% below its 2005 volumes." In paragraph 7 of its opening statement during the substantive meeting with the Panel, the EC goes on to argue that "[t]he group of MFN banana suppliers had never exported so many bananas into the European Communities as it did in 2006." Can Ecuador provide a reasoned answer as to whether it agrees with these statements. If so, what are the reasons to explain the decrease in EC imports of bananas from Ecuador, accompanied by an apparent increase in the EC imports of other MFN bananas?

Ecuador believes that the assertion of the EC that other MFN countries, except Ecuador have experienced a "spectacular increase of exports to the EC" since January 2006 is not true. First, traditional MFN exporters, which are the largest exporters to the EU, generally experienced an increase which in the best of cases bordered 10% compared with 2005, and this in no way constitutes a spectacular growth, as stated by the EC. It could be argued that an important exception was Costa Rica, whose exports grew 32% approximately in 2006 compared to 2005. However, 2005 is not an adequate benchmark for that country, because in 2005 Costa Rican exports fell almost 26% to 623,687 mt due to climate problems. Therefore, what happened in 2006 (824,590 mt of exports) was only a recovery of Costa Rica's normal export volumes, which even so did not reach 2004 levels (842,629 mt).

In second place, although other less bigger MFN exporters like Brazil and Peru recorded a significant increase in exports in 2006, at the same time, other countries like Venezuela, Mexico and Honduras suffered a similarly important loss in their sales to the EC.

In third place, Ecuador believes that it is essential to consider the issue within the framework of a broader analysis that allows visualizing the evolution of MFN, ACP and Ecuadorian exports to the

EC 15 and the EC 10 (EC 25), from 1999 to 2006. In this broad framework it can be seen that MFN exports between 1999 and 2006 for the EC25 in general remained stable and recorded a slight increase in 2006, contrary to the declaration of the EC (3,208,943 mt in 1999 compared to 3,293,638 mt in 2006). In turn, Ecuadorian exports during the same period generally remained stable and recorded a fall in 2006 (1,074,407 mt in 1999 compared to 1,027,209 mt in 2006). On the contrary, it is notorious that ACP exports registered a sustained increase in the same period of 688,217 mt in 1999 to 891,190 mt. The growth of ACP is steeper in 2006 after the increase of the tariff protection received from the EC against MFN suppliers, as a result of the tariff increase from €75/mt to €176/mt. See attached comparative table for more details at Exhibit ECU-9

This proves that there is no "spectacular growth of MFN exports to the EC since 2006". The assertion of the EC that MFN suppliers had never exported so many bananas to the EC as in 2006 is also untrue. APC imports into the EC-25 in 2006 were 30% higher than their constructed EC-25 import level in 1999. It is the ACP banana suppliers, not the MFN suppliers, that have seen a "spectacular increase" in banana shipments to the EC.

On the other hand, Ecuador stresses that the fall of its exports in 2006 is a direct consequence of the introduction of the MFN tariff of €176/mt by the EC. Indeed, the increase of approximately 2.34 times in the MFN tariff (from €75/t to €176/t) generated negative economic impacts on MFN suppliers, the real and full dimension of which will only be appreciated in the medium term. It not only made Ecuadorian and MFN exports more expensive, there are other measures that should be analysed:

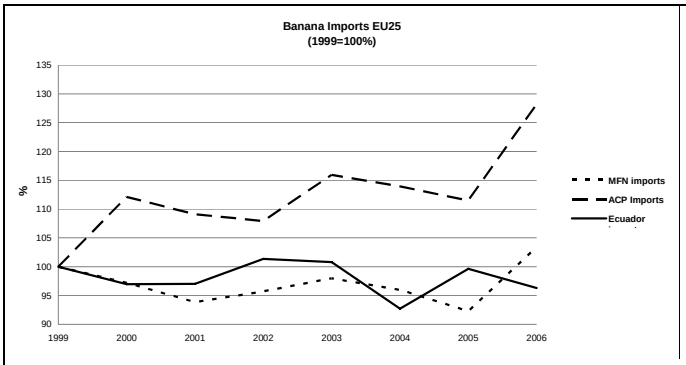
The EC reduced by more than half the ACP out of quota tariff from €380/t to €176/t, it increased to more than double the MFN tariff -from €75/t to €176/t , it established an exclusive ACP 0 tariff quota, which went from 750,000 mt to 775.000 mt. These measures caused a substantial improvement in the conditions of competition and a significant increase in preferences for ACP suppliers against MFN suppliers.

The findings of the Arbitrator regarding this issue fully coincide with the above statements: "In this case, the tariff equivalent proposed by the EC would result in an increase of the margin of preference currently enjoyed by ACP suppliers thanks to the €75/t tariff applied to imports within quota, to place it at €230/t, which **would significantly increase the margin of preference they enjoy against MFN banana suppliers prior to the rebinding**. In view that the use of the price gap methodology means that the rebinding will have impartial effects on *total* imports, **any advantage achieved by preferential supplies in the EC market as a result of this added advantage would happen at the expense of MFN banana suppliers**.[12]

Therefore, we can state that there is a huge increase in the margin of preference of ACP bananas produced as a direct consequence of the introduction of the €176/t discriminatory MFN tariff.

ACP countries currently also benefit from a reduction of their out of quota tariff from €380/t to €176/t (a 2.2 times reduction). This reduction gives ACP suppliers huge incentives to cross subsidized over quota ACP exports (profitable in quota sales lead to profitable cross subsidized over quota sales).

[12] WT/L/616, 1 August 2005, European Communities - ACP-EC Association Agreement Recourse to Arbitration pursuant to the Decision of 14 November 2001, Arbitral award, paragraph 69.



Banana Imports into the EU25 (tons)			
	MFN imports	**ACP Imports**	**Ecuador imports**
1999	3,208,943	688,217	1,074,407
2000	3,118,517	771,502	1,041,713
2001	3,014,628	748,216	1,042,540
2002	3,070,810	739,530	1,087,452
2003	3,140,260	798,801	1,081,666
2004	3,077,783	782,962	993,825
2005	2,963,764	763,672	1,062,735
2006	3,293,638	891,190	1,027,209

Source: Eurostat – Extracted Sept 26, 2007 (EU15 CN8 level/EU 10 '99-'03 HS4 level, '04-'06 CN8 level)

32. (Ecuador) In paragraph 50 of its first written submission, the EC argues that:

"there is ample evidence that Ecuador's banana industry is facing a number of difficulties that have nothing to do with the new import regime of the European Communities. These difficulties include:

(i) Adverse climatic conditions negatively affecting the 2006 production: the drought at the end of 2005 was followed by heavy rain at the beginning of 2006.

(ii) According to Aprobanec, the Association of banana growers in Quevedo, Ecuador's banana production was significantly damaged by the eruption of the volcano Tungurahua on 16 August 2006. The volcano caused significant damage to approximately 35% of the banana plantations in the Los Rios province, which produces about 30% of all Ecuadorian bananas.

(iii) Ecuador introduced certain administrative measures that encouraged traders operating in the European Communities' market to source bananas from other countries. For example, a letter sent by the Association of German Fruit Importers to Mr. Rizzo, Minister of Agriculture in Ecuador on 15 August 2006, expresses the discontent of the German traders with an Ecuadorian decree providing that the fruit should be inspected only at the plantation and not at the port. This administrative measure incited German traders to source bananas from other MFN countries, neighbouring Ecuador. Another administrative measure with a similar effect on European traders was adopted in August 2006: it imposed a minimum price of $3.25 per box and obliged exporters to pay producers via the Central Bank." (Footnotes omitted)

Can Ecuador provide a reasoned answer as to whether it agrees with these assertions.

(i) These assertions are wrong because total Ecuadorian banana exports to all destinations increased from 4,331,300 mt in 2005 to 4,402,390 in 2006 (an increase of 71,090 mt). However, exports to the EC fell from 1,059,000 in 2005 to 1,026,000 in 2006. This clearly shows that in 2006 Ecuadorian exports continued growing and that there was a diversion of trade originally directed to the EC market to other destinations as a direct consequence of the increase of the MFN tariff from €75/t to €176/t. The notable increase of ACP protection and margin of preference in 2006 means that these countries sharply increased their exports to the

Community market, in detriment of some MFN suppliers and particularly Ecuador, which had to sell to other markets.

(ii) According to official reports of the Ministry of Agriculture and Livestock of Ecuador, the effects of the two eruptions were approximately 108,000 mt of bananas that the country failed to export. If the eruptions had not taken place, the increase in the total volume of Ecuadorian exports to all destinations in 2006 (which reached an additional 71,090 mt compared to 2005) would have been even greater.

(iii) The administrative measures mentioned by the EC, as has been demonstrated, never affected the growth of total Ecuadorian exports in 2006. The price of USD 3.25 per box of bananas is a referential price that should have been paid by Ecuadorian exporters to all destinations and not only to the EC, and as we have seen exports to all destinations rather grew in 2006 in spite of these problems, unlike exports to the EC as a direct consequence of the increase of the tariff to €176/t.

33. (Ecuador) Please provide information on whether Ecuador's banana exports to the EC benefit from any preferential systems and, if yes, please describe those systems, indicating the relevant dates, and focusing your response on the period 1999 to 2007.

Ecuador's banana exports to the EC never benefited from any preferential systems granted by the European Communities. This includes the period 1999 to 2007.

34. (Ecuador) How did the actual conditions for the export of bananas change following the various enlargements of the EC in the period 1999 and 2007?

In 1995, when Austria, Finland, and Sweden joined the EC, the EC "autonomously" enlarged its MFN tariff quota by 353,000 mt, thereby increasing its MFN tariff-quota volume to 2.553 million mt.[13] The EC has yet to alter its schedule of concessions to reflect this accession or otherwise provide Article XXIV:6 compensation to the MFN suppliers.

The enlargement of the EC to 25 members also meant for Ecuador and MFN suppliers (mostly in Latin America) a huge loss in access levels, because before the enlargement the region exported from 560,000 to 570,000 mt of bananas per annum to the 10 countries that joined the EC (according to EUROSTAT figures) and once they became members of the EC25, the EC arbitrarily established an enlargement quota of only 460,000 mt per annum as compensation for Latin America.

More than 58.2% of this tonnage corresponded to Ecuador, and the rest to other Latin American countries. The presence of ACP bananas in this market was negligible.

This means that the EC drastically reduced previous exports by Latin American countries in 110,000 mt, inflicting losses estimated in millions of dollars which the EC has failed to compensate.

The enlargement of the EU also meant a significant improvement of ACP preferences, because ACP countries went from having very small marginal exports to the EC prior to May 1, 2004 (according to EUROSTAT figures), to having access to a quota of 460,000 mt with 0 tariff, while Latin American was reduced in approximately 110.000 mt in exports and had to pay €75/t, while before the enlargement it benefited in general from a free market, because most countries used an applied tariff equivalent to 0 to bananas.

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

On the other hand, also according to EUROSTAT figures, Ecuador had average annual exports to the EC10 of 314,713 mt during the period 2000-2002. These exports fell to 195,450 mt in 2004, 173,290 mt in 2005 and 65,550 in 2006, when the 176 €/t tariff entered into force.

In consequence, the enlargement of the EC with the accession of 10 new members meant huge losses in terms of volumes and net revenues for Ecuador, which have not been compensated, as explained below.

Correcting for the errors in the EC calculations, Ecuador arrived at a figure of €374,442,049.30 as the compensation due arising from the modification of the schedules of the EC-10 countries. The following chart presents the results of these two corrections to the EC's calculations:

08030019 Bananas, fresh (excl. Plantains

Summary by acceding country

Countries	Volumes (tonnes)[1]	Value (€)[4]	Duties with NMS rate (€)	Bound duty rate NMS	Duties with EU15 rate	Bond duty rate EU15 rate	Credits/ Debits
Cyprus	945.50	666,707.80	1,137,211.37	30% + 570 C£	642,936.67	680€/t	494,274.70
Czech Republic	122486.4146	58,296,676.28	0.00	0.00	83,290,761.93	680€/t	-83,290,761.93
Estonia	13,374.43	6,481,863.16	1,296,372.63	0.20	9,094,610.36	680€/t	-7.798,237.73
Hungary[2]	75,607.96	24,626,015.00	4,925,203.00	0.20	51,413,412.80	680€/t	-46,488,209.80
Lithuania	24,168.09	10,917,025.12	545,851.26	0.05	16,434,302.76	680€/t	-15,888,451.51
Latvia	20,391.43	9682751.578	4,841,375.79	0.50	13,866,175.66	680€/t	-9,024,799.87
Malta	7,512.40	3,233,909.43	29,092,352.76	40% + 1500 Ln	5,108,429.85	680€/t	23,983,922.92
Poland[3]	256,956.53	111,829,147.00	57,032,864.97	0.51	174,730,439.24	680€/t	-171,743,858.63
Slovenia	37,177.48	16,831,546.80	336,630.94	0.02	25,280,683.34	680€/t	-24,944,052.40
Slovakia	58,443.93	26,287,659.54	0.00	0.00	39,741,875.05	680€/t	-39,741,875.05
Total	617,064.16		99,207,862.72	1.48	419,603,627.67		-374,442,049.30

[1] Except for Hungary and Poland, these figures are the future trade prospects calculated in accordance with para. 6 of the Understanding on the Interpretation of Article XXVIII of the GATT 1994

[2] Hungary has a TRQ of 17 079 + (in-quota rate same as out-of-quota rate)

[3] Poland has a TRQ of 33 000 + (in-quota rate – 20%)

[4] For Hungary and Poland, the figures represent the total value; for the others, they represent the value of the future trade prospects on the basis of the unit value during the representative period.

In this regard, the information that the EC has provided indicates that for the period 2000-2002, Ecuador's share in the total value of imports into the EC-10 was 58.2%. Assuming that Ecuador's share in such imports during the period 2001-2003 remained at the same level, the total compensation due to Ecuador would be 58.2% of €374,442,049.30 per annum, or €217,925,273 per annum.

It is easily deduced that the compensation owed by the EC to Ecuador for its enlargement as a consequence of the accession of 10 new members is by no means compensated with the introduction of the €176/t tariff, applicable since 1 January 2006 to the 10 countries that joined the EC, as the European Communities would have us believe.

In January 2007, when Romania and Bulgaria acceded to the EC prior to accession, Romania imported 143,000 mt of Latin American bananas, subject to a tariff of 16%;[14] Bulgaria imported 55,000 mt in 2005, subject to a tariff of 11.2%.[15] Following accession, both countries became subject to an "autonomous" €176/mt tariff. No scheduling changes or compensation adjustments have been made.

35. (Ecuador) In paragraph 6 of its oral statement during the substantive meeting with the Panel, Ecuador mentions that "[l]ast year, the European Communities' tariff on bananas required the payment of additional tariffs for Ecuador in the order of €103 million more than the previous year as a result of the European Communities' unilateral 'tariff only' scheme." For clarification, can Ecuador describe the methodology for this calculation, and provide the amounts paid from 1999 to 2006. Can Ecuador also clarify whether it is arguing that €103 million is the additional amount paid in 2006 as compared to the duties paid during the prior year (2005) before the EC banana regime of 1 January 2006 entered into force.

The additional tariffs for Ecuador amounting to 103 million Euros were derived by taking the difference between total duties actually paid by Ecuador in 2006 under the current €176/mt rate and the duties Ecuador would have paid that same year had the rate been €75/mt (as it was from 1995 to 2005). The methodology for this calculation is as follows: [Total duties paid by Ecuador to the EC in 2006] – [Total volume of EC imports of bananas from Ecuador in 2006 (in mt) x €75/mt]. The actual calculation is as follows: €180,788,696 – [1,027,209 mt x €75/mt] = €180,788,696 – €77,040,675 = €103,748,021.

Based on 1999-2006 trade data total duties paid to the EC for imports of bananas from Ecuador between 1999 and 2006 were:

- 1999 – €52,259,175;
- 2000 – €51,816,960;
- 2001 – €52,880,355;
- 2002 – €62,059,943;
- 2003 – € 59,974,208;
- 2004 – €70,847,381;
- 2005 – €79,705,148; and
- 2006 – €180,788,696

36. (Ecuador) In paragraph 10 of its closing statement during the substantive meeting with the Panel, the EC argues that "[t]he fundamental GATT distinction between tariff and non-tariff measures is an important element of this case. Tariff measures are subject to Articles I and II, and non-tariff measures are governed by Articles XI and XIII. The European Communities is unaware of any instance in which a single measure has been found to be in breach of both Article I and Article XIII." Can Ecuador provide a reasoned answer as to whether it agrees with this statement.

[14] U.N. Comtrade Database: Romania banana imports 2002-2005, Exhibit ECU-10.
[15] U.N. Comtrade Database: Bulgaria banana imports 2002-2005, Exhibit ECU-10.

The compliance panel in *Bananas III (Article 21.5 – Ecuador)* concluded the ACP tariff-quotas were being maintained in breach of both Article I and Article XIII of the GATT.[16]

In any event, As previously noted, there is no provision of the WTO that prevents a single measure from violating more than one provision of the WTO and there is no reason to try to imply such a rule. The EC has no textual or contextual basis for arguing that a tariff quota may not simultaneously violate Article I and Article XIII.

37. (Ecuador) Can Ecuador confirm that it signed an *Understanding on Bananas* with the EC on 30 April 2001, the text of which is reproduced in documents WT/DS27/58 and WT/DS27/60. If so, did the legal and factual assumptions based upon which Ecuador signed such understanding on 30 April 2001 change by June 2001 when the Understanding was notified to the DSB?

Ecuador signed the Understanding on Bananas with the EC on 30 April 2001. Ecuador was, and is, quite certain regarding what it agreed to under the Understanding – a transitional regime comprised of several phased steps to be taken by the EC to ultimately bring about a resolution to the dispute, not an immediate end to the dispute. Both the text of the Understanding and Ecuador's communication confirm this interpretation.

What changed, from Ecuador's point of view, and what prompted Ecuador's July 2001 communication to the DSB, was the EC's portrayal of the Understanding to the DSB in June 2001 – as a mutually satisfactory solution within the meaning of DSU Article 3.6 and an end to the *Bananas* dispute.[17] Ecuador did not, and to this day does not, share the EC's interpretation.

Immediately after the EC's communication, Ecuador clarified that the Understanding identified a "*means* by which a long-standing dispute *can* be resolved,"[18] comprised of "the execution of two phases" and "the implementation of several key features, which demands the collective action of the WTO membership." Ecuador viewed the EC's approach to the Understanding (as a mutually agreed solution within the meaning of Article 3.6) as denying the transitional nature of the Understanding.

Ecuador's concerns have been borne out by the EC's actions since 2001. The EC failed to satisfy the terms of the Understanding, the waiver Annex, as well as its obligations under the covered agreements.

38. (Ecuador) Paragraph G of the Banana Understanding provides that "[t]he EC and Ecuador consider that this Understanding constitutes a mutually agreed solution to the banana dispute." Why did Ecuador then state in its notification of the Understanding to the DSB (document WT/DS27/60) that "although Ecuador sees the Understanding as an agreed solution which can contribute to an overall, definite and universally accepted solution, it must be made clear that the provisions of Article 3.6 of the DSU are not applicable in this case"? Please provide a reasoned response.

Ecuador, especially because of the EC purported notification, came to realize that the EC might try to use the Understanding as means to restrict WTO control and Ecuador's rights under WTO dispute settlement rights. Ecuador wished to make clear to the EC and WTO members generally, despite

[16] *See EC – Bananas III (Article 21.5 – Ecuador)*, paras. 6.160 and 6.161.

[17] *See* Notification of Mutually Agreed Solution, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/58, 2 July 2001.

[18] *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Understanding on Bananas between the European Communities and Ecuador*, WT/DS27/60, 9 July 2001("Ecuador Communication"),quoting EC-Ecuador Understanding, paragraph A.

Ecuador's commitment to and hope for the Understanding, it was not a mutually satisfactory solution in the sense of Article 2 of the DSU.

39. (Ecuador) In paragraph 15 of its second written submission, the EC argues that Ecuador "accepted the legality of the Understanding [on Bananas reached between the EC and Ecuador on 30 April 2001], by initially complying with its provisions." The Panel notes Ecuador's assertion in paragraph 26 of its opening statement that "the Understanding plainly requires a waiver of Article I (for which Ecuador *agreed* to lift its reserve) and a waiver of Article XIII, which Ecuador *committed* to promote to permit the EC tariff quota for ACP countries until 1 January 2006. *Ecuador did its part regarding the waivers* ..." (Emphasis added). In the light of this assertion, does Ecuador consider that it has at least partly complied with the Understanding? If not, why not? If yes, what are Ecuador's views on the point made by the EC, in paragraph 62 of the EC's first second written submission, that Ecuador's partial compliance proves the "binding nature" of the Understanding? What implications does the eventual binding nature of the Understanding have, in Ecuador's view, for the potential status of the Understanding as a mutually agreed solution?

Ecuador complied with its obligations under the Understanding, which proves none of the illogical propositions that the EC seeks to derive from Ecuador's compliance.

Compliance with the terms of the bilateral Understanding does not remotely mean that Ecuador cannot complain under the WTO about measures that the EC never would have applied if the EC had complied with the bilateral Understanding. This EC argument turns international law and good faith on its head, once again. The intention of the parties that the Understanding result in a durable mutually satisfactory solution does not make the Understanding such a mutually satisfactory solution, as Ecuador has previously explained.

40. (Ecuador) In paragraph 4 of its statement during the substantive meeting with the Panel, Suriname argues that "[i]n this case there can be no doubt that a *mutually agreed* solution exists. Therefore, there cannot be any *disagreement* in the sense of Article 21.5 of the DSU." Provided that a mutually agreed solution exists, can Ecuador provide a reasoned answer as to whether it agrees with Suriname's conclusion in regard to Article 21.5 of the DSU.

Ecuador disagrees. There is no provision of the DSU that precludes bringing a complaint under Article 21.5 simply on the basis that the challenged measure complied or was alleged to comply with an agreement alleged to constitute a mutually agreed solution. The DSU encourages mutually agreed solutions, but carefully does not provide anywhere that a mutually agreed solution precludes or limits the right to bring dispute settlement proceedings. The DSU drafters were wise not to provide that a mutually agreed solution limits any DSU rights, for any such limitation would be a disincentive for parties to try to negotiate solutions. This is graphically illustrated in this dispute, where the EC is attempting to avoid scrutiny of it flagrant violations of the WTO on grounds that the Understanding constituted a sub silencio waiver of Ecuador's WTO rights. The DSU authorizes and requires Panels to determine compliance with covered agreements. The DSU does not authorize a Panel to forego or limit its responsibilities because the defending party in the dispute alleges that the complaining party waived its WTO rights in a bilateral agreement. Despite their protests, the EC and ACP countries are urging the Panel out of expediency in this dispute to fabricate rules regarding mutually agreed solutions that would make dispute parties, especially complaining parties, reluctant ever to enter into a mutually agreed solution, since that would cost them their WTO rights. The WTO Agreements do not provide such a rule, and it would be bad policy and bad law to try to contrive one.

41. (Ecuador) In paragraph 14 of its second written submission, the EC states that the term "1 January 2006" in the phrase "[to further actions that, by 1 January 2006 would enable the] system [to] operate fairly without any waiver at all", used by Ecuador in paragraph 11 of its

own second written submission, is "probably a typographical error and should be replaced by 1 January 2008". Does Ecuador agree? If not, why not?

Ecuador agrees and apologizes for the inadvertent error.

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

Ecuador is arguing that any tariff quota must conform with Article XIII, unless it is covered by a waiver or by some other exception. Ecuador has not done a survey of all possible exceptions, and the EC has not argued that its tariff quotas benefit from a waiver or other exception.

With regard to the possible exceptions mentioned in the question – the Enabling Clause and GATTT Article XXIV – Ecuador does not consider that the Enabling Clause provides an exception, since it is expressly an exception only to GATT Article I:1.[19] As noted by the Appellate Body in *EC – Tariff Preferences*, the Enabling Clause "excepts Members from complying with the obligation contained in Article I:1 for the purpose of providing differential and more favourable treatment to developing countries ... ."[20] It does not permit a Member to derogate from the provisions of other GATT Articles, including Article XIII.

For Free Trade Areas and Customs Unions that meet the strict criteria of Article XXIV, that Article creates an exception that could justify some kinds of exceptions from the obligations of Article XIII. As the Appellate Body found in *Turkey – Textiles*, a GATT-inconsistent quantitative measure n would only be justified under Article XXIV if: (i) the FTA met the "substantially all trade" coverage test of Article XXIV:8(b); (ii) the FTA met the requirements of XXIV:5(b) that duties and regulations not be higher upon the formation of the FTA than prior to it; and (iii) the GATT-inconsistent measure was *necessary* for the formation of the FTA.[21]

Assuming that no higher barriers were imposed on third countries, and that the substantially all trade test were met, it is self-evident that exempting products of free trade area partners from duties, quotas and tariff quotas contributes to meeting the test of eliminating duties and other regulations of commerce on substantially all products of the free trade area. Indeed, failure to include such an exemption, or limiting such exemption through devices such as capping the preferences is a negative point though not necessarily fatal, since the requirement is not "all trade", but rather "substantially all trade" must be free from duties or other restrictions. Whether the third test is met– the necessity of taking the measure inconsistent with the WTO obligation in order to form the free trade area – will depend on the nature of the measures.

43. (Ecuador) If the tariff rate quota of €75/mt for 2.2 million metric tons expired at the end of 2002, what would be the arguments of Ecuador to demonstrate a violation of Article II:1(a) and (b) of the GATT 1994? In particular, would in such a case Ecuador accept that the EC's bound level of duty is merely an MFN duty of 680€/mt? If not, why not?

[19] Paragraph 1 of the Enabling Clause provides that '[notwithstanding the provisions of Article I of the General Agreement, contracting parties may accord differential and more favourable treatment to developing countries." Paragraph 2 identifies the four types of measures that can be exempted from a finding of inconsistency with Article I:1 under the Enabling Clause. *EC – Tariff Preferences (AB)*", para. 112.

[20] *EC – Tariff Preferences (AB),* para. 90.

[21] Appellate Body Report, *Turkey – Restrictions on Imports of Textiles and Clothing Products*, WT/DS34/AB/R, adopted 19 November 1999 ("*Turkey – Textiles (AB)"*), para. 58.

If the DSB found that the EC's €75/mt for 2.2 million metric tons concession expired at the end of 2002, the EC's only bound commitment would be the €680/mt duty. Neither Ecuador nor any other WTO member could then claim that a duty of €176/mt – or any duty up to €680/mt – breaches Article II:1(a) and (b).

44. (Ecuador) What are the specific EC obligations under Article II of the GATT 1994 that Ecuador argues are being infringed by the EC duty of €176/mt applied to bananas originating in Ecuador and other MFN countries?

Article II:1(a) and (b).

45. (Ecuador) In what way should paragraph 9 of the Framework Agreement on Bananas (BFA) be interpreted, if not to establish an expiration of a 2.2 mt tariff rate quota (TRQ)? In other words, what exactly has expired, under the terms of paragraph 9, on 31 December 2002?

The BFA expired on that date. The tariff quota concession did not expire, because the EC made that concession independently in its schedule. Since none of provisions of the BFA were WTO-consistent terms and conditions, their legitimacy and validity were only as commitments among the parties to the BFA, and thus they must be considered to have expired on 31 December 2002, if they even had any effectiveness among BFA parties by that point. Other provisions that plainly were not terms, conditions or qualifications of the concession, such as the commitment not to pursue adoption of the panel report or the commitment to consult in 2001, were not WTO terms conditions or qualifications on a concession, could not have been enforced in WTO dispute settlement proceedings, and would have expired with the BFA.

46. (Ecuador) In paragraph 93 of its second written submission, the EC argues that:

> **"Ecuador's second written submission goes on to assert in paragraphs 69 and 70 that 'eliminating the volume restraint element of a tariff quota does not authorize ignoring the tariff binding'. In other words, Ecuador seems to imply that once a tariff quota is granted in a WTO Member's schedules, the tariff part somehow becomes obligatory and perpetual, while the quota part may be freely eliminated. This assertion is not supported by any provision of WTO law and Ecuador's second written submission does not even attempt to offer any explanation as to its legal basis. Moreover, accepting that the 'tariff element' and the 'quota element' of a tariff quota are completely separable and each has a 'life of its own' leads to unreasonable results. For example, Ecuador should explain why the rule that it proposes should not be the other way round, i.e. that the 'tariff element' of a tariff quota may be freely amended, while the 'quota element' should be treated as obligatory and perpetual."**

Can Ecuador provide a reasoned answer as to whether it agrees with the EC's arguments.

The EC's concessions are the in-quota concession of €75/mt for 2.2 million mt; and the over-quota concession of €680/mt, subject. These concessions are subject to such adjustments as may be agreed in Article XXIV:6 negotiations to account for accessions of countries (who had more favourable bindings on bananas than those of the EC) since the concession was granted, but the need for such adjustment is not disputed in this proceeding, and therefore Ecuador and other parties continue to refer to the €75/mt for 2.2 million mt; concession, without prejudice to the obligation for adjustments.

Ecuador does not argue that the EC is bound to provide a €75/mt duty for an unlimited quantity of bananas. However, the EC cannot eliminate the €75/mt for 2.2 million mt obligation by asserting that

it wishes to eliminate the "quota element" of that concession (i.e. the 2.2 million mt) and, having eliminated that element, then automatically it no longer has any obligation with respect to the €75/mt duty. It is true that just eliminating the quantitative limit of 2.2 million mt would not breach the EC's binding and indeed would grant more favourable treatment than required by the binding, which is always welcome, but not required by Article II. What the EC cannot do is avoid its duty obligation by the simple expedient of eliminating the quota element and announcing that that step eliminates any tariff obligation. If there were such a right, all WTO members could eliminate all their low duty and zero duty tariff quota concessions by the same expedient.

47. (Ecuador) In paragraph 3 of its statement during the substantive meeting with the Panel, Saint Lucia argues that "[i]n 2005 WTO Ministers in Hong Kong accepted the tariffication proposal in which the TRQ was replaced by a single tariff of €176 per tonne. Indeed, the Ecuadorian delegation was a leading campaigner for this change and Minister Støre of Norway was charged with monitoring trade flows that would indicate if the change had in fact disadvantaged MFN suppliers." In paragraph 11 of its third party statement Saint Lucia adds that "Ecuador argues that ... the European Communities was allowed only one shot at 'rectifying the matter'. I trust that [the Panel] will reject this narrow and self-serving reading of the waiver – a reading that even Ecuador did not share when it agreed to join the monitoring group that kept under review the actual effects on import volumes of the tariff of €176 per tonne." Can Ecuador provide a reasoned answer as to whether it agrees with the arguments raised by Saint Lucia. Can Ecuador also provide evidence to support the factual assertions made by Saint Lucia, regarding the acceptance by WTO Ministers in Hong Kong of the tariffication proposal in which the TRQ was replaced by a single tariff of €176 per tonne.

Ecuador does not agree. To the contrary, a large number of Latin American nations, including Ecuador, Honduras, Panama, Colombia, and Nicaragua, made statements at the Ministerial Conference decrying the EC's adoption of the €176/mt tariff.[22] Ecuador agreed to participate in Minister Støre's monitoring procedures with the hope that it would produce a speedy negotiated solution. At the same time, Ecuador expressly reserved its rights to use all the legal instruments at its disposal in the WTO to safeguard its rights.[23]

QUESTIONS ADDRESSED TO PARTIES AND THIRD PARTIES

86. (Both Parties, Belize, Cameroon, Côte d'Ivoire, Dominica, the Dominican Republic, Ghana, Jamaica, Madagascar, Saint Lucia, Saint Vincent and the Grenadines, and Suriname) In paragraph 31 of its statement during the substantive meeting with the Panel, Cameroon argues that "[c]'est un fait reconnu que les producteurs de bananes ACP sont moins compétitifs que les producteurs NPF. Comparés à ces derniers, les producteurs ACP produisent à un coût plus élevé. Pour des raisons historiques et géographiques, ils ne disposent pas des mêmes économies d'échelle que les producteurs NPF. Dès lors, les producteurs ACP ne peuvent les concurrencer que sur les marches où ils bénéficient d'un accès préférentiel." Can Cameroon provide evidence for its assertions. Can Belize, Côte d'Ivoire, Dominica, the Dominican Republic, Ghana, Jamaica, Madagascar, Saint Lucia, Saint Vincent and the Grenadines, and Suriname confirm that they agree with these specific assertions made by Cameroon. Can Cameroon, as well as Belize, Côte d'Ivoire, Dominica, the Dominican Republic, Ghana, Jamaica, Madagascar, Saint Lucia, Saint Vincent and the Grenadines, and Suriname specify the relevance of this argument, if any, in the context of its eventual analysis of Article XIII of the

[22] *See* Ministerial Conference, Sixth Session, *Summary Record of the Fourth Meeting Held in Hong Kong Convention and Exhibition Centre, Hong Kong, China on Wednesday, 14 December 2005, at 8 p.m*, WT/MIN(05)/SR/4, 24 February 2006, agenda item 2(b), attached as Exhibit ECU-11.

[23] *See* Hong Kong Statement of Ecuador and Dispute Settlement Body, *Minutes of Meeting Held in the Centre William Rappard on 17 February 2006*, WT/DSB/M/205, 31 March 2006, para. 61. Exhibit ECU-11.

GATT 1994, in particular as regards the chapeau of Article XIII:2. Can the Parties provide a reasoned answer as to whether they agree with these assertions, and specify, in their view, how the same should be taken into account in the context of an eventual analysis of Article XIII of the GATT 1994, in particular as regards the chapeau of Article XIII:2.

Ecuador has no comment on the relative efficiency of these countries. However, Article XIII:2 does not permit a restricting Member to use allocations of restrictions to make up for relative economic inefficiency of one or more supplying Members. To the contrary the goal of Article XII is to achieve the same distribution of any restrictions as would likely prevail in the absence of the restriction.

87. (Both Parties and Brazil) In paragraph 17 of its statement during the substantive meeting with the Panel, Brazil argues that "a Member is not exempted from discharging its burden of proof as regards the compliance of the new measures with the DSB recommendations and rulings even if such measures are intended to implement a suggestion by the panel." Can Brazil elaborate on this argument, and the Parties provide a reasoned answer as to whether they agree with Brazil's argument.

Ecuador understood Brazil's statement to agree with Ecuador's position that nothing in the DSU immunizes a measure from challenge in an Article 21.5 proceeding simply on the basis that the defending party argues or even ultimately proves that the measure conforms with a panel suggestion. Ecuador may have further comments, depending on the responses to this question.

88. (Both Parties and Colombia) In paragraph 16 of its third party submission, Colombia argues that "[a]n applied tariff of €176/tonne does not constitute a 'rebinding' [under the Doha Waiver]." Can Colombia elaborate on this argument, and the Parties provide a reasoned answer as to whether they agree with it.

Ecuador understood Colombia to explain that the €176/tonne duty that the EC applies to bananas (except those benefiting from the zero duty quota) is not in fact bound. The EC does not dispute that this duty is not bound.

89. (Both Parties and Côte d'Ivoire) In paragraph 21 of its oral statement during the substantive meeting with the Panel, Côte d'Ivoire argues that "moins d'une année suffit pour produire et exporter des bananas". Can Côte d'Ivoire provide evidence for its argument. Can the Parties comment on the argument made by Côte d'Ivoire, and explain how rapidly banana production and exports can be expanded, and how much time is necessary for suppliers to fully respond to a change in market conditions, such as a change in the EC's import regime for bananas.

The Côte d'Ivoire underestimates the timetable for completing any new banana project of a meaningful scale. A new banana project is not simply about how long it takes a banana plant, once in the ground, to produce bananas. When suppliers establish these new plantations to respond to improved conditions of entry, a great many preparatory steps must be taken, including, among others:

- identifying the land;
- conducting soil surveys;
- evaluating farm-to-port operations, as well as port operations;
- addressing any government policy or regulatory issues;

- developing infrastructure, including digging drainage, installing irrigation, and installing roadways;

- contracting for meristems, 1,800 of which are needed for each hectare and often are difficult to source in significant magnitudes;

- planting the new fields; and

- cultivating export-quality production.

The lead-time required for these steps is typically two to three years, if not more. Thus, while *short-term* responses to a change in market conditions occur primarily from more intensive production of existing plantations, a longer period of time is needed to launch new plantations and bring them to peak production. willingness on the part of investors to make this investment depends in part on perception of the stability of market conditions.

90. (Both Parties, Nicaragua and Panama) In paragraph 108 of their respective third party submissions, Nicaragua and Panama argue that "[t]he EC's €75/mt concession – *which from 1995 to 2005 covered all bound in-quota Latin American imports and informed the rate applicable to all other Latin American bananas entering the EC market* – has been the single most important banana concession in Schedule CXL. In contrast to *the prohibitive €680/mt rate, under which virtually no Latin American volumes have ever been entered,* the €75/mt concession is the only rate that enabled Latin American market access to the EC market from 1995 to 2005. Unless the €75/mt bound rate receives the full protections of GATT Article II, the entire value of the EC's mandatory Uruguay Round concessions will be nullified". (Emphasis added). Can Nicaragua and Panama provide evidence for their assertions. If MFN banana imports have increased under an applied tariff rate of €176/mt, as argued by the EC, how can this be reconciled with the statement that "a €75/mt concession is the only rate that enabled Latin American market access to the EC market from 1995 to 2005"? Can Nicaragua and Panama clarify what would be meant by "providing the full protections of GATT Article II" to the €75/mt tariff rate. Can Parties provide a reasoned answer as to whether they agree with the assertions made by Nicaragua and Panama.

Ecuador may comment further after reviewing the response of Nicaragua and Panama. However, each of the quota assertions in Ecuador's view is correct and supported by the record of this dispute. In particular, evidence introduced by both parties demonstrated that no statistically significant imports occurred at the €680/mt, and all or virtually all imports into the EC of MFN bananas occurred at the €75/mt rate, within the tariff quota. Ecuador has already indicated its agreement that if the panel were to find that the €75/mt tariff quota is no longer bound, the EC's Uruguay Round "concessions" would become simply the prohibitive €680/mt rate. Ecuador believes that Nicaragua and Panama were simply comparing the 75 and 680 rates, which, were the only rates applicable to MFN bananas in 1995-2005.

91. (Both Parties, Nicaragua and Panama) In paragraph 19 of their combined statement during the substantive meeting with the Panel, Nicaragua and Panama argue that "[t]he EC tariff, which was the EC's scheduled banana concession from 1963-1994, was the equivalent of about 80 euro per tonne." Can Nicaragua and Panama elaborate on this argument and provide evidence for their assertions, as appropriate. Can the Parties comment on the argument and assertions.

Ecuador believes that this calculation was demonstrated before the Arbitrator. Ecuador may comment further on seeing the response of Nicaragua and Panama.

92. (Both Parties and Suriname) In paragraph 10 of its statement during the substantive meeting with the Panel, Suriname argues that "[b]oth the Doha Waiver and the Understanding on Bananas were negotiated by the WTO members, including the interested parties, after the DSB adopted its recommendations and rulings in the original Bananas dispute. These two instruments constitute new secondary WTO law and create an entirely new legal framework for the issues that are now pending before the Panel. These new instruments clearly strike a new balance of rights and obligations for the entire WTO membership, in addition to the parties to the dispute." Can Suriname elaborate on these arguments. Can both Parties provide a reasoned answer as to whether they agree with Suriname.

In Ecuador's opinion, the Doha Waiver, which was granted by the WTO membership on a time-limited and conditional basis, does affect rights and obligations of WTO members. A waiver granted by WTO Members in accordance with the rules can modify those rules for WTO purposes. However, the Understanding was between Ecuador and the EC, and is not an agreement that can modify rights and obligations of anyone under the WTO.

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

As is evident in the response to other questions and the different notifications that were made, the parties did not have the same view of the significance and effect of the respective agreements.

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

Ecuador believes that the United States may have had a better appreciation at the time it concluded its negotiations as to how the EC might attempt to misconstrue or misuse the provision in question. In any event, Ecuador does not consider that this difference between the two Understandings has any legal effect in a WTO proceeding. Paragraph G could not have made the Understanding into a mutually agreed solution in the sense of Article 3 if that had been Ecuador's intent. Further, as noted previously, a mutually agreed solution in any event does not limit a Member's dispute settlement rights, nor may a Panel modify its determination of rights and obligations under the WTO to take account of the US or Ecuadorian Understandings with EC, whether or not either is a mutually agreed solution in the view of the Panel.

95. (Ecuador and all Third Parties) In paragraph 6 of its oral statement during the substantive meeting with the Panel, Ecuador mentions that "Ecuador's per capita GDP for 2005 was about 8 per cent of the per capita average of the EC, and also is less than that of many of the ACP countries." In turn, in paragraph 16 of their combined statement during the substantive meeting with the Panel, Nicaragua and Panama state that Nicaragua's "Gross National Income of $910 is below the GNIs of several LDCs and well behind the GNIs of most ACP countries." Can Ecuador, Nicaragua and Panama provide the data sources that were used to make their respective assertions and specify the per capita GDP figures in those sources for Ecuador, the EC and the MFN suppliers and ACP countries that are participating as Third

Parties in these proceedings. Can other Third Parties provide a reasoned answer as to whether they agree with the assertions made by Ecuador, Nicaragua and Panama.

Attached as Exhibit ECU-12, please find the data sources for the assertion made by Ecuador in its oral statement. In that regard, the GDP per capita of Ecuador for the year 2007 according to the IMF, is lower than: Belize, Dominica, Dominican Republic, Jamaica, Saint Vincent and the Grenadines, Suriname and almost two times lower than that of Saint Lucia. Regarding Ecuador's GDP per capita in comparison to that of the EC-27, for the year 2007 and according to EUROSTAT data, our GDP its 9 per cent of that of the EC. The data changes because Ecuador made its first calculation, asserted in our oral statement, comparing the EC-25 for the year 2005.

96. (Ecuador and Nicaragua) In paragraph 6 of its closing statement during the substantive meeting with the Panel, the EC argues that "the draft dated November 2, 2001, which Nicaragua has attached to its third party submission as Exhibit N-1, provided that the Doha Waiver would be terminated automatically within two months after the notification of the arbitration award to the General Council. However, this provision was not included in the final version of the Doha Waiver. The link between the awards of the arbitrator and the termination of the Doha Waiver was abandoned." Can Ecuador and Nicaragua provide a reasoned answer as to whether they agree with the statement.

The EC is wrong in claiming that this preparatory waiver document shows that "the link between the awards of the arbitrator and the termination of the Doha Waiver was abandoned."[24] It proves exactly the contrary.

The document to which the EC is referring was a relatively early version of the draft banana provisions of the waiver.[25] Developed by the EC, not the MFN supplying countries, it was put forward before the notion of an Annex had even emerged. As evidenced by its proposed text, the EC already well understood by the time this version was put forward that absent a "*multilateral control*" on "*any re-binding*,"[26] and a waiver termination provision linked to that multilateral control,[27] this waiver would not be approved.

The two-month termination provision in the EC's proposed text was an early iteration of what later became the waiver's mandatory termination provision "upon entry into force of the new EC tariff regime." The EC used the phrase "two months after the notification of the arbitration award" for the simple reason that under the approach it was proposing, there were still no requirements as to when the arbitration procedure would need to begin and end. Indeed, the EC was still envisioning in this draft that arbitration would occur *after* the new regime took effect, and, thus, framed the waiver standard in the present tense, not the future conditional tense (*i.e.* "does not result in ...," rather than "would result in ..."), and pegged the termination provision to the notification of the award, whenever that might occur.

[24] Closing statement of the European Communities, 19 September 2007, para. 5.

[25] *See* Council for Trade in Goods, *European Communities – The ACP-EC Partnership Agreement: Revision* (Communication from the European Communities), G/C/W/187/Add. 2/Rev. 1, 2 November 2001. Both Nicaragua and Panama attached this document to their third party written submissions as Exhibits N-1 and P-1, respectively.

[26] *Id.*, Noting Clause 3 in this same document.

[27] *Id.*, 3ter.

None of the MFN drafters was willing to accept this imprecisely defined EC draft.[28] As subsequent drafts and the final waiver text made clear, they insisted, instead, on more elaborated, carefully sequenced procedures entailing consultations and two rounds of arbitration that would have to be concluded in their entirety *before* the regime took effect.[29] Once the arbitration provisions were refined by the negotiators to require a conclusion of all procedures before 2006, the waiver termination provision, which remained an absolute prerequisite throughout this drafting period, was necessarily also refined to take effect "upon entry into force of the new EC tariff regime."

The EC, having already acknowledged in its earlier draft the necessity of a lapsed waiver linked to arbitration, cannot be allowed to claim now that the *strengthened* final text of the waiver no longer contained that same linkage and granted, instead, blanket authority to the EC to install whatever regime it wanted to as of 2006.

97. (Ecuador, Nicaragua and Panama) What are exactly, in your view, the current binding concessions that the EC has, relating to bananas? Is it the TRQ as described in the EC's Schedules LXXX and CXL; is it a single duty of €75/mt; or is it rather something else? If it was a single duty of €75/mt, please explain why the Panel should consider that the 2.2 million mt volume and the out-of-quota duty of €680/mt are not a relevant part of the EC's current concessions.

Please see Ecuador's responses to question 46.

98. (Ecuador, Nicaragua and Panama) Does the Framework Agreement on Bananas (BFA) include "terms, conditions or qualifications" to the EC's relevant concession on bananas in the sense of Article II(1)(b) of the GATT?

As Ecuador has previously noted, all the provisions of the agreement that might have been considered "terms, conditions or qualifications" of the concession have either been superseded or found inconsistent with the EC's obligations or both, insofar as Ecuador is aware. The €75/mt tariff quota, while also required by the BFA, is not a term, condition or qualification of the concession, but rather was a plurilateral commitment to make that concession, which the EC duly made. Other terms gave or purported to give procedural rights to BFA parties that are now moot. As Ecuador has explained previously, Article 9 terminates the BFA, but does not purport to terminate the €75/mt concession.

99. (Ecuador, Nicaragua and Panama) Do you agree with the EC that a Member could, through a "term, condition or qualification" on a concession that was included in its Schedule and accepted by the other Members, provide for the elimination of a bound TRQ?

Traditionally, it was possible (though extraordinarily rare) to provide for a concession of limited duration. Whether that is still possible, particularly for an agricultural product and in the light of commitments made in the Agreement on Agriculture, is a point on which Ecuador wishes to defer comment. In Ecuador's view, the record plainly establishes that, even if there were such a theoretical

[28] There were several other elements of this draft that the Latin American negotiators considered unacceptable, including: (i) a waiver access standard expressed as an "aim," not a requirement (3bis); (ii) an access standard that protected both MFN and ACP suppliers, not just MFN suppliers (3bis, 3ter); (iii) an access standard that would be analyzed by the Arbitrator after the fact ("does not result in"), rather than prospectively ("would result in ..."); and (iv) an access standard that would only be measured "at the time of the re-binding," not over time (3ter). The MFN negotiators insisted on striking every one of these proposed EC elements. By replacing (i) and (iii) above with the final waiver text, the MFN negotiators were further reinforcing the unseverable link between the pre-2006 arbitration awards and the termination of the waiver.

[29] *See* Draft EC Proposal for Article I waiver, 11 November 2001, in Exhibits P-1 and N-1; Ministerial Conference, *European Communities – The ACP-EC Partnership Agreement*, WT/MIN(01)/15, 14 November 2001, WT/L/436 ("Article I waiver"), Annex in Exhibit EC-2.

possibility, the EC did not make its bound TRQ terminate in 2002, and the record, including of the EC's own actions and arguments show that this argument is wrong and that the EC even making the argument is contrary to the principle of good faith that the EC so frequently invokes.

100. (Ecuador, Nicaragua and Panama) In paragraph 79 of its second written submission, the EC argues that:

> **"[I]n paragraph 59 of its second written submission, Ecuador argues that 'it is scarcely likely that the negotiators of the BFA would consider as satisfactory solution a system that as of 2003 would leave all their banana exports to the EC subject to an essentially prohibitive duty of €680/mt'. This statement is in full contradiction with paragraph 25 of Ecuador's second written submission, where it is stated that 'in every negotiation parties strive for a balance of benefits, but the reality does not always turn out as the negotiators were expecting or assuming at the time of the negotiations. It would destabilize the entire premise of the WTO tariff system of concessions were to be adjusted according to whether the concessions had the result contemplated at the time that the concession was granted'. Perhaps Ecuador should explain whether its statement in paragraph 25 is correct, in which case it would lose its Article II claims, or whether its statement in paragraph 59 is correct, in which case it would lose its Article I claims."**

Can Ecuador, Nicaragua and Panama provide a reasoned answer as to whether they agree with the EC's arguments.

The two statements are not inconsistent.

Paragraph 59 is part of Ecuador's argument that there are many factors that support the view that the termination clause of the Banana Framework Agreement did not and was never intended to terminate the EC's €75/mt tariff quota concession. There is no disagreement that a tariff of €680/mt is essentially prohibitive. While countries occasionally make unwise bargains, the Panel would have to presume that the BFA members, as well as all the non-EC members of the WTO were insane or incompetent to accept, in place of the tariff quota that the EC had proposed, a modest improvement for 8 years, following which the concession would disappear the EC would be allowed to essentially prohibit all imports with a duty up to €680/mt. The EC's only effort to explain this extraordinary "concession" it achieved in 1994 and rediscovered in the summer of 2007 has been to say that the EC promised to consult with the BFA parties. It would have been a dismal consultation had the EC's current argument been true. It is not technically impossible that a group of small developing countries or even all of the other WTO members would make a miscalculation of colossal portions such as the EC is ascribing in this argument to the BFA parties and the acquiescent WTO members, but it is highly unlikely and a further reason, added to all the other evidence that the EC and all parties always considered and even argued that the concession continued, to suspect that no one understood the concession to terminate as now argued by the EC.

Paragraph 25 of Ecuador's submission addresses the EC's argument that the Doha Waiver must have meant that the EC was free to set the duty of its choosing so long as it maintained market access measured, according to the EC, by current trade. Ecuador was pointing out that the norm in concessions is that a party takes the risk that the concessions it bargains for, and the concessions it grants, may not turn out to have the same commercial value that the party projects during negotiations. Paragraph 59 deals with the current case, where what is disputed is the continued existence of a concession, an issue which would have extraordinary effects, rendering largely pointless this dispute and most of the discussion of bananas for at least the last 5 years. Paragraph 25

is simply making the point that concessions that all parties agree were validly made may have not turn out to be as commercially valuable, or may be more valuable, than originally projected.

101. (Ecuador, Nicaragua, Panama and the US) In paragraph 4 of its closing statement during the substantive meeting with the Panel, referring to the alleged termination of the Doha Waiver, the EC argues that "[i]f the Doha Waiver wanted to say what Ecuador, Nicaragua and Panama are arguing, the text should have read that the waiver would terminate 'if the *Arbitrator concludes* that the EC has failed to rectify the matter'. The Doha Waiver does not say so." Can Ecuador, Nicaragua and Panama provide a reasoned answer as to whether they agree with this statement. Could the US comment on the same, in the light of its argument in paragraph 21 of its statement during the substantive meeting with the Panel, reproduced in the previous question.

As Ecuador explained in paragraph 24 of Ecuador's second submission, the reasonable interpretation of the fifth Tiret is that the waiver expires after the Arbitrator's finding that the EC has failed to rectify the matter, without the need for extra words that the EC claims are needed. The use of identical and somewhat legalistic terminology of rectifying the matter supports this meaning. This is reinforced by the architecture of the waiver, directed at resolving the issue before 1 January 2006, while still giving the EC the chance to reach agreement with interested parties or failing that, to persuade a neutral arbitrator that the EC had met the waiver standards. This is a far more plausible reading than the EC's interpretation that all those complex and compressed dispute settlement and consultative procedures were all but meaningless, because the EC was then free to implement unilaterally whatever the EC chose.

ANNEX D-2

RESPONSES BY THE EUROPEAN COMMUNITIES TO QUESTIONS POSED BY THE PANEL

QUESTIONS ADDRESSED TO PARTIES

1. (Both Parties) In paragraph 39 of its third party submission, Colombia concludes that "the tariff level that would result in at least maintaining the conditions of competition between MFN bananas and ACP bananas is the difference between the price gap for MFN bananas (€97/tonne) and the price gap for ACP bananas (€86/tonne), or €11/tonne." Can the Parties provide a reasoned answer as to whether they agree with the argument raised by Colombia.

1. The European Communities observes that Colombia's statement echoes price-gap methodologies suggested during the 2005 Arbitrations. The outcomes of the Arbitration awards have confirmed the limits of these estimation exercises. With regard to the Colombia's suggestions, the first Arbitral Award (in paragraph 92) acknowledged that the price gap methodology implies "difficulties with the availability and reliability of actual market prices".

2. Today, the use of such a methodology is not justified any longer. Almost two years after the introduction of the new banana import regime there is plenty of real market data available that show us what has really happened. There is no more need to work with uncertain estimates. The real market data confirms that the tariff currently applied by the European Communities has more than maintained the total market access of the MFN suppliers. Consequently, the European Communities does not consider that there is any scope for further discussing Colombia's suggestions.

2. (Both Parties) How has the EC been applying the MFN tariff of €176/mt to individual imports? What volume and share of its imports have been subject to that tariff?

3. The European Communities applies a single tariff of €176/mt to all bananas imported into the European Communities, with the exception of the first 775 000 tons of bananas coming from ACP countries which are imported at a zero tariff.

4. The aggregate quantity of bananas imported into the European Communities in 2006 was 4,184,897 tons. The tariff of €176 per ton was applied to 3,409,897 tons and the zero duty was applied to the 775,000 tons of ACP bananas.

3. (Both Parties) In paragraph 15 of its first written submission, Ecuador states that, subsequent to adopting Council Regulation No. 1964/2005, "the EC has issued implementing regulations ancillary to [such regulation]." Can Parties identify all ancillary or implementing regulations associated with Council Regulation No. 1964/2005 adopted by the EC since November 2005, if any.

5. The implementing Regulations have been adopted by the European Commission on the basis of the authorisation granted through Regulation 1964/2005. These are:

(i) Commission Regulation (EC) No 2015/2005 of 9 December 2005 on imports during January and February 2006 of bananas originating in ACP countries.

(ii) Commission Regulation 219/2006 of 8 February 2006, on imports of bananas from ACP countries for the period 1 March to 31 December 2006.

(iii) Commission Regulation (EC) No 1789/2006 of 5 December 2006, on imports of bananas from ACP countries for the period 1 January to 31 December 2007.

4. (Both Parties) Is the import regime for bananas contained in EC Council Regulation No. 1964/2005, to be considered "the new EC tariff regime", in the sense that the term is used in the Doha Waiver? What is the exact date of entry into force of "the new EC tariff regime"? Has the EC Council Regulation No. 1964/2005 been modified in any way since its entry into force?

6. The European Communities understands that the Panel's question refers to the third line from the end of the last paragraph, where it is stated that "if the EC has failed to rectify the matter, this waiver shall cease to apply to bananas upon the entry into force of the new EC tariff regime".

7. As mentioned in paragraph 71 of the first written submission of the European Communities and in paragraph 41 of the second written submission of the European Communities, the European Communities considers that "the new EC tariff regime" the introduction of which could bring the termination of the Doha Waiver could only be the tariff regime that was presented to the Arbitrator and on which the Arbitrator made a pronouncement in its Award. As further mentioned in paragraph 72 of the first written submission of the European Communities, the European Communities never introduced the tariff regime that was presented to the Arbitrator and on which the Arbitrator made a pronouncement in its Award. On 1 January 2006, the European Communities introduced, through Regulation 1964/2005, a different import regime than the one analysed by the Arbitrator.

8. In light of the above, the European Communities takes the view that Regulation 1964/2005 is not the "new EC tariff regime", the introduction of which could bring the termination of the Doha Waiver.

9. Regulation 1964/2005 has not been amended since its adoption on 29 November 2005.

5. (Both Parties) Ecuador has advanced claims against the preferences granted by the EC to ACP bananas under both Articles I and XIII of the GATT 1994. Do Parties see any particular order in which these two claims should be considered in this dispute? Does Ecuador consider its claim under Article XIII of the GATT 1994 a subsidiary or secondary claim to its claim under Article I? If the preferences granted by the EC to ACP bananas are inconsistent with either Article I or Article XIII of the GATT 1994, on what grounds would Ecuador argue that additional findings regarding the same preferences under the other provision, i.e. Article XIII or Article I of the GATT, respectively, would also be necessary to resolve the matter at issue?

10. The European Communities has provided facts and arguments in its two Written Submissions and in its two Statements supporting the conclusion that its current banana import regime violates neither Article I, nor Article XIII of the GATT.

11. The European Communities considers that the Panel should first analyse the claims raised under Article I, because this analysis is a necessary element in assessing Ecuador's claims under Article XIII.

6. (Both Parties) In paragraph 37 of their joint third party submission, Belize, Cameroon, Côte d'Ivoire, Dominica, the Dominican Republic, Ghana, Jamaica, Madagascar, Saint Lucia, Saint Vincent and the Grenadines, and Suriname state that:

> **"pursuant to the Understanding [on Bananas reached between the EC and Ecuador on 30 April 2001], the banana dispute was taken off the agenda of the**

> **DSB in accordance with Article 21.6 of the DSU. Indeed, at the DSB meeting held on 1 February 2002 [footnote omitted], the representative of the EC noted that the EC had implemented the second phase of the Understanding on Bananas which would be applicable until the time the EC's banana import regime became a tariff-only regime i.e. at the latest by 1 January 2006, and that the EC considered that this matter should therefore be withdrawn from the DSB agenda. Ecuador agreed by stating that it 'also considered that this item should no longer appear on the agenda of future DSB meeting.'"**

Can Parties confirm that the issue of the implementation of the rulings and recommendations of the DSB in the *EC – Bananas III* dispute was withdrawn from the DSB's agenda with the consent of both the EC and Ecuador, in accordance with Article 21.6 of the DSU.

12. The issue of the implementation of the *EC – Bananas III* DSB recommendations and rulings was indeed withdrawn from the DSB's agenda with the consent of both the European Communities and Ecuador, in accordance with Article 21.6 of the DSU. Given that this Article provides that the issue of implementation "shall remain on the DSB's agenda until the issue is solved", the removal of the item from the agenda of the DSB supports the argument that Ecuador considered that the issue was solved with the introduction in 2002 of the new tariff-quota-based import regime as envisaged in the Understanding.

7. (Both Parties) In paragraph 4 of its statement during the substantive meeting with the Panel, Brazil argues that "Article 3.7 of the DSU should be interpreted in its integrality, with due account of all the provisions contained therein, that is to say the preference for negotiated solutions and the conformity with WTO agreements. Those two elements permit us to conclude that compliance with the covered agreements has precedence over negotiated solutions and that parties to an agreed solution are not authorized by such instrument to circumvent their obligations under the multilateral trading rules." Can the Parties provide a reasoned answer as to whether they agree with this statement.

13. The European Communities considers that the provisions of the Understanding are in conformity with the WTO rules. As mentioned in paragraph 15 of the second written submission of the European Communities, Ecuador does not explain how an initially "consistent with the covered agreements" Understanding (as evidenced by Ecuador's initial compliance with its provisions) has suddenly become "inconsistent with the covered agreements". Indeed, neither Ecuador, nor Brazil explains which aspects of the Understanding are not in conformity with a WTO rule (and with which WTO rule). For these reasons, the European Communities does not understand Ecuador's and certain Third Parties' assertions that the Understanding is not a "mutually agreed solution" because allegedly it is not in conformity with the WTO agreements.

14. In any event, as mentioned in paragraph 15 of the second written submission of the European Communities, Ecuador cannot escape the obligations it has undertaken with the Understanding by claiming the Understanding's alleged non-conformity with the WTO rules. The application of the principle of *bona fides* (good faith) bars Ecuador from relying on the alleged "illegality" of the Understanding in order to avoid the obligations it has undertaken through it, when Ecuador has already reaped the benefits of the Understanding and had from the very beginning full knowledge of the legal status of the Understanding.

8. (Both Parties) If the Panel was to examine whether the current EC regime for bananas results "in at least maintaining total market access for MFN banana suppliers", what should be the appropriate criteria to consider? Would the relevant criteria be the same that were considered by the Arbitrator in its Awards of August 2005 and October 2005?

15. As mentioned in the answer to Question 1, predicting the future is an imprecise exercise by its own nature. The models used are not perfect and they rely on uncertain assumptions. Fortunately, we do not need to rely on such imperfect criteria and uncertain methods any more. Two years after the introduction of the new import regime of the European Communities there is ample evidence and real market data that can establish quite easily that the total market access of the MFN suppliers has been more than maintained.

16. The European Communities considers that the Panel can use market statistics that show a significant increase in the volumes of MFN bananas imported into the European Communities and market statistics that show that the growth of MFN imports is greater than the growth of the total market for bananas in the European Communities as evidence establishing that the total market access of the MFN suppliers has been more than maintained.

9. (Both Parties) In paragraph 38 of its statement during the substantive meeting with the Panel, Ecuador argues that "[i]t will be recalled that the waiver in any event expires 1 January 2008, but the MFN duty continues, and will be the margin of preference for any preferences that the EC grants inconsistent with WTO rules into the future, past 2007. It will be recalled that the EC had made plain its intent to use not only the 'Everything but Arms' initiative but also WTO-conforming free trade agreements to carry on with preferences past 2007. Further, even if the EC were to grant no future preferences, the duty will restrict future banana imports." Can Ecuador elaborate on these arguments, and can the EC provide a reasoned answer as to whether it agrees.

17. The European Communities notes the inconsistencies in Ecuador's statements in paragraph 38 of Ecuador's oral statement. Ecuador starts by referring to "any preferences that the EC grants *inconsistent* with WTO rules into the future". Then, Ecuador goes on to refer to the EC's intent to use "WTO *conforming* free trade agreements to carry on with preferences past 2007". And then Ecuador concludes by stating that "even if the EC were to grant *no future preferences*, the duty will restrict future banana imports".

18. It is clear that these statements have no relevance for the analysis of whether the Doha Waiver continues to cover the Cotonou Preference until the end of 2007. These statements simply confirm that Ecuador has brought these proceedings in order to exercise pressure in the tariff negotiations that the European Communities is currently holding with Latin American banana exporting countries. In this paragraph, Ecuador rather cynically admits that the examination of the legality of the Doha Waiver is of secondary importance, since the Doha Waiver and the Cotonou Preference will in any event expire at the end of 2007. What really interests Ecuador is to seek to influence the "MFN duty" that will "continue past 2007" and which is currently under negotiation.

19. The European Communities invites the Panel to resist Ecuador's attempt to use the WTO dispute settlement system in order to influence arms-length tariff negotiations which are taking place in accordance with Article XXVIII of the GATT and in parallel with the negotiations in the Doha round.

10. (Both Parties) In paragraph 71 of its first written submission, the EC argues that the phrase "the new EC tariff regime" can only refer to the tariff regime that was presented to the Arbitrator and on which the Arbitrator made a pronouncement in its Award. Can Ecuador provide a reasoned answer as to whether it agrees with this statement. Would the EC consider its argument valid even if it was established that the TRQ to which the Banana Framework Agreement (BFA) relates has not expired at the end of 2002? Does the EC refer to the applied system and not the rebinding?

20. As mentioned in paragraph 71 of its first written submission, the European Communities takes the view that the correct interpretation of the Doha Waiver is that it would expire upon the European Communities' implementation of the banana import regime analysed by the Arbitrator and found not to at least maintain the total market access of the MFN suppliers. Given that this situation relates to the implementation of a new import regime after the end of 2005, this conclusion is not affected by the characteristics of the banana import regime that the European Communities had in place until the end of 2005.

21. As far as the last part of the question is concerned: the European Communities notes that the Doha Waiver provides that "the EC shall rectify the matter". The European Communities considers that this means that the continued operation of the Doha Waiver depended on whether the European Communities would indeed put in place a banana import regime that would at least maintain the total market access of the MFN suppliers. The European Communities does not consider that a "rebinding" was the only way that the "matter" could be "rectified". This is evidenced by the fact that the Doha Waiver provides that "the EC shall rectify the matter" and not that "the EC shall rectify the matter *through a new rebinding*". Therefore, the European Communities considers that it has "rectified the matter" by applying a tariff that more than maintains the total market access of the MFN suppliers.

11. (Both Parties) In paragraph 23 of its first written submission, the EC argues that "on 1 January 2006, the European Communities introduced a tariff only system and the Cotonou Preference took the form of a tariff quota for certain volumes of bananas coming from Cotonou beneficiary developing countries". Can the EC provide a reasoned answer as to how can an MFN tariff combined with a tariff-rate quota for ACP countries qualify as a "tariff-only system". Can Ecuador provide a reasoned answer as to whether it agrees with the EC's statement in paragraph 23 and, if not, what would qualify, in its view, as a "tariff-only system".

22. As mentioned in paragraph 24 of the first written submission of the European Communities, the "tariff only" nature of the banana import regime of the European Communities cannot be disputed. The fact that there is a limit on the quantity of ACP bananas that can be imported free of duty does not change this fact.

23. The GATT itself recognizes that tariff quotas are tariff measures and not ordinary quantitative restrictions. This is seen from the fact that GATT Article XIII, paragraph 5 expressly provides that the rules of GATT Article XIII "shall also apply to tariff quotas". If tariff quotas were quantitative restrictions, then there would be no need for GATT Article XIII, paragraph 5 at all.

24. This is a generally accepted principle, which has also been expressly recognized, e.g., in the First Arbitration Award, where it is stated that "tariff quota commitments constitute, in the WTO context, a variant of a tariff concession rather than a non-tariff measure per se"[1]. The Arbitrator went on to conclude that in the particular circumstances of the import regime that the European Communities had in place until the end of 2005, the economic effect of the particular tariff quotas applied by the European Communities was comparable to a quota regime (non-tariff measure), because virtually all imports were being effected through these tariff quotas.

25. Moreover, the fact that a tariff quota with the characteristics of the Cotonou Preference does not alter the tariff only character of the import regime is also confirmed in the previous report of this Panel under Article 21.5, where it is stated in paragraph 6.157 that the European Communities could adopt a "tariff only system with a tariff quota for ACP bananas". This statement shows that the imposition of a "cap" on a tariff preference does not alter the tariff-only character of an import regime. This is even more so in the present case, where the European Communities needed to impose a "cap"

[1] Para 60.

on the trade preference offered to the ACP countries in order to maintain the total market access of the MFN suppliers, in accordance with the provisions of the Doha Waiver.

26. Last, it should be pointed out that in the process of tariffication carried out regarding agricultural products in the Uruguay Round, it is evident that tariff quotas were regarded as tariffs since the Modalities Paper explicitly envisaged a role for them in the new tariffied system[2]:

Minimum access opportunities shall be implemented on the basis of a tariff quota at a low or minimal rate and shall be provided on an m.f.n. basis.

27. The legal basis for tariffication is contained in Article 4.2 of the Agriculture Agreement. The measures that were to be tariffied are listed in the footnote to that provision, and they do not include tariff quotas.

12. (Both Parties) In paragraph 26 of its first written submission, Ecuador argues that "[t]he burden is on the EC if it wishes to claim that it still has a valid waiver with respect to bananas, and that this waiver covers the EC measures at issue. [E]ven if the burden were on Ecuador …" Could the Parties develop their legal arguments as to which of them should bear the burden of proving that the Doha Waiver is still valid and whether it covers the EC measure at issue.

28. The European Communities considers that each party needs to provide sufficient evidence and legal arguments in order to support its claims. In the particular case of the Doha Waiver, the European Communities notes that the Doha Waiver was lawfully granted by the competent authorities of the WTO. Its continued operation has not been challenged before any WTO body and no WTO body has taken the decision to revoke or terminate it. Therefore, if Ecuador wishes to claim that the Doha Waiver is not applicable any more, it must provide the evidence and legal arguments necessary in order to support its claims.

13. (Both Parties) In paragraph 43 of their respective third party submissions, Nicaragua and Panama argue that the Latin American suppliers insisted on inserting, into the Bananas Annex of the Doha Waiver, the sentence "If the EC has failed to rectify the matter, this waiver shall cease to apply to bananas upon entry into force of the new EC tariff regime", which did not appear in the original EC draft. Nicaragua and Panama argue further that the insertion of such sentence is an "explicit penalty for EC unilateralism following two arbitration losses", without which the waiver would not have been approved. Can the Parties provide a reasoned answer as to whether they agree with this statement.

29. In that section of their third party submissions, Nicaragua and Panama have tried to show that the negotiating history of the Doha Waiver supports their interpretation of the Doha Waiver. However, as mentioned in paragraph 6 of the closing statement of the European Communities, the negotiating history of the Doha Waiver establishes exactly the opposite of what Nicaragua and Panama assert and provides support for the European Communities' interpretation of the waiver's terms. In particular, the draft waiver dated 2 November 2001, which Nicaragua and Panama have attached to their third party submissions as Exhibit 1, provided that the Doha Waiver would terminate automatically within two months from the notification of the arbitration award to the General Council. This provision was not included in the final version of the Doha Waiver. The final version provides that the Doha Waiver would terminate if the European Communities fails to "rectify the matter". The link between the awards of the Arbitrator and the automatic termination of the Doha Waiver was abandoned.

[2] Annex 3, para. 14.

30. This shows that the correct interpretation of the Doha Waiver is that the termination of the Doha Waiver would not be automatic and directly related to the outcome of the Arbitration awards, but that it would depend on whether the European Communities would actually "rectify the matter".

31. Nicaragua and Panama pretend that an extreme penalty, such as the termination of the waiver, was merely linked to a procedural step. However, this interpretation of the Doha Waiver is neither supported by the text of the Waiver, nor by the negotiating history of the Waiver.

14. (Both Parties) Under the fifth tiret of the Bananas Annex of the Doha Waiver, can Parties identify the specific conditions listed therein and explain how many of those would have to be fulfilled for the waiver to cease to apply to bananas?

32. As mentioned in paragraphs 36 and 37 of the first written submission of the European Communities, the European Communities considers that the Doha Waiver would terminate if the European Communities failed to introduce an import regime that would at least maintain the total market access of the MFN suppliers. Maintaining total market access for MFN suppliers was the only condition that had to be satisfied for the continued operation of the Doha Waiver at that stage.

33. Therefore, the only point that Ecuador has raised and which the Panel is invited to rule upon, is whether the condition for the continued existence of the Doha Waiver was (a) that the European Communities implements a new import regime that would at least maintain total market access for the MFN suppliers; or (b) that the Arbitrator be convinced that the system proposed by the European Communities at that time was likely to maintain such total market access in the future. The European Communities respectfully submits that the Panel should find that the correct interpretation of the Doha Waiver is that the condition for the continued existence of the Doha Waiver is (a).

34. The Annex also imposed on the European Communities certain other obligations that had to be complied with at an earlier stage, such as the obligation to timely initiate negotiations with interested parties and the obligation to provide to the interested parties information on the methodology followed for the calculation of the new level of tariffs. The European Communities has complied with all these obligations and Ecuador did not challenge this fact in its request for the establishment of the Panel, or in any of its Written Submissions or oral statements. As these obligations are not included in the fifth tiret of the Annex, to which the question of the Panel refers, the European Communities mentions them here for the sake of completeness.

15. (Both Parties) On what grounds does the EC argue that the phrase "suitable waiver" in paragraph 6.158 of the report of the first *EC – Bananas III* compliance Panel should be interpreted to mean a waiver from only Article I of the GATT 1994? On what grounds does Ecuador argue that the same term should be interpreted as referring to a waiver to both Articles I and XIII of the GATT 1994?

35. As mentioned in paragraphs 81 and 82 of the first written submission and paragraphs 29 to 34 of the second written submission of the European Communities, there are a number of considerations establishing that the "suitable waiver" in paragraph 6.157 of the first Article 21.5 Panel report is a waiver from Article I of the GATT and not from Article XIII of the GATT.

36. First, where the Panel considered that a waiver from Article XIII was required, the Panel expressly said so. For example, the Panel expressly stated that a waiver from GATT Article XIII was needed for the system suggested in paragraph 6.158 of its report. In the system under the 6.158 suggestion (i) all imports would be made pursuant to tariff quotas (as a result of which the economic effect of the particular tariff quotas would be comparable to a quota regime, as concluded in paragraph 60 of the First Arbitration Award); and (ii) the tariff quotas would be administered in ways that would not necessarily comply with GATT Article XIII, paragraph 2. The Panel found that such

an import regime would need a waiver from GATT Article XIII. If the Panel had considered that the system suggested in paragraph 6.157 of its report also needed a waiver from GATT Article XIII, it would have expressly stated so.

37. Second, a tariff only import regime with a tariff preference for certain WTO Members subject to a "cap", may need a waiver from GATT Article I, but does not need a waiver from GATT Article XIII. As already mentioned, it would be absurd to consider that an *unlimited* tariff preference offered to the ACP countries would be fully compatible with Article XIII, but that a *limited* tariff preference is not compatible with Article XIII. This would amount to saying that the rights of the MFN suppliers are hurt when their competitors enjoy a limited tariff preference, but are not hurt when that tariff preference is completely unlimited.

38. Third, there is no authority in any of the previous banana disputes supporting the proposition that an import regime with the characteristics of the current import regime of the European Communities would need a waiver from Article XIII. For example, during the arbitration that took place in accordance with the provisions of the Doha Waiver, the Arbitrator took note of the disagreement of the parties as to the need for an Article XIII waiver and did not reach any conclusion as to whether such a waiver was needed. Likewise, the *Bananas III* jurisprudence relates to an import regime that was the equivalent of a "quota regime", because all imports were made pursuant to tariff quotas. The characteristics of the 1997 import regime were completely different from the characteristics of the current import regime and, therefore, the Appellate Body's findings of 1997 are not relevant in the current situation. The same is true for the import regime that was in place in 1999 and which was analysed by this Panel in 1999.

39. There is extensive GATT and WTO practice to support the view that Members do not regard exclusion from a tariff quota as a matter governed by Article XIII. This practice is to be found in the waivers that have been granted for various preferential schemes. With few exceptions (such as the 2001 waiver respecting bananas) these waivers are limited to Article I:1, and yet the preferences granted under these waivers regularly include tariff quotas for the beneficiary countries only.

40. Under the Generalized System of Preferences (GSP), first adopted as a policy by UNCTAD II in 1968, the major developed countries have introduced systems of tariff preferences for the products of the developing world[3]. Such schemes required waiver from GATT obligations and the first of these was given to Australia in 1966 to 'grant preferential tariff treatment to certain goods of less-developed countries'[4]. The waiver was from Article I:1 only, and it explicitly authorized the use of tariff quotas (in fact these are listed in an annex). The decision contained no reference to Article XIII. However, this Article was referred to in the working party discussion of the waiver[5]:

> One delegation stated that Article XIII:5 of the General Agreement provided for the non-discriminatory application of tariff quotas in accordance with the rules in respect of the administration of quota restrictions contained in that Article. Since the Australian scheme established preferential tariff quotas for certain imports from less-developed countries and territories. it was essential that quotas should be so administered as to involve no discrimination between such countries or territories.

41. Thus, it was the evident understanding of those participating that the favourable treatment for developing countries in the form of tariff quotas required a waiver of Article I:1 but not Article XIII. However, Article XIII did apply regarding the internal distribution of the tariff quota.

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[3] See, UNCTAD, Agreed conclusions of the Special Committee on Preferences, doc. TD/B/330, 1970; 10 ILM 1083 (1971).

[4] L/2627, 1966, BISD 14S/23.

[5] L/2527, 1966; BISD 14S/162, para. 30.

42. The GSP schemes of WTO Members are now authorized by the CONTRACTING PARTIES' decision of 1979 known as the Enabling Clause[6]. The operative words of this document say 'Notwithstanding the provisions of Article I of the General Agreement, contracting parties may accord differential and more favourable treatment to developing countries'. There is no specific reference in the text authorizing the use of tariff quotas, but Members have often included them in their schemes. Thus, a WTO report of 2001[7] reported that the US scheme used tariff quotas[8], as did that of Japan to a limited extent[9], and that the EC scheme had previously made use of them[10].

43. Perhaps the waiver that most directly establishes the understanding of Members in this regard is that of 1973 in which the CONTRACTING PARTIES decided to waive Article I:1 (only) in respect of 'tariff-free quotas for handicraft products from South Pacific Islands'.[11]

44. It should be emphasized that, as decisions of the CONTRACTING PARTIES, all these instruments form part of GATT 1994 (under Annex 1A of the WTO Agreement)[12]. They all indicate that Members assumed that the grant of a tariff quota for the benefit of certain countries to the exclusion of other Members would be an infringement of Article I:1, but not of other GATT obligations, such as Article XIII.

45. In light of the above, the European Communities considers that its current banana import regime, which has all the characteristics described by the Panel in paragraph 6.157 of its first Article 21.5 report, does not need a waiver from the application of Article XIII of the GATT.

16. (Both Parties) In paragraph 96 of its first written submission, the EC states that "the text of GATT Article XIII, paragraph 1 makes clear that a Member can successfully claim that another Member's measures violate the provisions of GATT Article XIII, only if its can show that ... the allegedly offending Member imposes a prohibition or restriction on products originating from the complaining Member and, in principle, there is a nullification and impairment of a benefit accruing to the complaining Member". Can the EC elaborate its arguments in support of each of these propositions, i.e. that in order to make a successful claim under Article XIII:1 of the GATT 1994, the complaining Member must show: (a) that the challenged measure must be a prohibition or restriction on products originating from the complaining Member; and, (b) that there is a nullification and impairment of a benefit accruing to the complaining Member. Can Ecuador provide a reasoned answer as to whether it agrees with the arguments raised by the EC.

46. (a) The European Communities understand this question as mainly concerning the meaning of paragraph 5 of Article XIII. In the European Communities' view the ordinary meaning of the words 'shall apply' in the first part of the paragraph must be considered in their context and in the light of the object and purpose of the GATT. In particular, the European Communities has in mind the basic GATT principle that it creates rights for Members but not for non-Members. This principle is itself an application of the broader principle that contractual arrangements are assumed to create rights only for the parties. This is not to deny that parties to a treaty could if they chose agree with each other to give benefits to third parties. However, there is no indication that WTO Members have undertaken such obligations as parties to the GATT. Rather, it is clear that, as illustrated in matters such as anti-

[6] BISD 26S/203 (1980).
[7] The Generalised System of Preferences, WT/COMTD/W/93, 2001.
[8] Ibid. para. 49
[9] Ibid., para. 43.
[10] Ibid. para. 29
[11] L/3968, 1973, BISD 20S/29
[12] Appellate Body Report *EC – Tariff Preferences*, para. 90.

dumping and countervailing duty law, Members have felt themselves free to disregard WTO obligations when they are dealing with imports from non-Members.

47. As noted in the European Communities' second written submission, depending on the circumstances, the imposition of a tariff quota can be either beneficial or prejudicial to the Member on whose trade the tariff quota has been imposed. In contrast, the 'prohibition or restriction' referred to in paragraph 1 is inherently a prejudicial action. In the European Communities' view this characteristic must also be respected in the process of 'applying' Article XIII to tariff quotas. If it is not, it will have the effect of imposing on Members obligations to give benefits to non-Members of the WTO contrary to the principle just mentioned.

48. To be specific, the problem becomes apparent if paragraph 1 is read (taking the circumstances of the present case) as saying the following:

49. "No tariff quota may be applied to the importation of any product of the territory of an ACP Member or on the exportation of any product destined for the territory of an ACP 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 accorded a quota."

50. This reading would mean that an advantage could not be given to an ACP Member unless a similar advantage had been given to all third countries. These countries would, of course, include non-Members of the WTO. The reduction *ad absurdum* would arise where tariff quotas were given (without discrimination) to all WTO Members, but not to other countries. On the above reading of Article XIII this would be forbidden. In the European Communities' view such an outcome conflicts with WTO principles.

51. Consequently, the European Communities' view is that in 'applying' paragraph 1 of Article XIII to tariff quotas account must be taken of the essential characteristic of paragraph 1 – that it is forbidding the imposition of a prejudicial measure.

52. There are of course many situations where paragraph 1 can be applied to tariff quotas while still respecting this principle. In the European Communities' view the essential field of application of Article XIII as regards tariff quotas is in the division of the quota element of a tariff quota regime. Thus, in the context of paragraph 1, if a Member divides up a tariff quota in a way that one Member's allocation is worse than those of other countries it may invoke paragraph 1 to say that a tariff quota has been imposed on it when similar tariff quotas have not been imposed on other countries.

53. On the other hand, the situation were a tariff quota had been conferred on imports from certain countries, but other countries had been subjected to a higher tariff, the prejudiced Members would have their remedy in the rule on preventing tariff discrimination contained in Article I:1.

54. Thus, Article XIII:1 would come into play if a tariff quota had been imposed on banana imports from the MFN countries and on the ACP countries, in that the MFN countries might, in appropriate circumstances, claim that the tariff quotas allocated to them were unfairly small compared to those allocated to the ACP countries. However, since in circumstances of the present case no tariff quota was imposed on imports from MFN countries no such claim is available to them.

55. In its submission the European Communities' summed up this legal situation by saying that the challenged measure must be a prohibition or restriction on products originating from the complaining Member.

56. (b) In the remarks on nullification and impairment referred to by the Panel, the European Communities does not intend any departure from the usual interpretation of the presumption contained in Article 3.8 of the DSU.

17. (Both Parties) In paragraph 60 of its second written submission, the EC argued that "[i]n effect, Ecuador is saying that the discrimination constitutes the 'restriction' [within the context of Article XIII:2 of the GATT 1994]. Having created this 'restriction' it then compares it with that on ACP products and comes, *not surprisingly*, to the conclusion that there is discrimination, which it assumes falls within paragraph 2 [of Article XIII]". (Emphasis added) Can Ecuador provide a reasoned answer as to whether it agrees with this statement. Do the words "not surprisingly" in the EC statement mean that, provided that the existence of the restriction mentioned by the EC can be proven, the EC accepts that there would be a violation of Article XIII:2?

57. The explanation of the statement quoted by the Panel is as follows. The situation being examined by the Panel is essentially one of tariff discrimination that is governed by Article I:1 rather than Article XIII. Ecuador attempts to artificially extend the scope of Article XIII by finding 'prohibitions and restrictions' that do not exist. It argues that for the MFN countries not to be given the benefit of the tariff quota that is accorded to the ACP countries is a restriction. Forgetting for the moment the meaning that 'restriction' has in the GATT, and in particular in Article XIII, one could, in everyday speech, say that higher tariffs tend to restrict imports more than lower tariffs. What Ecuador is trying to do is, in essence, to take that everyday usage and inset it into Article XIII in order to treat the MFN countries treatment as a restriction for the purposes of paragraphs 1 and 2. The European Communities' use of 'not surprisingly' was meant simply to indicate that a higher tariff would obviously be regarded as a greater restriction than a lower tariff, again, using the word 'restriction' in that broader, everyday sense. However, the flaw in Ecuador's argument is that in Article XIII, as in Article XI, the word restriction does not include tariff discrimination. Put another way, although tariff discrimination may reduce imports from the countries suffering the discrimination, that does not make such discrimination into a 'restriction'.

58. Thus, the direct answer to the Panel's question is that if the existence of restrictions in terms of Article XIII:2 can be proven, and there is discrimination, the European Communities accepts that there would be a violation of Article XIII:2.

18. (Both Parties) In paragraph 51 of its statement during the substantive meeting with the Panel, Ecuador argues that its "exports are restricted by the high duty compared to those who participate in the zero duty quota. The only difference between a straight quota and a tariff quota in this regard is that exclusion from a straight quota means no access, while exclusion from a tariff quota means access restricted by the higher duty that applies to imports not benefiting from the tariff quota, which may be prohibitive in effect." In paragraph 52 of the same statement, Ecuador adds that "[i]t is true that unlimited preferences for ACP bananas would be worse than the tariff quota only for ACP countries, but exclusion from the tariff quota is more restrictive of Ecuador and other members than if they were allowed to participate in the zero duty tariff quota as they are entitled under Article XIII." Can the EC provide a reasoned answer as to whether it agrees with this statement. Can Ecuador clarify whether it is arguing that any high duty would qualify as a "restriction" under Article XIII of the GATT 1994. If yes, why? Can Ecuador also clarify on what grounds, and according to what criteria, would a tariff be considered to be "prohibitive in effect". In Ecuador's view, does the restriction result from the in-quota tariff or the out-of-quota tariff?

59. The basis of the answer to this question is essentially the same as that for Question 17. Ecuador is seeking to blur the distinction between tariff barriers and non-tariff barriers (notably quotas). The distinction is a vital one in GATT. It was created not only because of conceptual

differences but for very practical reasons to do with strategies for achieving trade liberalization. The basic GATT strategy was to abolish non-tariff barriers (as manifested in Article XI), or convert them into tariffs, and to negotiate mutual reductions in tariffs (as indicated in Article XXVIIIbis). It is a strategy which has been pursued throughout the history of GATT, most recently in the tariffication process applied to agricultural non-tariff barriers in the Uruguay Round.

60. To implement this strategy required separate rules to be made for tariffs and non-tariff barriers, and therefore, as far as possible, for a clear distinction to be made between the two concepts. As with any area of law, drawing distinctions between concepts can give rise to difficulties. In the case of tariff quotas the problem of interpretation is aggravated by the unspecific language of Article XIII:5, which merely states that 'The provisions of this Article shall apply to any tariff quota instituted or maintained by any contracting party'. However, the present circumstances do not present difficult issues.

19. (Both Parties) In paragraph 57 of its statement during the substantive meeting with the Panel, Ecuador argues that "[i]t is a fact that the restriction in a tariff quota is achieved by means of a tariff – the higher duty applied to products imported outside the quota than inside the quota. That is not a problem because Article XIII specifically applies to any tariff quota, and, unlike Article XI the reference to restrictions in Article XIII does not exclude taxes, duties or other charges." Can Ecuador elaborate on this argument, and the EC provide a reasoned answer as to whether it agrees with Ecuador's arguments in this context.

61. This observation of Ecuador was addressed in the European Communities' Closing Statement (at paragraph 8) where it was pointed out that the interpretation that it presents would reduce Article I:1, perhaps the most well-known of all international trade rules, to an irrelevancy.

62. The EC explains elsewhere the fundamental distinction made in the GATT between tariff and non-tariff barriers, a division which is reflected in the relative scopes of Articles I:1 and XIII. As it does in regard to term 'shall apply' in paragraph 5, Ecuador is endorsing an interpretation that is in purely literal terms consistent with the words of Article XIII, without taking account of their context or object and purpose.

20. (Both Parties) If, under Article II of the GATT 1994, the EC was bound to a €75/mt tariff rate in-quota duty for 2.2 million metric tons of bananas, in addition to the zero-duty TRQ of 775,000 metric tons for ACP bananas, should such a finding affect the manner in which the Panel conducts its analysis under Article XIII?

63. The European Communities considers that the only binding it currently has for the importation of bananas is for a tariff of €680 per ton. The current import regime (i.e. with an applied tariff of €176 per ton) has never coincided with any other binding.

64. The European Communities also notes that the Cotonou Preference has never been bound in its Schedule of Concessions.

65. The European Communities does not see how the hypothetical in this question can have any relevance for the application of Article XIII of the GATT on the current banana import regime of the European Communities.

21. (Both Parties) In paragraph 19 of its opening statement during the substantive meeting with the Panel, the EC argues that "[t]he complainants attempt to draw some analogy with the regimes analysed by this Panel in 1997 and 1999. This is not correct. Following the abolition of the tariff-quota-based system in 2006, the current regime is so different to those of the 1990s

that no analogy can be drawn." Can the EC elaborate on this argument, and Ecuador provide a reasoned answer as to whether it agrees with the same.

66. The European Communities' argument in this extract reflected the fact that the regimes analysed by the panel in 1997 and 1999 were ones in which the legality of certain tariff quotas was being determined in regard to their relationship with other tariff quotas. In those circumstances a meaningful comparison could be made of the quantities of the various tariff quotas since the applicable tariffs were all at the same level. In such a situation it is possible for paragraph 1 of Article XIII to be invoked because one can say whether similar restrictions of a quantitative character are being applied. Likewise the distribution rules of paragraph 2 can be invoked because one can compare the quantities assigned to the various benefiting Members.

67. In contrast, no such comparisons (between the relative position of ACP and MFN countries) are possible regarding the regime being examined in the present dispute because imports from MFN countries are not subject to any tariff quota, still less a tariff quota at the level enjoyed by the ACP countries. Although the ACP have identifiable quantities, for the MFN countries there are none and so there is nothing on which the comparison may be based. The difference in the treatment of imports in the two groups lies solely in the field of tariffs.

22. (Both Parties) In paragraph 10 of its statement during the substantive meeting with the Panel, Brazil argues that "the EC abruptly jumps to the flawed conclusion that because the Member has chosen to implement a suggestion by the panel such Member would always be in compliance with its obligations under the covered agreements." In paragraph 11 of the same statement, Brazil adds that "[i]n no provision does the DSU grant Members certainty as to the 'lawfulness' of a measure taken to comply just because such measure is intended to implement a suggestion made by a panel. To the contrary, Article 21.5 sets forth the Members' right to resort to a panel where there is disagreement as to the consistency with covered agreements of the measures taken to comply." Can the Parties provide a reasoned answer as to whether they agree with Brazil's argument.

68. Brazil's statements echo the position expressed by Ecuador in paragraph 44 of its second written submission. The European Communities considers that this position is not correct.

69. As mentioned in paragraphs 22 to 25 of the second written submission of the European Communities, it is settled law that panel reports that have been adopted by the DSB are binding for both the complaining and the defending parties to the dispute. A panel's suggestions as to how the defending party may put itself in compliance with the WTO rules are not binding for the defending party: the defending party enjoys the freedom to choose any of the various options that may exist to bring about compliance. However, this does not mean that suggestions are entirely devoid of legal significance. On the contrary, a suggestion contains a significant legal ruling. In suggesting a particular course of action, the Panel is finding that such action is lawful and that the implementation of this suggestion will lead to the defending party's compliance with the obligations found to have been infringed.

70. The European Communities considers that if the complaining party does not appeal the suggestions made by the panel, then following the adoption of the panel's report by the DSB there is a presumption of legality covering these suggestions which makes them binding on the complaining party. This means that if the defending party decides to implement the measures suggested by the panel, the complaining party may not challenge the conformity of these measures with the WTO rules in an Article 21.5 procedure. Allowing such a challenge would be inconsistent with Article 17.14 of the DSU read together with Article 16.4 of the DSU, Article 19.1 of the DSU and Article 21.1 of the DSU, because it would mean that the complaining party does not "unconditionally accept" the panel's report.

71. To hold otherwise would create an undue legal uncertainty for the defending party as to the course of action that it should follow. It would also seriously compromise the credibility of panels and of the DSB, because it would create the possibility for Article 21.5 Panels to reverse decisions taken by the DSB. This would curtail the panels' ability to make suggestions and would render the relevant provisions of Article 19.1 of the DSU inoperative.

72. Conversely, finding that the measures suggested by a panel cannot be challenged in an Article 21.5 procedure would not deprive complaining parties of any procedural rights. A complaining party disagreeing with a particular suggestion of the panel would always have the right to lodge an appeal with the Appellate Body, in accordance with the procedures and time limits provided for in the DSU.

73. Moreover, Brazil's position leads to a confusion of the roles of the Appellate Body and of Article 21.5 panels and opens the door for an abuse of Article 21.5 of the DSU, as well as of Article 16.4 and Article 17 of the DSU, which describe the procedures and time limits within which appeals against panel reports should be lodged.

74. As mentioned in paragraphs 27 and 28 of the second written submission of the European Communities, challenges to panel reports can be brought only in accordance with specific procedures and within specific time limits, described in Article 16.4, Article 17.4 and Article 17.6 of the DSU. Article 21.5 of the DSU is meant to cover only the very specific situation where there is a disagreement as to the proper implementation of the panels findings by the defending party. Article 21.5 cannot and should not be used to challenge the panel's findings themselves. This is why a complaining party should not be allowed to challenge before an Article 21.5 panel any measures of the defending party that were expressly suggested in the panel report and have been adopted by the DSB, which means that they have not been the subject of a successful appeal.

75. To hold otherwise would amount to giving complaining parties the right to "bypass" the strict procedural requirements for appellate review and "replace" the procedures before the Appellate Body with procedures before Article 21.5 panels. Such a serious weakening of the role of the Appellate Body would run against the basic principles of the DSU.

76. In light of the above the European Communities considers that, once the Panel has satisfied itself that the current import regime of the European Communities has the characteristics of the import regime suggested by the Panel in paragraph 6.157 of its first Article 21.5 report, it should reject the Article XIII claims of Ecuador outright.

23. (Both Parties) The Understanding on Bananas signed by the EC with Ecuador and the US seems to include references, in both Phases I and II, to a bound tariff-rate quota, designated as "quota 'A'", of 2.2 million metric tons with an in-quota tariff rate not exceeding €75/mt, that would possibly extend beyond the end of 2002. Can Parties provide a reasoned answer as to whether they agree with this reading of the Understanding. Can the EC explain how this can be reconciled with its argument that the TRQ expired at the end of 2002, considering that the EC has been arguing for the binding nature of the Understanding on Bananas and that it would constitute a mutually agreed solution?

77. The European Communities considers that these specific provisions do not contradict any of the arguments advanced in the written submissions and oral statements of the European Communities. First, at the time the Understanding was signed (i.e. in April 2001), the tariff quota for the 2.2 million tons of bananas was still bound. Second, Phase I would be implemented during a period of time that the tariff quota for the 2.2 million tons would still be bound (i.e. between 1 July 2001 and 31 December 2001). Therefore, it is normal that the description of Phase I includes a reference to the "bound tariff rate quota designated as quota A" and set at 2.2 million tons of bananas.

78. Moreover, part of Phase II would also be implemented during a period of time that the tariff quota for the 2.2 million of tons would still be bound (i.e. between 1 January 2002 and 31 December 2002). This explains why the description of the Phase II includes the statement that "during Phase II, the provisions applying to Phase I will continue". However, the casual reference to the continued application of the provisions of Phase I during Phase II does not have any broader legal significance. The main points that the description of Phase II sought to address was (i) the increase in the quantities of bananas imported from MFN countries and the corresponding reduction in the quantities of bananas imported from ACP countries during Phase II and (ii) the allocation of licenses for traders of MFN bananas during Phase II. The drafters of the Understanding did not need to add to that part of the Understanding a more detailed analysis of the legal nature of tariff quota "A" (i.e. that it would be bound until the end of 2002 and then continue as an autonomous, unbound tariff quota until the end of 2005).

24. (Both Parties) Irrespective of their differences in the interpretation of the Framework Agreement on Bananas (BFA), can the Parties identify the document that constitutes the legally binding schedules of the European Communities for bananas at the date of the establishment of this Panel on 20 March 2007, indicating its WTO document symbol if any, and specify any changes to that document that might have taken place in regard to bananas.

79. As mentioned in paragraphs 5 to 8 of the first written submission of the European Communities, the banana concessions were initially contained in Schedule LXXX, which was executed on 15 April 1994 and withdrawn on 1 January 1995, in light of the European Communities' enlargement to 15 Member States.

80. A new Schedule CXL was submitted to the WTO on 14 March 1996, which has not yet been certified, because certain WTO Members have not yet lifted all their objections. Schedule CXL was withdrawn on 1 May 2004, in light of the European Communities' enlargement to 25 Member States. The European Communities has not submitted a new Schedule of Concessions yet, as the relevant negotiations under Article XXIV and Article XXVIII of the GATT are still pending.

81. In any event, the European Communities' banana concessions are the same in both Schedule LXXX and Schedule CXL.

25. (Both Parties) Paragraph 9 of the Framework Agreement on Bananas (BFA) annexed to the EC Schedules provides that "[t]his agreement shall apply until 31 December 2002" (Emphasis added). Could it be concluded from this language that only the Framework Agreement on Bananas annexed to the EC Schedules expired on 31 December 2002, but not Section I B of the EC Schedules, where the tariff rate quota (TRQ) is also indicated? Please provide a reasoned response.

82. This question reflects the argument advanced in paragraph 58 of Ecuador's second written submission. As mentioned in paragraph 77 of the second written submission of the European Communities, Ecuador's argument is not correct.

83. First, the Annex is an integral part of the Schedule and contains the terms, conditions and qualifications to which the relevant concession is subject. The entries into Section I B of the Schedule do not have a life independent from the Annex. This is made clear on page 9 of Section I B, where it is expressly stated that the concession for the 2.2 million tons is granted "as indicated in the Annex". The space limitations of page 9 of Section I B of the Schedule, which forced its drafters to put the time limitation in the Annex and not on page 9 itself, cannot be given a legal significance.

84. Second, if indeed the intention was to establish a perpetual concession for the 2.2 million tons, the European Communities (and the other signatories of the banana framework agreement) could

have simply included in the Schedules the concession without incorporating the provision that limits the concession's duration. Even better, the European Communities (and the other parties) could have stated that the concession for the 2.2 million tons is perpetual and that the expiration date of 31 December 2002 applies only to other aspects of the Annex. This they did not do. The fact that the entire text of the agreement was incorporated into the Annex shows that it was clear from the very beginning that the expiration clause applied to all the terms of the concession for the tariff quota of 2.2 million tons.

85. Third, the date of 31.12.2002 as end of the BFA was chosen for a specific reason. Council Regulation (EEC) No 404/93 of 13 February 1993 on the common organization of the market,[13] in Article 32 provided what follows:

> No later than the end of the third year after the entry into force of this Regulation and, in any case, when the flat-rate reference income referred to in Article 12 (4) is reviewed, the Commission shall submit a report to the European Parliament and the Council on the operation of this Regulation.
>
> This report shall contain among other things an analysis of the development of Community, of third-country and ACP banana marketing flows since the implementation of these arrangements. The report shall be accompanied where necessary by appropriate proposals.
>
> The Commission shall again report to the European Parliament and the Council by 31 December 2001 on the operation of this Regulation and make appropriate proposals concerning the new arrangements to apply after *31 December 2002*.[14]

86. In very simple words, the European Communities had thus decided to make a "state of play" 10 years after the Regulation had entered into force and, following this reflection exercise, make appropriate proposals concerning the new arrangements to apply after 31 December 2002.

87. This explains why the same date was included in the BFA and why there was this end date for the TRQ.

88. In light of the above, the European Communities considers that the Panel should reject the argument put forward by Ecuador.

26. (Both Parties) Should the expressions "agreed system" used in paragraph 8 of the Framework Agreement on Bananas (BFA) annexed to the EC Schedules, "the agreement" used in paragraph 9, and "this agreement" used in paragraphs 9, 10 and 11, be considered to be equivalent?

89. As mentioned in paragraph 9 of its first written submission, the European Communities considers that these provisions of the Annex to the Schedule of Concessions of the European Communities establish (i) the starting date of the concession for the tariff quota of the 2.2 million tons (i.e. October 1, 1994, in accordance with paragraph 8) and (ii) the termination date for that concession (i.e. 31 December 2002, in accordance with paragraph 9).

27. (Both Parties) Should paragraph 9 of the Framework Agreement on Bananas (BFA) be interpreted as a stand-alone provision or by taking into account other parts and sections of the EC's Schedule, as well as the intentions of the parties in all subsequent procedures?

[13] Official Journal L 047, 25/02/1993, p. 1-11.
[14] Emphasis adedd.

90. The European Communities notes that, as mentioned above, the concession was granted "as indicated in the Annex". Therefore, the Panel needs to interpret the concession contained in page 9 of Section I B of the European Communities' Schedule on the basis of the terms, conditions and qualifications of the Annex as a whole, including the clause providing that the concession would expire at the end of 2002.

91. The European Communities cannot see the relevance of "the intentions of the parties in all subsequent procedures" for the Panel's analysis of the terms, conditions and qualifications incorporated in the Schedule of the European Communities.

92. It is noted that Ecuador was not a party to the Banana Framework Agreement.

28. (Both Parties) In paragraph 69 of its statement during the substantive meeting with the Panel, Ecuador argues that "[t]ariff quota concessions can be withdrawn, but the withdrawing member must follow Article XXVIII procedures which the Doha Waiver required and the European Communities failed to do." Can Ecuador clarify in what specific way the EC has "failed" to follow Article XXVIII procedures and what would be the legal consequences of such failure. Can the EC provide a reasoned answer as to whether it agrees with Ecuador's assertion that it has failed to follow Article XXVIII procedures.

93. As mentioned in paragraph 92 of the second written submission of the European Communities, the Panel should disregard Ecuador's claims under Article XXVIII of the GATT, because Ecuador did not include any Article XXVIII claims in its request for the establishment of the Panel and, therefore, an analysis of Article XXVIII issues is not within the Terms of Reference of this Panel.

94. In any event, the European Communities considers that it has not violated Article XXVIII and that there is no scope for a claim that Article XXVIII has been breached.

QUESTIONS ADDRESSED TO THE EUROPEAN COMMUNITIES

48. (EC) In its first written submission, the EC identifies an Exhibit EC-6, which is described as "[i]ntentionally left blank". Can the EC explain the reason for that.

95. The legal team representing the European Communities had scanned the documents annexed as Exhibits to the first written submission of the European Communities. Due to a mistake in the numbering of these documents, the indication "Exhibit EC-6" was not assigned to any document. In order to save time, the legal team representing the European Communities decided to leave the indication "Exhibit EC-6" blank, instead of renumbering and rescanning all Exhibits after Exhibit EC-5.

49. (EC) Can the EC expand on the factual information provided in Exhibit EC-3 of its submission by providing annual import data (and their sources) for each year from 1999 to 2003 for EC15 and from 2004 to 2006 for EC25 (also showing separately the EC15 imports from 2004 to 2006, if possible) and for the first half of 2007 for EC27 for the following:

(a) Volume, CIF value (in Euros/mt and USD/mt) and average unit value (in Euros/mt and USD/mt) of banana imports by the EC from Ecuador, from each of the other MFN suppliers, and from each of the ACP countries;

(b) Ecuador's share (percentage) of EC banana imports, both in volume and value terms;

(c) Ecuador's share (percentage) of total volume of banana imports by the EC divided by Ecuador's share of global banana exports; and,

(d) EC's tariff revenue on bananas for the period between 1999 and mid-2007.

96. Exhibit EC-12 illustrates the volume, CIF value and average unit value of banana imports by the EC from Ecuador, from each of the other MFN suppliers, and from each of the ACP countries.

97. Exhibit EC-13 indicates Ecuador's share of EC banana imports, both in volume and value terms as well as Ecuador's share of total volume of banana imports by the EC divided by Ecuador's share of global banana exports.

98. Lastly, Exhibit EC-14 concerns EC's tariff revenue on bananas for the period between 1999 and mid-2007.

99. Import data concerning the European Communities were extracted from Comext (Eurostat), on 26 September 2007. They consist of the imports for EC-15 from 1999 to 2003, from 2004 to 2006 for EC-25, and for the first half of 2007 for EU-27.

100. Figures concerning EC-15 from 2004 to 2006 are also included in Exhibit EC-12 (Table 4), as requested by the Panel. However, these figures are not completely accurate and thus can be taken only as indicative. In fact, once bananas have been legally imported into the Common Market, they enjoy the right to freely circulate between the different Member States. Therefore part of bananas consumed in the 10 new Member States has been imported via the EC-15.

50. (EC) Can the EC also provide annual import data (and their sources) for each year from 1988 to 1998 for EC12 and EC15, as appropriate (showing separately the EC12 imports, if possible) with the information requested in letters (a) to (d) of the previous question.

101. The European Communities has consulted the data made available by Eurostat but found out that there are not accurate estimates. The reason has been explained in the answer given to Question 49.

102. The only figures which are available to the European Communities concern volumes imported and average unit value during the relevant period, and are illustrated in Exhibit EC-15.

51. (EC) Can the EC expand on the factual information provided in Exhibit EC-3 by providing annual consumption and production data (and their sources) for each of the EC member States, and for each of the years in the period 1999-2006, as well as for the fist half of 2007, for the following:

(a) Total volume of banana production in the EC;

(b) Total volume and FOB value of bananas exports by the EC, if any;

(c) Consumption volumes for each of the EU 27 member States;

(d) Total sales of bananas within the EC, i.e. domestic consumption including waste, which equals EC production plus imports minus exports; and,

(e) Share (percentage) of the total volume of domestic sales within the EC that is supplied by Ecuador, by other MFN suppliers, and by ACP suppliers.

103. Exhibit EC-16 shows the total annual production in the European Communities from 1999 to 2006. To date, there are no official figures for the EC production in 2007. However, according to industry and specialised press information, European Communities' production in 2007 is estimated to be lower than in the previous year since bananas plantations in Martinique and Guadeloupe have been destroyed by Hurricane Dean on 17 August 2007.

104. There are no exports of bananas from the European Communities.

105. The European Communities does not have data on consumption volumes for each of the EU 27. In fact, data collected by Eurostat concern only imports. Just to give an example: Belgium imports almost 30% of MFN bananas, but this does not imply that all these fruits are consumed in Belgium. Indeed, a large part of them will be sold and consumed in Germany.

106. Exhibit EC-17 concerns total sales of bananas within the European Communities. One has to bear in mind that there are no bananas produced in the European Communities which are exported outside the Communities.

107. Exhibit EC-18 contains shares of the total volume of domestic sales within the European Communities supplied by Ecuador, by other MFN suppliers, and by ACP suppliers.

52. (EC) In paragraph 36 of its second written submission, the EC states that "during the period between its first written submission and its second written submission, the European Communities has updated the information on the first quarter of 2007 with market data from April and May 2007." Can the EC provide the data source that was used to make the assertions mentioned subsequently in that same paragraph.

108. All data concerning the internal market submitted by the European Communities have been provided by Eurostat. These figures are regularly updated (often on a daily basis). This explains why there can be slight differences between different tables provided, or between estimates provided at different moments in time.

53. (EC) Can the EC provide information about the Everything But Arms (EBA) scheme in respect to bananas imports? Are EC banana imports subject to any other preferential systems? If yes, please describe those systems, indicating the relevant dates, and focusing your response on the period 1999 to 2007.

109. The EBA scheme is laid down in Council Regulation (EC) no. 980/2005 of 27 June of 2005, applying a scheme of generalised tariff preferences (GSP), more particularly its Chapter II Section 3 ("Special arrangement for least developed countries").

110. According to Article 12.3 of this EC Regulation "Common Customs Tariff duties on the products of CN code 0803 00 19 shall be reduced by 20% annually as from 1 January 2002. They shall be entirely suspended as from 1 January 2006". Accordingly, imports of bananas originating from least developed countries will benefit from duty-free treatment in the EC market.

111. It is worth noting that few least developed countries have the capacity to export bananas. Since 2000, only four LDCs have exported to the European Communities (Rwanda, Uganda, Somalia and Cape Verde) and in very limited quantities. Contrary to the baseless assertions contained in the study produced by the Center for International Economics and submitted by Nicaragua and Panama, the export potential of countries such as Angola and Mozambique is extremely limited.

112. The EC does not offer any other preferential system for banana imports, with the exception of the Cotonou Preference.

54. (EC) How did the actual conditions for the import of bananas change following the various enlargements of the EC in the period 1999 and 2007?

113. Between 1 January 1999 and 31 December 2006, there has been only one enlargement of the European Communities, which brought the Member States from 15 to 25. In this context, and taking into account historical imports of bananas by the new 10 Member States, the European Communities opened an autonomous TRQ of 300,000 mt subject to the in-quota tariff of €75MT for the period 1 May 2004-31 December 2004. For the year 2005, a TRQ of 460,000 mt was opened. As a result, the total MFN TRQs increased to 3.113 million MT.

55. (EC) In paragraph 11 of its opening statement during the substantive meeting with the Panel, the EC argues that Ecuador does "not wish to allow the ACP countries to have their trade preference until the end of this year." Can the EC explain the reasons for its reference to the "end of this year" in this statement.

114. As mentioned in paragraph 34 of the first written submission of the European Communities, the duration of the Doha Waiver is commensurate to the duration of the corresponding trade preferences found in Article 37 of the Cotonou Agreement, i.e. until 31 December 2007. Moreover, the Annex to the Doha Waiver provides that the waiver would also cover bananas until 31 December 2007, provided that the terms of the Annex are satisfied. Ecuador claims that these terms have not been satisfied and, therefore, that the Doha Waiver on bananas was terminated on 31 December 2005 and, consequently, does not cover bananas until 31 December 2007.

115. Given that the oral statement of the European Communities was delivered on 18 September 2007, which is in the same year with 31 December 2007, the European Communities used the expression "the end of this year" instead of "31 December 2007".

56. (EC) In paragraph 7 of its first written submission, the EC mentions that on 19 January 2004, it had announced its intention to withdraw Schedule CXL, in the context of the EC enlargement from 15 to 25, and then to 27, member States. Can the EC specify which are the relevant documents in this respect and whether its concession(s) on bananas was/were described therein. If so, how was it/were they described? Also, can the EC specify the similar relevant documents in regard to its enlargement in 2007, and how its concession(s) on bananas was/were described therein.

116. The European Communities announced on 19 January 2004 the withdrawal of the commitments in its Schedule of Concession, together with the commitments in the Schedules of Concessions of 10 other WTO Members. The withdrawal of the commitments was effective as of 1 May 2004, date on which these 10 WTO Members became Member States of the European Communities. The relevant document is G/SECRET/20, dated 30 January 2004. This document did not make a specific reference to the commitments on bananas, which were withdrawn together with all other commitments in the Schedules.

117. The relevant negotiations between the European Communities and the other WTO Members have not been concluded yet and the European Communities has not submitted a new Schedule of Concessions yet.

118. It is noted that the European Communities has also withdrawn specifically its banana concessions on 15 July 2004. The relevant document is G/SECRET/22, dated 2 August 2004. Following this withdrawal, the European Communities announced its intention to grant a banana

concession for a bound duty of €230 per ton on 31 January 2005. The relevant document is G/SECRET/22/Add.1.

57. (EC) Can the EC confirm that Part I, Section 1.B of the EC's schedule LXXX and CXL is divided in three sub-sections (i.e. 1. Current Access Quotas; 2. Non-Tariffied Product Quotas; and, 3. Minimum Access Quotas). Do you agree with the argument in paragraph 85 of the respective third party submissions by Nicaragua and Panama in the sense that the "2,200,000 mt dutiable at 75 ECU/mt" quota is classified under the "current access" sub-section of the EC schedule? If that was the case, please provide an explanation of the reasons for classifying it under that sub-section.

119. Indeed, Part I, Section I-B of Schedules LXXX and CXL include these three sub-sections. However, these subsections do not affect in any way the administration of the corresponding tariff quotas. The European Communities had used these subsections during the Uruguay Round for historical reasons (e.g., "Current Access Quotas" covered products the imports of which represented a substantial part of the European Communities' market, while "Minimum Access Quotas" covered products with minimal imports into the European Communities). These subsections never had and still do not have any legal significance in this context.

58. (EC) In paragraph 65 of its first written submission, the EC requests the Panel "to dismiss the relevant Ecuador claims in their entirety". In paragraph 6 of its second written submission, the EC adds that "the provisions of the Understanding are binding upon Ecuador and bar Ecuador from challenging an import regime with the characteristics of the current import regime of the [EC]". What is the nature of the EC's argument in this regard? Does the EC argue that the Panel has no jurisdiction to hear Ecuador's claims?

120. The European Communities does not challenge the Panel's jurisdiction with this preliminary objection, but rather Ecuador's right to bring these claims.

121. The European Communities considers that the Panel should first find that Ecuador is bound by the terms of the Understanding. Then, the Panel should find that, through the Understanding, Ecuador accepted that the Cotonou Preference would continue to exist for the entire duration of the waiver that the European Communities had requested at the time the Understanding was signed and the grant of which Ecuador accepted to support in the Understanding. Finally, the Panel should find that Ecuador must now comply with its undertakings and, therefore, that Ecuador cannot challenge the Cotonou Preference.

59. (EC) At the DSB meeting of 1 February 2002, Ecuador stated that "Ecuador, like other countries, also considered that this item should no longer appear on the agenda of future DSB meetings." (WT/DSB/M/119, para. 5) This sentence was preceded by the following statement by Ecuador:

> **"During the dispute settlement process, Ecuador had demonstrated patience and flexibility and had, in this spirit, signed a bilateral Understanding on Bananas with the EC on 30 April 2001. This Understanding constituted a sound basis for the EC to implement a transitional banana import regime so that by 1 January 2006, at the latest, a WTO-compatible tariff-only regime would be put into place. The transitional regime contained various phases, stages and elements to be implemented. One element was to obtain waivers from Articles I and XIII of the GATT 1994. However, the decision to grant these waivers included new stages which would have to be carried out in order to ensure a proper transition to a tariff-only banana import regime, as from 1 January 2006. *Accordingly, insofar as the EC continued to implement the DSB's recommendations by meeting its***

> ***commitments, Ecuador wished to reserve its rights under Article 21 of the DSU. Therefore if there was any disagreement concerning the measures applied by the EC, the matter could be referred to the original Panel pursuant to Article 21.5 of the DSU*." (WT/DSB/M/119, para. 5, emphasis added)**

Can the EC provide a legally reasoned comment on this apparent reservation by Ecuador of its right to invoke Article 21.5.

122. The European Communities has not argued that the withdrawal of the issue on the implementation of the DSB rulings and recommendations from the agenda of the DSB has any particular legal significance. The European Communities has argued that Ecuador is barred from challenging the Cotonou Preference because it had accepted the existence of the Cotonou Preference until the end of 2007 in the Understanding.

60. (EC) In paragraph 4 of its statement during the substantive meeting with the Panel, the US argues that:

> **"The Understanding [on Bananas] is not a 'covered agreement' – it is not listed in Appendix 1. Accordingly, the DSU cannot be used to settle a dispute as to the meaning or effect of the Understanding, and the DSU cannot enforce the Understanding by blocking a party to the Understanding from recourse to the DSU. The EC itself has in fact conceded that there is no bar to proceeding with dispute settlement even in the face of a mutually agreed solution. It is worth noting that, during the *India – Autos* proceeding (which, like the negotiation of the Bananas Understandings, took place in the spring of 2001), the EC also held that view that a mutually agreed solution could not prevent recourse to the DSU ... "**

Can the EC provide a reasoned answer as to whether it agrees with this statement and whether there are any differences between the circumstances of the current proceedings and those in the *India – Autos* case regarding a mutually agreed solution.

123. It is important to note, first of all, that *India – Autos* was an ordinary Article XXIII dispute whereas the present dispute is a 'compliance' case under DSU Article 21.5. In effect, the mutually agreed settlement is an acceptance that the respondent has complied with the DSB recommendations and rulings, since it must be in accordance with WTO rules. It would therefore be perverse to allow the complainant to commence proceedings that explicitly denied this. By respecting the Understanding the panel would be doing what is required of it in the DSU, which is of course a covered agreement.

124. Moreover, the European Communities notes that the report of the panel in the *India – Autos* case states in paragraph 7.113:

> […] such agreements are expressly referred to and supported by the DSU. It is certainly reasonable to assume, particularly on the basis of Article 3 of the DSU […] that these agreed solutions are intended to reflect a settlement of the dispute in question, which both parties expect will bring a final conclusion to the relevant proceedings.[15]

[15] See the report of the panel in *India – Measures Affecting the Automotive Sector*, dated 21 December 2001, ("*India - Autos*"), at paragraph 7.113.

The European Communities also notes that the panel found in paragraph 7.115 of its report that "it may also be the case that it cannot be lightly assumed that those drafters intended mutually agreed solutions, expressly promoted by the DSU, to have no meaningful legal effect in subsequent proceedings". These statements confirm that the panel in *India – Autos* considered it possible that a mutually agreed solution could bar a party from commencing dispute settlement proceedings.

61. (EC) In paragraph 16 of its second written submission, Ecuador states that "[t]he EC does not contest that it grants preferences that are contrary to Article I, but argues that the preferences it grants to bananas of ACP origin are covered by the Doha Waiver through 31 December 2007." A similar characterization is also made by Nicaragua and Panama in paragraph 19 of their respective third party submissions and by the US in paragraph 19 of its statement during the substantive meeting with the Panel. Can the EC provide a reasoned answer as to whether it agrees with this statement.

125. The European Communities considers that the Doha Waiver covers the Cotonou Preference and waives the application of Article I of the GATT until the end of 2007. In light of this fact, the European Communities does not wish to invoke any other arguments in favour of the Cotonou Preference's compatibility with Article I of the GATT.

62. (EC) In paragraph 36 of its statement during the substantive meeting with the Panel, Ecuador argues that "[i]n its own second submission, the EC did not attempt to refute Ecuador's analysis of why, following Vienna Convention principles, it is plain that the waiver had expired, and why the EC arguments were not sustainable. Instead, the EC simply reaffirmed its position and dismissed Ecuador's reliance on the ordinary meaning of the words of the waiver in their context and in light of the object and purpose as 'formalistic'." Can the EC provide a reasoned answer as to whether it agrees with this statement.

126. The European Communities did not simply dismiss Ecuador's arguments as "formalistic", but rather based its position on the facts and legal arguments mentioned in its Written Submissions and oral statements that establish that all the conditions for the continued application of the Doha Waiver until the end of 2007 have been satisfied. The European Communities has also demonstrated the absurd results to which Ecuador's arguments lead. None of Ecuador's arguments adequately rebut the facts and arguments presented by the European Communities.

63. (EC) In paragraphs 13 and 14 of their respective third party submissions, Nicaragua and Panama state that "[t]he EC would hardly have agreed to negotiate the terms of the Article I waiver with Ecuador had Ecuador already given away its Article I rights... [and that t]he EC would not have had to worry about Ecuador's waiver concerns in November 2001 if Ecuador had already 'contractually' obligated itself in April 2001 to accept any future Article I violation". Can the EC provide a reasoned answer as to whether it agrees with this statement.

127. This naïve statement echoes a similar argument advanced in Ecuador's second written submission and is equally baseless. Irrespective of the obligations that Ecuador had undertaken with the Understanding, it is a fact that Ecuador and the other Latin American countries were blocking the grant of the waiver for the Cotonou Agreement. Paradoxically, Nicaragua and Panama do confirm this fact. Therefore, the European Communities had no choice other than to negotiate with Ecuador and the other Latin American countries a solution that would allow the Cotonou Agreement to receive its waiver.

64. (EC) In paragraph 24 of their respective third party submissions, Nicaragua and Panama state that the expression "in clinical isolation", which was coined by the Appellate Body in *US – Gasoline* when referring to public international law, would not be relevant as used

by the EC, as in paragraph 68 of its first written submission, when referring to the "real world". Can the EC provide a reasoned answer as to whether it agrees with this statement.

128. The statement criticized by Panama and Nicaragua needs to be read very closely. In fact, it is only "paraphrasing" an expression used in a previous Appellate Body report.

129. The arguments advanced by Ecuador and the Third Parties that support it in this case have confirmed that the Panel is indeed invited to rule in this case "in clinical isolation" from the real situation in the banana market.

65. (EC) On page 7 of their respective third party submissions – based on the use of the expressions "whether the EC has rectified the matter" and "if the EC has failed to rectify the matter" in tiret 5 of the Banana Annex to the Doha Waiver, as well as on the expressions "the new EC tariff regime" and "the new EC tariff only regime" in tirets one and five – Nicaragua and Panama conclude that, after two negative findings by the Arbitrator, the new EC tariff regime introduced thereafter would not fulfil the "tariff only" requirements of the Annex and, therefore, would lose waiver coverage "upon its entry into force, and not at some later point". Can the EC provide a reasoned answer as to whether it agrees with this statement.

130. See the answer provided in Questions 4 and 13, above.

66. (EC) In paragraph 27 of their respective third party submissions, Nicaragua and Panama argue that the EC's waiver for bananas was authorized to continue beyond 2006 only if the EC either: (a) received a first arbitration determination that its "envisaged rebinding would result in at least maintaining total market access for MFN banana suppliers, taking into account all EC WTO market access commitments; (b) rectified the matter by reaching a mutually satisfactory solution with the interested parties; or, (c) received a determination in the second arbitration that the EC had rectified the matter. Can the EC provide a reasoned answer as to whether it agrees with this statement.

131. It is the opinion of the European Communities that the text of the Doha Waiver makes it clear that such a waiver would continue to apply until the end of year 2007 under the condition that the European Communities introduced an import regime that would maintain the total market access of the MFN banana suppliers. This regime, moreover, would need to be different from the ones that the Arbitrators had found unlikely to maintain such market access.

67. (EC) In paragraph 36 of their combined statement during the substantive meeting with the Panel, Nicaragua and Panama argue that "[a]s confirmed by its eleventh recital, th[e Article I Doha] waiver was only able to receive the collective endorsement of the Membership after the EC committed in the Annex to a strict 'multilateral control' on 'any rebinding.'" Can the EC provide a reasoned answer as to whether it agrees with this statement.

132. The European Communities considers that the condition for the continued application of the Doha Waiver until the end of 2007 was the introduction of an import regime that would maintain the total market access of the MFN suppliers. The section of the recital cited in this question confirms the European Communities' interpretation of the Doha Waiver.

68. (EC) In paragraph 39 of their combined statement during the substantive meeting with the Panel, Nicaragua and Panama argue that "[i]f the DSB panel erroneously revisited the defunct waiver access standard and confirmed what the Arbitrator's prior analytical framework makes obvious – that a 135% increase in the MFN tariff, and ACP and EBA margin of preference, definitionally fails to result 'in at least maintaining' MFN conditions of competition into the future – the EC would be undeterred. It would simply do what it did in

late 2005. It would reduce its tariff by only a few digits and call the matter 'rectified'. If the Latin American suppliers then returned to the same panel, the EC could merely continue the same sequence for as long as it needed to, reducing its tariff by minuscule amounts, digit-by-digit, until the Partnership Agreement expired on its own terms." Can the EC provide a reasoned answer as to whether it agrees with this statement.

133. The market reality, as evidenced by the statistics and data at the disposal of the Panel, shows the flaws in the arguments of Nicaragua and Panama. The European Communities' current import regime has more than maintained the total market access of the MFN suppliers. This shows that the European Communities has fulfilled the obligations it undertook in the Doha Waiver.

134. Moreover, this statement of Nicaragua and Panama confirms once more that the real intention of Ecuador and the Third Parties that support it, is to use (or rather abuse) these dispute settlement proceedings in order to influence the tariff negotiations with the European Communities. Indeed, Ecuador and these Third Parties ostensibly request the Panel to find that the Doha Waiver has expired. However, a Panel finding that the Doha Waiver has expired would not have any impact on the tariff applied by the European Communities to bananas from MFN countries, as incorrectly stated by the legal advisors of Nicaragua and Panama. This lapsus in the reasoning of the legal advisors of Nicaragua and Panama confirms that their challenge to the Cotonou Preference is in reality a disguised effort to achieve an advantage in the tariff negotiations.

135. The European Communities respectfully requests the Panel once more not to allow Ecuador and the Third Parties that support it to distort the role of the WTO dispute settlement procedures.

69. (EC) In paragraph 21 of its statement during the substantive meeting with the Panel, the US argues that "[t]he phrase '[i]f the EC has failed to rectify the matter', at the beginning of the fifth sentence in tiret 5 of the [bananas] Annex [to the Article I Doha Waiver] can only refer back to the determination made by the second arbitrator following the EC's effort to 'rectify the matter.'" Can the EC provide a reasoned answer as to whether it agrees with the statement.

136. See answer provided to Question 13.

70. (EC) In paragraph 33 of its first written submission, the EC argues that "[a] similar waiver [from Article XIII of the GATT 1994, to the one that expired on December 31, 2005] is not needed anymore, because in contrast to the old all-tariff-quota regime, the new banana import system that the European Communities applies since 1 January 2006 is not 'comparable to a quota regime'". Can the EC elaborate on this point.

137. See the answers provided in Question 11 and Question 15, above.

71. (EC) In paragraph 61 of their respective third party submissions, Nicaragua and Panama argue that the EC has essentially confirmed its violations of Articles XIII:1 and 2 by repeatedly acknowledging that a tariff quota reserved for the ACP would require an Article XIII waiver of those two paragraphs. In support of this statement, Nicaragua and Panama contend that: (a) The Understanding the EC signed with Ecuador and the US in 2001, stipulated that the EC would request a waiver of Article XIII of the GATT 1994 needed for the management of the [750,000 mt ACP] quota; (b) The EC's 2001 request for a waiver of Articles XIII:1 and 2 reiterated that the limited tariff quota set aside for ACP countries required a waiver from the obligations established under Article XIII of the GATT; and, (c) The EC's October 2005 waiver request sought Article XIII coverage for its proposal to institute a 775,000 mt ACP tariff quota in combination with a €187/mt MFN tariff (i.e. an arrangement that, like the current one, would have subjected ACP bananas to a tariff quota and MFN bananas to a flat tariff). Can the EC confirm the accuracy of the factual assertions raised by

Nicaragua and Panama, and provide a reasoned answer as to whether it agrees with the arguments raised by these Members.

138. As already mentioned, the import regime that the European Communities had in place until the end of 2005 was the equivalent of quota regime because virtually all banana imports were made under tariff quotas. Moreover, there were different tariff quotas allocated to different groups of countries and administered in different ways. In these circumstances, it is normal that the European Communities sought and obtained a relevant waiver from the application of Article XIII of the GATT for that particular import regime.

139. Such a waiver is not needed after the introduction of the tariff only regime on 1 January 2006. However, in order to provide all parties with additional legal security, the European Communities had placed a request for a new waiver from the application of Article XIII in late 2005. At that time the Arbitration was still pending and the final form of the import regime that the European Communities would implement as of 1 January 2006 was not yet clear. Following the introduction of the current tariff only import regime such a waiver is no longer necessary and this is why the European Communities does not pursue it anymore.

72. (EC) In paragraph 42 of their respective third party submissions, Nicaragua and Panama argue that the Latin American banana-supplying countries agreed to review and approve a waiver without a specified 2006 tariff-only rate, only after a number of pre-2006 multilateral controls were built into the text and drafted to their satisfaction. Before approving the waiver, the MFN drafters insisted that the Annex: (a) Set forth mandatory commitments (rather than "aims"); (b) Protect only MFN suppliers (rather than both MFN and ACP suppliers); (c) Protect against the erosion of pre-2006 applied MFN access conditions over time (rather than only bound concessions in the short term); (d) Automatically terminate the waiver in the event of a negative second arbitration determination (rather than end the process with a simple notification to the General Council); and, (e) Clarify that the arbitration and Article XXVIII procedures had to be concluded prior to the 2006 tariff-only regime (rather than allow the procedures to be conducted without a pre-2006 deadline). Can the EC provide a reasoned answer as to whether it agrees with the statement. Can the EC also confirm the accuracy of the factual assertions raised by Nicaragua and Panama.

140. Please see the answer to Question 13.

73. (EC) In paragraph 46 of their combined statement during the substantive meeting with the Panel, Nicaragua and Panama argue that "[t]he Bananas III panel and Appellate Body already expressly found that Article XIII, including Article XIII:5, applies to all bananas irrespective of origin and irrespective of the regulatory means by which those bananas are entered. If the unconditional obligations of Article XIII were interpreted otherwise, any Member could apply a discriminatory tariff quota with impunity, so long as one or more suppliers were regulated by other means." Can the EC provide a reasoned answer as to whether it agrees with these arguments.

141. The European Communities believes that the implementation of a tariff only system for bananas, following the suggestion of the Panel in Bananas III, would require only a Waiver of GATT's Article I. As explained in its first written submission, the language used by the Panel in its report appears to support the said interpretation.

142. More importantly, however, this interpretation is supported by sound legal reasoning. Indeed, the title of Article XIII of the GATT makes it clear that it does not apply to tariffs ("Non-discriminatory Administration of Quantitative Restrictions").

143. The constant reference in paragraphs 2, 3 and 4 of Article XIII to "quotas" makes it very clear what the scope of this provision is. The text of paragraph 5 of the same provision is even more enlightening on this point: "[t]he provisions of this Article shall apply to any tariff quota instituted or maintained by any contracting party, and, in so far as applicable, the principles of this Article shall also extend to export restrictions" .

144. In addition, if GATT Article XIII was meant to cover also ordinary tariffs, there would be no reason of existence for GATT Article I, paragraph 1 nor of several other GATT provisions. In fact, if any kind of "prohibition or restriction" on imports and exports of goods is caught by Article XIII, paragraph 1, then the European Communities wonder why the GATT contains different provisions, each dedicated to a different type of obstacle to trade.

145. Moreover, the Communities wonder why such a general, far reaching and catch-all provision has not been included in Part I of the GATT, where the basilar and general principles of the agreement are enshrined, instead of being foreseen after Article XI which concerns "General Elimination of Quantitative Restrictions".

146. It is thus not by accident that – to the Communities' best knowledge – there has never been a single case in which a measure has been found to be in breach of both Article I and Article XIII GATT.

147. Finally, the absurd results to which it would lead the interpretation suggested by Ecuador, Nicaragua and Panama have been illustrated in the oral statement of the European Communities (paragraphs 17 to 20) and it is therefore unnecessary to repeat them.

148. The European Communities finds regrettable that Nicaragua and Panama distort the Panel and Appellate Body reports in Bananas III to have these reports say what they actually do not say. Suffices it to stress once again that those reports assessed a different regime, which – unlike the current one – included quotas.

74. (EC) If the EC's concession on bananas is still the TRQ as described in Schedules LXXX and CXL, including the quota volume of 2.2 million metric tons and the in-quota duty of €75/mt), would the EC agree that an applied duty of €176/mt would be in breach of Article II:1(a) and (b) of the GATT 1994? If not, why not?

149. The European Communities notes that Article II:1(a) provides that "each contracting party shall afford to the commerce of the other contracting parties treatment no less favourable than that provided in the […] Schedule …". The European Communities also notes that Article II:1(b) provides that "the products […] shall on their importation into the territory to which the Schedule relates and subject to the terms, conditions or qualifications set forth in that Schedule, be exempt from ordinary customs duties in excess of those set forth and provided therein."

150. Therefore, the answer to the hypothetical question asked by the Panel would depend on whether the tariff applied by the European Communities was found to be *less favourable treatment* than that provided in the European Communities' Schedules. It would also depend on whether the tariff applied was found to be in excess of the *ordinary customs duties* provided in the Schedule, subject to the terms, conditions and qualifications contained in the Schedule.

151. The Panel does not need to answer these questions in the present case, because the only banana binding in the European Communities Schedules of Concessions is a tariff of €680 per ton.

75. (EC) In paragraph 83 of their respective third party submissions, Nicaragua and Panama argue that the EC's "commitments in the case of 'fresh bananas' (0803 00 19) are its

Uruguay Round tariffication concessions scheduled to replace its pre-existing consolidated banana tariff of 20% ad valorem (approximately 80 ECU/mt) in effect since 1963 pursuant to Uruguay Round tariffication". (Footnotes omitted). Can the EC provide a reasoned answer as to whether it agrees with the arguments of Nicaragua and Panama.

152. As mentioned in paragraph 72 of the European Communities' second written submission, the Marrakesh Agreements constitute a fresh start in the process of accumulating obligations from the Schedules. As a consequence, the European Communities' concessions in the Uruguay Round Schedule must be read as they stand, without any reference to earlier concessions. Therefore, the statement of Nicaragua and Panama does not have any relevance for the current proceedings.

76. (EC) In paragraph 70 of its second written submission, the EC quoted language from the 1993 Uruguay Round Agriculture Modalities paper according to which such paper "shall not be used as a basis for dispute settlement proceedings under the [WTO] Agreement." In the subsequent paragraph of its submission, the EC states that the Appellate Body has confirmed that the Agriculture Modalities paper "does not constitute an agreement among the WTO Members". In response, in paragraph 63 of its statement during the substantive meeting with the Panel, Ecuador argues that "[t]he EC does not deny that a time-limited concession would have been inconsistent with the agreed Uruguay Round modalities, but the EC complains that those modalities should be ignored because they were not to be used as a basis for dispute settlement. Ecuador is not making a claim that the EC is violating the modalities, but only pointing out that the modalities were such that, if the EC intended or was thought by anyone to have made a time limited access commitment on a product as important as bananas, it is inconceivable that it would have passed unnoticed." Can the EC provide a reasoned answer as to whether it agrees with Ecuador's arguments.

153. In paragraphs 116 and 117 of its first written submission, the European Communities referred to the consistent jurisprudence under the GATT and the WTO which allows WTO Members to subject their concessions to time limitations, such as the time limitation which the European Communities had put in its concession for the tariff quota of the 2.2 million tons of bananas. Neither Ecuador, nor the joint submissions of Nicaragua and Panama have attempted to refute this legal argument of the European Communities.

154. The European Communities regrets the fact that Ecuador tries to use the modalities paper as a basis for litigation in the present case, when the modalities paper was issued with the explicit qualification that it "shall not be used as a basis for dispute settlement proceedings" under the WTO and DSU rules. This reflects the WTO Members' desire to ensure that only their actual commitments are referred to in dispute settlement proceedings. In paragraph 72 of its second written submission the European Communities has provided additional arguments establishing that Ecuador's arguments based on the modalities paper should be rejected.

77. (EC) In paragraphs 9 and 10 of its communication to the Arbitrator in the context of the first Arbitration under the Annex to the Doha Waiver, dated 13 May 2005, reproduced in Exhibit ECU-4, the EC stated that it "also has a bound tariff rate quota of 2,200,000 tonnes, with an in-quota rate of 75€/t. The EC has no other commitments for bananas. Until 31 December 2002, the EC was also bound by the Framework Agreement on Bananas which had been incorporated into the EC's Schedule. It is no longer in force." Can the EC advance legal reasons to reconcile the above with its argument in this dispute that the TRQ of 2.2 million metric tons would now not be in force as a result of the expiration of the Framework Agreement on Bananas (BFA).

155. As mentioned in paragraph 89 of the second written submission of the European Communities, the description of the European Communities' banana import regime in the Arbitration Awards and in its own submissions during these Arbitrations is not correct.

156. Moreover, as mentioned in paragraph 90 of the second written submission of the European Communities, these descriptions do not have any relevance for the present procedure for a number of reasons. First, because the Arbitration was not held within the context of the DSU. Second, because the subject matter of the Arbitration was to determine whether the new import regime of the European Communities would maintain total market access for MFN suppliers and not to determine what were the concessions bound in Schedule CXL at the time the Arbitration was held. Therefore, any relevant statements in the Arbitration Awards should be treated as simple *dicta* that are not binding upon the parties to this dispute.

157. Moreover, there is no provision in the DSU that could support the proposition that a party's incorrect description of facts in a different context and in non-DSU proceedings can be taken into consideration by a panel in order to define that party's rights and obligations under the GATT. The European Communities respectfully invites the Panel to disregard any such statements made in a different context and outside the DSU and to interpret the Schedules of Concessions of the European Communities on the basis of the terms of the Schedules themselves.

78. (EC) Can the EC confirm, providing appropriate evidence, that the only tariff rate quota (TRQ) it has been applying since the beginning of 2006 is the zero-duty TRQ of 750,000 metric tons of bananas, and that in practice it has not been applying the TRQ of 2.2 million metric tons at an in-quota duty of €75/metric ton beyond the end of 2002.

158. The European Communities confirms that the only "tariff quota" applied since 1 January 2006 is the autonomous tariff quota for the Cotonou Preference, applied to 775.000 tons of bananas of ACP origin. As evidence, the European Communities refers to the implementing Commission Regulations, mentioned in Question 3 above.

159. In the period between the end of 2002 and the end of 2005, the European Communities was still implementing the tariff-quota-based import regime, as agreed in the Understanding. In accordance with the provisions of the Understanding, the EC allocated to MFN countries an autonomous tariff quota for a total of 2.65 million tons of bananas, i.e. for much more than the 2.2 million tons that was bound in its Schedules until the end of 2002. Following the enlargement of the European Communities in 2004, the European Communities accepted another 300,000 tons for the period 1 May 2004 to 31 December 2004, which went up to 460,000 tons in 2005. Therefore, the European Communities accepted a total of 3.113 million tons of bananas imported from MFN suppliers in 2005 at a tariff of €75.

160. As already mentioned, after the end of 2002, the European Communities accepted these ever increasing quantities of MFN bananas because it complied in good faith with the provisions of the Understanding and not because it had a relevant binding in its Schedules. This practice was duly discontinued at the end of 2005, again in accordance with the provisions of the Understanding, to which the European Communities complied in good faith until the end.

79. (EC) In paragraph 20 of its rebuttal submission to the Arbitrator in the context of the first arbitration under the Annex to the Doha Waiver, dated 7 June 2005, reproduced in Exhibit ECU-5, the EC stated that:

> **"In Article XXVIII negotiations, a Member may seek to modify the concessions which it has bound itself to provide. Merely changing the form of an import regime does not in itself require a Member to go through an Article XXVIII**

> **procedure. It is only where a Member cannot change the form of an import regime consistently with its concessions that it is required to go through an Article XXVIII procedure (otherwise it will act inconsistently with Article II GATT). In the present case, if the EC was proposing to apply a duty of €75/t or less on an unlimited basis it would not need to go through an Article XXVIII procedure because it could provide such treatment consistently with its current commitment of an in-quota duty of €75/t within a tariff-rate quota of 2,200,000 tonnes and an out-of-quota rate of €680. If the duty is to be €76/t or above the EC has to conduct an Article XXVIII process. The fact that the Waiver Decision and the Waiver Annex is replete with references to Article XXVIII GATT proves that it was accepted that the EC's MFN tariff under a tariff-only regime would be greater than €75/t" (Footnote omitted).**

How does the EC relate its above statement with its argument in paragraph 10 of its first written submission that the EC's tariff concessions contain only one bound tariff rate for bananas, i.e. €680 per ton?

161. As mentioned in paragraph 88 of its second written submission, the European Communities has engaged in good faith negotiations under Article XXVIII of the GATT because it has undertaken to do so in the Understanding. Moreover, the European Communities has noted that the panel report in *EEC – Newsprint* may support the proposition that "under long standing GATT practice, even purely formal changes in the tariff schedules of a contracting party which may not affect the GATT rights of other countries […] have been considered to require renegotiations". Therefore, Article XXVIII negotiations are not necessary *only* where a WTO Member seeks to increase the level of its bound tariffs, but may also be necessary when it seeks to decrease the level of its bound tariffs. Consequently, if the European Communities' statements before the Arbitration took a different view, those statements were wrong.

162. However, as already mentioned in Question 77, any erroneous statements made by the European Communities in a different context and in a non-DSU procedure do not have any legal significance for the current proceedings before the Panel.

80. (EC) In paragraph 99 of their respective third party submissions, Nicaragua and Panama argue that the EC's "legal instruments, WTO assertions, and other official statements consistently confirm the enduring validity of a €75/mt concession". Nicaragua and Panama further argue that examples have already been referenced by Ecuador, and offer the following additional ones: (a) In Regulation 216, the EC would have explicitly referenced a tariff quota of 2 200 000 tonnes at a rate of €75 as bound in the WTO until the entry into force of a tariff-only regime; (b) In its GATT Article I waiver discussions, the EC confirmed it intended to adopt a tariff-only system in 2006, which would entail a re-binding of its 75 and 680 €/tonne bound rates under the relevant procedures of Article XXVIII of the GATT 1994; and, (c) In an internal communication to its own Member States, the EC confirmed that, should the Community wish to move to a tariff-only system at a rate higher than €75/t., GATT Article XXVIII provided that such modification should be notified to all GATT Contracting Parties. Can the EC confirm the accuracy of the factual assertions raised by Nicaragua and Panama, and provide a reasoned answer as to whether it agrees with the arguments raised by these Members.

163. The documents cited by Nicaragua and Panama pre-date the expiry of the binding for the tariff quota for the 2.2 million tons. Council Regulation (EC) No. 216/2001 was approved on 29 January 2001, was applied as of 1 April 2001 and was replaced by Regulation 2587/2001 on 19 December 2001. The document cited by Nicaragua and Panama in the context of the GATT Article I waiver discussions is dated 5 November 2001, when the binding for the tariff quota of the 2.2 million tons was still in place and it was still unclear what bindings the European Communities

would agree with banana suppliers in the future. The Communication of the Commission to the Council, to which Nicaragua and Panama refer, is also dated 1 June 1999.

164. The Annex to the Schedule of the European Communities provided that consultations for the replacement of the concession on the tariff quota for the 2.2 million tons of bananas would start in 2001. Moreover, the European Communities agreed in the Understanding (which was signed in April of 2001) that it would hold Article XXVIII negotiations in order to agree on the new system that would replace the then applicable banana import regime. All of the documents cited by Nicaragua, Panama and Ecuador were prepared before the expiration of the tariff quota for the 2.2 million tons of bananas at the end of 2002 and at a time when the European Communities was either about to start negotiations, or was already holding negotiations for a new import regime. At that time it was not yet clear what would be the outcome of these negotiations. This explains these documents' references to then bound tariff quota for 2.2 million tons of bananas. It is evident that these statements do not amount to a rebinding of that tariff quota.

81. (EC) In paragraph 95 of their respective third party submissions, Nicaragua and Panama argue that the phrase "This agreement shall apply until 31 December 2002", contained in the Framework Agreement on Bananas "did not say or mean that the EC's multilateral current-access concessions on bananas would also terminate as of 31 December 2002. If the parties had intended to terminate multilateral concessions in their plurilateral agreement, they would have stated this with specificity in the BFA and provided their justification for doing so. Their use of the alternative word 'agreement' made clear they had no intention of revoking the actual concessions themselves." Can the EC provide a reasoned answer as to whether it agrees with the arguments raised by Nicaragua and Panama.

165. Please see the answer to Question 25.

82. (EC) In paragraph 93 of their respective third party submissions, Nicaragua and Panama argue that the EC commitments appearing in column 4 [of its Schedules] would not have been identified as 'final', much less 'current access quotas' or 'concessions,' if they were to lapse shortly after the close of the Uruguay Round implementation period and be replaced by a €680/mt stand-alone bound rate that would functionally ban all MFN access.[16]" Can the EC provide a reasoned answer as to whether it agrees with the arguments raised by Nicaragua and Panama.

166. There are a number of flaws in this assertion, most of which have already been identified by the European Communities in its written submissions and oral statements. First, this assertion ignores the fact that the BFA was agreed in the aftermath of certain GATT dispute settlement procedures and not within the context of the Uruguay Round. The simple timing coincidence in these two independent events does not allow Nicaragua and Panama to use the one event in order to make an argument for the other.

167. Second, the BFA provided that consultations would commence in 2001 (i.e. one year before the expiration of the concession) for the system that would replace that concession. Therefore, the arrangement achieved for the MFN suppliers participating in the BFA was quite positive: a bound concession for 8 years and the possibility to negotiate a new deal better adapted to the market conditions between 2001 and 2002.

168. Third, the fact that this concession was included under both the "Initial Quota" and the "Final Quota" columns simply meant that there would be no period during which there would be successive

[16] (*footnote original*) As the 2005 Arbitrator found, and the EC confirmed, barely negligible volumes of imports (10,000-20,000 mt) could enter the EC at the 680 €/mt rate. *See AAI*, para. 60, n.52.

progressive reductions in the bindings of the European Communities. This confirms that the tariff quota was indeed granted "as indicated in the Annex", because the Annex expressly provides that the starting date for the operation of the concession would be a fixed date, i.e. October 1, 1994. For the avoidance of any doubt, the European Communities notes that the word "Final Quota" in that column obviously does not mean that the concession would be in place at the end of time.

169. Fourth, as already mentioned, the division of the European Communities' Schedules into "Current Access Quotas" and "Minimum Access Quotas" was simply reflecting the percentage of the total market for the specific product that was covered by imports prior to the conclusion of the Uruguay Round. This division does not have any legal implications, it does not affect the way in which the tariff quotas were administered and it does not create any additional rights for the exporting countries.

83. (EC) In Exhibits N-1 and P-1 to their respective third party submissions, Nicaragua and Panama submit a number of documents as "Article I waiver negotiating history documents". Can the EC confirm the accuracy of those documents and provide the Panel with any further relevant documents relating to those negotiations.

170. Please see the answer to Question 13.

84. (EC) In Exhibits N-2 and P-2 to their respective third party submissions, Nicaragua and Panama submit an analysis made by the Centre for International Economics, dated August 2007, the main findings of which would be reflected in paragraph 47 of their third party submissions. Can the EC provide a reasoned answer as to whether it agrees with the main findings or any other relevant points in the analysis made by the Centre for International Economics, quoted by Nicaragua and Panama.

171. The European Communities does not agree with the conclusions of the above-mentioned analysis.

172. The study produced by the Centre for International Economics (the "CIE") is based on totally incorrect assumptions and contains a number of predictions which are turning out to be erroneous and unfounded.

173. For instance, the study predicts (page 14) for year 2007 a 44 000 tonnes increase in ACP bananas imports into the European Communities (for a total of 950 000 tonnes). However, the facts show this prediction to be completely wrong. In fact, in year 2007 the European Communities will import less ACP bananas than it did in the previous year.

174. Again, the study estimates for year 2008 total imports of ACP bananas into the European Communities to amount to 1 022 000 tonnes. However, actual sales data and trends show that this forecast will not materialise.

175. The study seems to ignore some basic facts. For instance, one may observe that the only ACP countries which have recently increased their exports are Dominican Republic and Ghana. Dominican Republic has specialised in organic bananas, which represent 80% of their exports and constitute a niche in the banana market. Ghana is, on his part, only a small producer and a very minor player in both the European and, even more, the worldwide banana market. Another indicative fact is that the only new plantation started since the end of 2005 has been in Brazil, not in ACP countries, where Fyffes started a new plantation in January 2006 and this contributed to the great increase of Brazilian exports to the European Communities' market in 2006 and 2007.

176. The lack of credibility of this study does not surprise the European Communities, since the author of the study, the CIE, has also in the past produced studies which turned out to be completely unreliable.

177. For instance, during the arbitration proceedings Panama presented another study prepared by the CIE. In page 28 of this document it is stated that at any tariff level above €75 a tonne, Latin America bananas producers would be severely harmed. At page 29, this loss is quantified in the following terms: "for every €10 a tonne increase in the tariff, there is a likely 87 000 tonne loss of Latin American access".

178. However, reality shows that, in spite of a duty of €101/mt higher than the one indicated in the study (€176/mt instead of €75/mt), in 2006 Latin American countries have exported into the European Communities 10% more than 2005. Furthermore, in 2007, first semester, there is an additional increase of 8%, compared to 2006.

179. Another false prediction of the previous CIE's study is as follows: access into the European Communities' bananas market for Latin America's producers was supposed to be reduced by 870 000 tonnes, due to the increase of the level of duty to €176/tonne. Facts show, however, that Latin America access instead has increased by 470 000 tonnes in only 18 months.

180. This is not all. Similarly, other studies presented by Panama in past procedures turned out to forecast wrong events. The Angolan feasibility study submitted during the Arbitration procedures included forecasts on production in Angola which never materialised. None of the 1890 hectares of land which should have progressively produced bananas in that country has so far produced any.

181. The European Communities also refers to the considerations developed by the Ivory Cost in its oral statement (points 17 et seq.).

182. In the light of this, the European Communities urges the Panel to disregard the study submitted by Panama and to form its opinion on the basis of the actual sales data which are undisputed and publicly available.

85. (EC) In Exhibits N-3 and P-3 to their respective third party submissions, Nicaragua and Panama submit a copy of the "EC's Draft Request for Article XIII Waiver, 21 May 2001". Could the EC confirm the accuracy of that document and provide the Panel with any further relevant documents relating to the negotiations for that Article XIII waiver.

183. The European Communities observes that the draft request submitted by Nicaragua and Panama is irrelevant for the purpose of determining whether the current ACP TRQ of 775,000 is in violation of Article XIII of the GATT. The draft request refers to the tariff-quota-based banana import regime that the European Communities had in place between 1 July 2001 and 31 December 2005, as agreed in the Understanding. As already mentioned, virtually all imports under that import regime were made under tariff quotas and there were different tariff quotas allocated to different groups of countries with different terms. As this Panel had found in paragraph 6.158 of its first Article 21.5 report, such an import regime would need a waiver from the application of Article XIII of the GATT. Such a waiver is no longer necessary, because the European Communities has introduced a tariff only import regime on 1 January 2006.

QUESTIONS ADDRESSED TO PARTIES AND THIRD PARTIES

86. (Both Parties, Belize, Cameroon, Côte d'Ivoire, Dominica, the Dominican Republic, Ghana, Jamaica, Madagascar, Saint Lucia, Saint Vincent and the Grenadines, and Suriname) In paragraph 31 of its statement during the substantive meeting with the Panel, Cameroon

argues that "[c]'est un fait reconnu que les producteurs de bananes ACP sont moins compétitifs que les producteurs NPF. Comparés à ces derniers, les producteurs ACP produisent à un coût plus élevé. Pour des raisons historiques et géographiques, ils ne disposent pas des mêmes économies d'échelle que les producteurs NPF. Dès lors, les producteurs ACP ne peuvent les concurrencer que sur les marches où ils bénéficient d'un accès préférentiel." Can Cameroon provide evidence for its assertions. Can Belize, Côte d'Ivoire, Dominica, the Dominican Republic, Ghana, Jamaica, Madagascar, Saint Lucia, Saint Vincent and the Grenadines, and Suriname confirm that they agree with these specific assertions made by Cameroon. Can Cameroon, as well as Belize, Côte d'Ivoire, Dominica, the Dominican Republic, Ghana, Jamaica, Madagascar, Saint Lucia, Saint Vincent and the Grenadines, and Suriname specify the relevance of this argument, if any, in the context of its eventual analysis of Article XIII of the GATT 1994, in particular as regards the chapeau of Article XIII:2. Can the Parties provide a reasoned answer as to whether they agree with these assertions, and specify, in their view, how the same should be taken into account in the context of an eventual analysis of Article XIII of the GATT 1994, in particular as regards the chapeau of Article XIII:2.

184. The European Communities believes that the facts described by Cameroon are manifestly accurate and correct.

185. However, if these elements could have a certain relevance within an analysis of the WTO compatibility of a regime providing for quantitative restrictions, they are certainly irrelevant in the context of an analysis of a tariff-only regime under Article XIII of the GATT 1994.

186. In fact, for the reasons explained in the answer to Question 73, above, Article XIII applies to quantitative restrictions and not *any* kind of trade restriction.

87. (Both Parties and Brazil) In paragraph 17 of its statement during the substantive meeting with the Panel, Brazil argues that "a Member is not exempted from discharging its burden of proof as regards the compliance of the new measures with the DSB recommendations and rulings even if such measures are intended to implement a suggestion by the panel." Can Brazil elaborate on this argument, and the Parties provide a reasoned answer as to whether they agree with Brazil's argument.

187. The general principles applicable to burden of proof in WTO dispute settlement require that the party claiming a violation of a provision of the WTO agreements bears the burden of demonstrating that the measure is not consistent with the relevant provisions of the agreements. As most recently confirmed in paragraph 6.4 of the report of the Article 21.5 Panel in *Korea – Anti-Dumping Duties on Imports of Certain Paper from Indonesia, Recourse to Article 21.5 by Indonesia*, dated 28 September 2007 (DS312), this principle also applies in the context of Article 21.5 proceedings, where the complaining party bears the burden of demonstrating its claim that the measure taken to comply by the defending party is not consistent with the WTO rules.

88. (Both Parties and Colombia) In paragraph 16 of its third party submission, Colombia argues that "[a]n applied tariff of €176/tonne does not constitute a 'rebinding' [under the Doha Waiver]." Can Colombia elaborate on this argument, and the Parties provide a reasoned answer as to whether they agree with it.

188. The European Communities reserves its answer to this question until it has seen Colombia's elaboration of its argument.

89. (Both Parties and Côte d'Ivoire) In paragraph 21 of its oral statement during the substantive meeting with the Panel, Côte d'Ivoire argues that "moins d'une année suffit pour produire et exporter des bananes". Can Côte d'Ivoire provide evidence for its argument. Can

the Parties comment on the argument made by Côte d'Ivoire, and explain how rapidly banana production and exports can be expanded, and how much time is necessary for suppliers to fully respond to a change in market conditions, such as a change in the EC's import regime for bananas.

189. The European Communities reserves its answer to this question until it has seen the response of Cote d'Ivoire.

90. (Both Parties, Nicaragua and Panama) In paragraph 108 of their respective third party submissions, Nicaragua and Panama argue that "[t]he EC's 75 €/mt concession – which from 1995 to 2005 covered all bound in-quota Latin American imports and informed the rate applicable to all other Latin American bananas entering the EC market – has been the single most important banana concession in Schedule CXL. In contrast to the prohibitive 680 €/mt rate, under which virtually no Latin American volumes have ever been entered, the 75 €/mt concession is the only rate that enabled Latin American market access to the EC market from 1995 to 2005. Unless the 75 €/mt bound rate receives the full protections of GATT Article II, the entire value of the EC's mandatory Uruguay Round concessions will be nullified". (Emphasis added). Can Nicaragua and Panama provide evidence for their assertions. If MFN banana imports have increased under an applied tariff rate of 176€/mt, as argued by the EC, how can this be reconciled with the statement that "a 75 €/mt concession is the only rate that enabled Latin American market access to the EC market from 1995 to 2005"? Can Nicaragua and Panama clarify what would be meant by "providing the full protections of GATT Article II" to the 75 €/mt tariff rate. Can Parties provide a reasoned answer as to whether they agree with the assertions made by Nicaragua and Panama.

190. The European Communities considers that the assertion of Nicaragua and Panama should be rejected, because it requests the Panel to find that an "applied tariff" becomes a "bound tariff" simply by virtue of its being applied. If accepted, such a proposition would lead to the collapse of the whole GATT system and the Doha round negotiations.

191. The European Communities reserves the right to provide more comments once it has seen Nicaragua's and Panama's response to this question.

91. (Both Parties, Nicaragua and Panama) In paragraph 19 of their combined statement during the substantive meeting with the Panel, Nicaragua and Panama argue that "[t]he EC tariff, which was the EC's scheduled banana concession from 1963-1994, was the equivalent of about 80 euro per tonne." Can Nicaragua and Panama elaborate on this argument and provide evidence for their assertions, as appropriate. Can the Parties comment on the argument and assertions.

192. The European Communities is not able to understand the calculations supporting the assertion of Nicaragua and Panama. The European Communities reserves its answer to this question until it has seen Nicaragua and Panama's elaboration of their argument.

92. (Both Parties and Suriname) In paragraph 10 of its statement during the substantive meeting with the Panel, Suriname argues that "[b]oth the Doha Waiver and the Understanding on Bananas were negotiated by the WTO members, including the interested parties, after the DSB adopted its recommendations and rulings in the original Bananas dispute. These two instruments constitute new secondary WTO law and create an entirely new legal framework for the issues that are now pending before the Panel. These new instruments clearly strike a new balance of rights and obligations for the entire WTO membership, in addition to the parties to the dispute." Can Suriname elaborate on these arguments. Can both Parties provide a reasoned answer as to whether they agree with Suriname.

193. The European Communities reserves its answer to this question until it has seen Suriname's elaboration of its argument.

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

194. The European Communities does not know the answer to this question.

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

195. The European Communities considers that the analysis of the legal status and effect of the Understanding should be primarily based on its content and not on any unilateral statements issued by the signatories after its signing. In that regard, the European Communities notes that the Understanding (i) describes in great detail the characteristics of the two banana import regimes that the European Communities should implement by 1 July 2001 and by 1 January 2002 respectively and (ii) expressly provides that Ecuador's right to retaliate will be terminated. In light of the content of the Understanding and the rights and obligations mutually accepted by both parties, the European Communities respectfully submits that the Understanding is indeed a "mutually agreed solution" to the banana dispute between Ecuador and the European Communities.

196. The European Communities considers that the inclusion in the text of the Understanding of the phrase "the EC and Ecuador consider that this Understanding constitutes a mutually agreed solution to the banana dispute" confirms the European Communities' interpretation of the legal status and effect of the Understanding.

102. (EC, Nicaragua and Panama) In paragraph 44 of their combined statement during the substantive meeting with the Panel, Nicaragua and Panama argue that "[t]he [first compliance] panel's second suggestion never absolved any discriminatory ACP tariff quota from the obligations of Article XIII, however the larger import regime might be structured. To the contrary, the panel, only paragraphs before, found the EC's exclusive ACP tariff quota, by its own specific shape and nature, to be a quantitative restriction covered by Article XIII:5 that failed to treat like products 'equally, irrespective of origin,' in violation of Article XIII. No subsequent compliance suggestion can be read to nullify that actual finding of law." Can Nicaragua and Panama elaborate on these arguments. Can the EC provide a reasoned answer as to whether it agrees with the argument.

197. The European Communities does not agree with this view of the first Article 21.5 panel's application of Article XII. In the first place, the phrase 'own specific shape and nature' does not appear in the panel's report. Secondly, the European Communities is not even certain what the phrase means in the context of tariff quotas, but will assume that the Nicaragua and Panama imply that the finding of breach of Article XIII regarding the tariff quota for ACP countries was made irrespective of whether or not other countries were subject to tariff quotas.

198. The European Communities notes that at paragraph 6.25 of that report, in application of the principles enunciated by the Appellate Body in Bananas III, the panel said:

> 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.

199. Thus, it is evident that the panel in reaching its conclusion had explicitly in mind that tariff quotas were being applied to imports both from the ACP and from the MFN countries. Furthermore, this statement was made by way of introduction to the panel's analysis of the application of paragraphs 1 and 2 of Article XIII.

ANNEX D-3

RESPONSES BY BELIZE, CAMEROON, CÔTE D'IVOIRE, DOMINICA, DOMINICAN REPUBLIC, GHANA, JAMAICA, MADAGASCAR, SAINT LUCIA, SAINT VINCENT AND THE GRENADINES, AND SURINAME TO QUESTIONS POSED BY THE PANEL

86. (Both Parties, Belize, Cameroon, Côte d'Ivoire, Dominica, the Dominican Republic, Ghana, Jamaica, Madagascar, Saint Lucia, Saint Vincent and the Grenadines, and Suriname) In paragraph 31 of its statement during the substantive meeting with the Panel, Cameroon argues that "[c]'est un fait reconnu que les producteurs de bananes ACP sont moins compétitifs que les producteurs NPF. Comparés à ces derniers, les producteurs ACP produisent à un coût plus élevé. Pour des raisons historiques et géographiques, ils ne disposent pas des mêmes économies d'échelle que les producteurs NPF. Dès lors, les producteurs ACP ne peuvent les concurrencer que sur les marches où ils bénéficient d'un accès préférentiel." Can Cameroon provide evidence for its assertions?

There are various elements relating to the production of bananas and the placing on the market of bananas which determine the competitiveness of banana producers.

First, there are natural factors. In that respect, the ACP producers are in a worse position than the MFN producers, in particular with respect to the following elements :

- scarcity of land which is appropriate for growing bananas;
- the poor quality of the ground on which the bananas are grown;
- more significant temperature differences;
- the need to irrigate and drain the ground on which the bananas are grown;
- more frequent ground infestations, necessitating replanting every five or six years (compared with several decades for MFN countries).

Second, there are the economic and human factors in relation to which the ACP countries also find themselves in a worse position:

- higher input costs (fertilizers, treatment products, packaging, etc.). These costs are significant due to the lack of local producers of these input products;

- the impossibility of economies of scales due to the limited size of the plantations. Where the ACP country with the highest production annually exports around 250,000 tons only, Ecuador exports more than 4,000,000 tonnes.

- more expensive shipping costs due to the limited size of the volumes which are shipped and due to the insularity of the countries concerned, which does not allow producers and transporters to optimise costs;

As a result:

- the yields amount to around 40 tonnes per hectare in the ACP countries compared with 50 tonnes per hectare in MFN countries;

- the number of boxes obtained per stem of bananas is around 1 in ACP countries compared with 1.25 in MFN countries;

– the productivity of the workers is much higher in MFN countries than in ACP countries (0.7 man per ha in the MFN countries and 1.15 man per ha in the ACP countries).

As a result of the more limited yields and the higher costs, the banana producers in the ACP countries are less competitive than the banana producers in MFN countries. The less competitive position of ACP banana producers has also been noted by the President of Chiquita Europe in an interview in 2007 which was annexed to Côte d'Ivoire's Oral Statement.[1] The lack of competitiveness is also demonstrated by the fact that the ACP countries from the Carribean are unable to export to the US market which is geographically much closer than the EC market.

Can Belize, Côte d'Ivoire, Dominica, the Dominican Republic, Ghana, Jamaica, Madagascar, Saint Lucia, Saint Vincent and the Grenadines, and Suriname confirm that they agree with these specific assertions?

Yes.

Can Cameroon, Belize, Côte d'Ivoire, Dominica, the Dominican Republic, Ghana, Jamaica, Madagascar, Saint Lucia, Saint Vincent and the Grenadines, and Suriname specify the relevance of this argument, if any, in the context of its eventual analysis of Article XIII of the GATT 1994, in particular as regards the chapeau of Article XIII:2?

As a preliminary remark, Cameroon, Belize, Côte d'Ivoire, Dominica, the Dominican Republic, Ghana, Jamaica, Madagascar, Saint Lucia, Saint Vincent and the Grenadines, and Suriname (hereinafter referred to as the ACP third parties) would like to reassert that they do not consider Article XIII of the GATT to be relevant in the present case since no prohibition or quantitative restriction on imports of bananas exists and *a fortiori* no such prohibition or quantitative restriction is imposed by the EC on Ecuador or other MFN suppliers.

If, however, the Panel would reach the surprising conclusion that the cap of 775,000 tons imposed on the preferential tariff treatment granted to the ACP countries in the context of a flat tariff regime allowing unlimited supplies at the MFN rate is a restriction within the meaning of GATT Article XIII, it should, in order to interpret that provision, take into account that the limitation of 775,000 is a limitation on a preference covered by an Article I waiver. It is as such a disadvantage to the ACP countries which are the beneficiaries of the preference. Therefore, the shares which the ACP countries might be expected to obtain in the absence of such a restriction on their preferential access would be at a minimum equivalent to their current share. Indeed, the ACP countries would, in such a case, benefit from an unlimited preferential tariff access.

89. (Côte d'Ivoire) In paragraph 81 of its oral statement during the substantive meeting with the Panel, Côte d'Ivoire argues that "moins d'une année suffit pour produire et exporter des bananas". Can Côte d'Ivoire provide evidence for its argument?

In its Oral Statement, Côte d'Ivoire has indicated that "In 2007, the Center for International economics has postponed the outcome of its predictions to 2014 in order to explain the reasons of the failure of its forecasting model. According to it, projects would currently be ongoing in Mozambique and Angola. Why would we need to wait until 2014 to evaluate the results while less than a year is sufficient to produce and export bananas." If a project had been initiated in 2005 or beginning of 2006 when the European Communities implemented its new import regime, this new production would

[1] See also the Italtrend Report on "Etat des lieux et compétitivité des plantations de bananas en Côte d'Ivoire" and the Horus Report on "La banane africaine dans l'Union européenne", which are attached as an Annex to this Reply.

have been placed on the market around September 2006, consistent with the agronomic possibilities of this plant as demonstrated by the official information from the Agricultural Research Center for International Development (CIRAD) which is attached as an annex to this reply.[2]

92. (Suriname) In paragraph 10 of its statement during the substantive meeting with the Panel, Suriname argues that "[b]oth the Doha Waiver and the Understanding on Bananas were negotiated by the WTO Members, including the interested parties, after the DSB adopted is recommendations and rulings in the original Bananas dispute. These two instruments constitute new secondary WTO law and create an entirely new legal framework for the issues that are now pending before the Panel. These new instruments clearly strike a new balance of rights and obligations for the entire WTO membership, in addition to the parties to the dispute." Can Suriname elaborate on these arguments?

The legal background against which the WTO compatibility of the measures which are challenged in the present dispute needs to be assessed is radically different from the legal framework existing at the time the original *Bananas III* dispute was decided. This new legal framework now includes the Doha Waiver and the Understandings on Bananas.

The Understanding on Bananas is secondary WTO law to the extent that it is a mutually agreed solution putting an end to a dispute brought before the Dispute Settlement Body. The Understanding was duly notified to the DSB and is, indeed, referred to in the Doha Waiver.

The Doha Waiver is secondary WTO law since it is a decision by all WTO Members to grant a waiver of the obligations under Article I of the GATT in order to make the Cotonou preference possible.

These two new legal instruments must be taken into account to decide on the WTO compatibility of the new EC banana import regime. Since these two new instruments were not in existence at the time of the decision of the *Bananas III* dispute, it is clear that the legal framework has changed fundamentally. The adoption of these new legal instruments has modified the balance of rights and obligations for the WTO Members and as such constitutes a clear break in the chain of events between the original dispute and the new EC banana import regime. The legal analysis which must be carried out in examining the WTO compatibility of the new EC banana regime is therefore substantially different from the analysis carried out in the context of an Article 21.5 compliance review. The fact that any challenge of the new EC banana import regime must take place in the framework of new dispute settlement proceedings is also consistent with the Panel's findings in *Canada – Aircraft II* where it rejected Canada's argument that certain claims were not properly before the Panel and stated that *de novo* proceedings are appropriate where the matters are different or broader than those that were the subject of the original dispute (at para. 7.18)

The existence of this new legal background, i.e. the Understanding on Bananas and the Doha Waiver adopted to make possible the implementation of the Cotonou Agreement as opposed to the former Lomé Agreement, also means that the measures being challenged by Ecuador are not measures taken to comply with the recommendations and rulings of the DSB in the original *Bananas III* dispute. Indeed, these measures being challenged have been adopted to implement the commitments undertaken in the Understanding on Bananas and in the Doha Waiver which were adopted after the DSB issued its recommendations and rulings in the original *Bananas III* case. Any challenge of the new EC banana import regime should therefore be subject to new dispute settlement proceedings under Article 6 of the DSU.

95. (Ecuador and all third parties) In paragraph 6 of its oral statement during the substantive meeting with the Panel, Ecuador mentions that "Ecuador's per capita GDP for 2005

[2] Exhibit CI-1.

was about 8 per cent of the per capita average of the EC, and also is less than that of many of the ACP countries." In turn, in paragraph 16 of their combined statement during the substantive meeting with the Panel, Nicaragua and Panama state that Nicaragua's "Gross National Income of $910 is below the GNIs of several LDCs and well behind the GNIs of most ACP countries." Can Ecuador, Nicaragua and Panama provide the data sources that were used to make their respective assertions and specify the per capita GDP figures in those sources for Ecuador, the EC and the MFN suppliers and ACP countries that are participating as Third Parties in these proceedings? Can other Third Parties provide a reasoned answer as to whether they agree with the assertions made by Ecuador, Nicaragua and Panama?

Cameroon, Belize, Côte d'Ivoire, Dominica, the Dominican Republic, Ghana, Jamaica, Madagascar, Saint Lucia, Saint Vincent and the Grenadines, and Suriname consider that it is regrettable that Ecuador, in order to support its case, tries to create conflicts among developing countries and that it does not take into account the fact that, with respect to bananas, some countries clearly benefit from production conditions and distribution opportunities which are largely more favourable than those enjoyed by other countries.

In any case, Cameroon, Belize, Côte d'Ivoire, Dominica, the Dominican Republic, Ghana, Jamaica, Madagascar, Saint Lucia, Saint Vincent and the Grenadines, and Suriname consider that the GDP and the GNI are not decisive criteria in assessing the development of countries. If one wants to do so, it is more appropriate to refer to the development index elaborated by the United Nations in the framework of its development program. In the 2006 Human Development Report of the UNDP which is attached as an annex to this reply, Ecuador and the other MFN countries are ranked at a more developed level than most ACP countries.

103. (Cameroon) In paragraphs 16-19 of its oral statement during the substantive meeting with the Panel, Cameroon makes reference to a series of statistics about the volume of imports of MFN bananas to the EC. Can Cameroon provide its data sources?

Data concerning import volumes into the EC have been taken from Eurostat and were annexed to the ACP third party written submission.

Data concerning import volumes into the United States have been taken from USDA and were annexed to the ACP third party written submission.

The source of the data concerning wholesales prices is the European Commission. The price data used were annexed to the EC's first written submission as Exhibit EC-7.

105. (Côte d'Ivoire) In paragraphs 4 to 6 of its oral statement during the substantive meeting with the Panel, Côte d'Ivoire refers to trade statistics for the years of 2005 to 2007. Can Côte d'Ivoire provide its data source?

Data were taken from Eurostat and were annexed to the ACP third party written submission.

114. (Suriname) In paragraph 7 of its statement during the substantive meeting with the Panel, Suriname argues that "[t]o allow Ecuador to challenge the new EC banana import regime in the framework of Article 21.5 compliance proceedings *would be equivalent to ignoring the legal effects of the mutually agreed solution* reached between Ecuador and the EC". (emphasis added). In Suriname's view what are the main legal effects under the DSU of a mutually agreed solution reached between the parties to a dispute?

A mutually agreed solution has mainly two major legal effects.

First, a mutually agreed solution is the preferred way of settling a dispute which is the ultimate objective of the dispute settlement system. As stated by Article 3.7 of the DSU: "the aim of the dispute settlement mechanism is to secure a positive solution to a dispute. A solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred." By solving the dispute, the mutually agreed solution thus puts an end to the dispute with respect to which it has been agreed. As a result, subsequent measures that would be adopted in the same sector, for instance in order to implement the mutually agreed solution, cannot be challenged through compliance proceedings. Thus, the mutually agreed solution constitutes a bar to any further Article 21.5 proceedings. Any measures taken to implement the mutually agreed solution are no longer measures taken to comply with the recommendations and rulings of the original dispute. There is a break in the link between the recommendations and rulings of the DSB in the original dispute and subsequent measures adopted to implement a mutually agreed solution.

It has been argued by Ecuador that any solution which serves the purpose of Article 3 of the DSU should be consistent with the WTO rules. The solution agreed in the Understanding on Bananas between Ecuador and the EC was fully consistent with WTO rules. Indeed, it provides for the introduction of a tariff-only regime for imports of bananas no later than 1 January 2006 and requires that Ecuador lifts its reserve concerning the waiver of Article I of the GATT requested by the EC for the Cotonou preference. Thus, the solution envisaged in the Understanding is fully consistent with WTO rules. Whether the waiver covering the Cotonou preference is still valid taking into account the provisions and the terms of the waiver is a different issue which would need to be examined, if challenged, in the framework of new dispute settlement proceedings but not in the framework of Article 21.5 compliance proceedings.

Second, a mutually agreed solution is a binding international agreement whereby the parties are free to make concessions to achieve an acceptable balance of concessions between them. Parties negotiating a mutually agreed solution may go beyond the issues at stake in the specific dispute. A mutually agreed solution is in the first place an agreement between sovereign states which are free to accept and grant rights and obligations in areas other than those covered by the dispute in order to achieve an equitable overall balance. A mutually agreed solution is therefore not to be equated to the simple implementation of the recommendations and rulings of the DSB. For that reason, Article 3.7 DSU states "[i]n the absence of a mutually agreed solution, the first objective of the dispute settlement mechanism 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". A mutually agreed solution, being an agreement between sovereign states, is binding upon its parties pursuant to public international law. Both parties have to comply with its terms in good faith and cannot put its terms into question thereafter.

As a final remark, it should be emphasized that the issue as to whether the Understanding on Bananas is a covered agreement under the DSU does not appear to be relevant. Indeed, the issue in the present case is not to examine whether the new EC banana import regime is consistent with the Understanding on Bananas, but about the legal effects of the Understanding on Bananas in subsequent proceedings, in particular in Article 21.5 proceedings, in the framework of the DSU. As noted by the Panel in *India – Autos*, "At the very least, the Panel sees merits in India's argument that **the issue** in this respect **is** not solely whether the mutually agreed solution is a covered agreement, **but rather**, **what effects it may have on the exercise of procedural rights under the DSU in subsequent proceedings**."(at para. 7.116)

In that case, India had argued that the issue was whether the DSU may be invoked again in respect of a matter formally raised under the DSU and settled through a mutually agreed solution. India's argument was based on the premise that the matter raised before the Panel was the same as the matter which had been settled through the mutually agreed solution and that this prevented from challenging it in the framework of **new dispute settlement proceedings**. The Panel, however, found that the

matter referred to it had not been settled by the mutually agreed solution. Thus, there was no need to rule on the legal effects of mutually agreed solutions.

The argument raised by the ACP third parties in the present case is different. The ACP Third Parties submit that the existence of a mutually agreed solution means that the original dispute has been settled and thus prevents the parties from challenging subsequent measures in the framework of **Article 21.5 proceedings**. However, it is similar to India's argument in *India – Autos* in the sense that it requires the Panel to rule on the effects which mutually agreed solutions may have on the exercise of procedural rights in subsequent proceedings. The DSU which is a covered agreement expressly refers to mutually agreed solutions. The Panel in the present case should thus determine the impact, in procedural terms, of the Understanding on Bananas in the Article 21.5 proceedings initiated by Ecuador. The ACP Third Parties submit that the Panel should conclude that this mutually agreed solution prevents Ecuador from challenging the new EC banana import regime in the framework of Article 21.5 proceedings.

115. (Suriname) In paragraph 8 of its statement during the substantive meeting with the Panel, Suriname argues that "Ecuador should not be allowed to bring this case before a compliance panel [because] the measures now challenged are not measures taken to comply with the recommendations and rulings of the original Panel [but] constitute an entirely new import regime. Can Suriname elaborate on the reasons why, in its view, the EC banana import regime challenged by Ecuador is not a measure taken to comply with the rulings and recommendations of the DSB in the original Bananas III case. It is because, as stated in paragraph 10 if the same statement, "[b]oth the Doha Waiver and the Understanding on Bananas were negotiated by the WTO Members, including the interested parties, after the DSB adopted its recommendations and rulings" or for some other reason? Please provide a reasoned response, making reference to any relevant legal sources.

Two points are relevant to explain why the EC banana import regime challenged by Ecuador in the present dispute is not a measure taken to comply with the recommendations and rulings of the DSB in the original *Bananas III* case.

First, the measure being challenged in the present dispute is radically different from the measure examined by the Panel and the Appellate Body in the original dispute: the new regime is a tariff-only regime while the previous regime was a quota regime whereby various quotas were allocated to various groups.

Second, the measure being challenged has not been taken to implement the recommendations and rulings of the DSB in the original *Bananas III* case but to implement the Understanding on Bananas and the Doha Waiver. The existence of this new legal framework which did not exist at the time the original dispute was decided breaks any possible link between the new EC banana import regime and the recommendations and rulings of the original dispute.

The above is confirmed by the minutes of the DSB. Once the Understandings on Bananas were concluded and notified to the DSB, at the regular DSB meetings, WTO Members did no longer refer anymore to the implementation of the recommendations and rulings of the DSB in the original *Bananas III* dispute but to the implementation of the Understandings. For instance, the representative of Ecuador, at the DSB meeting held on 16 May 2001(WT/DSB/M/105) stated that "[h]is country would follow closely the implementation of both Understandings reached by the EC in this case." Similarly, during the meeting of 20 June 2001 (WT/DSB/M/106), he indicated that "his country would monitor closely the implementation of the Understanding reached between the EC and Ecuador, which provided that a new banana regime based on tariffs would become effective in 2006. Ecuador would also monitor closely a transitional regime to be put in place in the meantime." In other

words, once the Understandings were agreed between the EC and Ecuador and the US, the issue became an issue about the implementation of the Understandings.

ANNEX D-4

RESPONSES BY BRAZIL TO QUESTIONS POSED BY THE PANEL

87. (Both Parties and Brazil) In paragraph 17 of its statement during the substantive meeting with the Panel, Brazil argues that a "Member is not exempted from discharging its burden of proof as regards the compliance of the new measures with the DSB recommendations and rulings even if such measures are intended to implement a suggestion by the panel". Can Brazil elaborate on this argument, and the parties provide a reasoned answer as to whether they agree with Brazil's argument.

The Appellate Body has already established that "in WTO dispute settlement, as in most legal systems and international tribunals, the burden of proof rests on the party that asserts the affirmative of a claim or defence".[1] In Brazil's opinion, "the EC's claim is based on nothing more than the Communities' own assertion that it has implemented a suggestion by a panel. By solely *declaring* – unilaterally – that the current import regime is compatible with the WTO rule because it derives from a suggestion made by the panel, the EC is not supporting its claim".[2]

In addition, the fact that the EC has chosen to bring its measures into compliance by supposedly implementing one of the panel's three suggestions does not lead to automatic compliance with the covered agreements, exempting the Communities from discharging its burden of proof. The EC remains to prove how and why the new measures comply with the DSB rulings and recommendations.

Contrarily to what the Communities purports, there is no automatic compliance in the DSU. In no provision does the DSU grant Members certainty as to the "lawfulness" of a measure taken to comply just because such measure is intended to implement a suggestion made by a panel. Neither does the DSU oblige Members to implement such a suggestion. Rather, the DSU sets out that those suggestions derive from a *discretionary right* conferred to panels and the Appellate Body. [3] This being the case, even if a panel or the Appellate Body makes a suggestion under Article 19.1 of the DSU, according to the WTO jurisprudence, "members remain free to choose how they implement the DSB recommendations and rulings".[4]

Moreover, as stressed by Brazil before the panel, "whether or not a Member's intention to comply meets the test of consistency with covered agreements is an assessment that should be left to a panel. That is so because even in the case a Member chooses to implement a suggestion by the panel, such a measure is still subject to an Article 21.5 review.[5] (…) [W]ithin Article 21 (…), the *declarations* of the implementing Member form an integral part of the surveillance of implementation, but they do not stand alone. Rather, *they are complemented by, and subject to, multilateral review within the WTO*".[6] (emphasis added)

Brazil reiterates that "if the EC's arguments were to prevail, they would lead to absurd results. If accepted, they would render Article 21.5 devoid of any significance, for the reason that any

[1] See Appellate Body Reports in *Chile – Price Band System (Article 21.5 – Argentina)*, para. 134; *US – Wool Shirts and Blouses*, para. 335; and *EC – Sardines*, para. 270.

[2] See Brazil's third party oral statement, para. 8.

[3] See Appellate Body Reports *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, paras. 182 and 189.

[4] See Panel Report in *EC – Bananas III (Article 21.5 – Ecuador)*, para. 6.154.

[5] See Brazil's third party submission, para. 12.

[6] See Appellate Body Report in *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 70.

measure based on a panel's suggestion would automatically escape the test of consistency with the covered agreements. Thereby it would give the implementing Member a blanket waiver from proving that it has met its obligations and depriving the complaining party of any surveillance of the implementation process"[7].

95. (Ecuador and Third Parties) In paragraph 6 of its oral statement during the substantive meeting with the Panel, Ecuador mentions that "Ecuador's per capita GDP for 2005 was about 8 per cent of the per capita average of the EC, and also is less than that of many of the ACP countries". In turn, in paragraph 16 of their combined statement during the substantive meeting with the Panel, Nicaragua and Panama state that Nicaragua's "Gross National Income of $910 is below the GNIs of several LDCs and well behind the GNIs of most ACP countries". Can Ecuador, Nicaragua and Panama provide the data sources that were used to make their respective assertions and specify the per capita GDP figures in those sources for Ecuador, the EC and the MFN suppliers and ACP countries that are participating as Third Parties in these proceedings. Can other Third Parties provide a reasoned answer as to whether they agree with the assertions made by Ecuador, Nicaragua and Panama.

At the outset, it should be noted that Brazil has had no access to the figures used by Ecuador, Nicaragua and Panama in order to make such assertions. Notwithstanding, it is possible to affirm that the ACP group consists of African, Caribbean and Pacific countries that were, at some point in history, colonies or territories of European countries. To Brazil's knowledge, the fundamental criteria that determine the participation of a country in the ACP group would be the historical ties that link the ACP countries to some European nations. Those criteria being essentially of a political nature, it would not be impossible that social and economic conditions in other countries from either Latin America or other parts of the world are worse than those in some ACP countries.

[7] See Brazil's third party submission, para. 14.

ANNEX D-5

RESPONSES BY COLOMBIA TO QUESTIONS POSED BY THE PANEL

1. (Both Parties) In paragraph 39 of its third party submission, Colombia concludes that "the tariff level that would result in at least maintaining the conditions of competition between *MFN bananas and ACP bananas* is the difference between the price gap for MFN bananas (€97/tonne) and the price gap for ACP bananas (€86/tonne), or €11/tonne." Can the Parties provide a reasoned answer as to whether they agree with the argument raised by Colombia.

Colombia would like to take this opportunity to better explain the statement in paragraph 39 of its third party submission.

The use of the price-gap methodology provides an estimate of a tariff equivalent of a trade restriction. The larger the price-gap, the larger is the level of protection accorded to the domestic producers.

The difference between the price-gap of MFN bananas and the price-gap of ACP bananas for the EC market gives the relative commercial disadvantage of MFN bananas with respect to ACP bananas, on account of the trade restrictions imposed by the EC. A difference of zero means that the tariff equivalents are the same and the conditions of competition are equal. On the other hand, a large difference means that their tariff equivalents are wide apart, and it is a measure of the differences in conditions of competition of one supplier with respect to the other supplier.

Therefore, the €11/ton should be the margin of preference for ACP bananas in order to at least maintain the conditions of competition between MFN bananas and ACP bananas.

88. (Both Parties and Colombia) In paragraph 16 of its third party submission, Colombia argues that "[a]n applied tariff of €176/tonne does not constitute a 'rebinding' [under the Doha Waiver]." Can Colombia elaborate on this argument, and the Parties provide a reasoned answer as to whether they agree with it.

Pursuant to the Understanding on Bananas between the EC and Ecuador of 30 April 2001, the EC undertook– among other things – to initiate GATT Article XXVIII negotiations. This commitment was incorporated in two recitals of the "Decision of 14 November 2001" (WT/L/436) under which the EC was granted a waiver from Article I:1 of the GATT in order to provide preferential tariff treatment to products originating in ACP States. The relevant recitals state:

- "Noting that the implementation of the preferential tariff treatment for bananas may be affected as a result of GATT Article XXVIII negotiations"

- "Noting the assurances from the Parties to the Agreement that any re-binding of the EC tariff on bananas under the relevant GATT Article XXVIII procedures should result in at least maintaining total market access for MFN banana suppliers and their willingness to accept a multilateral control on the implementation of this commitment"

Additionally, the Annex to the waiver provides that if any interested party requests arbitration, "the mandate of the arbitrator shall be to determine … whether the envisaged *rebinding* of the EC tariff on bananas would result in at least maintaining total market access for MFN banana supplier ...".

For Colombia, measures that do not take the form of a binding in the EC's schedule cannot be considered as fulfilling the EC's commitments under the Doha Waiver.

To illustrate why this is so, let us assume that the EC has an applied tariff of €11/tonne[1], but does not commit itself to bind this tariff. Although this tariff level would certainly comply with the tariff level standard, this action does not rectify the matter. This is because the Annex to the Doha Waiver requires that the instrument used to ensure at least maintaining total market access for MFN bananas must take the form of a "rebinding". Autonomous or unilateral concessions which do not take the form of a binding are not envisaged in the Annex to the Doha Waiver. This is because the level of certainty and security of market access that is provided by an autonomous concession simply cannot be compared with the legally binding guarantee provided by a tariff binding in a Member's schedule. An autonomous concession cannot be enforced in ordinary dispute settlement proceedings under Article II of the GATT, and it does not give rise to negotiating rights under Article XXVIII of the GATT.

Furthermore, Colombia notes that,in paragraph 36 of its first award the Arbitrator ruled that "all EC WTO market-access commitments relating to bananas includes commitments incurred as a result of EC enlargement under Articles XXIV:6 and XXVIII of GATT 1994". In the negotiations regarding EC enlargement from fifteen to twenty five Member States, the EC has claimed that its applied tariff of €176 per metric ton amounts to adequate compensation for its enlargement. Since the €176 per metric ton tariff is not bound, the general level of reciprocal and mutually advantageous concessions envisaged in paragraph 2 of Article XXVIII of the GATT have not been re-established. Thus, by failing to alter its scheduled commitment on bananas, the EC has also failed to comply with commitments arising from its enlargement.

The foregoing is the elaboration of Colombia's prior statement that "[a]n applied tariff of €176/tonne does not constitute a 'rebinding' [under the Doha Waiver]." [Colombia notes that similar objections have been raised by Ecuador.[2]]

104. (Colombia and Panama) In paragraph 6 of its oral statement during the substantive meeting with the Panel, Cote d'Ivoire said that:

> **"Ces données statistiques révèlent que la plupart des pays NPF ont réduit leur approvisionnement du marché américain, dont ils sont les fournisseurs exclusifs, pour approvisionner davantage le marché européen. Ainsi:**
>
> - **En 2006, la Colombie a augmenté ses exportations vers l'Union Européenne de 59.000 tonnes par rapport à 2005 et diminué de 40 000 tonnes celles à destination des USA,**
>
> - **le Costa Rica a accru de près de 200.000 tonnes ses exportations vers l'Union Européenne et de 105.000 tonnes ses exportations vers les USA,**
>
> - **le Panama a préféré également accroître ses apports au marché européen de 29.000 tonnes alors que ses exportations vers les USA n'ont progressé que de 5.500 tonnes,**

[1] The tariff level that would maintain conditions of competition between ACP bananas and MFN bananas with 2002-2004 as the reference period. See first written submission of Colombia, Costa Rica, Ecuador, and Guatemala, 24 June 2005, footnote 84; Responses of Colombia, Costa Rica, Ecuador, and Guatemala to Question No. 3 from the Arbitrator, 22 June 2005.

[2] See second written submission of Ecuador, para. 34.

- **le Pérou a doublé ses exportations vers l'Union Européenne avec 22.400 tonnes alors qu'il n'a augmenté ses exportations vers les USA que de 2.700 tonnes."**

Can Colombia and Panama provide a reasoned answer as to whether they agree with the assertions made by Côte d'Ivoire.

First of all, Colombia wishes to underline the following finding of the Arbitrator in its first Award: "… it has been stated that tariff bindings under Article II of GATT 1994 represent generally, "commitments on conditions of competition for trade, not on volume trade" … Indeed, as far as market access opportunities provided through tariff concessions are concerned, all that is guaranteed for an exporting Member is an opportunity to enter the market of an importing Member under secure and predictable conditions (but not a guarantee to export certain volumes to that market)" (WT/L/616 paragraph 30).

Now, according to Eurostat, imports of bananas from Colombian to the EC-25 increased 69.257 tons or 7.8% from 2005 to 2006 and, according to Colombian statistics, Colombian exports of bananas to the United States decreased 46.700 ton or 8.9% for the same period. However, the increase in banana exports to the EC–25 is not necessarily related with the decrease in exports to the United States during the same period of time.

As Colombia explained during the Panel hearing, trade flows are explained by a number of factors, especially variations in conditions of supply and demand. Indeed, although the tariff rate for bananas in the United States is 0%, Colombian exports to the United States went down in 2006.

Variations in conditions of supply include improvements in the productivity of foreign suppliers, changes in the behaviour of competitive foreigner suppliers to the EU market, variations in conditions of supply for domestic producers and external shocks. Variations in the conditions of demand include changes in relative prices, appreciation of the Euro, substitution in consumption and increases in disposable income.

As stated in paragraph 24 of Colombia's third party submission, "it is impossible to isolate the impact of the measure at issue on trade flows from the myriad of other factors that constantly affect fluctuations in international trade (whether on the supply-side, demand-side or other)".

It is important for all parties to remember that the relevant issue before the Panel is whether the EC has at least maintained total market access for MFN Banana exporters. In this regard an improvement in the volume of exports to the EC does not establish that the EC is complying with its obligations under the Doha Waiver.

ANNEX D-6

RESPONSE BY JAPAN TO THE QUESTION POSED BY THE PANEL

106. (Japan) In paragraph 7 of its third party submission, Japan argues that it "understands the point here to be that the fact that *the EC's current import regime is the measure taken in accordance with the Understanding, that is, a mutually agreed solution, itself was not established at the time when Ecuador initiated this panel proceeding*. [Footnote omitted] Therefore, even if the EC's argument concerning the validity of the Doha Waiver for Article I of the GATT is justified in the later proceeding, and thus the EC's current import regime is established to be in compliance with the mutually agreed solution, there is still a merit in bringing this claim to the panel under Article 21.5 of the DSU" (Emphasis added). Can Japan elaborate on the emphasized part of the above argument.

1. The argument of Japan in paragraph 9 of its third party submission (paragraph 7 of its Executive Summary) relates to the EC's statement in paragraph 38 of its second written submission, to which Japan referred in its submission at footnote 15. The EC's statement in the said paragraph reads as follows: "[i]t is a *well established fact* that the current import regime more than maintains the market access of Ecuador and the other MFN countries and Ecuador already knew this *fact* when it initiated the current proceedings." (Emphasis added.) In this regard, even if the EC's argument is right in that the current import regime is consistent with the Understanding as long as it actually maintains the market access of MFN countries, Japan considers that the above-mentioned fact was not established when Ecuador initiated this panel proceeding, and thus, the fact that "the EC's current import regime is the measure taken in accordance with the Understanding" was not established, either.

2. Japan understands that, in this compliance panel, one of the core issues is the question whether or not the EC maintains a valid waiver from GATT Article I for implementing its preferential import regime in accordance with the EC-Ecuador "Understanding of Bananas." The validity of the waiver is subject to the fulfillment of the conditions set out in the Annex of the "Doha Waiver", and one of those conditions is that the EC's scheme "maintains total market access for MFN suppliers."

3. In Japan's view, the question whether the EC's import regime would result in maintaining the market access for MFN countries or not primarily requires a careful examination of the meaning of the term, "maintaining the market access", which does not seem so obvious in the context of the Doha Waiver. It was also an issue in the past two arbitration proceedings, whose mandate was to determine whether the proposed EC regime would preserve the market access for MFN countries: EC's calculation methodology for assessing the market access was much contended among the interested parties.

4. Moreover, Ecuador mentions that the current EC banana measures would not have found to meet the requirement of the waiver even if it had been proposed as the second EC proposal prior to 2006.[1] Japan believes that such Ecuador's comment indicates that Ecuador does not consider that the EC's current regime *actually* maintains the market access for MFN countries.

5. For the above reasons, Japan considers that the EC's statement that the "*fact* that the current import regime more than maintains the market access of Ecuador" is "*well established*" is too assertive and unilateral, and thus, in Japan's view, the fact the EC's current import regime was consistent with the Understanding was not yet established when Ecuador initiated this panel proceeding. Therefore, Japan believes that such a statement of the EC will not make Ecuador's claim without merit.

[1] Second written submission of Ecuador, para. 17.

ANNEX D-7

RESPONSES BY NICARAGUA AND PANAMA TO QUESTIONS POSED BY THE PANEL

The Governments of Nicaragua and Panama set forth below their written responses to the 25 September 2007 Questions of the Panel directed to Nicaragua and Panama, virtually all of which are posed to both countries in combination. In the two instances in which questions are posed to Nicaragua and not Panama, and the one instance in which a question is posed to Panama and not Nicaragua, the answers provided are the views of that country to which the question is addressed.

90. (Both Parties, Nicaragua and Panama) In paragraph 108 of their respective third party submissions, Nicaragua and Panama argue that "[t]he EC's €75/mt concession – *which from 1995 to 2005 covered all bound in-quota Latin American imports and informed the rate applicable to all other Latin American bananas entering the EC market* – has been the single most important banana concession in Schedule CXL. In contrast to *the prohibitive €680/mt rate, under which virtually no Latin American volumes have ever been entered*, the €75/mt concession is the only rate that enabled Latin American market access to the EC market from 1995 to 2005. Unless the €75/mt bound rate receives the full protections of GATT Article II, the entire value of the EC's mandatory Uruguay Round concessions will be nullified". (Emphasis added). Can Nicaragua and Panama provide evidence for their assertions. If MFN banana imports have increased under an applied tariff rate of €176/mt, as argued by the EC, how can this be reconciled with the statement that "a €75/mt concession is the only rate that enabled Latin American market access to the EC market from 1995 to 2005"? Can Nicaragua and Panama clarify what would be meant by "providing the full protections of GATT Article II" to the €75/mt tariff rate. Can Parties provide a reasoned answer as to whether they agree with the assertions made by Nicaragua and Panama.

This multi-part question asks that the statements in paragraph 108 of the third party submissions of Nicaragua and Panama be substantiated, related to market access under the current arrangement, and clarified as they relate to Article II "protections."

Paragraph 108

Paragraph 108 states that *as between* the EC's in-quota and over-quota concessions on bananas, MFN access during the years 1995-2005 was essentially only possible at the €75/mt in-quota rate, and not at the €680/mt over-quota rate. This same point was confirmed by the Arbitrator in 2005:

> [T]he economic effect of the EC tariff quotas for bananas is, in an analytical sense, comparable to a quota regime (non-tariff measure), as evidenced by the negligible volume of banana imports entering the European Communities at the out-of-quota tariff.[1]

[1] Award of the Arbitrator, *European Communities – The ACP-EC Partnership Agreement – Recourse to Arbitration Pursuant to the Decision of 14 November 2001*, WT/L/616, 1 August 2005 ("*AAI*"), para. 60; *see also* third party written submission of Panama, 20 August 2007 ("third party written submission of Panama"), n. 106; third party written submission of Nicaragua, 20 August 2007 ("third party written submission of Nicaragua"), n. 106.

To support that conclusion, the Arbitrator referenced information supplied by the EC indicating that:

> between 10,000 to 20,000 tonnes of bananas are imported out of quota every year. That represents about 0.3% of the total imports and they correspond to marginal imports of residual quantities, consisting for the most part of a few tonnes, in consignments. There is no consolidated information about their origin.[2]

Since Nicaragua and Panama were only commenting in paragraph 108 on MFN access under the rates bound in the EC's Schedule, MFN market access under the current deconsolidated arrangement was not intended to be addressed by the passage quoted above.

Market access under the current arrangement

On the issue of market access under the current arrangement, the position of Nicaragua and Panama remains as follows:

- As of 1 January 2006, the issue of market access lost all legal relevance when the waiver for bananas lapsed.

- Even if the waiver had not lapsed, the current EC arrangement – which represents a 135% increase in the €75/mt tariff applied to all MFN banana imports from 1995 to 2005, a 135% increase in the prior ACP and EBA margin of preference of €75/mt, and a 25,000 mt increase in the prior exclusive ACP tariff quota – fails on its face to preserve into the future total competitive opportunities as between MFN and EC producers, and MFN and ACP producers.

- The trade-flow and pricing arguments put forward by the EC find no place in the WTO's legal concept of market access. In any event, those selectively-presented, short-term data badly misrepresent the relative and evolving picture in the EC marketplace for MFN and ACP banana imports.

Article II protections

In stating that the EC's concessions are entitled to Article II protection, Nicaragua and Panama were making the point that the EC must uphold the guarantees built into Article II to give "security and predictability" to all, not just some, of its scheduled concessions.[3] Article II:1(a) ensures MFN banana-supplying Members that the EC will not accord import treatment less favourable than that provided for in its Schedule. Article II:1(b) ensures MFN suppliers that the EC will not apply a customs duty in excess of those provided for in its Schedule. By applying an ordinary customs duty far in excess of €75/mt to *all* imports of MFN bananas, the EC has breached both of those Article II protections.

91. (Both Parties, Nicaragua and Panama) In paragraph 19 of their combined statement during the substantive meeting with the Panel, Nicaragua and Panama argue that "[t]he EC

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[2] *AAI*, n.52.

[3] *See* GATT Panel Report, *Panel on Newsprint*, L/5680, adopted 20 November 1984, BISD 31S/114 ("*Newsprint*"), para. 52 (wherein the panel "*shared the view expressed before it relating to the fundamental importance of the security and predictability of GATT tariff bindings, a principle which constitutes a central obligation in the system of the General Agreement*.") (Emphasis added); and Appellate Body Report, *European Communities – Customs Classification of Certain Computer Equipment*, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, adopted 22 June 1998 ("*EC – Computer Equipment (AB)*"), para. 82 (wherein the Appellate Body stated that "Article II:1 of the GATT 1994 ensures the maintenance of the security and predictability of tariff concessions by requiring that Members not accord treatment less favourable to the commerce of *other* Members than that provided for in their Schedules.") (emphasis in original).

tariff, which was the EC's scheduled banana concession from 1963-1994, was the equivalent of about €80 per tonne." Can Nicaragua and Panama elaborate on this argument and provide evidence for their assertions, as appropriate. Can the Parties comment on the argument and assertions.

The full passage at issue in this question reads as follows:

> Access was possible [for Nicaragua] because those markets were encumbered by a simple tariff of 20% *ad valorem* and, in the case of Germany, no tariff at all. The 20% tariff, which was the EC's scheduled banana concession from 1963-1994, was the equivalent of about 80 Euro per tonne.

The level and duration of the prior EC banana concession from 1963 to 1990 was confirmed by the *Bananas III* panel: "From 1963, the EC had a consolidated tariff of 20 per cent ad valorem on bananas."[4] As regards MFN access under that former concession, most Latin American bananas entered the EC through the northern EC Member States.[5] Belgium, Denmark, Ireland, Luxemburg and the Netherlands all allowed MFN access subject only to the EC's 20% bound tariff rate. Germany, which accounted for approximately one-third of all MFN imports into the EC,[6] accorded pursuant to the Treaty of Rome a tariff-free quota for imports of bananas from all sources in an amount equivalent to Germany's total consumption (*i.e.* duty-free access for all imports).[7]

The estimated €80/mt referenced in the question above was derivatively calculated from the tariff conversions put forward in *Bananas III* and *Bananas II*:

- As stated in the *Bananas III* Report,

  > Guatemala and Honduras submitted data showing the following three-month average ad valorem equivalencies: (a) based on 1993 data: (i) ECU 100 per tonne - 30.03 per cent; and (ii) ECU 75 per tonne – 22.6 per cent."[8]

  The EC did not provide any contradictory data in that proceeding. Using these conversion ratios, a 20% bound rate would have approximated 75 ECU/mt.[9]

- In the *Bananas II* Report, the complainants submitted evidence showing that 100 ECU/mt equaled to over 25 per cent *ad valorem*.[10] Here, too, the EC did not submit evidence to the

[4] Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Complaints by Ecuador, Guatemala and Honduras, Mexico, and the United States*, WT/DS27/R, adopted 25 September 1997, as modified by Appellate Body Report, WT/DS27/AB/R ("*Bananas III (Panel)*"), para. 3.31, *see also* Panel Report, *EEC – Member States' Import Regimes for Bananas*, 3 June 1993, unadopted, DS32/R ("*Bananas I*"), para 13.

[5] *Bananas I*, para. 12.

[6] *Id.*

[7] *Id.*, para 17.

[8] *Bananas III (Panel)*, para. 4.96.

[9] Guatemala and Honduras calculated the *ad valorem* equivalents for each of weeks 29-41 and then averaged those AVEs as shown in Exhibit N/P-1 (For purposes of this submission, Panama and Nicaragua have used the designation N/P-*x* to identify joint exhibits). If an average per metric tonne price for weeks 29-41 is used, the calculations would be as follows: 100 ECU ÷ 332 ECU/mt price = 30%; and 75 ECU ÷ 332 ECU/mt price = 22.6%.

[10] Panel Report, *EEC – Import Regime for Bananas*, 11 February 1994, unadopted, DS38/R ("*Bananas II*"), para. 24.

contrary.[11] Using that conversion as the reference point, a 20% bound rate would have approximated 80 ECU/mt.[12]

Whichever of these two calculations is used, the point remains that, *for decades*, Nicaragua had access to the northern EC markets free of duty in the case of Germany, and at a duty the equivalent of 75-80 ECU/mt in all other EC markets into which its product entered. Today, after winning multiple dispute settlement actions, Nicaragua faces a €176/mt ($4.33/box) customs burden; a €176/mt tariff disadvantage relative to the EC's preferred suppliers; and an exclusive ACP tariff quota in which Nicaragua has no right to participate. Thus, while ACP suppliers (most of which are economically far better situated than Nicaragua) have seen their discriminatory access advantages multiply, Nicaragua has seen its access opportunities deteriorate, so much so that its producers can no longer even enter the EC's banana market.

95. (Ecuador and all Third Parties) In paragraph 6 of its oral statement during the substantive meeting with the Panel, Ecuador mentions that "Ecuador's per capita GDP for 2005 was about 8 per cent of the per capita average of the EC, and also is less than that of many of the ACP countries." In turn, in paragraph 16 of their combined statement during the substantive meeting with the Panel, Nicaragua and Panama state that Nicaragua's "Gross National Income of $910 is below the GNIs of several LDCs and well behind the GNIs of most ACP countries." Can Ecuador, Nicaragua and Panama provide the data sources that were used to make their respective assertions and specify the per capita GDP figures in those sources for Ecuador, the EC and the MFN suppliers and ACP countries that are participating as Third Parties in these proceedings. Can other Third Parties provide a reasoned answer as to whether they agree with the assertions made by Ecuador, Nicaragua and Panama.

Nicaragua's Gross National Income ("GNI") of $910 for 2005 was obtained from the World Bank preliminary estimates set forth in Exhibit N/P-2. The updated World Bank data, also included in that Exhibit, reflect a slightly higher 2005 GNI for Nicaragua of $950, which is still well below the GNIs of most ACP countries. The requested per capita GDP figures for all Parties and Third Parties in this proceeding can also be found in Exhibit N/P-2.

96. (Ecuador and Nicaragua) In paragraph 6 of its closing statement during the substantive meeting with the Panel, the EC argues that "the draft dated 2 November 2001, which Nicaragua has attached to its third party submission as Exhibit N-1, provided that the Doha Waiver would be terminated automatically within two months after the notification of the arbitration award to the General Council. However, this provision was not included in the final version of the Doha Waiver. The link between the awards of the arbitrator and the termination of the Doha Waiver was abandoned." Can Ecuador and Nicaragua provide a reasoned answer as to whether they agree with the statement.

The EC is wrong in claiming that this preparatory waiver document shows that "the link between the awards of the arbitrator and the termination of the Doha Waiver was abandoned."[13] It proves exactly the contrary.

The document to which the EC is referring was a relatively early version of the draft banana provisions of the waiver.[14] Developed by the EC, not the MFN supplying countries, it was put

[11] *Id.*, para. 134.
[12] 100 ECU ÷ 400 ECU/mt price = 25%; and 80 ECU ÷ 400 ECU/mt price = 20%.
[13] Closing statement of the European Communities, 19 September 2007, para. 5.
[14] *See* Council for Trade in Goods, *European Communities – The ACP-EC Partnership Agreement: Revision* (Communication from the European Communities), G/C/W/187/Add.2/Rev.1, 2 November 2001. Both

forward before the notion of an Annex had even emerged. As evidenced by its proposed text, the EC already well understood by the time this version was put forward that absent a "*multilateral control*" on "*any re-binding*,"[15] and a waiver termination provision linked to that multilateral control,[16] this waiver would not be approved.

The two-month termination provision in the EC's proposed text was an early iteration of what later became the waiver's mandatory termination provision "upon entry into force of the new EC tariff regime." The EC used the phrase "two months after the notification of the arbitration award" for the simple reason that under the approach it was proposing, there were still no requirements as to when the arbitration procedure would need to begin and end. Indeed, the EC was still envisioning in this draft that arbitration would occur *after* the new regime took effect, and, thus, framed the waiver standard in the present tense, not the future conditional tense (*i.e.* "does not result in ... ," rather than "would result in ..."), and pegged the termination provision to the notification of the award, whenever that might occur.

None of the MFN drafters was willing to accept this imprecisely defined EC draft.[17] As subsequent drafts and the final waiver text made clear, they insisted, instead, on more elaborated, carefully sequenced procedures entailing consultations and two rounds of arbitration that would have to be concluded in their entirety *before* the regime took effect.[18] Once the arbitration provisions were refined by the negotiators to require a conclusion of all procedures before 2006, the waiver termination provision, which remained an absolute prerequisite throughout this drafting period, was necessarily also refined to take effect "upon entry into force of the new EC tariff regime."

The EC, having already acknowledged in its earlier draft the necessity of a lapsed waiver linked to arbitration, cannot be allowed to claim now that the *strengthened* final text of the waiver no longer contained that same linkage and granted, instead, blanket authority to the EC to install whatever regime it wanted to as of 2006.

97. (Ecuador, Nicaragua and Panama) What are exactly, in your view, the current binding concessions that the EC has, relating to bananas? Is it the TRQ as described in the EC's Schedules LXXX and CXL; is it a single duty of €75/mt; or is it rather something else? If it was a single duty of €75/mt, please explain why the Panel should consider that the 2.2 million mt volume and the out-of-quota duty of €680/mt are not a relevant part of the EC's current concessions.

The EC's in-quota concessions are €75/mt for 2.2 million mt; its over-quota concession is €680/mt. The continuing effect of those concessions, in their entirety, is confirmed by Sections 1A and 1B of the EC's Schedule; by the findings of *Bananas III*; by the findings of the 2005 Arbitrator,

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Nicaragua and Panama attached this document to their third party written submissions as Exhibit N-1 and Exhibit P-1, respectively.

[15] *Id.*, Noting Clause 3 in the same document.

[16] *Id.*, 3ter.

[17] There were several other elements of this draft that the Latin American negotiators considered unacceptable, including: (i) a waiver access standard expressed as an "aim," not a requirement (3bis); (ii) an access standard that protected both MFN and ACP suppliers, not just MFN suppliers (3bis, 3ter); (iii) an access standard that would be analyzed by the Arbitrator after the fact ("does not result in"), rather than prospectively ("would result in ..."); and (iv) an access standard that would only be measured "at the time of the re-binding," not over time (3ter). The MFN negotiators insisted on striking every one of these proposed EC elements. By replacing (i) and (iii) above with the final waiver text, the MFN negotiators were further reinforcing the unseverable link between the pre-2006 arbitration awards and the termination of the waiver.

[18] *See* Draft EC Proposal for Article I waiver, 11 November 2001, in Exhibit P-1 and Exhibit N-1; Ministerial Conference, *European Communities – The ACP-EC Partnership Agreement*, WT/MIN(01)/15, 14 November 2001, WT/L/436 ("Article I waiver"), Annex in Exhibit EC-2.

and by the EC's own common, consistent, discernable pattern of acts and pronouncements evidenced throughout the period in which those bindings have been in effect.[19]

It bears noting that these EC Uruguay Round concessions were for the EC of 12. There are now 15 other EC Member States. The great majority of those 15 Member States had an incidence of bound duties and regulations on banana imports prior to accession that was *far* less restrictive than the incidence of banana duties and restrictions applied following accession.[20] The EC has yet to fulfil its GATT Article XXIV obligation to adjust its Uruguay Round concessions (or provide compensation) to redress these accession abrogations.

98. (Ecuador, Nicaragua and Panama) Does the Framework Agreement on Bananas (BFA) include "terms, conditions or qualifications" to the EC's relevant concession on bananas in the sense of Article II(1)(b) of the GATT?

As defined by prior cases, the phrase "terms, conditions or qualifications" used in GATT Article II:1(b) covers qualifying restrictions or conditions made to the substantive content or scope of concessions[21] that do not otherwise diminish a Member's multilateral obligations.[22] The BFA does not include "terms, conditions or qualifications" to the EC's relevant concessions in the sense of Article II:1(b).

The so-called "terms and conditions" alleged by the EC were not even a part of the BFA. As explained in the third party submissions and oral statements of Nicaragua and Panama, the BFA contained no qualification of any sort relating to the continuing effect of the EC's in-quota concessions.[23] This plurilateral "agreement," signed well before the EC's Uruguay Round Schedules were even finalized, primarily related to country allocations and the administration of those allocations under terms favourable to the four Latin American signatories. While that plurilaterally "*agreed system*" and "*agreement*" were qualified by the termination language of paragraph 9, the BFA nowhere stated that the EC's multilaterally-required "current access" *concessions*, which the EC still separately needed to schedule in the Uruguay Round, would be null and void as of 2003.

As regards the numerous tariff-quota allocation, re-allocation, and administrative provisions of the BFA that were not otherwise addressed in the EC's attempted termination claim, these were all found to be inconsistent with the EC's WTO obligations in the 1997 *Bananas III* rulings.[24] The illegality of those provisions prevented them from being "terms, conditions or qualifications" in the sense of Article II(1)(b).

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[19] Third party written submission of Panama, paras. 99-100; third party written submission of Nicaragua, paras. 99-100.

[20] *E.g.*, Prior to 1995, Austria, Finland, and Sweden accorded unlimited bound duty-free access to banana imports. Likewise, prior to 2004, most of the ten Central and Eastern European countries accorded bound zero-duty or low-duty access to banana imports. None of the 15 countries that acceded to the EC from 1995 forward accorded preferential access to the ACP.

[21] Appellate Body Report, *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, WT/DS103/R, WT/DS113/R and Corr. 1, adopted 27 October 1999, para. 134.

[22] Appellate Body Report, *European Communities – Measures Affecting the Importation of Certain Poultry Products*, WT/DS69/AB/R, adopted 23 July 1998, para. 98; and *Bananas III (Panel)*, paras. 7.113-7.114.

[23] Third party written submission of Panama, para. 95; third party written submission of Nicaragua, para. 95; Oral Statements of Panama and Nicaragua, para. 50.

[24] *See Bananas III (Panel)*, para. 7.399; Appellate Body Report, *European Communities – Regime for Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted 25 September 1997 ("*Bananas III (AB)*"), para. 255.

99. (Ecuador, Nicaragua and Panama) Do you agree with the EC that a Member could, through a "term, condition or qualification" on a concession that was included in its Schedule and accepted by the other Members, provide for the elimination of a bound TRQ?

Although no WTO case has yet examined the issue of whether a Member in the Uruguay Round was entitled to insert a "term, condition or qualification" into its Schedule that would later eliminate an agricultural current-access tariff quota, it is hard to see how a scheduled elimination of *any* current-access quota would be consistent with the Uruguay Round reform process and the WTO *Agreement on Agriculture* ("*AoA*"). Unlike the circumstances in the *US – Sugar Waiver* case, where request-and-offer concessions in the Annecy Round were at issue, the issue here is a current-access tariff quota formed pursuant to the Uruguay Round Draft Modalities. The "tariffication" principles of those Draft Modalities "*required* [Members] *to maintain*, for tariffied products, current import access opportunities at levels corresponding to those existing during the 1986-88 base period."[25] As confirmed in the *AoA* itself, the objective of the tariffication process was to enable the "substantial progressive reduction in agricultural ... protection ... over an agreed period of time."[26] The *Bananas III* Appellate Body considered this reform objective to be embodied in *AoA* Article 4.1:

> Article 4.1 of the *Agreement on Agriculture* provides as follows:
>
> > Market access concessions contained in Schedules relate to bindings and reductions of tariffs, and to other market access commitments as specified therein.
>
> In our view, Article 4.1 does more than merely indicate where market access concessions and commitments for agricultural products are to be found. *Article 4.1 acknowledges that significant, new market access concessions, in the form of new bindings and reductions of tariffs as well as other market access commitments (i.e. those made as a result of the tariffication process), were made as a result of the Uruguay Round negotiations on agriculture and included in Members' GATT 1994 Schedules. These concessions are fundamental to the agricultural reform process that is a fundamental objective of the Agreement on Agriculture.*[27]

If the "agricultural reform process" underlying the *AoA* and the principle of "significant, new market access concessions" acknowledged in *AoA* Article 4.1 are to have meaning, they should, at a minimum, be read to create a presumption against a scheduled revocation of the very same current-access opportunities that were required in that "agricultural reform process." Absent a showing by the Member alleging the revocation that (i) it had *expressly* notified the Membership of its intention to deny future current-access opportunities, and (ii) the Membership had *expressly* authorized that intention, a Uruguay Round "term, condition or qualification" that revoked "current access" should not otherwise be allowed.

Nicaragua and Panama are aware of no current-access revocation authority extended to *any* agricultural product during the Uruguay Round. To the contrary, where there were "special treatment cases" under the access modalities (all of which related to rice), these were specifically delineated in Annex 5 of the *AoA*, and required minimum-access opportunities and reform over time.

In the case of bananas, not only was there no express authority from the Membership to revoke the EC's in-quota concessions, none of the five BFA signatories themselves understood at that

[25] Third party written submission of Panama, para. 80, n. 89; third party written submission of Nicaragua, para. 80, n. 89 (emphasis added).
[26] *Id.*, para. 81, n.90.
[27] *Bananas III (AB)*, para. 156 (emphasis added).

time, or in the 13 years thereafter, that the in-quota concessions would terminate. The EC's own consistent validation of the in-quota bindings throughout the years confirms this was so.

As to the non-BFA countries, it bears noting that the EC submitted the BFA as a Corrigendum to its Schedule on 29 March 1994, *4 days after* the end of the Uruguay Round schedule verification process was closed.[28] It is impossible to see how the entire Membership can now be held subject to BFA provisions that most had never seen before the Schedules closed and that, in any case, contained no language anywhere within its four corners that expressly terminated the EC's Section 1B Uruguay Round concessions on this product.

100. (Ecuador, Nicaragua and Panama) In paragraph 79 of its second written submission, the EC argues that:

> **"[I]n paragraph 59 of its second written submission, Ecuador argues that 'it is scarcely likely that the negotiators of the BFA would consider as satisfactory solution a system that as of 2003 would leave all their banana exports to the EC subject to an essentially prohibitive duty of €680/mt'. This statement is in full contradiction with paragraph 25 of Ecuador's second written submission, where it is stated that 'in every negotiation parties strive for a balance of benefits, but the reality does not always turn out as the negotiators were expecting or assuming at the time of the negotiations. It would destabilize the entire premise of the WTO tariff system of concessions were to be adjusted according to whether the concessions had the result contemplated at the time that the concession was granted'. Perhaps Ecuador should explain whether its statement in paragraph 25 is correct, in which case it would lose its Article II claims, or whether its statement in paragraph 59 is correct, in which case it would lose its Article I claims."**

Can Ecuador, Nicaragua and Panama provide a reasoned answer as to whether they agree with the EC's arguments.

The two quoted statements are addressing two entirely unrelated points, are in no respect contradictory, and are both correct.

First statement

The first statement ("it is scarcely likely that the negotiators of the BFA would consider a satisfactory solution a system that, as of 2003, would leave all their banana exports to the EC subject to an essentially prohibitive duty of 680 €/mt") is a point that Nicaragua and Panama themselves made in their third party submissions. It is a point that correctly highlights the absurdity of inferring into the BFA a "term, condition or qualification" (*i.e.* prohibited access as of 2003) that would nullify the BFA's sole purpose of improving access in order to "settle" *Bananas II*.

The statement's underlying point – that texts cannot be read in a way that leads to absurd results – is equally valid in the case of Ecuador's Article I claim. Like the EC's BFA reading, the EC's assertion that it was free to establish a regime of its own choosing after two rounds of exhaustive arbitration would absurdly nullify the Annex's sole purpose of requiring a "multilateral control" on "*any* rebinding." The principle of effectiveness being asserted in Ecuador's first statement, thus, broadly upholds Ecuador's Article I claim, not causes it to fail.

[28] *See* Trade Negotiations Committee, *Informal Meeting of Heads of Delegation*, 20 January 1994, MTN.TNC/W/131; Trade Negotiations Committee, *Informal Meeting of Heads of Delegation*, 24 March 1994, MTN.TNC/W/139, 29 March 1994; *EC – Computer Equipment (AB)*, para. 95, n.92.

Second statement

The second statement ("in every negotiation parties strive for a balance of benefits, but the reality does not always turn out as the negotiators were expecting or assuming at the time of the negotiations") was made by Ecuador in response to the EC's argument that Ecuador's interpretation of the waiver would lead to an "unreasonable" result. The "unreasonable" result alleged by the EC was one under which the EC would still be able to benefit from the waiver even if the Arbitrator had validated a proposed rate that later caused MFN volumes to diminish.

Ecuador's second statement draws an analogy to Article II to make the point that even if the EC's hypothetical occurred, it would not have been "unreasonable" under GATT practice. Ecuador correctly notes that whenever countries set concessions, they have no advance certainty as to the impact those concessions will have on future trade flows. As the *Oilseeds* panel confirmed, Article II can only be read to protect "competitive conditions" because governments can neither "predict with precision what the impact of their interventions on import volumes will be ... ,"[29] nor later determine whether the trade impact "following a change in policies is attributable to that change or to other factors." Ecuador was, thus, simply saying that the Annex's prospective assessment of conditions of competition, which the Arbitrator was required to apply under the ordinary meaning of its text, entailed an orientation broadly comparable to that used when rights are established under Article II on the basis of a prospective assessment of conditions of competition. Hence, there was nothing "unreasonable" or irregular about this orientation.

The EC's proposed reading, on the other hand – under which the EC would be free to establish whatever arrangement it wants to following two rounds of exhaustive arbitration based on its unilateral assessment of "real world" trade flows at some post-2006 point in time – truly would be unreasonable and contrary to WTO practice. There is nothing in the WTO rules or prior cases that would support an *ad hoc* volume assessment of a "new tariff regime" (indeed, an autonomous one) *after* it has already taken effect.

The issue present in Ecuador's second statement – *i.e.* the necessity and appropriateness of assessing an "envisaged rebinding" prospectively, rather than after the fact – is entirely unrelated to Ecuador's Article II argument. In the case of the EC's scheduled concessions, the MFN suppliers could not possibly have assessed prospectively a 680 €/mt stand alone tariff for the simple reason that there was no such stand-alone concession to assess. The EC's assertion that Ecuador's second statement causes Ecuador to "lose its Article II claim," is, thus, an unfortunate confusion of both that second statement and the Article II claim itself.

101. (Ecuador, Nicaragua, Panama and the US) In paragraph 4 of its closing statement during the substantive meeting with the Panel, referring to the alleged termination of the Doha Waiver, the EC argues that "[i]f the Doha Waiver wanted to say what Ecuador, Nicaragua and Panama are arguing, the text should have read that the waiver would terminate 'if the *Arbitrator concludes* that the EC has failed to rectify the matter'. The Doha Waiver does not say so." Can Ecuador, Nicaragua and Panama provide a reasoned answer as to whether they agree with this statement. Could the US comment on the same, in the light of its argument in paragraph 21 of its statement during the substantive meeting with the Panel, reproduced in the previous question.

Tiret five did not have to use the words "*the Arbitrator concludes that*" because those words were already obviously captured by sentences three, four, and five of that tiret.

[29] GATT Panel Report, *European Economic Community – Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins*, L/6627, adopted 25 January 1990, BISD 37S/86 ("*EEC –Oilseeds I")*, paras. 150-151.

As demonstrated in the third party submissions of Nicaragua and Panama, the EC had two ways to "rectify the matter" under tiret five. It could reach a "mutually satisfactory solution" with the interested parties prior to the Second Arbitration or, in the absence of a mutually satisfactory solution, it could receive a Second Arbitration determination that it "has rectified the matter."

Sentences two and three of tiret five ("Within 10 days of the notification of the arbitration award to the General Council, the EC will enter into consultations with those interested parties that requested the arbitration. In the absence of a mutually satisfactory solution, the same arbitrator will be asked ...") address the "mutually satisfactory solution" option. Read together they make clear that if a Second Arbitration is initiated, a "mutually satisfactory solution" is no longer an option achievable under the timetable called for by the Annex.

The ensuing sentences, thus, speak solely to the second rectification option, a Second Arbitration ("... the same arbitrator will be asked to determine, within 30 days of the new arbitration request, whether the EC has rectified the matter. The second arbitration award will be notified to the General Council. If the EC has failed to rectify the matter, this waiver shall cease to apply to bananas upon entry into force of the new EC tariff regime."). In the last of those sentences, the phrase "if the EC has failed to rectify the matter" conspicuously repeats the same past-perfect formulation of the Second Arbitration's terms of reference defined in sentence three ("whether the EC has rectified the matter"). The replicated terms of reference in sentence five, following two sentences that solely and explicitly relate to the Second Arbitration, instil the phrase "if the EC has failed to rectify the matter" with a meaning identical to "if the Arbitrator concluded that the EC has failed to rectify the matter." Indeed, the Arbitrator fulfilled that very meaning by determining the EC "has failed to rectify the matter" in its final determination. [30]

There is a special irony in the EC's query as to why the fifth sentence did not state "if the Arbitrator concludes." Whereas Ecuador, Nicaragua, Panama, and the Untied States can easily demonstrate that those words were redundant under the ordinary meaning of tiret five, the EC cannot possibly explain why the drafters neglected to write into tiret five the numerous words needed to substantiate its tortured reading (*i.e.* "*only if the EC implements the exact arrangement invalidated in Arbitration, or forgets to declare another regime of its own choosing 'rectified,*'" will the waiver cease to apply). Not a single word or passage of the Annex supports that alleged meaning.

102. (EC, Nicaragua and Panama) In paragraph 44 of their combined statement during the substantive meeting with the Panel, Nicaragua and Panama argue that "[t]he [first compliance] panel's second suggestion never absolved *any* discriminatory ACP tariff quota from the obligations of Article XIII, however the larger import regime might be structured. To the contrary, the panel, only paragraphs before, found the EC's exclusive ACP tariff quota, *by its own specific shape and nature,* to be a quantitative restriction covered by Article XIII:5 that failed to treat like products 'equally, irrespective of origin,' in violation of Article XIII. No subsequent compliance suggestion can be read to nullify that *actual* finding of law." Can Nicaragua and Panama elaborate on these arguments. Can the EC provide a reasoned answer as to whether it agrees with the argument.

In a number of carefully reasoned passages, the *Bananas III (Article 21.5 – Ecuador)* panel explicitly found the EC's exclusive ACP tariff quota, by its own specific shape and nature, to be a quantitative restriction covered by Article XIII:5 that failed to treat like products "equally, irrespective of origins" in violation of Article XIII:

[30] Award of the Arbitrator, *European Communities – The ACP-EC Partnership Agreement – Second Recourse to Arbitration Pursuant to the Decision of 14 November 2001*, WT/L/625, 27 October 2005 ("*AAII*"), para. 127.

- In response to the EC's claim that the ACP tariff quota constitutes an "upper limit on a tariff preference and is not a tariff quota subject to Article XIII," the panel confirmed that the reserve was definitionally a tariff quota covered under Article XIII:

> 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.*[31]

- In response to the EC's claim that the ACP tariff quota is unreviewable under Article XIII because it constitutes a "regime" separate and distinguishable from the MFN tariff arrangement, the panel found that the "separate" ACP arrangement was still necessarily covered by the non-discrimination obligations of Article XIII:

> 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 agreements, if these provisions apply only within regulatory regimes established by that Member.[32]

Since the foregoing findings would be nullified by the EC's contention that the panel's "second suggestion" absolves the current exclusive ACP tariff quota of all GATT Article XIII obligations, that EC reading of the suggestion cannot be correct.

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[31] Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 of the DSU by Ecuador*, WT/DS27/RW/ECU, adopted 6 May 1999 ("*Bananas III (Article 21.5 – Ecuador)*"), para. 6.20. (Emphasis added.)

[32] *Id.*, para. 6.24 quoting *Bananas III (AB)*, para. 190. (Emphasis added.)

QUESTIONS ADDRESSED TO THIRD PARTIES

104. (Colombia and Panama) In paragraph 6 of its oral statement during the substantive meeting with the Panel, Cote d'Ivoire said that:

> **"Ces données statistiques révèlent que la plupart des pays NPF ont réduit leur approvisionnement du marché américain, dont ils sont les fournisseurs exclusifs, pour approvisionner davantage le marché européen. Ainsi:**
>
> - **En 2006, la Colombie a augmenté ses exportations vers l'Union Européenne de 59.000 tonnes par rapport à 2005 et diminué de 40 000 tonnes celles à destination des USA,**
> - **le Costa Rica a accru de près de 200.000 tonnes ses exportations vers l'Union Européenne et de 105.000 tonnes ses exportations vers les USA,**
> - **le Panama a préféré également accroître ses apports au marché européen de 29.000 tonnes alors que ses exportations vers les USA n'ont progressé que de 5.500 tonnes,**
> - **le Pérou a doublé ses exportations vers l'Union Européenne avec 22.400 tonnes alors qu'il n'a augmenté ses exportations vers les USA que de 2.700 tonnes."**

Can Colombia and Panama provide a reasoned answer as to whether they agree with the assertions made by Côte d'Ivoire.

Panama does not accept the assertions made by Côte d'Ivoire on either legal or factual grounds.

As a legal matter, the issue of market access to the EC market no longer has relevance under GATT Article I. Even if it had relevance, a Member's volume performance is not part of the WTO's legal concept of "market access." Conditions of competition (in this case, "as applied" conditions of competition between MFN and EC producers, and MFN and ACP producers) are what is covered by that term. A regime that installs a 135% increase in the €75/mt tariff on MFN bananas applied from 1995 to 2005, a 135% increase in the prior ACP and EBA margin of preference of €75/mt, and a 25,000 mt increase in the prior exclusive ACP tariff quota cannot be considered to preserve prior conditions of competition.

Even on purely factual grounds, the Ivory Coast's selective reference to Panama's export levels conveys a distorted impression of the EC market. In 1999, when the EC became obligated to come into compliance with *Bananas III*, Panama's banana exports to the EC were 465,000 mt.[33] Panama's EC exports have systematically dropped in virtually every year since then, reaching only 311,000 mt in 2006. This represents *a 33% decline* since 1999. The picture for the group of ACP suppliers, on the other hand, is exactly the reverse. The ACP saw their 1999 export volume of 688,000 mt systematically grow to 891,000 mt in 2006, reflecting *a 30% increase* since 1999. The graph set forth in Exhibit N/P-3 portrays these strikingly divergent market trends.

107. (Nicaragua) Since Nicaragua was a party to the negotiations of the Framework Agreement on Bananas (BFA), can Nicaragua clarify what was, in its view, the purpose and

[33] Exhibit N/P-3.

meaning of paragraph 9 of the BFA. More specifically, what is the precise (nature of the) "agreement" that "shall apply until 31 December 2002"?

Paragraph 9 of the BFA states that "*[t]his agreement* shall apply until 31 December 2002."[34] For reasons relating to the nature of the BFA (and for the interpretive reasons separately addressed in Nicaragua's third party submission, oral statement, and response to Question 110 below), Nicaragua and the other BFA signatories included paragraph 9 to terminate the plurilateral "agreement" itself by 2003, but certainly not to terminate the separate multilateral concessions set forth in the EC's Schedule.

The "agreed system" laid down in the BFA included a number of administrative provisions for allocating and reallocating quantities under the EC's banana tariff quota. All signatories recognized the complexity of that "agreed system." Its export quota-allocation, quota-transferability, and licensing rules, which themselves were complex, had to be integrated into the equally complex import-quota and licensing rules of Regulation 404. The signatories recognized, too, that the EC's future enlargements, referenced in paragraph 1 of the BFA ("... subject to any increase resulting from the enlargement of the Community"), would compound the administrative challenge and require regulatory adaptations to ensure proper implementation of the BFA's "agreed system."

Because of these various complexities and future developments, and the EC's insistence that the Latin American signatories agree to a "peace clause" throughout the duration of the BFA, Nicaragua and the other signatories considered a termination date to be prudent. The termination provision was to serve as a check, or quality control, on the functioning of the "agreed system," and a backstop to ensure that the rights of the Latin American signatories would continue to be upheld as the EC Member States grew in number. Thus, when the BFA signatories stated in paragraph 9 that "*[t]his* agreement shall apply ...," they meant simply that the *BFA itself* would terminate. They never once contemplated a termination of the multilateral concessions separately contained in the EC's Schedule.

Indeed, because the BFA, by its very nature, was a plurilateral agreement, it *could not have* set a limitation on the multilateral concessions contained in the EC's Schedule. The five signing countries, which reached this agreement before the EC had even officially scheduled its multilateral banana commitment, had no legal authority to invalidate future multilateral concessions. If Members were free to pre-empt concessions on a bilateral or plurilateral basis, the global trading system of multilateral concessions would lose the certainty, security, and predictability guaranteed under GATT Article II.[35]

108. (Nicaragua and Panama) In paragraph 6 of their respective third party submissions, Nicaragua and Panama state that:

> **"when the EC contends in this proceeding that its current measures fulfil its important 'international development efforts,' it is conspicuously obscuring the paramount objective underlying the measures at issue, the protection of its own heavily subsidized production". (Footnote omitted)**

Could Nicaragua and Panama elaborate on such statement and explain in what manner, if any, such circumstance would become relevant for the Panel's analysis in the current proceedings.

[34] Emphasis added.
[35] *See EC – Computer Equipment (AB)*, para. 82; *Newsprint*, para. 52.

The EC's banana regime's objective of ensuring the "satisfactory marketing of bananas produced within the Community"[36]

The EC produces bananas in Spain (the Canary Islands), France (Guadeloupe and Martinique), Portugal (continental Portugal, Madeira, and the Azores), Greece (Crete), and Cyprus.[37] Despite only modest production levels, EC producers have for decades insisted on support and market protections to insulate local production from external competition.

Regulation 404 was premised on the guarantee that bananas produced in the EC would not be "place[d] in a worse situation" than before the introduction of the Common Market Organization ("CMO") and would be "disposed of on the Community market providing an adequate income for [EC] producers."[38] Those pre-eminent CMO guarantees, while not emphasized when the EC externally defends its banana policies, have guided the structure of the EC's successive banana regimes since 1993.

To ensure remunerative prices for EC-grown bananas, the EC's original banana CMO, and every modified CMO since then, has relied on two forms of EC grower protections: large banana subsidy payments and strict limitations on EC access for Latin American bananas. The producing Member States and EC Commission have considered these two protections to be inextricably linked. In their view, large subsidies put an "adequate income" into the pocket of the producers, while border restrictions ensure the marketing and fiscal stability needed to sustain those payments over time.

Of those two forms of protection, banana subsidies have always been the true centerpiece of the CMO, around which the border measures have been structured for fiscal reinforcement.[39]

- From 1993 through 2006, the subsidy scheme, known as "compensatory aid," conferred a type of deficiency payment to EC producers. Under that arrangement, total compensatory aid payments in recent years amounted on average to over $300 million annually (or approximately $7.50 a box), making bananas *one of the most subsidized* of all products covered by the EC's Common Agricultural Policy.[40]

- As of 1 January 2007, the EC "reformed" its banana subsidy scheme by *enlarging* its "envelope" of production-oriented subsidies for the sector. The new scheme, amounting to approximately $380 million annually for the next 6 years,[41] continues to be for the express purpose of "support[ing] [EC] banana production" and "ensur[ing] a fair standard of living for EC banana producers."[42] The enlarged "envelope" is being allocated to Spain, France, and Portugal for distribution as those Member States see fit, including through nationally administered "system[s] of deficiency payments close to the [prior] scheme" of compensatory

[36] Council Regulation (EEC) 404/93 of 13 February 1993 on the common organization of the market in bananas, OJ L 47/1, 25 February 1993 (hereinafter "Regulation 404"), Whereas clause 10.

[37] In recent years, total EC banana production has averaged approximately 750,000 mt annually, historically amounting to 16% or less of total EC consumption.

[38] Regulation 404, Whereas clauses 3 and 7, and Title III.

[39] *Id*., Title III and Whereas clauses 3, 4, and 7.

[40] *Id*. *See also* "A Tariff Only Regime for Bananas – Why the Tariff Rate Should be Set at a Low Level," Swedish Ministry of Agriculture, Food, and Consumer Affairs, 23 September 2004, pp. 3-4.

[41] *See* "CAP Reform: Commission welcomes Council agreement on reform of banana regime," *EC Press Release*, IP/06/1842, 19 December 2006, providing that € 280 million of aid is provided to banana growers as of 1 January 2007, with € 278.8 million transferred to the POSEI program and € 1.2 million to the single payment scheme. This equates to $380 million at an exchange rate of € 1.36 = $1.

[42] Council Regulation (EC) No. 2013/2006 of 19 December 2006 amending Regulations (EEC) No. 404/93, (EC) No. 1782/2003, and (EC) No. 247/2006 as regards the banana sector, OJ L 384/13, 29 December 2006, Whereas clauses 1 and 5.

aid.[43] The new payment level equates to a subsidy of $9.50 per box, an amount almost equivalent to Latin America's entire per-box FOB, ocean freight, discharge, and handling costs to the EC market.

The EC's border restrictions have served to "ring-fence" those ample subsidies as follows:

- From 1993 to the end of 2005, the EC's restrictive tariff-quota system created an artificially high, stable internal price and "supply balance," thereby better ensuring "profitable [grower] prices" and fiscal predictability in subsidy outlays.[44]

- Likewise, from 2006 forward, the EC has chosen a high tariff only a few digits lower than the one rejected in Arbitration and a tariff quota on competitive ACP bananas expressly for the purpose of "*ensur[ing] that Community production is maintained and that these producers are not put in a less favourable situation as before the entering into force of its import quota regime in 1993*."[45]

Legal relevance

Given that conditions of competition as between MFN and EC banana producers lost legal relevance after the GATT Article I waiver lapsed, the EC's extensive, and now enlarged, banana subsidy payments merely help set this dispute in its proper factual context.

If the lapsed waiver standard (and, hence, conditions of competition) were still relevant, however, prior WTO cases have found that MFN "competitive opportunities" are nullified or impaired by the subsequent modification and enlargement of domestic subsidy measures.[46] Thus, under the prior waiver standard, the EC's enlarged banana subsidy payments as of 2007 would simply have reaffirmed that MFN conditions of competition are not being maintained by the current regime.

109. (Nicaragua and Panama) In paragraph 48 of their combined statement during the substantive meeting with the Panel, Nicaragua and Panama argue that "[t]he EC itself appears to recognize that its Article XIII defences are not convincing. Why else would it still have a request pending for a renewed Article XIII waiver to cover its exclusive ACP tariff quota under an arrangement in which MFN bananas would separately be entered under a flat tariff?" Can Nicaragua and Panama provide evidence of the factual assertions raised in this statement.

The chronological sequence of the EC's renewed Article XIII waiver request[47] has been as follows:

- On 31 December 2005, the EC's 2001 Article XIII waiver for its exclusive ACP tariff-quota expired.

[43] Towards a Reform of the Internal Aspects of the Common Organisation of the Market in Bananas, Consultation Document of the Impact Analysis Steering Group, 3 April 2006, p. 8.

[44] Regulation 404, Whereas clauses 3, 4, 9, and 10; and Article 16.

[45] European Commission, *Communication from the Commission on the Modification of the European Community's Import Regime for Bananas*, COM (2004) 399, final, 2 June 2004, p. 4. (Emphasis added.)

[46] Panel Report, *Japan – Measures Affecting Consumer Photographic Film and Paper*, WT/DS44/R, adopted 22 April 1998, paras. 10.33-10.41 (emphasis added); *EEC–Oilseeds I*, paras. 142-151 (emphasis added).

[47] *Request for Extension of a Waiver Under GATT Article XIII, Tariff Rate Quota for Bananas of ACP Origin*, G/C/W/529, 11 October 2005.

- On 7 October 2005, the EC requested an "extension" of that waiver until 31 December 2007 to cover its proposal to install as of 1 January 2006 a 775,000 mt ACP duty-free tariff quota in combination with a 187 €/mt MFN tariff.[48]

- On 10 March 2006, 9 May 2006, 12 July 2006, and 20 November 2006, the EC's Article XIII waiver request was taken up by the Council for Trade in Goods ("CTG").[49] In each of those meetings, the Latin American supplier countries raised concerns about the technical deficiencies of that request and the unsettled nature of the banana dispute.

- On 19 March 2007, also in the context of a CTG meeting, the EC asked "to suspend the discussions on [its] request for the extension of the Article XIII waiver ... until further notice."[50] The EC made clear at the time that although it was requesting a "delay" in the debate on the waiver in light of the concerns raised by the Latin Americans, it was "definitely maintaining its request," not withdrawing it.[51]

There has been no further action on the EC's waiver request since that time.

110. (Nicaragua and Panama) In their respective third party submissions, Nicaragua and Panama seem to argue that several drafting-history considerations, subsequent developments and contextual elements should be taken into account in interpreting Paragraph 9 of the Framework Agreement on Bananas (BFA) ("[t]his *agreement* shall apply until 31 December 2002"). If so, can Nicaragua and Panama elaborate on the legal reasons as to why that should be the case.

Interpretive framework

The Panel's interpretation of the BFA should be governed by the rules of the Vienna Convention.

Because the EC has argued that the terms of the BFA set a time limitation on its WTO Schedule, and Ecuador, Nicaragua, and Panama have argued to the contrary, an interpretation of the EC's Schedule and BFA has become necessary.[52] As reaffirmed by the Appellate Body in *U.S.-Gambling*, interpreting the text of a Member's Schedule "involves identifying the *common intention* of Members, and is to be achieved by following the customary rules of interpretation of public international law, codified in Articles 31 and 32 of the *Vienna Convention*."[53] The Panel should accordingly interpret the ordinary meaning of the Schedule and BFA, taking into account contextual

[48] *Id.*

[49] *See* Council for Trade in Goods, *Minutes of the Meeting of the Council for Trade in Goods – 10 March 2006*, G/C/M/83, 1 May 2006, para. 5.2; Council for Trade in Goods, *Minutes of the Meeting of the Council for Trade in Goods – 9 May 2006*, G/C/M/84, 29 June 2006, para. 6.2; Council for Trade in Goods, *Minutes of the Meeting of the Council for Trade in Goods – 12 July 2006*, G/C/M/85, 14 September 2006, paras. 4.1-4.4; Council for Trade in Goods, *Minutes of the Meeting of the Council for Trade in Goods – 20 November 2006*, G/C/M/86, 3 January 2007, paras. 6.1-6.3.

[50] Council for Trade in Goods, *Minutes of the Council for Trade in Goods – 19 March 2007*, G/C/M/88, 26 April 2007, paras. 3.2, 3.3. Exhibit N/P–4.

[51] *Id.*, para. 3.2.

[52] *See* first written submission of the European Communities, 20 July 2007, para. 9 and para. 114 ("The Annex, which is an *integral part of the Schedules* ... .") (emphasis added); second written submission of the European Communities, 13 August 2007, para. 69.

[53] Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, adopted 20 April 2005 ("*US – Gambling (AB)*"), para. 159, citing *EC – Computer Equipment (AB)*, para. 109 (emphasis in original).

elements, objectives, drafting histories, and subsequent developments, to determine the common intention of Members respecting paragraph 9 and the other relevant text in question.[54]

Text

The clear text of the BFA and the EC's Schedule demonstrates that paragraph 9 of the BFA did not set a time limitation on the EC's banana concession. As demonstrated by Panama and Nicaragua in their written submissions, the ordinary meaning of the terms "final," "current access quotas," and "concessions," used to define the banana commitments inscribed in the EC's Schedule, cannot be reconciled with commitments that lapsed shortly after the Uruguay Round implementation period.

As further explained by Nicaragua in its response to Question 107 above, the cross-reference to the BFA in column 7 of the EC's Schedule does nothing to change the finality of those concessions. While the BFA terminated itself, it did not terminate the EC's scheduled multilateral commitments, nor could it due to its plurilateral nature.

Context and purpose

The contextual elements reinforce that reading. The BFA was intended to improve access for the MFN signatories for the purpose of "settling" *Bananas II*. A €680/mt stand-alone tariff would create a prohibitive regime as of 2003 worse than the one challenged in *Bananas II*.

Likewise, multilateral concessions are intended to "yield rights and grant benefits,"[55] not erect a stand-alone tariff higher than any the EC had ever scheduled before.

Subsequent practice

As noted by the Appellate Body in *US – Gambling*, in order for subsequent "practice" within the meaning of Article 31(3)(b) of the Vienna Convention to be established "(i) there must be a common, consistent, discernible pattern of acts or pronouncements; *and* (ii) those acts or pronouncements must imply agreement on the interpretation of the relevant provision."[56]

Both of these cumulative conditions are satisfied here. The EC has consistently pronounced that the banana commitments set out in its Schedule are bound. Until this dispute, the EC continued to state as much in public announcements, and continued to accord imports the treatment described in its Schedule well after the purported 2002 "termination" of its concessions.[57] Those pronouncements and actions reflect the same understanding shared by the other parties to the BFA, the Latin American signatories. Thus, subsequent practice confirms that the EC's €75 binding did not expire.

Supplementary means

In *US – Gambling*, the Appellate Body relied on several supplementary means – including explanatory notes on drafts of the US Schedule and Uruguay Round scheduling guidelines (the "1993 Scheduling Guidelines") – to complete its interpretation of the U.S. Schedule.[58] In this dispute, the

[54] Even if the BFA is not integral to the EC's Schedule, it is nevertheless an agreement among States that should be interpreted according to the rules of the Vienna Convention. *See* Panel Report, *India – Measures Affecting the Automotive Sector*, WT/DS146/R, WT/DS175/R and Corr. 1, adopted 5 April 2002, para. 7.118.

[55] *Bananas III (AB)*, para. 154.

[56] *US – Gambling (AB)*, para. 192 (emphasis in original).

[57] *See* Exhibit N/P-5.

[58] *See US – Gambling (AB)*, paras. 204-213.

original draft of the EC's Uruguay Round Schedule proposed a bound tariff rate of 100 ECU/mt without time limitations of any sort, confirming the absence of any EC intention to set a termination date for its concession. Further, the Uruguay Round "Draft Modalities" from which these concessions were formed, required the EC "to maintain, for tarrified products, current import access opportunities at levels corresponding to those existing during the 1986-88 base period," meaning that "current access" would need to be bound from that point forward.[59] The EC's suggestion that the BFA imposes a termination date on its banana concession ignores that drafting mandate.

Thus, every element of the required Vienna Convention analysis confirms that the "common intention" of WTO Members regarding the EC's scheduled banana commitments was, and is, that those commitments have no limitation in time.

111. (Nicaragua and Panama) In paragraph 50 of their combined statement during the substantive meeting with the Panel,, under a number of bullet points, Nicaragua and Panama make reference to various documents, such as for instance "the EC's 1994 corrigendum". Are the contents of this "EC's 1994 corrigendum" contained in the EC's Schedules LXXX and CXL? Can Nicaragua and Panama specify the references to those documents that are not annexed to their respective submissions and provide copies of the same, if possible.

The Corrigendum – Section 1-B of Schedule LXXX

The EC's 29 March 1994 "corrigendum to the European Communities schedule of concessions for agricultural products as regards bananas" was made part of the EC's Uruguay Round Schedule LXXX, which governed the EC of 12. That corrigendum, set forth in Exhibits N-5 and P-5 of the third party written submissions of Nicaragua and Panama, contains Section 1-B (Tariff Quotas) of Schedule LXXX, which reflects the EC's scheduled in-quota concession on bananas (75 ECU/t for 2.2 million tones) and, behind that, the BFA.

Section 1-A of Schedule LXXX

The corrigendum did not include Section 1-A (Tariffs) of Schedule LXXX, which sets forth the EC's Uruguay Round out-of-quota banana concession (850 ECU/t, to be reduced over the six-year Uruguay Round reduction period to 680 ECU/t). Section 1-A (Tariffs) of Schedule LXXX is set forth in Exhibits N-4 and P-4 of the third party written submissions of Nicaragua and Panama.

Schedule CXL

Schedule CXL, governing the EC of 15, was submitted to the WTO on 28 February 1996, but has never been certified by the WTO.[60] The banana commitments in Schedule CXL, which can be found in Exhibit EC-1, are the same as those in Sections 1-A and 1-B of Schedule LXXX. As in Schedule LXXX, the BFA appears in a separate Annex.

112. (Nicaragua and Panama) In paragraph 52 of their combined statement during the substantive meeting with the Panel, Nicaragua and Panama argue that "there is ample paper trail of EC acknowledgements that [the EC's] €75/mt concession would have to be accorded

[59] Modalities for the Establishment of Specific Binding Commitments Under the Reform Programme, Market Access, Annex 3, MTN.GNG/MA/W/24, 20 December 1993 ("Draft Modalities"). *Agriculture: Explanation: Market Access*, www.wto.org/English/tratop_e/agric_e/ag_intro02_access_e.htm (last visited 14 August 2007).

[60] *See* GATT, *Procedures for the Modification and Rectification of Schedules of Tariff Concessions*, L/4962, 28 March 1980.

Article II protection in the EC's move to 'tariff only'." Can Nicaragua and Panama specify the documents referenced and provide copies of the same, if possible.

Since June 1999 when the EC first announced its proposal to move to a tariff-only regime to comply with the *Bananas III* ruling, the EC has consistently made clear that its €75/mt in-quota Uruguay Round rate has continuing bound effect (*i.e.* continuing coverage under GATT Article II). A long list of EC statements confirming the continuing effect of the €75/mt concession and its obligation to conduct Article XXVIII negotiations for any tariff over that rate (as well as the relevant documents from which those statements are taken) can be found in Exhibit N/P-5.

ANNEX D-8

RESPONSES BY THE UNITED STATES TO QUESTIONS POSED BY THE PANEL

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

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

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

> As we have explained to the EC during bilateral discussions last week and indicated at meetings of the DSB, the Understanding identifies the means by which the long-standing dispute over the EC's banana import regime can be resolved, but, as is obvious from its own text, it does not in itself constitute a mutually agreed solution pursuant to Article 3.6 of the DSU. In addition, in view of the steps yet to be taken by all parties, it would also be premature to take this item off the DSB agenda.[1]

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

3. The United States would leave to Ecuador and the EC, as the negotiators and drafters of the Understanding between them, the question of what value to place on the language in Paragraph G of the Ecuador-EC Understanding. In this regard, the explanations expressed by Ecuador after the unilateral notification by the EC of both the Ecuador-EC Understanding and the EC-US Understanding, would appear helpful. In a communication to the DSB[2], Ecuador emphasized that the Understanding "identified means by which the long-standing dispute" could be solved, but that the Understanding was comprised of phases and required implementation of several key features requiring collective WTO membership action.[3] Ecuador also noted that since "several steps" needed to be taken, "it would be premature to take this item off the DSB agenda which considers this issue at every regular meeting pursuant to Article 21.6 of the DSU."[4] Finally, Ecuador concluded that

[1] WT/DS27/59, G/C/W/270, 2 July 2001, second paragraph.
[2] WT/DS27/60, G/C/W/274, 9 July 2001
[3] *Id*., para. 1.
[4] *Id*., para. 3.

although it "sees the Understanding as an agreed solution that can *contribute* to an overall, definite and universally accepted solution, it must be made clear that the provisions of Article 3.6 of the DSU *are not applicable*."[5] (Emphasis added).

4. In any event, as the United States explained in its third party oral statement, whether the Understandings were a "mutually agreed solution" or not is irrelevant. Nothing in the Dispute Settlement Understanding (DSU) precludes a party to a mutually agreed solution from having recourse to the DSU. The US arguments on this point are set out in paragraphs 3 through 13 of its third party oral statement.

101. (Ecuador, Nicaragua, Panama and the US) In paragraph 4 of its closing statement during the substantive meeting with the Panel, referring to the alleged termination of the Doha Waiver, the EC argues that "[i]f the Doha Waiver wanted to say what Ecuador, Nicaragua and Panama are arguing, the text should have read that the waiver would terminate 'if the *Arbitrator concludes* that the EC has failed to rectify the matter'. The Doha Waiver does not say so." Can Ecuador, Nicaragua and Panama provide a reasoned answer as to whether they agree with this statement. Could the US comment on the same, in the light of its argument in paragraph 21 of its statement during the substantive meeting with the Panel, reproduced in the previous question.

5. The Annex clearly sets out a mechanism whereby once an arbitrator found twice that the EC had presented a tariff proposal that did not meet the conditions of the Annex, the waiver would automatically expire once the new EC tariff regime went into effect. The EC argument ignores the plain text of the waiver and the Annex. As the United States explained in paragraph 21 of its third party statement, the phrase "[i]f the EC has failed to rectify the matter", at the beginning of the fifth sentence in tiret 5 of the Annex, can only refer back to the determination required to be made by the arbitrator pursuant to the third sentence of tiret 5. The fourth sentence requires that the arbitration award be notified to the General Council. The fifth sentence then provides the consequence arising from such a notified arbitration award where the arbitrator found that the EC failed to "rectify the matter" – the waiver shall cease to apply upon entry into force of the new EC tariff regime. There is no need to explain again in the fifth sentence that it was the arbitrator who had to conclude that the EC had failed, since the sentence and the actions therewith flow from the preceding two sentences. The EC's interpretation would "read" the role of the second arbitrator out of the Annex, allowing for a unilateral determination by the EC itself that its new regime met the conditions of the Annex.

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

> any re-binding of the EC tariff on bananas under the relevant GATT Article XXVIII procedures *should result in at least maintaining total market access for MFN banana suppliers* and their willingness to accept a *multilateral control on the implementation of this commitment*.[6]

The reference to "*multilateral control*"refers to the Annex arbitration procedures and argues against any EC interpretation that would allow the waiver to continue in effect in the face of the two negative arbitral determinations and a subsequent unilateral determination of "compliance", or unilateral choice of banana import regime, by the EC.

116. (US) In paragraph 4 of its statement during the substantive meeting with the Panel, the US argues that the *Understanding on Bananas* reached between the EC and US on 11 April 2001

[5] *Id.*., paragraph after numbered para. 3.
[6] Article I Waiver, Recital 11 (emphasis added).

(document WT/DS27/59) "is <u>not</u> a 'covered agreement' – it is not listed in Appendix 1." Does the US argue that, under the DSU, a panel should attribute no legal consequences to a mutually agreed solution reached between the parties to a dispute? Does, in the view of the US, the fact that a particular agreement between WTO Members is not part of the list of "Agreements Covered by the Understanding" in Appendix 1 of the DSU, mean that a WTO Panel should attribute no legal consequences to such agreement in the context of a particular dispute?

7. With respect to the first part of the Panel's question, in which the Panel inquires about the legal consequences of a mutually agreed solution, the United States wishes to begin by recalling that the EC-US Understanding on Bananas is not a mutually agreed solution.

8. The United States recognizes that the EC-US Understanding, as well as the Ecuador-EC Understanding, are important documents. Indeed, there was great expectation that the Understandings would serve as the path to the eventual resolution of the dispute. Nonetheless, the importance ascribed to the Understandings is a separate matter from the question of whether any legal consequences arise from them.

9. Turning to the question of the legal consequences of mutually agreed solutions in general, the United States notes that the DSU does not itself provide for any legal consequences, with only three exceptions. Article 3.6 requires that mutually agreed solutions be notified to the DSB and the relevant Councils and Committees. Article 12.7 provides that the existence of a mutually satisfactory solution reached prior to the conclusion of a panel proceeding affects the form and content of the panel's report: "Where a settlement of the matter among the parties to the dispute has been found, the report of the panel shall be confined to a brief description of the case and to reporting that a solution has been reached." Article 22.8 provides that "the suspension of concessions or other obligations shall be temporary and shall only be applied until such time as the measure found to be inconsistent with a covered agreement has been removed, or the Member that must implement recommendations or rulings provides a solution to the nullification or impairment of benefits, or a mutually satisfactory solution is reached." The fact that the legal consequences of a mutually agreed solution are spelled out in these three provisions is significant because it stands in stark contrast to the lack of any provision that assigns the legal consequences that the EC would now attribute to such solutions. There is therefore no basis in the DSU for attributing any legal consequences to a mutually agreed solution other than the limited ones specified in Articles 3.6, 12.7, and 22.8.

10. In particular, there is no basis in the DSU, or elsewhere in the covered agreements, for the EC argument that parties to a "mutually agreed solution" are precluded from having recourse to Article 21.5 proceedings. The US arguments on this point are set out in paragraphs 6 through 13 of its third party oral statement. Indeed, and as noted in our third party oral statement, the EC agreed with this position in the *India – Autos* proceeding. There, the EC held the view that a mutually agreed solution could not prevent recourse to the DSU. The EC argued that the relevant 1997 EC-India Agreement was not a "covered agreement" in the sense of Article 1.1 of the DSU and therefore the rights and obligations of the parties under the 1997 Agreement were not enforceable under the DSU.[7]

11. Mutually agreed solutions are not "covered agreements" within the meaning of Article 1 of the DSU. Indeed, a mutually agreed solution may not take the form of a written agreement at all.[8]

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

[8] There is no requirement in the DSU that the "mutually agreed solution" be in writing or even "agreed" before the "solution" is accepted. For example, a responding Member may take an action on its own that is then considered acceptable by the complaining party. At that point, after the action has been taken, the complaining party may "agree" with the respondent that the action constitutes a "mutually agreed solution" that needs to be notified pursuant to Article 3.6.

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

12. The second part of the Panel's question asks whether a WTO Panel should attribute no legal consequences to an agreement between the parties in the context of a particular dispute. To be clear, the United States has argued in this dispute that the alleged mutually agreed solution between the EC and Ecuador would not have the legal consequences suggested by the EC – that is, to bar Ecuador from bringing this proceeding. The United States has not advanced, and would not support, the proposition that any agreement between the parties is never entitled to legal consequences in WTO dispute settlement. To the contrary, some DSU provisions provide explicitly for certain agreements to have such consequences, for example, DSU Articles 4.3, 21.3(b), and 25. In addition, certain other WTO agreements provide for legal consequences of agreements between Members; free trade agreements meeting the requirements of Article XXIV of the GATT 1994 are one example. And, it has sometimes been necessary to examine the legal consequences of an agreement among Members in order to understand the meaning of a WTO legal obligation that makes reference to that agreement; for example, in the original *Bananas* proceeding it was necessary to examine the Lomé Convention in order to understand the waiver, adopted pursuant to Articles IX:3 and IX:4 of the Marrakesh Agreement, for the then-extant EC bananas regime. And as noted above, in Articles 3.6, 12.7, and 22.8, the DSU does assign certain legal consequences to mutually agreed solutions.

13. However, in each such situation, it is an identifiable provision of the covered agreements that forms the basis for ascribing legal consequences within WTO dispute settlement to an agreement other than a covered agreement. By contrast, in this proceeding, the EC has not identified – and cannot identify – any WTO provision that would give the Understanding the legal consequences that the EC claims. As a result, there is no basis for this Panel to ascribe any such legal consequences to the Understanding either.

ANNEX D-9

COMMENTS BY ECUADOR TO THE RESPONSES OF THE EUROPEAN COMMUNITIES AND THIRD PARTIES

13. (Both Parties) In paragraph 43 of their respective third party submissions, Nicaragua and Panama argue that the Latin American suppliers insisted on inserting, into the *Bananas Annex* of the Doha Waiver, the sentence "If the EC has failed to rectify the matter, this waiver shall cease to apply to bananas upon entry into force of the new EC tariff regime", which did not appear in the original EC draft. Nicaragua and Panama argue further that the insertion of such sentence is an "explicit penalty for EC unilateralism following two arbitration losses", without which the waiver would not have been approved. Can the Parties provide a reasoned answer as to whether they agree with this statement.

Ecuador agrees with the response of Nicaragua and Panama and disagrees with that of the EC. Further evidence that the EC once shared the view of Ecuador, Nicaragua and Panama is found in the EC's closing statement to the Arbitrator:

> Mr. Chairman, Distinguished Arbitrators, today, we all stand on a precipice. In one week's time you will render your Award ... If the Award is negative, then all the parties represented here fall off the precipice together. The landing risks to be hard. The EC loses its waiver for the ACP preference upon the entry into force of tariff-only yet it is required, by the ACP-EC Partnership Agreement, to ensure preferential treatment for ACP products.[1]

15. (Both Parties) On what grounds does the EC argue that the phrase "suitable waiver" in paragraph 6.158 of the report of the first *EC – Bananas III* compliance Panel should be interpreted to mean a waiver from only Article I of the GATT 1994? On what grounds does Ecuador argue that the same term should be interpreted as referring to a waiver to both Articles I and XIII of the GATT 1994?

Ecuador reaffirms its response to Question 15, but wishes to add further comments in response to the EC argument that "extensive GATT and WTO practice" supports the EC argument that "exclusion from a tariff quota" is a matter governed not by Article XIII, but by Article I. This aspect of the EC response is contained in paragraphs numbered 38-44 of the EC response.

First, the EC renews its assertion that the *Bananas III* findings were not relevant because they concerned a regime with multiple tariff quotas, while now there is only a single tariff quota with duty free preference for ACP countries. However, nothing in the findings of the *Bananas III* Appellate Body and Article 21. 5 reports suggests that it would make any difference how many tariff quotas a country created. The Panel said, at paragraph 6.20 of the Article 21.5 report:

> 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

[1] Award of the Arbitrator, *European Communities – The ACP-EC Partnership Agreement – Second Recourse to Arbitration Pursuant to the Decision of 14 November 2001*, WT/L/625, 27 October 2005 ("*AAII*"), Oral Statement by the European Communities, 19 October 2005, para. 4, *available at* http://trade,ec,europa.eu/wtodispute/show.cfm?id=239&code=2 (emphasis added).

> is a quantitative limit on the availability of a specific tariff rate. Thus, Article XIII applies to the 857,700 tonne limit.[2]

The Appellate Body, in a finding cited by the Article 21.5 Panel, said:

> 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 agreements, if these provisions apply only within regulatory regimes established by that Member.[3]

Certainly there is nothing in the text of Article XIII of the GATT that could lead to another conclusion. Article XIII:5 does not limit any aspect of the application of the provisions of Article XIII to situations where there is more than one tariff quota or more than one regime.

As Ecuador has discussed in prior submissions, in accordance with the *Bananas III* rulings and recommendations, the 2001 Understanding called for waivers of *both* Articles XIII and I to cover the exclusive "interim" ACP tariff quota to be implemented by the EC in various stages prior to "tariff only." The EC in fact obtained such waivers and sought but did not obtain an extension of the Article XIII waiver for its ACP tariff quota.

The EC has continued to seek approval of that Article XIII request, albeit feigning, in the light of its unsuccessful pursuit of the waiver that a waiver is for security rather than necessity.[4]

Against the plain language of Article XIII, the rulings in *Bananas III*, and this waiver practice, the EC now argues in its response that "extensive practice" establishes that a waiver of Article I is sufficient to cover a tariff quota whose preferential rate of duty is limited to a few countries and excludes principal suppliers. However, the "practice " to which the EC refers appears to be an EC assertion that a few Members maintain or have maintained what the EC says are tariff quotas under their respective generalized systems of preferences, notwithstanding that the waiver for generalized preferences, as originally granted and as incorporated in the Enabling Clause, was only a waiver of Article I. The EC also points to a 1973 waiver of Article 1:1 for "tariff-free quotas for handicraft products from South Pacific Islands."

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[2] Appellate Body Report, *European Communities – Regime for Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted 25 September 1997 ("*Bananas III (AB)*"), para. 190.

[3] Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Complaints by Ecuador, Guatemala and Honduras, Mexico, and the United States*, WT/DS27/R, adopted 25 September 1997, para. 7.69. ("*Bananas III (Panel)*"), as modified by *Bananas III (AB)*.

[4] Although the EC "suspended" discussion of the proposed extension on 19 March 2007, the EC stated at the time that it was "definitely maintaining its request," not withdrawing it. Council for Trade in Goods, *Minutes of the Council for Trade in Goods – 19 March 2007*, G/C/M/88, 26 April 2007, para. 3.2. Exhibit N/P-4.

As the EC would have to agree, the Enabling Clause and GSP preferences are not at issue here. If they were, the EC would be required to extend GSP preferences to *all* similarly-situated developing countries, including the Latin American supplying countries, which it has never been willing to do in the case of bananas. Neither are the measures of other countries that the EC says are tariff quotas at issue in this dispute, including the measures for handicraft products of South Pacific Islands. It may be that the measures are not tariff quotas, or have some other justification, or it may be that the measures, if challenged under Article XIII, would be found inconsistent with the obligations of the countries concerned. None of that is relevant. It is not a defense for the violations of any WTO rules that the defending party thinks that other countries may also violate that rule, nor does the absence of a challenge of particular measures establish that those measures are consistent with the rules. There are many instances in which measures so very long standing have been found inconsistent with WTO rules when finally challenged; the EC's successful challenges of Canada's automotive measures thirty five years after they were instituted or FSC measures of the United States taxation measures nearly 20 years after they were implemented are just two examples.[5]

The EC's effort, even now, to try to induce this Panel on such a flimsy basis to ignore the provisions of Article XIII and overrule prior rulings only underlines the need for this Panel to rule on all of Ecuador's claims.

16. (Both Parties) In paragraph 96 of its first written submission, the EC states that "the text of GATT Article XIII, paragraph 1 makes clear that a Member can successfully claim that another Member's measures violate the provisions of GATT Article XIII, only if its can show that... the allegedly offending Member imposes a prohibition or restriction on products originating from the complaining Member and, in principle, there is a nullification and impairment of a benefit accruing to the complaining Member". Can the EC elaborate its arguments in support of each of these propositions, i.e. that in order to make a successful claim under Article XIII:1 of the GATT 1994, the complaining Member must show: (a) that the challenged measure must be a prohibition or restriction *on products originating from the complaining Member*; and, (b) that there is a *nullification and impairment of a benefit* accruing to the complaining Member. Can Ecuador provide a reasoned answer as to whether it agrees with the arguments raised by the EC.

The EC responds as if Article XIII:1 provided that no *benefit* could be conferred on products of a Member unless the same *benefit* were conferred on every other country, including non-members. The EC then becomes very angry with the straw man it has created. However, unfortunately for the EC, the prohibition in Article XIII:1 is against imposing a restriction on products of a member if products of other countries are not similarly restricted. In the case of any tariff quota, the restriction is the higher duty imposed on imports not benefiting from the preferential tariff quota. The EC can impose any higher duty it wishes on non-members. What the EC cannot do under WTO rules is consign Ecuadorian and other MFN bananas to the high duty, while excluding them from fair participation in the zero duty tariff quota.

22. (Both Parties) In paragraph 10 of its statement during the substantive meeting with the Panel, Brazil argues that "the EC abruptly jumps to the flawed conclusion that because the Member has chosen to implement a suggestion by the panel such Member would always be in compliance with its obligations under the covered agreements." In paragraph 11 of the same statement, Brazil adds that "[i]n no provision does the DSU grant Members certainty as to the 'lawfulness' of a measure taken to comply just because such measure is intended to implement a

[5] Appellate Body Report, *Canada – Certain Measures Affecting the Automotive Industry*, WT/DS139/AB/R, WT/DS142/AB/R, adopted 31 May 2000; Panel Report, *United States – Tax Treatment for "Foreign Sales Corporations"*, WT/DS108/R, adopted 8 October 1999.

suggestion made by a panel. To the contrary, Article 21.5 sets forth the Members' right to resort to a panel where there is disagreement as to the consistency with covered agreements of the measures taken to comply." Can the Parties provide a reasoned answer as to whether they agree with Brazil's argument.

Among the myriad of fallacies in the EC argument, it is perhaps sufficient to note again here that accepting a panel report, unconditionally or otherwise, does not mean accepting the wholly unfounded interpretation that the other Party in the dispute opts to impute to a suggestion in the Panel report.

25. (Both Parties) Paragraph 9 of the Framework Agreement on Bananas (BFA) annexed to the EC Schedules provides that "[t]his *agreement* shall apply until 31 December 2002" (Emphasis added). Could it be concluded from this language that only the Framework Agreement on Bananas annexed to the EC Schedules expired on 31 December 2002, but not Section I B of the EC Schedules, where the tariff rate quota (TRQ) is also indicated? Please provide a reasoned response.

Throughout this proceeding, the EC has been unable to point to a single EC act or pronouncement from 1994 forward that supports its contention that the BFA terminated the EC's in-quota banana concessions as of 31 December 2002. Every utterance the EC has made on the matter until this dispute settlement proceeding demonstrates implicitly or explicitly that the EC considered the 75 Ecu/mt concession on 2.2 million mt to have no termination date.

The EC errs in thinking it was necessary to state that the concession was perpetual, because concession are presumed to be without time limit, all the more so in light of the modalities governing the agriculture negotiations, of which the EC is quick to claim the advantage when it suits. The concession does not state that it was granted as indicated in the Annex, but that the further conditions were as indicated in the Annex.

The EC's argument that it's newly discovered termination theory for the banana concession gains is justified by the hopes of EC internal regulations is not serious. The EC argues that the date of termination of the BFA was designed to coincide with the date in 2002 on which the EC's internal regulation of 1993 aspired that the EC would be able to have a new banana regime. This is not credible, as there is no evidence even from the EC that even BFA signatories were aware of or considered credible, let alone binding, the EC's ten year projections for it to undertake reforms. Certainly WTO members cannot be charged with agreeing that the EC's vague and unilateral plans should inform the understanding of the EC's tariff quota concession in this regard.

Even the EC's own authors of the EC's final report on the operation of the EC banana regime fully understood that those in-quota concessions would endure. When the EC issued that report in 2005, it confirmed (yet again) that "Quota A" covered "2.200.000 tonnes at a *bound tariff rate of EUR 75/t.*"[6]

80. (EC) In paragraph 99 of their respective third party submissions, Nicaragua and Panama argue that the EC's "legal instruments, WTO assertions, and other official statements consistently confirm the enduring validity of a €75/mt concession". Nicaragua and Panama further argue that examples have already been referenced by Ecuador, and offer the following additional ones: (a) In Regulation 216, the EC would have explicitly referenced a tariff quota of 2 200 000 tonnes at a rate of €75 as bound in the WTO until the entry into force of a tariff-only regime; (b) In its GATT Article I waiver discussions, the EC confirmed it intended to adopt a tariff-only system in 2006, which would entail a re-binding of its 75 and 680 €/tonne bound rates under the relevant procedures of Article XXVIII of the GATT 1994; and, (c) In an internal

[6] Report from the Commission to the European Parliament and the Council on the Operation of the Common Organisation of the Market in Bananas (SEC(2005) XXX), COM(2005 50 final, § 1.4.1

communication to its own Member States, the EC confirmed that, should the Community wish to move to a tariff-only system at a rate higher than €75/t., GATT Article XXVIII provided that such modification should be notified to all GATT Contracting Parties. Can the EC confirm the accuracy of the factual assertions raised by Nicaragua and Panama, and provide a reasoned answer as to whether it agrees with the arguments raised by these Members.

The EC asks the Panel to believe that in November of 2001, knowing that (according to the EC) the binding on the 75 Ecu/mt tariff quota was going to expire leaving in place (according to the EC 2007) only the 680 Ecu/mt duty, the EC was unclear what tariff binding the EC would agree with banana suppliers in the future. Ecuador asks that the Panel, in evaluating the credibility of the EC in asserting to this panel that the tariff concession expired 31 December 2002, consider not only the language of the concession and the consistent record of the EC and the WTO until this Panel proceeding, but also that the EC has repeatedly argued that statements it makes in a dispute settlement proceeding (at least in regard to this topic) should be dismissed if "erroneous" or made "in the heat of litigation.".

ANNEX D-10

COMMENTS BY THE EUROPEAN COMMUNITIES TO THE RESPONSES OF ECUADOR AND THIRD PARTIES

QUESTIONS ADDRESSED TO PARTIES

2. (Both Parties) How has the EC been applying the MFN tariff of €176/mt to individual imports? What volume and share of its imports have been subject to that tariff?

1. The European Communities notes that there are certain mistakes in the market data provided by Ecuador. For example, Ecuador's data shows in Exhibit ECU-6 that Uganda imported 1,128 mt of bananas into the European Communities in year 2006, while the correct figure is only 28 mt.[1]

9. (Both Parties) In paragraph 38 of its statement during the substantive meeting with the Panel, Ecuador argues that "[i]t will be recalled that the waiver in any event expires 1 January 2008, but the MFN duty continues, and will be the margin of preference for any preferences that the EC grants inconsistent with WTO rules into the future, past 2007. It will be recalled that the EC had made plain its intent to use not only the 'Everything but Arms' initiative but also WTO-conforming free trade agreements to carry on with preferences past 2007. Further, even if the EC were to grant no future preferences, the duty will restrict future banana imports." Can Ecuador elaborate on these arguments, and can the EC provide a reasoned answer as to whether it agrees.

2. Ecuador's response to this question is not correct for a number of reasons. First, the market data establishes that the domestic banana production of the European Communities has decreased following the introduction of the new import regime on 1 January 2006. Therefore, Ecuador's assertion that the tariff currently applied to banana imports "protects EC domestic banana production" more than the import regime in place prior to 1 January 2006 is factually incorrect. Second, the market data also shows that imports from the group of MFN suppliers grow at a higher rate than imports from the group of ACP suppliers. Therefore, Ecuador's assertion that the tariff currently applied does not maintain the pre-2006 total market access of the MFN group of suppliers vis-à-vis the group of ACP suppliers is factually incorrect. Third, the conditions for the continued existence of the Doha Waiver until the end of 2007 have no relation to any market developments that may occur after the expiration of the Doha Waiver and the Cotonou Preference (i.e. after 31 December 2007). Therefore, Ecuador's assertions are not relevant for the proceedings before this Panel.

12. (Both Parties) In paragraph 26 of its first written submission, Ecuador argues that "[t]he burden is on the EC if it wishes to claim that it still has a valid waiver with respect to bananas, and that this waiver covers the EC measures at issue. [E]ven if the burden were on Ecuador …" Could the Parties develop their legal arguments as to which of them should bear the burden of proving that the Doha Waiver is still valid and whether it covers the EC measure at issue.

3. The European Communities does not agree with what Ecuador states in its response to the Panel's questions. The European Communities believes that Ecuador's arguments are manifestly in contradiction with the settled case-law.

4. The basic rule concerning the allocation of burden of proof in WTO disputes has been clearly established in *US – Wool Shirts and Blouses*, where the Appellate Body stated that "the burden of

[1] See Exhibit EC-19. Source of data: Eurostat.

proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence. 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."[2]

5. The situation in the current proceedings is very different from that of the *European Communities-conditions for the granting of tariff preferences to developing countries*. In that case the contested measure was considered to be in violation of Article I, unless covered by the Enabling Clause. In our case it is undisputed that the WTO has granted a waiver covering the Cotonou Preference and that such waiver is in force until proven to have terminated.

6. In the first written submission of Ecuador, Ecuador argues that:

> "Pursuant to [the] provisions [of the two Understandings on Bananas], and with the participation and consent of other WTO members, suitable GATT Article I and GATT Article XIII waiver conditions applicable to bananas were negotiated and granted at the Doha Ministerial Conference in November 2001. As discussed more fully below, the Article I Waiver included an Annex on bananas requiring that the EC's future tariff-only regime "result in at least maintaining total market access for MFN banana suppliers," taking into account "all EC WTO market-access commitments relating to bananas ...". In the event of disagreement over whether the proposed regime met the conditions of the Annex, the Annex provided for arbitration. If the EC was found by the Arbitrator twice to have failed to satisfy the terms of the Annex standard, the waiver of Article I with respect to bananas would expire. In 2005, the EC twice proposed a new MFN rate for bananas that was, in each case, challenged by substantial suppliers and rejected by Arbitrators as not meeting the standards of the Article I waiver. The EC, nevertheless, proceeded to impose a new MFN duty at €176/mt, with a tariff rate quota for ACP countries at a zero duty for 775,000 mt., notwithstanding the termination of the Article I waiver with respect to bananas."[3]

7. It is therefore evident that Ecuador's acknowledges that the Cotonou preference enjoyed a legally valid waiver from Article I of the GATT 1994 but claims that, following the two arbitrations, that waiver has ceased to apply. Therefore, Ecuador, as a Party asserting a fact, ought to prove that its arguments regarding the termination of the Doha Waiver are founded. The European Communities submits that Ecuador has failed to discharge such burden of proof.

14. (Both Parties) Under the fifth tiret of the Bananas Annex of the Doha Waiver, can Parties identify the specific conditions listed therein and explain how many of those would have to be fulfilled for the waiver to cease to apply to bananas?

8. The European Communities has already provided its interpretation as to the conditions that had to be satisfied in order for the Doha Waiver to be terminated at the end of 2005. The European Communities considers that these conditions have not been satisfied and, therefore, that the Doha Waiver continues to exist until the end of 2007.

9. Ecuador seeks to rely on Article XXVIII in order to support its claims. The European Communities notes that Article XXVIII provides the framework through which WTO Members are supposed to negotiate. Contrary to Ecuador's assertions, a failure to reach a negotiated agreement cannot be impugned only upon one of the negotiating parties. Ecuador and the Third Parties that

[2] Page 14.
[3] Paras 11 to 13.

support it in these proceedings prevented the successful conclusion of the negotiations by not agreeing with the proposals of the European Communities. In fact, Ecuador still prevents the successful conclusion of the negotiations today, by initiating these proceedings. Therefore, Ecuador cannot rely on the non-conclusion of the negotiations to support its claims, because this non-conclusion is as much its fault as it is the fault of the other negotiating parties.

10. The European Communities considers that this interpretation is in accordance with the principle of good faith (*bona fides*), which is enshrined in Article 31 of the Vienna Convention, according to which "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". Accordingly, in *Korea – Procurement*, the panel found that this principle, expression of a principle of public international law, must be taken into account by WTO adjudicating bodies.

16. (Both Parties) In paragraph 96 of its first written submission, the EC states that "the text of GATT Article XIII, paragraph 1 makes clear that a Member can successfully claim that another Member's measures violate the provisions of GATT Article XIII, only if its can show that... the allegedly offending Member imposes a prohibition or restriction on products originating from the complaining Member and, in principle, there is a nullification and impairment of a benefit accruing to the complaining Member". Can the EC elaborate its arguments in support of each of these propositions, i.e. that in order to make a successful claim under Article XIII:1 of the GATT 1994, the complaining Member must show: (a) that the challenged measure must be a prohibition or restriction on products originating from the complaining Member; and, (b) that there is a nullification and impairment of a benefit accruing to the complaining Member. Can Ecuador provide a reasoned answer as to whether it agrees with the arguments raised by the EC.

11. The European Communities has already provided its views on the proper interpretation of Article XIII and its application to facts such as those faced by the Panel in this case. The *Bananas III* panel, which dealt with facts that were completely different from the facts of the present case, can hardly have intended in this single sentence to reject a well-established GATT practice in this regard.

12. In any event, in accordance with DSU Article 3.8, the European Communities has demonstrated that subjecting the tariff preference granted to ACP countries to a "cap" does not cause Ecuador any "nullification or impairment".

23. (Both Parties) The Understanding on Bananas signed by the EC with Ecuador and the US seems to include references, in both Phases I and II, to a bound tariff-rate quota, designated as "quota 'A'", of 2.2 million metric tons with an in-quota tariff rate not exceeding €75/mt, that would possibly extend beyond the end of 2002. Can Parties provide a reasoned answer as to whether they agree with this reading of the Understanding. Can the EC explain how this can be reconciled with its argument that the TRQ expired at the end of 2002, considering that the EC has been arguing for the binding nature of the Understanding on Bananas and that it would constitute a mutually agreed solution?

13. The European Communities notes with satisfaction that Ecuador does not claim that the Understanding amounted to a rebinding of the European Communities' concession for the 2.2 million tons of bananas. The European Communities agrees with this position and, therefore, for purposes of these proceedings it is undisputed that the Understanding does not have the effect of rebinding this concession.

28. (Both Parties) In paragraph 69 of its statement during the substantive meeting with the Panel, Ecuador argues that "[t]ariff quota concessions can be withdrawn, but the withdrawing member must follow Article XXVIII procedures which the Doha Waiver required and the EC

failed to do." Can Ecuador clarify in what specific way the EC has "failed" to follow Article XXVIII procedures and what would be the legal consequences of such failure. Can the EC provide a reasoned answer as to whether it agrees with Ecuador's assertion that it has failed to follow Article XXVIII procedures.

14. As the European Communities has already explained, the only binding in its Schedules of Concessions on 1 January 2006 was for a tariff of €680 per ton of bananas imported. An applied tariff of €176 per ton constitutes neither a "rebinding in violation of Article XXVIII", nor a violation of Article II. Therefore, Ecuador's claims are factually incorrect.

15. Moreover, as already mentioned, the European Communities initiated the negotiations in full compliance with the provisions of the Doha Waiver. However, it takes two parties to reach an agreement in negotiations. Ecuador cannot put the blame solely on the European Communities for the fact that a negotiated agreement has not yet been reached.

QUESTIONS ADDRESSED TO ECUADOR

29. (Ecuador) Can Ecuador expand on the factual information provided in Chart 1 of its first written submission by providing annual data (and their sources) for each year from 1999 (where "EC" refers from 1999 to 2003 to EC15 and from 2004 to 2006 to EC25, but, if possible, also show separately EC15 from 2004 to 2006; and for the first half of 2007 for EC27) for the following:

(a) Volume, FOB value and average unit value (in Euros/mt and USD/mt) of banana exports from Ecuador to the EC, and to the rest of the world;

(b) Share (percentage) of banana exports from Ecuador going to the EC, in volume and value terms;

(c) Share (percentage) of total volume of banana exports by Ecuador going to the EC divided by the EC's share of global banana imports; and,

(d) Amount of duties paid to the EC for the importation of bananas from Ecuador for each of the years specified above.

16. The European Communities has some doubts on the accuracy of certain figures provided by Ecuador in the Exhibits ECU-8, ECU-9, ECU-10 as well as in its in response to Panel's questions 29, 30, 31, 32, 33, 34, and 35. For instance, the European Communities observes a major discrepancy between the data contained in Exhibit ECU-8, part (a) continued, under B (world imports from Ecuador) and the answer provided by Ecuador to questions 29-35, page 2, table on volume exports from Ecuador. Some differences between these tables are quite significant (for instance, in 2006, more than 550,000 tons).

17. The European Communities would like to point out that the figures it had provided in its own submissions on this point were taken from the Ecuadorean Central bank (Exhibit EC-13 Table 9).

18. The discrepancies signalled above appear, in turn, to affect the shares in Exhibit ECU-8, part (b), since it seems that worldwide exports taken into account in this table could be higher than the real ones. Therefore, the European Communities considers that this table may not be accurate.

19. In addition, the same problem seems to arise with regard to the data on world imports shown in part (c) of same Exhibit. Indeed, FAO data on world imports and exports are much lower than those

shown in Exhibit ECU-8, part (c). So, the EC's shares of global imports indicated under letter G may not be completely correct.

20. Import and export data, as provided by FAO are enclosed in Exhibit EC-20.

30. (Ecuador) Chart II in Exhibit ECU-3 refers to "Imports of Bananas by The EU – 27" for the years 2005-2007. In regard to this chart, could Ecuador:

(a) Explain how it calculated the figures for 2005-2006, i.e. before the enlargement of the EU to 27 member States;

(b) Clarify whether the figures for 2007 are estimates and, if so, explain the calculations involved; and,

(c) State whether the figures for 2007 need any rectification, in the light of any relevant subsequent events since the submission of Ecuador's first written submission.

21. See above, paragraphs 16 and seq.

31. (Ecuador) In paragraph 46 of its first written submission, the EC mentions that "although the group of MFN countries (to which Ecuador belongs) has seen a spectacular increase in the volumes exported into the European Communities since 1 January 2006, Ecuador has experienced a slight reduction in its own exports: its 2006 volumes were approximately 3.6% below its 2005 volumes." In paragraph 7 of its opening statement during the substantive meeting with the Panel, the EC goes on to argue that "[t]he group of MFN banana suppliers had never exported so many bananas into the European Communities as it did in 2006." Can Ecuador provide a reasoned answer as to whether it agrees with these statements. If so, what are the reasons to explain the decrease in EC imports of bananas from Ecuador, accompanied by an apparent increase in the EC imports of other MFN bananas?

22. Ecuador submits market data that are not relevant to the issues before this Panel and that seek to confuse the issues. First, the Doha Waiver obliged the European Communities to maintain the total market access of the group of MFN suppliers. This means that the relevant periods that must be compared are (i) the period under the new import regime (i.e. 2006 and the first 6 months of 2007) with (ii) the period under the old regime (i.e. 1 January 2002 until 31 December 2005). Therefore, Ecuador's comparison of the export performance of the MFN and ACP countries between 1999 and 2005 has no relation to the question of whether the standard of the Doha Waiver has been satisfied. In contrast, the European Communities has provided market data comparing the relevant periods and establishing that the MFN suppliers' market access was more than maintained under the current regime.

23. Second, as already explained, it is not necessary any more to use the methods used by the Arbitrators prior to the introduction of the current import regime of the European Communities. At that time, the Arbitrators were trying to predict the future and were relying on various assumptions and models. This is not needed anymore, given that there is now ample evidence and market data from the real operation of the import regime that establishes that the MFN suppliers' market access has been more than maintained.

24. Third, the table provided by Ecuador confirms the fact that the MFN suppliers exported to the European Communities larger quantities of bananas in 2006 than in any other year since 1999.

25. Finally, Ecuador chooses not to provide any market data for 2007. As already explained, these data confirm the trends observed in 2006 and establish that the growth in MFN imports is larger than the growth in ACP imports.

32. (Ecuador) In paragraph 50 of its first written submission, the EC argues that:

> **"there is ample evidence that Ecuador's banana industry is facing a number of difficulties that have nothing to do with the new import regime of the European Communities. These difficulties include:**
>
> **(i) Adverse climatic conditions negatively affecting the 2006 production: the drought at the end of 2005 was followed by heavy rain at the beginning of 2006.**
>
> **(ii) According to Aprobanec, the Association of banana growers in Quevedo, Ecuador's banana production was significantly damaged by the eruption of the volcano Tungurahua on August 16, 2006. The volcano caused significant damage to approximately 35% of the banana plantations in the Los Rios province, which produces about 30% of all Ecuadorian bananas.**
>
> **(iii) Ecuador introduced certain administrative measures that encouraged traders operating in the European Communities' market to source bananas from other countries. For example, a letter sent by the Association of German Fruit Importers to Mr. Rizzo, Minister of Agriculture in Ecuador on 15 August 2006, expresses the discontent of the German traders with an Ecuadorian decree providing that the fruit should be inspected only at the plantation and not at the port. This administrative measure incited German traders to source bananas from other MFN countries, neighbouring Ecuador. Another administrative measure with a similar effect on European traders was adopted in August 2006: it imposed a minimum price of $3.25 per box and obliged exporters to pay producers via the Central Bank." (Footnotes omitted)**

Can Ecuador provide a reasoned answer as to whether it agrees with these assertions.

26. The European Communities notes that Ecuador's response does not deny the accuracy of the facts mentioned in the first submission of the European Communities. The European Communities considers that these facts have affected the decisions of traders sourcing bananas for the European markets and helps explains the reasons for the small reduction in the quantities of bananas exported from Ecuador into the European Communities. The European Communities also notes that, despite these problems, the quantity of bananas exported from Ecuador into the European Communities in 2006 is greater than the quantity of bananas exported in 2004 (under the old import regime). This confirms that the new import regime has not restricted in any way Ecuador's market access into the European Communities.

27. Further information on the adverse climatic conditions are included in Exhibit EC-21 and Exhibit EC-22. The former is a report published on the web-site of FAO in May 2006 which specifically describes the effects of the adverse climatic conditions on the bananas production of, among other countries, Ecuador[4]. The latter is a general description of the heavy rainfall and flooding

[4] http://www.fao.org/es/esc/en/20953/20987/highlight_107821en.html

which occurred in Ecuador in year 2006, and is taken from the web-site of NOAA's Satellite and Information Services[5].

28. In Exhibit EC-23 also it is also shown that Ecuador is diverting some of its sales to countries other than the European Communities and the United States (e.g. Russia, Ukraine etc.) where it can have better prices, and that its plantations suffer of some structural problems in comparison to other MFN bananas producers (e.g. Costa Rica and Colombia).

37. (Ecuador) Can Ecuador confirm that it signed an Understanding on Bananas with the EC on 30 April 2001, the text of which is reproduced in documents WT/DS27/58 and WT/DS27/60. If so, did the legal and factual assumptions based upon which Ecuador signed such understanding on 30 April 2001 change by June 2001 when the Understanding was notified to the DSB?

29. The European Communities notes that the text of the Understanding itself provides that it is a "mutually agreed solution". The European Communities has never understood what prompted Ecuador to seek to re-characterise the legal nature of the Understanding after its signing. In any event, Ecuador's unilateral statement cannot affect the legal nature of the Understanding as established by the Understanding's express provisions and its general content.

38. (Ecuador) Paragraph G of the Banana Understanding provides that "[t]he EC and Ecuador consider that this Understanding constitutes a mutually agreed solution to the banana dispute." Why did Ecuador then state in its notification of the Understanding to the DSB (document WT/DS27/60) that "although Ecuador sees the Understanding as an agreed solution which can contribute to an overall, definite and universally accepted solution, it must be made clear that the provisions of Article 3.6 of the DSU are not applicable in this case"? Please provide a reasoned response.

30. The European Communities notes that Ecuador's response confirms its desire to avoid compliance with the provisions of the Understanding by seeking to re-characterise its legal nature. The European Communities respectfully requests the Panel not to allow Ecuador to distort to true nature of the Understanding.

40. (Ecuador) In paragraph 4 of its statement during the substantive meeting with the Panel, Suriname argues that "[i]n this case there can be no doubt that a mutually agreed solution exists. Therefore, there cannot be any disagreement in the sense of Article 21.5 of the DSU." Provided that a mutually agreed solution exists, can Ecuador provide a reasoned answer as to whether it agrees with Suriname's conclusion in regard to Article 21.5 of the DSU.

31. Ecuador merely states that it disagrees with Suriname's assertion for two reasons: (i) there is no provision of the DSU that precludes bringing a complaint under Article 21.5 even if presence of a mutually agreed solution, and (ii) such a rule would be a "disincentive for parties to try to negotiate solutions".

32. On the former, paraphrasing Ecuador's statement, one could argue that there also is no provision of the DSU which precludes a Panel to take into account a mutually agreed solution. On the contrary, the European Communities believes that bilateral agreements between WTO members form part of the "applicable rules of law" between the parties to the dispute, in conformity with Article 31, paragraph 3(c) of the Vienna Convention on the Law of Treaties. On the latter, the European Communities believes that, actually, the contrary of what Ecuador states holds true. In fact, were WTO Members free to disregard their commitments provided for in a mutually agreed solution, this

[5] http://www.ncdc.noaa.gov/oa/climate/research/2006/mar/hazards.html

would really be a disincentive for parties to negotiate solutions. In fact, the value of a mutually agreed solution would be largely thwarted by such a rule.

33. In this context, the European Communities notes that even the Unites States does not argue that mutually agreed solutions cannot not be taken into consideration by the DSB. In its answer to Panel's question 101, the Unites States in fact asserts that "[t]he United States has not advanced, and would not support, the proposition that any agreement between the parties is never entitled to legal consequences in WTO dispute settlement."

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

34. As the European Communities has shown in paragraphs 35 to 45 of the European Communities' Answers to the Panel's Questions, the GATT CONTRACTING PARTIES repeatedly authorized the use of tariff quotas by granting waivers, such as the Enabling Clause, which covered Article I but made no reference to Article XIII. In the form of the Enabling Clause, at least, they continue to operate and to be taken advantage of under the WTO in order to justify exclusion from preferences granted by tariff quotas. These waivers and their application constitute concordant, common and consistent practice and as such are 'subsequent practice' within the meaning of Article 31(3)(b) of the Vienna Convention on the Law of Treaties indicating that Article XIII does not regulate exclusion from tariff quotas.

35. Another example of such waivers from Article I:1 of the GATT regarding tariff quotas is the *Italy – Preferences for Libya* Decision of 9 October 1952 (see Exhibit EC-24).[6] One can observe that a waiver from Article XIII was neither considered necessary, nor ever discussed.

45. (Ecuador) In what way should paragraph 9 of the Framework Agreement on Bananas (BFA) be interpreted, if not to establish an expiration of a 2.2 mt tariff rate quota (TRQ)? In other words, what exactly has expired, under the terms of paragraph 9, on 31 December 2002?

36. The European Communities disagrees with Ecuador's answer to the present question. The European Communities does not understand the reasons why – according to Ecuador - other parts of the BFA have expired at the end of year 2002, while the €75/mt concession has not.

37. Ecuador's assertion that "the EC made that concession *independently* in its schedule" is simply untrue, considering that the Schedule of the European Communities makes an explicit reference to its Annex for the "terms and condition" applying to that concession.

46. (Ecuador) In paragraph 93 of its second written submission, the EC argues that:

> **"Ecuador's second written submission goes on to assert in paragraphs 69 and 70 that 'eliminating the volume restraint element of a tariff quota does not authorize ignoring the tariff binding'. In other words, Ecuador seems to imply that once a tariff quota is granted in a WTO Member's schedules, the tariff part somehow becomes obligatory and perpetual, while the quota part may be freely eliminated. This assertion is not supported by any provision of WTO law and**

[6] The Exhibit contains a copy of the mentioned decision (document L/2824, p. 7) as well as a copy of the Report by the Working Party on Italy/Libya and Italy/Somalia Waivers in which the various modifications and extension of the Waiver for Libya are described.

> **Ecuador's second written submission does not even attempt to offer any explanation as to its legal basis. Moreover, accepting that the 'tariff element' and the 'quota element' of a tariff quota are completely separable and each has a 'life of its own' leads to unreasonable results. For example, Ecuador should explain why the rule that it proposes should not be the other way round, i.e. that the 'tariff element' of a tariff quota may be freely amended, while the 'quota element' should be treated as obligatory and perpetual."**

Can Ecuador provide a reasoned answer as to whether it agrees with the EC's arguments.

38. The European Communities notes that the OECD glossary of statistical terms gives the following definition of "tariff quota": "A tariff quota is a quantitative threshold (quota) on imports above which a higher tariff is applied. The lower tariff rate applies to imports within the quota". This makes it evident that the tariff and the quantitative threshold are inextricably and inevitably linked, as one is set at a given level because of the other, and vice-versa. The European Communities is unaware of any dispute arisen because a WTO Member contended that another Member would be bound to apply to future imports the in-quota tariff after the elimination of a tariff quota.

QUESTIONS ADDRESSED TO PARTIES AND THIRD PARTIES

90. (Both Parties, Nicaragua and Panama) In paragraph 108 of their respective third party submissions, Nicaragua and Panama argue that "[t]he EC's €75/mt concession – which from 1995 to 2005 covered all bound in-quota Latin American imports and informed the rate applicable to all other Latin American bananas entering the EC market – has been the single most important banana concession in Schedule CXL. In contrast to the prohibitive €680/mt rate, under which virtually no Latin American volumes have ever been entered, the €75/mt concession is the only rate that enabled Latin American market access to the EC market from 1995 to 2005. Unless the €75/mt bound rate receives the full protections of GATT Article II, the entire value of the EC's mandatory Uruguay Round concessions will be nullified". (Emphasis added). Can Nicaragua and Panama provide evidence for their assertions. If MFN banana imports have increased under an applied tariff rate of €176/mt, as argued by the EC, how can this be reconciled with the statement that "a €75/mt concession is the only rate that enabled Latin American market access to the EC market from 1995 to 2005"? Can Nicaragua and Panama clarify what would be meant by "providing the full protections of GATT Article II" to the €75/mt tariff rate. Can Parties provide a reasoned answer as to whether they agree with the assertions made by Nicaragua and Panama.

39. The question already highlights the inconsistency of the thesis supported by Nicaragua and Panama: the fact that MFN banana imports increased under a €176/mt duty shows clearly that it cannot be argued that "a €75/mt concession is the only rate that enabled Latin American market access to the EC market from 1995 to 2005".

40. The European Communities has provided the proper market data relating to the properly defined relevant periods which establish that Nicaragua and Panama's assertions are not correct.

91. (Both Parties, Nicaragua and Panama) In paragraph 19 of their combined statement during the substantive meeting with the Panel, Nicaragua and Panama argue that "[t]he EC tariff, which was the EC's scheduled banana concession from 1963-1994, was the equivalent of about €80 per tonne." Can Nicaragua and Panama elaborate on this argument and provide evidence for their assertions, as appropriate. Can the Parties comment on the argument and assertions.

41. As the European Communities has already explained, the concessions resulting from the Uruguay Round must be read on their own. The European Communities does not have the information necessary to calculate what would be the equivalence in today's prices for the European Communities of 25 Member States of the tariffs applied by various European countries in the 1960s and 1970s. Moreover, these assertions of Nicaragua and Panama have no relevance to the issues before the Panel.

92. (Both Parties and Suriname) In paragraph 10 of its statement during the substantive meeting with the Panel, Suriname argues that "[b]oth the Doha Waiver and the Understanding on Bananas were negotiated by the WTO members, including the interested parties, after the DSB adopted its recommendations and rulings in the original Bananas dispute. These two instruments constitute new secondary WTO law and create an entirely new legal framework for the issues that are now pending before the Panel. These new instruments clearly strike a new balance of rights and obligations for the entire WTO membership, in addition to the parties to the dispute." Can Suriname elaborate on these arguments. Can both Parties provide a reasoned answer as to whether they agree with Suriname.

42. The European Communities generally agrees with the arguments developed by Suriname in its response.

96. (Ecuador and Nicaragua) In paragraph 6 of its closing statement during the substantive meeting with the Panel, the EC argues that "the draft dated 2 November 2001, which Nicaragua has attached to its Third Party submission as Exhibit N-1, provided that the Doha Waiver would be terminated automatically within two months after the notification of the arbitration award to the General Council. However, this provision was not included in the final version of the Doha Waiver. The link between the awards of the arbitrator and the termination of the Doha Waiver was abandoned." Can Ecuador and Nicaragua provide a reasoned answer as to whether they agree with the statement.

43. The European Communities disagrees with the interpretation provided by Ecuador and by Nicaragua and Panama. The European Communities was never prepared to accept (and did not accept with the Doha Waiver) a system whereby the Doha Waiver would terminate automatically on the basis of predictions about the future found in an Arbitration award.

102. (EC, Nicaragua and Panama) In paragraph 44 of their combined statement during the substantive meeting with the Panel, Nicaragua and Panama argue that "[t]he [first compliance] panel's second suggestion never absolved any discriminatory ACP tariff quota from the obligations of Article XIII, however the larger import regime might be structured. To the contrary, the panel, only paragraphs before, found the EC's exclusive ACP tariff quota, by its own specific shape and nature, to be a quantitative restriction covered by Article XIII:5 that failed to treat like products 'equally, irrespective of origin,' in violation of Article XIII. No subsequent compliance suggestion can be read to nullify that actual finding of law." Can Nicaragua and Panama elaborate on these arguments. Can the EC provide a reasoned answer as to whether it agrees with the argument.

44. The European Communities does not agree with Nicaragua and Panama. Nicaragua and Panama continue to misuse the findings of the Panel in 1999, in an attempt to apply these findings to the current regime. However, the European Communities wishes to stress once gain that the current regime presents a large number of differences from the one scrutinised by the Panel in 1999. Thus, the comparison between the two systems, made by Nicaragua and Panama, is incorrect and misleading.

113. (Saint Lucia) In paragraph 3 of its statement during the substantive meeting with the Panel, Saint Lucia argues that "[i]n 2005 WTO Ministers in Hong Kong accepted the

tariffication proposal in which the TRQ was replaced by a single tariff of €176 per tonne. Indeed, the Ecuadorian delegation was a leading campaigner for this change and Minister Støre of Norway was charged with monitoring trade flows that would indicate if the change had in fact disadvantaged MFN suppliers." Can Saint Lucia provide evidence to support its assertion that in Hong Kong WTO Ministers accepted the tariffication proposal in which the TRQ was replaced by a single tariff of €176 per tonne.

45. The European Communities considers that the description of meetings at the WTO Ministerial of Hong Kong made by Santa Lucia is accurate.

46. Also, the European Commission would like to stress how the "Understanding between Costa Rica Columbia, Ecuador, Guatemala and the European Commission on the Banana Issue" (annexed to Santa Lucia's answer to the Panel's question) shows the good faith in which the European Communities negotiated a solution with the MFN countries and its willingness to revise its tariff level "if the collected data indicates market imbalances" (see point 7 of the Understanding).