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The *Dispute Settlement Reports* of the World Trade Organization (the "WTO") include panel and Appellate Body reports, as well as arbitration awards, in disputes concerning the rights and obligations of WTO Members under the provisions of the *Marrakesh Agreement Establishing the World Trade Organization*. The *Dispute Settlement Reports* are available in English, French and Spanish.

This volume may be cited as DSR 1997:II

TABLE OF CONTENTS

Page

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

Report of the Appellate Body
WT/DS27/AB/R

Adopted by the Dispute Settlement Body
on 25 September 1997

European Communities,
Appellant/Appellee

Ecuador, Guatemala, Honduras, Mexico and the United States,
Appellants/Appellees

Belize, Cameroon, Colombia, Costa Rica, Côte d'Ivoire, Dominica, Dominican Republic, Ghana, Grenada, Jamaica, Japan, Nicaragua, Saint Lucia, St. Vincent and the Grenadines, Senegal, Suriname and Venezuela,
Third Participants

Present:

Bacchus, Presiding Member
Beeby, Member
El-Naggar, Member

TABLE OF CONTENTS

I. INTRODUCTION

1. The European Communities and Ecuador, Guatemala, Honduras, Mexico and the United States (the "Complaining Parties") appeal from certain issues of law and legal interpretations in the Panel Reports, *European Communities - Re-*

gime for the Importation, Sale and Distribution of Bananas[1] (the "Panel Reports"). The Panel was established on 8 May 1996 to consider a complaint by the Complaining Parties against the European Communities concerning the regime for the importation, sale and distribution of bananas established by Council Regulation (EEC) No. 404/93 of 13 February 1993 on the common organization of the market in bananas ("Regulation 404/93")[2], and subsequent EC legislation, regulations and administrative measures, including those reflecting the provisions of the Framework Agreement on Bananas (the "BFA"), which implement, supplement and amend that regime. The relevant factual aspects of the EC common market organization for bananas are described fully at paragraphs 3.1 to 3.36 of the Panel Reports.[3]

2. The Panel issued four Panel Reports that were circulated to the Members of the World Trade Organization (the "WTO") on 22 May 1997. The Panel Reports contain the following conclusions:

With respect to Ecuador, in paragraph 9.1 of the Report, WT/DS27/R/ECU, the Panel concluded:

> ... that for the reasons outlined in this Report aspects of the European Communities' import regime for bananas are inconsistent with its obligations under Articles I:1, III:4, X:3 and XIII:1 of GATT, Article 1.2 of the Licensing Agreement and Articles II and XVII of the GATS. These conclusions are also described briefly in the summary of findings.

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[1] Complaint by Ecuador, WT/DS27/R/ECU; Complaint by Guatemala and Honduras, WT/DS27/R/GTM, WT/DS27/R/HND; Complaint by Mexico, WT/DS27/R/MEX; Complaint by the United States, WT/DS27/R/USA, 22 May 1997.

[2] Official Journal, No. L 47, 25 February 1993, p. 1.

[3] The following terms are used throughout this Report:

- "ACP States" refers to the African, Caribbean and Pacific States which are parties to the Fourth ACP-EC Convention of Lomé (the "Lomé Convention"), signed in Lomé, 15 December 1989, as revised by the Agreement signed in Mauritius, 4 November 1995;
- "traditional ACP States" refers to the 12 ACP States, listed in the Annex to Regulation 404/93, which have traditionally exported bananas to the European Communities; these are Côte d'Ivoire, Cameroon, Suriname, Somalia, Jamaica, Saint Lucia, St. Vincent and the Grenadines, Dominica, Belize, Cape Verde, Grenada and Madagascar;
- "traditional ACP bananas" refers to the quantities of bananas, exported by the traditional ACP States, up to the quantities of bananas set out in the Annex to Regulation 404/93;
- "non-traditional ACP bananas" refers to the quantities of bananas exported by the traditional ACP States in excess of the quantities of bananas set out in the Annex to Regulation 404/93, and to the quantities of bananas exported by banana-producing ACP States other than traditional ACP States;
- "third-country bananas" refers to the quantities of bananas exported by non-ACP States to the European Communities.

With respect to Guatemala and Honduras, in paragraph 9.1 of the Reports, WT/DS27/R/GTM and WT/DS27/R/HND, the Panel concluded:

> ... that for the reasons outlined in this Report aspects of the European Communities' import regime for bananas are inconsistent with its obligations under Articles I:1, III:4, X:3 and XIII:1 of GATT and Article 1.3 of the Licensing Agreement. These conclusions are also described briefly in the summary of findings.

With respect to Mexico, in paragraph 9.1 of the Report, WT/DS27/R/MEX, the Panel concluded:

> ... that for the reasons outlined in this Report aspects of the European Communities' import regime for bananas are inconsistent with its obligations under Articles I:1, III:4, X:3 and XIII:1 of GATT, Articles 1.2 and 1.3 of the Licensing Agreement and Articles II and XVII of the GATS. These conclusions are also described briefly in the summary of findings.

With respect to the United States, in paragraph 9.1 of the Report, WT/DS27/R/USA, the Panel concluded:

> ... that for the reasons outlined in this Report aspects of the European Communities' import regime for bananas are inconsistent with its obligations under Articles I:1, III:4, X:3 and XIII:1 of GATT, Article 1.3 of the Licensing Agreement and Articles II and XVII of the GATS. These conclusions are also described briefly in the summary of findings.

In each of the Panel Reports, the Panel made the following recommendation:

> ... that the Dispute Settlement Body request the European Communities to bring its import regime for bananas into conformity with its obligations under GATT, the Licensing Agreement and the GATS.

3. On 11 June 1997, the European Communities notified the Dispute Settlement Body[4] (the "DSB") of its decision to appeal certain issues of law covered in the Panel Reports and certain legal interpretations developed by the Panel, pursuant to paragraph 4 of Article 16 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU"), and filed a Notice of Appeal with the Appellate Body pursuant to Rule 20 of the *Working Procedures for Appellate Review* (the "*Working Procedures*"). On 23 June 1997, the European Communities filed an appellant's submission pursuant to Rule 21 of the *Working Procedures*. On 26 June 1997, the Complaining Parties filed an appellant's submission pursuant to Rule 23(1) of the *Working Procedures*. In accordance with Rule 16(2) of the *Working Procedures*, and at the request of the Complaining

[4] WT/DS27/9, 13 June 1997.

Parties, the Appellate Body granted a two-day extension for the filing of appellees' and third participants' submissions. On 9 July 1997, the Complaining Parties filed an appellee's submission pursuant to Rule 22 of the *Working Procedures*, and the European Communities filed an appellee's submission pursuant to Rule 23(3) of the *Working Procedures*. Ecuador also filed a separate appellee's submission on that date. A joint third participants' submission was filed by Belize, Cameroon, Côte d'Ivoire, Dominica, Dominican Republic, Ghana, Grenada, Jamaica, Saint Lucia, St. Vincent and the Grenadines, Senegal and Suriname (the "ACP third participants") on 9 July 1997 pursuant to Rule 24 of the *Working Procedures*. That same day, Colombia, Nicaragua and Japan filed third participants' submissions and a joint third participants' submission was filed by Costa Rica and Venezuela.

A. Procedural Matters

4. On 10 July 1997, pursuant to Rule 16(2) of the *Working Procedures*, the Government of Jamaica asked the Appellate Body to postpone the dates of the oral hearing, set out in the working schedule for 21 and 22 July 1997, to 4 and 5 August 1997. This request was not granted as the Appellate Body was not persuaded that there were exceptional circumstances resulting in manifest unfairness to any participant or third participant that justified the postponement of the oral hearing in this appeal.

5. By letter of 9 July 1997, the Government of Saint Lucia submitted reasons justifying the participation of two specialist legal advisers, who are not full-time government employees of Saint Lucia, in the Appellate Body oral hearing. Saint Lucia argued that there are two separate issues concerning rights of representation in WTO dispute settlement proceedings. The first issue is whether a state may have its case presented before a panel or the Appellate Body by private lawyers. The second issue deals with the sovereign right of a state to decide who constitutes its official government representatives or delegation. On the second, and more fundamental issue, Saint Lucia submitted that as a matter of customary international law, no international organization has the right to interfere with a government's sovereign right to decide whom it may accredit as officials and members of its delegation. Furthermore, Saint Lucia noted that neither the DSU nor the *Working Procedures* deal with the issue of a sovereign state's entitlement to appoint its delegation or accredit persons as full and proper representatives of its government. Saint Lucia maintained that to do so would go beyond the powers of a panel, the Appellate Body or the WTO under customary international law. Saint Lucia also observed that there is no provision in the DSU or in the *Working Procedures* requiring governments to nominate only government employees as their counsel in WTO panel or Appellate Body proceedings.

6. The Governments of Canada and Jamaica supported the request by Saint Lucia. In a letter of 14 July 1997, Canada stated its concurrence with the proposition advanced by Saint Lucia that the composition of a WTO Member's delegation, in the absence of any rules to the contrary, is a matter internal to the Mem-

ber itself. Canada argued that it is the Member's right to authorize those individuals it considers necessary or appropriate to represent its interests. Canada maintained that it is not appropriate for a panel or the Appellate Body to verify the credentials of individuals that a Member has authorized to participate in its delegation. By letter of 14 July 1997, Jamaica also submitted that a government has the right to determine the composition of its own delegation within the context of international law and practice.

7. On 14 July 1997, the Complaining Parties filed a written submission opposing the request of Saint Lucia for permission to allow non-governmental employees to participate in the Appellate Body's oral hearing in this appeal. The Complaining Parties pointed out that the Panel ruled, in its first substantive meeting with the parties on 10 September 1996, that the private counsel seeking to represent Saint Lucia were not entitled to attend the Panel's meetings in this case. The Complaining Parties noted that "the Panel's ruling is not specifically appealed in this appeal".

8. With respect to Saint Lucia's request that its legal advisers be granted an opportunity to participate in the Appellate Body's oral hearing, the Complaining Parties argued that there is no basis for the WTO to change its established practice in this area, and that such a change would entail a fundamental change in the premises underlying the WTO dispute settlement system. The Complaining Parties maintained that the rules of international law governing diplomatic relations, particularly those codified in the *Vienna Convention on Diplomatic Relations*[5], do not support the proposition that a government can name whomever it wants as a member of its delegation to represent it in a foreign international body. The Complaining Parties also argued that the *Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character*[6] has never come into force and has not been ratified by any of the major host states, including Switzerland and the United States, and as such is not applicable to the WTO. The Complaining Parties argued that the law of diplomatic representation does not give states *carte blanche* as to whom they may appoint to their delegations. Furthermore, with respect to the practice of other international organizations and international tribunals, the Complaining Parties argued that where participation of outside counsel is permitted, it is done so in accordance with specific written rules which have been negotiated and agreed to by parties to that organization or treaty.

9. The Complaining Parties submitted that from the earliest years of the General Agreement on Tariffs and Trade (the "GATT"), presentations by governments in dispute settlement proceedings have been made exclusively by government lawyers or government trade experts. With respect to developing countries, the Complaining Parties argued that, unlike the practice before other inter-

[5] Done at Vienna, 16 April 1961, 500 UNTS 95.
[6] Done at Vienna, 14 March 1975, AJIL 1975, p. 730.

national tribunals, under the provisions of Article 27.2 of the DSU, developing countries are entitled to legal assistance from the WTO Secretariat. The Complaining Parties also cited certain policy reasons in support of their position. WTO dispute settlement, they argued, is dispute settlement among governments, and it is for this reason that the DSU safeguards the privacy of the parties during recourse to dispute settlement procedures. Furthermore, the Complaining Parties asserted that if private lawyers were allowed to participate in panel meetings and Appellate Body oral hearings, a number of questions concerning lawyers' ethics, conflicts of interest, representation of multiple governments and confidentiality would need to be resolved.

10. On 15 July 1997, the Appellate Body notified the participants and third participants in this appeal of its ruling that the request by Saint Lucia would be allowed. The Appellate Body said the following:

> ... we can find nothing in the *Marrakesh Agreement Establishing the World Trade Organization* (the "*WTO Agreement*"), the *DSU* or the *Working Procedures*, nor in customary international law or the prevailing practice of international tribunals, which prevents a WTO Member from determining the composition of its delegation in Appellate Body proceedings. Having carefully considered the request made by the government of Saint Lucia, and the responses dated 14 July 1997 received from Canada; Jamaica; Ecuador, Guatemala, Honduras, Mexico and the United States, we rule that it is for a WTO Member to decide who should represent it as members of its delegation in an oral hearing of the Appellate Body.

11. In providing additional reasons for our ruling in this Report, it is important to note first to what this ruling does and does not apply. A request was received from the Government of Saint Lucia to allow the participation of two legal counsel, who are not government employees of Saint Lucia, in the oral hearing of the Appellate Body in this appeal. This is not an appeal of the Panel's ruling concerning the participation of the same counsel in the panel meetings with the parties in this case. The Panel's ruling was not appealed by a party to the dispute[7], and thus that ruling is not before us in this appeal. Second, it is well-known that in WTO dispute settlement proceedings, many governments seek and obtain extensive assistance from private counsel, who are not employees of the governments concerned, in advising on legal issues; preparing written submissions to panels as well as to the Appellate Body; preparing written responses to questions from panels and from other parties as well as from the Appellate Body; and other preparatory work relating to panel and Appellate Body proceedings. These practices are not at issue before us. The sole issue before us is whether Saint Lucia is

[7] Pursuant to Articles 16.4 and 17.4 of the DSU, only parties to a dispute, and not third parties, may appeal a panel report.

entitled to be represented by counsel of its own choice in the Appellate Body's oral hearing.

12. We note that there are no provisions in the *Marrakesh Agreement Establishing the World Trade Organization* (the "*WTO Agreement*"), in the DSU or in the *Working Procedures* that specify who can represent a government in making its representations in an oral hearing of the Appellate Body. With respect to GATT practice, we can find no previous panel report which speaks specifically to this issue in the context of panel meetings with the parties. We also note that representation by counsel of a government's own choice may well be a matter of particular significance - especially for developing-country Members - to enable them to participate fully in dispute settlement proceedings. Moreover, given the Appellate Body's mandate to review only issues of law or legal interpretation in panel reports, it is particularly important that governments be represented by qualified counsel in Appellate Body proceedings.

B. Oral Hearing

13. The oral hearing was held on 21, 22 and 23 July 1997. In his opening statement, the Presiding Member of the Division reminded the participants and third participants that the purpose of the oral hearing was to clarify and distil the legal issues raised in this appeal. The participants and third participants presented oral arguments, were questioned by the Members of the Division hearing this appeal, and made concluding statements. The third participants participated fully in all aspects of the oral hearing.

II. ARGUMENTS OF THE PARTICIPANTS

A. European Communities - Appellant

14. The European Communities appeals from certain of the Panel's legal findings and conclusions as well as from certain legal interpretations developed by the Panel.

1. Preliminary Issues

(a) Right of the United States to Advance Claims under the GATT 1994

15. The European Communities argues that the Panel infringed Article 3.2 of the DSU by finding that the United States has a right to advance claims under the GATT 1994. The European Communities asserts that, as a general principle, in any system of law, including international law, a claimant must normally have a legal right or interest in the claim it is pursuing. The European Communities refers to judgments of the Permanent Court of International Justice (the "PCIJ") and the International Court of Justice (the "ICJ") as support for its argument that

the concept of *actio popularis* "is not known to international law as it stands at present".[8]

16. According to the European Communities, treaty law is a "method of contracting out of general international law". Therefore, the *WTO Agreement* must contain a rejection of the requirement of a legal interest or an acceptance of the notion of *actio popularis* in order to conclude that the WTO dispute settlement system sets aside the requirement of a legal interest. The absence of such an express rule in the DSU or in the other covered agreements indicates that general international law must be applied. The European Communities maintains that the reasoning advanced by the Panel that all parties to a treaty have an interest in its observance is a general observation which is true for all treaties. The European Communities submits that this has not been accepted by the ICJ as a valid proposition under general international law granting all parties to a multilateral treaty *locus standi* in all cases.

17. The European Communities also argues that the provisions of Article 10.2 of the DSU, allowing a WTO Member that has "a substantial interest in the matter before a panel" to participate as a third party, suggest *a fortiori* that a party to a dispute must show a legal interest. The European Communities asserts that the United States has no actual or potential trade interest justifying its claim, since its banana production is minimal, it has never exported bananas, and this situation is unlikely to change due to climatic and economic conditions in the United States. In the view of the European Communities, the Panel fails to explain how the United States has a potential trade interest in bananas, and production alone does not suffice for a potential trade interest. The European Communities also contends that the United States has no right protected by WTO law to shield its own internal market from the indirect effects of the EC banana regime.

(b) Specificity of the Request for Establishment of the Panel

18. The European Communities argues that Article 6.2 of the DSU requires that a "specific measure" be identified, which implies that the mere identification of the legislation or regulations at issue is not sufficient, especially if they are broad and extensive and if only specific aspects of them are being attacked. The European Communities asserts that "specific measures at issue" should be given a substantive meaning and not a formalistic interpretation. The European Communities submits further that the request for establishment of a panel must at the very least make a link between the specific measure concerned and the article of the specific agreement allegedly infringed thereby in order to give both the de-

[8] The European Communities refers to the *South West Africa Cases* (Second Phase), ICJ Reports 1966, p. 47; the *Case Concerning the Barcelona Traction, Light, and Power Company, Limited* (Second Phase), ICJ Reports 1970, p. 32; and the *Mavrommatis Palestine Concessions Case*, PCIJ (1925), Series A, No. 2, p. 12.

fending party and prospective third parties a clear idea of what the alleged infringements are.

2. Interpretation of the Agreement on Agriculture

19. In the view of the European Communities, the Panel erred in interpreting Article 4.1 of the *Agreement on Agriculture*. The European Communities submits that the Preamble of the *Agreement on Agriculture* indicates that Members were aware of the uniqueness and the specificity of the negotiations concerning agricultural products in the Uruguay Round as compared to tariff negotiations in other areas. Two elements of this specificity are especially important in the context of these proceedings. First, the transition from a highly restrictive system, largely based on non-tariff barriers, to more open market access for agricultural products had to be progressive. Second, the process of reform initiated by the *Agreement on Agriculture* was aimed at achieving binding commitments in three areas: market access, domestic support and export competition. The fundamental achievement of this reform process was the obligation to remove non-tariff barriers and to convert them into tariff equivalents, including tariff quotas. The European Communities contends that the Panel's failure to take into account both the context and the negotiating history of the *Agreement on Agriculture*, in particular as evidenced by the *Modalities* document[9], contributed to the Panel's erroneous interpretation of Article 4.1.

20. The European Communities argues that Article 4.1 is a substantive provision. Read in conjunction with Article 1(g), it defines the market access commitments regarding agricultural products contained in the Schedules as "commitments undertaken pursuant to the *Agreement on Agriculture*". In support of its argument, the European Communities also refers to the Panel's interpretation of Article 21.1 of the *Agreement on Agriculture*. In the view of the European Communities, Article 21.1 confirms the "agricultural specificity" in its clearest form and demonstrates that the rules of the *Agreement on Agriculture*, including the Schedules specifically referred to in Article 4.1, supersede the provisions of the GATT 1994 and the other Annex 1A agreements, where appropriate. The European Communities submits that pursuant to Article 21.1 of the *Agreement on Agriculture*, Article XIII:2(d) of the GATT 1994 is applicable to market access commitments, subject to the provision of Article 4.1 of the *Agreement on Agriculture* allowing the inclusion in those commitments of "other market access commitments as specified" in the Schedule. The European Communities does not contest that the Members' Schedules are formally annexed to the GATT 1994. However, in applying the rule of priority in the implementation of the WTO rules relating to agricultural products, as set out in Article 21.1 of the *Agreement on Agriculture*, the provisions of the GATT 1994 shall be applied with regard to the

[9] *Modalities for the Establishment of Specific Binding Commitments Under the Reform Programme*, MTN.GNG/MA/W/24, 20 December 1993.

parts of the Schedules concerning the agricultural products "subject to the provisions" of the *Agreement on Agriculture*, and in particular, Article 4.1. The market access commitments contained in the part of each Member's Schedule relating to agricultural products shall therefore be those resulting from the "bindings and reductions of tariffs, and *other* market access commitments *as specified therein*".

21. The European Communities submits further that the fact that a number of Members have used tariff quotas, with country-specific allocations and an "others" category for making current access commitments, is a clear indication that the practice of allocating tariff quotas in this manner was considered acceptable under the *Agreement on Agriculture*. The European Communities asserts that the Panel's conclusion that this practice is contrary to Article XIII of the GATT 1994, and is not protected by Article 21.1 of the *Agreement on Agriculture*, will destroy a large part of the results of the Uruguay Round negotiations on agriculture relating to tariffication.

3. Interpretation of Article XIII of the GATT 1994

22. The European Communities disagrees with several aspects of the Panel's conclusions on Article XIII of the GATT 1994. The European Communities argues that while Article XIII:2(d) does not explicitly permit allocations on the basis of agreement with some Members not having a substantial interest, it does not forbid that possibility. The only unequivocal obligation flowing from Article XIII, with respect to Members not having a substantial interest, is to ensure that any Member is entitled to have access to at least a share of the tariff rate quota that approaches, as closely as possible, the share it would expect to receive in the absence of that tariff rate quota. The European Communities submits that an agreement on the allocation of the tariff quota shares with as many supplying countries as possible cannot be against the object and purpose of Article XIII. Furthermore, the terms of Article XIII:2(d) do not exclude the combined use of agreements and unilateral allocations for substantial suppliers. What is important, for the allocation to be in conformity with Article XIII, is that any Member not able to reach an agreement with the importing Member should not be penalized in its access to the tariff rate quota. The European Communities refers to the panel report in *Norway - Restrictions on Imports of Certain Textile Products*[10] ("*Norway - Imports of Textile Products*"), arguing that if the combined use of allocation methods is allowed for Members having a substantial interest, it is also allowed for Members not having a substantial interest. More specifically, with respect to Guatemala, the European Communities maintains that Guatemala cannot be considered as having been harmed in its trade interests in bananas in any way by the decision of the European Communities to include it in the "others" category, which amounts to 49 per cent of the tariff rate quota. In addition, the

[10] Adopted 18 June 1980, BISD 27S/119, paras. 15-16.

European Communities asserts that the tariff quota reallocation rules for the BFA are not inconsistent with Article XIII.

4. Separate Regimes

23. The European Communities argues that there are, in fact, two separate EC import regimes for bananas: one preferential regime for traditional ACP bananas and one *erga omnes* regime for all other imported bananas. The European Communities contends further that the non-discrimination obligations of Articles I:1, X:3(a) and XIII of the GATT 1994 and Article 1.3 of the *Agreement on Import Licensing Procedures* (the "*Licensing Agreement*"), only apply *within* each of these two regimes.

24. The European Communities takes the view that in the context of the tariff negotiations in the Uruguay Round, the issue of specified quantities of traditional ACP bananas under the preferential treatment provided for by the Lomé Convention was never raised nor discussed, let alone negotiated or included in the EC GATT Schedule LXXX. Legally, this implies that, under the preferential treatment of the Lomé Convention, the specified quantities of imports of traditional ACP bananas are not part of the bound commitments of the *erga omnes* regime and that the obligations of the European Communities *vis-à-vis* Members that are parties to the Lomé Convention have their source in the Convention itself and not in the GATT 1994. Furthermore, the allocation by the European Communities of the tariff quota in the EC Schedule is not only separate from, but also irrelevant to, the allocation of ACP preferential quantities, and a licence for the importation of bananas at the in-quota reduced rate could never be used to import bananas from any traditional ACP State. Therefore, the European Communities submits that the Panel's conclusion that there is a single licensing regime is simply refusing to see what happens in the real world.

25. In support of this "separate regimes" argument, the European Communities refers to the *Panel on Newsprint*.[11] The European Communities claims that the situations in that panel report and in this case are identical, in particular, the relationship between an *erga omnes* tariff rate quota and preferential treatment under a preferential agreement. The European Communities admits that there is a partial (and rather formalistic) difference between the present case and the *Panel on Newsprint* case in that the preferential regime in the latter case was justified under Article XXIV of the GATT 1947. The European Communities argues that this does not affect the relevance of the *Panel on Newsprint* case, because the preferential nature of the Lomé Convention has not been contested and the European Communities continues to believe that the Lomé Convention is justified under Article XXIV. The European Communities is concerned that the Panel's findings would oblige the European Communities to include traditional ACP

[11] Adopted 20 November 1984, BISD 31S/114, para. 55.

bananas in the current tariff quota for non-traditional ACP and third-country bananas, i.e. to increase or modify the concessions made by the European Communities in the context of the Uruguay Round. This would affect the balance of rights and obligations resulting from the Uruguay Round negotiations on agriculture.

26. The European Communities submits that the Panel ignored the "objective legal situation" that the common organization of the market in bananas has three separate elements: an internal one, a general external one and a preferential one. The European Communities asserts that the plain language of the GATT 1994 indicates that Article XIII applies to the non-discriminatory administration of quantitative restrictions and tariff quotas. The European Communities contends that it has only one tariff quota concerning bananas - the tariff quota of 2.2 million tonnes set out in the EC Schedule - and that the preferential quantities of traditional ACP bananas are not included in this tariff quota.

5. Interpretation of the Lomé Convention and Scope and Coverage of the Lomé Waiver

27. The European Communities submits that the Panel endorsed a different interpretation of the Lomé Convention and of the Lomé Waiver[12] from the one commonly accepted by the parties to that Convention.

28. The European Communities argues that the decision taken by the EC Council in its meeting of 14 to 17 December 1992 reflects a clear common understanding that "... the Lomé commitments will be met by allowing tariff-free imports from each ACP State up to a traditional level reflecting its highest sendings (best ever) in any one year up to and including 1990. In cases where it can be shown that investment had already been committed to a programme of expanding production, a higher figure may be set for that ACP State". The reasons for this decision were in Protocol 5 on Bananas to the Lomé Convention ("Protocol 5") and in the obvious need not to waste EC public money and trade opportunities that the EC's financial intervention was trying to establish. The best-ever shipments to the European Communities, by definition, are a statistical measure of past trade, but they in no way reflect an element of the present. The European Communities argues that the Panel's interpretation is tantamount to reducing the words "at present" in Article 1 of Protocol 5 to redundancy. Article 1 of Protocol 5 took into account a dynamic factual situation.

29. The European Communities disagrees with the Panel's conclusion that the current licensing system is not "an advantage" that the ACP countries enjoyed in the European Communities prior to the introduction of the banana regime. Before

[12] The Fourth ACP-EEC Convention of Lomé, Decision of the CONTRACTING PARTIES of 9 December 1994, L/7604, 19 December 1994 (the "Lomé Waiver"); and EC - The Fourth ACP-EC Convention of Lomé, Extension of Waiver, Decision of the WTO General Council of 14 October 1996, WT/L/186, 18 October 1996.

1993, the licensing system operated by the United Kingdom and France applied only to imports from third countries, but not to traditional ACP imports. Such an advantage, by virtue of Protocol 5, needed to be carried over into the licensing arrangements for the "new" EC banana regime. The European Communities argues further that Article 167 of the Lomé Convention states that the object of the Convention is to promote trade between the ACP States and the European Communities, and that the Lomé Convention highlights the importance of improving conditions for market access for the ACP States. Article 167 clearly goes beyond a mere tariff preference insofar as it also provides for the securing of "effective additional advantages". The effectiveness of the advantages is a key element thereof. According to the European Communities, Protocol 5 requires the continuation of the advantages enjoyed by traditional ACP States. Tariff preferences alone have been shown to be insufficient to ensure this. Without the combined tariff preferences and the import licensing system, ACP bananas would not be competitive in the EC market, and the European Communities would therefore not be able to fulfil its obligations under the Lomé Convention.

6. Licensing Agreement

30. In the view of the European Communities, the Panel erred in law in interpreting the *Licensing Agreement*, in particular, Articles 1.2 and 1.3, as applicable to tariff quotas. According to the European Communities, the Panel failed to distinguish appropriately "import quotas", which are quantitative restrictions, from "tariff quotas", which do not limit imports but rather regulate access to a reduced tariff rate. The European Communities asserts that Article 1.1 of the *Licensing Agreement* defines an import licence as "... an application or other documentation ... to the relevant administrative body as a prior condition for importation into the customs territory of the importing Member". The European Communities argues that the EC tariff quota licence is *not* a prior condition for importation. It is necessary to gain access at a reduced rate, but not to import bananas. The European Communities submits that Article 1.1 of the *Licensing Agreement* covers licences which are prior conditions "for importation", not "for importation at a lower duty rate".

7. Articles I:1 and X:3(a) of the GATT 1994 and Article 1.3 of the Licensing Agreement

31. With respect to the "neutrality" obligation in Article 1.3 of the *Licensing Agreement*, the European Communities submits that the letter, the context and the negotiating history, and even the Panel's own interpretation of the relationship between Article X of the GATT 1994 and Article 1.3 of the *Licensing Agreement*, plead against the use of Article 1.3 of the *Licensing Agreement* as a legal tool to compare the requirements of different licensing systems. The European Communities concludes that the use of Article 1.3 of the *Licensing Agreement* in this way would duplicate Article I:1 of the GATT 1994.

32. In addition, the European Communities submits that Article X of the GATT 1994 is designed to ensure the transparency and the impartiality of public authorities charged with the administration of the relevant national legislation regarding trade. The *raison d'être* of Article X is to ensure that administrative actions are as neutral as possible. According to the European Communities, the Panel distorted the interpretation of this provision in such a way that Article X is now equivalent to a repetition of the most-favoured-nation ("MFN") provision in Article I:1 of the GATT 1994. The European Communities maintains that the Panel erred in finding that the requirements of uniformity, impartiality and reasonableness in Article X:3(a) do not refer to the administration of the laws, regulations, decisions and rulings, but to the laws, regulations, decisions and rulings themselves. With respect to the interpretation of Article 1.3 of the *Licensing Agreement*, the European Communities agrees with the Panel that a perfect parallel can be made between Article X:3(a) of the GATT 1994 and Article 1.3 of the *Licensing Agreement*. However, Article 1.3 of the *Licensing Agreement* is *lex specialis* for the administration of import licensing procedures, while Article X:3(a) of the GATT 1994 is *lex generalis* for the administration of all "laws, regulations, decisions and rulings ...". As a result of the Panel Reports, the European Communities queries whether it is possible to find a breach of Article X:3(a) of the GATT 1994 without also finding an infringement of Article 1.3 of the *Licensing Agreement*.

8. Interpretation of Article III:4 of the GATT 1994

33. The European Communities asserts that the Panel erred in finding that the licensing regime is an internal measure subject to Article III:4 of the GATT 1994, and not a border measure, and that the Panel misunderstood the notion of internal measures in the GATT 1994. The European Communities refers to the panel report in *Italian Discrimination Against Imported Agricultural Machinery*[13] ("*Italian Agricultural Machinery*") and argues that the word "all" in that report, when referring to measures that modify conditions of competition between domestic and imported products in domestic markets, is concerned with internal measures. The European Communities asserts that the panel report in *Italian Agricultural Machinery* stands for the proposition that Article III applies only to measures applied to imported products "once they have cleared through customs".[14]

34. The European Communities argues that a licence is a document which is a prior condition for applying the reduced duty-rate bound under the EC tariff quota to imported bananas. This all happens before the bananas have cleared customs. According to the European Communities, the existence of the licence is justified by operations whose very nature is that of a border operation concerning

[13] Adopted 23 October 1958, BISD 7S/60.
[14] *Ibid*., para. 11.

the duty-rate applicable to that product. The European Communities asserts that the Panel confuses the notion of border measures and the notion of adjustment at the border of an internal measure, the latter being the subject of *Ad* Article III of the GATT 1994.

35. In the case of the EC licensing system, it is obvious that domestic bananas are not subject to an import licence since they do not cross the border, do not clear customs, do not pay duty and are not included in any tariff quota. Therefore, the very application to an import licence of the notion of border adjustment in *Ad* Article III is legally wrong. The European Communities refers to the panel report in *United States - Section 337 of the Tariff Act of 1930*[15] ("*United States - Section 337*") in support of its interpretation. The European Communities submits further that most of the licensing procedures are applied to persons rather than products. The European Communities refers to the panel report in *United States - Restrictions on Imports of Tuna*[16] ("*United States - Imports of Tuna (1991)*") in support of its argument that Article III cannot be used to compare treatment between persons but only between products.

36. As to the effect of hurricane licences, the European Communities asserts that a simple side-effect resulting from the implementation of a measure pursuing a general internal policy, which has or might have an effect on the conditions of competition, should not be considered to infringe Article III:4 of the GATT 1994 unless clear evidence is provided that this general policy measure was designed to afford protection to domestic products. The European Communities asserts that hurricane licences are distributed only in the event of a proven catastrophe and are limited to the quantities lost due to the devastation caused by a hurricane. Therefore, these licences are clearly a means of intervention to support the income of those domestic producers that are harmed by the hurricane. The European Communities points out that operators can benefit from hurricane licences in two ways: they can use them to import bananas from third countries, or they can sell the licences. Hurricane licences by themselves do not affect the internal sale or offering for sale of domestic bananas to the detriment of imported bananas. The only effect they have is an occasional increase in the EC tariff quota. Finally, the European Communities asks whether WTO Members are not allowed to remedy the consequences of natural disasters within their own territories in order to prevent their producers from being eliminated.

9. Interpretation of Article I:1 of the GATT 1994

37. The European Communities contends that the Panel erred in law in interpreting Article I:1 of the GATT 1994. With respect to the activity function rules, the European Communities argues that discrimination occurs in treating identical situations differently, or in treating different situations in the same way. The

[15] Adopted 7 November 1989, BISD 36S/345.
[16] Unadopted, BISD 39S/155, p. 195.

Panel's findings would amount to compelling the European Communities to treat different situations concerning operators, in the same way, and by doing so, create additional burdens for some that would not be appropriate for the situation in which they are operating. In the view of the European Communities, nothing in Article I:1 of the GATT 1994 forbids a Member to treat different situations on their merits.

38. The European Communities submits that tariff quota licences have a considerable monetary value and confer significant advantages to the holders. The same factual reality does not exist with regard to traditional ACP bananas. It is "simply nonsensical" to find that a violation of Article I:1 of the GATT 1994 was committed solely on the grounds that the activity function rules are not used in the traditional ACP licensing system. The European Communities maintains that the activity function rules were established for reasons relating to EC domestic competition policy, and that competition policy considerations fall entirely outside the ambit of the *WTO Agreement* as it is currently drafted.

39. With respect to export certificates, the European Communities asserts that the possibility of passing quota rents to banana producers "does exist" in any situation where a licensing system exists together with limited access to a quantitative restriction or a tariff quota. In the view of the European Communities, it would be wrong to affirm that a distinction could be drawn between quota rents resulting from an export certificate, and quota rents arising from the existence of an import licence. The European Communities argues that there is no advantage for Colombian, Costa Rican and Nicaraguan bananas deriving from the requirement of export certificates. The distribution of quota rents, provided that licences are tradeable, confers no particular advantage, nor has any effect on, the importation of Ecuadorian, Guatemalan, Honduran and Mexican bananas into the European Communities as compared with the access of BFA bananas to the EC market.

10. Measures Affecting Trade in Services

40. The European Communities submits that the Panel erred in law by finding that there is no legal basis for an *a priori* exclusion of measures within the EC banana import licensing regime from the scope of the *General Agreement on Trade in Services* (the "GATS"). The European Communities argues that as a result of the Panel's interpretation of the scope of the GATS, there is a "total overlap" between the GATT 1994 and the other Annex 1A agreements of the *WTO Agreement*, on the one hand, and the GATS on the other hand. Any measure can fall under both the Annex 1A agreements and the GATS simultaneously. The European Communities maintains that there is no indication that the Panel examines, under the GATS, a different aspect or part of the EC licence allocation rules from that examined under the GATT 1994 or the *Licensing Agreement*. Therefore, exactly the same measures are scrutinized under the GATT 1994 and under the GATS. In the view of the European Communities, this is contrary to

Articles I and XXVIII of the GATS. Furthermore, this interpretation is contrary to Article 3.2 of the DSU.

41. The European Communities asserts that the Panel's broad interpretation of the term "affecting" is not supported by the text of Article XXVIII(c) of the GATS. If the category of "measures in respect of ... the purchase, payment or use of a service" in Article XXVIII(c) is part of the category of "measures affecting trade in services", then the term "in respect of" describes the same relationship as the term "affecting", namely that between measures and trade in services. The European Communities maintains that for an important category of these measures, "in respect of" means the same as "affecting". The European Communities argues that the words "for the supply of a service" in Article XXVIII(c)(iii) indicate that the measures must relate to a natural or legal person in its quality of a service supplier, or in its activity of supplying a service. In the view of the European Communities, the Panel's interpretation neglects the combined implication of Articles I and XXVIII(c)(iii) of the GATS, i.e. that the measures complained of must bear on the supply of a service. As a consequence, the measures at issue are measures in respect of importation of goods and measures relating to the supply of services with respect to these goods.

42. The European Communities also asserts that the Panel's interpretation is not supported by the preparatory work for the GATS. The European Communities argues that there is no indication that the broad interpretation given to the term "affecting" in a Note by the Secretariat[17], which is referred to by the Panel in support of its interpretation, was shared by the negotiators of the GATS. In addition, introducing into a general article on the scope of the GATS a very specific meaning of the word "affecting", derived from previous panel reports interpreting Article III of the GATT 1947, would be taking things out of context. The European Communities also argues that the Panel's view that the drafters of the GATS wanted to widen the scope of the GATS by using the term "supply of a service" instead of the narrower term "delivery of a service" is in no way conclusive, because it would still need to be shown that the measures concerned were taken in respect of the "production, distribution, marketing, sale and delivery of a service" within the definition of "supply of a service" in Article XXVIII(b) of the GATS. In the view of the European Communities, the Panel's interpretation is not supported by the context of the relevant GATS provisions. The European Communities argues that the preamble of the GATS as well as other important provisions, such as Articles VI:4 and XVI of the GATS, give no indication that the GATS is concerned with the indirect effects on trade in services of measures relating to trade in goods.

43. Furthermore, the European Communities argues that the negotiators of the GATS wanted to create an instrument of limited coverage that would be distinct

[17] *Definitions in the Draft General Agreement on Trade in Services*, Note by the Secretariat, MTN.GNS/W/139, 15 October 1991.

ratione materiae from the GATT 1994, and that the simultaneous application of the GATT 1994 and the GATS leads to a clear conflict between the rights of one Member under one agreement and the rights of another Member under the other agreement. In the view of the European Communities, measures targeted at trade in a certain good, such as the imposition of an anti-dumping duty, a selective safeguard measure or a prohibitive tariff, could have repercussions on service suppliers, in particular, distribution services, and could be condemned under the GATS. This would, in turn, impede the Member's right to take measures under the GATT 1994. As a further example of probable conflicts between the GATT 1994 and the GATS, the European Communities mentions discriminatory measures in favour of goods taken in a customs union pursuant to Article XXIV of the GATT 1994. These may have negative repercussions on services supplied from non-Member countries. It is quite likely that those repercussions would not be covered by the restrictions inscribed in the Services Schedules of the Members of the customs union. The European Communities asserts that a similar problem might arise with waivers granted under Article XXV of the GATT 1994 that allow discrimination in respect of trade in goods in relation to which certain services could be provided. This would run counter to Article II of the GATS, and the Lomé Waiver would become useless unless the respective services come within an Article II exemption.

44. The European Communities argues further that conflicts may occur where Members have, in accordance with Article XVI of the GATS, introduced restrictions into their Schedules that limit their commitments under Article XVII. When scheduling initial commitments under Article XVII, Members were told that there was no need to make provision in their Schedules for measures which were not direct limitations on services trade as such, but rather were restrictions on trade in goods. The European Communities argues that this interpretation would have scheduled limitations on trade in goods had there been a generally-shared awareness that such measures were deemed to be covered not just by the GATT 1994, but also by the GATS. The European Communities contends that this interpretation would amount to upsetting the results of the negotiations on scheduling under the GATS, if precisely those Members that had been the most liberal in their services scheduling, in particular in the sector of distribution services, would suffer negative consequences on their rights in trade in goods. The European Communities also maintains that the absence of rules of conflict and of a hierarchical relationship between the GATT 1994 and the GATS indicates that an overlap was not seen by the negotiators to exist between the GATS and the GATT 1994, because these agreements were believed by the negotiators to cover different domains and to apply to different kinds of measures.

45. Moreover, the European Communities argues that the Panel's view that, in the absence of an overlap between the GATS and the GATT 1994, the value of Members' obligations would be undermined by the possibility of circumvention, is not supported by the object and purpose of the two agreements. The European Communities asserts that the only example of the so-called frustration of the object and purpose that the Panel can suggest is in the transport area, which clearly

falls under Article III:4 of the GATT 1994. The European Communities asserts that apart from Article V, Article III:4 is probably the only article of the GATT 1994 that explicitly submits certain services measures to GATT disciplines. Article III:4 applies only to a limited number of services and applies only to the extent that measures relating to those services directly affect the competitive relationship between imported and domestic goods.

46. The European Communities argues that as a practical result of the Panel's conclusion that no measures are excluded *a priori* from the scope of the GATS, the Panel does not demonstrate that the impugned measures actually affect the supply of services, within the meaning of Article XXVIII(b), in one of the four modes of service supply. Under the EC's view of the term "affecting", the Panel does not explain how rules dividing up entitlements to parts of the tariff quota for bananas among importers constitute measures in respect of the production, distribution, marketing or sale and delivery of wholesale trade services by service suppliers present in the EC's territory. The European Communities asserts that the Panel's findings on activity functions, export certificates and hurricane licences are also characterized by the same lack of reasoning.

11. Scope of Article II of the GATS

47. The European Communities submits that the Panel's finding in paragraph 7.304 of the Panel Reports "that the obligation contained in Article II:1 of the GATS to extend 'treatment no less favourable' should be interpreted *in casu* to require providing no less favourable conditions of competition" is in contradiction with the customary rules of interpretation of public international law. The European Communities asserts that paragraphs 2 and 3 of Article XVII of the GATS reflect the interpretation of the terms "treatment no less favourable" given to Article III:4 of the GATT 1994 in the panel report, *United States - Section 337*.[18] This interpretation, which is contentious, cannot be equated with the ordinary meaning of the term "treatment no less favourable" in a wholly different article of the GATS.

48. In the view of the European Communities, the GATS negotiators found it necessary in the case of Article XVII to include concepts from previous GATT panel reports to clarify that the standard of "no less favourable treatment" was one of substantive discrimination based on modification of competitive conditions. The European Communities submits that such clarification was expressly omitted from the MFN clause in Article II:1 of the GATS, despite the fact that it was drafted on the same "treatment no less favourable" basis as Article XVII of the GATS. Therefore, Article II:1 of the GATS does not encompass the idea of substantive discrimination or the even further-reaching notion of modification of competitive conditions. The European Communities also asserts that the concept

[18] Adopted 7 November 1989, BISD 36S/345.

of "no less favourable treatment" is not limited to Article III of the GATT 1994. There are a number of MFN-type clauses in the GATT 1994 which use the same wording, for example, Article V, paragraphs 5 and 6 and Article IX:1. There is, therefore, no reason to conclude that since the wording of Article III:4 was used, this automatically carries a standard of substantive discrimination, including "modification of competitive conditions".

49. The European Communities maintains that it is only logical that the obligations under Article XVII of the GATS should be more onerous than those under Article II, because Members have made commitments and specifically opened up certain sectors, which is not the case with Article II of the GATS. According to the European Communities, it is unlikely that Members, many of whom originally viewed the GATS MFN clause as a conditional MFN provision during the Uruguay Round, could have, in the end, agreed to an MFN clause that also includes the principle of equality of competitive conditions without explicitly saying so.

50. Moreover, the European Communities submits that legislators may have a good knowledge of the competitive conditions prevailing between service suppliers of that Member and those not of that Member, but there is usually a lack of knowledge relating to the competitive conditions prevailing among services and service suppliers of various third countries. Therefore, the European Communities contends that it may be feasible for the legislators of Members to ensure formally equal treatment between third-country services and service suppliers, but it is virtually impossible to be sure that they are also ensuring equal competitive conditions.

51. Finally, the European Communities argues that the formulation of the Panel's finding in paragraph 7.304 of the Panel Report, in particular, the use of the term *in casu* might be interpreted to mean that the standard of equality of competitive conditions in Article II of the GATS applies only when, as in this case, full commitments have been made in a sector, while the formal MFN standard would apply for sectors without commitments. This would turn Article II into a half-conditional MFN clause and would contradict the result of the negotiations which was to have no conditions attached to the MFN clause.

12. Effective Date of GATS Obligations

52. The European Communities submits that the Panel erred in its interpretation of what constitutes "a situation" within the meaning of general international law as codified in Article 28 of the *Vienna Convention on the Law of Treaties* (the "*Vienna Convention*").[19] The European Communities maintains that the "situation" is the alleged *de facto* discrimination against and between foreign suppliers which must be proven to exist at the moment the obligations of the

[19] Done at Vienna, 23 May 1969, 1155 UNTS 331; 8 International Legal Materials, p. 679.

treaty - in this case the GATS - apply to the Members allegedly having caused the discrimination, and that such discrimination cannot lawfully be established on the basis of the factual situation existing before the entry into force of the treaty. The European Communities argues that the Panel failed to demonstrate that there was *de facto* discrimination after the entry into force of the GATS on 1 January 1995, as the Panel relied entirely on the Complaining Parties' data on the ownership and control of companies relating to 1992 and on the Complaining Parties' estimates on market shares of companies which were based on the situation existing before June 1993.

13. Burden of Proof

53. According to the European Communities, the Panel misapplied the standard of burden of proof affirmed by the Appellate Body in *United States - Measure Affecting Imports of Woven Wool Shirts and Blouses from India*[20] ("*United States - Shirts and Blouses from India*"). According to that standard, a complaining party must adduce "evidence sufficient to raise a presumption that what is claimed is true" in order to prove its claim.[21] In the view of the European Communities, this burden of proof should be satisfied, at the latest, at the first meeting of a panel.

54. The European Communities maintains, first, that the Panel misapplied this standard of burden of proof in deciding which companies are a "juridical person of another Member" and are "owned", "controlled" by or "affiliated" with a juridical person of another Member within the meaning of Articles XXVIII(m) and (n) of the GATS. The absolute minimum for any claim under the third mode of service supply is showing that these conditions are fulfilled. The European Communities argues that the Panel, in fact, relied exclusively on the list of alleged "banana wholesaling companies established in the European Communities that were owned or controlled by the Complainants' service suppliers, 1992" and that this list as such gave no clear indications about ownership or control. In this respect, the European Communities contends that, in particular, there are doubts that Del Monte was owned by Mexican persons at the time the complaint was brought and that, for this reason, it is impossible to argue that the Complaining Parties had satisfied the requirement of proving their claim in respect of companies from Mexico.

55. Second, the European Communities asserts that the burden of proof has not been discharged with respect to the distribution of the market for wholesale services for bananas between Category A and Category B Operators. The European Communities contends that the Panel's conclusion is based on alleged market shares for imports and production, and that it is not clear how the distribution of market shares in the services market can be based completely on shares in the

[20] WT/DS33/AB/R, adopted 23 May 1997.
[21] *Ibid.*

import and production markets, unless one assumes that service providers supply services only in respect of their own bananas and that there is no independent market for services in bananas in general. Finally, the European Communities maintains that, with respect to hurricane licences, the Panel posited an unproved identity of the class of Category B operators and of the class of "operators who include or represent EC producers" as well as the group of "operators who include or represent ACP producers".

14. Definition of Wholesale Trade Services

56. The European Communities submits that the Panel erred in applying the concept of wholesale trade services in the Provisional Central Product Classification (the "CPC Classification").[22] The European Communities argues that importation is not mentioned as one of the subordinate services of wholesale trade services, and that, although the list of subordinate services is only illustrative, reselling of merchandise is the core activity of wholesalers, whereas importation involves only buying and not selling. The licensing regime is an import licensing system and, therefore, does not touch the service providers of the Complaining Parties in their wholesale service activities, but only in their import activities, that is, in their activities in the goods sector. The European Communities maintains that, with respect to the allegedly discriminatory effect of operator categories, the Panel failed to demonstrate that there are unequal conditions of competition between service suppliers, and not between importers, who, although they may be also service suppliers, are not, in the latter capacity, affected by the licensing system. The European Communities submits further that the Panel erred in law by determining that integrated companies are service suppliers under the GATS, because normally only their products, and not their services, appear on the market, and thus the GATS does not apply.

15. Alleged Discrimination under Articles II and XVII of the GATS

(a) Operator Category Rules

57. The European Communities argues, in the alternative, that the EC licensing system for bananas is not discriminatory under Articles II and XVII of the GATS. Therefore, the Panel erred in law by condemning the operator category rules under Articles II and XVII of the GATS. The European Communities contends that, in the final analysis, the operator category rules are condemned principally because of statistical evidence on market shares. The European Communities refers to the panel report in *United States - Taxes on Automobiles*[23] where

[22] Provisional Central Product Classification, United Nations' Statistical Papers, Series M, No. 77, 1991.
[23] DS31/R, 11 October 1994, unadopted.

the panel looked at the statistical evidence, and beyond the dominant presence of imported goods in the sector of the market affected by the measure, in order to determine whether the measure had the "aim and effect" of affording protection to domestic production. The European Communities contends that the various aspects of the licensing system pursue legitimate policies and are not inherently discriminatory in effect or design. The European Communities asserts, therefore, that the Panel should have looked beyond the fact that, because of reasons related to the historical development of the banana distribution sector, service suppliers of the Complaining Parties are concentrated in one segment of the market, and EC and ACP suppliers in another segment.

58. The European Communities contends that the legitimate aim of the operator category rules, as recognized by the European Court of Justice (the "ECJ"), is to establish a machinery for dividing the tariff quota among the different categories of traders concerned, to encourage operators dealing in EC and traditional ACP bananas to obtain supplies of third-country bananas and to encourage importers of third-country bananas to distribute EC and ACP bananas. This corresponds with the EC's objectives of integrating the various national markets and of harmonizing the differing situations of banana traders in the various Member States. The European Communities maintains that to achieve "mutual interpenetration" of the markets of the various Member States, a system of transferability of licences was used. The operator category rules served the purpose of distributing the quota rents among operators in the market. The fact that service suppliers of the Complaining Parties may have been over-represented in one category in particular (Category A), and may have significant but not overwhelming representation in another category (Category B) is, in itself, no basis for arguing that the operator category rules afford protection to EC (or ACP) service suppliers. Furthermore, in terms of conditions of competition, operator category rules do not have the effect of affording protection to service suppliers of domestic- or ACP-origin as they leave a commercial choice to the operators.

(b) Activity Function Rules

59. The European Communities maintains that EC activity function rules aim to correct the position of all ripeners *vis-à-vis* all suppliers of bananas and seek to maintain the ripeners' bargaining power in relation to their commercial partners as it was before the creation of the tariff quota. The effect of activity function rules is highly dependent on the commercial choices of operators. Operators who supplied wholesale services primarily for bananas that were brought under the tariff quota can avoid, or reduce, the extent to which they are subject to activity function rules by extending their services to include EC and ACP bananas. The European Communities further submits that primary importers can resort to "licence pooling" or having bananas ripened under contract.

(c) Hurricane Licences

60. The European Communities asserts that hurricane licences are intended to compensate those who suffer directly from damage caused by tropical storms. The European Communities argues that the fact that compensation benefits those persons who have the nationality of the country where the disaster took place, does not necessarily signify that such measures are discriminatory and modify the conditions of competition under Article XVII of the GATS. There is no infringement of Article II of the GATS, as there is no formal, or hidden *de facto*, distinction as to operators. There is no indication in the hurricane licence rules that operators that are not ACP-owned or -controlled cannot own or represent ACP producers on the same basis as ACP or EC-owned or -controlled operators.

16. Nullification or Impairment

61. The European Communities argues that the Panel erred in paragraph 7.398 of the Panel Report in its application of the standard of rebuttal under Article 3.8 of the DSU in concluding that the European Communities had not succeeded in rebutting the presumption that there was nullification or impairment with respect to all of the Complaining Parties. The EC's argument related only to the United States, and was that the United States lacked a legal right or interest with respect to the GATT 1994. This is one of the exceptional cases where the presumption of nullification or impairment in Article 3.8 of the DSU could be rebutted, because of the absence of any trade damage to the United States, due to its lack of exports of bananas. The European Communities submits that the United States has never exported bananas to the European Communities or anywhere else in the world. Demonstrating a lack of any trade damage is a recognized way in the GATT of rebutting the presumption of nullification or impairment. As the Panel failed to rule on the issue of United States' export statistics, it is not capable of deciding that the European Communities has not succeeded in rebutting the presumption of nullification and impairment. The European Communities contends that this is a clear failure by the Panel to objectively assess the matter before it, as required under Article 11 of the DSU. Moreover, the Panel erred in law in its application of the standard of rebuttal under Article 3.8 of the DSU by assuming that the EC's rebuttal was based on mere quantitative elements when it was based on the United States' proven incapacity to grasp competitive opportunities in the banana export market. Thus, the Panel rendered meaningless the possibility of rebutting the presumption under Article 3.8 of the DSU. The European Communities also submits that the Panel infringed Article 9 of the DSU by not ruling separately on the position of the United States. The rights which the European Communities would have enjoyed if separate panels had been established have been impaired under Article 9 of the DSU.

B. Ecuador, Guatemala, Honduras, Mexico and the United States - Appellees

1. Trade in Goods

(a) Country Allocations

62. The Complaining Parties submit that the Panel correctly found the "two regimes" argument of the European Communities to be irrelevant for WTO purposes. The Complaining Parties argue that nothing in the text of Article XIII of the GATT 1994 suggests that the obligations concerning "restrictions" and "shares" of trade or imports can be avoided by creating legal formalities, such as "separate regimes", for administrative or other reasons. The Complaining Parties argue further that the insistence by the European Communities that it has "only one tariff quota concerning bananas" is neither legally relevant nor factually correct. Article XIII of the GATT 1994 clearly does not distinguish between quota allocations reflected in a Schedule and those that are not. In the view of the Complaining Parties, the panel report in *Norway - Imports of Textile Products*[24] confirms that creating separate regimes for certain developing countries does not permit a Member to avoid its Article XIII obligations. The Complaining Parties also argue that the *Panel on Newsprint*[25] does not support the "separate regimes" argument because the justification of the preferential treatment under Article XXIV of the GATT 1994 was crucial in the *Panel on Newsprint* case, and no such justification exists in this case. In response to the EC's concern about the modification of its obligations, the Complaining Parties argue that the Panel has not modified the EC's obligations under its Schedule but has insisted that these obligations be observed for the benefit of all concerned. Therefore, the Panel correctly concluded that all of the EC's country-specific allocations must be considered together in determining consistency with Article XIII of the GATT 1994.

63. The Complaining Parties submit that the Panel correctly concluded that EC allocations to non-substantial suppliers are inconsistent with Article XIII of the GATT 1994. They argue that the text of Article XIII:2(d) of the GATT 1994, in particular the word "all", amply supports the Panel's conclusion that the combined use of agreements and unilateral allocations for the allocation among Members having a substantial interest is inconsistent with Article XIII:2(d). In support of their argument, the Complaining Parties refer to the panel report in *Norway - Imports of Textile Products*[26] and to the drafting history of the GATT 1947.[27] The Complaining Parties argue that if Article XIII of the GATT 1994 does not allow the combined use of agreements and unilateral allocations for the

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[24] Adopted 18 June 1980, BISD 27S/119, paras. 15, 16 and 18.
[25] Adopted 20 November 1984, BISD 31S/114.
[26] Adopted 18 June 1980, BISD 27S/119, paras. 15-16.
[27] *Report of the First Session of the London Preparatory Committee of the United Nations Conference on Trade and Employment*, UN Document EPCT/33, October 1946, p. 14, referred to in the Complaining Parties' appellee's submission, para. 36.

allocation among Members having a substantial interest, it also does not allow the combined use for the allocation among Members without a substantial interest. Concerning the EC's argument as to allocations to Members without a substantial interest, the Complaining Parties argue that Article XIII of the GATT 1994 is unambiguous in requiring that the administration of quantitative restrictions and country-specific allocations must be non-discriminatory and reflective of recent trade patterns. The European Communities persists, against both the text and the object and purpose of Article XIII, in defending the arbitrary assignments of shares based on agreements with suppliers regardless of their level of trade. Additionally, the Complaining Parties assert that Article XIII:2(d) recognizes that it may indeed not always be practicable to reach agreement with all suppliers, but it is precisely for such situations that Article XIII:2(d) provides for the possibility of assigning country-specific allocations based on historical shares. However, the EC's insistence that Members cannot be considered as "having been harmed" by their inclusion in the "others" category ignores basic economic realities and the underlying tenets of Article XIII. Country-specific allocations are recognized in Article XIII:2 as an advantage for which specific rules are required to carry out the general principle in Article XIII:1 of non-discrimination. The Complaining Parties assert further that a Member may reallocate unused amounts of a quota or tariff quota among other supplying Members, but Article XIII:2 of the GATT 1994 does not permit this to be done in a discriminatory manner.

64. The Complaining Parties submit that the Panel correctly found that Article 21.1 of the *Agreement on Agriculture* is not a defence to the inconsistencies with Article XIII of the GATT 1994 found with respect to the EC's country-specific allocations. The Panel properly dismissed the EC's contention that Article 4.1 of the *Agreement on Agriculture* effectively incorporates GATT-inconsistent provisions of the Schedules into the *Agreement on Agriculture* and thereby legitimizes them. The ordinary meaning of Article 4.1 of the *Agreement on Agriculture* does not permit it to be read as a substantive provision. The Complaining Parties argue that, had the drafters wished to incorporate the Schedules by reference into the *Agreement on Agriculture*, they could have done so explicitly. No provision of the *Agreement on Agriculture* clashes with Article XIII of the GATT 1994. Accordingly, Article 21.1 of the *Agreement on Agriculture* is not relevant, and Article XIII of the GATT 1994 applies to the EC tariff quota allocations. The Panel's findings are fully supported by the object and purpose of the *Agreement on Agriculture*, which is to make agricultural products subject to strengthened and more operationally-effective GATT rules. Finally, the Complaining Parties assert that the fact that the "current access" tariff quotas of many WTO Members include country-specific allocations does not support the EC's argument. The related allegation by the European Communities that other countries have disregarded Article XIII of the GATT 1994 is factually unsupported. However, even if true, it cannot serve to contradict the ordinary meaning of the relevant terms of the *Agreement on Agriculture* nor to endorse the EC violations.

(b) Licensing Agreement

65. The Complaining Parties submit that the Panel correctly found that the *Licensing Agreement* applies to licensing procedures for tariff quotas. In their view, the European Communities cannot factually dispute that import licences are required as a prior condition for importing in-quota bananas. Moreover, this in-quota quantity comprises the sum total of third-country and non-traditional ACP bananas entering the EC market. According to the Complaining Parties, the context of Article 1.1 of the *Licensing Agreement*, as well as Articles 3.2, 3.3 and the Preamble of the *Licensing Agreement*, and prior GATT practice on the notion of "restriction", confirm that the *Licensing Agreement* also applies to licensing procedures for tariff quotas. The Complaining Parties also argue that a major achievement of the Uruguay Round agriculture negotiations was the large-scale conversion of non-tariff barriers to tariff quotas. They maintain that making tariff quotas an exception to the disciplines of the *Licensing Agreement* would directly contradict the trend towards transparency and predictability.

66. Finally, the Complaining Parties contend that the Panel properly concluded that the issuance of hurricane licences exclusively to ACP and EC producers and producer organizations, or operators including or directly representing them, but not to third-country producers and producer organizations or operators including or directly representing them, was inconsistent with the requirement of "neutrality in application" contained in Article 1.3 of the *Licensing Agreement*.

(c) Article III of the GATT 1994

67. The Complaining Parties submit that the Panel correctly found that the distribution of Category B licences conditioned on purchases of EC bananas is inconsistent with Article III:4 of the GATT 1994. According to the Complaining Parties, the text of Article III:4 indicates coverage beyond legislation directly regulating or governing the sale of domestic and like imported products. In support of this argument, the Complaining Parties refer to the panel report in *Italian Agricultural Machinery*[28] and to the Interpretative Note *Ad* Article III of the GATT 1994. Referring to the panel report in *United States - Section 337*, the Complaining Parties argue that the dispositive issue under Article III:4 is whether a discriminatory advantage is affecting the sale or purchase of the domestic product.[29] In response to the EC's argument relating to the panel reports in *United States - Imports of Tuna (1991)* and *United States - Section 337*, the Complaining Parties assert that these panel reports show that Article III does apply to all measures affecting trade in goods. The Complaining Parties insist that the object of Article III is to ensure that Members accord foreign products no less favourable treatment than like domestic products in the application of any measure af-

[28] Adopted 23 October 1958, BISD 7S/60, para. 11.
[29] Adopted 7 November 1989, BISD 36S/345, para. 5.10.

fecting the internal sale of products, regardless of whether it applies internally or at the border. The Complaining Parties further assert that the European Communities cannot claim that imported products are treated under the Category B rules in the same way as domestic products, once they have cleared customs. In support of this argument, they refer to the statement of the panel in *Italian Agricultural Machinery* that any measure that "modif[ies] the conditions of competition between the domestic and imported products on the internal market", including one that encourages domestic purchases of national goods, violates Article III:1 of the GATT 1994.[30] Referring to the Appellate Body's previous ruling that Article III:1 is a general principle that informs the rest of Article III[31], the Complaining Parties argue that given Category B's explicit incentive to purchase EC bananas, the "design and architecture" of the measure to afford protection to EC producers is clear.

(d) Article I:1 of the GATT 1994

68. The Complaining Parties submit that the Panel correctly found the activity function rules to be inconsistent with Article I:1 of the GATT 1994. In contrast to the activity function rules, the simpler procedures applicable to ACP bananas constitute a clear regulatory "advantage" in violation of Article I:1 of the GATT 1994. In support of their argument, the Complaining Parties refer to the panel report in *United States - Denial of Most-Favoured-Nation Treatment as to Non-Rubber Footwear from Brazil*[32] ("*United States - Non-Rubber Footwear*"). None of the rationales invoked by the European Communities in justification for the activity function rules - such as that ACP imports are "inherently less profitable" and that different "situations concerning operators" require a different allocation of quota rents - legitimizes regulations which discriminate explicitly among like products on the basis of their origin.[33] The Complaining Parties add that Article I:1 of the GATT 1994 applies to any "rules or formalities", and that the EC's argument that measures intended to implement competition policies are somehow "outside of the WTO" is "confused and groundless".

69. According to the Complaining Parties, the European Communities themselves recognized the commercial value of the export certificates in the European Commission *Report on the EC Banana Regime*, in which the European Commission indicated that export certificates helped the BFA countries "share in the economic benefits of the tariff quota".[34] The Complaining Parties argue that export

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30 Adopted 23 October 1958, BISD 7S/60, para. 12.

31 Appellate Body Report, *Japan - Taxes on Alcoholic Beverages* ("*Japan - Alcoholic Beverages*"), WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, 97 at 111.

32 Adopted 19 June 1992, BISD 39S/128, paras. 6.8-6.17.

33 *Ibid*., para. 6.11.

34 Commission of the European Communities, *Report on the EC Banana Regime*, VI/5671/94, July 1994, p. 12, contained in the Complaining Parties' first submission to the Panel.

certificates accord holders in BFA countries preferential bargaining leverage to extract a share of the quota rent for their fruit exported to the European Communities, and hence give BFA countries a competitive advantage over other Latin American suppliers. This "possibility" (i.e. privilege) was requested by the BFA countries.

(e) Article X of the GATT 1994

70. The Complaining Parties submit that the Panel correctly found that the licensing procedures applicable to Latin American bananas differ from, and go significantly beyond, those required in respect of traditional ACP bananas in violation of Article X:3(a) of the GATT 1994. Because everything from border measures to internal measures falls within the language of Article X:1 of the GATT 1994, and because the import licensing procedures of the European Communities constitute internal laws regulating border measures, the Complaining Parties conclude that the procedures at issue fall well within the scope of Article X:1 of the GATT 1994. The language of Article X:3(a) prohibits the application of two significantly different, origin-based sets of licensing procedures. The Complaining Parties argue that the Panel rested its findings on a review of the different EC procedures, not on the operator category and activity function rules themselves. The Panel's analysis specifically reviewed the licensing procedures at issue and not the enabling laws as such. Furthermore, there is no support in the WTO for the proposition that Article I and Article X of the GATT 1994 cannot overlap. The fact that the EC discriminatory import procedures are inconsistent with the uniformity requirement of Article X:3(a) does not mean that the licensing rules themselves cannot represent "rules and formalities" that have not been accorded immediately and unconditionally to like products of all origins in violation of Article I of the GATT 1994. The Panel correctly found that the EC practices violated both Articles I and X of the GATT 1994. In response to the EC's argument that Article 1.3 of the *Licensing Agreement* is *lex specialis*, and that the Panel must therefore make concurrent findings under both Article X:3(a) of the GATT 1994 as *lex generalis* and Article 1.3 of the *Licensing Agreement*, the Complaining Parties submit that it is only in the event of conflict between the GATT 1994 and a provision of another Annex 1A agreement (such as the *Licensing Agreement*), that the provision of the latter agreement prevails.

(f) Hurricane Licences

71. Furthermore, the Complaining Parties assert that the Panel correctly found that hurricane licences created an incentive to purchase EC bananas in violation of Article III:4 of the GATT 1994. Operators that purchase EC bananas can expect in the event of a hurricane to be compensated for both their lost volume in the form of extra "hurricane licences" and with respect to their reference quantities for purposes of future licensing entitlement. Therefore, operators are being encouraged, by way of hurricane licences, to purchase EC bananas instead of "Latin American bananas" in violation of Article III:4 of the GATT 1994. Ac-

cording to the Complaining Parties, irrespective of the impact hurricane licences may have had on the tariff quota, the incentive such licences create to purchase EC bananas is a clear, discriminatory modification of conditions of competition in violation of Article III:4 of the GATT 1994. Finally, the Complaining Parties assert that WTO Members are entitled to afford "occasional protection against the effects of natural disasters", but they may not do so through discriminatory measures that encourage the purchase of EC bananas.

72. The Complaining Parties assert that the Panel properly concluded that there is nothing in Protocol 5 that suggests that the European Communities is required to apply other factors to increase the shares of ACP countries above their best-ever export levels before 1991. They argue further that the plain language of Article 1 of Protocol 5 makes clear that it means past and present ACP "access to its traditional markets and its advantages on those markets," and not pending or contemplated ACP investments in production that may or may not materialize at some future time in the form of trade in the EC market. The Complaining Parties contend that operator category rules were not formerly enjoyed by ACP countries, and are not required to provide access to traditional markets, and that there are other methods consistent with WTO rules by which the European Communities could assist the ACP countries in competing in the EC market. During the Panel proceedings, the European Communities declined to put forward any facts relating to the "past" "situation" concerning import licence systems. The Complaining Parties argue that even if this "factual" issue is reviewable, the EC's belated assertion that licences for third-country banana imports "were a permanent market management system" is inconsistent with statements made during the Panel proceedings.

2. General Agreement on Trade in Services

(a) Threshold Legal Issues

73. With respect to all issues concerning the GATS raised in this appeal, the Complaining Parties argue that the Panel was correct. The Complaining Parties ask the Appellate Body to affirm the Panel's findings on the GATS.

74. The Complaining Parties submit that the ordinary meaning of the GATS, in its context, establishes that it has a broad scope and that the Panel correctly concluded that the GATS applies to all measures affecting the marketplace for services, including services measures that also relate to goods. The ordinary meaning of the term "affecting" is "having an effect on" or "having an impact on". The Complaining Parties contend that the negotiators of the GATS clarified the inclusive nature of the terms "trade in services" and "supply of a service" by adding the illustration found in Article XXVIII(c) of the GATS and, that this, together with the ordinary meaning of the term "affecting", makes plain that the scope of the GATS is "as sweeping as possible". The Complaining Parties argue that the European Communities is incorrect in claiming that "affecting" and "in respect of" are used in parallel in Article XXVIII(c) of the GATS. What follows

the phrase "affecting" is "trade in services" and, by contrast, what follows the phrase "in respect of" is not "trade in services". The Panel was, therefore, correct in rejecting the EC's argument.

75. The Complaining Parties also maintain that this broad ordinary meaning is confirmed by the broad interpretation of Article III of the GATT by previous panels. The Complaining Parties maintain that the drafters of the GATS were generally familiar with such basic GATT concepts[35], and that this includes the Note by the GATT Secretariat issued to the GATS negotiators.[36] A Secretariat Note of this sort, issued generally to all delegations participating in the negotiations, is a legitimate part of the preparatory work of the GATS for the purpose of confirming the ordinary meaning of the text - in this case, its broad scope.

76. The Complaining Parties submit that the Panel properly found that the mutual exclusivity of the GATT 1994 and the GATS would be fundamentally at odds with the object and purpose of both agreements. In support of this argument, the Complaining Parties set out a number of "goods measures" that do not directly regulate a service *per se*, but place foreign-owned firms at a distinct competitive disadvantage.[37] The acceptance of the argument of the European Communities that measures regulating goods are excluded from the GATS disciplines would seriously erode service commitments made in the goods distribution sector - both wholesaling and retailing. The Complaining Parties maintain that the entire sector is devoted to the distribution of goods and that measures affecting this sector will, by definition, have a direct or indirect connection with goods. In support of their argument as to the possibility of "overlaps" between the GATT 1994 and the GATS, the Complaining Parties refer also to the Appellate Body Report in *Canada - Certain Measures Concerning Periodicals* ("*Canada - Periodicals*").[38]

77. In response to the arguments of the European Communities concerning anti-dumping duties and preferential treatment of goods under free trade agreements, the Complaining Parties submit that the relevance of these arguments is not clear as the GATS violations in this case were not based on the fact that the European Communities provided greater market access to EC and ACP bananas than to "Latin American bananas". In reply to the argument by the European Communities on the GATT exceptions and waivers, the Complaining Parties submit that the Panel properly described this issue not as a fundamental issue of overlap between the GATT 1994 and the GATS, but rather as an issue of the "appropriate drafting of waivers". With respect to the EC's argument concerning scheduling, the Complaining Parties maintain that, had the negotiators under-

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[35] The Complaining Parties refer in particular to the panel report, *Italian Agricultural Machinery*, adopted 23 October 1958, BISD 7S/60.

[36] *Definitions in the Draft General Agreement on Trade in Services*, Note by the Secretariat, MTN.GNS/W/139, 15 October 1991, para. 12.

[37] Complaining Parties' appellee's submission, para. 193.

[38] WT/DS31/AB/R, adopted 30 July 1997.

stood that all goods-related measures were automatically exempted from the GATS, they would not have extended the GATS to include entire sectors - such as distribution and freight transportation - devoted entirely to the sale and movement of such goods. Finally, in response to the argument by the European Communities on the absence of any provision in the WTO agreements to resolve conflicts between the GATT 1994 and the GATS, the Complaining Parties submit that the framers of the GATS did not adopt a rule of exclusivity, and thus some sort of "unspoken hierarchy", because they did not perceive any "overlap" to have any significant consequences.

78. The Complaining Parties submit that the Panel correctly concluded that Article II of the GATS applies to instances of *de facto* discrimination. The Complaining Parties argue that the phrase "treatment no less favourable" in Article II of the GATS is unqualified and therefore not limited to measures embodying *de jure* discrimination, but rather by its terms applies to *all* less favourable treatment, whether or not the fact that it is less favourable is apparent from the face of the measure. The Complaining Parties agree also with the Panel that Article III of the GATT 1994 is an important context for the interpretation of Article II of the GATS, and that the prior interpretation of the phrase "treatment no less favourable" in Article III:4 by GATT panels confirms the broad plain meaning of the same phrase as used in Article II of the GATS. Article II:2 of the GATS and the Annex on Article II Exemptions, which set out elaborate listing and review procedures for MFN exemptions, provide additional relevant context. The Complaining Parties observe that it is difficult to imagine why the negotiators would provide such procedures if Members were at liberty to adopt discriminatory measures in any event, escaping coverage of Article II unless the discrimination is "formal" in design. The Complaining Parties also support the Panel's reasoning in that the additional paragraphs 2 and 3 in Article XVII of the GATS neither add to, nor subtract from, the "treatment no less favourable" standard. The Complaining Parties agree with the Panel in that the narrow "formal" interpretation of the MFN standard in Article II:1 of the GATS would be incompatible with its non-discrimination objective and purpose. The negotiating history of the MFN clause in the GATS confirms that the "treatment no less favourable" standard was intended to require effective equality of opportunities and that the GATS negotiators were made fully aware that it had been interpreted in that way by the panel report in *United States - Section 337*.[39] In support of this argument, the Complaining Parties refer to a Note by the GATT Secretariat reviewing various non-discrimination concepts in the context of offering possible MFN options for the Group of Negotiations on Services.[40]

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[39] Adopted 7 November 1989, BISD 36S/345, para. 5.11.

[40] *Most-Favoured-Nation Treatment and Non-Discrimination Under The General Agreement on Tariffs and Trade*, Note by the Secretariat, MTN.GNS/W/103, 12 June 1990.

(b) Application of GATS to the EC Licensing System

79. The Complaining Parties submit that the Panel correctly concluded that the EC licensing rules affected trade in wholesale trade services. In response to the EC's argument relating to the coverage of the definition of wholesale trade services, the Complaining Parties argue that, in fact, buying directly affects selling, and that if a wholesaler cannot buy bananas, he cannot sell them. The Complaining Parties submit that the EC's argument on integrated companies is irrelevant since the Complaining Parties demonstrated that their main distribution companies distributed bananas they had purchased from independent Latin American growers, in addition to bananas they grew themselves. In so far as trade in wholesale services for bananas was affected through import licences, the banana regime effectively regulated the access of banana wholesalers to the most important item they needed to provide wholesale trade services - namely, bananas.

80. The Complaining Parties contend that the Panel properly concluded that operator category rules, activity function rules and hurricane licences modify competitive conditions in favour of EC and ACP wholesale distribution firms in comparison to like third-country firms and are, therefore, inconsistent with both Articles II and XVII of the GATS. The Complaining Parties do not agree with the EC's "aims and effects" argument. The Complaining Parties note that the European Communities did not take this position before the Panel, that the European Communities does not indicate what in the text of the GATS calls for such an inquiry, and that the Appellate Body has found previously that the proper inquiry in applying the national treatment principle of Article III:1 of the GATT 1994 is not a measure's "aim and effect" but rather an examination of "... the underlying criteria used in a particular ... measure, its structure, and its overall application to ascertain whether it is applied in a way that affords protection to domestic products".[41]

81. In response to the argument by the European Communities that the aim of operator categories is to encourage "interpenetration" of markets, the Complaining Parties contend that this statement ignores the one-way transfer to EC and ACP firms of an entitlement to a portion of the business that had historically been in the hands of the Complaining Parties' distributors. The Complaining Parties further submit that the market integration claim by the European Communities is legally irrelevant under Articles II and XVII of the GATS and that Article V of the GATS governing market integration does not relieve the European Communities from either its national treatment or its MFN obligation *vis-à-vis* ACP and third-country service suppliers. The Complaining Parties refer to the EC's argument that operator categories were motivated largely by the legitimate need to promote competition by distributing quota rents "in a way which was not skewed

[41] Appellate Body Report, *Japan - Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, 97 at 120.

by the existing market situation".[42] According to the Complaining Parties, this is just another way of saying that the European Communities wished to re-arrange the "existing market situation" by moving business and resources from one group of service suppliers to another. The Complaining Parties also argue that the European Communities did not justify operator categories on the basis of competition policy concerns in any of the relevant directives establishing the measure. In response to the EC's argument that operator categories do not have an inherently discriminatory effect, the Complaining Parties argue that this is an inappropriate effort by the European Communities to place factual issues before the Appellate Body. In their view, operator categories are "inherently" discriminatory despite the EC's argument that all suppliers are on an equal footing to compete for access to supplies of the EC and ACP bananas. Unlike the wholesalers of the Complaining Parties, those of the European Communities and the ACP States are not required to initiate new business relationships in new regions in order to win back their traditional business.

82. With respect to the real design and operation of activity function allocations, the Complaining Parties submit that, since the Panel's assessment was in large part a factual inquiry, the Appellate Body should not interfere lightly with it. In response to the EC argument on the prevention of concentration of economic bargaining power in the hands of the large multinational companies, the Complaining Parties argue that this confirms the Panel's analysis that the allocation to ripeners was in fact *designed* to tilt the competitive environment against the Complaining Parties' firms. Furthermore, the Complaining Parties reject the argument by the European Communities that there were various opportunities available to avoid actual loss of market share, as such options involve substantial cost merely to regain former business. As a result, Complaining Parties' firms have a competitive disadvantage over EC firms which have not been required to make purchases or investments in order to retain their traditional banana business.

83. With respect to the allocation of hurricane licences, the Complaining Parties do not question the legitimacy of providing relief in the case of natural disasters, but rather the mechanism the European Communities has chosen to provide disaster relief. The Panel correctly found that this mechanism, in fact, increases the already large and discriminatory 30 per cent share of the tariff quota given predominantly to firms from the European Communities and the ACP States. However, the mechanism for hurricane licences places firms of the Complaining Parties' origin at a competitive disadvantage *vis-à-vis* EC and ACP operators from whom they package the licences.

84. In response to the EC's argument with respect to Article 28 of the *Vienna Convention*, the Complaining Parties argue that the Panel correctly characterized the measure at issue as continuing measures which were, in some cases, enacted

[42] EC's appellant's submission, para. 311.

before the entry into force of the GATS, but which did not cease to exist after that date. In its commentary on the final draft of the *Vienna Convention*, the International Law Commission recognized that such measures fall outside the scope of Article 28 of the *Vienna Convention*.[43] Concerning market shares, the Complaining Parties argue that the Panel necessarily had to base its analysis on trade data pertaining to a period several years earlier than the entry into force of the GATS, as the EC regime awards import rights based on *historical trade*.

85. With respect to the issue of the burden of proof, the Complaining Parties argue that, to the extent the Appellate Body can consider the claims raised by the European Communities to constitute an issue of law within its mandate under Article 17.6 of the DSU, the European Communities does not show how the Panel's rendering of its factual findings constitutes a legal error that the Appellate Body should reverse. The Complaining Parties observe that the Appellate Body in *United States - Shirts and Blouses from India*[44] declined to define a uniform set of facts needed to create the presumption of a violation, let alone the quantum of support needed to establish any particular fact given in the case. The Complaining Parties argue as well that the Panel based its evidentiary finding on a methodical, issue-by-issue examination of the evidence presented on the record, accurately described the information in the record and explained how, on the key facts, the European Communities had not rebutted the information submitted by the Complaining Parties. The Panel correctly concluded that Del Monte was Mexican-owned and that the relevance to the Panel's conclusion of a suggested alteration of Del Monte's status during the Panel's proceeding was not clear. The Complaining Parties further submit that there is no specific test required by the GATS concerning the ownership of ongoing companies.

86. The Complaining Parties argue that, with respect to ownership and control of service suppliers established in the European Communities, the Complaining Parties submitted to the Panel an array of corroborative information[45] which the Panel properly determined to be credible and sufficient. The Complaining Parties argue that the European Communities had not even asserted any point that contradicted the Complaining Parties' facts. The Complaining Parties maintain that the Panel correctly based its finding concerning market shares on the import and production markets, as it is this activity that generates entitlements to import licences as "primary importers". With respect to hurricane licences, the Complaining Parties assert that the European Communities should not be allowed to re-open this issue on appeal, as it never sought to dispute the identification of Category B operators (both of EC and ACP origin) as recipients of hurricane licences by the Complaining Parties during the Panel proceeding.

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[43] The Complaining Parties refer to the *Yearbook of the International Law Commission*, Vol. II (1966), p. 212.

[44] WT/DS33/AB/R, adopted 23 May 1997.

[45] The Complaining Parties refer to Exhibit E of their joint rebuttal submission.

3. Procedural Issues

(a) Request for Establishment of a Panel

87. The Complaining Parties submit that the Panel correctly found that the request for the establishment of a panel satisfied the requirements of Article 6.2 of the DSU. In response to the EC's arguments on specificity and the necessity of showing an explicit link between each measure and the article allegedly infringed, the Complaining Parties point out that there is no agreed WTO definition of the terms "specific measures at issue" and that, under the practice of the GATT 1947 CONTRACTING PARTIES, most requests for the establishment of a panel contained no explanation of how certain measures are inconsistent with the requirements of the specific agreements. The Complaining Parties also submit that the Panel correctly determined that the request was sufficiently precise to fulfil the three identified purposes of a panel request[46] by enabling the Panel to understand without difficulty which claims it was required to examine, by adequately informing the European Communities of the case against it, and by adequately informing third parties of the case against the European Communities.

(b) Right of the United States to Advance Claims under the GATT 1994

88. The Complaining Parties argue that the Panel correctly found that the United States has a right to advance "goods claims" in this dispute. The Complaining Parties submit that the European Communities appears to use the term "legal interest" as a "short-hand reference" for its arguments regarding United States' export interests in bananas and seems to stipulate an additional requirement that a complaining party must plead and prove nullification or impairment as a precondition for raising a claim. The Complaining Parties contend that neither Article XXIII of the GATT 1994 nor Articles 3.3 or 3.7 of the DSU contain any explicit requirement that a Member must have a "legal interest" in order to request a panel and that other provisions in the DSU, such as Article 3.8, confirm the absence of such a prerequisite. In addition, the "substantial interest" standard in Article 10.2 of the DSU on third-party participation is irrelevant because the rights of third-party participation and its purpose are fundamentally different from those of the parties to the dispute.

89. Moreover, the Complaining Parties contend that the European Communities was fundamentally mistaken in suggesting that "general" international law, requiring a legal interest to bring a claim, is operative in this case. The Complaining Parties observe that Article 3.2 of the DSU encompasses only customary

[46] The Complaining Parties refer to the Appellate Body Report, *Brazil - Measures Affecting Desiccated Coconut* ("*Brazil - Desiccated Coconut*"), WT/DS22/AB/R, adopted 20 March 1997, and argue that the discussion in that Report is equally relevant to requests for panels with standard terms of reference under Article 7.1 of the DSU.

rules of *interpretation* of public international law. Therefore, consistently with Article XVI:1 of the *WTO Agreement*, the Panel found that, in the absence of an explicit legal interest requirement in the *WTO Agreement*, GATT practice was relevant. As the Complaining Parties see it, in GATT practice, a wide variety of interests is permitted to support a claim.[47] The Panel noted that the United States does produce bananas in Hawaii and Puerto Rico, and that, even if the United States did not have a potential export interest, its internal market for bananas could be affected by the EC regime because of the potential effect on world prices. In the view of the Complaining Parties, the EC's arguments on the issue of the United States' trade interests contradict the EC's own past position in *United States - Restrictions on Imports of Tuna*.[48] The European Communities claimed in that case that any time a country produces a product, even if the application of another country's measure is only hypothetical, the potential effect on price in its market gives rise to a "legal interest".

90. The Complaining Parties submit further that the jurisdictional clause of Article XXIII of the GATT 1994 specifically applies to all WTO Members, and that Article 3.2 of the DSU specifically states that the WTO dispute settlement system "serves to preserve the rights and obligations of Members under the covered agreements".

(c) Nullification or Impairment

91. The Complaining Parties submit that the Panel correctly found that the numerous violations by the European Communities of the GATT 1994, the *Licensing Agreement* and the GATS have nullified or impaired benefits the United States is entitled to derive from those agreements. The Panel properly identified several areas in which benefits to the United States would be nullified or impaired by noting that the United States produces bananas in Puerto Rico and Hawaii and by finding that the violation by the European Communities of the WTO agreements could adversely affect the United States' internal market. The Complaining Parties also argue that the Panel justifiably cited the reasoning in *United States - Taxes on Petroleum and Certain Imported Substances*[49] ("*United States - Superfund*") in support of its finding that the European Communities had failed to rebut the presumption of nullification or impairment.

92. The Complaining Parties submit that the Panel noted a WTO Member's "interest in a determination of rights and obligations under the WTO Agreement". The Complaining Parties maintain that Article 3.7 of the DSU makes clear that it is for the complaining Member to decide whether to pursue dispute settlement and, if necessary thereafter, whether to pursue rights to suspend conces-

[47] The Complaining Parties refer to the Report by the Working Party on *Brazilian Internal Taxes*, adopted 30 June 1949, BISD II/181, para. 16.
[48] DS29/R, 16 June 1994, unadopted.
[49] Adopted 17 June 1987, BISD 34S/136, para. 5.1.9.

sions. More precision of the level of nullification or impairment becomes necessary only in the case where concessions are suspended under Article 22.4 of the DSU, because that provision requires that the level of suspension of concessions shall be equivalent to the level of nullification or impairment. According to the Complaining Parties, in the absence of a mutually-agreed solution, the first objective of dispute settlement is to secure the withdrawal of the inconsistent measure. This objective is not linked to the level of nullification or impairment, but to whether the measure at issue is inconsistent with WTO obligations.

C. Ecuador, Guatemala, Honduras, Mexico and the United States - Appellants

93. The Complaining Parties generally agree with the Panel's findings but consider that there are three conclusions that stand out in the Panel Reports as being unsupported by the relevant legal texts and customary principles of treaty interpretation, and are thus manifestly erroneous findings of law.

1. Scope of the Lomé Waiver

94. The Complaining Parties argue that the "ordinary meaning" of the Lomé Waiver, read in its context and in the light of its purpose, is clear, not ambiguous or obscure. The Lomé Waiver clearly and specifically waives Article I:1 of the GATT 1994 and no other provision of the *WTO Agreement*. According to the Complaining Parties, the Panel's overall approach in interpreting the Lomé Waiver was fundamentally flawed in two ways: first, it ignored the ordinary meaning of the text, and this is only allowed when the ordinary meaning would lead to a result that is "manifestly absurd or unreasonable"; and second, the Panel focused its analysis on speculation about the objective of the Lomé Waiver and the intentions of the parties seeking the Lomé Waiver, rather than on the text. The Complaining Parties contend that under the *Vienna Convention*, a treaty's object and purpose are to be considered in determining the meaning of the terms of the treaty but not as an independent basis for interpretation.

95. Furthermore, the Complaining Parties argue that in deciding that the Lomé Waiver applies to violations of Article XIII of the GATT 1994, the Panel disregarded the EC's express denial that the Lomé Waiver covers violations of Article XIII of the GATT 1994 in favour of what it infers to have been the EC's intentions in seeking the Waiver. However, the "object" of a treaty is that of all the parties, not the presumed intentions that might be attributed to only some of those parties. The Complaining Parties also assert that the rules governing the administration of quantitative restrictions in Article XIII are not analogous or "close" to the MFN provision of Article I of the GATT 1994. Instead, the specific rules in Article XIII are in fact an outgrowth of Article XI of the GATT 1994. The Complaining Parties argue that therefore, the Panel's reliance on "a general principle requiring non-discriminatory treatment" shared by Articles I and XIII of the GATT 1994 is "misguided". The Lomé Waiver does not state that the "princi-

ples" of Article I:1 are waived; it states that the "provisions" of that article are waived. A waiver analysis based on loose analogies among various non-discrimination/MFN-like obligations would extend a waiver from Article I well beyond Article XIII of the GATT 1994. MFN-like disciplines could also include Article V:5 on transit of goods, Article IX:1 on marks of origin and Article XVII:1 on state trading. The Complaining Parties maintain that GATT practice shows two things: that the non-discriminatory disciplines in Article XIII are distinct[50]; and that in 50 years the CONTRACTING PARTIES granted only *one* waiver in respect of Article XIII of the GATT 1994.[51] Consequently, the Complaining Parties conclude that the negotiating history and circumstances of the Lomé Waiver's adoption provide no support for disregarding the plain meaning of the text of the Waiver.

2. Measures "required" by the Lomé Convention

96. The Complaining Parties contend that the trade in bananas is exclusively regulated by Article 183 of the Lomé Convention and by Protocol 5. The Complaining Parties argue that Article 168(2)(a)(ii) of the Lomé Convention only applies to products listed in Annex XL, and this list does not include bananas. The Complaining Parties maintain furthermore that Annex XXXIX confirms the limited scope of Article 168(2)(a)(ii) of the Lomé Convention. They also argued that the "more favourable" treatment provided for by Article 168(2)(a)(ii) has been separately and specifically negotiated between the parties on a product-by-product basis. This did not happen for bananas. If Annex XL does not provide a specific arrangement for a particular product, then there is no trade requirement for that product other than for the European Communities to consult with the ACP States on providing additional preferential access. The Complaining Parties assert that Article 183 and Protocol 5 deal with both traditional and non-traditional ACP bananas. They argue that the text of these provisions shows in several ways that they contain the entirety of the EC's undertakings concerning all bananas from all ACP countries. In the view of the Complaining Parties, the ECJ Judgments in *Federal Republic of Germany v. Council of the European Union* ("*Germany v. Council*"), and in *Administrazione delle Finanze delle Stato v. Chiquita* ("*Chiquita Italia*")[52] support the proposition that Protocol 5 is *lex specialis*, not only in respect of trade in traditional ACP bananas, but also in relation

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[50] In support of their argument the Complaining Parties refer to the Working Party on *Import Restrictions Imposed by the United States Under Section 22 of the United States Agricultural Adjustment Act ("United States - Section 22")*, adopted 5 March 1955, BISD 3S/141, p. 144; and to the *Waiver on the Caribbean Basin Economic Recovery Act*, Decision of 15 February 1985, BISD 31S/20, p. 22.

[51] *Waiver Granted in Connection with the European Coal and Steel Community*, Decision of 10 November 1952, BISD 1S/17, para. 3.

[52] Case C-280/93, *Germany v. Council*, Judgment of the Court of 5 October 1994, ECR 1994, p. I-4973; and Case C-469/93, *Chiquita Italia*, Judgment of the Court of 12 December 1995, ECR 1995, p. I-4533.

to all bananas. Therefore, the ordinary meaning in the context of the relevant provisions of the Lomé Convention, confirmed by the application of the *lex specialis* principles of interpretation, shows that the Lomé Convention's only "trade instruments" on bananas are those set forth in Protocol 5, and that Protocol 5 contains no requirements with respect to non-traditional bananas.

97. The Complaining Parties also maintain that, if Article 168(2) of the Lomé Convention is read to require preferences for ACP bananas in addition to those set out in Protocol 5, it renders useless the strict limitations on preferential treatment of Protocol 5 for traditional ACP States. The Complaining Parties agree that during the first 18 years of the Lomé Convention (1975-1992), the trade provisions of Article 168(1) and 169(1) were not considered by the parties to be applicable to bananas. Therefore, it was incorrect of the Panel to conclude that Article 168(2) has become applicable since that time. In support of these arguments, the Complaining Parties refer to EC and ACP official statements reflecting a recognition that Protocol 5 alone governs the treatment of banana imports and that the Lomé Convention does not require preferential treatment for non-traditional ACP bananas.

3. GATS Claims of Guatemala, Honduras and Mexico

98. The Complaining Parties submit that the claims excluded were fully within the Panel's terms of reference under Article 7.1 of the DSU, as set out in the joint request for the establishment of a Panel in document WT/DS27/6. There is no provision analogous to Article 7 of the DSU for first written submissions and therefore, the Panel has impermissibly imposed an additional obligation on the Complaining Parties, contrary to the DSU, by requiring that all claims are spelled out in a complaining party's first written submission. The Complaining Parties note further that since the claims were within the Panel's terms of reference, there was no issue of unfair surprise to the detriment of the European Communities in the light of the simultaneous filing of rebuttal submissions pursuant to Article 12(c) of the *Working Procedures* in Appendix 3 to the DSU.

4. Scope of the Appeal

99. In an additional submission[53], Ecuador submits that the findings of the Panel in paragraph 7.93 of the Panel Reports concerning Ecuador's right to invoke Article XIII:2 or XIII:4 of the GATT 1994 are not addressed in the Notice of Appeal and that there was no argumentation on this issue in the EC's appellant's submission, except for in its "conclusions" section. Ecuador contends that the European Communities did not comply with the requirements in Rule 20(2)(d) of the *Working Procedures* and, as a result, did not conform with its "due process objectives" as set out by the Appellate Body in its Report in *Brazil* -

[53] Under Article 22(1) of the *Working Procedures.*

Measures Affecting Desiccated Coconut.[54] Therefore, Ecuador asks the Appellate Body to exclude this issue from the appeal.

D. European Communities - Appellee

1. Lomé Waiver - Traditional ACP Bananas

100. The European Communities agrees with the Panel that Article I of the GATT 1994 is a "general principle requiring non-discriminatory treatment". The European Communities maintains, however, that Article XIII cannot be assumed to be a "subset" of Article I:1 of the GATT 1994, and submits that the Complaining Parties do not contest this.[55] There are separate GATT 1994 and other WTO provisions, such as Article X and XIII of the GATT 1994 and 1.3 of the *Licensing Agreement* which, even though they are MFN or non-discrimination obligations, have their own *raison d'être* and scope and cannot be regarded as mere duplications of each other. The European Communities contends that the circumstances surrounding the negotiation of the Lomé Waiver clearly show that those involved in the negotiations must have been aware and must have recognized that there were, in fact, two different import regimes for bananas. The European Communities never explicitly requested a waiver for Article XIII of the GATT 1994 for the simple reason that there was no reason, logical or legal, for doing so. The European Communities was convinced that the provisions of Article XIII refer primarily to the allocation of a particular quantitative restriction or tariff rate quota and not to a generic non-discrimination principle. In such a situation, the question of whether the Lomé Waiver needed to contain an exemption not only from Article I, but also from Article XIII of the GATT 1994, never entered into consideration. Therefore, the Panel's finding that both regimes constitute one regime to which Article XIII should be applied across the board is fundamentally at odds with the circumstances under which the Lomé Waiver was negotiated.

101. Finally, the European Communities observes that the Panel was correct in seeing a link between Articles I:1 and XIII:1 of the GATT 1994. Otherwise, the specific language of the Lomé Waiver referring to "preferential treatment", and not merely to "preferential tariff treatment", would be deprived of any meaning. The European Communities submits that the principle of strict interpretation of exceptions to the GATT 1994 should be applied to the text of the Lomé Waiver, but not to the text or the content of the Lomé Convention, as the latter is not *per se* an exception to the GATT 1994 or the other WTO agreements. The Lomé Convention is an autonomous international agreement which does not stand in a hierarchical relationship with the GATT 1994, and in respect to which a panel or

[54] WT/DS22/AB/R, adopted 20 March 1997.

[55] The European Communities, in its oral presentation to the Appellate Body at the oral hearing, refers to the Complaining Parties' appellant's submission, para. 40.

the Appellate Body is not authorized to give a restrictive interpretation. In the view of the European Communities, insofar as WTO "quasi-judicial organs" need to understand the Lomé Convention in order to understand the Lomé Waiver, such organs should exercise judicial restraint and, in principle, defer to the interpretations of the parties to the Lomé Convention.

2. Lomé Waiver - Preferential Treatment of Non-Traditional Bananas

102. The European Communities submits that the discretion existing under Article 168(2)of the Lomé Convention, limiting its tariff obligations to provide a preferential margin on the MFN duty applied to third-country importation, is unlimited *vis-à-vis* its ACP partners. The European Communities argues that it must take into account the objectives of Article 168 and apply that Article in good faith by securing an effective additional advantage to the ACP-originated bananas when compared to the *erga omnes* tariff treatment.

103. With respect to the arguments of the Complaining Parties about what is "required" under the Lomé Waiver, the European Communities asserts that before 1 July 1993, Article 168(1) of the Lomé Convention applied to ACP bananas and that ACP bananas could therefore be imported duty-free. Since 1 July 1993, Article 168(2)(a)(ii) has applied to ACP bananas and ACP bananas thus enjoy "a preference" compared to the MFN-duty rate for third-country bananas. The European Communities argues that Annex XL of the Lomé Convention spells out the "intention" of the European Communities with respect to "certain" agricultural products covered by Article 168(2)(a)(ii). Therefore, Annex XL merely serves the purpose of clarifying the future tariff treatment for the listed products. That list is by no means exhaustive. The European Communities submits further that Protocol 5 provides for preferential treatment over and above the basic tariff preferential treatment. In the view of the European Communities, Article 168(2)(a)(ii) is not applicable to traditional bananas as these are subject to Protocol 5 which provides for more preferential treatment. However, Article 168(2)(a)(ii) remains applicable to non-traditional ACP bananas. In response to the reference by the Complaining Parties to the ECJ's judgments in *Germany v. Council* and in *Chiquita Italia*, the European Communities contends that those judgments do not support the proposition that Protocol 5 is *lex specialis*, not only in respect of the trade in traditional ACP bananas, but also in relation to all bananas.

104. Finally, the European Communities maintains that, in the light of the circumstances surrounding the discussions leading up to the granting of the Lomé Waiver, the partners of the European Communities in these discussions must have been perfectly aware that the treatment of the non-traditional ACP bananas was considered to be part and parcel of the preferential treatment granted by the Lomé Convention.

3. GATS Claims of Guatemala, Honduras and Mexico

105. The European Communities submits that the Panel acted lawfully when it excluded the GATS claims raised by the United States on behalf of Guatemala, Honduras and Mexico. The European Communities asserts that if claims are dropped at the stage of the first submission, the complaining party has voluntarily narrowed the scope or the number of claims originally contained in the request for the establishment of a panel. Once the defendant has relied on the dropping of a claim in the first submission, the complaining party is estopped from bringing it up again. Referring to the Appellate Body's ruling in *United States - Shirts and Blouses from India*[56] that for reasons of judicial economy a panel need not decide every claim contained in the terms of reference if it can decide the case without doing so, the European Communities submits further that *a fortiori* a panel must have the power to omit claims from consideration because they have voluntarily been dropped from the first submission. A panel is the master of its own procedure; its procedural rulings can only be quashed if they are contrary to the fundamental principle of proper procedure or to the provisions of the *WTO Agreement*. Lastly, the European Communities argues that a panel ruling on claims not properly advanced in the first written submission would have been contrary to Article 9.2 of the DSU requiring a panel to "organize its examination ... in such a way that the rights which the parties to the dispute would have enjoyed had separate panels examined the complaints are in no way impaired".

III. ARGUMENTS OF THE THIRD PARTICIPANTS

A. Belize, Cameroon, Côte d'Ivoire, Dominica, Dominican Republic, Ghana, Grenada, Jamaica, Saint Lucia, St. Vincent and the Grenadines, Senegal and Suriname

106. Belize, Cameroon, Côte d'Ivoire, Dominica, Dominican Republic, Ghana, Grenada, Jamaica, Saint Lucia, St. Vincent and the Grenadines, Senegal and Suriname disagree with certain of the legal findings and conclusions of the Panel and request the Appellate Body to take into consideration some issues of principal concern to the ACP third participants. However, the ACP third participants also endorse all the positions advanced by the European Communities in this appeal.

107. The ACP third participants assert that the Panel erred in law in finding that the Complaining Parties' request for the establishment of a panel was sufficient to meet the requirements of Article 6.2 of the DSU. The ACP third participants maintain that the panel request by the Complaining Parties contains only "bare allegations of inconsistencies" and does not provide, as required by Article 6.2 of the DSU, the summary of a legal basis for the allegations. They submit that

[56] WT/DS33/AB/R, adopted 23 May 1997, DSR 1997:I, 323 at 339.

this breach severely prejudiced the ACP third participants. They argue further that the ordinary meaning of Article 6.2, the context and its object and purpose did not justify the Panel's decision. In particular, the ACP third participants assert that it is not the Panel's function to cure errors in the submissions of the Complaining Parties to the disadvantage and prejudice of third parties or respondents. With respect to the function of Article 6.2 of the DSU, the ACP third participants contend that the Panel misunderstood the purpose that a third party has in "participating" in the panel proceedings, which is to make submissions to the Panel to protect vital national interests. Article 6.2 plays a fundamental role in enabling third parties to prepare their submissions to the panel adequately. In addition, the ACP third participants argue that the Panel erred in law by not recognizing that a legal interest test is a principle of international law, and that it is implicit in Article XXIII:1 of the GATT 1994 as well as in Articles 3.7, 4.11 and 10.2 of the DSU. It would be clearly against the intention of the drafters of the *WTO Agreement* to permit a Member to be a complaining party if that Member has a lesser interest than that required to join consultations or participate as a third party. Finally, the ACP third participants contend that a legal interest test is a practical necessity in order to avoid a proliferation of cases initiated by Members with no immediate trade interest in the results of the disputes.

108. In the view of the ACP third participants, the Panel precluded them from properly representing their interests and thereby tainted the entire proceeding. The ACP third participants assert that the right to observe at the first and second substantive meetings of the Panel with the parties did not permit full and adequate representation of their interests. Previous GATT practice recognizes that parties with interests such as those of the ACP third participants should be given full participatory rights; this practice is also supported by Articles 2, 3.2, 10.1, 11, 12.2, and 13.1 of the DSU. They add that the Panel's decision of 10 September 1996, prohibiting the participation of private counsel serving on the delegation of Saint Lucia in panel meetings, violated the general principle of international law that sovereign states are free to choose the representation of their choice.[57]

109. The ACP third participants submit that the Panel erred in law in its interpretation of the scope and coverage of the Lomé Waiver and the entitlements of ACP States in respect of both traditional and non-traditional quantities of bananas under the Lomé Convention. With respect to the interpretation of the EC's obligations under Article I of the GATT 1994, the ACP third participants take the view that the purpose of the Lomé Waiver was not properly considered by the Panel. In particular, the Panel did not acknowledge the fact that the sole purpose

[57] In support of their argument, the ACP third participants refer to the *Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character*, done at Vienna, 14 March 1975, AJIL 1975, p. 730, as well as to the practice before other international adjudicatory bodies: See pp. 20 and 22 of the ACP third participants' submission and the Annex thereof.

of obtaining the Waiver was to deal with the findings of the panel report in *EEC - Import Regime for Bananas*.[58] The ACP third participants argue that the Panel added the word "clearly" to the text of the Waiver which was not contained there and that it improperly interpreted the phrase "as required". In addition, the Panel erred in interpreting recitals to the Lomé Waiver as conditions and in its finding that a waiver must be interpreted narrowly. The ACP third participants contend that the drafters of the GATT envisaged that the conditions under which waivers are granted might be interpreted narrowly, but that once a waiver is granted, and in view of the fact that this is only done in cases of an exceptional nature involving hardship, there is no ground to interpret narrowly actions permissible under international agreements protected by a waiver. The ACP third participants submit that the Panel misinterpreted the 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 Tariff Concessions* ("*United States - Sugar Waiver*").[59]

110. The ACP third participants also argue that the Panel erred in limiting the preference required to be granted to traditional ACP States under Protocol 5 and Article 168 of the Lomé Convention. In this respect, the ACP third participants submit: first, Protocol 5 should not be read in isolation; and second, before 1990, there were no quantitative limitations on ACP exports to traditional markets. Moreover, in the view of the ACP third participants, the Panel erred in its interpretation of the EC's obligations under Article 168 of the Lomé Convention and Protocol 5 in relation to non-traditional ACP bananas. The Panel even failed to consider the application of Article 168(2)(d) to such quantities. In addition, prior to the introduction of Regulation 404/93, non-traditional ACP bananas benefited from more than the simple customs duties exemption. The benefits afforded to those suppliers in respect of quantities prior to 1995 must be protected within the new banana regime. The ACP third participants argue that Article 168(2)(a)(ii) of the Lomé Convention includes an obligation on the European Communities to adopt measures in relation to the importation of ACP agricultural products that give them a benefit over third-country agricultural products and ensure more favourable treatment, for which the level of preference is not specified. They assert that the Panel incorrectly assumed that Article 168 of the Lomé Convention only obliges the European Communities to provide tariff-free treatment. When read in conjunction with Articles 10 and 167 of the Lomé Convention, it is apparent that these provisions impose on the European Communities a form of "standstill" provision, stipulating that after the introduction of the banana regime, those benefits which had accrued previously to traditional ACP bananas must be maintained, not necessarily in form but in substance. The ACP third participants conclude that the provisions of Article 168 of the Lomé Convention confer on ACP agricultural products protection similar to that specifically provided for or reiter-

[58] DS38/R, unadopted.
[59] Adopted 7 November 1990, BISD 37S/228.

ated in Protocol 5 for bananas. The interpretation by the European Communities of its obligations under the Lomé Convention cannot be considered very generous, but for the Complaining Parties to argue that there are no obligations in respect of non-traditional ACP bananas is to completely ignore the text of the Lomé Convention.

111. The ACP third participants assert that the scope of the Lomé Waiver must be interpreted as extending to EC licensing procedures, because those procedures are an integral part of the importation regime and are therefore saved by the Lomé Waiver from inconsistency with Article I:1 of the GATT 1994 as "rules and formalities in connection with importation". The ACP third participants argue that the EC licensing regime was necessary to give effect to the EC's obligations under the Lomé Convention. This holds true, in particular, under a correct interpretation of the obligations of the European Communities (other than in Article 168 of the Lomé Convention and Protocol 5) under Articles 10, 135 and 167 of the Lomé Convention. The ACP third participants contend that the Panel incorrectly determined that these commitments are of no legal effect. Additionally, the Panel erred in law and fact in finding that the EC licensing regime did not follow in *form* the previous national regimes, since, in the view of the ACP third participants, the licensing regime, as regards operator categories and activity function rules, is substantially similar to the previous historic arrangements. Also, the Panel was incorrect in its finding regarding the *substance* of the previous national regimes and their relations to the EC regime. The ACP third participants argue that in particular under the United Kingdom system, ACP producers were given substantial protection and, in effect, had a guaranteed outlet for their supplies in both the United Kingdom and the French markets. The ACP third participants conclude that it is clear that a system which granted preferences in a superficial manner, but which, under the new factual circumstances of a single market, would make the demise of the ACP banana industry inevitable, would not meet the EC's obligations under Protocol 5.

112. The ACP third participants argue that the licensing regime is necessary because, in its absence, marketers of ACP bananas would have to compete with those of third-country bananas. ACP bananas will be unable to compete with third-country bananas because of the higher production and shipping costs of ACP bananas, and because of the risks caused by the "oligopolistic" structure of the market. The ACP third participants insist that when the Lomé Waiver is construed in the light of its object, purpose and context, it becomes clear that it saves from inconsistency any measure that is reasonably necessary to implement the EC's obligations to the ACP States under the Lomé Convention. The ACP third participants argue that the Panel erred in finding that the licensing procedures applied by the European Communities to traditional ACP imports, when compared to the procedures applied to imports of third-country and non-traditional bananas, can be considered an "advantage". According to the ACP third participants, the Panel was wrong to suggest that the "superficial differences" between ACP import rules and third-country import rules are of the same order as the very substantive disadvantage at issue in the *United States - Non-Rubber Footwear*

case.[60] Additionally, in the view of the ACP third participants, the Panel erred both in its proper role in interpreting the Lomé Convention, and in its interpretation of the Lomé Convention.

113. Finally, the ACP third participants submit that the Panel misinterpreted the scope and application of the GATS. The ACP third participants contend that the Panel's interpretation of the term "affecting" in Article I:1 of the GATS ignored the fact that the GATS covers only the "production" of a service, i.e. trade in services as such. The ACP third participants add that the GATS was negotiated after the GATT 1994 in order to provide protection supplementary to that provided by the GATT 1994 and to address trade in the area of services not covered by the GATT 1994. Concerning the term, "wholesale trade services", the ACP third participants argue that this relates to reselling and involves a purchase and a subsequent sale. Vertically-integrated companies do not "resell". The ACP third participants assert that the scope of Article II:1 of the GATS does not extend to the modification of conditions of competition. In the view of the ACP third participants, the measures relating to operator categories, BFA export certificate requirements and hurricane licences were necessary to carry out the EC's obligations under the Lomé Convention.

B. Colombia

114. Colombia's submission concerns three issues of law and legal interpretations addressed in the appeal of the European Communities. First, Colombia submits that the Panel erred in law in finding that the Complaining Parties' request for the establishment of a panel identified the specific measure at issue and presented the problem clearly within the meaning of Article 6.2 of the DSU. The almost complete listing of all the basic obligations under an agreement as submitted by the Complaining Parties does not provide any information on the legal basis of a complaint; it merely informs the reader that an inconsistency with the agreement is being claimed. Furthermore, in Colombia's view, the failure to observe the requirements of Article 6.2 of the DSU cannot be "cured" by clarifying the measure at issue and the legal basis of the complaint in the first submission to the panel. One of the most important functions of the requirements in Article 6.2 of the DSU is to enable other Members to decide whether to participate as third parties in the proceedings. This right cannot be exercised without sufficient information. In the event that such participation is not sought because the legal issues raised by the complaining party are insufficiently clear, a WTO Member who is a potential third party cannot subsequently exercise its right in the light of information contained in the first submission, since these are not made available to non-participants. In Colombia's view, for Members that decide not to participate in the proceedings because the request for the establishment of a panel was

[60] Adopted 19 June 1992, BISD 39S/128.

insufficiently clear, the subsequent clarification in the first submission can therefore not be described as a "cure" or an "efficient solution".

115. Second, Colombia contends that the Panel erred in law in finding that neither the inclusion of the tariff quota shares in the EC Schedule, nor the *Agreement on Agriculture*, permit the European Communities to act inconsistently with the requirements of Article XIII of the GATT 1994. Colombia submits that the review of the tariff quotas scheduled by the European Communities and the United States, which entail commitments negotiated with more than fifty other participants in the Uruguay Round, shows that few, if any, of these quota allocation commitments presently conform to the requirements set out in Article XIII of the GATT 1994. Therefore, in Colombia's view, it can be safely assumed that all quota allocation commitments made pursuant to the *Agreement on Agriculture* are actually or potentially inconsistent with Article XIII of the GATT 1994. Colombia submits that not only were quota allocations made irrespective of Article XIII, but also that Members have incorporated into their GATT 1994 Schedules tariff rates on agricultural products inconsistent with Article II:1(b) of the GATT 1994. In this respect, Colombia asserts that the Panel correctly found that "the tariff rates specified in the EC Uruguay Round Schedule are valid EC tariff bindings with respect to bananas", but that the Panel erred in its conclusion that the results of the Uruguay Round override the results of previous tariff negotiations. Colombia contends that the Panel's interpretation does not take into consideration the requirements of the procedures under Article XXVIII of the GATT 1994 and makes redundant paragraph 7 of the *Marrakesh Protocol to the General Agreement on Tariffs and Trade 1994* (the "*Marrakesh Protocol*"). Colombia concludes that in the event of conflict between the GATT 1994 provisions and the *Agreement on Agriculture*, the applicable provision that guides market access concessions undertaken pursuant to the *Agreement on Agriculture* is Article 4.1 and not the GATT 1994. Colombia asserts that the Panel failed to recognize that, in Articles 1(g), 4.1 and 21 of the *Agreement on Agriculture*, the drafters of the *WTO Agreement* had given a clear expression of their intention that the results of the tariffication exercise should override the results of earlier negotiations. By basing itself on general principles of law, the Panel concluded that the legal consequences which the drafters intended to achieve only in the field of agriculture applied to all previous concessions, including those for industrial products.

116. Colombia further contends that, by interpreting Article 4.1 of the *Agreement on Agriculture* as "a statement of where market access commitments can be found", the Panel deprives not only this provision but also all the country allocation commitments made by or in favour of a majority of WTO Members of any legal relevance. In this event, Article 4.1 would have the mere function of a "signpost" indicating the "way to the schedules". Colombia asserts that the *Agreement on Agriculture* regulates the relationship between it and the scheduled commitments differently from the GATT 1994. While the GATT 1994 is a framework agreement for the incorporation of tariff bindings, the *Agreement on Agriculture* and the scheduled commitments negotiated under it constitute *to-*

gether the result of a negotiation on the first stage of agricultural reform. Colombia adds that the market access commitments made under the *Agreement on Agriculture* constitute, in large part, settlements of disputes on the interpretation and application of the provisions of the GATT 1947 that had arisen prior to the Uruguay Round and during the Uruguay Round negotiations. The provisions related to the BFA in the EC market access commitments are not designed to circumvent GATT 1994 provisions, but to settle past disputes on the EC banana regime and to forestall new ones. Finally, Colombia asserts that, by sanctioning the increase in tariff bindings, but not the quota allocations negotiated in conjunction with the tariff bindings, the Panel creates an imbalance in the outcome of the Uruguay Round negotiations on agriculture.

117. Third, Colombia questions whether in the present case the transfer of a quota rent from an importer to an exporter is an "advantage granted to a product" within the meaning of Article I of the GATT 1994. Colombia contends that the Panel correctly recognized that Article I of the GATT 1994 is concerned with the treatment of foreign *products* originating from different foreign sources rather than with the treatment of the suppliers of these products, but that it fails to observe this distinction it has established. Colombia asserts that under the Panel's line of reasoning, financial advantages that might be passed on to producers are equated with competitive advantages accorded to the product, and the important legal distinction between advantages accorded to producers and those accorded to products is lost. Within the framework of a trade agreement such as the GATT 1994, different treatment of producers cannot be equated with different treatment of the products they produce. Therefore, in Colombia's view, the Panel incorrectly concluded that the quota rents generated from trade in bananas means that the EC licensing procedures constitute an "advantage granted to a product" within the meaning of Article I of the GATT 1994, as this can only be an advantage that changes the conditions faced by the product in the market of the importing Member. The mere transfer of quota rents from importers to exporters of other countries does not alter the conditions that the product sold by the exporters faces in the restricted market. Additionally, Colombia contends that it is not clear why the Panel referred to the panel report in *United States - Non-Rubber Footwear*[61]; the European Communities did not argue that there were two trade effects, one compensating the other, but only one possible trade effect relevant under Article I of the GATT 1994 that favoured the Complaining Parties. Colombia contends that the Panel dismissed an important point in an unreasoned manner and thereby failed to demonstrate how the competitive conditions for a product are improved when quota rents are transferred from importers to exporters under a regime which does not encourage an increase in exports of that product.

[61] Adopted 19 June 1992, BISD 39S/128.

C. Costa Rica and Venezuela

118. Costa Rica and Venezuela submit joint legal arguments with respect to the relationship between Articles 4.1 and 21.1 of the *Agreement on Agriculture* and Article XIII of the GATT 1994. They argue that the tariff bindings and tariff quota allocations resulting from the Uruguay Round negotiations on agriculture are in large part inconsistent with Articles II and XIII of the GATT 1994. These inconsistencies are justified only if there is a provision in the *WTO Agreement* according to which tariff bindings and other market access concessions made pursuant to the *Agreement on Agriculture* override the obligations under Articles II and XIII of the GATT 1994. In Costa Rica's and Venezuela's view, Articles 4.1 and 21.1 of the *Agreement on Agriculture* are the legal expression of the intent of the drafters to give legal effect to all market access concessions incorporated in the Schedules of Concessions. Costa Rica and Venezuela contend that the Panel erred in law when it found that the rise in bound tariffs resulting from the tariffication exercise could be justified on the basis of general principles governing the application of successive treaties. Such an interpretation would ignore the legal meaning of Article XXVIII of the GATT 1994 and of paragraph 7 of the *Marrakesh Protocol*. In the view of Costa Rica and Venezuela, the Panel therefore erred in finding that GATT-inconsistent quota allocation commitments made pursuant to the *Agreement on Agriculture* could not be justified under the *Agreement on Agriculture*.

119. Furthermore, with respect to the question of whether Article 4.1 of the *Agreement on Agriculture* is a substantive provision, Costa Rica and Venezuela argue that there is no other example in the whole of the *WTO Agreement* of a provision whose sole function is to inform the reader of the location of another provision. Costa Rica and Venezuela contend that the *Agreement on Agriculture* regulates the relationship between it and the scheduled commitments differently from the GATT 1994. While the GATT 1994 is a framework agreement for the incorporation of tariff bindings, the *Agreement on Agriculture*, and the scheduled commitments negotiated under it, constitute *together* the result of a negotiation on the first stage of agricultural reform. Additionally, Costa Rica and Venezuela submit that the market access commitments made under the *Agreement on Agriculture* constitute, in large part, settlements of disputes on the interpretation and application of the provisions of the GATT 1947 that had arisen prior to the Uruguay Round and during the Uruguay Round negotiations. It would not be justified to dismiss the quota allocation commitments as "illegitimate deals" between individual participants in the Uruguay Round negotiations designed to discriminate against other participants. These allocations were legitimate reactions of the negotiators to the legal uncertainty to which an application of the criteria set out in Article XIII of the GATT 1994 gives rise in a situation in which a highly restrictive import regime is transformed into a tariff-based regime.

120. In addition, Costa Rica and Venezuela are concerned that, by sanctioning the rise in the tariff bindings, but not the quota allocations negotiated in conjunction with the tariff bindings, the Panel creates an imbalance in the outcome of the negotiations on agriculture. Costa Rica and Venezuela add that they fully support

the EC's view on the issue whether Article XIII:2(d) of the GATT 1994 prohibits an allocation of quotas by an agreement that includes countries which do not have a substantial supplying interest.

121. Costa Rica and Venezuela question whether in the present case the transfer of a quota rent from an importer to an exporter is an "advantage granted to a product" within the meaning of Article I of the GATT 1994. Costa Rica and Venezuela contend that the Panel correctly recognized that Article I of the GATT 1994 is concerned with the treatment of foreign *products* originating from different foreign sources rather than with the treatment of the suppliers of these products, but that it fails to observe this distinction it has itself established. Costa Rica and Venezuela submit that, under the Panel's line of reasoning, financial advantages that might be passed on to producers are equated with competitive advantages accorded to the products, and the important legal distinction between advantages accorded to producers and those accorded to products is lost. Within the framework of a trade agreement such as the GATT 1994, different treatment of producers cannot be equated with different treatment of the products they produce. Therefore, Costa Rica and Venezuela take the position that the Panel incorrectly concluded that the quota rents generated by trade in bananas mean that they constitute an "advantage granted to a product" within the meaning of Article I of the GATT 1994, as this can only be an advantage that changes the conditions in the market. The mere transfer of a quota rent from importers to exporters of other countries does not alter the conditions that the product sold by the exporters faces in the quota-restricted market. Additionally, Costa Rica and Venezuela assert that it is not clear why the Panel referred to the panel report in *United States - Non-Rubber Footwear*[62], since the European Communities did not argue that there were two trade effects, one compensating the other, but only one possible trade effect relevant under Article I of the GATT 1994 that favoured the Complaining Parties. Costa Rica and Venezuela argue that the Panel dismissed an important point in an unreasoned manner and thereby failed to demonstrate how the competitive conditions for a product are improved when quota rents are transferred from importers to exporters under a regime which does not encourage an increase in exports of that product.

122. Costa Rica and Venezuela invite the Appellate Body to consider the broad implications that an acceptance of the Panel's interpretation of Article I of the GATT 1994 would entail. Most WTO Members that allocate tariff quotas among supplying countries do so by allocating a share to named countries constituting the main suppliers and a residual share to "other countries". The producers of the named countries can easily obtain the financial benefits associated with a quota regime by forming an export cartel or asking their government to channel exports through a single agency in accordance with Articles XVII and XX(d) of the GATT 1994; the "other countries" would need to cooperate with one another to

[62] Adopted 19 June 1992, BISD 39S/128.

secure that financial benefit, which is inherently more difficult. In spite of the different impact on producers from different countries, this method of allocating trade shares among countries has never been challenged in the history of the GATT. If Article I of the GATT 1994 were interpreted to oblige Members to afford not only equal trade opportunities for products but also equal opportunities to obtain the rents arising from the administration of quotas, a quota allocation mechanism used by practically all WTO Members, including the Complaining Parties, would be subject to challenge under the GATT 1994.

D. Nicaragua

123. Nicaragua fully supports the views expressed by Colombia, Costa Rica and Venezuela in their submissions to the Appellate Body. The views set out in these submissions should therefore be treated by the Appellate Body as representing the position of Nicaragua. Nicaragua in particular shares their view that the *Agreement on Agriculture*, and consequently the market accession commitments made pursuant to that Agreement, take precedence over the provisions of Article XIII of the GATT 1994.

124. With respect to the Panel's reasoning on Article XIII:1 that "the imports from all other countries must be similarly restricted", Nicaragua contends that the Panel draws from this principle the incorrect conclusion that any difference in the method of allocation, whether it can affect the distribution of trade or not, is inconsistent with Article XIII of the GATT 1994. Nicaragua submits that the text of Article XIII:1 clearly regulates the importation of products, not the granting of advantages to exporters or producers, whereas the sole objective of paragraph 2 of Article XIII is to prevent distortions in the distribution of trade arising from the administration of quotas. In this context, the terms "similarly restricted" can only be interpreted to refer to measures imposed in connection with importation that are capable of altering the distribution of trade. Therefore, the terms cannot be interpreted to mean "restricted with similar means", but rather should be interpreted to mean "with similar restrictive effect". Nicaragua also contends that the quota allocation in the case at issue does not accord a trade advantage, since the only consequence of the allocation is that the quota rent is no longer enjoyed by the importer but by the exporter of the exporting country. The resulting financial advantage cannot be used to increase the level of exports because that level is fixed by the quota. It therefore does not alter the competitive condition in favour of that product. In the view of Nicaragua, the mere allocation of a quota share to a particular Member does not distribute trade shares in favour of that Member and can therefore not by itself constitute discriminatory treatment of products inconsistent with Article XIII of the GATT 1994. Nicaragua admits that differences in the means of imposing restrictions can lead to discrimination even when they do not change the distribution of trade shares. However, this is a matter specifically covered by Article I of the GATT 1994 and the *Licensing Agreement*. The Panel's interpretation of the terms of Article XIII of the GATT 1994 as entailing a total prohibition of any distinction in the means of restriction, including

distinctions that do not affect the distribution of trade shares, goes beyond the terms and objectives of Article XIII and the GATT 1994 in general.

125. In addition, Nicaragua contends that the Panel did not correctly determine the issue whether a Member's supplying interest is substantial within the meaning of Article XIII of the GATT 1994. Nicaragua asserts that a Member's interest in supplying a product may be substantial because its exports of the product represent a substantial proportion of total imports of the quota-allocating Member or because its exports of the product represent a substantial proportion of its own total exports. In fact, the words "interest in supplying" suggest that the determination should be made by examining the pattern of trade from the perspective of the interest of the supplying country, which in turn suggests that the proportion of exports of the product in its total exports is the relevant proportion. With respect to the Panel's argumentation on Article XXVIII of the GATT 1994, Nicaragua asserts first that there is no rule that "substantial supplying interest" can only be determined on the basis of the import share from which an exception can only be created by agreement, and, second that the function of the terms as used in Articles XIII and XXVIII is not identical. Nicaragua submits that, given the different objectives of the two provisions, the definition adopted by Members under Article XIII of the GATT 1994 can justifiably differ from that adopted under Article XXVIII of the GATT 1994.

E. Japan

126. In its submission, Japan presents arguments concerning the issue of specificity of the request for the establishment of a panel under Article 6.2 of the DSU. In Japan's view, the "Panel's interpretations on this issue are highly erroneous" and, if accepted by the Appellate Body, will have serious implications for the future operation of the dispute settlement mechanism.

127. Japan submits that the request for the establishment of a panel does not fulfil the two requirements of Article 6.2 of the DSU: the identification of the "specific measure at issue" and the provision of a "brief summary of the legal basis of the complaint". Japan considers that the mere identification of the basic regulation and a simple listing of the provisions which are allegedly violated are not enough. At least the linkage "between the specific measure ... concerned and the Article allegedly infringed thereby" must be provided to meet the requirements under Article 6.2 of the DSU. In the view of Japan, undue emphasis on the promptness of the settlement, without taking account of the respondent's burden, may invite abuse of the dispute settlement system and could cause serious damage to its proper operation. The DSU must be interpreted so as to serve the fair settlement of disputes. Japan argues that the Panel's argument that the Complaining Parties "cured" uncertainty with their first submission should not be accepted. Japan asserts: first, the lack of specificity in the request for the establishment of a panel requires extensive additional work on the respondent's side for the preparation of its defence, which could be avoided if the request for the establishment of a panel is sufficiently specific; second, the Panel's proposed rem-

edy puts too much emphasis on the interests of the Complaining Parties; and third, the first submission does not replace the request for the establishment of a panel with respect to the notice function which is required under Article 6.2 of the DSU. Finally, Japan argues that the Panel's reasoning has no legal basis in the text of the DSU.

128. Japan agrees with the Complaining Parties that the first written submission does not determine the claims made by a complaining party, and that such a finding has no basis in the text of the DSU. However, in the view of Japan, if the Complaining Parties failed to include in their first submission certain claims which are identified in their request for the establishment of a panel, those Complaining Parties should be deemed to have withdrawn such claims. In addition, Japan does not disagree with the Complaining Parties on the progressive nature of a panel proceeding, and it considers that the parties to the dispute should be permitted to make any legal and factual arguments responding to the panel's questions or other parties' arguments throughout the proceeding. However, the complaining party's legal claims must be within the terms of reference of the panel. Finally, Japan considers that, in this case, the Panel incorrectly found that the panel request adequately informed the European Communities of the case against it. Japan contends that the Panel's analysis does not take due account of the burden upon the respondent to respond to the case against it.

IV. ISSUES RAISED IN THIS APPEAL

129. The appellant, the European Communities, raises the following issues in this appeal:

(a) Whether the United States had a right to bring claims under the GATT 1994;

(b) Whether the request for the establishment of the panel made by the Complaining Parties in WT/DS27/6 meets the requirements of Article 6.2 of the DSU;

(c) Whether the market access concessions made by the European Communities under the *Agreement on Agriculture* prevail, as a result of Articles 4.1 and 21.1 of the *Agreement on Agriculture*, over the obligations of the European Communities under Article XIII of the GATT 1994;

(d) Whether the EC's 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 consistent with Article XIII:1 of the GATT 1994; and whether the tariff quota reallocation rules of the BFA are consistent with the requirements of Article XIII:1 of the GATT 1994;

(e) Whether the European Communities is "required" under the relevant provisions of the Lomé Convention to allocate tariff quota shares to traditional ACP States in excess of their pre-1991 best-ever export volumes, and to maintain the EC import licensing procedures that are applied to imports of third-country and non-traditional ACP bananas;

(f) Whether the existence of two separate EC regimes for the importation of bananas is legally relevant to the application of the non-discrimination provisions of the GATT 1994 and the other Annex 1A agreements of the *WTO Agreement*;

(g) Whether the provisions of the *Licensing Agreement* apply to licensing procedures for tariff quotas; and whether Article 1.3 of the *Licensing Agreement* precludes the imposition of different import licensing systems on like products when imported from different Members;

(h) Whether Article X:3(a) of the GATT 1994 precludes the imposition of different import licensing systems on like products when imported from different Members; and whether both Article 1.3 of the *Licensing Agreement* and Article X:3(a) of the GATT 1994 apply to import licensing procedures;

(i) Whether the application of the EC activity function rules to imports of third-country and non-traditional ACP bananas, in the absence of the application of such rules to imports of traditional ACP bananas, is consistent with Article I:1 of the GATT 1994; and whether the EC export certificate requirement for the importation of BFA bananas is consistent with the requirements of Article I:1 of the GATT 1994;

(j) Whether the EC import licensing procedures are within the scope of Article III:4 of the GATT 1994; and, if so, whether the EC practice with respect to hurricane licences is consistent with the requirements of Article III:4 of the GATT 1994;

(k) Whether the GATS applies to the EC import licensing procedures, or whether the GATT 1994 and the GATS are mutually exclusive agreements;

(l) Whether "operators" under the relevant EC regulations are service suppliers within the meaning of Article I:2(c) of the GATS that are engaged in the supply of "wholesale trade services"; and whether vertically-integrated companies, which include such operators, are service suppliers;

(m) Whether the requirement of Article II:1 of the GATS to extend "treatment no less favourable" should be interpreted as including *de facto*, as well as *de jure*, discrimination;

(n) Whether the Panel erred by giving retroactive effect to Articles II and XVII of the GATS, contrary to the principle stated in Article 28 of the *Vienna Convention*;

(o) Whether the Panel misapplied the standard of burden of proof, set out in the Appellate Body Report in *United States - Shirts and Blouses from India*[63]: in deciding which companies are a "juridical person of another Member" and are "owned" by, "controlled" by or "affiliated" with persons of another Member within the meaning of paragraphs (m) and (n) of Article XXVIII of the GATS; in deciding the market shares of the companies engaged in wholesale trade in bananas within the European Communities; and in its conclusions concerning the category of "operators who include or directly represent EC or ACP producers" that have suffered damage from hurricanes;

(p) Whether the Panel erred in finding 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 is inconsistent with the requirements of Articles II and XVII of the GATS;

(q) Whether the Panel erred in finding that 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 is inconsistent with the requirements of Article XVII of the GATS;

(r) Whether the Panel erred in finding that the allocation of hurricane licences exclusively to operators who include or directly represent EC or ACP producers of bananas is inconsistent with the requirements of Articles II and XVII of the GATS;

(s) Whether the Panel erred in concluding that the European Communities has not succeeded in rebutting the presumption that its breaches of the GATT 1994, the GATS and the *Licensing Agreement* have nullified or impaired benefits of the Complaining Parties.

130. The Complaining Parties, as appellants, raise the following issues in this appeal:

(a) Whether the Lomé Waiver granted to the European Communities for "the provisions of paragraph 1 of Article I of the General Agreement" applies also to breaches of Article XIII of the GATT 1994 with respect to the EC's country-specific allocations for traditional ACP States;

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[63] WT/DS33/AB/R, adopted 23 May 1997.

(b) Whether the European Communities is "required" under the relevant provisions of the Lomé Convention to provide duty-free access for 90,000 tonnes of non-traditional ACP bananas and a margin of tariff preference in the amount of 100 ECU/tonne for all other non-traditional ACP bananas;

(c) Whether the Panel erred in excluding from the scope of this case certain claims relating to Article XVII of the GATS made by Mexico and all the GATS claims made by Guatemala and Honduras because those complaining parties did not address such claims in their first written submissions to the Panel;

(d) Ecuador raises the question whether the Panel's finding at paragraph 7.93 of the Panel Reports concerning Ecuador's right to invoke Articles XIII:2 or XIII:4 of the GATT 1994 is properly within the scope of this appeal.

131. We will address these issues in turn, and we will deal simultaneously with the issues that have been raised by both the European Communities and the Complaining Parties.

A. Preliminary Issues

1. Right of the United States to Bring Claims under the GATT 1994

132. We agree with the Panel that "neither Article 3.3 nor 3.7 of the DSU nor any other provision of the DSU contain any explicit requirement that a Member must have a 'legal interest' as a prerequisite for requesting a panel".[64] We do not accept that the need for a "legal interest" is implied in the DSU or in any other provision of the *WTO Agreement*. It is true that under Article 4.11 of the DSU, a Member wishing to join in multiple consultations must have "a substantial trade interest", and that under Article 10.2 of the DSU, a third party must have "a substantial interest" in the matter before a panel. But neither of these provisions in the DSU, nor anything else in the *WTO Agreement*, provides a basis for asserting that parties to the dispute have to meet any similar standard. Yet, we do not believe that this is dispositive of whether, in this case, the United States has "standing"[65] to bring claims under the GATT 1994.

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[64] Panel Reports, para. 7.49.

[65] Standing, or *locus standi*, is generally understood to mean the right to bring an action in a dispute. See B. Garner, *A Dictionary of Modern Legal Usage* (Oxford University Press, 1987), p. 347; L.B. Curzon, *A Dictionary of Law*, 4th ed. (Pitman Publishing, 1993), p. 232. Article 1.1 of the DSU states that: "The rules and procedures of this Understanding shall apply to *disputes brought pursuant to the consultation and dispute settlement provisions* of the agreements listed in Appendix 1 to this Understanding ...". (emphasis added)

133. The participants in this appeal have referred to certain judgments of the International Court of Justice and the Permanent Court of International Justice relating to whether there is a requirement, in international law, of a legal interest to bring a case.[66] We do not read any of these judgments as establishing a general rule that in all international litigation, a complaining party must have a "legal interest" in order to bring a case. Nor do these judgments deny the need to consider the question of standing under the dispute settlement provisions of any multilateral treaty, by referring to the terms of that treaty.

134. This leads us to examine Article XXIII of the GATT 1994, which is the dispute settlement provision for disputes brought pursuant to the GATT 1994, most other Annex 1A agreements and the *Agreement on Trade Related Aspects of Intellectual Property Rights* ("*TRIPs*").[67] The chapeau of Article XXIII:1 of the GATT 1994 provides:

> If any Member should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded
>
> ...

Of special importance for determining the issue of standing, in our view, are the words "[i]f any Member should consider ...".[68] This provision in Article XXIII is consistent with Article 3.7 of the DSU, which states:

> Before bringing a case, a Member shall exercise its judgement as to whether action under these procedures would be fruitful.
>
> ...

135. Accordingly, we believe that a Member has broad discretion in deciding whether to bring a case against another Member under the DSU. The language of Article XXIII:1 of the GATT 1994 and of Article 3.7 of the DSU suggests, furthermore, that a Member is expected to be largely self-regulating in deciding whether any such action would be "fruitful".

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[66] The EC's appellant's submission in paras. 9-10 refers to the ICJ and PCIJ Judgments in: the *South West Africa Cases*, (Second Phase), ICJ Reports 1966, p. 4; the *Case Concerning the Barcelona Traction, Light and Power Company, Limited* (Second Phase), ICJ Reports 1970, p. 4; the *Mavrommatis Palestine Concessions Case*, PCIJ (1925) Series A, No. 2, p. 1; the *S.S. "Wimbledon"* case, PCIJ (1923) Series A, No. 1, p.1; and the *Case Concerning the Northern Cameroons*, ICJ Reports 1963, p. 4. The Complaining Parties' appellee's submission, in para. 364, also refers to the ICJ Judgment in the *South West Africa Cases*.

[67] Article XXIII of the GATT 1994 is referred to as the dispute settlement provision in most other Annex 1A agreements (*Agreement on Agriculture*, *Agreement on the Application of Sanitary and Phytosanitary Measures*, *Agreement on Textiles and Clothing*, *Agreement on Technical Barriers to Trade*, *Agreement on Trade-Related Investment Measures*, *Agreement on Preshipment Inspection*, *Agreement on Rules of Origin*, *Licensing Agreement*, *Agreement on Subsidies and Countervailing Measures*, *Agreement on Safeguards*) and in *TRIPs*.

[68] We note that Articles XXIII:1 and XXIII:3 of the GATS use similar opening phrases: "If any Member should consider ..." and "If any Member considers ...".

136. We are satisfied that the United States was justified in bringing its claims under the GATT 1994 in this case. The United States is a producer of bananas, and a potential export interest by the United States cannot be excluded. The internal market of the United States for bananas could be affected by the EC banana regime, in particular, by the effects of that regime on world supplies and world prices of bananas. We also agree with the Panel's statement that:

> ... with the increased interdependence of the global economy, ... Members have a greater stake in enforcing WTO rules than in the past since any deviation from the negotiated balance of rights and obligations is more likely than ever to affect them, directly or indirectly.[69]

137. We note, too, that there is no challenge here to the standing of the United States under the GATS, and that the claims under the GATS and the GATT 1994 relating to the EC import licensing regime are inextricably interwoven in this case.

138. Taken together, these reasons are sufficient justification for the United States to have brought its claims against the EC banana import regime under the GATT 1994. This does not mean, though, that one or more of the factors we have noted in this case would necessarily be dispositive in another case. We therefore uphold the Panel's conclusion that the United States had standing to bring claims under the GATT 1994.

2. Request for Establishment of the Panel

139. Article 6.2 of the DSU requires that a request for the establishment of a panel:

> ... identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.

140. We agree with the Panel that the request in this case, WT/DS27/6, dated 12 April 1996, which refers to "a regime for the importation, sale and distribution of bananas established by Regulation 404/93 (O.J. L 47 of 25 February 1993, p. 1), and subsequent EC legislation, regulations and administrative measures, including those reflecting the provisions of the Framework Agreement on bananas, which implement, supplement and amend that regime", contains sufficient identification of the specific measures at issue to fulfil the requirements of Article 6.2 of the DSU.

141. With respect to whether the panel request provides, as required, a "brief summary of the legal basis of the complaint sufficient to present the problem clearly"[70], we agree with the Panel's conclusion that "the request is sufficiently

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[69] Panel Reports, para. 7.50.
[70] DSU, Article 6.2.

specific to comply with the *minimum standards* established by the terms of Article 6.2 of the DSU"[71] (emphasis added). We accept the Panel's view that it was sufficient for the Complaining Parties to list the provisions of the specific agreements alleged to have been violated without setting out detailed arguments as to which specific aspects of the measures at issue relate to which specific provisions of those agreements. In our view, there is a significant difference between the *claims* identified in the request for the establishment of a panel, which establish the panel's terms of reference under Article 7 of the DSU, and the *arguments* supporting those claims, which are set out and progressively clarified in the first written submissions, the rebuttal submissions and the first and second panel meetings with the parties.

142. We recognize that a panel request will usually be approved automatically at the DSB meeting following the meeting at which the request first appears on the DSB's agenda.[72] As a panel request is normally not subjected to detailed scrutiny by the DSB, it is incumbent upon a panel to examine the request for the establishment of the panel very carefully to ensure its compliance with both the letter and the spirit of Article 6.2 of the DSU. It is important that a panel request be sufficiently precise for two reasons: first, it often forms the basis for the terms of reference of the panel pursuant to Article 7 of the DSU; and, second, it informs the defending party and the third parties of the legal basis of the complaint.

143. We do not agree with the Panel that "even if there was some uncertainty whether the panel request had met the requirements of Article 6.2, the first written submissions of the Complainants 'cured' that uncertainty because their submissions were sufficiently detailed to present all the factual and legal issues clearly".[73] Article 6.2 of the DSU requires that the *claims*, but not the *arguments*, must all be specified sufficiently in the request for the establishment of a panel in order to allow the defending party and any third parties to know the legal basis of the complaint. If a *claim* is not specified in the request for the establishment of a panel, then a faulty request cannot be subsequently "cured" by a complaining party's argumentation in its first written submission to the panel or in any other submission or statement made later in the panel proceeding.

144. We note, in passing, that this kind of issue could be decided early in panel proceedings, without causing prejudice or unfairness to any party or third party, if panels had detailed, standard working procedures that allowed, *inter alia*, for preliminary rulings.

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71 Panel Reports, para. 7.29.
72 DSU, Article 6.1.
73 Panel Reports, para. 7.44.

3. GATS Claims by Guatemala, Honduras and Mexico

145. We do not agree with the Panel's decisions to exclude certain claims under Article XVII of the GATS made by Mexico[74] and all of the GATS claims made by Guatemala and Honduras[75] from the scope of this case. There is no requirement in the DSU or in GATT practice for arguments on all claims relating to the matter referred to the DSB to be set out in a complaining party's first written submission to the panel. It is the panel's terms of reference, governed by Article 7 of the DSU, which set out the claims of the complaining parties relating to the matter referred to the DSB.

146. In this dispute, the Complaining Parties filed a joint request for the establishment of the Panel in WT/DS27/6, dated 12 April 1996, and the parties to the dispute agreed that the Panel would have standard terms of reference pursuant to Article 7.1 of the DSU. The Panel's terms of reference in this dispute, therefore, must be determined by an examination of the joint request for the establishment of a panel in WT/DS27/6, which includes claims that the EC measures are inconsistent with, *inter alia*, Articles II, XVI and XVII of the GATS. The Complaining Parties filed their request for the establishment for a panel jointly, but they filed their first written submissions to the Panel separately.[76] Any omissions in the arguments contained in the first written submissions of Mexico or of Guatemala and Honduras were rectified in their joint representations with the other Complaining Parties made at the first meeting of the parties with the Panel, as well as in their joint written rebuttal submission and in their joint representations made at the second meeting of the parties with the Panel. Specific arguments on all relevant GATS claims were made by the five Complaining Parties jointly in their oral statements at the first and second meetings with the Panel and in their written rebuttal submission.

147. For these reasons, we reverse the conclusions of the Panel that certain claims under Article XVII of the GATS made by Mexico[77] and all of the GATS claims made by Guatemala and Honduras[78] are not to be included within the scope of this case. We do not agree with the Panel's statement that a "failure to make a claim in the first written submission cannot be remedied by later submissions or by incorporating the claims and arguments of other complainants".[79] Pursuant to Articles 6.2 and 7.1 of the DSU, the terms of reference of the Panel in this case were established in the request for the establishment of the panel, WT/DS27/6, in which the claims specified under the GATS were made by all five Complaining Parties jointly.

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74 Panel Report, WT/DS27/R/MEX, paras. 7.309-7.311.
75 Panel Reports, paras. 7.57-7.58.
76 Guatemala and Honduras submitted a first written submission jointly.
77 Panel Report, WT/DS27/R/MEX, paras. 7.309-7.311.
78 Panel Reports, para. 7.58.
79 *Ibid*., para. 7.57.

4. Ecuador's Right to Invoke Article XIII of the GATT 1994

148. Ecuador argues, in its submission of 9 July 1997, that the European Communities did not properly set out any allegation of error concerning paragraph 7.93 of the Panel Reports in the Notice of Appeal, nor did the European Communities include in its appellant's submission any statement of the grounds for such an appeal, any specific allegations of errors in the issues of law covered in the Panel Reports, or any legal arguments in support of an appeal of that finding. In the appellant's submission of the European Communities, there was merely a summary reference to paragraph 7.93 of the Panel Reports in Part IV, paragraph 352, of the Conclusions. Ecuador argues that this omission, on the part of the European Communities, does not meet the requirements of Rule 20(2)(d) or Rule 21(2) of the *Working Procedures*.

149. The Panel's finding on this issue reads as follows:

> ... we find that the failure of Ecuador's Protocol of Accession to address banana-related issues does not mean that Ecuador must accept the validity of the BFA as contained in the EC's Schedule or that it is precluded from invoking Article XIII:2 or XIII:4.[80]

150. Paragraphs (c) and (d) of the Notice of Appeal read as follows:

> (c) The Panel erred in law in its interpretation of the Agreement on Agriculture and, in particular, of Articles 4.1 and 21.1 of that Agreement and their relation to the GATT, in particular its Article XIII.
>
> (d) In the alternative: the Panel erred in its interpretation of Article XIII of GATT, in particular paragraph 2(d) (both in relation to the allocation of country shares in the Tariff Rate Quota (TRQ)) for bananas and to the tariff quota reallocation rules of the Banana Framework Agreement (BFA).

151. Rule 20(2)(d) of the *Working Procedures* provides that a notice of appeal shall include:

> ... a brief statement of the nature of the appeal, *including the allegations of errors* ... (emphasis added)

Rule 21(2)(b)(i) of the *Working Procedures* requires that an appellant's submission shall set out:

> ... a precise statement of the grounds for the appeal, including the *specific allegations of errors* in the issues of law covered in the panel report ... *and the legal arguments in support thereof* ... (emphasis added)

152. In our view, the claims of error by the European Communities set out in paragraphs (c) and (d) of the Notice of Appeal do not cover the Panel's finding in

[80] Panel Reports, para. 7.93.

paragraph 7.93 of the Panel Reports. The finding in that paragraph explicitly deals with Ecuador's right to invoke Article XIII:2 or XIII:4 of the GATT 1994, given that Ecuador acceded to the WTO *after* the *WTO Agreement* entered into force and *after* the tariff quota for the BFA countries had been negotiated and inscribed in the EC Schedule to the GATT 1994. There is no specific mention of this Panel finding in either the Notice of Appeal or in the main arguments of the appellant's submission by the European Communities. Therefore, Ecuador had no notice that the European Communities was appealing this finding. For these reasons, we conclude that the Panel's finding in paragraph 7.93 of the Panel Reports should be excluded from the scope of this appeal.

B. Multilateral Agreements on Trade in Goods

1. Agreement on Agriculture

153. The European Communities raises the question whether the market access concessions for agricultural products made by the European Communities pursuant to the *Agreement on Agriculture* prevail over Article XIII of the GATT 1994. The European Communities maintains that this result necessarily follows from the meaning and intent of Articles 4.1 and 21.1 of the *Agreement on Agriculture*. Accordingly, the European Communities contends that it is permitted with respect to such market access concessions to act inconsistently with the requirements of Article XIII of the GATT 1994. The Panel concluded that the *Agreement on Agriculture* does not permit the European Communities to act inconsistently with the requirements of Article XIII of the GATT 1994.

154. The market access concessions for agricultural products that were made in the Uruguay Round of multilateral trade negotiations are set out in Members' Schedules annexed to the *Marrakesh Protocol*, and are an integral part of the GATT 1994. By the terms of the *Marrakesh Protocol*, the Schedules are "Schedules to the GATT 1994", and Article II:7 of the GATT 1994 provides that "Schedules annexed to this Agreement are hereby made an integral part of Part I of this Agreement". With respect to concessions contained in the Schedules annexed to the GATT 1947, the panel in *United States - Restrictions on Importation of Sugar* ("*United States - Sugar Headnote*") found that:

> ... Article II permits contracting parties to incorporate into their Schedules acts yielding rights under the General Agreement but not acts diminishing obligations under that Agreement.[81]

This principle is equally valid for the market access concessions and commitments for agricultural products contained in the Schedules annexed to the GATT 1994. The ordinary meaning of the term "concessions" suggests that a Member may yield rights and grant benefits, but it cannot diminish its obligations.[82] This

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[81] Adopted 22 June 1989, BISD 36S/331, para. 5.2.
[82] *Ibid.*

interpretation is confirmed by paragraph 3 of the *Marrakesh Protocol*, which provides:

> The implementation of the concessions and commitments contained in the schedules annexed to this Protocol shall, upon request, be subject to multilateral examination by the Members. This would be *without prejudice to the rights and obligations of Members under Agreements in Annex 1A of the WTO Agreement*. (emphasis added)

155. The question remains whether the provisions of the *Agreement on Agriculture* allow market access concessions on agricultural products to deviate from Article XIII of the GATT 1994. The preamble of the *Agreement on Agriculture* states that it establishes "a basis for initiating a process of reform of trade in agriculture" and that this reform process "should be initiated through the negotiation of commitments on support and protection and through the establishment of strengthened and more operationally effective GATT rules and disciplines". The relationship between the provisions of the GATT 1994 and of the *Agreement on Agriculture* is set out in Article 21.1 of the *Agreement on Agriculture*:

> The provisions of GATT 1994 and of other Multilateral Trade Agreements in Annex 1A to the WTO Agreement shall apply subject to the provisions of this Agreement.

Therefore, the provisions of the GATT 1994, including Article XIII, apply to market access commitments concerning agricultural products, except to the extent that the *Agreement on Agriculture* contains specific provisions dealing specifically with the same matter.

156. 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*.

157. That said, we do not see anything in Article 4.1 to suggest that market access concessions and commitments made as a result of the Uruguay Round negotiations on agriculture can be inconsistent with the provisions of Article XIII of the GATT 1994. There is nothing in Articles 4.1 or 4.2, or in any other article of the *Agreement on Agriculture*, that deals specifically with the allocation of tariff quotas on agricultural products. If the negotiators had intended to permit

Members to act inconsistently with Article XIII of the GATT 1994, they would have said so explicitly. The *Agreement on Agriculture* contains several specific provisions dealing with the relationship between articles of the *Agreement on Agriculture* and the GATT 1994. For example, Article 5 of the *Agreement on Agriculture* allows Members to impose special safeguards measures that would otherwise be inconsistent with Article XIX of the GATT 1994 and with the *Agreement on Safeguards*. In addition, Article 13 of the *Agreement on Agriculture* provides that, during the implementation period for that agreement, Members may not bring dispute settlement actions under either Article XVI of the GATT 1994 or Part III of the *Agreement on Subsidies and Countervailing Measures* for domestic support measures or export subsidy measures that conform fully with the provisions of the *Agreement on Agriculture*. With these examples in mind, we believe it is significant that Article 13 of the *Agreement on Agriculture* does not, by its terms, prevent dispute settlement actions relating to the consistency of market access concessions for agricultural products with Article XIII of the GATT 1994. As we have noted, the negotiators of the *Agreement on Agriculture* did not hesitate to specify such limitations elsewhere in that agreement; had they intended to do so with respect to Article XIII of the GATT 1994, they could, and presumably would, have done so. We note further that the *Agreement on Agriculture* makes no reference to the *Modalities* document[83] or to any "common understanding" among the negotiators of the *Agreement on Agriculture* that the market access commitments for agricultural products would not be subject to Article XIII of the GATT 1994.

158. For these reasons, we agree with the Panel's conclusion that the *Agreement on Agriculture* does not permit the European Communities to act inconsistently with the requirements of Article XIII of the GATT 1994.

2. Article XIII of the GATT 1994

159. The European Communities raises two legal issues relating to the interpretation of Article XIII of the GATT 1994. The first is whether the allocation by the European Communities 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 such Members (including Guatemala), is consistent with Article XIII:1. The second is whether the tariff quota reallocation rules of the BFA are consistent with the requirements of Article XIII:1 of the GATT 1994.

160. Article XIII of the GATT 1994 requires the non-discriminatory administration of quantitative restrictions. As provided in paragraph 5, Article XIII also applies to tariff quotas. Article XIII:1 sets out a basic principle of non-

[83] *Modalities for the Establishment of Specific Binding Commitments Under the Reform Programme*, MTN.GNG/MA/W/24, 20 December 1993.

discrimination in the administration of both quantitative restrictions and tariff quotas. Article XIII:1 stipulates that the importation or exportation of a product of a Member can only be prohibited or restricted if:

> ... 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.

161. In administering quantitative import restrictions or tariff quotas, Members must also observe the rules in Article XIII:2. The chapeau of Article XIII:2 provides that 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 ...

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.

162. Therefore, on the first issue raised by the European Communities, 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.

163. The second issue relates to the consistency of the tariff quota reallocation rules of the BFA with Article XIII:1 of the GATT 1994. Pursuant to these reallocation rules, a portion of a tariff quota share not used by the BFA country to which that share is allocated may, at the joint request of the BFA countries, be reallocated to the other BFA countries. These reallocation rules 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. Moreover, the reallocation of unused portions of a tariff quota share exclusively to other BFA countries, and not to other non-BFA banana-supplying Members,

does not result in an allocation of tariff quota shares which approaches "as closely as possible the shares which the various Members might be expected to obtain in the absence of the restrictions". Therefore, the tariff quota reallocation rules of the BFA are also inconsistent with the chapeau of Article XIII:2 of the GATT 1994.

3. The Scope of the Lomé Waiver

164. On 9 December 1994, at the request of the European Communities and of the 49 ACP States that were also GATT contracting parties, the CONTRACTING PARTIES granted the European Communities a waiver from certain of its obligations under the GATT 1947 with respect to the Lomé Convention.[84] The operative paragraph of this Decision of the CONTRACTING PARTIES reads as follows:

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

This is the Lomé Waiver. The WTO General Council, acting pursuant to paragraphs 3 and 4 of Article IX of the *WTO Agreement* and the provisions of the *Understanding in Respect of Waivers of Obligations under the General Agreement on Tariffs and Trade 1994*, decided on 14 October 1996 to extend this waiver until 29 February 2000.[85]

165. The appeals by the European Communities and the Complaining Parties raise two distinct legal issues relating to the scope of the Lomé Waiver. The first issue is whether the European Communities is "required" under the relevant provisions of the Lomé Convention to do what it has done in the measures at issue in this appeal, that is, to provide duty-free access for all traditional ACP bananas; to provide duty-free access for 90,000 tonnes of non-traditional ACP bananas; to provide a margin of tariff preference in the amount of 100 ECU/tonne for all other non-traditional ACP bananas; to allocate tariff quota shares to the traditional ACP States that supplied bananas to the European Communities before 1991 in the amount of their pre-1991 best-ever export volumes; to allocate tariff quota shares to some traditional ACP States in excess of their pre-1991 best-ever export volumes to the European Communities; to allocate tariff quota shares to

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[84] The Fourth ACP-EEC Convention of Lomé, Decision of the CONTRACTING PARTIES of 9 December 1994, L/7604, 19 December 1994.

[85] EC - The Fourth ACP-EC Convention of Lomé, Extension of Waiver, Decision of the WTO General Council of 14 October 1996, WT/L/186, 18 October 1996.

ACP States exporting non-traditional ACP bananas; and to maintain the import licensing procedures that are applied by this measure to imports of third-country and non-traditional ACP bananas.

166. The second issue is whether the Lomé Waiver, which specifically covers violations of Article I:1 of the GATT 1994, also covers violations of Article XIII with respect to the EC's country-specific tariff quota allocations for traditional ACP States. We will address these two issues in turn.

(a) What is "required" by the Lomé Convention?

167. The European Communities asserts that the Panel should not have conducted an objective examination of the requirements of the Lomé Convention, but instead should have deferred to the "common" EC and ACP views on the appropriate interpretation of the Lomé Convention. This assertion is without merit. The Panel was correct in stating:

> We note that since the GATT CONTRACTING PARTIES incorporated a reference to the Lomé Convention into the Lomé waiver, the meaning of the Lomé Convention became a GATT/WTO issue, at least to that extent. Thus, we have no alternative but to examine the provisions of the Lomé Convention ourselves in so far as it is necessary to interpret the Lomé waiver.[86]

We, too, have no alternative.

168. From the operative paragraph of the Lomé Waiver, it is clear that what is waived is compliance with only "the provisions of paragraph 1 of Article I of the General Agreement", and it is clear also that compliance with those provisions is only waived "to the extent necessary" to permit the European Communities to provide the "preferential treatment" that is "required" by the relevant provisions of the Lomé Convention. It is equally clear that the use of the term "required" is not accidental. Originally, the European Communities and the ACP States that were contracting parties to the GATT 1947 requested a waiver that would have allowed the European Communities to grant preferential treatment as "foreseen" under the relevant provisions of the Lomé Convention.[87] However, the term "foreseen" was not accepted by the CONTRACTING PARTIES, and was replaced in the text of the waiver by the more stringent term "required".[88] We do not agree with the European Communities that this is a distinction without a difference.[89]

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[86] Panel Reports, para. 7.98.

[87] ACP Countries - European Communities, Fourth Lomé Convention, Request for a Waiver, L/7539, 10 October 1994.

[88] CONTRACTING PARTIES, Fiftieth Session, Summary Record of the First Meeting, 8 December 1994, SR. 50/1, 8 February 1995, p. 13.

[89] Preferential treatment that is authorized or called for in the Lomé Convention, or reflected in its objectives, may well be preferential treatment "foreseen" under the Lomé Convention, but it is not

169. To determine what is "required" by the Lomé Convention, we must look first at the text of that Convention and identify the provisions of it that are relevant to trade in bananas. Article 183 of Chapter 2, entitled "Special undertakings on rum and bananas", which is part of the general title on "Trade Cooperation", and Protocol 5 on Bananas are clearly provisions that specifically concern trade in bananas. Article 183 reads as follows:

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

Article 183 does not in itself clarify what is "required" with respect to trade in ACP bananas. Article 183 does, however, refer to Protocol 5, which is an integral part of the Lomé Convention.[90] Article 1 of Protocol 5 stipulates:

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

The requirements in Protocol 5 clearly apply to "traditional markets" for traditional ACP bananas, and to nothing more.

170. In addition, the Lomé Convention contains Article 168(2)(a)(ii), which is also relevant to trade in ACP bananas. Article 168(2)(a)(ii), which is found in the chapter on the "General trade arrangements" of the Lomé Convention, reads in relevant part as follows:

> ... the Community shall take the necessary measures to ensure *more favourable treatment* than that granted to third countries benefiting from the most-favoured-nation clause for the same products. (emphasis added)

These "products" include bananas. Article 168(2)(a)(ii) applies to *all* ACP agricultural products that come under a common organization of the market and that are subject to import restrictions. Nothing in Article 168(2)(a)(ii) indicates that bananas are to be excluded from the scope of this provision, either because the import arrangement for bananas is dealt with elsewhere, or because bananas are not included in the non-exhaustive list of preferential arrangements under Article 168(2)(a)(ii) that is contained in Annex XL of the Lomé Convention. Therefore,

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necessarily preferential treatment "required" or made mandatory by the Lomé Convention. Provisions of the Lomé Convention, such as Article 15(a); Article 24, second indent; Article 135; and Article 167 authorize or call for preferential treatment of ACP products. These provisions elaborate one of the central objectives of the Lomé Convention - to promote the expansion of trade and the economic development of the ACP States. These provisions may "foresee", but do not "require", any preferential treatment.

[90] Pursuant to Article 368 of the Lomé Convention, protocols annexed to the Convention form an integral part thereof.

under Article 168(2)(a)(ii), the European Communities is required to "take the necessary measures to ensure more favourable treatment than that granted to third countries benefiting from the most-favoured-nation clause" for *all* ACP bananas. This requirement in Article 168(2)(a)(ii) in no way conflicts with Article 1 of Protocol 5, which requires additional preferential treatment for *traditional* ACP bananas over and above the preferential treatment for *all* ACP bananas that is required by Article 168(2)(a)(ii).[91]

171. These are the requirements that the Lomé Convention imposes on the European Communities for trade in ACP bananas. The admittedly difficult legislative task facing the European Communities was to translate these requirements into appropriate regulations while also transforming the previously varied, national banana markets of its Member States into a single Community-wide market for bananas. It is not our task to do this for the European Communities. Our task is to determine whether the particular regulatory means that the European Communities has chosen to employ, and that are at issue in this appeal, are in fact means that are "required" by the Lomé Convention. In our view, to be "required", each of the relevant provisions of the measures at issue in this appeal must be reasonably necessary to give effect to the relevant obligations imposed on the European Communities by the Lomé Convention. We shall examine them in turn.

172. The European Communities grants duty-free access to all traditional ACP bananas. It will be recalled that Protocol 5 specifies that "no ACP State shall be placed, as regards *access* to its *traditional* markets and its *advantages* on those markets, in a less favourable situation than in the past or present" (emphasis added). With respect to *traditional* ACP bananas, this mandate of Protocol 5 is reinforced by the additional obligations imposed on the European Communities by Article 168(2)(a)(ii), which, as we have said, applies to *all* ACP bananas. Before the creation of a single Community-wide market for bananas through the enactment of Regulation 404/93, duty-free "access" for their banana exports was indisputably one of the "advantages" enjoyed by the ACP States. Therefore, in our view, the duty-free access afforded by the European Communities to all traditional ACP bananas is "required".

173. In addition, the European Communities grants duty-free access to 90,000 tonnes of non-traditional ACP bananas and a margin of tariff preference in the amount of 100 ECU/tonne to all other non-traditional ACP bananas. The out-of-quota tariff rate for non-traditional ACP bananas is 693 ECU/tonne; the out-of-quota tariff rate for third-country bananas is 793 ECU/tonne.[92] Protocol 5 does not apply here; Protocol 5 does not apply to non-traditional ACP bananas. How-

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[91] This interpretation of the relationship between Article 168 and Protocol 5 is confirmed by the ECJ in paragraph 101 of its Judgment of 5 October 1994, *Germany v. Council*, Case C-280/93, ECR 1994, p. I-4973. The Court stated that "... the import of bananas from ACP States falls under Article 168(2)(a)(ii) of the Lomé Convention ...", and that Article 1 of Protocol 5 also applies to traditional ACP bananas.

[92] Out-of-quota tariff rates for shipments in 1996-97. See Panel Reports, para. 3.7.

ever, the obligation imposed on the European Communities by Article 168(2)(a)(ii) to "take the necessary measures to ensure more favourable treatment" for *all* ACP bananas "than that granted to third countries benefiting from the most-favoured-nation clause for the same product" does apply. The tariff rates applied to imports of bananas from third countries benefitting from MFN treatment are an in-quota tariff rate of 75 ECU/tonne and, as already noted above, an out-of-quota tariff rate of 793 ECU/tonne. Both the duty-free access afforded to the 90,000 tonnes of non-traditional ACP bananas, imported in-quota, and the margin of tariff preference in the amount of 100 ECU/tonne afforded to all other non-traditional ACP bananas by the European Communities are clearly "more favourable treatment" than that afforded by the European Communities to bananas from third countries benefitting from MFN treatment. Therefore, the remaining issue under Article 168(2)(a)(ii) is whether the particular measures chosen by the European Communities to fulfil the obligations in that Article to provide "more favourable treatment" to non-traditional ACP bananas are also in fact "necessary" measures, as specified in that Article. In our view, they are. Article 168(2)(a)(ii) does not say that only *one* kind of measure is "necessary". Likewise, that Article does not say *what* kind of measure is "necessary". Conceivably, the European Communities might have chosen some other "more favourable treatment" in the form of a tariff preference for non-traditional ACP bananas. But it seems to us that this particular measure can, in the overall context of the transition from individual national markets to a single Community-wide market for bananas, be deemed to be "necessary". Therefore, in our view, both the duty-free access granted by the European Communities to the 90,000 tonnes of non-traditional ACP bananas and the margin of tariff preference in the amount of 100 ECU/tonne granted to all other non-traditional ACP bananas are "required" by the Lomé Convention.

174. The European Communities also allocates tariff quota shares to the traditional ACP States that supplied bananas to the European Communities before 1991 in the amount of their pre-1991 best-ever export volumes. With respect to these allocations, it will be recalled that Article 1 of Protocol 5 obliges the European Communities to ensure that "[i]n respect of its banana exports to the Community markets, no ACP State shall be placed as regards access to its traditional markets and its advantages on those markets, in a less favourable situation than in the past or at present". We note here that the European Court of Justice has ruled in its Judgment of 5 October 1994 in *Germany v. Council* that pursuant to Article 1 of Protocol 5:

> ... the Community is obliged to permit the access, free of customs duty, *only* of the quantities of bananas actually imported 'at zero duty' in the best year *before 1991* from each ACP State which is a traditional supplier.[93] (emphasis added)

[93] Case C-280/93, ECR 1994, p. I-4973, para. 101.

Thus, the pivotal date is 1991. To be sure, the European Communities might have used another basis for determining the tariff quota shares allotted to the traditional ACP States that supplied bananas to the European Communities before 1991. For example, the European Communities might have chosen to use a fixed reference period of 10, or perhaps 20, years. The European Communities might also have chosen an average export volume rather than the best-ever export volumes that was in fact chosen. However, some standard was clearly needed. The standard chosen by the European Communities does have a legitimate basis in the history of the banana trade of the European Communities with the traditional ACP States. Therefore, we are persuaded that the allocation of tariff quota shares for traditional ACP bananas chosen by the European Communities is "required".

175. The European Communities also allocates tariff quota shares to some traditional ACP States *in excess of* their pre-1991 best-ever export volumes so as to reflect potential increases in trade in the future as a result of investments made in banana production in those ACP States.[94] In our view, tariff quota shares *in excess of* the pre-1991 best-ever export volumes, which are designed to reflect potential increases in trade *in the future*, are not reasonably necessary to guarantee that these traditional ACP States are not placed, as regards market access and market advantages, in a less favourable situation than *at any time before 1991*. These traditional ACP States could not have enjoyed any pre-1991 market access or advantages with respect to future quantities of bananas. This would be different only if, before 1991, these ACP States had a guarantee in any of their traditional markets that they would be able to export quantities of bananas that might in the future result from investments they made. There was, however, no such guarantee. Finally, it is clear that any future increases in trade as a result of investments are highly speculative. For these reasons, we conclude that the allocation of tariff quota shares in excess of pre-1991 best-ever export volumes to reflect investments is not "required" by the Lomé Convention.

176. The European Communities also allocates country-specific tariff quota shares to ACP States exporting non-traditional ACP bananas. It will be recalled that the more expansive requirement of Article 1 of Protocol 5 does not apply to non-traditional ACP bananas. Only the more limited requirement of Article 168(2)(a)(ii), to take "necessary measures to ensure more favourable treatment" to certain ACP agricultural products, including bananas, applies to non-traditional ACP bananas. However, in our view, this obligation to afford "more favourable treatment" to non-traditional ACP bananas could be met without allocating tariff quota shares. Therefore, the allocation of tariff quota shares to ACP States exporting non-traditional ACP bananas is not "required".

[94] Neither the Lomé Convention's provisions on trade development (Articles 135-138), nor its provisions on development finance cooperation (Articles 220-327), can be interpreted as *requiring* that elements other than the best-ever levels (e.g. investment decisions) are to be taken into account in the determination of the extent of the preferential treatment.

177. The final relevant provisions of the measures at issue that must be addressed are the import licensing procedures that are applied to third-country and non-traditional ACP bananas. We have concluded that certain tariff preferences for ACP bananas are "required" by the Lomé Convention. We have also concluded that the tariff quota allocations to traditional ACP States in the amount of their pre-1991 best-ever export volumes is "required". It may be that, in order to do all that is "required" by the Lomé Convention, the European Communities should do something more. Conceivably, this could be some form of import licensing arrangement. However, the issue before us is not whether some hypothetical licensing arrangement that might be enacted by the European Communities is "required" by the Lomé Convention. The issue before us is whether the specific provisions of these import licensing procedures that have in fact been enacted by the European Communities, and are at issue in this appeal, are "required". The import licensing procedures at issue here create advantages for favoured EC operators that market traditional ACP bananas, by providing those operators with quota rents that, even the European Communities acknowledges, amount to "cross-subsidization".[95] We see nothing in any of the relevant provisions of the Lomé Convention that can in any way be construed to "require" such "cross-subsidization". Therefore, in our view, these import licensing procedures are not "required".

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

[95] Commission of the European Communities, *Report on the Operation of the Banana Regime*, 11 October 1995, SEC (95) 1565 final, p. 18. See also Commission of the European Communities, *Impact of Cross-subsidization within the Banana Regime*, Note for Information, Ecuador's first submission to the Panel, Exhibit 11.

(b) What is Covered by the Lomé Waiver?

179. Having determined what is "required" by the Lomé Convention, we must next determine what is covered by the Lomé Waiver.

180. Specifically, we must determine whether the Lomé Waiver applies not only to breaches of Article I:1 of the GATT 1994, but also to breaches of Article XIII of the GATT 1994, with respect to the EC's country-specific tariff quota allocations for traditional ACP States.

181. The operative paragraph of the Lomé Waiver reads in relevant part:

> Subject to the terms and conditions set out hereunder, the provisions of *paragraph 1 of Article I* of the General Agreement shall be waived, until 29 February 2000, to the extent necessary to permit the European Communities to provide preferential treatment for products originating in ACP States as required by the relevant provisions of the Fourth Lomé Convention, ...[96] (emphasis added)

182. The Panel, nevertheless, concluded that the Lomé Waiver should be interpreted so as to waive not only compliance with the obligations of Article I:1, but also compliance with the obligations of Article XIII of the GATT 1994. The Panel based its conclusion on the need to give "real effect"[97] to the Lomé Waiver and on the "close relationship"[98] between Articles I and XIII:1.

183. We disagree with the Panel's conclusion. The wording of the Lomé Waiver is clear and unambiguous. By its precise terms, it waives only "the provisions of paragraph 1 of Article I of the *General Agreement* ... to the extent necessary" to do what is "required" by the relevant provisions of the Lomé Convention. The Lomé Waiver does not refer to, or mention in any way, any other provision of the GATT 1994 or of any other covered agreement. Neither the circumstances surrounding the negotiation of the Lomé Waiver, nor the need to interpret it so as to permit it to achieve its objectives, allow us to disregard the clear and plain wording of the Lomé Waiver by extending its scope to include a waiver from the obligations under Article XIII. Moreover, 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.

184. The Panel's interpretation of the Lomé Waiver as including a waiver from the GATT 1994 obligations relating to the allocation of tariff quotas is difficult to reconcile with the limited GATT practice in the interpretation of waivers, the strict disciplines to which waivers are subjected under the *WTO Agreement*, the

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[96] The Fourth ACP-EEC Convention of Lomé, Decision of the CONTRACTING PARTIES of 9 December 1994, L/7604, 19 December 1994.
[97] Panel Reports, para. 7.106.
[98] *Ibid*., para. 7.107.

history of the negotiations of this particular waiver and the limited GATT practice relating to granting waivers from the obligations of Article XIII.

185. There is little previous GATT practice on the interpretation of waivers. In the panel report in *United States - Sugar Waiver*, the panel stated:

> The Panel took into account in its examination that waivers are granted according to Article XXV:5 only in "exceptional circumstances", that they waive obligations under the basic rules of the General Agreement and that their terms and conditions consequently have to be interpreted narrowly.[99]

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.

186. With regard to the history of the negotiations of the Lomé Waiver, we have already noted that the CONTRACTING PARTIES limited the scope of the waiver by replacing "preferential treatment *foreseen* by the Lomé Convention" with "preferential treatment *required* by the Lomé Convention" (emphasis added). This change clearly suggests that the CONTRACTING PARTIES wanted to restrict the scope of the Lomé Waiver.

187. Finally, we note that between 1948 and 1994, the CONTRACTING PARTIES granted only one waiver of Article XIII of the GATT 1947.[100] In view of the truly exceptional nature of waivers from the non-discrimination obligations under Article XIII, it is all the more difficult to accept the proposition that a waiver that does not explicitly refer to Article XIII would nevertheless waive the obligations of that Article. If the CONTRACTING PARTIES had intended to waive the obligations of the European Communities under Article XIII in the Lomé Waiver, they would have said so explicitly.

188. Thus, we conclude that the Panel erred in finding that "the Lomé waiver waives [the] inconsistency with Article XIII:1 to the extent necessary to permit the EC 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 EC".[101]

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[99] Adopted 7 November 1990, BISD 37S/228, para. 5.9.

[100] *Waiver Granted in Connection with the European Coal and Steel Community*, Decision of 10 November 1952, BISD 1S/17, para. 3.

[101] Panel Reports, para. 7.110.

4. The "Separate Regimes" Argument

189. It has 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*.

190. 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.

191. 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.[102] In the present case, the non-discrimination obligations of the GATT 1994, specifically Articles I:1 and XIII[103], 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[104] that the non-discrimination provisions of the GATT 1994, specifically, Articles

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[102] *Panel on Newsprint*, adopted 20 November 1984, BISD 31S/114.

[103] 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).

[104] Panel Reports, paras. 7.82 and 7.167.

I:1 and XIII, apply to the relevant EC regulations, irrespective if there is one or more "separate regimes" for the importation of bananas.

5. Licensing Agreement

192. The appeal by the European Communities raises two legal issues relating to the interpretation and application of the *Licensing Agreement*. The first is whether the *Licensing Agreement* applies to import licensing procedures for tariff quotas. The second is whether the requirement of "neutrality in application" in Article 1.3 of the *Licensing Agreement* precludes the imposition of different import licensing systems on like products when imported from different Members.

193. With respect to the first issue, "import licensing" is defined in Article 1.1 of the *Licensing Agreement* as follows:

> For the purpose of this Agreement, import licensing is defined as *administrative procedures used for the operation of import licensing régimes* requiring the submission of an application or other documentation (other than that required for customs purposes) to the relevant administrative body *as a prior condition* for importation into the customs territory of the importing Member. (emphasis added)

Although the precise terms of Article 1.1 do not say explicitly that licensing procedures for tariff quotas are within the scope of the *Licensing Agreement*, a careful reading of that provision leads inescapably to that conclusion. The EC import licensing procedures require "the submission of an application" for import licences as "a prior condition for importation" of a product at the lower, in-quota tariff rate.[105] The fact that the importation of that product is possible at a high out-of-quota tariff rate without a licence does not alter the fact that a licence is required for importation at the lower in-quota tariff rate.[106]

194. We note that Article 3.2 of the *Licensing Agreement* provides that:

> Non-automatic licensing shall not have trade-restrictive or -distortive effects on imports additional to those caused by the imposition of *the restriction*. (emphasis added)

We note also that Article 3.3 of the *Licensing Agreement* reads:

> In the case of licensing requirements for purposes *other than the implementation of quantitative restrictions*, Members shall publish

[105] See 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, which explicitly requires operators to submit licence applications. Official Journal No. L 142, 12 June 1993, p. 6.

[106] In this case, the out-of-quota tariff rate on bananas is prohibitively high and, therefore, importation of bananas without a licence is in fact only a theoretical possibility. See B. Borrell, *EU Bananarama III*, The World Bank, Policy Research Working Paper 1386, December 1994, p. 16.

> sufficient information for other Members and traders to know the basis for granting and/or allocating licences. (emphasis added)

We see no reason to exclude import licensing procedures for the administration of tariff quotas from the scope of the *Licensing Agreement* on the basis of the use of the term "restriction" in Article 3.2. We agree with the Panel that, in the light of the language of Article 3.3 of the *Licensing Agreement* and the introductory words of Article XI of the GATT 1994[107], the term "restriction" as used in Article 3.2 should not be interpreted to encompass only quantitative restrictions, but should be read also to include tariff quotas.[108]

195. For these reasons, we agree with the Panel that import licensing procedures for tariff quotas are within the scope of the *Licensing Agreement*.

196. With respect to the second issue, the Panel found that Article 1.3 of the *Licensing Agreement* "preclude[s] the imposition of one system of import licensing procedures in respect of a product originating in certain Members and a different system of import licensing procedures on the same product originating in other Members".[109]

197. Article 1.3 of the *Licensing Agreement* reads as follows:

> The rules for import licensing procedures shall be *neutral in application* and *administered* in a fair and equitable manner. (emphasis added)

By its very terms, Article 1.3 of the *Licensing Agreement* clearly applies to the *application* and *administration* of import licensing procedures, and requires that this application and administration be "neutral ... fair and equitable". Article 1.3 of the *Licensing Agreement* does not require the import licensing *rules*, as such, to be neutral, fair and equitable. Furthermore, the context of Article 1.3 - including the preamble, Article 1.1 and, in particular, Article 1.2 of the *Licensing Agreement* - supports the conclusion that Article 1.3 does not apply to import licensing *rules*. Article 1.2 provides, in relevant part, as follows:

> Members shall ensure that the administrative procedures used to implement import licensing régimes are in conformity with the relevant provisions of GATT 1994 ... as interpreted by this Agreement, ...

As a matter of fact, none of the provisions of the *Licensing Agreement* concerns import licensing *rules*, *per se*. As is made clear by the title of the *Licensing Agreement*, it concerns import licensing *procedures*. The preamble of the *Licensing Agreement* indicates clearly that this agreement relates to import licens-

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[107] The introductory words of Article XI of the GATT 1994 read as follows: "No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures ...".

[108] Panel Reports, para. 7.154.

[109] Panel Reports, WT/DS27/R/GTM, WT/DS27/R/HND, WT/DS27/R/MEX and WT/DS27/R/USA, para. 7.261.

ing procedures and their administration, not to import licensing rules. Article 1.1 of the *Licensing Agreement* defines its scope as the *administrative procedures* used for the operation of import licensing regimes.

198. We conclude, therefore, that the Panel erred in finding that Article 1.3 of the *Licensing Agreement* precludes the imposition of different import licensing systems on like products when imported from different Members.

6. Article X:3(a) of the GATT 1994

199. The European Communities raises two legal issues relating to the application and interpretation of Article X:3(a) of the GATT 1994. The first issue is whether the requirements of uniformity, impartiality and reasonableness set out in Article X:3(a) preclude the imposition of different import licensing systems on like products imported from different Members. The second issue is whether both Article X:3(a) of the GATT 1994 and Article 1.3 of the *Licensing Agreement* apply to the EC import licensing procedures.

200. On the first issue, the Panel found that the application of operator category rules and 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, is inconsistent with the requirements of Article X:3(a) of GATT".[110] In coming to this conclusion, the Panel relied on a 1968 Note by the GATT Director-General, which asserted that Article X:3(a) precludes the application of one set of regulations and procedures to some contracting parties and a different set to others.[111] However, the European Communities correctly pointed out during the Panel proceedings that the 1968 Note cannot be considered as an authoritative interpretation of GATT rules because it was never endorsed by a formal decision of the CONTRACTING PARTIES.

> Article X:3(a) of the GATT 1994 provides:
>
> Each Member shall administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings of the kind described in paragraph 1 of this Article.

The text of Article X:3(a) clearly indicates that the requirements of "uniformity, impartiality and reasonableness" do not apply to the laws, regulations, decisions and rulings *themselves*, but rather to the *administration* of those laws, regulations, decisions and rulings. The context of Article X:3(a) within Article X, which is entitled "Publication and Administration of Trade Regulations", and a

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[110] Panel Reports, para. 7.212, with regard to operator category rules; and WT/DS27/R/ECU, WT/DS27/R/GTM, WT/DS27/R/HND and WT/DS27/R/MEX, para. 7.231, with regard to activity function rules.

[111] See *Agreement on Implementation of Article VI*, Note by the GATT Director-General of 29 November 1968, L/3149.

reading of the other paragraphs of Article X, make it clear that Article X applies to the *administration* of laws, regulations, decisions and rulings. To the extent that the laws, regulations, decisions and rulings themselves are discriminatory, they can be examined for their consistency with the relevant provisions of the GATT 1994.

201. We conclude, therefore, that the Panel erred in finding that Article X:3(a) of the GATT 1994 precludes the imposition of one system of import licensing procedures on a product originating in certain Members and a different system on the same product originating in other Members.

202. With respect to the second issue, the Panel found that the relevant provisions of the GATT 1994 *and* the *Licensing Agreement* apply to the EC import licensing procedures for bananas[112], and then proceeded to examine the consistency of the import licensing procedures with Article X:3(a) of the GATT 1994. Having found that the operator category rules and the activity function rules were inconsistent with Article X:3(a) of the GATT 1994, the Panel, referring to the ruling of the Appellate Body in *United States - Shirts and Blouses from India*[113], concluded that it was not necessary to address whether the EC import licensing procedures were also inconsistent with the *Licensing Agreement*.[114]

203. Article X:3(a) of the GATT 1994 applies to all "laws, regulations, decisions and rulings of the kind described in paragraph 1" of Article X, which includes those, *inter alia*, "pertaining to ... requirements, restrictions or prohibitions on imports ...". The EC import licensing procedures are clearly regulations pertaining to requirements on imports and, therefore, are within the scope of Article X:3(a) of the GATT 1994. As we have concluded, the *Licensing Agreement* also applies to the EC import licensing procedures. We agree, therefore, with the Panel that *both* the *Licensing Agreement* and the relevant provisions of the GATT 1994, in particular, Article X:3(a), apply to the EC import licensing procedures. In comparing the language of Article 1.3 of the *Licensing Agreement* and of Article X:3(a) of the GATT 1994, we note that there are distinctions between these two articles. The former provides that "the rules for import licensing procedures shall be neutral in application and administered in a fair and equitable manner". The latter provides that each Member shall "administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions or rulings of the kind described in paragraph 1 of [Article X]".

We attach no significance to the difference in the phrases "neutral in application and administered in a fair and equitable manner" in Article 1.3 of the *Licensing Agreement* and "administer in a uniform, impartial and reasonable manner" in

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[112] Panel Reports, para. 7.163.

[113] WT/DS33/AB/R, adopted 23 May 1997, DSR 1997:I, 323 at 340. The Appellate Body stated that "[a] panel need only address those claims which must be addressed in order to resolve the matter in issue in the dispute".

[114] Panel Reports, paras. 7.213 and 7.232.

Article X:3(a) of the GATT 1994. In our view, the two phrases are, for all practical purposes, interchangeable. We agree, therefore, with the Panel's interpretation that the provisions of Article X:3(a) of the GATT 1994 and Article 1.3 of the *Licensing Agreement* have identical coverage.[115]

204. Although Article X:3(a) of the GATT 1994 and Article 1.3 of the *Licensing Agreement* both apply, the Panel, in our view, should have applied the *Licensing Agreement* first, since this agreement deals specifically, and in detail, with the administration of import licensing procedures. If the Panel had done so, then there would have been no need for it to address the alleged inconsistency with Article X:3(a) of the GATT 1994.

7. Article I:1 of the GATT 1994

205. The appeal by the European Communities raises two legal issues relating to the interpretation of Article I:1 of the GATT 1994. The first issue is whether the activity function rules of the EC import licensing procedures are consistent with Article I:1 of the GATT 1994, in the absence of the application of such rules to imports of traditional ACP bananas. The second issue is whether the EC requirement to match import licences with export certificates for bananas exported from BFA countries is consistent with the requirements of Article I:1 of the GATT 1994.

206. On the first issue, the Panel found that the procedural and administrative requirements of the activity function rules for importing third-country and non-traditional ACP bananas differ from, and go significantly beyond, those required for importing traditional ACP bananas. This is a factual finding. Also, 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*.[116] It may well be that there are considerations of EC competition policy at the basis of the activity function rules. This, however, does not legitimize the activity function rules to the extent that these rules discriminate among like products originating from different Members. For these reasons, we agree with the Panel that the activity function rules are an "advantage" granted to bananas imported from traditional ACP States, and not to bananas imported from other Members, within the meaning of Article I:1. Therefore, we uphold the Panel's finding that the activity function rules are inconsistent with Article I:1 of the GATT 1994.

207. On the second issue, the Panel found that the EC export certificate requirement is inconsistent with the requirements of Article I:1 of the GATT 1994. The EC export certificate requirement accords BFA banana suppliers, which are initial holders of export certificates, preferential bargaining leverage to extract a

[115] Panel Reports, WT/DS27/R/GTM, WT/DS27/R/HND, WT/DS27/R/MEX, WT/DS27/R/USA, para. 7.261.
[116] Adopted 19 June 1992, BISD 39S/128, para. 6.9.

share of the quota rents for their fruit exported to the European Communities, and gives them a competitive advantage over other Latin American suppliers.[117] The EC export certificate requirement thus provides an advantage to some Members (i.e. the BFA countries) that is not given to other Members. Therefore, we agree with the Panel that the export certificate requirement is inconsistent with Article I:1 of the GATT 1994.

8. Article III of the GATT 1994

208. The appeal of the European Communities raises two legal issues with respect to the application and interpretation of Article III of the GATT 1994. The first issue is whether the EC procedures and requirements for the distribution of licences for importing bananas among eligible "operators" within the European Communities are measures within the scope of Article III:4 of the GATT 1994. The second issue is whether the issuance of hurricane licences exclusively to EC producers and producer organizations, or to operators including or directly representing them, is inconsistent with Article III:4 of the GATT 1994.

209. On the first issue, the Panel found that, although licences are a condition for the importation of bananas into the European Communities at in-quota tariff rates:

> ... the administration of licence distribution procedures and the eligibility criteria for the allocation of licences to operators form part of the EC's internal legislation and are "laws, regulations and requirements affecting the internal sale, ..." of imported bananas in the meaning of Article III:4.[118]

210. Article III:4 of the GATT 1994 provides in relevant part:

> The products of the territory of any Member imported into the territory of any other Member shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use ...

211. At issue in this appeal is not whether *any* import licensing requirement, as such, is within the scope of Article III:4, but whether the EC procedures and requirements for the *distribution* of import licences for imported bananas among eligible operators *within* the European Communities are within the scope of this provision. The EC licensing procedures and requirements include the operator category rules, under which 30 per cent of the import licences for third-country

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[117] The European Communities recognized the commercial value of the export certificates in the Commission's *Report on the EC Banana Regime*, VI/5671/94, July 1994, p. 12, in which it indicated that export certificates helped the BFA countries "share in the economic benefits of the tariff quota".

[118] Panel Reports, para. 7.178.

and non-traditional ACP bananas are allocated to operators that market EC or traditional ACP bananas, and the activity function rules, under which Category A and B licences are distributed among operators on the basis of their economic activities as importers, customs clearers or ripeners. These rules go far beyond the mere import licence requirements needed to administer the tariff quota for third-country and non-traditional ACP bananas or Lomé Convention requirements for the importation of bananas. These rules are intended, among other things, to cross-subsidize distributors of EC (and ACP) bananas and to ensure that EC banana ripeners obtain a share of the quota rents.[119] As such, these rules affect "the internal sale, offering for sale, purchase, ..." within the meaning of Article III:4, and therefore fall within the scope of this provision. Therefore, we agree with the conclusion of the Panel on this point.

212. On the second issue, the Panel found that the EC practice with respect to hurricane licences may create an incentive for operators to purchase bananas of EC origin for marketing in the European Communities, and that this practice is an advantage accorded to bananas of EC-origin that is not accorded to bananas of third-country origin. The Panel concluded, therefore, that the issuance of hurricane licences exclusively to EC producers and producer organizations, or operators including or directly representing them, is inconsistent with the requirements of Article III:4 of the GATT 1994.

213. Hurricane licences allow for additional imports of third-country (and non-traditional ACP) bananas at the lower in-quota tariff rate. Although their issuance results in increased exports from those countries, we note that hurricane licences are issued exclusively to EC producers and producer organizations, or to operators including or directly representing them. We also note that, as a result of the EC practice relating to hurricane licences, these producers, producer organizations or operators can expect, in the event of a hurricane, to be compensated for their losses in the form of "quota rents" generated by hurricane licences. Thus, the practice of issuing hurricane licences constitutes an incentive for operators to market EC bananas to the exclusion of third-country and non-traditional ACP bananas. This practice therefore affects the competitive conditions in the market in favour of EC bananas. We do not dispute the right of WTO Members to mitigate or remedy the consequences of natural disasters. However, Members should do so in a manner consistent with their obligations under the GATT 1994 and the other covered agreements.

214. For these reasons, we agree with the Panel that the EC practice of issuing hurricane licences is inconsistent with Article III:4 of the GATT 1994.

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[119] EC's appellant's submission, para. 325 and the EC's oral statement, para. 70. See also Commission of the European Communities, *Report on the Operation of the Banana Regime*, 11 October 1995, SEC (95) 1565 final, p. 18; and Commission of the European Communities, *Impact of Cross-subsidization within the Banana Regime*, Note for Information, Ecuador's first submission to the Panel, Exhibit 11.

215. We note that, in coming to this conclusion, the Panel found:

> However, before deciding whether the practice of issuing hurricane licences is inconsistent with Article III:4, we need to consider that Article III:1 is a general principle that informs the rest of Article III, as the Appellate Body has recently stated. Since Article III:1 constitutes part of the context of Article III:4, it must be taken into account in our interpretation of the latter. Article III:1 articulates a general principle that internal measures should not be applied so as to afford protection to domestic production. According to the Appellate Body, the protective application of a measure can most often be discerned from the design, the architecture, and the revealing structure of the measure. We consider that the design, architecture and structure of the EC practice of issuing hurricane licences all indicate that the measure is applied so as to afford protection to EC (and ACP) producers.[120]

216. The Panel has misinterpreted what we said in the Appellate Body Report in *Japan - Alcoholic Beverages*.[121] We were dealing in that case with allegations of inconsistencies with Article III:2, first and second sentences, of the GATT 1994. It is true that at page 18 of that Report, we stated that "Article III:1 articulates a general principle" which "informs the rest of Article III". However, we also said in that Report that Article III:1 "informs the first sentence and the second sentence of Article III:2 in different ways".[122] With respect to Article III:2, first sentence, we noted that it does not refer specifically to Article III:1. We stated:

> This omission must have some meaning. We believe the meaning is simply that the presence of a protective application need not be established separately from the specific requirements that are included in the first sentence in order to show that a tax measure is inconsistent with the general principle set out in the first sentence.[123]

With respect to Article III:2, second sentence, we found:

> Unlike that of Article III:2, first sentence, the language of Article III:2, second sentence, specifically invokes Article III:1. The significance of this distinction lies in the fact that whereas Article III:1 acts implicitly in addressing the two issues that must be considered in applying the first sentence, it acts explicitly as an en-

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[120] See paragraph 7.249 of the Panel Reports (footnotes deleted). See also a similar finding in paragraph 7.181 relating to the operator category rules.

[121] WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, 97.

[122] *Ibid*., 111.

[123] *Ibid.*, 111-112.

> tirely separate issue that must be addressed along with two other issues that are raised in applying the second sentence.[124]

The same reasoning must be applied to the interpretation of Article III:4. Article III:4 does *not* specifically refer to Article III:1. Therefore, a determination of whether there has been a violation of Article III:4 does *not* require a separate consideration of whether a measure "afford[s] protection to domestic production".

C. General Agreement on Trade in Services

1. Application of the GATS

217. There are two issues to consider in this context. The first is whether the GATS applies to the EC import licensing procedures. The second is whether the GATS overlaps with the GATT 1994, or whether the two agreements are mutually exclusive. With respect to the first issue, the Panel found that:

> ... no measures are excluded *a priori* from the scope of the GATS as defined by its provisions. The scope of the GATS encompasses any measure of a Member to the extent it affects the supply of a service regardless of whether such measure directly governs the supply of a service or whether it regulates other matters but nevertheless affects trade in services.[125]

For these reasons, the Panel concluded:

> We therefore find that there is no legal basis for an *a priori* exclusion of measures within the EC banana import licensing regime from the scope of the GATS.[126]

218. The European Communities argues that the GATS does not apply to the EC import licensing procedures because they are not measures "affecting trade in services" within the meaning of Article I:1 of the GATS. In the view of the European Communities, Regulation 404/93 and the other related regulations deal with the importation, sale and distribution of bananas. As such, the European Communities asserts, these measures are subject to the GATT 1994, and not to the GATS.

219. In contrast, the Complaining Parties argue that the scope of the GATS, by its terms, is sufficiently broad to encompass Regulation 404/93 and the other related regulations as measures affecting the competitive relations between domestic and foreign services and service suppliers. This conclusion, they argue, is not affected by the fact that the same measures are also subject to scrutiny under the GATT 1994, as the two agreements are not mutually exclusive.

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[124] Japan - Alcoholic Beverages, DSR 1996:I, 97 at 116.
[125] Panel Reports, WT/DS27/R/ECU, WT/DS27/R/MEX and WT/DS27/R/USA, para. 7.285.
[126] *Ibid*., para. 7.286.

220. In addressing this issue, we note that Article I:1 of the GATS provides that "[t]his Agreement applies to measures by Members affecting trade in services". In our view, the use of the term "affecting" reflects the intent of the drafters to give a broad reach to the GATS. The ordinary meaning of the word "affecting" implies a measure that has "an effect on", which indicates a broad scope of application. This interpretation is further reinforced by the conclusions of previous panels that the term "affecting" in the context of Article III of the GATT is wider in scope than such terms as "regulating" or "governing".[127] We also note that Article I:3(b) of the GATS provides that "'services' includes *any service* in *any sector* except services supplied in the exercise of governmental authority" (emphasis added), and that Article XXVIII(b) of the GATS provides that the "'supply of a service' includes the production, distribution, marketing, sale and delivery of a service". There is nothing at all in these provisions to suggest a limited scope of application for the GATS. We also agree that Article XXVIII(c) of the GATS does not narrow "the meaning of the term 'affecting' to 'in respect of'".[128] For these reasons, we uphold the Panel's finding that there is no legal basis for an *a priori* exclusion of measures within the EC banana import licensing regime from the scope of the GATS.

221. The second issue is whether the GATS and the GATT 1994 are mutually exclusive agreements. The GATS was not intended to deal with the same subject matter as the GATT 1994. The GATS was intended to deal with a subject matter not covered by the GATT 1994, that is, with trade in services. Thus, the GATS applies to the supply of services. It provides, *inter alia*, for both MFN treatment and national treatment for services and service suppliers. Given the respective scope of application of the two agreements, they may or may not overlap, depending on the nature of the measures at issue. Certain measures could be found to fall exclusively within the scope of the GATT 1994, when they affect trade in goods as goods. Certain measures could be found to fall exclusively within the scope of the GATS, when they affect the supply of services as services. There is yet a third category of measures that could be found to fall within the scope of both the GATT 1994 and the GATS. These are measures that involve a service relating to a particular good or a service supplied in conjunction with a particular good. In all such cases in this third category, the measure in question could be scrutinized under both the GATT 1994 and the GATS. However, while the same measure could be scrutinized under both agreements, the specific aspects of that measure examined under each agreement could be different. Under the GATT 1994, the focus is on how the measure affects the goods involved. Under the GATS, the focus is on how the measure affects the supply of the service or the service suppliers involved. Whether a certain measure affecting the supply of a

[127] Panel Reports, WT/DS27/R/ECU, WT/DS27/R/MEX and WT/DS27/R/USA, para. 7.281. See, for example, the panel report in *Italian Agricultural Machinery*, adopted 23 October 1958, BISD 7S/60, para. 12.

[128] Panel Reports, WT/DS27/R/ECU, WT/DS27/R/MEX and WT/DS27/R/USA, para. 7.280.

service related to a particular good is scrutinized under the GATT 1994 or the GATS, or both, is a matter that can only be determined on a case-by-case basis. This was also our conclusion in the Appellate Body Report in *Canada - Periodicals.*[129]

222. For these reasons, we agree with the Panel that the EC banana import licensing procedures are subject to both the GATT 1994 and the GATS, and that the GATT 1994 and the GATS may overlap in application to a particular measure.

2. Whether Operators are Service Suppliers Engaged in Wholesale Trade Services

223. The European Communities raises two issues concerning the definition of wholesale trade services and the application of that definition. Both these issues relate to the Panel's finding that:

> ... operators in the meaning of Article 19 of Regulation 404/93 and operators performing the activities defined in Article 5 of Regulation 1442/93 are service suppliers in the meaning of Article I:2(c) of GATS provided that they are owned or controlled by natural persons or juridical persons of other Members and supply wholesale services. When operators provide wholesale services with respect to bananas which they have imported or acquired for marketing, cleared in customs or ripened, they are actual wholesale service suppliers. Where operators form part of vertically integrated companies, they have the capability and opportunity to enter the wholesale service market. They could at any time decide to resell bananas which they have imported or acquired from EC producers, or cleared in customs, or ripened instead of further transferring or processing bananas within an integrated company. Since Article XVII of GATS is concerned with conditions of competition, it is appropriate for us to consider these vertically integrated companies as service suppliers for the purposes of analysing the claims made in this case.[130]

224. First, the European Communities questions whether the operators within the meaning of the relevant EC regulations are, in fact, service suppliers in the sense of the GATS, in that what they actually do is buy and import bananas. The European Communities argues that "when buying or importing, a wholesale trade services supplier is a buyer or importer and not covered by the GATS at all, because he is not providing any reselling services".[131] The European Communities

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[129] Appellate Body Report, WT/DS31/AB/R, adopted 30 July 1997, DSR 1997:I, 449 at 465.
[130] Panel Reports, WT/DS27/R/ECU, WT/DS27/R/MEX and WT/DS27/R/USA, para. 7.320 (footnotes deleted).
[131] EC's appellant's submission, para. 293.

also challenges the Panel's conclusion that "integrated companies", which may provide some of their services in-house in the production or distribution chain, are service suppliers within the meaning of the GATS.

225. On the first of these two issues, we agree with the Panel that the operators as defined under the relevant regulations of the European Communities are, indeed, suppliers of "wholesale trade services" within the definition set out in the Headnote to Section 6 of the CPC.[132] We note further that the European Communities has made a full commitment for wholesale trade services (CPC 622), with no conditions or qualifications, in its Schedule of Specific Commitments under the GATS.[133] Although these operators, as defined in the relevant EC regulations, are engaged in some activities that are not strictly within the definition of "distributive trade services" in the Headnote to Section 6 of the CPC, there is no question that they are also engaged in other activities involving the wholesale distribution of bananas that are within that definition.

226. The Headnote to Section 6 of the CPC defines "distributive trade services" in relevant part as follows:

> ... the principal services rendered by wholesalers and retailers may be characterized as *reselling merchandise, accompanied by a variety of related, subordinated services* ... (emphasis added)

We note that the CPC Headnote characterizes the "*principal* services" rendered by wholesalers as "reselling merchandise". This means that "reselling merchandise" is not necessarily the *only* service provided by wholesalers. The CPC Headnote also refers to "a variety of related, subordinated services" that may accompany the "principal service" of "reselling merchandise". It is difficult to conceive how a wholesaler could engage in the "principal service" of "reselling" a product if it could not also purchase or, in some cases, import the product. Obviously, a wholesaler must obtain the goods by some means in order to resell them.[134] In this case, for example, it would be difficult to resell bananas in the European Communities if one could not buy them or import them in the first place.

227. The second issue relates to "integrated companies". In our view, even if a company is vertically-integrated, and even if it performs other functions related to the production, importation, distribution and processing of a product, to the extent that it is also engaged in providing "wholesale trade services" and is therefore affected in that capacity by a particular measure of a Member in its supply of

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[132] Provisional Central Product Classification, United Nations Statistical Papers, Series M, No. 77, 1991, p. 189.

[133] European Communities and their Member States' Schedule of Specific Commitments, GATS/SC/31, 15 April 1994, p. 52.

[134] After all, as the European Communities has pointed out, "goods cannot walk" or be resold by themselves (EC's appellant's submission, para. 236).

those "wholesale trade services", that company is a service supplier within the scope of the GATS.

228. For these reasons, we uphold the Panel's findings on both these issues.[135]

3. Article II of the GATS

229. The European Communities appeals the Panel's finding:

> ... that the obligation contained in Article II:1 of GATS to extend "treatment no less favourable" should be interpreted *in casu* to require providing no less favourable conditions of competition.[136]

The critical issue here is whether Article II:1 of the GATS applies only to *de jure*, or formal, discrimination or whether it applies also to *de facto* discrimination.

230. The Panel's approach to this question was to interpret the words "treatment no less favourable" in Article II:1 of the GATS by reference to paragraphs 2 and 3 of Article XVII of the GATS. The Panel said:

> ... we note that the standard of "no less favourable treatment" in paragraph 1 of Article XVII is meant to provide for no less favourable conditions of competition regardless of whether that is achieved through the application of formally identical or formally different measures. Paragraphs 2 and 3 of Article XVII serve the purpose of codifying this interpretation, and in our view, do not impose new obligations on Members additional to those contained in paragraph 1. In essence, the "treatment no less favourable" standard of Article XVII:1 is clarified and reinforced in the language of paragraphs 2 and 3. The absence of similar language in Article II is not, in our view, a justification for giving a different ordinary meaning in terms of Article 31(1) of the Vienna Convention to the words "treatment no less favourable", which are identical in both Articles II:1 and XVII:1.[137]

231. We find the Panel's reasoning on this issue to be less than fully satisfactory. The Panel interpreted Article II of the GATS in the light of panel reports interpreting the national treatment obligation of Article III of the GATT. The Panel also referred to Article XVII of the GATS, which is also a national treatment obligation. But Article II of the GATS relates to MFN treatment, not to national treatment. Therefore, provisions elsewhere in the GATS relating to national treatment obligations, and previous GATT practice relating to the interpretation of the national treatment obligation of Article III of the GATT 1994 are not necessarily relevant to the interpretation of Article II of the GATS. The Panel

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[135] Panel Reports, WT/DS27/R/ECU, WT/DS27/R/MEX and WT/DS27/R/USA, para. 7.320.
[136] *Ibid.*, para. 7.304.
[137] *Ibid.*, para. 7.301.

would have been on safer ground had it compared the MFN obligation in Article II of the GATS with the MFN and MFN-type obligations in the GATT 1994.[138]

232. Articles I and II of the GATT 1994 have been applied, in past practice, to measures involving *de facto* discrimination.[139] We refer, in particular, to the panel report in *European Economic Community - Imports of Beef from Canada*[140], which examined the consistency of EEC regulations implementing a levy-free tariff quota for high quality grain-fed beef with Article I of the GATT 1947. Those regulations made suspension of the import levy for such beef conditional on production of a certificate of authenticity. The only certifying agency authorized to produce a certificate of authenticity was a United States agency. The panel, therefore, found that the EEC regulations were inconsistent with the MFN principle in Article I of the GATT 1947 as they had the effect of denying access to the EEC market to exports of products of any origin other than that of the United States.

233. The GATS negotiators chose to use different language in Article II and Article XVII of the GATS in expressing the obligation to provide "treatment no less favourable". The question naturally arises: if the GATS negotiators intended that "treatment no less favourable" should have exactly the same meaning in Articles II and XVII of the GATS, why did they not repeat paragraphs 2 and 3 of Article XVII in Article II? But that is not the question here. The question here is the meaning of "treatment no less favourable" with respect to the MFN obligation in Article II of the GATS. There is more than one way of writing a *de facto* non-discrimination provision. Article XVII of the GATS is merely one of many provisions in the *WTO Agreement* that require the obligation of providing "treatment no less favourable". The possibility that the two Articles may not have exactly the same meaning does *not* imply that the intention of the drafters of the GATS was that a *de jure*, or formal, standard should apply in Article II of the GATS. If that were the intention, why does Article II not say as much? The obligation imposed by Article II is unqualified. The ordinary meaning of this provision does not exclude *de facto* discrimination. Moreover, if Article II was not applicable to *de facto* discrimination, it would not be difficult - and, indeed, it would be a good deal easier in the case of trade in services, than in the case of trade in goods - to devise discriminatory measures aimed at circumventing the basic purpose of that Article.

234. For these reasons, we conclude that "treatment no less favourable" in Article II:1 of the GATS should be interpreted to include *de facto*, as well as *de*

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[138] In addition to Article I (the fundamental MFN provision of the GATT), Articles III:7, IV(b), V:2 and V:5, IX:1 and XIII:1 are also MFN-type obligations in the GATT 1994.

[139] See *European Economic Community - Imports of Beef from Canada*, adopted 10 March 1981, BISD 28S/92; *Spain - Tariff Treatment of Unroasted Coffee*, adopted 11 June 1981, BISD 28S/102; and *Japan - Tariff on Imports of Spruce-Pine-Fir (SPF) Dimension Lumber*, adopted 19 July 1989, BISD 36S/167.

[140] Adopted 10 March 1981, BISD 28S/92, paras. 4.2-4.3.

jure, discrimination. We should make it clear that we do not limit our conclusion to this case. We have some difficulty in understanding why the Panel stated that its interpretation of Article II of the GATS applied "*in casu*".[141]

4. Effective Date of the GATS Obligations

235. The European Communities also raises the question whether the Panel erred in giving retroactive effect to Articles II and XVII of the GATS, contrary to the principle stated in Article 28 of the *Vienna Convention*. Article 28 states the general principle of international law that "[u]nless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to ... any situation which ceased to exist before the date of entry into force of the treaty ...". The Panel stated in its finding on this issue that:

> ... the scope of our legal examination includes only actions which the EC took or continued to take, or measures that remained in force or continued to be applied by the EC, and thus did not cease to exist after the entry into force of the GATS. Likewise, any finding of consistency or inconsistency with the requirements of Articles II and XVII of GATS would be made with respect to the period after the entry into force of the GATS.[142]

The Panel stated, further, in a footnote to this finding, that "the EC measures at issue may be considered as continuing measures, which in some cases were enacted before the entry into force of the GATS but which did *not* cease to exist after that date (the opposite of the situation envisaged in Article 28)".[143]

236. The European Communities argues that the continuing situation at issue here is not the continued existence of Regulation 404/93 and other related regulations, but is, instead, the alleged discrimination against and among foreign service suppliers. The European Communities maintains that *de facto* discrimination is a fact at a particular point in time, and does not necessarily continue for as long as a law remains in force. The European Communities argues that the Panel based its finding with respect to *de facto* discrimination on data related to 1992, that is, before the entry into force of the GATS on 1 January 1995. In the view of the European Communities, there is no basis for the assumption that this factual data relating to 1992, even if correct, continued to exist after the entry into force of the GATS. In the absence of evidence to the contrary, the European Communities argues, it should be concluded that the *de facto* discrimination in 1992 was a situation which ceased to exist before the entry into force of the GATS. Consequently, the European Communities contends that the non-retroactivity principle in Article 28 of the *Vienna Convention* applies in this case,

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[141] Panel Reports, WT/DS27/R/ECU, WT/DS27/R/MEX and WT/DS27/R/USA, para. 7.304.
[142] *Ibid.*, para. 7.308 (footnotes deleted).
[143] *Ibid.*, footnote 486.

and that this invalidates the Panel's conclusion of inconsistency of the EC import licensing regime with Articles II and XVII of the GATS.

237. It is, however, evident from the terms of its finding that the Panel concluded, as a matter of fact, that the *de facto* discrimination did continue to exist after the entry into force of the GATS.[144] This factual finding is beyond review by the Appellate Body. Thus, we do not reverse or modify the Panel's conclusion in paragraph 7.308 of the Panel Reports.

5. Burden of Proof

238. The European Communities argues that the Panel has not followed the ruling by the Appellate Body in *United States - Shirts and Blouses from India*[145], as it relates to the burden of proof, in deciding the following issues:

- which companies are a "juridical person of another Member" within the meaning of Article XXVIII(m) of the GATS and are "owned", "controlled" by or "affiliated" with such a juridical person of another Member within the meaning of Article XXVIII(n) of the GATS and are providing wholesale trade services through commercial presence within the European Communities;
- the market shares of the respective companies engaged in wholesale trade in bananas within the European Communities; and
- the category of "operators" that include or directly represent EC (or ACP) producers who have suffered damage from hurricanes.

239. In our view, the conclusions by the Panel on whether Del Monte is a Mexican company[146], the ownership and control of companies established in the European Communities that provide wholesale trade services in bananas[147], the market shares of suppliers of Complaining Parties' origin as compared with suppliers of EC (or ACP) origin[148], and the nationality of the majority of operators that "include or directly represent" EC (or ACP) producers[149], are all factual conclusions. Therefore, we decline to rule on these arguments made by the European Communities.

6. Whether the EC Licensing Procedures are Discriminatory Under Articles II and XVII of the GATS

240. The European Communities argues that the EC licensing system for bananas is not discriminatory under Articles II and XVII of the GATS, because the

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144 Panel Reports, WT/DS27/R/ECU, WT/DS27/R/MEX and WT/DS27/R/USA, para. 7.308.
145 Appellate Body Report, WT/DS33/AB/R, adopted 23 May 1997.
146 Panel Reports, WT/DS27/R/ECU, WT/DS27/R/MEX, WT/DS27/R/USA, para. 7.330.
147 *Ibid*., para. 7.331.
148 *Ibid*., paras. 7.333-7.334.
149 Panel Reports, WT/DS27/R/ECU and WT/DS27/R/USA, para. 7.392.

various aspects of the system, including the operator category rules, the activity function rules and the special hurricane licence rules, "pursue entirely legitimate policies" and "are not inherently discriminatory in design or effect".[150]

241. We see no specific authority either in Article II or in Article XVII of the GATS for the proposition that the "aims and effects" of a measure are in any way relevant in determining whether that measure is inconsistent with those provisions. In the GATT context, the "aims and effects" theory had its origins in the principle of Article III:1 that internal taxes or charges or other regulations "should not be applied to imported or domestic products so as to afford protection to domestic production". There is no comparable provision in the GATS. Furthermore, in our Report in *Japan - Alcoholic Beverages*[151], the Appellate Body rejected the "aims and effects" theory with respect to Article III:2 of the GATT 1994. The European Communities cites an unadopted panel report dealing with Article III of the GATT 1947, *United States - Taxes on Automobiles*[152], as authority for its proposition, despite our recent ruling.

(a) Operator Category Rules

242. The European Communities argues that the aim of the operator category system, in view of the objective of integrating the various national markets, and of the differing situations of banana traders in the various Member States, was not discriminatory but rather was to establish machinery for dividing the tariff quota among the different categories of traders concerned. In the view of the European Communities, the operator category system also serves the purpose of distributing quota rents among the various operators in the market. The European Communities emphasizes, furthermore, that the principle of transferability of licences is used in order to develop market structures without disrupting existing commercial links. The effect of the operator category rules, the European Communities argues, is to leave a commercial choice in the hands of the operators.

243. We do not agree with the European Communities that the aims and effects of the operator category system are relevant in determining whether or not that system modifies the conditions of competition between service suppliers of EC origin and service suppliers of third-country origin. Based on the evidence before it[153], the Panel concluded "that most of the suppliers of Complainants' origin are

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[150] EC's appellant's submission, para. 301.

[151] Appellate Body Report, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996.

[152] DS31/R, 11 October 1994, unadopted.

[153] We note that the European Communities contests the Panel's findings in paras. 7.331, 7.333 and 7.334 of the Panel Reports, WT/DS27/R/ECU, WT/DS27/R/MEX, WT/DS27/R/USA, concerning the relative market shares of suppliers of EC (or ACP) origin as compared with suppliers of Complaining Parties' origin. We also note that the Panel indicated that it relied on evidence supplied by the Complaining Parties, and that the European Communities failed to present information that

classified in Category A for the vast majority of their past marketing of bananas, and that most of the suppliers of EC (or ACP) origin are classified in Category B for the vast majority of their past marketing of bananas".[154] We see no reason to go behind these factual conclusions of the Panel.

244. We concur, therefore, with the Panel's conclusion that "the allocation to Category B operators of 30 per cent of the licences allowing for the importation of third-country and non-traditional ACP bananas at in-quota tariff rates creates less favourable conditions of competition for like service suppliers of Complainants' origin and is therefore inconsistent with the requirement of Article XVII of GATS".[155] We also concur with the Panel's conclusion that the allocation to Category B operators of 30 per cent of the licences for importing third-country and non-traditional ACP bananas at in-quota tariff rates is inconsistent with the requirements of Article II of the GATS.[156]

(b) Activity Function Rules

245. The European Communities maintains that the aim of the activity function rules is to protect the banana ripeners against the concentration of economic bargaining power in the hands of the primary importers as a result of the tariff quota. The European Communities contends that the policy objective is to correct the position of all ripeners *vis-à-vis* all suppliers of bananas, without distinction as to nationality. Furthermore, the European Communities asserts, the effect of the activity function rules depends on the commercial choices made by operators. Operators that previously supplied wholesale trade services to bananas brought under the tariff quota can avoid or reduce the extent to which they are subject to the activity function rules by extending their services to the EC market segment. These operators may also resort to licence pooling within independent ripeners, or they may retain ownership of the bananas they import and have them ripened under contract. Thus, in the view of the European Communities, there are many options open to primary importers, and the activity function rules do not have the effect of providing less favourable conditions of competition.

246. As indicated earlier, we do not accept the argument by the European Communities that the aims or effects of the activity function rules are relevant in determining whether they provide less favourable conditions of competition to services and service suppliers of foreign origin. In this respect, we note the Panel's factual conclusions that:

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would cast doubt on the evidence presented by the Complaining Parties (see Panel Reports, WT/DS27/R/ECU, WT/DS27/R/MEX, WT/DS27/R/USA, paras. 7.331 and 7.333).

[154] Panel Reports, WT/DS27/R/ECU, WT/DS27/R/MEX, WT/DS27/R/USA, para. 7.334 (footnotes deleted).

[155] Panel Reports, WT/DS27/R/ECU, WT/DS27/R/MEX, WT/DS27/R/USA, para. 7.341.

[156] *Ibid*., para. 7.353.

> ... even the EC statistics suggest that 74 to 80 per cent of ripeners are EC controlled. Thus, we conclude that the vast majority of the ripening capacity in the EC is owned or controlled by natural or juridical persons of the EC and that most of the bananas produced in or imported to the EC are ripened in EC owned or controlled ripening facilities.[157]

We also note the Panel's factual finding that "most of the service suppliers of Complainants' origin will usually be able to claim reference quantities only for primary importation, and possibly for customs clearance, but not for the performance of ripening activities".[158] Given these factual findings, we see no reason to reverse the Panel's legal conclusion that the allocation to ripeners of a certain proportion of the Category A and B licences allowing the importation of third-country and non-traditional ACP bananas at in-quota tariff rates creates less favourable conditions of competition for like service suppliers of Complainants' origin, and is therefore inconsistent with the requirements of Article XVII of GATS.[159]

(c) Hurricane Licences

247. The European Communities asserts that the purpose of the hurricane licences is to compensate those that suffer damage caused by tropical storms. With respect to Article XVII of the GATS, the European Communities maintains that the hurricane licence provisions do not modify competitive conditions between EC operators and operators of Complaining Parties' origin. With respect to Article II of the GATS, the European Communities argues that there is no *de facto* discrimination since there is no indication in the hurricane licence rules that operators that are not ACP - owned or - controlled cannot own or represent ACP producers on the same basis as ACP or EC - owned or - controlled operators.

248. Once again, we do not accept the argument by the European Communities that the aims and effects of a measure are relevant in determining its consistency with Articles II or XVII of the GATS. We note that under the EC hurricane licence rules, only operators who include or directly represent EC or ACP producers or producer organizations affected by a tropical storm are eligible for allocation of hurricane licences.[160] The Panel made a conclusion of fact that "the vast majority of operators who 'include or directly represent' EC or ACP producers are service suppliers of EC (or ACP) origin".[161] Given this factual finding, we do not reverse the Panel's conclusions in paragraphs 7.393 and 7.397 of the Panel Reports.

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[157] Panel Reports, WT/DS27/R/ECU and WT/DS27/R/USA, para. 7.362 (footnotes deleted).
[158] Panel Reports, WT/DS27/R/ECU and WT/DS27/R/USA, para. 7.362 (footnotes deleted).
[159] *Ibid*., para. 7.368.
[160] *Ibid*., para. 7.392.
[161] *Ibid.*

D. Nullification or Impairment

249. The Panel concluded that:

> ... the infringement of obligations by the EC under a number of WTO agreements, are a *prima facie* case of nullification or impairment of benefits in the meaning of Article 3.8 of the DSU, which provides that "there is normally a presumption that a breach of the rules has an adverse impact on other Members parties to that covered agreement". To the extent that this presumption can be rebutted, in our view the EC has not succeeded in rebutting the presumption that its breaches of GATT, GATS and Licensing Agreement rules have nullified or impaired benefits of the Complainants.[162]

The European Communities has appealed this conclusion.

250. We observe, first of all, that the European Communities attempts to rebut the presumption of nullification or impairment with respect to the Panel's findings of violations of the GATT 1994 on the basis that the United States has never exported a single banana to the European Community, and therefore, could not possibly suffer any trade damage. The attempted rebuttal by the European Communities applies only to one complainant, the United States, and to only one agreement, the GATT 1994. In our view, the Panel erred in extending the scope of the presumption in Article 3.8 of the DSU to claims made under the GATS as well as to claims made by the Complaining Parties other than the United States.

251. We note that Article 12.7 of the DSU provides in part that:

> ... the report of a panel shall set out the findings of fact, the applicability of relevant provisions and *the basic rationale behind any findings and recommendations* that it makes. (emphasis added)

In paragraph 7.398 of the Reports, the Panel has provided no more by way of a "basic rationale" than a reference in a footnote to a previous panel report.[163] That said, we note that the two issues of nullification or impairment and of the standing of the United States are closely related. Indeed, the European Communities argues these two issues in the alternative. In the part of the Panel Reports dealing with standing[164], two points are made that the Panel may well have had in mind in reaching its conclusions on nullification or impairment. One is that the United States is a producer of bananas and that a potential export interest by the United States cannot be excluded; the other is that the internal market of the United States for bananas could be affected by the EC bananas regime and by its effects on world supplies and world prices of bananas. These are matters that we have already decided are relevant to the question of the standing of the United States

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[162] Panel Reports, para. 7.398.
[163] *Ibid*., footnote 523.
[164] Panel Reports, paras. 7.47-7.52.

under the GATT 1994. They are equally relevant to the question whether the European Communities has rebutted the presumption of nullification or impairment.

252. So, too, is the panel report in *United States - Superfund*, to which the Panel referred.[165] In that case, the panel examined whether measures with "only an insignificant effect on the volume of exports do nullify or impair benefits under Article III:2 ...". The panel concluded (and in so doing, confirmed the views of previous panels) that:

> Article III:2, first sentence, cannot be interpreted to protect expectations on export volumes; it protects expectations on the competitive relationship between imported and domestic products. A change in the competitive relationship contrary to that provision must consequently be regarded *ipso facto* as a nullification or impairment of benefits accruing under the General Agreement. A demonstration that a measure inconsistent with Article III:2, first sentence, has no or insignificant effects would therefore in the view of the Panel not be a sufficient demonstration that the benefits accruing under that provision had not been nullified or impaired even if such a rebuttal were in principle permitted.[166]

253. The panel in *United States - Superfund* subsequently decided "not to examine the submissions of the parties on the trade effects of the tax differential"[167] on the basis of the legal grounds it had enunciated. The reasoning in *United States - Superfund* applies equally in this case.

254. For these reasons, we can find no legal basis on which to reverse the conclusions of the Panel in paragraph 7.398 of the Panel Reports.

V. FINDINGS AND CONCLUSIONS

255. For the reasons set out in this Report, the Appellate Body:

(a) upholds the Panel's conclusion that the United States had standing to bring claims under the GATT 1994 in this case;

(b) upholds the Panel's conclusion that the request for the establishment of the panel in this case was consistent with Article 6.2 of the DSU., with the modification that a faulty request cannot be "cured" by the first written submission of a complaining party;

(c) reverses the Panel's conclusions that certain of the claims under Article XVII of the GATS made by Mexico and all the claims

[165] Panel Reports, paras. 7.47-7.52, footnote 523.
[166] Adopted on 17 June 1987, BISD 34S/136, para. 5.1.9.
[167] *Ibid*., para. 5.1.10.

made under the GATS by Guatemala and Honduras are not to be included within the scope of this case;

(d) upholds the Panel's conclusion that the *Agreement on Agriculture* does not permit the European Communities to act inconsistently with the requirements of Article XIII of the GATT 1994;

(e) upholds 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 is inconsistent with Article XIII:1 of the GATT 1994;

(f) upholds the Panel's finding that the tariff quota reallocation rules of the BFA are inconsistent with Article XIII:1 of the GATT 1994, and modifies the Panel's finding by concluding that the BFA tariff quota reallocation rules are also inconsistent with the chapeau of Article XIII:2 of the GATT 1994;

(g) concludes that the European Communities is "required" under the relevant provisions of the Lomé Convention to: provide duty-free access for traditional ACP bananas, provide duty-free access for 90,000 tonnes of non-traditional ACP bananas, provide a margin of tariff preference in the amount of 100 ECU/tonne for all other non-traditional ACP bananas, and allocate tariff quota shares to the traditional ACP States in the amount of their pre-1991 best-ever export volumes;

(h) concludes that the European Communities is *not* "required" under the relevant provisions of the Lomé Convention to: allocate tariff quota shares to traditional ACP States in excess of their pre-1991 best-ever export volumes, allocate tariff quota shares to ACP States exporting non-traditional ACP bananas, or maintain the EC import licensing procedures that are applied to third-country and non-traditional ACP bananas;

(i) and therefore, based on the conclusions in (g) and (h), upholds the findings of the Panel that the European Communities is "required" under the relevant provisions of the Lomé Convention to provide preferential tariff treatment for non-traditional ACP bananas, is not "required" to allocate tariff quota shares to traditional ACP States in excess of their pre-1991 best-ever export volumes, and is not "required" to maintain the EC import licensing procedures that are applied to third-country and non-traditional ACP bananas;

(j) reverses the finding of the Panel that the Lomé Waiver waives 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;

(k) upholds the Panel's findings that the non-discrimination provisions of the GATT 1994, specifically, Articles I:1 and XIII, apply to the relevant EC regulations, irrespective of whether there are one or more "separate regimes" for the importation of bananas;

(l) upholds the Panel's finding that licensing procedures for tariff quotas are within the scope of the *Licensing Agreement*, and reverses the Panel's finding that Article 1.3 of the *Licensing Agreement* precludes the imposition of different import licensing systems on like products when imported from different Members;

(m) reverses the Panel's finding that Article X:3(a) of the GATT 1994 precludes the imposition of different import licensing systems on like products when imported from different Members; and upholds the Panel's finding that both Article 1.3 of the *Licensing Agreement* and Article X:3(a) of the GATT 1994 apply to the EC import licensing procedures, with the modification that the Panel should have applied the provisions of the *Licensing Agreement* first, as it is the more specific and detailed agreement;

(n) upholds the Panel's conclusions that the EC activity function rules and the BFA export certificate requirement are inconsistent with Article I:1 of the GATT 1994;

(o) upholds the Panel's findings that Article III:4 of the GATT 1994 applies to the EC import licensing procedures, and that the EC practice with respect to hurricane licences is inconsistent with Article III:4 of the GATT 1994;

(p) upholds the Panel's conclusions that there is no legal basis for an *a priori* exclusion of measures within the EC import licensing regime from the scope of the GATS and that the GATT 1994 and the GATS may overlap in application to a measure;

(q) upholds the Panel's findings that "operators" as defined in the relevant EC regulations are service suppliers within the meaning of Article I:2(c) of the GATS that are engaged in providing "wholesale trade services" and that, where such operators form part of vertically-integrated companies, such companies are service suppliers for the purposes of this case;

(r) upholds the Panel's conclusion that Article II:1 of the GATS should be interpreted to include *de facto*, as well as *de jure*, discrimination;

(s) upholds the Panel's conclusion that the scope of its legal examination of the application of Articles II and XVII of the GATS includes only actions that the European Communities took, or continued to take, or measures that remained in force or continued to be applied by the European Communities, and thus did not cease to exist after the entry into force of the GATS;

(t) upholds the Panel's findings relating to: which companies are owned or controlled by, or are affiliated with, persons of Complaining Parties' origin, and are providing wholesale trade services in bananas through commercial presence within the European Communities; the respective market shares of service suppliers of Complaining Parties' origin as compared with service suppliers of EC (or ACP) origin; and the nationality of the majority of operators that "include or directly represent" EC (or ACP) producers that have suffered damage from hurricanes;

(u) upholds 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 is inconsistent with Articles II and XVII of the GATS;

(v) upholds 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 is inconsistent with Article XVII of the GATS;

(w) upholds the Panel's conclusions that the EC practice with respect to hurricane licences is inconsistent with Articles II and XVII of the GATS; and

(x) upholds the Panel's finding that the European Communities has not succeeded in rebutting the presumption that its breaches of the GATT 1994 have nullified or impaired the benefits of the United States, with the modification that this finding should be limited to the United States and to the EC's obligations under the GATT 1994.

256. The foregoing legal findings and conclusions uphold, modify or reverse the findings and conclusions of the Panel in Parts VII and IX of the Panel Reports, but leave intact the findings and conclusions of the Panel that were not the subject of this appeal.

257. The Appellate Body *recommends* that the Dispute Settlement Body request the European Communities to bring the measures found in this Report and in the Panel Reports, as modified by this Report, to be inconsistent with the GATT 1994 and the GATS into conformity with the obligations of the European Communities under those agreements.

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

(COMPLAINT BY GUATEMALA AND HONDURAS)

Report of the Panel
WT/DS27/R/GTM
WT/DS27/R/HND

Adopted by the Dispute Settlement Body on 25 September 1997
as modified by the Appellate Body Report

NB: For Parts I to V of this report, see Parts I to V of the Panel Report in European Communities - Regime for the Importation, Sale and Distribution of Bananas, Complaint by Ecuador, WT/DS27/R/ECU, DSR 1997:III, 1093-1445.

TABLE OF CONTENTS

VI. INTERIM REVIEW

6.1 On 2 April 1997, the European Communities, Ecuador, Guatemala, Honduras, Mexico and United States requested the Panel to review in accordance with Article 15.2 of the DSU precise aspects of the interim reports that had been issued to the parties on 18 March 1997. The European Communities also requested the Panel to hold a further meeting with the parties on the issues identified in its written comments. The Panel met with the parties on 14 April 1997 in order to hear their arguments concerning the interim reports. We carefully reviewed the arguments presented by the EC and by the Complaining parties, jointly or individually, and the responses offered by the other side.

6.2 With respect to procedural matters, the Complaining parties commented on the Panel's interpretation of the requisite degree of specificity of a panel request in light of the requirements of Article 6.2 of the DSU. They also raised concerns as to the Panel's refusal to consider claims made or endorsed by one or more of them after the filing of the first written submissions. As regards those claims which the Panel had found unnecessary to address, the Complaining parties further argued that several of them, e.g., allegations regarding overfiling under the activity function rules and the distribution of licences to producers, were not issues of secondary importance and should be addressed by the Panel in addition to those aspects of the licensing procedures which had been found to be inconsistent with WTO rules. Furthermore, they suggested several drafting changes. We carefully considered these arguments and where we agreed, we modified the Findings in response in paragraphs 7.40, 7.42 and 7.49.

6.3 The EC and the Complaining parties asked for a number of specific modifications or additions to those paragraphs in the Findings which summarize their legal arguments. Since these proposed changes concerned the representation of the parties' own legal arguments, we generally accepted them. In particular, in reaction to suggestions by the EC, we modified or expanded paragraphs 7.65, 7.78, 7.104, 7.169, 7.200, 7.205, 7.224, 7.287, 7.301 and 7.313. In our view, these adjustments in general did not entail repercussions for the legal analysis in the Findings. However, in the context of the applicability of the Lomé waiver to licensing procedures and of the interpretation of Article II of GATS, we added more detail to the legal reasoning in paragraphs 7.198 and 7.301-7.302.

6.4 In respect of the discussion of Article XIII in the Findings, the Complaining parties asked the Panel to expand its findings on "Members with a substantial interest" and "New members". The EC commented on the Panel's treatment of issues such as "previous representative period", "special factors" or the EC enlargement. To the extent we accepted these suggestions, we adjusted the Findings, e.g., in paragraphs 7.91-7.94.

6.5 The Complaining parties also commented on the application of the Lomé waiver to Article XIII, on the one hand, and to the tariff treatment of non-traditional imports of ACP bananas, on the other. To the extent that we agreed with those comments, we made adjustments to paragraphs 7.104-7.110 and para-

graphs 7.135 and 7.139. The EC also raised arguments concerning the interpretation of the coverage of the waiver. In response to the EC's comments, we revised paragraphs 7.197-7.199.

6.6 Both sides requested the Panel to expand the factual discussion of the differences between the licensing procedures applied to traditional ACP imports as opposed to those applied to third-country and non-traditional ACP imports. We broadly followed these suggestions by adding more factual information from, or cross-referring to, specific parts of the descriptive section of the panel report on which our findings are based. We inserted additions in paragraphs 7.190-7.192. Other modifications along the same lines are reflected in paragraphs 7.211, 7.221 and 7.230.

6.7 With respect to the part of the Findings dealing with GATS issues, the Complaining parties proposed several specific drafting changes. We accepted these suggestions where we considered them appropriate and modified language in the discussion of "measures affecting trade in services", (paragraphs 7.281, 7.282 and 7.285), of "wholesale trade services" (paragraphs 7.287 and 7.291) and of certain other issues (see, e.g., paragraphs 7.316, 7.324, 7.347, 7.377 and 7.391). Further to that, the Complaining parties also commented on the application of the concept of "conditions of competition" to services. We revised the report accordingly in paragraphs 7.335-7.236 where we found merit in the suggestions. Finally, they clarified their claims as being based on allegations of less favourable treatment accorded to their service suppliers, not their services. In light of this, we modified the Findings accordingly, particularly in paragraphs 7.294, 7.297, 7.298, 7.306, 7.314, 7.317, 7.324, 7.329, 7.341 and 7.353.

6.8 The EC commented extensively on the part of the Findings dealing with GATS issues. Paragraphs 7.301-7.302 and 7.308 reflect our responses to the EC's concerns about the interpretation of Article II of GATS and the effective date of GATS obligations.

6.9 With respect to the sections addressing specific claims under Articles II and XVII of GATS against certain aspects of its licensing procedures, the EC suggested that the factual information it had submitted was not sufficiently reflected and discussed in the Findings of the interim report. In particular, the EC referred to information concerning nationality, ownership or control of trading companies and ripeners. Moreover, the EC asked the Panel to take more account of the information it had provided concerning the evolution in recent years of market shares of suppliers of EC/ACP origin as opposed to suppliers of Complaining parties' origin in the EC/ACP and the third-country market segments. In response to these comments, we significantly revised paragraphs 7.329-7.339 and also changed paragraphs 7.362-7.363. The revised paragraphs address in more detail the information submitted by the EC and indicate specifically how we evaluated it. We also expanded our discussion of exactly why the Panel draws conclusions from the information submitted by the parties which are different from the conclusions advocated by the EC.

6.10 In respect of the interim reports' descriptive section, the EC and the Complaining parties suggested further changes which we took into account in re-examining that part of the reports. As to the EC's request for a section describing the EC's view of the facts, we were of the view that the EC's interpretation of the facts is already reflected in a comprehensive manner in the section of the panel report which contains the legal arguments. However, where we saw the need to follow specific suggestions for changes by either side, we revised the descriptive section of the interim reports.

6.11 Guatemala also suggested changes to the Findings in respect of our discussion of its claims relating to the EC's substitution in the Uruguay Round of specific tariff rates on bananas for its pre-Uruguay Round ad valorem tariff rates. We modified paragraph 7.139 to indicate that our finding is limited to the specific circumstances surrounding the Uruguay Round of Multilateral Trade Negotiations.

VII. FINDINGS

7.1 This case is an exceedingly complex one. There are six parties (one representing 15 member States) and 20 third parties, meaning that almost one-third of Members are involved in the case. In addition to claims under the General Agreement on Tariffs and Trade 1994, claims are made for the first time in dispute settlement under four other WTO agreements: The Agreement on Agriculture, the Agreement on Import Licensing Procedures, the Agreement on Trade-Related Investment Measures and the General Agreement on Trade in Services. The submissions by the Complainants[1] and the EC totalled several thousand pages. Moreover, the unprecedented number and complexity of the claims and arguments has meant that the organization and presentation of our work has not been easy.

7.2 The findings are divided into three main parts. First we address various organizational issues that arose in the course of the Panel's work. Second, we consider preliminary issues raised by the EC concerning the validity of the establishment of this Panel and the lack of a legal interest in some issues on the part of the United States. Finally, we address the substantive issues presented by this case.

A. Organizational Issues

7.3 In the course of these proceedings, we considered two issues related to the organization of our work. These concerned the extent of the participatory rights

[1] Our use of the term Complainants in these Findings is explained in para. 7.59 infra. In respect of organizational and preliminary issues, it is used to refer to all five Complaining parties.

to be afforded third parties and the presence in Panel meetings of private lawyers representing third parties.

1. Participation of Third Parties

7.4 At the meeting of the Dispute Settlement Body on 8 May 1996, Belize, Cameroon, Colombia, Costa Rica, Côte d'Ivoire, Dominica, Dominican Republic, Ghana, Grenada, Jamaica, Nicaragua, Saint Vincent and the Grenadines, Saint Lucia, Senegal, Suriname and Venezuela requested to be allowed to participate more fully in the work of the Panel, i.e., these Members requested to be present at all meetings between the Panel and the parties to the dispute; to be able to present their point of view at each of these meetings; to receive copies of all submissions and other written material; and to be allowed to present written submissions both to the first and to the second meetings of the Panel. While the DSB took note of these statements, there was no consensus on such participation.[2] Several of these countries later confirmed their requests in letters addressed to the Chairman of the DSB.

7.5 Subsequently, we considered the above requests. The rights of third parties are dealt with in Article 10 and Appendix 3 of the Dispute Settlement Understanding. Article 10 provides that third parties "shall have an opportunity to be heard by the panel and to make written submissions to the panel". It also provides that third parties are entitled to receive the submissions of the parties made to the first substantive panel meeting. Paragraph 6 of Appendix 3 specifies that third parties shall be invited "to present their views during a session of the first substantive meeting of the panel set aside for that purpose. All such third parties may be present during the entirety of this session". Under prior GATT practice, more expansive rights were granted to third parties in several disputes, including the two prior disputes involving bananas and in the *Semiconductors* case.[3] In those cases, however, the extension of such rights had been the subject of agreement between the parties at that time. No such agreement existed between the parties in the present dispute.

7.6 Having considered representations by the Complainants, the EC and third parties, we decided prior to our first substantive meeting with the parties that, in addition to the rights specifically provided for in the DSU, third parties in this

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[2] WT/DSB/M/16, item 1, pp.1-5.

[3] Panel Report on "EEC - Import Regime for Bananas", issued on 11 February 1994 (not adopted), DS38/R, p.4, para. 8; Panel Report on "EEC - Member States' Import Regimes for Bananas", issued on 3 June 1993 (not adopted), DS32/R, p.2, para. 9; Panel Report on "Japan - Trade in Semiconductors", adopted on 4 May 1988, BISD 35S/116, 116-117, para. 5. See also Panel Report on "EEC - Tariff Treatment on Imports of Citrus Products from Certain Countries in the Mediterranean Region", issued on 7 February 1985 (not adopted), L/5776, p.2, para. 1.5; Interim Panel Report on "United Kingdom - Dollar Area Quotas", adopted on 30 July 1973, BISD 20S/230, 231, para. 3.

dispute would be invited to observe the whole of the proceedings at that meeting and not just the one session thereof set aside for hearing third-party arguments.

7.7 At the first substantive meeting of the Panel, the EC requested that third parties be allowed to participate in future panel meetings as set out in paragraph 7.4 above. The Complainants expressed the view that third party rights were sufficiently safeguarded by the normal procedures as set out in Article 10 of the DSU. We consulted the parties on this issue, but they maintained their opposing viewpoints.

7.8 We thereafter ruled as follows:

> "(a) The Panel has decided, after consultations with the parties in conformity with DSU Article 12.1, that members of governments of third parties will be permitted to observe the second substantive meeting of the Panel with the parties. The Panel envisages that the observers will have the opportunity also to make a brief statement at a suitable moment during the second meeting. The Panel does not expect them to submit additional written material beyond responses to the questions already posed during the first meeting.
>
> (b) The Panel based its decision, *inter alia*, on the following considerations:
>
> (i) the economic effect of the disputed EC banana regime on certain third parties appeared to be very large;
>
> (ii) the economic benefits to certain third parties from the EC banana regime were claimed to derive from an international treaty between them and the EC;
>
> (iii) past practice in panel proceedings involving the banana regimes of the EC and its member States; and
>
> (iv) the parties to the dispute could not agree on the issue".

As a consequence of our ruling, the third parties in these proceedings enjoyed broader participatory rights than are granted to third parties under the DSU.

7.9 Following the second substantive meeting of the Panel with the parties, several of the third parties asked for further participatory rights, including participation in the interim review process. We consulted the parties and found that, as before, they had diverging views on the appropriateness of granting this request. We decided that no further participatory rights should be extended to third parties, except, in accord with normal practice, to permit them to review the draft of the summary of their arguments in the Descriptive Part. In this regard, we noted that Article 15 of the DSU, which deals with the interim review process, refers only to parties as participants in that process. In our view, to give third parties all of the rights of parties would inappropriately blur the distinction drawn in the DSU between parties and third parties.

2. Presence of Private Lawyers

7.10 At the beginning of the Panel's first substantive meeting on 10 September 1996, one of the Complainants objected to the alleged presence of private lawyers in the Panel meeting. In accordance with Article 12.1 of the DSU and the Working Procedures of Appendix 3, we held consultations with the Complainants and the EC on this issue and the Complainants expressed opposition to allowing private lawyers to be present.

7.11 We thereafter asked parties and third parties to observe the guidelines contained in our working procedures and that only members of governments (including the European Commission and an international civil servant of the ACP Secretariat) attend the Panel meeting. We based our request on the following considerations:

(a) It has been past practice in GATT and WTO dispute settlement proceedings not to admit private lawyers to panel meetings if any party objected to their presence and in this case the Complainants did so object.

(b) In the working procedures of the Panel, which were adopted at the Panel's organizational meeting, we had expressed our expectation that only members of governments would be present at Panel meetings.

(c) The presence of private lawyers in delegations of some third parties would be unfair to those parties and other third parties who had utilized the services of private lawyers in preparing their submissions, but who were not accompanied by those lawyers because they assumed that all participants at the meeting would comply with our expectations as expressed in the working procedures adopted by the Panel at its organizational meeting.

(d) Given that private lawyers may not be subject to disciplinary rules such as those that applied to members of governments, their presence in Panel meetings could give rise to concerns about breaches of confidentiality.

(e) There was a question in our minds whether the admission of private lawyers to Panel meetings, if it became a common practice, would be in the interest of smaller Members as it could entail disproportionately large financial burdens for them.

(f) Moreover, we had concerns about whether the presence of private lawyers would change the intergovernmental character of WTO dispute settlement proceedings.

7.12 We noted that our request would not in any respect adversely affect the right of parties or third parties to meet and consult with their private lawyers in the course of panel proceedings, nor to receive legal or other advice in the preparation of written submissions from non-governmental experts.

B. Preliminary Issues

7.13 First, the EC claims that the consultations held in this matter between the Complainants and the EC did not fulfil their minimum function of affording a possibility for arriving at a mutually satisfactory solution and a clear setting out of the different claims of which a dispute consists. Second, it claims that the request for the establishment of this Panel was unacceptably vague and failed to comply with the requirements of Article 6.2 of the DSU. Third, it claims that the United States has no legal right or interest in a resolution of certain of its claims and therefore should not be permitted to raise them. Fourth, the EC claims that it is entitled to separate panel reports under Article 9 of the DSU.

7.14 As the Appellate Body has made clear in its first two decisions, under Article 3.2 of the DSU the starting point for the interpretation of treaty provisions is the Vienna Convention on the Law of Treaties (the "Vienna Convention").[4] Article 31 of the Vienna Convention provides in relevant part as follows:

> "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 light of its object and purpose.
>
> ...
>
> 3. There shall be taken into account, together with the context:
> ... (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
> ...".

Article 32 of the Vienna Convention permits recourse to

> "supplementary means of interpretation ... 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".

7.15 In addition, Article XVI of the Marrakesh Agreement Establishing the World Trade Organization provides as follows:

> "Except as otherwise provided under this Agreement or the Multilateral Trade Agreements, the WTO shall be guided by the decisions, procedures and customary practices followed by the CONTRACTING PARTIES to GATT 1947 and the bodies established in the framework of GATT 1947".

7.16 In light of this framework for interpretation, we turn to the arguments of the EC.

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[4] 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, DSR 1996:I, 97 at 104-106; Appellate Body Report on "United States - Standards for Reformulated and Conventional Gasoline", adopted on 20 May 1996, WT/DS2/AB/R, DSR 1996:I, 3 at 15-16.

1. Adequacy of the Consultations

7.17 Consultations under Article 4 of the DSU are normally required as the first step in the WTO dispute settlement process.[5] Article 4.2 of the DSU requires a Member "to accord sympathetic consideration to and afford adequate opportunity for consultation regarding any representations made by another Member ...". Article 4.5 of the DSU specifies that "[i]n the course of the consultations ... before resorting to further action under this Understanding, Members should attempt to obtain satisfactory adjustment of the matter". However, if consultations fail to settle a dispute within 60 days of the request for consultations, Article 4.7 of the DSU authorizes the complaining party to request the DSB to establish a panel.[6]

7.18 The EC argues that the consultations that were held in this matter between the Complainants and the EC did not fulfil their minimum function of affording a possibility for arriving at a mutually satisfactory solution and a clear setting out of the different claims of which a dispute consists. The Complainants argue that Article 4.5 of the DSU only requires that an "attempt" be made to resolve the matter. Since consultations were held on 14-15 March 1996, the Complainants argue that they complied with the DSU and were authorized to request the DSB to establish a panel when those consultations failed to produce a mutually agreed solution to the dispute. We note that the EC did not raise this issue in the DSB.[7]

7.19 Consultations play a critical role in the WTO dispute settlement process as they did under GATT. Experience under the DSU to date has shown that consultations frequently enable disputes between Members to be resolved without resort to the dispute settlement panel process.[8] Since the DSU provides in Article 3.7 that "[a] solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred", disputing parties should consult in good faith and attempt to reach such a solution. Consultations are, however, a matter reserved for the parties. The DSB is not involved; no panel is involved; and the consultations are held in the absence of the Secretariat. In these circumstances, we are not in a position to evaluate the consultation process in order to determine if it functioned in a particular way. While a mutually agreed solution is to be preferred, in some cases it is not possible for parties to agree upon one. In those cases, it is our view that the function of a panel is only to ascertain that consultations, if required, were in fact held or, at least, requested.[9]

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5 Under Article 8.10 of the Agreement on Textiles and Clothing, a matter may be taken to the DSB without prior consultations under the DSU.

6 If there is a failure to consult, Article 4.3 of the DSU provides that a panel may be requested after 30 days.

7 Minutes of DSB Meeting of 24 April 1996, WT/DSB/M/15, item 1, pp.1-2; Minutes of DSB Meeting of 8 May 1996, WT/DSB/M/16, item 1, pp.1-5.

8 WT/DBS/8, p.17 (1996 Annual Report of the DSB).

9 DSU, Article 4.3.

7.20 As to the EC argument that consultations must lead to an adequate explanation of the Complainants' case, we cannot agree. Consultations are the first step in the dispute settlement process. While one function of the consultations may be to clarify what the case is about, there is nothing in the DSU that provides that a complainant cannot request a panel unless its case is adequately explained in the consultations. The fulfilment of such a requirement would be difficult, if not impossible, for a complainant to demonstrate if a respondent chose to claim a lack of understanding of the case, a result which would undermine the automatic nature of panel establishment under the DSU. The only prerequisite for requesting a panel is that the consultations have "fail[ed] to settle a dispute within 60 days of receipt of the request for consultations ...".[10] Ultimately, the function of providing notice to a respondent of a complainant's claims and arguments is served by the request for establishment of a panel and by the complainant's submissions to that panel.

7.21 We reject the EC's claim that the Complainants' case should be dismissed because the consultations held concerning this dispute did not perform their minimum function of affording a possibility for arriving at a mutually satisfactory solution and a clear setting out of the different claims of which a dispute consists.

2. Specificity of the Request for Panel Establishment

(a) Article 6.2 and the Request for Establishment of the Panel

7.22 Article 6.2 of the DSU provides in relevant part as follows:

> "The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a brief legal basis of the complaint sufficient to present the problem clearly. ... ".

The EC claims that the request for the establishment of the Panel in this case fails to "identify the specific measures at issue" and does not "provide a brief legal basis of the complaint sufficient to present the problem clearly".

7.23 The relevant parts of the Complainants' request for the establishment of this Panel read as follows:

> "The European Communities maintains a regime for the importation, sale and distribution of bananas established by Regulation 404/93 (O.J. L 47 of 25 February 1993, p. 1), and subsequent EC legislation, regulations and administrative measures, including those reflecting the provisions of the Framework Agreement on bananas, which implement, supplement and amend that regime. The regime and related measures appear to be inconsistent with the

[10] DSU, Article 4.7.

obligations of the EC under, *inter alia*, the General Agreement on Tariffs and Trade 1994 ("GATT 1994"), the Agreement on Import Licensing Procedures, the Agreement on Agriculture, the General Agreement on Trade in Services ("GATS") and the Agreement on Trade-Related Investment Measures ("TRIMs Agreement").

[Description of consultations omitted]

The Governments of Ecuador, Guatemala, Honduras, Mexico and the United States, acting jointly and severally, each in the exercise of the rights accruing to it as a member of the WTO, therefore, respectfully request the establishment of a panel to examine this matter in light of the GATT 1994, the Agreement on Import Licensing Procedures, the Agreement on Agriculture, the GATS, and the TRIMs Agreement, and find that the EC's measures are inconsistent with the following Agreements and provisions among others:

(1) Articles I, II, III, X, XI and XIII of the GATT 1994,

(2) Articles 1 and 3 of the Agreement on Import Licensing Procedures,

(3) the Agreement on Agriculture,

(4) Articles II, XVI and XVII of the GATS, and

(5) Article 2 of the TRIMs Agreement.

These measures also produce distortions which nullify or impair benefits accruing to Ecuador, Guatemala, Honduras, Mexico and the United States, directly or indirectly, under the cited Agreements; and these measures impede the objectives of the GATT 1994 and the other cited Agreements".[11]

(b) The Arguments of the Parties

7.24 The EC claims that the Complainants' request for the establishment of this Panel fails to comply with the requirements of Article 6.2 of the DSU. The EC notes that the request refers specifically to only one EC regulation and describes that regulation and related, but unspecified, measures as a "regime". The EC further notes that while the request refers to some specific agreements and provisions, it suggests that there might be other unspecified provisions and agreements that are relevant, and that it fails to explain which part of the EC regime is inconsistent with the requirements of which provision of which agreement. The EC argues that for these reasons the panel request is inadequate to serve as the basis for the terms of reference of the Panel and inadequate to give appropriate notice to the EC and potential third parties of which claims may be put forward by the

[11] WT/DS27/6.

Complainants. In support of its arguments, the EC cites two panel reports issued under the Tokyo Round Agreement on the Interpretation of Article VI (the "Tokyo Round Anti-Dumping Code"), one of which was adopted by the Committee on Anti-Dumping Practices and one of which was not.[12]

7.25 In response, the Complainants argue that their request refers to the basic EC regulation that establishes the EC rules on banana imports and that this reference is sufficient to identify the measures at issue. They argue, in addition, that Article 6.2 does not require a panel request to tie each part of a contested measure to a specific provision of a WTO agreement that it is inconsistent with, but rather that submissions to panels serve that purpose. The Complainants further argue that the Tokyo Round Anti-Dumping Code cases are irrelevant. Moreover, they note that the EC did not raise this issue at either DSB meeting at which the panel request was presented and cannot now claim that it was prejudiced by not knowing the claims of the Complainants. Finally, the Complainants argue that this Panel may not rule on this claim because it is outside the Panel's terms of reference.

(c) Analysis of the Article 6.2 Claim

7.26 We examine first the argument by the Complainants that we have no authority to consider the EC claim. As noted above, panels under GATT 1947 and the Tokyo Round agreements considered similar claims.[13] We see no reason to deviate from that practice. Because of the application of "reverse" consensus decision-making applicable in the case of panel establishment in the DSB, the DSB is not likely to be an effective body for resolving disputes over whether a request for the establishment of a panel meets the requirements of Article 6.2 of the DSU. Therefore, as a practical matter only the panel established on the basis of the request (and thereafter the Appellate Body) can perform that function. Moreover, the issue we are asked to resolve can be viewed in essence as a decision on the scope of our terms of reference, which is clearly a proper subject for

[12] Panel Report on "United States - Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway", adopted on 26 April 1994, ADP/87, p.99, paras. 333-335; Panel Report on "EC - Anti-Dumping Duties on Audiotapes in Cassettes Originating in Japan", issued on 28 April 1995, ADP/136, p.53, para. 295.

[13] Panel Report on "United States - Denial of Most-Favoured Nation Treatment as to Non-Rubber Footwear from Brazil", adopted on 19 June 1992, BISD 39S/128, pp.147-148, paras. 6.1-6.2. Panels under Tokyo Round agreements include: Panel Report on "European Communities - Imposition of Anti-Dumping Duties on Imports of Cotton Yarn from Brazil", adopted on 4 July 1995, ADP/137, pp.105-109, paras. 438-466; Panel Report on "United States - Countervailing Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway", adopted on 27 April 1994, SCM/153, pp.68-69, paras. 208-214; Panel Report on "United States - Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway", adopted on 26 April 1994, ADP/87, p.99, paras. 333-335; Panel Report on "United States - Anti-Dumping Duties on Imports of Gray Portland Cement and Cement Clinker from Mexico", issued on 7 September 1992, ADP/82, pp.49-50, para. 5.12.

consideration by a panel.[14] We turn therefore to an analysis of the EC claim in light of the interpretative rule of the Vienna Convention and of Article XVI of the WTO Agreement. In this connection, we examine (i) the ordinary meaning of the terms of Article 6.2, (ii) the context of the terms of Article 6.2, (iii) the object and purpose of Article 6.2 and (iv) past practice under Article 6.2 and its predecessor.

(i) Ordinary Meaning of Treaty Terms

7.27 Article 6.2 of the DSU requires that the "specific measures at issue" be "identif[ied]" and that there be "a brief summary of the legal basis of the complaint sufficient to present the problem clearly". The EC challenges the panel request on both grounds. As to the first requirement, the panel request does identify the basic EC regulation at issue by place and date of publication. In our view, this complies with the requirements of Article 6.2. While the request does not identify the subsequent EC legislation, regulations and administrative measures that further refine and implement the basic regulation, we believe that the "banana regime" that the Complainants are contesting is adequately identified.

7.28 As to the second requirement of Article 6.2, a complete elaboration of the complainant's legal argument is not required. Article 6.2 specifies only that the request must include a "summary" of the legal basis of the complaint and that the summary need only be "brief". However, Article 6.2 does require that summary to "present the *problem* clearly". In undertaking an analysis of whether the panel request in this case complies with the terms of Article 6.2 of the DSU, we find it useful to divide the request into three categories of specificity. First, in most cases, the request alleges that the EC banana regime is inconsistent with the requirements of a specific provision of a specific agreement. Second, in the case of the Agreement on Agriculture, the request simply alleges that the regime is inconsistent with that agreement. Third, the panel request indicates that the list of provisions specified in the request is not exclusive. We examine the compliance of the request with Article 6.2 in each of these three situations.

7.29 Where the panel request alleges that the banana regime is inconsistent with the requirements of a specific article of a specific agreement, we believe that the request is sufficiently specific to comply with the minimum standards established by the terms of Article 6.2 of the DSU. For example, the request claims that the regime is inconsistent with the requirements of six GATT provisions: Articles I, II, III, X, XI and XIII, as well as inconsistent with the requirements of specific provisions of the Agreement on Import Licensing Procedures, the Agreement on Trade-Related Investment Measures and the General Agreement on Trade in Services. Generally, each of these provisions is concerned with a

[14] The Appellate Body has considered terms of reference issues. Appellate Body Report on "Brazil - Measures Affecting Desiccated Coconut", issued on 21 February 1997, WT/DS22/AB/R, DSR 1997:I, 167 at 186.

distinct obligation. For example, Article I of GATT bans discrimination on the basis of origin in respect of certain specified matters. A fair reading of the panel request's reference to Article I would be that there is an allegation that the EC banana regime is inconsistent with the requirements of Article I because it contains elements that discriminate in favour of some countries to the detriment of Members. Such an allegation can be described as a "brief summary of the legal basis of the complaint", which arguably presents the "problem" clearly, i.e. there is discrimination on the basis of product origin which is inconsistent with the requirements of Article I. However, a panel request that does no more than identify a measure and specify the provision with which it is alleged to be inconsistent is, in our view, at the outer limits of what is acceptable under Article 6.2. Nonetheless, particularly in light of our analysis below of the object and purpose and of the context of Article 6.2 and of past GATT and WTO practice, we believe that this conclusion is the appropriate interpretation of the terms of Article 6.2. In this regard, we note that there is no explicit requirement in Article 6.2 to explain how the measure at issue is inconsistent with the requirements of a specific WTO provision and the EC concedes in its response to our questions that a simple listing of the provision and agreement alleged to have been violated may suffice for the purposes of Article 6.2.[15]

7.30 The panel request alleges an inconsistency with the requirements of the Agreement on Agriculture, without specifying any provision thereof. It also states that "the EC's measures are inconsistent with the following Agreements and provisions *among others*", suggesting that there may be inconsistencies with unspecified agreements and inconsistencies with unspecified provisions of the specified agreements. In these two situations, it is not possible at the panel request stage, even in the broadest generic terms, to describe what legal "problem" is asserted. While a reference to a specific provision of a specific agreement may not be essential if the problem or legal claim is otherwise clearly described, in the absence of some description of the problem, a mere reference to an entire agreement or simply to "other" unspecified agreements or provisions is inadequate under the terms of Article 6.2. Accordingly, we find that references to a WTO agreement without mentioning any provisions or to unidentified "other" provisions are too vague to meet the standards of Article 6.2 of the DSU.

[15] In its response, the EC seems to accept that the following panel requests under the DSU meet the requirements of Article 6.2 even though they only list the WTO provisions that the challenged measures are alleged to be inconsistent with, without explaining why: Canada - Certain Measures Concerning Periodicals, Request for the Establishment of a Panel, 24 May 1996, WT/DS31/2; EC - Measures Concerning Meat and Meat Products (Hormones), Request for the Establishment of a Panel, WT/DS26/6; EC - Trade Description of Scallops, Request for the Establishment of a Panel by Chile, WT/DS14/5; EC - Trade Description of Scallops, Request for the Establishment of a Panel by Peru, WT/DS12/7; EC - Trade Description of Scallops, Request for the Establishment of a Panel by Canada, WT/DS7/7. We would note that at least one of the EC's three panel requests under the DSU has mentioned only the agreement and provisions alleged to have been violated, i.e., United States - Tariff Increases on Products from the EC, Request for the Establishment of a Panel by the EC, WT/DS39/2.

7.31 Thus, we preliminarily find that, given the ordinary meaning of the terms of Article 6.2 of the DSU, the panel request made by Complainants was generally sufficient to meet its requirements. We note, however, that since the invocation of the Agreement on Agriculture in the panel request did not indicate a specific provision thereof, we will not consider the claim raised by Ecuador in its first written submission under that Agreement. We will also not consider the claims raised by Ecuador, Guatemala and Honduras, and the United States in their first written submissions under Article 5 of the TRIMs Agreement since the panel request referred only to Article 2 of the TRIMs Agreement.[16] We now consider whether this preliminary finding is supported by the context and the object and purpose of Article 6.2. We also consider past practice under Article 6.2 and its predecessor.

(ii) Context

7.32 The terms of Article 6.2 of the DSU must be interpreted in light of their context in the WTO dispute settlement system. First and foremost, that system is designed to settle disputes.[17] Article 3.2 of the DSU specifies that "[t]he dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. ...". Article 3.3 continues in the same vein (emphasis added):

> "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".

In our view, the DSU must be interpreted so as to promote the prompt settlement of disputes, without adopting a reading of DSU provisions that would prolong disputes unnecessarily or make the DSU overly difficult for Members, including developing country Members, to use. A clear test of specificity, such as we apply in this case, is required.

7.33 The problems presented by other interpretations of Article 6.2 are readily apparent in this case. While no one would contest that there is a real dispute between the Complainants and the EC over the EC's import regime for bananas, if we were to rule that the panel request did not meet the requirements of Article 6.2 of the DSU and that the Complainants' panel request was accordingly invalid, the resolution of this dispute would be delayed by at least 6 or 7 months. Yet,

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[16] Given that the request for consultations did list Article 5 of the TRIMs Agreement, the omission of that article in the panel request could be understood as a decision by the Complainants not to pursue this claim in the light of a more thorough legal assessment and/or the consultations.

[17] Appellate Body Report on "United States - Measure Affecting Imports of Woven Wool Shirts and Blouses from India", issued on 25 April 1997, WT/DS33/AB/R, DSR 1997:I, 323 at 340.

what purpose would that serve? Once the Complainants filed their first submission, there could be no doubt exactly what their claims were. To the extent that a respondent could legitimately claim surprise in what was contained in a complainant's submission, the efficient solution would be to grant the respondent several more weeks to file its initial submission, not to start the entire consultation/panel request process over. This is particularly true given that a reading of Article 6.2 of the DSU such as the EC proposes could result in some parts of the case being accepted, while others were relegated to a different proceeding, something completely contrary to the DSU's philosophy of resolving all related issues together, as expressed in Article 9 of the DSU.[18] Moreover, such a reading could make it more difficult for Members, and particularly developing-country Members, to use the dispute settlement system, except by incurring the expense of private legal experts at the earliest stage of the proceedings.

7.34 Thus, a consideration of the context of the terms of Article 6.2 supports the preliminary finding reached in paragraph 7.31 above.

(iii) Object and Purpose

7.35 We see three purposes for Article 6.2 of the DSU. First, the request for the establishment of a panel under Article 6.2 will usually serve to set the terms of reference of the panel under Article 7 of the DSU. Second, the request informs the responding Member of the scope of the case against it. Third, the request informs potential third parties of the scope of the case, so that they can better decide whether they wish to assert third-party rights.

7.36 In this case, we believe that the request for establishment of a panel adequately serves these three purposes. First, we have already found that Article 6.2 of the DSU requires a complainant to specify the provision of the WTO agreements that it is relying upon by agreement and article. Thus, a panel will always be able to understand which claims it is required to examine under its terms of reference. Given this interpretation of Article 6.2, we understand our terms of reference without difficulty in this case.

7.37 Second, it appears that the panel request adequately informed the EC of the case against it. We reach this conclusion in light of the facts that the EC did not complain about the request's specificity until it filed its first submission, it did not ask for time beyond the normal periods indicated in the DSU to file its submission and it did not claim in its written submissions that its defence was preju-

[18] Article 9 of the DSU provides that "1. Where more than one Member requests the establishment of a panel related to the same matter, a single panel may be established to examine these complaints taking into account the rights of all Members concerned. A single panel should be established to examine such complaints whenever feasible. ... 3. 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".

diced in any particular way by a lack of specificity in the panel request. The EC stated at the Panel's hearings, however, that it had been prejudiced in that the lack of minimal clarity handicapped the EC in the preparation of its defence. However, as pointed out by the Complainants, the EC's oral presentation at the first meeting of the Panel, its responses to our questions and its rebuttal submission essentially followed the line of argument made in its initial submissions, suggesting that it had sufficient time to develop its line of defence. In these circumstances, we believe that the object and purpose of Article 6.2 of the DSU was served by the Complainants' panel request, suggesting that such request was adequately specific under Article 6.2.

7.38 Third, it appears that the panel request adequately informed third parties of the case against the EC, as 20 third parties participated in this panel process.[19]

7.39 Thus, a consideration of the object and purpose of Article 6.2 supports the preliminary finding reached in paragraph 7.31 above.

(iv) Past Practice

7.40 Article XVI:1 of the WTO Agreement provides, as noted above, that the "WTO shall be guided by the decisions, procedures and customary practices" of GATT. In the case of adopted panel reports, the Appellate Body has indicated that

> "Adopted panel reports are an important part of the GATT *acquis*. They are often taken into account by subsequent panels. They create legitimate expectations among WTO Members, and, therefore should be taken into account where they are relevant to any dispute. However, they are not binding, except with respect to resolving the particular dispute between the parties to that dispute".[20]

There are two GATT/WTO cases that consider issues related to the one we face here. In 1992 a panel declined to consider claims based on GATT Articles X and XXIII(b)-(c) because they were not within its terms of reference, which it noted were defined by the request for the establishment of the panel.[21] More recently, a WTO panel reached a similar result in respect of a claim that consultations had not been properly held under Article XXIII, rejecting the claim because a fair reading of the documents that were used to establish its terms of reference

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[19] Belize, Cameroon, Canada, Colombia, Costa Rica, Côte d'Ivoire, Dominica, Dominican Republic, Ghana, Grenada, India, Jamaica, Japan, Nicaragua, Philippines, Saint Vincent and the Grenadines, Saint Lucia, Senegal, Suriname and Venezuela. Thailand indicated a third-party interest in the proceedings, but later withdrew.

[20] 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, DSR 1996:I, 97 at 108.

[21] Panel Report on "United States - Denial of Most-favoured-nation Treatment as to Non-rubber Footwear from Brazil", adopted on 19 June 1992, BISD 39S/128, 147-148, paras. 6.1-6.2.

showed that the issue had not been raised in those documents.[22] Although treated as a "terms of reference" issue in both cases, the results were in effect determined on the basis of the panel request. The terms of reference were found not to encompass the claim because the provision or issue had not been referred to in the panel request (and related documents in one case), which in both cases had served to establish the panels' terms of reference. Our reading of the terms of Article 6.2 of the DSU is not inconsistent with these past GATT/WTO panel decisions, nor with a recent Appellate Body decision affirming the above-mentioned WTO panel decision.[23] In this connection, we note that the power of a panel to interpret its terms of reference is not negated by the requirement in Article 7.2 of the DSU that a panel address the "relevant" provisions of covered agreements cited by the parties.

7.41 With respect to practice of GATT contracting parties and Members in requesting panels, numerous examples may be found in the period from 1989[24] to date of panel requests containing only an allegation that a measure is inconsistent with the requirements of a specific provision of a specific agreement, without a more detailed description of the problem.[25] Indeed, as noted above, the EC concedes as much in its response to our questions where it examines panel requests in eight WTO cases and finds that in most cases there is no specific explanation given as to how the contested measure is inconsistent with the requirements of the specified provisions of the specified agreements. To date, no GATT or WTO panel has found such requests to be inadequate, except in respect of the anti-dumping and countervailing duty claims discussed in the following paragraph. Thus, our reading of the terms of Article 6.2 of the DSU is consistent with the practice followed by GATT contracting parties and WTO Members in requesting

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[22] Panel Report on "Brazil - Measures Affecting Desiccated Coconut", issued on 17 October 1996, WT/DS22/R, pp.77-78, paras. 286-290.

[23] Appellate Body Report on "Brazil - Measures Affecting Desiccated Coconut", issued on 21 February 1997, WT/DS22/AB/R, DSR 1997:I, 167 at 186.

[24] In 1989, the GATT CONTRACTING PARTIES adopted Improvements to the GATT Dispute Settlement Rules and Procedures (BISD 36S/61), including the following language, which is quite similar to that contained in Article 6.2 of the DSU:

> "F.(a) The request for a panel or a working party shall be made in writing. It shall indicate whether consultations were held, and provide a brief summary of the factual and legal basis of the complaint sufficient to present the problem clearly".

There were no specific rules on the form of requests for the establishment of panels prior to 1989.

[25] See examples cited in note 15 supra. See also EC - Measures Affecting Livestock and Meat (Hormones), Request for the Establishment of a Panel, WT/DS48/5; Brazil - Measures Affecting Desiccated Coconut, Request for the Establishment of a Panel, WT/DS22/2; European Communities - Duties on Imports of Grains, Request for the Establishment of a Panel, WT/DS13/2; Japan - Taxes on Alcoholic Beverages, Request for the Establishment of a Panel by the United States, WT/DS11/2; European Communities - Duties on Imports of Cereals, Request for the Establishment of a Panel, WT/DS9/2; United States - Standards for Reformulated and Conventional Gasoline, Request for the Establishment of a Panel, WT/DS4/2; United States - Measures Affecting the Importation and Internal Sale and Use of Tobacco, Recourse to Article XXIII:2 by Argentina, DS44/8; EEC - Restrictions on Imports of Apples, Communication from Chile, DS39/2 & DS41/2.

panels under Article 6.2 and the similar language of its predecessor provision, which was adopted by the GATT CONTRACTING PARTIES in 1989.

7.42 It can be argued, however, that our reading of the terms of Article 6.2 may not be consistent with several panel decisions (adopted and unadopted) under the Tokyo Round Agreement on Implementation of Article VI (the "Tokyo Round Anti-Dumping Code").[26] We find these cases to be of limited relevance in the interpretation of the terms of Article 6.2 of the DSU. In the first place, the Tokyo Round Anti-Dumping Code had different rules for the initiation of panel procedures than were applicable in the case of GATT 1947 panels. More fundamentally, Article 15 of the Tokyo Round Anti-Dumping Code required a so-called conciliation procedure, involving the disputing parties and the Committee charged with supervising the operations of the Code, between the end of the consultation period and the filing of a request to establish a panel. The practice under this conciliation procedure involved the preparation of a detailed statement of issues by the complaining party, which was circulated to the members of the Committee so that they might attempt to solve the dispute through conciliation. Article 15.5 of the Tokyo Round Anti-Dumping Code referred to the conciliation process as involving a "detailed examination by the Committee". In order to make the conciliation process meaningful, it may have been appropriate to insist that all claims brought before a panel have been considered in the conciliation process. Such a conciliation requirement does not exist under the DSU and did not exist under GATT 1947 rules. There has never been a practice of preparing such a statement of claims. Moreover, the nature of antidumping cases is different from this case.

7.43 In any event, we recognize that past practice under the Tokyo Round Anti-Dumping Code may have been inconsistent with the result we reach. We recall that Article 3.3 of the DSU states that the prompt settlement of disputes is essential to the effective functioning of the WTO and we believe that our interpretation of Article 6.2 of the DSU best achieves that objective.

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[26] Panel Report on "United States - Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway", adopted 26 April 1994, ADP/87, paras. 333-335; Panel Report on "European Communities - Imposition of Anti-Dumping Duties on Imports of Cotton Yarn from Brazil", ADP/137, adopted on 4 July 1995, paras. 438-466; Panel Report on "United States - Anti-Dumping Duties on Imports of Gray Portland Cement and Cement Clinker from Mexico", issued on 7 September 1992 (not adopted), ADP/82, para. 5.12; Panel Report on "EC - Anti-Dumping Duties on Audiotapes in Cassettes Originating in Japan", issued on 28 April 1995 (not adopted), ADP/136, para. 295. In addition, there was one case involving this issue under the Tokyo Round Agreement on Interpretation and Application of Articles VI, XVI and XXIII. Panel Report on "United States - Countervailing Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway", adopted 27 April 1994, SCM/153, paras. 208-214 (following the approach of the Salmon antidumping case cited above). A claim of noncompliance with Article 6.2 was made in the Panel Report on "Measures Affecting Desiccated Coconut", dated 17 October 1996, WT/DS22/R, para. 290, but the panel did not reach the Article 6.2 issue, except as noted above, by finding that the failure to allege that a measure was inconsistent with the requirements of a specific provision of GATT meant that a claim based on that provision was not within the panel's terms of reference, a result which we follow.

(v) Cure

7.44 Finally, we note that at the second substantive Panel meeting, we expressed the preliminary view that even if there was some uncertainty whether the panel request had met the requirements of Article 6.2, the first written submissions of the Complainants "cured" that uncertainty because their submissions were sufficiently detailed to present all the factual and legal issues clearly. We considered that at the time that the EC filed its first written submission to the Panel, it had complete knowledge of the Complainants' case through their submissions. In light of our analysis of the panel request and Article 6.2 as outlined above, we confirm our preliminary view.[27]

7.45 We therefore find that the panel request made by the Complainants was sufficient to meet the requirements of Article 6.2 of the DSU to the extent that it alleged inconsistencies with the requirements of specific provisions of specific WTO agreements.

7.46 In light of the foregoing finding, since the invocation of the Agreement on Agriculture in the panel request did not indicate a specific provision thereof, we will not consider the claim raised by Ecuador in its first written submission under that Agreement. We will also not consider the claims raised by Ecuador, Guatemala and Honduras, and the United States in their first written submissions under Article 5 of the TRIMs Agreement since the panel request referred only to Article 2 of the TRIMs Agreement.[28]

3. Requirement of Legal Interest

7.47 The EC argues that the US claims concerning trade in goods should be rejected because US banana production is minimal, its banana exports are nil and that for climatic reasons this situation is not likely to change. As a result, the EC suggests that the United States has not suffered any nullification or impairment of WTO benefits in respect of trade in bananas as required by Article 3.3 and 3.7 of the DSU.[29] Moreover, the EC argues that the United States would have no effective WTO remedy under Article 22 of the DSU. With no effective remedy and absent any notion of a declaratory judgment or advisory opinion in the WTO dispute settlement system, the EC claims that the United States cannot raise "goods" issues because it has "no legal right or interest" therein. The EC argues

[27] We exclude from this confirmation any suggestion that the panel request was sufficient to allow claims based on the Agreement on Agriculture and Article 5 of the TRIMs Agreement since as to those provisions, the panel request did not comply at all with the requirements of Article 6.2 and, accordingly, there was no uncertainty that could be cured.

[28] The panel request listed Article XI of GATT, but no claims under Article XI were pursued by the Complainants.

[29] Article 3.3 of the DSU provides that the prompt settlement of disputes is essential "in situations where a Member considers that benefits accruing to it directly or indirectly under the covered agreements are being impaired". Article 3.7 of the DSU requires Members to exercise judgment as to whether invocation of the DSU would be "fruitful".

that there must be a requirement in the WTO dispute settlement system that a complaining party have such a "legal interest" because the absence of such a requirement would undermine the DSU by leading to litigation "by all against all". The EC also suggests that the interests of Members in any given case can be adequately protected through assertion of a third party interest in the case.

7.48 In response, the Complainants argue that there is no basis in the DSU for the EC's claim and that their claims are covered by the Panel's terms of reference. They argue that Article 3.8 of the DSU presupposes a finding of infringement prior to a consideration of the nullification-or-impairment issue, suggesting that even if no compensation were due, an infringement finding could be made. Moreover, they argue that it is inappropriate to try to define potential trade. They also mention that in a past case the EC advanced a broad notion of nullification or impairment, which if generally accepted would permit the Complainants to claim nullification or impairment in this case.

7.49 In examining this issue, we note that neither Article 3.3 nor 3.7 of the DSU nor any other provision of the DSU contain any explicit requirement that a Member must have a "legal interest" as a prerequisite for requesting a panel. The reference in Article XXIII of GATT to nullification or impairment (or the impeding of the attainment of any GATT objective) does not establish a procedural requirement. Moreover, Article 3.8 of the DSU provides that nullification or impairment is normally presumed if there is an infringement of the obligations of a WTO agreement.[30]

7.50 We fail to see that there is, or should be, a legal interest test under the DSU. This view is corroborated by past GATT practice, which suggests that if a complainant claims that a measure is inconsistent with the requirements of GATT rules, there is not a requirement to show actual trade effects. GATT rules have been consistently interpreted to protect "competitive opportunities" as opposed to actual trade flows. For example, in the 1949 Working Party Report on Brazilian Internal Taxes, a number of the members of the working party took the view that

> "the absence of imports from contracting parties ... would not necessarily be an indication that they had no interest in the exports of the product affected by the tax, since their potentialities as exporters, given national treatment, should be taken into account".[31]

This view was confirmed in the 1958 *Italian Agricultural Machinery* case, where the panel noted that Article III of GATT applied to "any laws or regulations which might adversely modify the conditions of competition between the domestic and imported products".[32] The *Section 337* case notes that Article III is con-

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[30] See Panel Report on "United States - Taxes on Petroleum and Certain Imported Substances", adopted on 17 June 1987, BISD 34S/136, 158, para. 5.1.9.

[31] GATT/CP.3/42, adopted 30 June 1949, II/181, 185, para. 16.

[32] Panel Report on "Italian Discrimination Against Imported Agricultural Machinery", adopted 23 October 1958, 7S/60, 64, para.12.

cerned with "effective equality of opportunities for imported products".[33] These cases confirm that WTO rules are not concerned with actual trade, but rather with competitive opportunities. Generally, it would be difficult to conclude that a Member had no possibility of competing in respect of a product or service. The United States does produce bananas in Puerto Rico and Hawaii. Moreover, even if the United States did not have even a potential export interest, its internal market for bananas could be affected by the EC regime and that regime's effect on world supplies and prices. Indeed, with the increased interdependence of the global economy, which means that actions taken in one country are likely to have significant effects on trade and foreign direct investment flows in others, Members have a greater stake in enforcing WTO rules than in the past since any deviation from the negotiated balance of rights and obligations is more likely than ever to affect them, directly or indirectly. Since the United States is likely to be affected by the EC regime, it would have an interest in a determination of whether the EC regime is inconsistent with the requirements of WTO rules. Thus, in our view a Member's potential interest in trade in goods or services and its interest in a determination of rights and obligations under the WTO Agreement are each sufficient to establish a right to pursue a WTO dispute settlement proceeding. Moreover, we note that this result is consistent with decisions of international tribunals.[34]

7.51 As to the EC's suggestions that the absence of a legal interest test (defined to exclude the US "goods" claims in this case) would undermine the DSU because it would lead to litigation "by all against all" and that the interests of Members in any given case can be adequately protected through assertion of a third party rights in the case, we note that all Members have an interest in ensuring that other Members comply with their obligations. That interest is not completely served by the possible assertion of third party rights since there may be no occasion to assert such rights unless another Member initiates a DSU proceeding and

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[33] Panel Report on "United States - Section 337 of the Tariff Act of 1930", adopted on 7 November 1989, BISD 36S/345, 386-387, para. 5.11.

[34] The International Court of Justice has not defined the concept of legal interest in specific terms. However, a number of its cases would support finding a legal interest in this case. For example, in the *Wimbledon* case, the Permanent Court of International Justice found that a state could raise a claim with respect to the Kiel Canal even though its fleet did not want to use it, suggesting that a potential interest was sufficient for a legal interest. PCIJ (1923), Ser. A, no. 1, 20. In *Northern Cameroons* (*Preliminary Objections*), the ICJ stated:

> "The function of the Court is to state the law, but it may pronounce judgment only in connection with concrete cases where there exists at the time of adjudication an actual controversy involving a conflict of legal interest between the parties. The Court's judgment must have some practical consequence in the sense that it can affect existing legal rights or obligations of the parties, thus removing uncertainty from their legal relations" (ICJ Reports (1963), 33-34).

Here, our decision will have such an effect to the extent that the EC is obligated to revise the challenged measures. See also Part II of the Draft Articles on State Responsibility, art. 40.2(e)-(f), provisionally adopted by the Drafting Committee of the International Law Commission. A/CN.4/L.524, 21 June 1996.

since third party rights are more limited than the rights of parties. The likelihood of litigation by all against all seems unlikely, as Members are admonished by Article 3.7 of the DSU to exercise restraint in bringing cases and the cost of bringing cases is such, especially in a case like this one, that this admonition is likely to be followed. In our view, it is also unlikely that significant numbers of cases will be initiated by Members that have no immediate trade interest in their results.

7.52 Thus, we find that under the DSU the United States has a right to advance the claims that it has raised in this case.

4. Number of Panel Reports

7.53 The EC requested the Panel, pursuant to Article 9 of the DSU, to prepare four panel reports in this case-one each for the claims of Ecuador, Guatemala and Honduras (who filed a joint first submission), Mexico and the United States. The Complainants suggested that, even if the EC had a right to insist on separate reports under Article 9, it should not do so because of the increased administrative burden that would be placed upon the Panel. Moreover, they requested that the Panel should make the same findings and conclusions with respect to the same claims.

7.54 Article 9 of the DSU provides in relevant part as follows:

> "1. Where more than one Member requests the establishment of a panel related to the same matter, a single panel may be established to examine these complaints taking into account the rights of all Members concerned.
>
> 2. The single panel shall organize its examination and present its findings to the DSB in such a manner that the rights the parties to the dispute would have enjoyed had separate panels examined the complaints are in no way impaired. If one of the parties to the dispute so requests, the panel shall submit separate reports on the dispute concerned. ...".

7.55 We interpret the terms of Article 9 to require us to grant the EC request. However, in light of the fact that the Complainants presented joint oral submissions to the Panel, joint responses to questions and a joint rebuttal submission, as well as the fact that they have collectively endorsed the arguments made in each other's first submissions, we must also take account of the close interrelationship of the Complainants' arguments.

7.56 In our view, one of the objectives of Article 9 is to ensure that a respondent is not later faced with a demand for compensation or threatened by retaliation under Article 22 of the DSU in respect of uncured inconsistencies with WTO rules that were not complained of by one of the complaining parties participating in a panel proceeding. Our reports must bear this objective in mind.

7.57 For purposes of determining whether a Complainant in this matter has made a claim, we have examined its first written submission, as we consider that

document determines the claims made by a complaining party. To allow the assertion of additional claims after that point would be unfair to the respondent, as it would have little or no time to prepare a response to such claims. In this regard, we note that paragraph 12(c) of the Appendix 3 to the DSU on "Working Procedures" foresees the simultaneous submission of the written rebuttals by complaining and respondent parties, a procedure that was followed in this case. To allow claims to be presented in the rebuttal submissions would mean that the respondent would have an opportunity to rebut the claims only in its oral presentation during the second meeting. In our view, the failure to make a claim in the first written submission cannot be remedied by later submissions or by incorporating the claims and arguments of other complainants.

7.58 Accordingly, we have decided that the description of the Panel's proceedings, the factual aspects and the parties' arguments should be identical in the four reports. In the "Findings" section, however, the reports differ to the extent that the Complainants' initial written submissions to the Panel differ in respect of alleging inconsistencies with the requirements of specific provisions of specific agreements. Thus, to take an example, the report for Guatemala and Honduras does not discuss GATS issues because their initial written submission did not allege inconsistencies with the requirements of GATS provisions.

7.59 In light of the foregoing, in the "Findings" we use the term "the Complainants" to refer to all of the Complaining parties who have made a particular claim. In discussing the claim, when we refer to the Complainants' arguments, we mean all arguments made in support of the claim by the various Complaining parties, who have incorporated each other's arguments into their own. Thus, the term "the Complainants" in this report means Guatemala and Honduras and one or more of the other Complaining parties. In cases where only Guatemala has made a claim as outlined above, we refer to that claim as being made by Guatemala.

7.60 As explained above, when one of the Complaining parties has not claimed that a specific provision of a specific agreement has been violated in its initial written submission to the Panel, we do not discuss our findings with respect to that claim in the report for that party. However, for the convenience of readers of the four reports, we have used the same paragraph numbers and footnote numbers for the substantive discussions of the same issues in the four reports. Where an issue has not been raised by Guatemala or Honduras, we indicate in this report which reports and which paragraph numbers in those reports discuss that issue.

C. Substantive Issues

7.61 We now turn to an examination of the substantive issues raised by the Complainants in respect of the EC's regime for the importation, sale and distribution of bananas. We first address claims related to the EC's quantitative allocations for bananas, including the shares assigned to the ACP countries and to signatories of the Framework Agreement on Bananas ("BFA"). Second, we consider tariff issues, including preferences afforded to imports of certain ACP bananas.

We then consider the claims made in respect of the EC licensing procedures for bananas. Finally, we examine the claims raised in respect of the General Agreement on Trade in Services.

7.62 Before doing so, we consider 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. 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.[35] 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.

7.63 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.

1. The EC Market for Bananas: Article XIII of GATT

7.64 As of 1995, bananas could be marketed in the EC as follows:

a. First, up to 857,700 tonnes of bananas were permitted to enter duty-free from traditional ACP suppliers.

b. Second, pursuant to its GATT Article II Schedule, the EC permitted the entry of a total of up to 2.2 million tonnes of bananas at a tariff of 75 ECU per tonne. This quota was allocated as follows: (i) 49.4 per cent to the countries who are parties to the BFA; (ii) 90,000 tonnes to ACP countries in respect of amounts that they did not traditionally supply to EC member States (admitted duty-free); and (iii) the rest (46.5 per cent) to other banana exporters. In 1995 and 1996, the EC increased the 2.2 million tonne tariff quota by 353,000 tonnes to take account of the enlargement of the EC to include Austria, Finland and Sweden, although no change has been made in the EC's Schedule. Additional quantities were permitted at the in-quota tariff via hurricane licences.

c. Third, imports of bananas in excess of the above-mentioned amounts were subject in 1995 to a tariff of 822 ECU per tonne (722 ECU for ACP bananas). The 822 ECU per tonne tariff will

[35] 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, 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, DSR 1996:I, 97 at 113-115.

fall in equal instalments to 680 ECU per tonne on full implementation of the EC's Uruguay Round commitments.

d. Finally, bananas from EC territories could be sold on the EC market without restriction. In 1995, 658,200 tonnes of such bananas were marketed in the EC.

7.65 The Complainants claim that the EC has failed to allocate country-specific tariff quota shares to those Complainants that export bananas to the EC and that the EC's allocation of tariff quota shares to the ACP and BFA countries is inconsistent with the requirements of the tariff quota allocation rules of Article XIII of GATT. The EC responds that it has complied with the terms of Article XIII. In particular, the EC argues that the preferences it provides to traditional ACP bananas are permitted under the Lomé waiver and its treatment of BFA and other bananas is provided pursuant to the EC's Schedule into which the BFA is incorporated.

7.66 We first consider how Article XIII of GATT should be interpreted and whether the EC's banana tariff quota shares conform to its requirements. We then consider whether any inconsistencies with Article XIII are waived by the Lomé waiver or permitted as a result of the negotiation of the BFA and its inclusion in the EC's Schedule.

(a) Article XIII

7.67 Article XIII of GATT generally regulates the administration of quotas and tariff quotas. In relevant parts, it provides as follows:

> Article XIII
>
> *Non-Discriminatory Administration of Quantitative Restrictions*
>
> 1. No prohibition or restriction shall be applied by any Member on the importation of any product of the territory of any other Member or on the exportation of any product destined for the territory of any other Member, unless the importation of the like product of all third countries or the exportation of the like product to all third countries is similarly prohibited or restricted.
>
> 2. In applying import restrictions to any product, Members shall aim at a distribution of trade in such product approaching as closely as possible the shares which the various Members might be expected to obtain in the absence of such restrictions and to this end shall observe the following provisions:
>
> ...
>
> (*d*) In cases in which a quota is allocated among supplying countries the Member applying the restrictions may seek agreement with respect to the allocation of shares in the quota with all other Members

having a substantial interest in supplying the product concerned. In cases in which this method is not reasonably practicable, the Member concerned shall allot to Members having a substantial interest in supplying the product shares based upon the proportions, supplied by such Members during a previous representative period, of the total quantity or value of imports of the product, due account being taken of any special factors which may have affected or may be affecting the trade in the product. No conditions or formalities shall be imposed which would prevent any Member from utilizing fully the share of any such total quantity or value which has been allotted to it, subject to importation being made within any prescribed period to which the quota may relate.*[36]

...

4. With regard to restrictions applied in accordance with paragraph 2 (*d*) of this Article or under paragraph 2 (*c*) of Article XI, the selection of a representative period for any product and the appraisal of any special factors*[37] affecting the trade in the product shall be made initially by the Member applying the restriction; *Provided* that such Member shall, upon the request of any other Member having a substantial interest in supplying that product or upon the request of the [CONTRACTING PARTIES], consult promptly with the other Member or the [CONTRACTING PARTIES] regarding the need for an adjustment of the proportion determined or of the base period selected, or for the reappraisal of the special factors involved, or for the elimination of conditions, formalities or any other provisions established unilaterally relating to the allocation of an adequate quota or its unrestricted utilization.

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

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[36] Note Ad Article XIII, Paragraph 2(d), reads: "No mention was made of 'commercial considerations' as a rule for the allocation of quotas because it was considered that its application by governmental authorities might not always be practicable. Moreover, in cases where it is practicable, a Member could apply these considerations in the process of seeking agreement, consistently with the general rule laid down in the opening sentence of paragraph 2".

[37] Note Ad Article XIII, Paragraph 4, provides: "See note relating to 'special factors' in connection with the last subparagraph of paragraph 2 of Article XI". That note reads as follows: "The term 'special factors' includes changes in relative productive efficiency between domestic and foreign producers, or as between different foreign producers, but not changes artificially brought about by means not permitted under the Agreement".

7.68 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. In the terms of the general rule[38] of the chapeau of Article XIII:2:

> "In applying import restrictions to any product, Members shall aim at a distribution of trade in such product approaching as closely as possible the shares which the various Members might be expected to obtain in the absence of such restrictions ... ".

In this case, we are concerned with tariff quotas, which are permitted under GATT rules, and not quantitative restrictions *per se*. However, Article XIII:5 makes it clear, and the parties agree, that Article XIII applies to the administration of tariff quotas. In light of the terms of Article XIII, it can be said that the object and purpose of Article XIII: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. 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.

7.69 While previous panels have dealt with specific aspects of Article XIII, this is the first case in which a broad challenge to a quota or tariff quota system has been made. Therefore, we must in the first instance consider in general terms how the various subdivisions of Article XIII work together. 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. 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. The only directly relevant panel report dealt with this issue briefly, but confirms this interpretation of Article XIII:1. The report found an inconsistency with the requirements of Article XIII:1 where a GATT contracting party negotiated export restrictions on imports of products from some countries but imposed unilateral import restrictions on the like products from another country. The re-

[38] At the 1955 Review Session, a working party considering amendments to Article XIII stated: "The Working Party ... agreed to recognize that the general rule contained in the introduction to paragraph 2 governed the various sub-paragraphs of that paragraph including those of sub-paragraph (d)". Working Party Report on "Quantitative Restrictions", adopted on 2, 4 and 5 March 1955, BISD 3S/170, 176, para. 24.

port also noted differences in administration (import restrictions versus export restraint) and in transparency between the two measures.[39]

7.70 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)).

7.71 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.

7.72 The terms of Article XIII:2(d) make clear that the combined use of agreements and unilateral allocations to Members with substantial interests is not permitted. The text of Article XIII:2(d) provides that where the first "method", i.e., agreement, is not reasonably practicable, then an allocation must be made. Thus, in the absence of agreements with all Members having a substantial interest in supplying the product, the Member applying the restriction must allocate shares in accordance with the rules of Article XIII:2(d), second sentence. In the absence of this rule, the Member allocating shares could reach agreements with some Members having a substantial interest in supplying the product that discriminated against other Members having a substantial interest supplying the product, even if those other Members objected to the shares they were to be allocated.

7.73 The question then is whether 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. 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

[39] 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. See also Panel Report on "EEC - Quantitative Restrictions Against Imports of Certain Products from Hong Kong", adopted 12 July 1983, BISD 30S/129, 139-140, para. 33.

restricted as required by Article XIII:1.[40] 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.

7.74 The allocation of country-specific tariff quota shares to all supplying countries on the basis of the first method (agreement) may in practice be difficult since there will likely be demand for more than 100 per cent of the tariff quota and, furthermore, there would be no possibility to make provision for new suppliers. This would leave the second method as the only practical alternative-a result that, however, runs counter to the provision of Article XIII:2(d) to first seek agreement with all Members having a substantial interest in supplying the product concerned.

7.75 The consequence of the foregoing analysis is that Members may be effectively required to use a general "others" category for all suppliers other than Members with a substantial interest in supplying the product. The fact that in this situation tariff quota shares are allocated to some Members, notably those having a substantial interest in supplying the product, but not to others that do not have a substantial interest in supplying the product, would not necessarily be in conflict with Article XIII:1. While the requirement of Article XIII:2(d) is not expressed as an exception to the requirements of Article XIII:1, it may be regarded, to the extent that its practical application is inconsistent with it, as *lex specialis* in respect of Members with a substantial interest in supplying the product concerned.

7.76 In so far as this in practice results in the use of an "others" category for all Members not having a substantial interest in supplying the product, it comports well with the object and purpose of Article XIII, as expressed in the general rule to the chapeau to Article XIII:2. When a significant share of a tariff quota is assigned to "others", the import market will evolve with the minimum amount of distortion. Members not having a substantial supplying interest will be able, if sufficiently competitive, to gain market share in the "others" category and possibly achieve "substantial supplying interest" status which, in turn, would provide them the opportunity to receive a country-specific allocation by invoking the provisions of Article XIII:4. New entrants will be able to compete in the market, and likewise have an opportunity to gain "substantial supplying interest" status. For the share of the market allocated to Members with a substantial interest in supplying the product, the situation may also evolve in light of adjustments following consultations under Article XIII:4. In comparison to a situation where country-specific shares are allocated to all supplying countries, including Members with minor market shares, this result is less likely to lead to a long-term

[40] 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.

freezing of market shares. This is, in our view, consistent with the terms, object and purpose, and context of Article XIII.

7.77 In this case, we are confronted with the following situation: with respect to its common market organization for bananas, the EC reached an agreement on shares in its bound tariff quota for bananas with the BFA countries, allocated shares of that tariff quota in respect of non-traditional ACP bananas and created an "others" category in that tariff quota for other Members (and non-Members). In addition, it also allocated tariff quota quantities to traditional ACP suppliers of bananas. To evaluate this situation in light of the foregoing discussion of Article XIII, it is necessary to consider (i) whether the EC market organization for imported bananas should be analyzed as one or two regimes for purposes of Article XIII, (ii) which Members could be considered to have had a substantial interest in supplying bananas to the EC at the time the EC regulation was put in place and how they were treated by the EC, (iii) how Members without such a substantial interest were treated and (iv) the position of new Members.

(i) Separate Regimes

7.78 The EC has one common market organisation for bananas established by Regulation 404/93. It has argued, however, that it has two separate regimes for imported bananas - one for bananas traditionally supplied by certain ACP countries, and one for bananas from non-traditional ACP, BFA and other third-country sources. In its view, the Panel should separately examine the consistency of each of these regimes with the requirements of Article XIII. The EC claims that the regime for traditional supplies of ACP bananas has a different legal basis than the bound tariff quota for bananas because it is a preferential regime in that different tariff rates apply to ACP bananas as compared to other bananas. The Complainants argue that nothing in the language of Article XIII supports such a distinction, that recognizing it would undermine the purpose of that Article and that Article implies that there cannot be separate regimes because if there were, imports under the separate regimes would not be similarly restricted as required by Article XIII:1.

7.79 We note that Article XIII:1 provides that no restriction shall be applied by any Member on the importation of any product of another Member "unless the importation of the like product of all third countries ... is similarly ... restricted". Article XIII:2 requires Members when allocating tariff quota shares to "aim at a distribution of trade ... approaching as closely as possible the shares which the various Members might be expected to obtain in the absence of such restrictions". By their terms, these two provisions of Article XIII do not provide a basis for analysing quota allocation regimes separately because they have different legal bases or because different tariff rates are applicable. Article XIII applies to allocations of shares in an import market for a particular product which is restricted by a quota or tariff quota. In our view, its non-discrimination requirements apply to that market for that product, irrespective of whether or how a Member subdivides it for administrative or other reasons. Indeed, 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.

7.80 Similarly, in our view, the existence of different tariff rates does not imply that the EC import measures applied to bananas must or should be treated as two separate regimes. The object and purpose of Article XIII:2 is to attempt to approximate under a tariff quota regime the trade shares that would have occurred in the absence of the tariff quota. To the extent that a preferential tariff benefits imports from certain countries, their trade shares should already reflect that preference. Thus, the fact that different tariff rates may apply to imports from different Members does not justify separate analysis of the allocation of tariff quota shares on the basis of the tariff applicable to the Member in question, without reference to the allocations to Members subject to a different tariff rate. While it is true that non-beneficiaries of the tariff preference by definition cannot benefit from that preference, they may be affected by the way in which tariff quota shares benefitting from the tariff preference are allocated. For example, an allocation of shares could be made in a way that would allow beneficiaries of the tariff preference to compete more effectively than would the tariff preference alone. Not to apply Article XIII in such a situation would mean that preferential treatment in addition to the tariff preference was being afforded to those Members.

7.81 Past GATT and WTO practice suggests that Members have typically distinguished between tariff preferences and non-tariff preferences. For example, in the so-called Enabling Clause, preferential tariff treatment on a unilateral basis is authorized for developing countries in general terms in accordance with the Generalized System of Preferences, while non-tariff preferences are permitted only to the extent governed by instruments multilaterally negotiated under GATT/WTO auspices.[41] As noted below (paragraph 7.106), most current waivers allowing preferential treatment have been limited to preferential tariff treatment. The "separate regimes" argument of the EC blurs these distinctions and would result in a tariff preference providing preferential treatment in addition to a tariff advantage.

7.82 We find that the EC has only one regime for banana imports for purposes of analysing whether its allocation of tariff quota shares is consistent with the requirements of Article XIII.

(ii) Members with a Substantial Interest

7.83 The following statistics supplied by the EC indicate the shares of suppliers to the EC banana market during the 1989-1991 period. We use 1989-1991 statis-

[41] Decision of the CONTRACTING PARTIES of 28 November 1979 on "Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries", BISD 26S/203.

tics because the EC claims that at the time it negotiated the BFA, 1992 statistics were not available. Although the Complainants contest this assertion, they have not convinced us that such statistics were in fact available.

GATT Contracting Party 1993	1989-1991 Average Volume (tonnes)	1989-1991 Average of Shares %
Costa Rica	508,957	19.7
Colombia	409,153	15.7
St. Lucia	114,445	4.5
Côte d'Ivoire	98,908	3.8
Cameroon	82,938	3.1
St.Vincent & the Grenadines	70,464	2.7
Jamaica	57,505	2.2
Dominica	52,628	2.0
Nicaragua	44,840	1.7
Suriname	28,465	1.1
Guatemala	28,128	1.2
Belize	23,412	0.9
Grenada	8,215	0.3
Dominican Republic	4,789	0.2
Venezuela	90	0.0
Madagascar	23	0.0
Other ACP countries	1,215	0.1
Total	1,534,062	59.2

Non - GATT Contracting Party 1993	1989-1991 Average Volume (tonnes)	1989-1991 Average of Shares %
Panama	465,701	18
Ecuador	401,419	15.2
Honduras	136,858	5.4
Somalia	41,751	1.7
Cape Verde	2,820	0.1
Total	1,048,549	40.4

The EC argues that only Colombia and Costa Rica had a "substantial interest in supplying the product" in the sense of Article XIII:2(d), in that they were the only GATT contracting parties at the time with market shares of more than 10 per cent and that, analogously to practice under Article XXVIII of GATT, a market share of 10 per cent could be considered as the threshold for a country to establish a substantial interest.[42] The other major suppliers to the EC market-Ecuador and Panama-were not GATT contracting parties at the time. The remaining suppliers had relatively minor shares. The Complainants argue that the EC cannot claim compliance with Article XIII:2(d), first sentence, because there were GATT contracting parties with which the EC did not reach agreement and that they in some cases had more significant market shares of EC banana imports than some of the countries with which the EC did reach agreement in the BFA.

7.84 We do not find it necessary to set a precise import share for determination of whether a Member has a substantial interest in supplying a product. A determination of substantial interest might well vary somewhat based on the structure of the market.[43]

7.85 Given the particular circumstances of this case, we find that it was not unreasonable for the EC to conclude that at the time the BFA was negotiated Colombia and Costa Rica were the only contracting parties that had a substantial interest in supplying the EC banana market in terms of Article XIII:2(d). We also find that it is not reasonable to conclude that at the time the BFA was negotiated Nicaragua and Venezuela had a substantial interest in supplying the EC banana market in the terms of Article XIII:2(d).

7.86 Before turning to the consequences of the above finding, we must consider whether it would be possible for other Members to challenge an agreement reached under Article XIII:2(d), first sentence. The EC argues that since it negotiated an agreement with Colombia and Costa Rica in compliance with Article XIII:2(d), first sentence, the provisions of that agreement may not be challenged as not complying with other provisions of Article XIII. However, even though the EC did negotiate an agreement as foreseen in Article XIII:2(d), first sentence, it is necessary to keep in mind that the goal of any such agreement is provided in the general rule in the chapeau to Article XIII:2. We would not rule out the possibility that an agreement that does not generally achieve this goal may be open to challenge by Members who are not parties to the agreement, even if there is no

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[42] Paragraph 7 to the Note Ad Article XXVIII:1 states that "[t]he expression 'substantial interest' is not capable of a precise definition ... It is, however, intended to be construed to cover only those Members which have ... a significant share in the market ...". It was indicated in 1985, however, that a 10 per cent rule has been applied generally. Analytical Index: Guide to GATT Law and Practice, 6th rev. ed. 1995, p.941, citing TAR/M/16, p.10.

[43] We note that in the case of Article XXVIII, the Uruguay Round Understanding on the Interpretation of Article XXVIII of the General Agreement on Tariffs and Trade 1994 provides that the Member which has the highest ratio of exports affected by the concession to its total exports shall be deemed to have principal supplying interest in the product at issue for purposes of negotiations under Article XXVIII. There is so far no similar understanding applicable to Article XIII.

requirement to include such Members in the negotiations because they do not have a substantial interest in supplying the product concerned. For example, in our view, it would be possible for other Members to challenge an agreement between the EC, Colombia and Costa Rica if it divided the bound tariff quota between only Colombia and Costa Rica. Support for allowing for the possibility of such a challenge is found in past GATT practice.[44]

7.87 In this case, however, we find it unnecessary to specify in detail under what circumstances an agreement reached pursuant to Article XIII:2(d) may be challenged. If our findings on the use of separate regimes (paragraph 7.82), on the shares assigned to Members without a substantial interest (paragraph 7.90) and the rights of new Members under Article XIII (paragraph 7.92), as well as those relating to the EC's licensing procedures, are adopted by the DSB, it will be necessary for the EC to reconsider its treatment of banana imports, including the allocation of tariff quota shares.

7.88 Accordingly, we make no finding on whether the allocation of shares to Colombia and Costa Rica is consistent with the requirements of the general rule in the chapeau to Article XIII:2(d).

(iii) Members without a Substantial Interest

7.89 As noted above (paragraph 7.73), Article XIII:1 would permit the EC to allocate a tariff quota share to all supplying Members without a substantial interest in the form of an "others" category, without specific shares. In this case, the EC allocated tariff quota shares by agreement and assignment to some Members (e.g., ACP countries (in respect of traditional and non-traditional exports), Nicaragua and Venezuela) without allocating such shares to other Members (e.g., Guatemala). Moreover, under the BFA, the BFA countries were given special

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[44] For example, in a case involving Norwegian quotas on textiles products, the panel found that Norway had reached agreement on the limitation of textiles imports from six countries, but not Hong Kong. The panel found that the quantitative restrictions limiting Hong Kong exports were subject to Article XIII:2 and ruled that

> "Norway's reservation of market shares for these six countries therefore represented a partial allocation of quotas under an existing regime of import restrictions of the product in question and that Norway must therefore be considered to have acted under Article XIII:2(d). ... The Panel was of the view that to the extent that Norway had acted with effect to allocate import quotas for these products to six countries but had failed to allocate a share to Hong Kong, its ... action was inconsistent with Article XIII".

This report's conclusion was based in part on the fact that Hong Kong had a substantial interest in supplying most of the products at issue. Nonetheless, the report supports the argument that Article XIII:2(d) agreements may be challenged by Members not having a substantial interest, as the panel report drew no distinction between products where Hong Kong had a substantial interest and those where it did not. Panel Report on "Norway - Restrictions on Imports of Certain Textiles Products", adopted on 18 June 1980, BISD 27S/119, 125-126, paras. 15-16.

rights in respect of reallocation of tariff quota shares[45] that were not given to other Members (e.g., Guatemala). For the reasons noted above (paragraphs 7.69 and 7.73), such differential treatment of like products from Members is inconsistent with the requirements of Article XIII:1.

7.90 Accordingly, we find that (i) the EC's allocation of tariff quota shares by agreement and by assignment to some Members not having a substantial interest in supplying bananas to the EC (including Nicaragua and Venezuela and certain ACP countries in respect of traditional and non-traditional exports) but not to other Members (such as Guatemala) and (ii) the tariff quota reallocation rules of the BFA, are inconsistent with the requirements of Article XIII:1.

(iv) New Members

7.91 We now consider the position of a Member who acceded to the WTO or GATT after the implementation of the EC common market organization for bananas (a "new" Member). As noted above, the general rule in the chapeau to Article XIII:2 indicates that the aim of Article XIII:2 is to give to Members the share of trade that they might be expected to obtain in the absence of a tariff quota. There is no requirement that a Member allocating shares of a tariff quota negotiate with non-Members, but when such countries accede to the WTO, they acquire rights, just as any other Member has under Article XIII whether or not they have a substantial interest in supplying the product in question.

7.92 Thus, although the EC reached an agreement with all Members who had a substantial interest in supplying the product at one point in time, under the consultation provisions of Article XIII:4, the EC would have to consider the interests of a new Member who had a substantial interest in supplying the product if that new Member requested it to do so.[46] The provisions on consultations and adjustments in Article XIII:4 mean in any event that the BFA could not be invoked to justify a permanent allocation of tariff quota shares. Moreover, while new Members cannot challenge the EC's agreements with Colombia and Costa Rica in the

[45] Under the BFA, there is a general provision that provides that if a country with a country-specific share of the tariff quota indicates to the EC that it will be unable to deliver the allocated quantity, the amount of the short-fall is to be allocated in accordance with the BFA allocations (including to the "others" category). The BFA also provides that countries with country-specific shares of the tariff quota may jointly request the EC to allocate the short-fall differently, in which case the EC is required to do so. As a result, according to the Complainants, in 1995 and 1996, all of the tariff quota share allocated to Nicaragua, and 70 and 30 per cent, respectively, of the share allocated to Venezuela, have been reallocated to Colombia.

[46] While the provisions of Article XIII:4 on consultations and adjustments seem to be primarily aimed at adjustments to quota shares allocated pursuant to Article XIII:2(d), second sentence, they also apply in the case where agreements were reached pursuant to Article XIII:2(d), first sentence, with Members having a substantial interest in supplying the product concerned. In addition, in so far as a new Member has a substantial interest in supplying that product, its share of the "others" category can be viewed, for purposes of Article XIII:4, as a provision established unilaterally relating to the allocation of an adequate quota.

BFA on the grounds that the EC failed to negotiate and reach agreement with them, they otherwise have the same rights as those Complainants who were GATT contracting parties at the time the BFA was negotiated to challenge its consistency with Article XIII. Generally speaking, all Members benefit from all WTO rights.

7.93 In this connection, we find that the failure of Ecuador's Protocol of Accession to address banana-related issues does not mean that Ecuador must accept the validity of the BFA as contained in the EC's Schedule or that it is precluded from invoking Article XIII:2 or XIII:4.

(v) Other Arguments

7.94 In light of our findings in respect of Article XIII:1, we find it unnecessary to address the claims and arguments in respect of the interpretation of Article XIII:2(d), second sentence (e.g., the use of a "previous representative period" and "special factors") or in respect of the EC's enlargement to include Austria, Finland and Sweden.[47] We would note, however, that in order to bring its banana import regulations into line with Article XIII, the EC would have to take account of Article XIII:1 and XIII:2(d). In order to allocate country-specific tariff quota shares consistently with the requirements of Article XIII, the EC would have to base such shares on an appropriate previous representative period[48] and any special factors would have to be applied on a non-discriminatory basis (see paragraph 7.69).

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[47] The Appellate Body has stated that "[a] panel need only address those claims which must be addressed in order to resolve the matter in issue in the dispute". Appellate Body Report on "United States - Measure Affecting Imports of Woven Wool Shirts and Blouses from India", issued on 25 April 1997, WT/DS33/AB/R, DSR 1997:I, 323 at 340.

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

> "[I]n keeping with normal GATT practice, the Panel considered it appropriate to use as a 'representative period' a three-year period previous to 1979, the year in which the EC measures were in effect. Due to the existence of restrictions in 1976, the Panel held that that year could not be considered as representative, and that the year immediately preceding 1976 should be used instead. The Panel thus chose the years 1975, 1977, 1978 as a 'representative period'".

Panel Report on "EEC Restrictions on Imports of Dessert Apples - Complaint by Chile", adopted on 10 November 1980, BISD 27S/98, 113, para. 4.8. In the report of the "Panel on Poultry", issued on 21 November 1963, GATT Doc. L/2088, para. 10, the panel stated: "[T]he shares in the reference period of the various exporting countries in the Swiss market, which was free and competitive, afforded a fair guide as to the proportion of the increased German poultry consumption likely to be taken up by United States exports". See also Panel Report on "Japan - Restrictions on Imports of Certain Agricultural Products", adopted on 22 March 1988, BISD 35S/163, 226-227, para. 5.1.3.7.

(b) The Allocation of Tariff Quota Shares to ACP Countries: the Lomé Waiver

7.95 In light of the finding that the EC's allocation of country-specific tariff quota shares for bananas to the ACP countries for both traditional and non-traditional bananas is not consistent with the requirements of Article XIII (paragraph 7.90), we now consider whether that inconsistency is covered by the Lomé waiver. In this connection, we recall the findings of the second *Banana* panel report.[49] It found that (i) the specific duties levied by the EC on imports of bananas were inconsistent with Article II, (ii) the preferential tariff rates for banana imports from ACP countries were inconsistent with the requirements of Article I and (iii) certain procedures regarding the allocation of licences were inconsistent with the requirements of Articles I and III. It also found that the then effective EC rules did not discriminate between sources of supply in the sense of Article XIII because the licences issued to import bananas could be used to import bananas from any source. After the issuance of the panel report, which was not adopted by the GATT CONTRACTING PARTIES, the EC and the ACP countries that were GATT contracting parties requested a waiver (although they were and still are of the opinion that such a waiver is not needed) of the EC's Article I:1 obligations in order to permit the EC to provide preferential treatment to the ACP countries as required by the Lomé Convention.[50]

7.96 Subsequently, the Lomé waiver was adopted by the GATT CONTRACTING PARTIES in December 1994 and was extended by the WTO General Council in October 1996.[51] Under the operative paragraph of the Lomé waiver,

> "the provisions of paragraph 1 of Article I of the General Agreement shall be waived, until 29 February 2000, to the extent necessary to permit the European Communities to provide preferential treatment for products originating in ACP States as required by the relevant provisions of the Fourth Lomé Convention, without being

[49] Panel Report on "EEC - Import Regime for Bananas", issued 11 February 1994 (not adopted), DS38/R, p.52, paras. 169-170.

[50] The EC's Uruguay Round Schedule substituted a specific tariff in place of its prior *ad valorem* tariff binding for bananas. The consistency of that substitution with GATT rules is examined in para. 7.137 *et seq.* of the Guatemala-Honduras report. In respect of the panel's finding that the EC regime was inconsistent with the requirements of Article III, the EC did not change the regime and we examine that issue in para. 7.171.

[51] EC - The Fourth ACP-EEC Convention of Lomé, Waiver Decision of 9 December 1994, L/7604, 19 December 1994; Extension of the Waiver, Decision of 14 October 1996, WT/L/186. Although the Lomé waiver was initially approved by the GATT CONTRACTING PARTIES until 29 February 2000, it was necessary for the WTO General Council to consider whether to extend it because under the Uruguay Round Understanding in Respect of Waivers of Obligations under the General Agreement on Tariffs and Trade 1994, all waivers in effect on the entry into force of the WTO Agreement expired two years thereafter (i.e., on 1 January 1997) unless extended.

> required to extend the same preferential treatment to like products of any other contracting party".

In order to determine whether the EC may allocate tariff quota shares to the ACP countries inconsistently with the requirements of Article XIII, we must determine whether those allocations are covered by the Lomé waiver. This determination involves resolving two interpretative issues. First, what preferential treatment in respect of bananas is "required" by the Lomé Convention? Second, does the Lomé waiver, which refers only to Article I:1 of GATT, encompass a waiver of Article XIII obligations as well?

(i) Preferential Treatment Required by the Lomé Convention

7.97 As a preliminary matter, the EC and the ACP countries argue that the Panel is not authorized to interpret the Lomé Convention. We accept that we are not directed in our terms of reference to interpret the Lomé Convention. We recall that we have found that the EC's allocation of tariff quota shares to ACP countries is inconsistent with the requirements of Article XIII (paragraph 7.90). However, in order to determine whether or not the EC's Article XIII obligations are waived, we must determine whether or not the Lomé waiver applies. That requires an interpretation of the Lomé waiver, which is a decision of the GATT CONTRACTING PARTIES, later extended by a WTO General Council decision. Since the waiver applies to action "necessary ... to provide preferential treatment ... *as required by the relevant provisions of the Fourth Lomé Convention*" (emphasis added), we must also determine what preferential treatment is required by the Lomé Convention.

7.98 The EC argues that the Panel must accept the EC and the ACP countries' interpretation of the Lomé Convention as valid since they are the parties to the Lomé Convention. We note that since the GATT CONTRACTING PARTIES incorporated a reference to the Lomé Convention into the Lomé waiver, the meaning of the Lomé Convention became a GATT/WTO issue, at least to that extent. Thus, we have no alternative but to examine the provisions of the Lomé Convention ourselves in so far as it is necessary to interpret the Lomé waiver. Moreover, we note that in their submissions to us, it appears that the EC and the ACP countries are not in accord on some aspects of what is required by the Lomé Convention.

7.99 We note that the Lomé Convention permits the EC to limit duty-free ACP country exports to the EC of products subject to common market organizations in the EC, i.e., many agricultural products. In respect of those products, Article 168(2)(a)(ii) of the Lomé Convention requires the EC to:

> "take necessary measures to ensure more favourable treatment than that granted to third countries benefitting from the most-favoured-nation clause for the same products".

Moreover, in the case of bananas, Protocol 5 to the Lomé Convention places some restraints on the EC's right to limit imports of ACP bananas. It specifies in Article 1:

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

Since the Lomé Convention was signed in 1989 and was expected to enter into force in 1990, we believe that the words "at present" should be interpreted to refer to 1990. A Joint Declaration to Protocol 5 provides that "Article 1 of Protocol 5 does not prevent the Community from establishing common rules for bananas as long as no ACP State, traditional supplier to the Community, is placed as regards access to, and advantages in, the Community in a less favourable situation than in the past or at present". The fact that the EC has done so obviously makes the meaning of Protocol 5 more difficult to ascertain since what was a system of individual EC member State markets has been transformed into one EC-wide market.

7.100 In allocating country-specific shares of the banana tariff quota to traditional ACP banana supplying countries, the EC set the shares at the level of each ACP country's "best-ever" exports to the EC, adjusted for certain other factors. The issue is whether it was required to do so by the Lomé Convention. The Complainants correctly point out that Protocol 5 does not guarantee that a certain level of banana exports will be achieved, and in response to questions of the Panel, the EC did not disagree. We recall that generally speaking, ACP countries formerly competed for the most part on either the French or UK markets and that on these markets they were protected by and large from import competition from other banana exporters. Given this degree of market access and advantage, the issue is how the EC could fulfil its obligations under Protocol 5 on an EC-wide market.

7.101 It appears that prior to Regulation 404/93 there were no set maximum levels for ACP exports to EC member State markets. While the ACP countries did not have specific quotas, they generally did enjoy protected access to one EC member State market (e.g., France, in the case of Cameroon and Côte d'Ivoire; Italy, in the case of Somalia; the UK, in the case of several Caribbean ACP countries).[52] Access to these markets was essentially controlled by ad hoc decisions.[53] We think that it can be reasonably contended that an EC-wide equivalent of the market access and advantages enjoyed by ACP countries in the past would be a country-specific tariff quota share, which may be assimilated to the past advantage of a protected EC member State market, set at their pre-1991 best-ever

[52] Panel Report on "EEC - Member States' Import Regime for Bananas", issued on 3 June 1993 (not adopted), DS32/R, p.3, para. 12.
[53] Idem, pp.4-5, 7, paras. 19-22, 37-38.

export levels. We note that since the pre-1991 best-ever export levels of the ACP countries occurred in different years for different countries (and in some cases, many years ago), there was no way for the EC to provide tariff quota shares covering such amounts consistently with the requirements of Article XIII:2, which requires shares to be based on a previous representative period, which has generally been interpreted to mean the most recent three years.[54] If the EC had (i) provided only a non-country-specific share for ACP countries or (ii) set shares for ACP countries at a level lower than their pre-1991 best-ever levels, an ACP country with the ability to export at its pre-1991 best-ever level might have been effectively prevented from doing so either by lack of the protected market provided by a specific-country share allocation or by the volume limit of its share allocation. Thus, in order not to place an ACP country in a less favourable situation as regards access to and advantages on its traditional markets, which is the EC's obligation under the Lomé Convention, it was not unreasonable for the EC to conclude that the Lomé Convention requires the allocation of country-specific tariff quota shares to the ACP countries in an amount of their pre-1991 best-ever exports of bananas to the EC. We accept that interpretation for purposes of our analysis of this issue.

7.102 There is, however, nothing in Protocol 5 that suggests that the EC is required to apply other factors to increase the shares of ACP countries above their best-ever export levels prior to 1991. While the Lomé Convention contains various provisions concerning trade promotion and assistance to ACP countries, there are no specific provisions established in the Lomé Convention that can be said to require country-specific tariff quota shares in excess of past exports. Thus, in our view, the EC is not required by the Lomé Convention to assign tariff quota shares to ACP countries in excess of their pre-1991 best-ever exports to the EC.

7.103 Accordingly, we find that it was not unreasonable for the EC to conclude that the Lomé Convention requires the EC to allocate country-specific tariff quota shares to traditional ACP banana supplying countries in an amount of their pre-1991 best-ever exports to the EC. However, we do find that the allocation of tariff quota shares to ACP countries in excess of their pre-1991 best-ever exports to the EC is not required by the Lomé Convention.

(ii) Application of the Lomé Waiver to the EC's Article XIII Obligations

7.104 The Lomé waiver, as quoted above, permits the EC to provide preferential treatment to ACP countries as required by the Lomé Convention. However, by its terms, the Lomé waiver only waives compliance with the provisions of Article I:1. Thus, the issue arises whether the EC's obligations under Article XIII are also

[54] See Panel Report on "EEC - Restrictions on Imports of Apples from Chile", adopted on 10 November 1980, BISD 27S/98, 113, para. 4.8.

waived in connection with preferential treatment required by the Lomé Convention. The Complainants argue that they are not and that such an interpretation would be unprecedented. Indeed, the EC has not argued that the Lomé waiver should be interpreted to waive its obligations under Article XIII. In its response to a question from the Panel, the EC stated that it did not claim and "has no need to suggest" that the Lomé waiver covers a violation of Article XIII. Rather the EC argued that (i) it has not acted inconsistently with the requirements of Article XIII and (ii) the Lomé waiver permits the preferential treatment required by the Lomé Convention. Since we have rejected the EC's argument that it has complied with Article XIII and have found that the EC's allocation of country-specific shares to ACP countries is inconsistent with Article XIII, we believe that it is appropriate to consider also whether this inconsistency is covered by the Lomé waiver. In this regard, we note that the EC has also argued that where 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 (see paragraph 7.205).

7.105 In interpreting the scope of the Lomé waiver, we are mindful that the only GATT panel to interpret a waiver recalled that waivers are to be granted only in exceptional circumstances[55] and concluded that "their terms and conditions consequently have to be interpreted narrowly".[56] The waiver at issue in that case had no expiration date and permitted imposition of restrictions on a number of important agricultural products. A GATT working party on the waiver noted:

> "Since the Decision [approving the waiver] refers to the provisions of Articles II and XI of the Agreement, it does not affect the obligations of the United States under any other provisions of the Agreement. In particular, as its obligations under Article XIII are not affected, the United States would acquire no right by virtue of this waiver to deviate from the rule of non-discrimination provided for in that Article".[57]

In light of this practice, we now consider the scope of the Lomé waiver, and, in particular, whether it waives the obligations of the EC under Article XIII in respect of the allocation of tariff quota shares based on the best-ever exports of bananas by the ACP countries to the EC.

7.106 We recall that Article 168(2)(a)(ii) of the Lomé Convention requires some preferential treatment for products from ACP sources. As we have found above, Protocol 5 to the Lomé Convention expands this general obligation in respect of

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[55] GATT, Article XXV:5; WTO, Article IX:3-4.

[56] Panel Report on "US - 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 on 7 November 1990, BISD 37S/228, 256-257, para. 5.9.

[57] Working Party Report on "Import Restrictions Imposed by the United States Under Section 22 of the United States Agricultural Adjustment Act", adopted on 5 March 1955, BISD 3S/141, 144, para. 10.

traditional ACP banana exports in that it is not unreasonable for the EC to interpret it to require the EC to provide access opportunities to the EC market for the ACP countries in a volume no greater than their pre-1991 best-ever exports to the EC. As explained above, this can be accomplished only by country-specific tariff quota shares and by tariff quota shares that are larger than would be allowed under Article XIII (assuming that the best-ever exports did not occur within a representative period). If the Lomé waiver is interpreted to waive only compliance with the obligations of Article I:1, the waiver would effectively limit preferential treatment to tariff preferences. In our view, in light of the 75 ECU per tonne rate applicable to the EC's bound tariff quota, tariff preferences alone would not allow the EC to provide market access opportunities and advantages required of it by the Lomé Convention. In other words, in order to give real effect to the Lomé waiver, it needs to cover Article XIII to the extent necessary to allow the EC to allocate country-specific tariff quota shares to the ACP countries in the amount of their pre-1991 best-ever banana exports to the EC. Otherwise, the EC could not practically fulfil its basic obligation under the Lomé Convention in respect of bananas, as we have found that it was not unreasonable for the EC to conclude that the Lomé Convention may be interpreted to require country-specific tariff quota shares at levels not compatible with Article XIII. Since it was the objective of the Lomé waiver to permit the EC to fulfil that basic obligation, logically we have no choice therefore but to interpret the waiver so that it accomplishes that objective. In fact, such an interpretation would be consistent with the terms of this particular waiver as it applies to preferential treatment generally and not, as is mostly the case with other currently effective waivers, only to preferential *tariff* treatment.[58]

7.107 Such an interpretation is also supported by the close relationship between Articles I and XIII:1, both of which 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,[59] 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

[58] There are three other waivers now in force for preferential treatment to groups of developing countries. These waivers cover Canadian preferences to Caribbean countries and US preferences to Caribbean countries and to Andean countries. In each of these three cases, the waiver is limited by its terms to preferential *tariff* treatment. CARIBCAN, WT/L/185; Caribbean Basin Economic Recovery Act, WT/L/104; Andean Trade Preference Act, WT/L/184. The waiver in respect of United States - Former Trust Territory of the Pacific Islands, WT/L/183, applies also to non-tariff preferential treatment.

[59] Panel Report on "United States - Denial of Most-favoured-nation Treatment as to Non-rubber Footwear from Brazil", adopted on 19 June 1992, BISD 39S/128, 150, para. 6.8 (Article I:1 applies to rules for revocation of countervailing duties).

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.

7.108 The foregoing considerations suggest that the Lomé waiver should be interpreted so as to waive compliance with the obligations of Article XIII, to the extent indicated above. We must consider, however, whether such a conclusion is consistent with past GATT practice that waivers are to be interpreted narrowly. Our interpretation of the Lomé waiver is narrow in the sense that the Lomé waiver itself has been qualified by the fact that it is applicable only to preferential treatment "required" by the Lomé Convention and does not extend to all preferential treatment that the EC might wish to give to the ACP countries. Thus, there is no danger of an overly broad interpretation of its scope. In our view, we only acknowledge what is implied in the decision to grant the waiver in the first place.

7.109 In reaching this conclusion, however, we note our view that the scope of the Lomé waiver lacks precision. Future waiver negotiations will have to deal more precisely with the issues raised in this case in order to reduce differences in interpretation.

7.110 In light of these factors, to the extent that we have found that the EC has acted inconsistently with the requirements of Article XIII:1 (paragraph 7.90), we find that the Lomé waiver waives that inconsistency with Article XIII:1 to the extent necessary to permit the EC 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 EC.

(c) The Allocation of Tariff Quota Shares to BFA Countries

7.111 In our general discussion above of Article XIII (paragraph 7.90), we found that the EC's allocation of shares in its tariff quota to the BFA countries not having a substantial interest in supplying bananas and in respect of non-traditional ACP bananas is inconsistent with the requirements of Article XIII. In this section, we consider whether any such inconsistency may be permitted because of (i) the inclusion of the banana tariff quota allocation to BFA countries and in respect of non-traditional ACP bananas in the EC's Schedule attached to the Marrakesh Protocol or (ii) the priority provision of the Agreement on Agriculture.

(i) Inclusion of the BFA Tariff Quota Shares in the EC Schedule

7.112 The EC argues that even if the tariff quota share allocations to the BFA countries and in respect of non-traditional ACP bananas do not satisfy the requirements of Article XIII, they are consistent with GATT rules because of their inclusion in the EC's Schedule as a result of the Uruguay Round negotiations. The Complainants argue that a prior adopted GATT panel report (the so-called

Sugar Headnote case)[60] supports the conclusion that tariff bindings in schedules cannot justify inconsistencies with the requirements of generally applicable GATT rules. The EC responds that the Uruguay Round Schedules are of a different nature than past GATT tariff protocols, thereby undermining the legal reasoning underpinning the *Sugar Headnote* case, and that, in any event, the inclusion of the BFA tariff quota shares in its Schedule overrides Article XIII because of the priority provision of the Agreement on Agriculture.

7.113 The panel in the *Sugar Headnote* case found that qualifications on tariff bindings do not override other GATT provisions after an analysis of the wording of Article II, its object, purpose and context, and the drafting history of the provision. Although it made no mention of the Vienna Convention, it seems to have followed closely Articles 31 and 32 thereof.[61] Its analysis was as follows:

> 5.1 ... The *United States* argues that the proviso "subject to the terms, conditions or qualifications set forth in that Schedule" in Article II:1(b) permits contracting parties to include qualifications relating to quantitative restrictions in their Schedule. The United States had made use of this possibility by reserving in its Schedule of Concessions the right to impose quota limitations on imports of sugar in certain circumstances. Since the restrictions on the importation of sugar conformed to the qualifications set out in the Schedule of the United States, and the Schedules of Concessions were, according to Article II:7, an integral part of the General Agreement, the restrictions were consistent with the United States obligations under that Agreement. argues that qualifications to concessions made in accordance with Article II:1(b) cannot justify measures contrary to other provisions of the General Agreement, in particular not quantitative restrictions inconsistent with Article XI:1. ...
>
> 5.2 The Panel first examined the issue in the light of the wording of Article II. It noted that in Article II:1(b), the words "subject to the ... qualifications set forth in that Schedule" are used in conjunction with the words "shall ... be exempt from ordinary customs duties in excess of those set forth in [the Schedule]". This suggests that Article II:1(b) permits contracting parties to qualify the obligation to exempt products from customs duties in excess of the levels specified in the Schedule, not however to qualify their obligations under other Articles of the General Agreement. The Panel further noted that the title of Article II is "Schedules of Concessions" and that the ordinary meaning of the word "to concede" is

[60] Panel Report on "US - Restrictions on Imports of Sugar", adopted on 22 June 1989, BISD 36S/331, 341-343, paras. 5.2-5.7.

[61] These provisions of the Vienna Convention are quoted in para. 7.14 supra.

"to grant or yield". This also suggests in the view of the Panel that Article II permits contracting parties to incorporate into their Schedules acts yielding rights under the General Agreement but not acts diminishing obligations under that Agreement.

5.3 The Panel then examined the issue in the light of the purpose of the General Agreement. It noted that one of the basic functions of the General Agreement is, according to its Preamble, to provide a legal framework enabling contracting parties to enter into "reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade". Where the General Agreement mentions specific types of negotiations, it refers to negotiations aimed at the reduction of barriers to trade (Articles IV(d), XVII:3 and XXVIII bis). This supports in the view of the Panel the assumption that Article II gives contracting parties the possibility to incorporate into the legal framework of the General Agreement commitments additional to those already contained in the General Agreement and to qualify such additional commitments, not however to reduce their commitments under other provisions of that Agreement.

5.4 The Panel then examined the issue in the context of the provisions of the General Agreement related to Article II. It noted that negotiations on obstacles to trade created by the operation of state-trading enterprises may be conducted under Article XVII:3 and that a note to that provision provides that such negotiations

> "may be directed towards the reduction of duties and other charges on imports and exports or towards the conclusion of *any other mutually satisfactory arrangement consistent with the provisions of the Agreement* (See paragraph 4 of Article II and the note to that paragraph)." (emphasis added).

The negotiations foreseen in Article XVII:3 are thus not to result in arrangements inconsistent with the General Agreement, in particular not quantitative restrictions made effective through state-trading that are not justified by an exception to Article XI:1. The Panel saw no reason why a different principle should apply to quantitative restrictions made effective by other means.

5.5 The Panel then examined the issue in the light of the practice of the CONTRACTING PARTIES. The Panel noted that the CONTRACTING PARTIES adopted in 1955 the report of the Review Working Party on Other Barriers to Trade, which had concluded that:

> "there was nothing to prevent contracting parties, when they negotiate for the binding or reduction of tariffs, from negotiating on matters, such as subsidies, which might affect the

> practical effects of tariff concessions, and from incorporating in the appropriate schedule annexed to the Agreement the results of such negotiations; *provided that the results of such negotiations should not conflict with other provisions of the Agreement*." (emphasis added) (BISD 3S/225).
>
> Whether the proviso in this decision is regarded as a policy recommendation, as the United States argues, or as the confirmation of a legal requirement, as Australia claims, it does support, in the view of the Panel, the conclusion that the CONTRACTING PARTIES did not envisage that qualifications in Schedules established in accordance with Article II:1(b) could justify measures inconsistent with the other Articles of the General Agreement.
>
> 5.6 The Panel finally examined the issue in the light of the drafting history. It noted that the reference to "terms and qualifications" was included in a draft of the present Article II:1(b) during the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment. The original draft had referred only to "conditions". This amendment was proposed and adopted "in order to provide more generally for the sort of qualifications actually provided in the form of notes in the specimen Schedule. A number of these notes are, in effect, additional concessions rather than *conditions* governing the tariff bindings to which they relate" (E/PC/T/153 and E/PC/T/W/295). Schedule provisions qualifying obligations under the General Agreement were not included in the specimen Schedule nor was the possibility of such Schedule provisions mentioned by the drafters. The Panel therefore found that the drafting history did not support the interpretation advanced by the United States.
>
> 5.7 For the reasons stated in the preceding paragraphs, the Panel found that Article II:1(b) does not permit contracting parties to qualify their obligations under other provisions of the General Agreement and that the provisions in the United States GATT Schedule of Concessions can consequently not justify the maintenance of quantitative restrictions on the importation of certain sugars inconsistent with the application of Article XI:1".

7.114 We agree with the analysis of the *Sugar Headnote* panel report and note that Article II was not changed in any relevant way as a result of the Uruguay Round. Thus, based on the *Sugar Headnote* case, we conclude that the EC's inclusion of allocations inconsistent with the requirements of Article XIII in its Schedule does not prevent them from being challenged by other Members. We note in this regard that the Uruguay Round tariff schedules were prepared with full knowledge of the *Sugar Headnote* panel report, which was adopted by the GATT CONTRACTING PARTIES in the middle of the Round (June 1989). This is particularly significant in light of the Appellate Body's statement that

"[a]dopted panel reports are an important part of the GATT *acquis*. They are often taken into account by subsequent panels. They create legitimate expectations among Members, and, therefore should be taken into account where they are relevant to any dispute".[62]

7.115 The EC further argues that the principle of *pacta sunt servanda* supports its position that the BFA should override GATT rules. However, in our view, that principle applies as well to Article II, as interpreted by the *Sugar Headnote* case. We cannot accept that a conflict between Article II and the BFA should necessarily be resolved in the BFA's favour. It was to ensure consistency with the basic GATT rules that the *Sugar Headnote* panel reached the conclusions it did. As that panel stated (paragraph 5.2): "Article II permits contracting parties to incorporate into their Schedules acts yielding rights under the General Agreement but not acts diminishing obligations under that Agreement". That rule is a basic agreement of the Members that must be enforced.

7.116 The EC also notes that Article II:7 of GATT incorporates schedules into Part I of GATT, which contains Articles I and II, and argues that one provision of Part I such as Article II may not be given priority over another (i.e., the schedules). However, we are of the opinion that if there is a conflict between a schedule and GATT rules, it is necessary to resolve it, and that is what the *Sugar Headnote* panel did.[63]

7.117 Finally, the EC argues that the result in the *Sugar Headnote* case was necessary under GATT practice because tariff protocols, which added tariff commitments to schedules, were not accepted by all GATT contracting parties. It further argues that such a result is not necessary in the context of the WTO because all Members accepted all the results of the Uruguay Round. The *Sugar Headnote* panel's analysis was, in our view, a straightforward exercise in treaty interpretation under Vienna Convention principles. It made no mention that the result it reached was "necessary" under GATT practice. Moreover, the US measure at issue in the *Sugar Headnote* case first appeared in the Annecy and Torquay Protocols, both of which were signed by all GATT contracting parties at the time.[64] Thus, these Protocols were in this respect similar to the schedules attached to the WTO Agreement.

7.118 Thus, we find that the inclusion of the BFA tariff quota shares in the EC's Schedule does not permit the EC to act inconsistently with the requirements of Article XIII of GATT.

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[62] 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, DSR 1996: I, 97 at 108.

[63] The incorporation of schedules into Part I was done only because "it was intended that Part II [of GATT] would be immediately superseded by the [Havana] Charter provisions when the Charter entered into force". Analytical Index: Guide to GATT Law and Practice, 6th rev. ed. 1995, p.99.

[64] Contracting Parties to the General Agreement on Tariffs and Trade, Status of Legal Instruments, pp. xxi, 3-2.1-2.4, 3-3.1-3.4.

7.119 Since we have found that the inclusion of the BFA in the EC's Schedule does not permit the EC to act inconsistently with the requirements of Article XIII of GATT, we do not need to address Guatemala's argument that it reserved its rights in respect of the inclusion of the BFA tariff quotas in the EC's Schedule at the time it accepted the WTO Agreement. In respect of this argument, we would note, however, that Article XVI:5 of the WTO Agreement does not permit reservations.

(ii) Agreement on Agriculture

7.120 The EC argues that the provisions of the Agreement on Agriculture prevail over GATT rules such as Article XIII and that the inclusion by the EC of the BFA tariff quota shares in its tariff schedules means that they prevail over Article XIII, even if the *Sugar Headnote* case remains a valid interpretation of GATT rules.

7.121 In examining this argument, we note that the Agreement on Agriculture was intended to make agricultural products subject to strengthened and more operationally effective GATT rules. In the Preamble to the Agreement, Members recall:

> "their long-term objective as agreed at the Mid-Term Review of the Uruguay Round 'is to establish a fair and market-oriented agricultural trading system and that a reform process should be initiated through the negotiation of commitments on support and protection and through the establishment of strengthened and more operationally effective GATT rules and disciplines' ".

7.122 In some cases, the results of the agricultural negotiations were not consistent with the rules found in other WTO agreements. For example, Article 4.2 of the Agreement on Agriculture prohibits the use of certain measures that might otherwise be authorized by Article XI:2 of GATT; Article 5 of the Agreement on Agriculture permits the use of certain measures that might otherwise be questioned under Articles II and XIX of GATT and the Agreement on Safeguards. In order to establish priority for rules of the Agreement on Agriculture, Article 21.1 of that Agreement specifies:

> "The provisions of GATT 1994 and of other Multilateral Trade Agreements in Annex 1A to the WTO Agreement shall apply subject to the provisions of this Agreement [i.e., the Agreement on Agriculture]".

It is clear from Article 21.1 that the provisions of the Agreement on Agriculture prevail over GATT and the other Annex 1A agreements. But there must be a provision of the Agreement on Agriculture that is relevant in order for this priority provision to apply. It is not the case that Article 21.1 of the Agreement on Agriculture means that no GATT/WTO rules apply to trade in agricultural products unless they are explicitly incorporated into the Agreement on Agriculture. We note that one of the purposes of the Agreement on Agriculture is to bring

agriculture under regular GATT/WTO disciplines. It is against this background that we consider the EC's argument.

7.123 There is no provision of the Agreement on Agriculture that incorporates tariff bindings related to agricultural products into the Agreement on Agriculture. While the Annexes to the Agreement are incorporated into the Agreement by Article 21.2 thereof, tariff bindings are not. Indeed, under paragraph 1 of the Marrakesh Protocol, the Uruguay Round schedules attached to that protocol, which include the agricultural tariff bindings, are explicitly made schedules to GATT.

7.124 An examination of the Agreement on Agriculture reveals that most of its provisions and annexes are concerned with domestic support and export subsidies and do not relate to market access concessions generally except for Articles 4 (market access) and 5 (special safeguard provisions) and Annex 5 (special treatment with respect to paragraph 2 of Article 4). Since we are not concerned here with special treatment or special safeguard measures, only Article 4 itself might be relevant. It reads as follows:

> "1. Market access concessions contained in Schedules relate to bindings and reductions of tariffs, and to other market access commitments specified therein.
>
> 2. Members shall not maintain, resort to, or revert to any measures of the kind which have been required to be converted into ordinary customs duties [footnote omitted], except as otherwise provided for in Article 5 and Annex 5".

In our view, Article 4.1 is not a substantive provision, but is a statement of where market access commitments can be found. The definition of "market access concessions" (Article 1(g) of the Agreement on Agriculture) makes it clear that the Schedules annexed to Article II of GATT also contain the import quota commitments undertaken pursuant to Annex 5 of the Agreement on Agriculture (as well as an identification of the tariff lines which are eligible for the special safeguard provisions of Article 5 of the Agreement on Agriculture). If the Agreement on Agriculture would have allowed for country-specific allocations of tariff quotas there would have been a specific provision to this effect in deviation from Article XIII:2(d) as with the special treatment provisions of Annex 5. In contrast, Article 4.2 is a substantive provision in that it prohibits the use of certain non-tariff barriers, subject to certain qualifications. As a substantive provision, it prevails over such GATT provisions as Article XI:2(c).

7.125 Moreover, neither Article 4.1 nor 4.2 of the Agreement on Agriculture provides that agricultural tariff bindings have a special standing vis à vis other tariff bindings or that a market access commitment included therein is absolved from complying with other GATT rules. Indeed, we note that there are a number of provisions in the Agreement on Agriculture which simply refer to other agreements or decisions that are not incorporated into the Agreement on Agriculture. The reference in Article 14 to the Agreement on Sanitary and Phytosanitary Measures is one example; the reference to the Decision on Measures Cover-

ing the Possible Negative Effects of the Reform Programme on Least-Developed and Net Food-Importing Developing Countries in Article 16 is another example. These "cross-reference" provisions may be explained by the attempt of the framers of the Agreement on Agriculture to provide a complete overview of the Uruguay Round results in agriculture, since these matters are referred to generally in the preamble to the Agreement.

7.126 Finally, we note that, pursuant to Article 21 of the Agreement on Agriculture, GATT rules apply "subject to" the provisions of the Agreement on Agriculture, a wording that clearly suggests priority for the latter. But giving priority to Article 4.1 of the Agreement on Agriculture, which simply "relates" market access concessions to Members' goods schedules as attached to GATT by the Marrakesh Protocol, does not necessitate, or even suggest, a limitation on the application of Article XIII. The provisions are complementary, and do not clash. Thus, Article 21 of the Agreement on Agriculture is not relevant in this case.

7.127 Accordingly, we find that neither the negotiation of the BFA and its inclusion in the EC's Schedule nor the Agreement on Agriculture permit the EC to act inconsistently with the requirements of Article XIII of GATT.

(d) Tariff Quota Share Allocations and Article I:1

7.128 Guatemala and Honduras claim that the EC's tariff quota share allocations to the ACP and BFA countries and the reallocation rules of the BFA are inconsistent with the requirements of Article I:1 because they constitute "rules and formalities" in connection with importation and are applied on a non-MFN basis. The EC responds that these issues should be dealt with under Article XIII.

7.129 These matters may fall within the definition of "rules and formalities" as that term is used in Article I:1. In our view, however, it is more appropriate to consider these issues under Article XIII because that is the more specific provision. This is in accord with past GATT practice, where panels have resolved similar issues under Article XIII, without resort to Article I.[65]

7.130 Accordingly, we make no finding on the compatibility of the EC's tariff quota share allocations and BFA reallocation rules with Article I:1.

[65] Panel Report on "EEC Restrictions on Imports of Apples from Chile", adopted on 10 November 1980, BISD 27S/98, 112, para. 4.1, Panel Report on "EEC - Restrictions on Imports of Dessert Apples - Complaint by Chile", adopted on 22 June 1989, BISD 36S/93, 133, para. 12.28.

2. Tariff Issues

7.131 The Complainants have not challenged the tariff preferences accorded by the EC to traditional ACP bananas, i.e., bananas in traditional amounts from ACP countries that traditionally supplied the EC market. They have, however, claimed that the tariff preferences granted by the EC to non-traditional ACP bananas, i.e., bananas from ACP countries that have not traditionally supplied the EC market and bananas from historical suppliers in excess of their traditional supplies, are inconsistent with the requirements of Article I:1 of GATT. The tariff preference in the case of non-traditional ACP bananas imported under the relevant EC tariff quota share (90,000 tonnes) is 75 ECU per tonne (0 versus 75 ECU), while for over-quota bananas it is 100 ECU per tonne (in 1995: 822 ECU versus 722 ECU). The EC responds that to the extent that these tariff preferences are inconsistent with Article I:1, the inconsistency is permitted by the Lomé waiver.

7.132 Article I:1 provides in relevant part as follows:

> "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 Member to any product originating in ... any other country shall be accorded immediately and unconditionally to the like product originating in ... the territories of all other Members".

7.133 It is clear that the above-described tariff preferences for ACP bananas are inconsistent with Article I:1 since ACP and other bananas are like products and the lower tariffs on ACP-origin bananas are not provided unconditionally to bananas from other Members. The issue is whether the Lomé waiver covers the inconsistency. As noted above, the Lomé waiver provides:

> "the provisions of paragraph 1 of Article I of the General Agreement shall be waived, until 29 February 2000, to the extent necessary to permit the European Communities to provide preferential treatment for products originating in ACP States as required by the relevant provisions of the Fourth Lomé Convention, without being required to extend the same preferential treatment to like products of any other contracting party".[66]

7.134 In this regard, we note that Article 168(2)(a)(ii) of the Lomé Convention provides that the EC:

> "shall take the necessary measures to ensure more favourable treatment than that granted to third countries benefitting from the most-favoured-nation clause for the same products".

While Members in granting the Lomé waiver could have limited the extent to which the EC could provide preferential tariff treatment under Article I:1, they

[66] EC - The Fourth ACP-EEC Convention of Lomé, Waiver Decision of 9 December 1994, L/7604, 19 December 1994; Extension of the Waiver, Decision of 14 October 1996, WT/L/186.

did not do so. Thus, even though waivers must be interpreted strictly,[67] it seems to us that the preferential tariff for non-traditional ACP bananas is clearly a tariff preference of the sort that the Lomé waiver was designed to cover. In our view, in light of the requirement of Article 168(2)(a)(ii) of the Lomé Convention, the Lomé waiver permits the EC to grant tariff preferences to ACP countries on non-traditional bananas.

7.135 The Complainants argue, however, that the EC Court of Justice has ruled that Protocol 5 of the Lomé Convention supersedes Article 168(2)(a)(ii) with the result that the EC is not required to give non-traditional ACP bananas more favourable treatment pursuant to that provision. We do not agree with this characterization of the Court of Justice decision.[68] In the part of the decision cited by the Complainants, the Court of Justice rejected the argument that the EC Council could not rely on Article 168(2)(a) in adopting the EC banana regime. Indeed, the Court states "the import of bananas from ACP States falls under Article 168(2)(a)(ii) of the Lomé Convention". The issue in the case was whether the Lomé Convention required that all ACP bananas had to be admitted duty-free, and the Court ruled that Protocol 5 did not require that. It did not rule that Article 168(2)(a)(ii), which generally requires some preferential treatment of ACP products, did not apply to bananas not covered by Protocol 5.

7.136 Accordingly, we find that to the extent that the EC's preferential tariff treatment of non-traditional ACP bananas is inconsistent with its obligations under Article I:1, those obligations have been waived by the Lomé waiver.

7.137 Guatemala challenges the EC tariffs as being inconsistent with the EC's pre-Uruguay Round tariff binding on bananas of 20 per cent ad valorem, which it asserts was not properly modified through negotiations under Article XXVIII of GATT 1947. Guatemala recalls that despite the EC's former tariff binding of 20 per cent ad valorem on bananas, in 1993, the EC established a tariff quota for bananas and implemented a duty on in-quota bananas of 100 ECU per tonne and on over-quota bananas of 850 ECU per tonne. It later notified the GATT Secretariat of its intention to renegotiate its pre-Uruguay Round tariff binding on bananas under Article XXVIII. The EC responds that its 20 per cent tariff binding was replaced by the inclusion of the new tariff binding in its Uruguay Round Schedule.

7.138 The second *Banana* panel report found that the new EC duties were inconsistent with the requirements of Article II.[69] We agree with that finding. The issue for this Panel is whether that inconsistency was cured by the inclusion in the EC's Uruguay Round Schedule of a new binding in respect of bananas, which

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[67] Panel Report on "US - 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 on 7 November 1990, BISD 37S/228, 256-257, para. 5.9.

[68] Germany v. Council, Case C-280/93, para. 101 (Judgment of 5 October 1994).

[69] Panel Report on "EEC - Import Regime for Bananas", issued on 11 February 1994 (not adopted), DS38/R, pp.38-40, paras. 132-136.

establishes an in-quota duty of 75 ECU per tonne and an over-quota duty of 850 ECU per tonne, falling to 680 ECU per tonne at the end of the implementation period for the Uruguay Round commitments.

7.139 The purpose of tariff schedules is to make it clear what tariff commitments Members have made and Article II requires Members to adhere to those commitments. In the Uruguay Round of Multilateral Trade Negotiations, all original Members participated and a complex new set of agreements and commitments was entered into, replacing GATT 1947 and various related side agreements. In this connection, many changes in tariff bindings were made, including certain tariff increases, and it was for all prospective members of the WTO to decide whether they would accept the new agreements, including the new bindings proposed by other participants. Under Article XVI:5 of the WTO Agreement, reservations are not permitted, except to the extent provided for in a WTO agreement; there is no such provision in GATT 1994. In this regard, we recognize the importance of not undermining the stability and predictability of tariff bindings. In light of the foregoing, in our view, the tariff rates specified in the EC's Uruguay Round Schedule are the valid EC tariff bindings in respect of bananas.

7.140 Furthermore, we note that there is a basic difference between this finding in respect of *tariff rates* and our finding in paragraph 7.118 in respect of the BFA tariff quota *allocations*. Under Article II of GATT, the purpose of the tariff schedules is to set clearly the tariff rate maxima that must be respected. As interpreted in the *Sugar Headnote* case, as discussed above, Article II of GATT does not allow Members to qualify their *non-tariff* obligations in their tariff schedules in a way that is inconsistent with WTO obligations.

7.141 We find that the tariff rates specified in the EC's Uruguay Round Schedule are the valid EC tariff bindings in respect of bananas.

3. The EC Banana Import Licensing Procedures

7.142 We turn now to an examination of the EC's banana import licensing procedures.[70] We give an overview of the claims of the Complainants and explain how we will organize our discussion of the numerous issues raised by those claims.

7.143 Altogether, the Complainants, jointly or severally, have raised more than 40 different claims against the EC licensing regime in general, or against specific elements thereof, under provisions of GATT, the Licensing Agreement and the TRIMs Agreement.[71]

7.144 We begin by considering three general issues: (i) whether the Licensing Agreement covers licences relating to tariff quotas; (ii) the relationship between claims under GATT 1994 and the Annex 1A Agreements in light of the General Interpretative Note to Annex 1A; and (iii) whether the EC licensing procedures should be analysed as one or two regimes.

(a) General Issues

(i) Scope of the Licensing Agreement

7.145 The first general interpretative issue is whether the Licensing Agreement applies to tariff quotas. The Complainants argue that the administration of tariff quotas is subject to the disciplines embodied in the Licensing Agreement and have raised claims under Articles 1.2, 1.3, 3.2 and 3.5 of that Agreement. The EC takes the opposite view. It argues that the Licensing Agreement applies to "import restrictions". Since in its view tariff quotas do not constitute import restrictions, tariff quotas are not subject to the provisions of the Licensing Agreement. It also argues that import licences are tradeable and are not a "prior condition for importation" within the meaning of Article 1.1 of the Licensing Agreement since import licences are required only for the purpose of benefitting from the in-quota duty rate.

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[70] The EC common organization of the banana market, including the licensing regime and its administrative application, encompass more than 100 different regulations. The most important ones are: Council Regulation (EC) No. 404/93 of 13 February 1993 on the common organization of the market in bananas (O.J. L 47/1 of 25 February 1993); 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 (O.J. L 142/6 of 12 June 1993); 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 (O.J. L 349/105 of 31 December 1994); and Commission Regulation (EC) No. 478/95 on additional rules for the application of Council Regulation (EEC) No. 404/93 as regards the tariff quota arrangements for imports of bananas into the Community and amending Regulation (EEC) No. 1442/93 (O.J. L 49/13 of 4 March 1995).

[71] We recall that we decided not to consider claims under Article 5 of the TRIMs Agreement and under Article 4.2 of the Agreement on Agriculture because they were not or not adequately raised in the request for the establishment of the Panel. See para. 7.46 supra.

7.146 We therefore turn to an examination of the terms of the Licensing Agreement, interpreted in light of their context and of the object and purpose of the Agreement. Article 1.1 of the Licensing Agreement provides (footnote omitted):

> "For the purpose of this Agreement, import licensing is defined as administrative procedures used for the operation of import licensing regimes requiring the submission of an application or other documentation (other than that required for customs purposes) to the relevant administrative body as a prior condition for importation into the customs territory of the importing Member".

7.147 The terms of Article 1.1 do not explicitly include, or exclude, the administration of tariff quotas from the coverage of the Licensing Agreement. Its terms define "import licensing" as "administrative procedures used for the operation of import licensing regimes". However, footnote 1 to Article 1.1 further defines "administrative procedures" to include "those procedures referred to as 'licensing' as well as other similar administrative procedures". Accordingly, irrespective of whether the term "licensing" is used, in our opinion, administrative procedures are covered by the Licensing Agreement provided that they have a purpose similar to licensing. In other words, Article 1 of the Licensing Agreement, as further elaborated by footnote 1 thereto, clearly follows a functional approach. It embodies a comprehensive coverage of the Licensing Agreement, except as specifically limited.

7.148 Two limitations on the scope of the Licensing Agreement may be derived from the terms of Article 1.1. First, the notion of "import licensing" is limited to procedures "requiring the submission of an application or other documentation (other than that required for customs purposes) to the relevant administrative body". The licensing procedures used by the EC for the administration of the in-quota imports of bananas meet the terms of this limitation because they require the submission of an application, as well as other documentation.

7.149 Second, Article 1.1 limits "import licensing" to regimes requiring the "submission of an application or other documentation" as a "prior condition for importation into the customs territory of the importing Member". In our view, the requirement to present an import licence upon importation constitutes a "prior condition for importation", irrespective of whether that requirement applies to the administration of a quantitative restriction or a tariff quota. The mere possibility to import a particular product at a higher tariff rate outside a tariff quota without being subjected to the same or any licensing requirement does not alter the fact that the importation of a particular product within a tariff quota at a lower duty rate is made dependent upon the presentation of an import licence as a prior condition for importation at that lower rate.[72]

[72] According to Article 18 of Regulation 1442/93, imports outside of the EC bound tariff quota are subject to automatic licensing.

7.150 Thus, while Article 1.1 does not specifically include licences for tariff quotas within its scope, it does not exclude them. Indeed, the general definition of the scope of application in Article 1.1 of the Licensing Agreement is formulated in a comprehensive manner: import licensing procedures are mentioned without any reference to the underlying measure for whose administration they are employed. Moreover, procedures which are not in explicit terms labelled as "licensing" but pursue a similar purpose are included in the scope of the Licensing Agreement by virtue of footnote 1 to Article 1.1.[73]

7.151 Article 3.1 of the Licensing Agreement also defines the coverage of the Agreement by providing that non-automatic licensing is covered by the Agreement as follows:

> "The following provisions, in addition to those in paragraphs 1 through 11 of Article 1, shall apply to non-automatic import licensing procedures. Non-automatic import licensing procedures are defined as import licensing not falling within the definition contained in paragraph 1 of Article 2".

Article 2:1 of the Licensing Agreement, in turn, reads:

> "Automatic import licensing is defined as import licensing where approval of the application is granted in all cases, and which is in accordance with the requirements of paragraph 2(a)".

Given that the approval of an application for an import licence is not, in the sense of Article 2.1 of the Licensing Agreement, granted by the relevant administrative bodies in all cases, the EC licensing procedures fall within the category of non-automatic import licensing.

7.152 Further indication of the scope of Article 3 of the Licensing Agreement can be derived from the wording of the first sentence of Article 3.2:

> "Non-automatic licensing shall not have trade-restrictive or -distortive effects on imports additional to those caused by the imposition of the *restriction*" (emphasis added).

This raises the question whether the term "restriction" should be interpreted narrowly so as to encompass only quantitative restrictions, or whether it should be read to include also other measures such as tariff quotas.

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[73] While it is true that the EC import licences for bananas are transferable and tradeable, it is also clear that a trader, regardless of whatever his classification might be with respect to operator categories and/or activity functions, at some point in time has to file an application for an import licence. That trader can use the licence he has obtained or sell it on the marketplace. Thus the trader who applies for a particular import licence is not necessarily the one who actually effectuates the importation of bananas. However, there is no requirement under Article 1.1 of the Licensing Agreement that the natural or legal person who files the application for a licence must also carry out the transaction of actually importing bananas. Moreover, in respect of transferability and tradeability of licences, there is no difference between the administration of quantitative restrictions and of tariff quotas.

7.153 In this context, Article 3.3 of the Licensing Agreement offers implicit guidance:

> "In the case of licensing requirements for purposes other than the implementation of quantitative restrictions, Members shall publish sufficient information for other Members and traders to know the basis for granting and/or allocating licences".

The phrase "other than the implementation of quantitative restrictions" makes clear that the coverage of Article 3 of the Licensing Agreement is not limited to procedures used in the implementation of quantitative restrictions. On the contrary, the wording of Article 3.3 implies that the disciplines concerning non-automatic licensing also cover procedures used for the administration of other measures.

7.154 Moreover, the use of the term "restriction" in Article 3.2 is not a reason to give a narrow reading to the scope of the Licensing Agreement. Past GATT panel reports support giving the term "restriction" an expansive interpretation.[74] The introductory words of Article XI of GATT provide as follows:

> "No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures ...".

Thus, tariffs and tariff quotas are restrictions as that term is used in Article XI, although "duties, taxes or other charges" are excepted from Article XI's requirements. A similar reading is appropriate in the case of the Licensing Agreement. Article 3.2 of the Licensing Agreement refers to "restrictions" and Article 3.3 of the Licensing Agreement applies to "licensing requirements for purposes other than the implementation of quantitative restrictions". Accordingly, we find that licensing procedures used for the implementation of measures other than quantitative restrictions, including tariff quotas, are subject to the disciplines of the Licensing Agreement.[75] We also note that our argument that tariff quotas are "restrictions" does not imply that they are not, in principle, legitimate trade measures under the agreements covered by the WTO in the same sense that tariffs are.

7.155 This finding is in accord with a consideration of the object and purpose and the context of the Licensing Agreement. The preamble to the Licensing Agreement makes it clear that the Licensing Agreement is to further the objectives of GATT. It is equally explicitly noted that the provisions of GATT apply to import licensing and then stated that Members desire that import licensing procedures not be used contrary to the principles and objectives of GATT. Since

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[74] Panel Report on "Japan - Trade in Semiconductors", adopted on 4 May 1988, BISD 35S/116, 153, paras. 104-105; Panel Report on "EEC - Programme of Minimum Import Prices, Licences and Surety Deposits for Certain Processed Fruits and Vegetables", adopted on 18 October 1978, BISD 25S/68, 98-100, para. 4.9.

[75] We note that past GATT/WTO practice in respect of this issue is not helpful in clarifying the meaning of the Licensing Agreement.

one of the principal GATT provisions dealing with import licensing is Article XIII, which by the explicit terms of Article XIII:5 applies to tariff quotas, it follows from the preamble to the Licensing Agreement that the Licensing Agreement should also apply to tariff quotas. There would not seem to be any reason to treat licensing procedures for quantitative restrictions differently from those for tariff quotas. The concerns raised in the preamble about the possible negative consequences of the inappropriate use of import licensing regimes would apply equally to both.

7.156 Accordingly, we find that the Licensing Agreement applies to licensing procedures for tariff quotas.

(ii) GATT 1994 and the Annex 1A Agreements

7.157 The Complainants have raised claims in respect of the EC's import licensing regime under GATT 1994, the Licensing Agreement and the TRIMs Agreement. Having found that the Licensing Agreement applies to tariff quotas, a further threshold question is whether both GATT 1994, as well as the Licensing Agreement and the TRIMs Agreement, apply to the EC's import licensing procedures. This requires us to consider the interrelationship of GATT 1994, on the one hand, and the Licensing Agreement and the TRIMs Agreement, on the other.

7.158 The General Interpretative Note to Annex 1A of the Agreement Establishing the WTO ("General Interpretative Note") reads:

> "In the event of conflict between a provision of the General Agreement on Tariffs and Trade 1994 and a provision of another agreement in Annex 1A to the Agreement Establishing the WTO ... , the provision of the other agreement shall prevail to the extent of the conflict".

Both the Licensing Agreement and the TRIMs Agreement are "agreement[s] in Annex 1A to the Agreement Establishing the WTO".

7.159 As a preliminary issue, it is necessary to define the notion of "conflict" laid down in the General Interpretative Note. In light of the wording, the context, the object and the purpose of this Note, we consider that it is designed to deal with (i) clashes between obligations contained in GATT 1994 and obligations contained in agreements listed in Annex 1A, where those obligations are mutually exclusive in the sense that a Member cannot comply with both obligations at the same time, and (ii) the situation where a rule in one agreement prohibits what a rule in another agreement explicitly permits.[76]

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[76] For instance, Article XI:1 of GATT 1994 prohibits the imposition of quantitative restrictions, while Article XI:2 of GATT 1994 contains a rather limited catalogue of exceptions. Article 2 of the Agreement on Textiles and Clothing ("ATC") authorizes the imposition of quantitative restrictions in the textiles and clothing sector, subject to conditions specified in Article 2:1-21 of the ATC. In other words, Article XI:1 of GATT 1994 prohibits what Article 2 of the ATC permits in equally explicit

7.160 However, we are of the view that the concept of "conflict" as embodied in the General Interpretative Note does not relate to situations where rules contained in one of the Agreements listed in Annex 1A provide for different or complementary obligations in addition to those contained in GATT 1994. In such a case, the obligations arising from the former and GATT 1994 can both be complied with at the same time without the need to renounce explicit rights or authorizations. In this latter case, there is no reason to assume that a Member is not capable of, or not required to, meet the obligations of both GATT 1994 and the relevant Annex 1A Agreement.

7.161 Proceeding on this basis, we have to ascertain whether the provisions of the Licensing Agreement and the TRIMs Agreement, to the extent they are within the coverage of the terms of reference of this Panel, contain any conflicting obligations which are contrary to those stipulated by Articles I, III, X, or XIII of GATT 1994, in the sense that Members could not comply with the obligations resulting from both Agreements at the same time or that WTO Members are authorized to act in a manner that would be inconsistent with the requirements of GATT rules. Wherever the answer to this question is affirmative, the obligation or authorization contained in the Licensing or TRIMs Agreement would, in accordance with the General Interpretative Note, prevail over the provisions of the relevant article of GATT 1994. Where the answer is negative, both provisions would apply equally.

7.162 Based on our detailed examination of the provisions of the Licensing Agreement, Article 2 of the TRIMs Agreement as well as GATT 1994, we find that no conflicting, i.e. mutually exclusive, obligations arise from the provisions of the three Agreements that the parties to the dispute have put before us. Indeed, we note that the first substantive provision of the Licensing Agreement, Article 1.2, requires Members to conform to GATT rules applicable to import licensing.

7.163 In the light of the foregoing discussion, we find that the provisions of GATT 1994, the Licensing Agreement and Article 2 of the TRIMS Agreement all apply to the EC's import licensing procedures for bananas.

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terms. It is true that Members could theoretically comply with Article XI:1 of GATT, as well as with Article 2 of the ATC, simply by refraining from invoking the right to impose quantitative restrictions in the textiles sector because Article 2 of the ATC authorizes rather than mandates the imposition of quantitative restrictions. However, such an interpretation would render whole Articles or sections of Agreements covered by the WTO meaningless and run counter to the object and purpose of many agreements listed in Annex 1A which were negotiated with the intent to create rights and obligations which in parts differ substantially from those of the GATT 1994. Therefore, in the case described above, we consider that the General Interpretative Note stipulates that an obligation or authorization embodied in the ATC or any other of the agreements listed in Annex 1A prevails over the conflicting obligation provided for by GATT 1994.

(iii) Separate Regimes

7.164 The EC argues that for purposes of Article I:1 of GATT and other non-discrimination provisions the traditional ACP licensing procedures should not be compared with the third-country and non-traditional ACP licensing procedures because they are separate regimes. We note that licensing procedures applicable to all banana imports are embodied in the same Regulation 1442/93. Furthermore, administrative decisions applying the EC banana import procedures are not always contained in separate regulations depending on whether they relate to traditional ACP licensing or third-country and non-traditional ACP licensing procedures. This would also suggest that all EC licensing procedures for banana imports constitute a single regime.

7.165 Moreover, we have refuted the same argument in paragraph 7.78 *et seq.* above in the context of Article XIII's application to allocation of tariff quota shares. The object and purpose of Article I, Article X, Article XIII and similar non-discrimination provisions are to preclude the creation of different systems for imports from different Members, as explained in a 1968 Note by the GATT Director-General on Article X:3(a).[77] [[Ecuador: [We discuss this Note in more detail in paragraph 7.228 *et seq.*, *infra*, but in our view, it is clear that the object and purpose of the non-discrimination provisions would be defeated if Members were permitted to create separate regimes for imports of like products based on origin.]]] [[Guatemala-Honduras, Mexico: [We discuss this Note in more detail in paragraph 7.209, 228 *et seq.*, *infra*, but in our view, it is clear that the object and purpose of the non-discrimination provisions would be defeated if Members were permitted to create separate regimes for imports of like products based on origin.]]] [[United States: [We discuss this Note in more detail in paragraph 7.209 *et seq.*, *infra*, but in our view, it is clear that the object and purpose of the non-discrimination provisions would be defeated if Members were permitted to create separate regimes for imports of like products based on origin.]]]

7.166 This is not to say that Members may not create import licensing regimes that vary in technical aspects. For example, the information required to establish origin for purposes of demonstrating an entitlement to a preferential tariff rate may differ from the information collected generally to establish origin. However, the measures for implementing a preferential tariff permitted under WTO rules should not in themselves create non-tariff preferences in addition to the tariff preference.

7.167 Accordingly, we find that the EC licensing procedures for traditional ACP bananas and third-country and non-traditional ACP bananas should be examined as one licensing regime.

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[77] Note by the Director-General of 29 November 1968, L/3149.

(iv) Examination of the Licensing Claims

7.168 In light of the foregoing, we organize our examination of the EC's import licensing procedures for bananas as follows.[78] In respect of each of the four principal components of the procedures to which the Complainants have objected - operator categories, activity functions, export certificates and hurricane licences, we first consider whether the EC's procedures are inconsistent with the general non-discrimination rules of Articles I and III of GATT. We then examine their consistency, where necessary, with Articles X:3 and XIII of GATT and the more specific provisions of the Licensing Agreement. We treat the claims under Article 2 of the TRIMs Agreement together with our consideration of the claims under Article III of GATT. We discuss the claims relating to operator categories in section (b), those relating to activity functions in section (c), those relating to export certificates in section (d) and those relating to hurricane licences in section (e). The remaining claims in respect of the EC licensing procedures are addressed in section (f).

(b) Operator Categories

7.169 For purposes of the distribution of licences the EC established three types of "operators": operators who have during a preceding three-year period marketed third-country bananas and non-traditional ACP bananas are classified in Category A. Those who have marketed bananas from EC and traditional ACP sources during a preceding three-year period fall within Category B. Operators who have marketed third-country and non-traditional ACP bananas as well as traditional ACP and EC bananas qualify for both categories. New market entrants who start marketing third-country or non-traditional ACP bananas may qualify as Category C operators. Article 19 of EC Regulation 404/93 earmarks 66.5 per cent of the licences allowing imports of third-country and non-traditional ACP bananas at the lower tariff rates within the tariff quota for Category A operators. Another 30 per cent is allocated to Category B operators, while 3.5 per cent is reserved for the new market entrants of Category C. Subject to limitations, import licences for third-country and non-traditional ACP bananas are transferable and tradeable within and between operator categories.

7.170 The Complaining parties raise claims against the operator category rules under Articles I, III, X and XIII of GATT and Article 2 of the TRIMs Agreement, as well as claims under the Licensing Agreement. In the case of Guatemala and Honduras, we consider the claims they have raised under Article III of GATT, Article 2 of the TRIMs Agreement and Articles I and X of GATT.

[78] In considering how to organize our findings, we note that Article 1.2 of the Licensing Agreement requires Members to conform to GATT rules applicable to import licensing procedures.

(i) Article III:4 of GATT

7.171 The Complainants claim that the rules introducing operator categories, the eligibility criteria for Category B operators and the allocation to Category B operators of 30 per cent of the licences required for the importation of third-country and non-traditional ACP bananas at the lower duty rate within the bound tariff quota are inconsistent with Article III:4 of GATT because this licence allocation amounts to a requirement or incentive to purchase EC bananas in order to be eligible to import the bananas of Complainants' origin.

7.172 The EC responds that the licensing regime applied to third-country imports within the tariff quota does not force any trader to purchase any quantity of EC bananas, but provides a tool for managing correctly the importation of third-country bananas according to the demand on the EC market. Likewise, the operator category rules and the allocation of 30 per cent of the licences required for imports from third-country sources form part of the EC's overall economic strategy and do not affect the volume of imports from third-country sources. Moreover, the EC reiterates that the licensing regime is applied at the border at the moment of importation, and not after the bananas have cleared customs and that, accordingly, all allegations concerning operator category rules under Article III are unfounded.

7.173 The relevant part of Article III:4 of GATT provides:

> "The products of the territory of any Member imported into the territory of any other Member shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use".

7.174 In addressing these claims concerning licensing procedures, we first examine the issue whether import licensing procedures are subject to the requirements of Article III. In this regard, we note that a GATT panel considered "... that the intention of the drafters of the Agreement was clearly to treat the imported products in the same way as the like domestic products once they had been cleared through customs. Otherwise indirect protection could be given."[79] In view of this interpretation of Article III:4, the fact that imported products may be subject to the collection of tariffs or the imposition of a licensing requirement taken as such, whereas the marketing of domestic products is obviously not, cannot per se violate Article III:4 of GATT.

7.175 The next question that arises is whether the EC procedures and requirements for the allocation of import licences for foreign products to eligible operators are measures that are included in the notion of "all laws, regulations and

[79] Panel Report on "Italian Discrimination against Imported Agricultural Machinery", adopted on 23 October 1958, BISD 7S/60, 63-64, para. 11.

requirements affecting their internal sale, offering for sale, purchase ..." in the meaning of Article III:4. In our view, the word "affecting" suggests a coverage of Article III:4, beyond legislation directly regulating or governing the sale of domestic and like imported products. We further have to take into account the context of Article III, i.e., the Interpretative Note Ad Article III which makes clear that the mere fact that an internal charge is collected or a regulation is enforced in the case of an imported product at the time or point of importation does not prevent it from being subject to the provisions of Article III.[80] A GATT panel interpreted the Note as follows:

> "The fact that Section 337 is used as a means for the enforcement of United States patent law at the border does not provide an escape from the applicability of Article III:4; the interpretative note to Article III states that any law, regulation or requirement affecting the internal sale of products that is enforced in the case of the imported product at the time or point of importation is nevertheless subject to the provisions of Article III. Nor could the applicability of Article III:4 be denied on the ground that most of the procedures in the case before the Panel are applied to *persons* rather than *products*, since the factor determining whether persons might be susceptible to Section 337 proceedings or federal district court procedures is the source of the challenged products, that is whether they are of United States origin or imported."[81] (emphasis added)

This interpretation is in line with the interpretation of the term "affecting" in other past GATT panel reports.[82]

7.176 We further note that our interpretation is confirmed by the fact that the coverage of Articles I and III with respect to governmental measures is not necessarily mutually exclusive, as demonstrated by Article I:1's incorporation into the GATT most favoured nation clause of "all matters referred to in paragraphs 2 and 4 of Article III". To put it differently, under GATT internal matters may be within the purview of the MFN obligations and border measures may be within the purview of the national treatment clause.

7.177 In the light of the foregoing, we have to distinguish the mere requirement to present a licence upon importation of a product as such from the procedures

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[80] "... any law, regulation or requirement of the kind referred to in paragraph 1 which applies to an imported product and to the like domestic product and is ... enforced in the case of the imported product at the time or point of importation, is nevertheless to be regarded as ... law, regulation or requirement of the kind referred to in paragraph 1, and is accordingly subject to the provisions of Article III."

[81] Panel Report on "US - Section 337 of the Tariff Act of 1930", adopted on 7 November 1989, BISD 36S/345, 385, para. 5.10.

[82] Panel Report on "Italian Discrimination against Imported Agricultural Machinery", adopted on 23 October 1958, BISD 7S/60, 63-64, para. 11; Panel Report on "EEC - on Imports of Parts and Components", adopted on 16 May 1990, BISD 37S/132, 197, paras. 5.20-5.21.

applied by the EC in the context of the licence allocation which are internal laws, regulations and requirements affecting the internal sale of imported products. In the alternative, if the mere fact that the EC regulations on the introduction of the common market organization for bananas include or are related to a border measure such as a licensing requirement would mean that the Article III cannot apply, it would not be difficult to evade the GATT national treatment obligation. Such a result would run counter to the object and purpose of Article III, i.e., the obligation of Members to accord foreign products no less favourable treatment than like domestic products in the application of any measure affecting the internal sale of products, regardless of whether it applies internally or at the border.

7.178 In turning to the specific measures at issue, we note that operators address claims for reference quantities of bananas marketed during a preceding three-year period and applications for the allocation of quarterly licences to competent member State authorities. The administration of the licence allocation procedures is carried out in cooperation between these authorities and the European Commission within the EC territory. Consequently, although licences are a condition for the importation of bananas into the EC at in-quota tariff rates, we find that the administration of licence distribution procedures and the eligibility criteria for the allocation of licences to operators form part of the EC's internal legislation and are "laws, regulations and requirements affecting the internal sale, ... purchase, ... distribution" of imported bananas in the meaning of Article III:4. Therefore, the argument that licensing procedures are beyond the purview of the GATT national treatment clause cannot, in our view, be sustained in light of the wording, context, object or purpose of Article III or with the findings of past GATT panel reports.

7.179 Turning now to the basic Article III claim of Complainants in respect of operator categories, we first recall the findings of the panel on *EEC - Import Regime for Bananas*[83] ("second *Banana* panel"), which held with regard to operator categories:

> "144. The Panel first examined the operation of the EEC import licensing system and noted the following. The quantity of bananas that an operator may import, pursuant to licences granted under the tariff quota, depends on the origin of the bananas that the operator has marketed during the preceding three-year period.[84] In particular, 30 per cent of the tariff quota is apportioned among operators who, during the preceding period, have purchased bananas from domestic or traditional ACP sources. As a result, operators wishing to increase their future share of bananas benefiting from the tariff

[83] Panel Report on "EEC - Import Regime for Bananas", issued on 11 February 1994 (not adopted), DS38/R.

[84] Council Regulation (EEC) No. 404/93, Article 19 (original footnote).

quota would be required to increase their current purchases of EEC or traditional ACP bananas.

145. The Panel noted that the General Agreement does not contain provisions specifically regulating the allocation of tariff quota licences among importers and that contracting parties are, therefore, in principle free to choose the beneficiaries of the tariff quota. They could, for instance, allocate the licences to enterprises on the basis of their previous trade shares. However, the absence of any provisions in the General Agreement specifically regulating the allocation of tariff quota licences also meant that contracting parties, in allocating such licences, had to fully observe the generally applicable provisions of the General Agreement, in particular those of Article III:4, which prescribes treatment of imported products no less favourable than that accorded to domestic products, and Article I:1, which requires most-favoured-nation treatment with respect to internal regulations.

146. The Panel then proceeded to examine the EEC licensing scheme in the light of the incentive provided under the regulations to buy bananas from domestic sources. The Panel noted that Article III:4 had been interpreted consistently by previous panels as establishing the obligation to accord imported products competitive opportunities no less favourable than those accorded to domestic products. A previous panel has stated:

> 'The words 'treatment no less favourable' in paragraph 4 call for effective equality of opportunities for imported products in respect of the application of laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products.'[85]

The Panel further noted that previous panels had found consistently that this obligation applies to any requirement imposed by a contracting party, including requirements 'which an enterprise voluntarily accepts to obtain an advantage from the government'.[86] In the view of the Panel, a requirement to purchase a domestic product in order to obtain the right to import a product at a lower rate of duty under a tariff quota is therefore a requirement affecting the purchase of a product within the meaning of Article III:4. The Panel further noted that, in judging whether effective equality of opportunities for imported products under Article III:4 was accorded, the

[85] Report of the panel on "United States - Section 337 of the Tariff Act of 1930", BISD 36S/345, 386, para. 5.11, adopted on 17 June 1987 (original footnote).

[86] Report of the panel on "EEC - Regulation on Imports of Parts and Components", BISD 37S/132, 197, paragraph 5.21, adopted on 16 May 1990 (original footnote).

trade impact of the measure was not relevant. The CONTRACTING PARTIES determined in 1949 that the obligations of Article III:4 'were equally applicable whether imports from other contracting parties were substantial, small or non-existent',[87] and they have confirmed this view in subsequent cases.[88] Thus it was not relevant that, at present, the incentive under the EEC regulations to buy domestic or traditional ACP bananas may only result in raising their price, and not in reducing the exports of the third-country bananas, since these exports, because of the high over-quota tariff, were limited *de facto* to the amount allocated under the tariff quota. The discrimination of imported bananas under the licensing scheme could therefore not be justified by measures on the importation that currently prevented, *de facto*, bananas from entering into the internal market. The Panel therefore found that the preferred allocation of part of the tariff quota to importers who purchase EEC bananas was inconsistent with Article III:4.

147. The Panel then examined the EEC licensing scheme in the light of the incentive provided under the regulations to buy bananas of ACP origin in preference to other foreign origins. The Panel noted that Article I:1 obliges contracting parties, with respect to all matters referred to in Article III:4, to accord any advantage, granted to any product originating in any country, to the like product originating in the territories of all other contracting parties. As under Article III, the Panel considered that actual trade flows were not relevant to determine conformity with Article I:1. The Panel therefore found that the preferred allocation of licences to operators who purchase bananas from ACP countries was inconsistent with the EEC's obligations under Article I:1.

148. The Panel noted that the EEC's licensing system, by reserving 66.5 per cent of the tariff quota to operators who had marketed third-country or non-traditional ACP bananas during a preceding period, included also incentives to continue importation of third-country bananas, even though these incentives may not have trade-distorting effects at present in view of the undisputed greater competitiveness of these third-country bananas. The Panel was of the view that, regardless of the trade effects, the apportioning of 66.5 per cent of the tariff quota to operators who had marketed

[87] Report of the working party on Brazilian Internal Taxes, BISD II/181, 185, para. 16, adopted on 30 June 1949 (original footnote).

[88] Report of the panel on "United States - Taxes on petroleum and certain imported substances", BISD 34S/136, 158, para. 5.1.9, adopted on 17 June 1987; Report of the panel on United States - Measures affecting alcoholic and malt beverages, DS23/R, para. 5.65, adopted on 19 June 1992 (original footnote).

> third-country or non-traditional ACP bananas could not offset or legally justify the inconsistencies of the licensing system with Articles III:4 and I:1. The Panel agreed in this respect with a previous panel that had found that 'an element of more favourable treatment would only be relevant if it would always accompany and offset an element of differential treatment causing less favourable treatment'."[89]

7.180 While the second *Banana* panel report was not adopted by the GATT CONTRACTING PARTIES, the Appellate Body has stated in another context:

> "[W]e agree with the panel's conclusion ... that unadopted panel reports 'have no legal status in the GATT or WTO system since they have not been endorsed through decisions by the CONTRACTING PARTIES to GATT or WTO Members'.[90] Likewise, we agree that 'a panel could nevertheless find useful guidance in the reasoning of an unadopted panel report that it considered to be relevant'.[91]."[92]

Neither the EC nor the Complainants have claimed that the rules concerning operator categories have significantly changed[93] since the second *Banana* panel report was issued on 11 February 1994 in a way that would affect the soundness of that panel's findings and conclusions with respect to Article III:4. Nor does the adoption of the Lomé waiver by the GATT CONTRACTING PARTIES and its extension by the WTO General Council, in our view, affect our examination of the allocation of licences to different operator categories in the light of Article III:4. Accordingly, we adopt the findings of the second *Banana* panel on Article III:4 of GATT in respect of operator categories as our own findings.

7.181 However, before finding whether 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 is inconsistent with Article III:4, we need to consider that Article III:1 is a "general principle that informs the rest of Article III", as the Appellate Body has recently stated.[94] Since Article III:1

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[89] Report of the panel on "United States Section 337 of the Tariff Act of 1930", BISD 36S/345, 388, para. 5.16, adopted on 7 November 1989 (original footnote).

[90] Panel Report on "Japan - Taxes on Alcoholic Beverages", adopted on 1 November 1996, WT/DS8/R, WT/DS10/R, WT/DS11/R, para. 6.10 (original footnote).

[91] *Ibid.*

[92] Appellate Body Report on "Japan - Taxes on Alcoholic Beverages", adopted on 8 November 1996, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, AB-1996-2, DSR 1996:I, 97 at 107-108.

[93] While provisions such as Article 19 of Regulation 404/93 of 13 February 1993 and Articles 3 and 4 of Regulation 1442/93 of 12 June 1993 have been implemented and modified through subsequent EC legislation, these rules are still in essence in force in the EC legal order without having been affected by subsequent legislation.

[94] Appellate Body Report on "Japan - Taxes on Alcoholic Beverages", DSR 1996:I, 97 at 111. The Report states: "The purpose of Article III:1 is to establish this general principle as a guide to understanding and interpreting the specific obligations contained in Article III:2 and in the other para-

constitutes part of the context of Article III:4, it must be taken into account in our interpretation of the latter. Article III:1 articulates a general principle that internal measures should not be applied so as to afford protection to domestic production.[95] As noted by the Appellate Body, the protective application of a measure can most often be discerned from the design, the architecture, and the revealing structure of the measure.[96] We consider that the design, architecture and structure of the EC measure that provides for 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 all indicate that the measure is also applied so as to afford protection to EC producers.

7.182 Thus, we find 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 is inconsistent with the requirements of Article III:4 of GATT.

(ii) Article 2 of the TRIMs Agreement

7.183 Proceeding on the assumption that the operator category rules are inconsistent with the requirements of Article III:4, the Complainants allege that the conditions for operator B eligibility and the 30 per cent tariff quota allocation for Category B operators are inconsistent with Article 2.1 of the TRIMs Agreement. The fact that the allocation of 30 per cent of the licences required for the importation of third-country bananas is contingent upon the marketing of EC (and traditional ACP) bananas amounts, in the view of the Complainants, to a purchasing requirement which falls within the first category of the Illustrative List in the Annex to the TRIMs Agreement of those trade-related investment measures which are inconsistent with Article III:4 of GATT.

7.184 In the EC's view, no breach of Article 2 of the TRIMs Agreement can be found because no breach of Article III:4 has occurred. In the alternative, the EC argues that rules establishing operator categories do not fall within the ambit of the TRIMs Agreement because there is no requirement to make an investment within a particular country; nor is there a requirement for purchase or use by an enterprise of products of domestic origin or from any domestic source in order to be allowed to make the investment.

7.185 In considering these arguments, we first examine the relationship of the TRIMs Agreement to the provisions of GATT. We note that with the exception

graphs of Article III, while respecting, and not diminishing in any way, the meaning of words actually used in the texts of those other paragraphs".

[95] *Ibid*., p.18.

[96] *Ibid*., p.29.

of its transition provisions[97] the TRIMs Agreement essentially interprets and clarifies the provisions of Article III (and also Article XI) where trade-related investment measures are concerned. Thus the TRIMs Agreement does not add to or subtract from those GATT obligations, although it clarifies that Article III:4 may cover investment-related matters.

7.186 We emphasize that in view of the importance of the TRIMs Agreement in the framework of the agreements covered by the WTO, we have examined the claims and legal arguments advanced by the parties under the TRIMs Agreement carefully. However, for the reasons stated in the previous paragraph, we do not consider it necessary to make a specific ruling under the TRIMs Agreement with respect to the eligibility criteria for the different categories of operators and the allocation of certain percentages of import licences based on operator categories. On the one hand, a finding that the measure in question would not be considered a trade-related investment measure for the purposes of the TRIMs Agreement would not affect our findings in respect of Article III:4 since the scope of that provision is not limited to TRIMs and, on the other hand, steps taken to bring EC licensing procedures into conformity with Article III:4 would also eliminate the alleged non-conformity with obligations under the TRIMs Agreement.

7.187 Therefore, we do not consider it necessary to make a specific ruling under the TRIMs Agreement with respect to 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.

(iii) Article I of GATT

7.188 The Complainants claim that (i) the conditions for operator B eligibility based on marketing of ACP bananas, (ii) the exemption of traditional ACP imports from operator category rules and (iii) the allocation of 30 per cent of the licences allowing imports of third-country bananas at in-quota tariff rates to Category B operators, are inconsistent with the requirements of Article I:1 of GATT. They argue: (a) that the comparatively less complex licensing procedures that apply to imports of bananas from traditional ACP sources are an "advantage" that the EC fails to accord to imports of third-country bananas, and (b) that these aspects of the EC licensing system provide an incentive or requirement to purchase bananas from traditional ACP sources over those originating in third countries. The EC responds that the existence of Category B licences *per se* does not create an incentive to purchase any particular product, but is designed to mitigate the effects of oligopolistic market structures and to stimulate competition between operators. Since licences allocated to particular operators are tradeable, the EC concludes that such licences do not constitute an impediment to imports from

[97] We have already dismissed the Complainants' claim under the transition provisions of Article 5 of the TRIMs Agreement because Article 5 was not listed in the request for the establishment of the Panel as required by Article 6.2 of the DSU, see para. 7.46.

any specific source. In the alternative, the EC maintains that the Lomé waiver covers any inconsistency with the requirements of Article I:1 because Category B licences are required under the Lomé Convention in order to maintain existing advantages for traditional ACP bananas on the EC market.

7.189 Article I:1 provides as follows:

> "With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed in 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 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 Members".

In our view, import licensing procedures, including the operator category rules, are "rules and formalities in connection with importation" in the meaning of Article I:1. A panel found, for example, that comparatively more favourable rules for revoking countervailing duties were an "advantage" for purposes of Article I:1 and that "making a regulatory advantage available to imports from some countries while not making it available to others" is inconsistent with Article I:1.[98]

7.190 In our view, the operator category and activity function rules contained in the licensing procedures for third-country and non-traditional ACP bananas require substantially more data to be submitted to show entitlement to a licence for third-country and non-traditional ACP bananas than is required by the procedures applicable to traditional ACP bananas. This is clearly demonstrated by comparing the data that needs to be maintained and submitted under the two systems.

7.191 In respect of traditional ACP bananas, we note that, according to the EC,[99] operators need only to obtain special certificates of origin from the issuing authority in the relevant ACP State for traditional ACP imports. In this regard, Article 14(4) of Regulation 1442/93 on "Detailed Rules Applicable to Imports of Traditional ACP Bananas" (as amended by Regulation 875/96) provides:

> "4. Import licence applications shall only be admissible where:
>
> (a) they are accompanied by the original of a certificate drawn up by the competent authorities of the ACP country concerned testifying to the origin of the bananas ...

[98] Panel Report on "US - Denial of MFN Treatment as to Non-Rubber Footwear from Brazil", adopted on 19 June 1992, BISD 39S/128, 150-151, paras. 6.8-6.11.

[99] See the first item on the chart submitted by the EC which is reproduced at para. 4.274.

(b) they contain

- the words 'traditional ACP bananas - Regulation (EEC) No 404/93' ...
- an indication of the country of origin ..."

7.192 In contrast, in respect of third-country and non-traditional ACP imports, operators need to apply for a reference quantity by sending details of banana volumes marketed during a preceding three-year period to the relevant competent authority. Article 19(2) of Regulation 404/93 on "Detailed Rules for the Application of the Tariff Quota Arrangements" provides in respect of imports of third-country and non-traditional ACP bananas that:

> "On the basis of separate calculations for each of the categories of operators ... each operator shall obtain import licences on the basis of the average quantities of bananas that he has sold in the three most recent years for which figures are available. For the category of [A] operators ..., the quantities to be taken into consideration shall be the sales of third-country and/or non-traditional ACP bananas. In the case of category [B] operators ..., sales of traditional ACP and/or Community bananas shall be taken into consideration. ...".

Article 4 of Regulation 1442/93 provides:

> "1. The competent authorities of the Member States shall draw up separate lists of operators in Category A and B and the quantities which each operators has marketed in each of the three years prior to that preceding the year for which the tariff quota is opened, broken down according to economic activity as described in Article 3(1).
>
> Operators shall register themselves and shall establish quantities they have marketed by submitting individual written applications on their own initiative in a single Member State of their choice.
>
> ...
>
> 2. The operators concerned shall notify the competent authorities at the latest by ... each year thereafter of the overall quantities of bananas marketed in each of the years referred to in paragraph 1, breaking them down clearly:
>
> (a) according to origin, pursuant to the definition laid down in Article 15 of Regulation (EEC) No 404/93,[100] as follows:

[100] Article 15 of Regulation 404/93 provides for definitions of, inter alia, "traditional imports from ACP States'", "non-traditional imports from ACP States", "imports from non ACP-third countries", "Community bananas".

- of imports from non-ACP third countries and non- traditional imports from ACP States,
- traditional imports from ACP States within the quantities set out in the Annex to Regulation (EEC) No. 404/93, specifying the quantities by State,
- Community bananas, specifying the region of production;

(b) according to the economic activity as described in Article 3(1).

3. The operators concerned shall make the supporting documents specified in Article 7 available to the authorities."

Article 7 of Regulation 1442/93 provides:

"At the request of the competent authorities of the Member States, the following documents may be submitted to establish the quantities marketed by each operator in Category A and B registered with them:

- the copy delivered to the importer of the Single Administrative Document (SAD) or, where applicable, his copy of the document for simplified declarations,
- a copy of the T2 declaration issued pursuant to ... for transactions effected during the reference period,
- original sales invoices or certified copies thereof,
- any relevant supporting documents such as national import documents issued and used before the entry into force of these arrangements,
- import licences issued pursuant to this Regulation and documents testifying to the marketing of bananas produced in the Community."

The information required to support claims in respect of activity functions (e.g., ripening) is not specified in this provision, but such information also must be maintained and submitted. We further note that the filing of data concerning the past volumes of traditional ACP and/or EC bananas marketed for purposes of the calculation of reference quantities for Category B operators relates to the eligibility of such operators for the allocation of licences allowing the importation of third-country and non-traditional ACP bananas at in-quota tariff rates. However, this filing of data on past banana volumes marketed is not a prerequisite for the importation of traditional ACP bananas, for the issuance of traditional ACP import licences, or for the marketing of EC bananas.

7.193 From the foregoing, in our view, it is clear that the procedural and administrative requirements for imports of third-country and non-traditional ACP bananas arising from the application of the operator category rules differ from, and

go significantly beyond, those required in respect of traditional ACP bananas. Thus, we believe that the licensing procedures applied by the EC to traditional ACP banana imports, when compared to the licensing procedures imposed on third-country and non-traditional ACP imports with its operator category rules, can be considered as an "advantage" which the EC does not accord to third-country and non-traditional ACP imports. The EC thereby acts inconsistently with the requirements of Article I:1.

7.194 In addition, Article I:1 obliges a Member to accord any advantage granted to any product originating in any country to the like product originating in the territories of all other Members, in respect of matters referred to in Article III:4. The matters referred to in Article III:4 are "laws, regulations and requirements affecting [the] internal sale, offering for sale, purchase, transportation, distribution and use [of a product]". In our view, the allocation to Category B operators of 30 per cent of the licences allowing for the importation within the tariff quota of third-country bananas means *ceteris paribus* that operators who in the future wish to maintain or increase their share of licences for the importation of third-country and non-traditional ACP bananas at in-quota tariff rates would be required to maintain or increase their current purchases and sales of traditional ACP (or EC) bananas in order to claim that they market traditional ACP (or EC) bananas for purposes of the operator category rules. Such a requirement to purchase and sell a product from one country (i.e., a source of traditional ACP imports) in order to obtain the right to import a product from any other country (i.e., a third country or a source of non-traditional ACP imports) at a lower rate of duty under a tariff quota is a requirement affecting the purchase of a product within the meaning of Articles III:4 and I:1. The allocation of licences allowing imports of third-country and non-traditional ACP bananas at in-quota tariff rates to operators who purchase and sell traditional ACP bananas is inconsistent with the EC's obligations under Article I:1 because it constitutes an advantage of the type covered by Article I that is accorded to traditional ACP bananas but which is not accorded to like products from all Members (i.e., non-traditional ACP and third-country bananas). We note that this result was also reached in the second *Banana* panel report as quoted above.[101]

7.195 Thus, we find that 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, are inconsistent with the requirements of Article I:1 of GATT.

[101] Panel Report on "EEC - Import Regime for Bananas", issued on 11 February 1994 (not adopted), DS38/R, p.42ff, paras. 143-148, especially para. 147.

(iv) Application of the Lomé Waiver to the EC's Article I Obligations

7.196 In light of the foregoing finding that the operator category rules contained in the EC's licensing procedures for bananas are inconsistent with the requirements of Article I:1, we must consider whether the EC's obligations in this respect have been waived by the Lomé waiver. We have already found that the Lomé waiver covers (i) tariff preferences that the EC currently affords to traditional and non-traditional ACP bananas, which would otherwise be inconsistent with its obligations under Article I:1 (paragraph 7.136) and (ii) to a limited extent, the banana tariff quota share allocations made by the EC to certain ACP countries, which would otherwise be inconsistent with its obligations under Article XIII (paragraph 7.110). As we noted in our discussion of this issue in the context of Article XIII, we must first determine whether the EC licensing procedures that we have found to be inconsistent with the requirements of Article I:1 are required by the Lomé Convention. If it is not, then the Lomé waiver is not applicable.

7.197 We recall that the operative paragraph of the Lomé waiver provides as follows:

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

For purposes of examining the issue of what is required by the Lomé Convention, we must examine the provisions of Article 168 and Protocol 5 of the Lomé Convention. In addition, we also consider whether the Lomé waiver should be interpreted to cover other provisions of the Lomé Convention that might be read to require such licensing procedures for ACP countries.

7.198 Article 168 of the Lomé Convention requires in general that ACP products be admitted duty-free to the EC. However, in the case of products, such as bananas, that are subject to specific rules as a result of the common agricultural policy, under Article 168(2)(a) they are to be (i) accorded duty-free treatment if there are no non-tariff measures applicable to their import or (ii) if (i) is not applicable (as is the case for bananas), given "more favourable treatment than that granted to third countries benefitting from the most-favoured-nation clause for the same products". The importation of traditional ACP bananas and non-traditional ACP bananas within the EC tariff quota is duty-free. Thus, for those imports, the basic requirement of Article 168, as expressed in its first paragraph, has been met, and we see no requirement in Article 168 that the EC must provide favourable treatment beyond such duty-free treatment. The Lomé waiver should not be interpreted to permit breaches of WTO rules that are not clearly required to satisfy the provisions of the Lomé Convention. This reading is confirmed by

the terms of the waiver itself, which states in its fourth preambular paragraph: "Considering that the preferential treatment ... required by the Convention is designed ... not to raise undue barriers or to create undue difficulties for the trade of other contracting parties". In our view, the EC licensing procedures at issue do create undue difficulties for the trade of other Members. Accordingly, since Article 168 of the Lomé Convention does not specifically require these licensing procedures, it cannot be invoked as a justification for applying the Lomé waiver to such procedures.

7.199 Protocol 5 of the Lomé Convention provides:

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

Protocol 5 suggests that each ACP country must be protected as regards its traditional markets and advantages thereon, nothing in the Lomé Convention specifically requires a licensing system for third-country and non-traditional ACP banana imports, such as is provided by the application of the operator category-activity function system to third-country and non-traditional ACP imports. It is, however, necessary to consider whether these licensing procedures were one of the advantages, as that term is used in Protocol 5, formerly enjoyed by the ACP countries under member States' banana import regimes.

7.200 The first *Banana* panel report provided detailed information on the licensing systems that were applied in the EC member States prior to the implementation of its common market organization for bananas. Prior to the implementation of Regulation 404/93, ACP bananas were primarily imported by France and the United Kingdom.[102] The panel report described the French regime as follows:

> "19. A banana import régime was first established in France by a Decree of 9 December 1931. This provided for the imposition of temporary quotas on imports of bananas from third countries. It was complemented by a law of 7 January 1932, on safeguard of production of bananas in colonies, protectorates or territories under French mandate. By Decree No. 60-460 of 16 May 1960, a special import régime was established for countries of the "zone franc" (i.e. former colonies). By an *arbitration* of the President of the Republic of 1962, the general supply of the French market was divided as follows: two thirds for national production (Guadeloupe, Martinique) and one third for imports from African suppliers (Cameroon, Côte d'Ivoire and Madagascar). Bananas from the Latin American countries were imported only to make up for any

[102] Panel Report on "EEC - Member States' Import Regimes for Bananas", issued on 3 June 1993 (not adopted), DS32/R, p.3, para. 12.

shortfall from the regions or countries mentioned above. When imported, the Latin American bananas were subject to the bound 20 per cent tariff and to licences.

20. In order to manage the banana market, an Interprofessional Committee for Bananas (Comité Interprofessionnel Bananier "CIB") was established on 5 December 1932. It was recognized as an agricultural interprofessional organization on 1 April 1989. The CIB brought together producers and importers, ripeners and distributors, including representatives of the African producers, as well as associated members (i.e., transporters). Since 1970, the GIEB (Groupement d'Intérêt Economique Bananier - Banana Economic Interest Group) has administered the existing quotas and import licences.

21. The CIB was responsible for assessing the demand for bananas on the French market on a yearly basis. A restricted Committee *(Conseil d'Administration)* of the CIB met every month to examine the quantities to buy the following month and to make a forecast for two months. In case of shortage of supply from one of the domestic or African sources, the CIB requested the GIEB to import from other third countries. In addition, the Ministry of Economics and Finance published notices to importers concerning the opening of quotas administered through licences. These licences were valid for a period of six months and were primarily designed to cover indirect imports made through other member States, as direct imports were made by the GIEB.

22. Import licences were granted to the GIEB by the government. The GIEB was exclusively responsible for purchasing and importing bananas directly from third countries. Imported quantities were then sold by the GIEB at the domestic market price. The "mark-up" was transferred to the Treasury. In addition to the national market organization, France was authorized, under the provisions of Article 115 of the Treaty of Rome, not to grant EEC treatment to bananas originating in certain third countries and put into free circulation in another EEC member State".[103]

It described the regime of the United Kingdom as follows:

"37. The banana import régime dated back to the early 1930's when the United Kingdom introduced preferential duties on imports of British Empire bananas. Traditionally, and before it joined the EEC, the United Kingdom imported most of its bananas from the Windward Islands and Jamaica, formerly part of the British

[103] Panel Report on "EEC - Member States' Import Regimes for Bananas", issued on 3 June 1993 (not adopted), DS32/R, pp. 4-5, paras. 19-22.

> Empire. These countries were now regarded as ACP countries under the Lomé Convention. Imports of bananas from ACP countries entered in unrestricted quantities and duty free. Between 1940 and 1958, there was a total ban on imports of bananas from Latin American countries. Thereafter, imports from third countries, usually Latin American bananas, had been subject to a quota, since 1985 an annual quota, and a licensing system, as well as the common external tariff of 20 per cent. Licences were granted under Section 2 of "The Import of Goods (Control) Order" of 1954. There was a guaranteed minimum quantity for third country banana imports which, in 1992, amounted to 38,868 tons. Additional imports from third countries occurred when there was a short-fall of supplies. Upon its accession to the EEC, the United Kingdom was authorized, by the Commission of the EC, under Article 115 of the Treaty of Rome, to apply restrictions to imports, through other member States, of bananas from third countries, put into free circulation in the EEC.
>
> 38. At the beginning of every calendar year, the government authorities fixed the level of bananas that could be imported from all suppliers, according to the domestic needs determined by the Ministry of Agriculture, Fisheries and Food. On the basis of these parameters, monthly supply and demand conditions were established by the Banana Trade Advisory Committee (BTAC), set up in 1973 as a consultative committee for trade in bananas. Under the existing rules, the Department of Trade and Industry (DTI) was responsible for administering the import licensing system which controlled the quantity of banana imports from third country suppliers. The DTI issued public notices to importers. Since 1985, this took the form of an annual Notice to Importers, inviting applications for licences for the importation of bananas of non-preferential origin. Importers who fulfilled certain well-established criteria were eligible to obtain these licences. Once licences were allocated, for the annual basic import quota, management of further imports from third countries was done on a monthly basis. The BTAC met to consider updated forecasts of supply and demand. The DTI was then advised on the issue of further licences to cover shortfalls in supply and increases in demand".[104]

Based on the foregoing description of the UK and French procedures, it appears that when licences for banana imports were used, they were issued on a discretionary basis from time to time to established importers. Thus, prior to or as of

[104] Panel Report on "EEC - Member States' Import Regimes for Bananas", issued on 3 June 1993 (not adopted), DS32/R, p. 7, paras. 37-38.

1990 (the reference period in the Lomé Convention for past or present advantages), neither the French nor the UK procedures appears to contain anything at all similar to the operator category-activity function system. Thus, in our view, licensing procedures of the kind presently applied were not an "advantage" that ACP countries formerly enjoyed in the EC or in individual member State markets.

7.201 In this connection, the EC argues that its licensing system is necessary to provide that the quantities for which access opportunities were given could actually be sold thereby guaranteeing traditional ACP bananas their existing advantages. We note that it appears that the ACP countries have enjoyed greater collective success on the EC market under Regulation 404/93 than in the years prior to 1993.[105] In any event, we believe that there are other methods consistent with WTO rules by which the EC could assist the ACP countries to compete on the EC market. As noted above, in our view, the Lomé waiver should not be interpreted to permit breaches of WTO rules that are not clearly required to satisfy the provisions of the Lomé Convention. This reading is, in our view, confirmed by the terms of the waiver itself, which states in its fourth preambular paragraph: "Considering that the preferential treatment ... required by the Convention is designed ... not to raise undue barriers or to create undue difficulties for the trade of other contracting parties". In our view, these licensing procedures do create undue difficulties for the trade of other Members. Since licensing procedures are not an advantage formerly enjoyed by ACP countries and they are not required to provide access to traditional markets, such procedures are not covered by the Lomé waiver.

7.202 There are other provisions of the Lomé Convention, such as Articles 15(a) and 167, that call for the promotion of trade between the EC and ACP countries. However, they are too general to impose specific requirements on the EC. Thus, we do not agree that those provisions can be read to require a particular licensing system such as the operator category-activity function system.

7.203 Finally, we note that a finding that the Lomé waiver does not apply to the EC's licensing procedures for banana imports is in accordance with past panel practice that waivers should be interpreted narrowly.[106]

7.204 Thus, we find that the Lomé waiver does not waive the EC's obligations under Article I:1 of GATT in respect of licensing procedures applied to third-country and non-traditional ACP imports, including those related to operator category rules.

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[105] According to statistics submitted by the EC, the ACP countries' average share of the EC-12 market for imported bananas averaged 611,000 tonnes in the years 1989-1992, or 22.8 per cent. For 1993-1994, it averaged 737,000 tonnes, or 25.4 per cent. The Complainants suggest that the ACP share is understated in the EC statistics.

[106] Panel Report on "US - 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 on 7 November 1990, BISD 37S/228, 256-257, para. 5.9.

(v) Article X:3(a) of GATT

7.205 The Complainants claim that the EC licensing procedures are inconsistent with the requirements of Articles X:3 of GATT because they are not administered in a uniform, impartial and reasonable manner. The EC responds that Article X:3 only applies to internal measures and therefore is not applicable in this case. Alternatively, it argues that a system permitted under Article I by the Lomé waiver cannot be found to breach another GATT provision imposing MFN-like obligations similar to those waived. We note that we found in the preceding section that the EC licensing procedures were not permitted under Article I by the Lomé waiver.

7.206 Article X:3(a) provides:

> "Each Member shall administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings of the kind described in paragraph 1 of this Article".

Article X:1 defines the coverage of Article X:3(a) as follows:

> "Laws, regulations, judicial decisions and administrative rulings of general application, made effective by any Member, pertaining to the classification or the valuation of products for customs purposes, or to rates of duty, taxes or other charges, or to requirements, restrictions or prohibitions on imports or exports or on the transfer of payments therefor, or affecting their sale, distribution, transportation, insurance, warehousing, inspection, exhibition, processing, mixing or other use ...".

Given that this provision enumerates national legislation regarding border measures as well as internal measures, and customs tariffs as well as quantitative measures, the coverage of Article X could hardly be more comprehensive. Accordingly, internal laws regulating border measures constitute "... requirements ... on imports ..." in the meaning of Article X:1 and cannot be excluded from its scope.

7.207 Consequently, we find that the EC import licensing procedures are subject to the requirements of Article X of GATT.

7.208 More specifically, the Complainants claim that the rules establishing operator categories on the basis of the source of bananas marketed during a preceding three-year period are inconsistent with the requirements of Article X:3(a) because the EC applies them to imports of third-country and non-traditional ACP bananas but not to traditional ACP imports. According to the Complainants, these rules are inconsistent with the standards of "uniform, impartial and reasonable administration" of domestic laws, regulations, decisions and rulings and thus are inconsistent with the requirements of Article X:3(a). The EC maintains that the rules applying operator categories are administered in a uniform, impartial and reasonable manner among the third countries which are subject to that separate licensing regime and that the Complainants have failed to provide evidence to the contrary.

7.209 The Complainants support their argument by referring to a 1968 Note by the GATT Director-General, which stated that Article X:3(a)

> "would not permit, in the treatment accorded to imported goods, discrimination based on country of origin, nor would they permit the application of one set of regulations and procedures with respect to some contracting parties and a different set with respect to the others".[107]

The EC responds that the 1968 Note cannot be considered as an authoritative interpretation of GATT rules because it was never endorsed by a formal decision of the CONTRACTING PARTIES.

7.210 We note that a prior panel in discussing the interpretation of Article X:3(a) found that its terms would be met if regulations were applied "in a substantially uniform manner, although there were some minor administrative variations, e.g. concerning the form in which licence applications could be made and the requirement of pro-forma invoices".[108] In that case, the panel found that such differences were minimal and did not in themselves establish a breach of Article X:3(a).

7.211 In our view, the Director-General's Note correctly describes the reach of Article X:3(a) and is consistent with the quoted panel decision. While minor "administrative variations" in the application of regulations may not be inconsistent with the requirements of Article X:3(a), as suggested by the above-mentioned panel report, two different sets of rules would be inconsistent with the requirements of Article X:3(a). In this case, we are confronted with a system for the importation of bananas into the EC with two different origin-based sets of import licensing procedures. These sets of licensing procedures differ significantly from one another, depending on whether imports of bananas are from traditional ACP sources or from third countries and non-traditional ACP sources, particularly with respect to the application of the rules on operator categories. The operator category (and activity function) rules contained in the licensing procedures for third-country and non-traditional ACP bananas (but not in the procedures applicable to traditional ACP bananas) mean that substantially more data must be maintained and submitted to show entitlement to a licence for third-country and non-traditional ACP bananas (see paragraphs 7.190 *et seq*.). These

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[107] Note by the GATT Director-General of 29 November 1968, L/3149.

[108] Panel Report on "EEC - Restrictions on Imports of Dessert Apples", Complaint by Chile, adopted on 22 June 1989, BISD 36S/93, 133, para.12.30. In the descriptive part of the *Chilean Apples* case, "concerning Article X:3, Chile argued that there were differences among the ten member States of the EEC as to the requirements they imposed on applications for licences for imports of dessert apples. It cited examples, such as a French requirement for licence applications to be accompanied by a pro forma invoice, which effectively meant that licences could not be applied for until after ships had been loaded. Other examples cited by Chile included acceptance of telexed licence applications by some member states and not others; differing procedures for bank guarantees; and the refusal by one member state to accept a licence issued by another". Idem at p.116, para. 6.3.

differences are not consistent with Article X:3(a)'s requirement of "uniform" administration.

7.212 As a result, we find that 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, is inconsistent with the requirements of Article X:3(a) of GATT.

(vi) Other Claims

7.213 In light of the foregoing findings on operator category rules and the allocation of certain percentages of import licences on the basis thereof, we do not consider it necessary to address the other claims raised by the Complaining parties against these EC measures.[109] We further note that a finding that operator category rules are or are not inconsistent with the requirements of other provisions of GATT or the Licensing Agreement would not affect the findings we have made in respect of operator category rules.

(c) Activity Functions

7.214 Activity function rules apply to Category A operators as well as to Category B operators. Article 3 of Regulation 1442/93 defines three categories of economic activities, i.e. (1) "primary" importers, (2) "secondary" importers and (3) ripeners. Fixed percentages of the licences required for the importation of bananas from third countries or non-traditional ACP sources at lower duty rates within the tariff quota are allocated on the basis of these "activity functions": Article 5 of Regulation 1442/93 provides for a weighting coefficient of 57 per cent for "primary" importers, 15 per cent for "secondary" importers, and 28 per cent for ripeners of bananas. The EC notes that "the Commission is guided by the principle whereby the licences must be granted to natural or legal persons who have undertaken the commercial risk of marketing bananas and by the necessity of avoiding disturbing normal trading relations between persons occupying different points in the marketing chain".[110]

7.215 The Complaining parties raise claims against the activity function rules under Articles I, III, X and XIII of GATT as well as claims under the Licensing Agreement. In the case of Guatemala and Honduras, we consider the claims they have raised under Articles III, I and X of GATT.

(i) Article III:4 of GATT

7.216 The Complainants claim that, while the reservation to ripeners of 28 per cent of the Category A and B import licences required for the importation of

[109] See note 47 supra.
[110] Recital 15 of Council Regulation 404/93.

third-country bananas does not necessarily force operators to alter their trade and distribution pattern, the activity function rules provide nevertheless a strong incentive for operators to change the pattern of their economic activities with a view to maximizing their licence allocation. In the Complainants' view, the activity function rules require marketing through "middlemen"[111] and are inconsistent with Article III:4 of GATT.

7.217 The EC explains that the licence distribution on the basis of "activity functions" is indispensable in order to avoid that certain operators in the supply chain would obtain extraordinary bargaining powers over their trading partners due to the commercial and financial power associated with the allocation of import licences for the tariff quota. The EC further submits that the Complainants failed to provide evidence as to how rules establishing activity functions could tilt competitive opportunities in favour of domestic products.

7.218 We note that the classification of companies according to the economic activities they perform applies to both Category A and B operators. Thus, for the application of the activity function rules, it does not matter whether economic actors have previously traded in third-country and non-traditional ACP bananas, on the one hand, or traditional ACP and EC bananas, on the other. Consequently, the rules establishing activity functions as such do not discriminate against bananas from third-country and non-traditional ACP sources. Unlike the case of the Category B operators, the right to import bananas at in-quota tariff rates is not tied to the purchase of domestic products. Thus, in respect of activity function rules, third-country and non-traditional ACP bananas are not treated less favourably than EC bananas in the terms of Article III:4.

7.219 Consequently, we find that 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 is not inconsistent with the requirements of Article III:4 of GATT.

(ii) Article I:1 of GATT

7.220 The Complainants claim that activity function rules are inconsistent with the requirements of Article I:1 because import licences for bananas from third countries are issued to Category A and B operators according to the economic activities performed by them, while the licensing system applied to imports of traditional ACP bananas does not utilize activity functions as a criteria for issuing licences. The EC argues that it is necessary to issue licences on the basis of activity functions so that certain operators in the supply chain do not obtain extraordinary bargaining power due to the commercial and financial power associated with import licences and that the use of activity functions as a criteria for

[111] Panel Report on "Canada - Administration of the Foreign Investment Review Act", adopted on 7 February 1984, BISD 30S/140, 160, para. 5.10.

issuing licences has no direct impact on the imports of bananas from any source. In the EC's view, the absence of a licence allocation based on activity functions under the traditional ACP licensing procedures cannot be regarded as an "advantage" in the meaning of Article I and thus there is no inconsistency with the requirements of Article I. In the alternative, the EC takes the position that activity function rules are covered by the Lomé waiver.

7.221 In our view, import licensing procedures, including the activity function rules, are "rules and formalities in connection with importation" in the meaning of Article I:1. For example, a panel found that comparatively less favourable rules for revoking countervailing duties were an "advantage" for purposes of Article I:1 and that "making a regulatory advantage available to imports from some countries while not making it available to others" is inconsistent with Article I:1.[112] As noted earlier (paragraphs 7.190 *et seq*.), in our view, the procedural and administrative requirements for imports of third-country and non-traditional ACP bananas arising from the application of the activity function rules differ from, and go significantly beyond, those required in respect of traditional ACP bananas. More specifically, the activity function rules contained in the licensing procedures for third-country and non-traditional ACP bananas (but not in the procedures applicable to traditional ACP bananas) mean that substantially more data must be maintained and submitted to show entitlement to a licence for third-country and non-traditional ACP bananas. In particular, in respect of past banana imports, Article 4(2) of Regulation 1442/93 requires a breakdown by origin, by category *and* activity function. Thus, we believe that the licensing procedures applied by the EC to traditional ACP banana imports, when compared to the licensing procedures imposed on third-country and non-traditional ACP imports with its activity function rules, can be considered as an "advantage" which the EC does not accord to third-country and non-traditional ACP imports..

7.222 We consider that imports of third-country and non-traditional ACP bananas are treated less favourably than traditional ACP imports since the latter are not subject to activity function rules. Finally, for the reasons given above, we reiterate our finding that the Lomé waiver does not waive the EC's obligations under Article I:1 in respect of licensing procedures (paragraph 7.204).

7.223 Accordingly, we find that 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, is inconsistent with the requirements of Article I:1 of GATT.

[112] Panel Report on "US - Denial of MFN Treatment as to Non-Rubber Footwear from Brazil", adopted on 19 June 1992, BISD 39S/128, 150-151, paras. 6.8-6.14.

(iii) Article X:3(a) of GATT

7.224 The Complainants claim that the differences in the licensing procedures applied by the EC to traditional ACP imports and those applied to third-country and non-traditional ACP imports and in particular the rules establishing activity functions are inconsistent with the requirements of Article X:3 of GATT because they are not administered in a uniform, impartial and reasonable manner. The EC responds that Article X only applies to internal measures and therefore is not applicable in this case. Alternatively, it argues that a system permitted under Article I by the Lomé waiver cannot be found to breach another GATT provision imposing MFN-like obligations similar to those waived. The EC maintains that the activity function rules are administered in a uniform, impartial and reasonable manner among the third countries which are subject to that separate licensing regime and that the Complainants have failed to provide evidence to the contrary.

7.225 Article X:3(a) provides:

> "Each Member shall administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings of the kind described in paragraph 1 of this Article".

Article X:1 defines the coverage of Article X:3(a) as follows:

> "Laws, regulations, judicial decisions and administrative rulings of general application, made effective by any Member, pertaining to the classification or the valuation of products for customs purposes, or to rates of duty, taxes or other charges, or to requirements, restrictions or prohibitions on imports or exports or on the transfer of payments therefor, or affecting their sale, distribution, transportation, insurance, warehousing, inspection, exhibition, processing, mixing or other use ...".

Given that this provision enumerates national legislation regarding border measures as well as internal measures, and customs tariffs as well as quantitative measures, the coverage of Article X could hardly be more comprehensive. Accordingly, internal laws regulating border measures constitute "... requirements ... on imports ..." in the meaning of Article X:1 and cannot be excluded from its scope.

7.226 Consequently, we find that the EC import licensing procedures are subject to the requirements of Article X of GATT.

7.227 More specifically, the Complainants claim that the rules establishing activity functions are inconsistent with the requirements of Article X:3(a) because the EC applies them to imports of third-country and non-traditional ACP bananas but not to traditional ACP imports. According to the Complainants, these rules are inconsistent with the standards of "uniform, impartial and reasonable administration" of domestic laws, regulations, decisions and rulings and thus are inconsistent with the requirements of Article X:3(a). The EC maintains that the rules applying activity functions are administered in a uniform, impartial and reasonable manner among the third countries which are subject to that separate licens-

ing regime and that the Complainants have failed to provide evidence to the contrary.

7.228 The Complainants support their argument by referring to a 1968 Note by the GATT Director-General, which stated that Article X:3(a)

> "would not permit, in the treatment accorded to imported goods, discrimination based on country of origin, nor would they permit the application of one set of regulations and procedures with respect to some contracting parties and a different set with respect to the others". [113]

The EC responds that the 1968 Note cannot be considered as an authoritative interpretation of GATT rules because it was never endorsed by a formal decision of the CONTRACTING PARTIES.

7.229 We note that a prior panel in discussing the interpretation of Article X:3(a) found that its terms would be met if regulations were applied "in a substantially uniform manner, although there were some minor administrative variations, e.g. concerning the form in which licence applications could be made and the requirement of pro-forma invoices".[114] In that case, the panel found that such differences were minimal and did not in themselves establish a breach of Article X:3(a).

7.230 In our view, the Director-General's Note correctly describes the reach of Article X:3(a) and is consistent with the quoted panel decision. While minor "administrative variations" in the application of regulations may not be inconsistent with the requirements of Article X:3(a), as suggested by the above-mentioned panel report, two different sets of rules would be inconsistent with the requirements of Article X:3(a). In this case, we are confronted with a common regime for the importation of bananas into the EC with two different origin-based sets of import licensing procedures. These sets of licensing procedures differ from one another, depending on whether imports of bananas are from traditional ACP sources or from third countries and non-traditional ACP sources, including with respect to the application of activity function rules. As noted earlier, (paragraphs 7.190 *et seq.*, e.g., Article 4:2(b) of Regulation 1442/93), in our view, the procedural and administrative requirements for imports of third-country and non-traditional ACP bananas arising from the activity function rules differ from, and

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[113] Note by the GATT Director-General of 29 November 1968, L/3149.

[114] Panel Report on "EEC - Restrictions on Imports of Dessert Apples", Complaint by Chile, adopted on 22 June 1989, BISD 36S/93, 133, para. 12.30. In the descriptive part of the *Chilean Apples* case, "concerning Article X:3, Chile argued that there were differences among the ten member states of the EEC as to the requirements they imposed on applications for licences for imports of dessert apples. It cited examples, such as a French requirement for licence applications to be accompanied by a pro forma invoice, which effectively meant that licences could not be applied for until after ships had been loaded. Other examples cited by Chile included acceptance of telexed licence applications by some member states and not others; differing procedures for bank guarantees; and the refusal by one member state to accept a licence issued by another". Idem at para. 6.3.

go significantly beyond, those required in respect of traditional ACP bananas. More specifically, the activity function rules contained in the licensing procedures for third-country and non-traditional ACP bananas (but not in the procedures applicable to traditional ACP bananas) mean that substantially more data must be maintained and submitted to show entitlement to a licence for third-country and non-traditional ACP bananas. These differences are not merely minor administrative variations in the application of regulations but are two different sets of rules which are inconsistent with the requirement of "uniform" administration as required by Article X:3(a).

7.231 As a result, we find that 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, is inconsistent with the requirements of Article X:3(a) of GATT.

(iv) Other Claims

7.232 In light of the foregoing findings on activity function rules under Articles I and X, we do not consider it necessary to address the other claims raised by the Complaining parties against these EC measures.[115] We further note that a finding that activity function rules are or are not inconsistent with the requirements of other provisions of GATT or the Licensing Agreement would not affect the findings we have made in respect of activity function rules.

(d) BFA Export Certificates

7.233 As part of the EC import licensing procedures, Category A and C operators are required, for imports from Colombia, Costa Rica or Nicaragua, to present export certificates issued by these countries. Category B operators are exempted from this requirement.

The relevant part of Article 6 of the BFA provides that:

> "... supplying countries with country quotas may deliver special export certificates for up to 70% of their quota, which, in turn, constitute a prerequisite for the issuance, by the Community, of certificates for the importation of bananas from said countries by "Category A" and "Category C" operators. ...".

The relevant part of Article 3.2 of EC Regulation 478/95 reads as follows:

> "For goods originating in Colombia, Costa Rica or Nicaragua, the application for an import licence of category A or C ... shall also not be admissible unless it is accompanied by an export licence

[115] See note 47 supra.

> currently valid for a quantity at least equal to that of the goods, issued by the competent authorities listed in Annex II."[116]

In light of these provisions, we consider the claims raised the Complaining parties, who have alleged that the export certificate requirement is inconsistent with the requirements of Articles I:1, III:4 and X:3 of GATT and Articles 1.2, 1.3 and 3.2 of the Licensing Agreement. In the case of Guatemala and Honduras, we consider the claim they raised under Article I:1.

7.234 Initially, the EC argues that a consideration of export certificates is outside the Panel's terms of reference because such certificates are not issued by the EC and therefore not part of the EC banana import regime. We agree that to the extent that the administration of export certificates is carried out by the authorities of Colombia, Costa Rica or Nicaragua, as appropriate,[117] it is not within the terms of reference of this Panel. However, we cannot agree with the EC's argument that export certificates are completely outside the EC's sphere of competence and their legal examination thus entirely excluded from the mandate of this Panel. On the contrary, Article 3 of Regulation 478/95 states clearly that an application for an EC import licence is not admissible unless it is accompanied by an export certificate. Thus the requirement to match EC import licences with BFA export certificates and the exemption of Category B operators therefrom are part of the EC legal system and, accordingly, are within our terms of reference, to the extent they fall within the EC's responsibility.

(i) Article I:1 of GATT

7.235 The Complainants claim that the fact that the EC recognizes only export certificates issued by BFA signatories as prerequisites for importation, amounts to the conferral of a "privilege" (i.e., a commercial benefit) not enjoyed by other Members. This is alleged to be inconsistent with the requirements of Article I:1.

7.236 The EC responds that the Complainants have failed to prove that the export certificate requirement constitutes an "advantage" in the meaning of Article I:1 accorded to BFA signatories which is not conferred on other third countries. The EC concedes that the administration of the export certificates by BFA signatories can generate quota rents, but only among operators who are interested in marketing BFA bananas. However, the EC takes the position that the WTO agreements do not contain rules on the sharing and allocation of quota rents, e.g., by means of a licensing scheme. Therefore, in its view, any government is enti-

[116] Regulation 478/95 of 1 March 1995 on additional rules for the application of Council Regulation (EEC) No. 404/93 as regards the tariff quota arrangements for imports of bananas into the Community and amending Regulations (EEC) No. 1442/93, O.J. L 49/13 of 4 March 1995.

[117] According to Annex II of Regulation 478/95, the bodies authorized to issue special export certificates are: for Colombia: Instituto Colombiano de Comercio Exterior; for Costa Rica: Corporación Bananera S.A.; and for Nicaragua: Ministerio de Economia y Desarrollo, Dirección de Comercio Exterior.

tled to pursue its own policies in the distribution of quota rents provided that there is no discrimination between products originating in different Members.

7.237 The issue presented is whether the export certificate requirement constitutes an advantage in respect of rules and formalities in connection with importation accorded to BFA bananas that is not accorded to third-country bananas as required by Article I:1.

7.238 On its face, it would appear that there is discrimination against BFA bananas because they are subject to a requirement that is not imposed on other third-country bananas. However, closer analysis suggests that the export certificate requirement may in fact constitute a favour, advantage, privilege or immunity in the meaning of Article I. It is a commonplace, which no party to the dispute contests, that tariff quotas are likely to generate quota rents. The allocation of licences used in the administration of such tariff quotas can be viewed as a mechanism for the distribution of such rents. In fact, the parties do not contest that the export certificate requirement serves the purpose, or at least has the effect, of transferring part of the quota rent which would normally accrue to initial EC import licence holders to the suppliers who are initial holders of export certificates for bananas originating in the three BFA countries. The EC argues that the WTO agreements do not contain any rules governing the distribution of quota rents which are generated by trade measures, e.g., tariff quotas, whose imposition is legitimate under those agreements. We nevertheless have to ascertain whether the particular mechanisms implemented for the purposes of rent transfer directly or indirectly entail inconsistencies with the obligations Members have to respect under the WTO agreements.

7.239 The requirement to match EC import licences with BFA export certificates means that those BFA banana suppliers who are initial holders of export certificates enjoy a commercial advantage compared to banana suppliers from other third countries.[118] We note that it is not possible to ascertain how many of the initial BFA export certificate holders are BFA banana producers or to what extent the tariff quota rent share that accrues to initial holders of BFA export certificates is passed on to the producers of BFA bananas in a way to create more favourable competitive opportunities for *bananas* of BFA origin. However, we also note that the possibility does exist to pass on tariff quota rent to BFA banana producers in such a way, whereas there is no such possibility in respect of non-BFA third-country banana producers. Thus, the EC's requirement affects the competitive relationship between *bananas* of non-BFA third-country origin and bananas of BFA origin. It is certainly true that Article I of GATT is concerned with the treatment of foreign *products* originating from different foreign sources

[118] "Whereas the framework agreement provides that the signatory countries are authorized to issue export licences for seventy percent of their allocations, which licences are to be presented in order to obtain import licences of Category A and C for import into the Community, *in conditions which may improve the regularity and stability of commercial transactions* and guarantee the absence of any discriminatory treatment among operators" (emphasis added). Recital 8 of Regulation 478/95.

rather than with the treatment of the suppliers of these products. In this respect, we note that the transfer of tariff quota rents which would normally accrue to initial holders of EC import licences to initial holders of BFA export certificates does occur when *bananas* originating in Colombia, Costa Rica and Nicaragua are, at some point, traded to the EC. Therefore, in our view, the requirement to match EC import licences with BFA export certificates and thus the commercial value of export certificates are linked to the *product* at issue as required under Article I. In practice, from the perspective of EC *importers* who are Category A or C operators, bananas of non-BFA third-country origin appear to be more profitable than bananas of BFA origin. This is confirmed by the fact that EC import licences for non-BFA third-country bananas and Category B licences for BFA bananas are typically oversubscribed in the first round of licence allocations, while Category A and C licences for BFA bananas are usually exhausted only in the second round of the quarterly licence allocation procedure. The EC argues that the fact that licences allowing the importation of non-BFA bananas at in-quota tariff rates are usually exhausted in the first round amounts to an advantage for bananas of Complainants' origin. While we do not endorse the EC's view, even if this were to constitute an advantage, we note "that Article I:1 does not permit balancing more favourable treatment under some procedure against a less favourable treatment under others".[119]

7.240 Indeed, one could argue that if the export certificate requirement is beneficial to BFA countries, non-BFA third countries could autonomously introduce a similar requirement in order to reap quota rent benefits. In this case, however, since the allocation of the "others" category of the BFA is not country-specific under the current EC regime, operators could switch to alternative sources within this category which are not subject to an export certificate requirement. Therefore, we consider that the requirement to match BFA export certificates with EC import licences in connection with the country-specific allocation of tariff quota shares under the BFA is an advantage or privilege in the terms of Article I:1 in respect of rules and formalities in connection with importation. Since the EC accords this advantage to products originating in Colombia, Costa Rica and Nicaragua "while denying the same advantage to a like product originating in the ter-

[119] "The Panel ... considered that Article I:1 does not permit balancing more favourable treatment under some procedure against a less favourable treatment under others. If such a balancing were accepted, it would entitle a contracting party to derogate from the most-favoured nation obligation in one case, in respect of one contracting party, on the ground that it accords more favourable treatment in some other case in respect of another contracting party. In the view of the Panel, such an interpretation of the most-favoured-nation obligation of Article I:1 would defeat the very purpose underlying the unconditionality of that obligation". Panel Report on "United States - Denial of Most-favoured-nation Treatment as to Non-rubber Footwear from Brazil", adopted on 19 June 1992, BISD 39S/128, 151, para. 6.10. Likewise, in the context of Article III a panel found that "an element of more favourable treatment would only be relevant if it would always accompany and offset an element of differential treatment causing less favourable treatment." Panel Report on "United States - Section 377 of the Tariff Act of 1930", adopted on 7 November 1989, BISD 36S/345, 388, para. 5.16.

ritories of other [Members],"[120] i.e., the Complainants' countries, the requirement to match EC import licences with BFA export certificates as provided for in Article 3 of Regulation 478/95 is inconsistent with Article I:1.

7.241 For these reasons, we find that the requirement to match EC import licences with BFA export certificates is inconsistent with the requirements of Article I:1 of GATT.

(ii) Other Claims

7.242 In light of our finding that the requirement to match EC import licences with BFA export certificates is inconsistent with the requirements of Article I:1, one of the fundamental provisions of GATT, we consider it unnecessary to make specific rulings on the other claims raised by the Complaining parties with respect to the same EC measures, including the claim that the exemption of Category B operators from the matching requirement violates Article I also.[121] A finding that these measures are or are not inconsistent with the requirements of Articles III and X of GATT and the Licensing Agreement would not affect our findings in respect of Article I. Moreover, steps taken by the EC to bring the measures into conformity with Article I should also eliminate the alleged non-conformity with these other obligations.

(e) Hurricane Licences

7.243 Hurricane licences[122] authorize operators who include or represent EC and ACP producers, or producer organizations "to import in compensation third-country bananas and non-traditional ACP bananas for the benefit of the operators who directly suffered damage as a result of the impossibility of the supplying the Community market with bananas originating in affected producer regions" be-

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[120] Panel Report on "United States - Denial of Most-favoured-nation Treatment as to Non-rubber Footwear from Brazil", adopted on 19 June 1992, BISD 39S/128, 151, para. 6.11.

[121] See note 47 supra.

[122] See, e.g., Commission Regulation (EC) No. 2791/94 of 16 November 1994 on the exceptional allocation of a quantity additional to the tariff quota for imports of bananas in 1994 as a result of tropical storm Debbie. Commission Regulation (EC) No. 510/95 of 7 March 1995 on the exceptional allocation of a quantity additional to the tariff quota for imports of bananas during the first quarter of 1995 as a result of tropical storm Debbie. Commission Regulation (EC) No. 1163/95 of 23 May 1995 on the exceptional allocation of a quantity additional to the tariff quota for imports of bananas during the second quarter of 1995 as a result of tropical storm Debbie. Commission Regulation (EC) No. 2358/95 of 6 October 1995 on the exceptional allocation of a quantity additional to the tariff quota for imports of bananas during the fourth quarter of 1995 as a result of tropical storms Iris, Luis and Marilyn. Commission Regulation (EC) No. 127/96 of 25 January 1996 on the exceptional allocation of a quantity additional to the tariff quota for imports of bananas during the first quarter of 1996 as a result of tropical storms Iris, Luis and Marilyn. Commission Regulation (EC) No. 822/96 of 3 May 1996 on the exceptional allocation of a quantity additional to the tariff quota for imports of bananas during the second quarter of 1996 as a result of tropical storms Iris, Luis and Marilyn.

cause of the impact of tropical storms.[123] In the aftermath of the hurricanes Debbie, Iris, Luis and Marilyn, 281,605 tonnes[124] of third-country or non-traditional ACP imports were authorized between November 1994 and May 1996. The Complaining parties have raised claims under Article I, III and X of GATT and Articles 1.2, 1.3 and 3.5(h) of the Licensing Agreement. In the case of Guatemala and Honduras, we consider the claims they raised under Articles III and I of GATT and Article 1.3 of the Licensing Agreement.

(i) Article III:4 of GATT

7.244 The Complainants allege that the issuance of hurricane licences by the EC is inconsistent with the requirements of Article III:4 of GATT because EC producers are treated more favourably than third-country suppliers. The EC argues that the distribution of hurricane licences does not discriminate against bananas from third countries because hurricane licences are used for the importation of third-country or non-traditional ACP bananas.

7.245 We recall that it is the purpose of the national treatment clause to protect foreign *products* from being treated less favourably than like domestic products. Therefore, we have to examine whether the EC, by issuing hurricane licences, treats third-country bananas less favourably than domestic bananas.[125] We note that hurricane licences can be used to import third-country bananas or non-traditional ACP bananas. Therefore, by issuing hurricane licences, the EC in effect authorizes imports of third-country (and non-traditional ACP) bananas at the lower duty rates in addition to the imports under the EC bound tariff quota.

7.246 In turning to the substance of this claim, we note that only operators including or directly representing EC (or traditional ACP) banana producers or producer organizations who have suffered damage caused by a tropical storm are eligible for the allocation of hurricane licences. We consider that it is not possible to ascertain to what extent such operators pass on the tariff quota rents linked

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[123] "Whereas ... these measures should be to the benefit of the operators who have directly suffered actual damage, without the possibility of compensation, and as a function of the extent of the damage." Recital 9 of Commission Regulation (EC) No. 510/95 of 7 March 1995 on the exceptional allocation of a quantity additional to the tariff quota for imports of bananas during the first quarter of 1995 as a result of tropical storm Debbie.

[124] Total quantities of authorized third-country and non-traditional ACP imports:

Regulation No. 2791/94 of 18 November 1994:	53,400 tonnes
Regulation No. 510/95 of 7 March 1995:	45,500 tonnes
Regulation No. 1163/95 of 23 May 1995:	19,465 tonnes
Regulation No. 2358/95 of 6 October 1995:	90,800 tonnes
Regulation No. 127/96 of 25 January 1996:	51,350 tonnes
Regulation No. 822/96 of 3 May 1996:	21,090 tonnes
Total:	281,605 tonnes

[125] The exception of Article III:8(b) of GATT could be relevant where production aids to domestic production would accrue only to the producers, but not to processors of a domestic product. However, no such defense was raised in this case.

to the hurricane licences to EC (or ACP) banana producers in a way to create more favourable competitive opportunities for *bananas* of EC (or traditional ACP) origin. However, we also note that it is the object and purpose of the EC hurricane licence regulations to pass on tariff quota rents to EC (or ACP) producers, whereas no such possibility exists in respect of third-country banana producers. Thus, competitive opportunities for *bananas* of Complainants' origin are less favourable than those that the EC provides to bananas of EC (or traditional ACP) origin, additional production of which may be encouraged in hurricane-prone regions because of the reduced risk of financial losses for such EC (or traditional ACP) banana producers in the event of a tropical storm.

7.247 Furthermore, since hurricane licences are issued only to operators who include or directly represent EC (or ACP) producers or producer organizations affected by a tropical storm,[126] Category A operators who have historically marketed third-country and non-traditional ACP bananas will not be allocated hurricane licences at all, irrespective of whether they include or represent third-country producers affected by a hurricane. Therefore, the fact that hurricane licences are issued only to operators who include or directly represent EC (or ACP) producers affected by a hurricane, although such licences might be used for the immediate importation of third-country (or non-traditional ACP) bananas, may provide an incentive for operators to market more EC (or traditional ACP) bananas grown in hurricane-prone areas than they otherwise would, in preference to third-country bananas, since the issuance of hurricane licences to eligible operators ensures that they can maintain, or do not lose, reference quantities for the purpose of establishing their entitlements to Category B licences in the future. Consequently, even if tariff quota rents linked to the hurricane licences are not fully passed on to producers by initial holders of hurricane licences who may only represent affected EC (or ACP) banana producers without being producers themselves, the greater incentive to market such EC (or traditional ACP) bananas arising from the fact that losses of such bananas caused by tropical storms can be

[126] "1. The quantities referred to in Article 1(2) shall be allocated to the operators who:
- include or directly represent banana producers affected by tropical storm Debbie.
- and who, during the last quarter of 1994, are unable to supply, on their own account, the Community market with bananas originating in the regions or countries referred to 1(2) on account of the damage caused by tropical storm Debbie.

2. The competent authorities in the Member States concerned shall determine the beneficiary operators who meet the requirements of paragraph 1 and shall make an allocation to each of them pursuant to this Regulation on the basis of:
- the quantities allocated to the producer regions or countries referred to in Article 1(2) and of
- the damage sustained as a result of tropical storm Debbie.

3. The competent authorities shall assess the damage sustained on the basis of all supporting documents and information collected from the operators concerned." Article 2 of Commission Regulation No. 2791/94 of 16 November 1994 on the "exceptional allocation of a quantity additional to the tariff quota for imports of bananas in 1994 as a result of tropical storm Debbie.

expected to be compensated for through the allocation of hurricane licences, nevertheless, adversely affects conditions of competition for *bananas* of Complainants' origin in respect of which the risk of loss due to hurricanes cannot be expected to be reduced by the EC's hurricane licence allocations.

7.248 In light of the foregoing, we now consider whether the above-described practice of issuing hurricane licences is inconsistent with the requirements of Article III:4. To establish an inconsistency with Article III:4, it would be sufficient for the Complainants to show that third-country bananas are treated less favourably than EC bananas in respect of a law, regulation or requirement affecting their internal sale, etc. We recall that we have agreed with the findings of the second *Banana* panel, which stated (paragraph 7.179): "A requirement to purchase a domestic product in order to obtain the right to import a product at a lower rate of duty under a tariff quota is therefore a requirement affecting the purchase of a product within the meaning of Article III:4". We note that this is the case in respect of the conditions attached to eligibility for hurricane licences. Since the practice of issuing hurricane licences may create an incentive for operators to purchase bananas of EC (and ACP) origin for marketing in the EC rather than bananas of third-country origin, this practice is an advantage accorded to bananas of EC origin that is not accorded to bananas of third-country origin. Thus, in terms of Article III:4, third-country bananas are treated less favourably than EC (and ACP) bananas in respect of a law, regulation or requirement affecting their internal sale.

7.249 However, before deciding whether the practice of issuing hurricane licences is inconsistent with Article III:4, we need to consider that Article III:1 is a general principle that informs the rest of Article III, as the Appellate Body has recently stated.[127] Since Article III:1 constitutes part of the context of Article III:4, it must be taken into account in our interpretation of the latter. Article III:1 articulates a general principle that internal measures should not be applied so as to afford protection to domestic production.[128] According to the Appellate Body, the protective application of a measure can most often be discerned from the design, the architecture, and the revealing structure of the measure.[129] We consider that the design, architecture and structure of the EC practice of issuing hurricane licences all indicate that the measure is applied so as to afford protection to EC (and ACP) producers.

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[127] Appellate Body Report on "Japan - Taxes on Alcoholic Beverages", DSR 1996:I, 97 at 111. The Report states: "The purpose of Article III:1 is to establish this general principle as a guide to understanding and interpreting the specific obligations contained in Article III:2 and in the other paragraphs of Article III, while respecting, and not diminishing in any way, the meaning of words actually used in the texts of those other paragraphs".

[128] *Ibid.*

[129] *Ibid.*, 120.

7.250 Thus, we find that the issuance of hurricane licences exclusively to EC producers and producer organizations or operators including or directly representing them is inconsistent with the requirements of Article III:4 of GATT.

(ii) Article I:1 of GATT

7.251 The Complainants claim that hurricane licences provide an "advantage" to ACP producers which is not unconditionally and immediately accorded to third-country producers as required by Article I:1 of GATT. The EC argues that the distribution of hurricane licences does not discriminate against bananas from third countries because hurricane licences are used for the importation of third-country or non-traditional ACP bananas. In the alternative, the EC submits that any inconsistency with Article I would be covered by the Lomé waiver.

7.252 We note that it is the purpose of the MFN clause to protect foreign *products* from being treated less favourably than like products of any other foreign origin. Therefore, we have to examine whether the EC, by issuing hurricane licences, accords bananas of Complainants' origin less favourable treatment than traditional ACP bananas. We share the view that hurricane licences are in general used to import third-country bananas or non-traditional ACP bananas. Therefore, by issuing hurricane licences, the EC in effect authorizes imports of third-country (and non-traditional ACP) bananas at the lower duty rates in addition to the imports under the EC bound tariff quota.

7.253 In turning to the substance of this claim, we note that only operators including or directly representing ACP (or EC) banana producers or producer organizations who have suffered damage caused by a tropical storm are eligible for the allocation of hurricane licences. We consider that it is not possible ascertain to what extent such operators pass on the tariff quota rents linked to the hurricane licences to ACP (or EC) banana producers in a way to create more favourable competitive opportunities for *bananas* of traditional ACP (or EC) origin. However, we also note that it is the object and purpose of the EC hurricane licence regulations to pass on tariff quota rents to ACP (and EC) producers, whereas no such possibility exists in respect of third-country banana producers. Thus, the EC modifies the competitive relationship between *bananas* of Complainants' origin and bananas of traditional ACP (or EC) origin, additional production of which is encouraged in hurricane-prone regions because of the reduced risk of financial losses for such traditional ACP (and EC) banana producers in the event of a tropical storm.

7.254 Furthermore, since hurricane licences are issued only to operators who include or directly represent ACP (or EC) producers or producer organizations affected by a tropical storm, Category A operators who have historically marketed third-country and non-traditional ACP bananas are unlikely to be allocated hurricane licences at all, irrespective of whether they include or represent third-country producers affected by a hurricane. Therefore, the fact that hurricane licences are issued only to operators who include or directly represent ACP (or EC) producers, although such licences might be used for the immediate importa-

tion of third-country (or non-traditional ACP) bananas, may provide an incentive for operators to market more traditional ACP (or EC) bananas grown in hurricane-prone areas than they otherwise would, in preference to third-country bananas, since the issuance of hurricane licences to eligible operators ensures that they can maintain, or do not lose, reference quantities for the purpose of establishing their entitlements to Category B licences in the future. Consequently, even if tariff quota rents linked to the hurricane licences are not fully passed on to producers by initial holders of hurricane licences who may only represent affected ACP (or EC) banana producers without being producers themselves, in a way to constitute an advantage for bananas of traditional ACP (or EC) origin grown in hurricane-prone regions, the greater incentive to market such traditional ACP (or EC) bananas arising from the fact that losses of such bananas caused by tropical storms can be expected to be compensated for through the allocation of hurricane licences, nevertheless, is an advantage that the EC does not accord to bananas of Complainants' origin in respect of which the risk of loss due to hurricanes cannot be expected to be reduced by the EC's hurricane licence allocations.

7.255 In light of the foregoing, we now consider whether the above-described practice of issuing hurricane licences is inconsistent with the requirements of Article I.1. To establish an inconsistency with Article I:1, it would be sufficient for the Complainants to show that bananas of ACP origin are accorded an advantage in respect of matters referred to in Article III:4 that is not accorded to bananas of third-country origin. We have already found that this is a matter referred to in Article III:4 (paragraph 7.248). Since the practice of issuing hurricane licences may create an incentive for EC operators to purchase bananas of ACP (and EC) origin for marketing in the EC rather than bananas of third-country origin, this practice is an advantage in terms of Article I:1 accorded to bananas of ACP origin that is not accorded to bananas of third-country origin.

7.256 Therefore, we find that the issuance of hurricane licences exclusively to traditional ACP producers and producer organizations or operators including or directly representing them is inconsistent with the requirements of Article I:1 of GATT.

(iii) Application of the Lomé Waiver

7.257 The EC maintains that the practice of issuing hurricane licences to ACP countries derives from historic British and French schemes whose preservation is required by Protocol 5 of the Lomé Convention and covered by the Lomé waiver. The EC submits that under the UK scheme, "disaster licences" were issued to the affected operators to cover the volume lost, in proportion to the quantity of bananas that they would have supplied from traditional sources but for the disaster.[130] Similar arrangements were in force in France beginning in 1962 which,

[130] According to the EC, the most recent example was the issue of disaster licences in 1989 following the destruction of the Jamaican banana crop caused by Hurricane Gilbert.

according to the EC, in the event of specific climate disasters authorized imports from other sources by those operators who had been affected by the disasters.

7.258 We recall that the Lomé waiver provides that:

> "... the provisions of paragraph 1 of Article I of the General Agreement shall be waived, until 29 February 2000, to the extent necessary to permit the European Communities to provide preferential treatment for products originating in ACP States as required by the relevant provisions of the Fourth Lomé Convention ...".

In this connection, we further recall that Protocol 5 of the Lomé Convention requires that in respect of banana exports to the EC market, "no ACP States shall be placed, as regards access to its *traditional* markets and *its advantages* on those markets, in a less favourable situation than in the past or at present" and the Joint Declaration to Protocol 5[131] provides that "... no ACP State, *traditional* supplier to the Community, is placed as regards access to, and advantages in, the Community, in a less favourable situation than in the past or at present". Since the possibility of obtaining hurricane licences existed under the historic French and UK licensing schemes, hurricane licences can be viewed as advantages in the meaning of the Lomé Convention enjoyed by ACP States in the past in respect of their access to their traditional markets. As such, in terms of the Lomé waiver, the issuance of hurricane licences may be viewed as preferential treatment required by the Lomé Convention and thus is within the coverage of the Lomé waiver.

7.259 Accordingly, we find that it was not unreasonable for the EC to conclude that the Lomé waiver waives its obligations under Article I:1 of GATT in respect of the issuance of hurricane licences to traditional ACP producers and producer organizations.

(iv) Article 1.3 of the Licensing Agreement

7.260 The Complainants claim that the issuance of hurricane licences by the EC exclusively to EC and ACP producers and producer organizations as well as operators who include or directly represent them is inconsistent with the requirements of Article 1.3 which requires the neutral application and the fair and equitable administration of import licensing procedures. The EC argues that no discrimination occurs in connection with the issuance of hurricane licences because the eligibility for hurricane licences is based on objective criteria.

7.261 Article 1.3 of the Licensing Agreement provides:

[131] Annex LXXIV - Joint declaration relating to Protocol 5 of the Fourth Lomé Convention.

> "The rules for import licensing procedures shall be neutral in application and administered in a fair and equitable manner".

To apply Article 1.3, we must interpret the terms "neutrality" in application, as well as "fairness" and "equity" in administration. In this regard, we recall our interpretation of Article X:3(a) of GATT (paragraph 7.211, 230). Using the reasoning developed there, we interpret the phrase "neutrality in application" to preclude the imposition of one system of import licensing procedures in respect of a product originating in certain Members and a different system of import licensing procedures on the same product originating in other Members.[132] In particular, we consider that the issuance of hurricane licences exclusively to ACP and EC producers and organizations or operators including or directly representing them in respect of bananas lost to hurricanes, but not to third-country producers and producer organizations or operators including or directly representing them, is inconsistent with the requirement of neutral application as contained in Article 1.3. In the light of the foregoing, we find it unnecessary to consider whether the EC hurricane licensing system meets Article 1.3's requirement of "fairness" and "equity".

7.262 The question then becomes whether the Lomé waiver applies so as to waive the EC's obligations under Article 1.3 in this regard. We note that the Lomé waiver was initially approved by the CONTRACTING PARTIES of GATT 1947, who had no power over the Tokyo Round Agreement on Import Licensing Procedures, which, at the time, was administered by a committee of signatories and contained no waiver provision. In the light of these considerations, the Lomé waiver from Article I of GATT cannot be read to waive the EC's obligations under Article 1.3 of the Licensing Agreement. We also note that the extension of the waiver by the General Council of the WTO has not altered that fact.

7.263 As a result, we find that the issuance of hurricane licences exclusively to ACP and EC producers and producer organizations or operators including or directly representing them is inconsistent with the requirements of Article 1.3 of the Licensing Agreement.

[132] We recall that we considered that minor "administrative variations" in the application of regulations may not be inconsistent with Article X:3(a) of GATT (para. 7.211, 230). In our view, the same consideration applies in the context of Article 1.3 of the Licensing Agreement.

(v) Other Claims

7.264 In light of our findings that the issuance of hurricane licences exclusively to EC and ACP producers and producer organizations or operators including or directly representing them is inconsistent with the requirements of Article III:4 of GATT and Article 1.3 of the Licensing Agreement, we consider it unnecessary to make specific rulings on the other claims raised by the Complaining parties with respect to the same EC measures.[133] We further note that a finding that these measures are or are not inconsistent with the requirements of Article X:3(a) of GATT or Article 3:5(h) of the Licensing Agreement would not affect the findings we have made in respect of hurricane licences. Moreover, steps taken by the EC to bring the measures into conformity with the requirements of these articles should also eliminate the alleged non-conformity with Article X:3(a) of GATT and Article 3:5(h) of the Licensing Agreement.

(f) Other Claims

(i) General

7.265 In light of the findings we have made on operator categories, activity functions, export certificates and hurricane licences under Articles I, III and X of GATT and Article 1.3 of the Licensing Agreement, we do not consider it necessary to address the other claims raised by the Complaining parties against the EC licensing procedures.[134] These claims are largely dependent on the existence of the operator category and activity function rules. For example, the alleged overfiling and unnecessary burdens and the alleged restrictive and distortive effects claimed to be inconsistent with the requirements of Article 3.2 of the Licensing Agreement and the alleged discouragement of tariff quota use claimed to be inconsistent with the requirements of Article 3.5(h) of the Licensing Agreement arise from the application of those rules. We further note that a finding that these EC measures are or are not inconsistent with the requirements of other provisions of GATT or the Licensing Agreement would not affect the findings we have made in respect of the EC licensing procedures.

7.266 We examine only the claim based on Article 1.2 of the Licensing Agreement, which we are required to do by Article 12.11 of the DSU since the claim relates to developing country Members.

(ii) Article 1.2 of the Licensing Agreement

7.267-7.273 [Used in the Ecuador and Mexico reports.]

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133 See note 47 supra.
134 See note 47 supra.

4. The EC Banana Import Licensing Procedures and the GATS

7.274-7.397 [Used in the Ecuador, Mexico and United States reports.]

5. Nullification or Impairment

7.398 The measures taken by the EC affecting the importation of bananas from the Complainants, because of the infringement of obligations by the EC under a number of WTO agreements, are a *prima facie* case of nullification or impairment of benefits in the meaning of Article 3.8 of the DSU, which provides that "there is normally a presumption that a breach of the rules has an adverse impact on other Members parties to that covered agreement". To the extent that this presumption can be rebutted,[135] in our view the EC has not succeeded in rebutting the presumption that its breaches of GATT, GATS and Licensing Agreement rules have nullified or impaired benefits of the Complainants.

D. Summary of Findings

7.399 The complexity of this case, and the unprecedented number of claims, arguments and Agreements involved, has resulted in a long report with an unprecedented number of findings. To assist the reader, the findings on the various procedural and substantive issues are repeated here. In summary we find that

1. Preliminary Issues

- the EC's claim that the Complainants' case should be dismissed because the consultations held concerning this dispute did not perform their minimum function of affording a possibility for arriving at a mutually satisfactory solution and a clear setting out of the different claims of which a dispute consists shall be rejected (paragraph 7.21).
- the panel request made by the Complainants was sufficient to meet the requirements of Article 6.2 of the DSU to the extent that it alleged inconsistencies with the requirements of specific provisions of specific WTO agreements (paragraph 7.45).
- under the DSU the United States has a right to advance the claims that it has raised in this case (paragraph 7.52).
- the description of the Panel's proceedings, the factual aspects and the parties' arguments should be identical in the four reports. In the "Findings" section, however, the reports differ to the extent that the

[135] See Panel Report on "United States - Taxes on Petroleum and Certain Imported Substances", adopted on 17 June 1987, BISD 34S/136, 158, para. 5.1.9.

Complainants' initial written submissions to the Panel differ in respect of alleging inconsistencies with the requirements of specific provisions of specific agreements (paragraph 7.58).

2. The EC Market for Bananas: Article XIII of GATT

- 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 (paragraph 7.63).
- the EC has only one regime for banana imports for purposes of analysing whether its allocation of tariff quota shares is consistent with the requirements of Article XIII (paragraph 7.82).
- it was not unreasonable for the EC to conclude that at the time the BFA was negotiated Colombia and Costa Rica were the only contracting parties that had a substantial interest in supplying the EC banana market in terms of Article XIII:2(d) (paragraph 7.85).
- it is not reasonable to conclude that at the time the BFA was negotiated Nicaragua and Venezuela had a substantial interest in supplying the EC banana market in the terms of Article XIII:2(d) (paragraph 7.85).
- the EC's allocation of tariff quota shares by agreement and by assignment to some Members not having a substantial interest in supplying bananas to the EC (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 BFA, are inconsistent with the requirements of Article XIII:1 (paragraph 7.90).
- the failure of Ecuador's Protocol of Accession to address banana-related issues does not mean that Ecuador must accept the validity of the BFA as contained in the EC's Schedule or that it is precluded from invoking Article XIII:2 or XIII:4 (paragraph 7.93).
- it was not unreasonable for the EC to conclude that the Lomé Convention requires the EC to allocate country-specific tariff quota shares to traditional ACP banana supplying countries in an amount of their pre-1991 best-ever exports to the EC (paragraph 7.103).
- the allocation of tariff quota shares to ACP countries in excess of their pre-1991 best-ever exports to the EC is not required by the Lomé Convention (paragraph 7.103).
- to the extent that we have found that the EC has acted inconsistently with the requirements of Article XIII:1 (paragraph 7.90), we find that the Lomé waiver waives that inconsistency with Article XIII:1 to the extent necessary to permit the EC 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 EC (paragraph 7.110).

- the inclusion of the BFA tariff quota shares in the EC's Schedule does not permit the EC to act inconsistently with the requirements of Article XIII of GATT (paragraph 7.118).
- neither the negotiation of the BFA and its inclusion in the EC's Schedule nor the Agreement on Agriculture permit the EC to act inconsistently with the requirements of Article XIII of GATT (paragraph 7.127).

3. Tariff Issues

- to the extent that the EC's preferential tariff treatment of non-traditional ACP bananas is inconsistent with its obligations under Article I:1, those obligations have been waived by the Lomé waiver (paragraph 7.136).
- the tariff rates specified in the EC's Uruguay Round Schedule are the valid EC tariff bindings in respect of bananas (paragraph 7.141).

4. The EC Banana Import Licensing Procedures

- the Licensing Agreement applies to licensing procedures for tariff quotas (paragraph 7.156).
- the provisions of GATT 1994, the Licensing Agreement and Article 2 of the TRIMS Agreement all apply to the EC's import licensing procedures for bananas (paragraph 7.163).
- the EC licensing procedures for traditional ACP bananas and third-country and non-traditional ACP bananas should be examined as one licensing regime (paragraph 7.167).
- 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 is inconsistent with the requirements of Article III:4 of GATT (paragraph 7.182).
- 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, are inconsistent with the requirements of Article I:1 of GATT (paragraph 7.195).

- the Lomé waiver does not waive the EC's obligations under Article I:1 of GATT in respect of licensing procedures applied to third-country and non-traditional ACP imports, including those related to operator category rules (paragraph 7.204).
- the EC import licensing procedures are subject to the requirements of Article X of GATT (paragraphs 7.207, 7.226).
- 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, is inconsistent with the requirements of Article X:3(a) of GATT (paragraph 7.212).
- 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 is not inconsistent with the requirements of Article III:4 of GATT (paragraph 7.219).
- 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, is inconsistent with the requirements of Article I:1 of GATT (paragraph 7.223).
- 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, is inconsistent with the requirements of Article X:3(a) of GATT (paragraph 7.231).
- the requirement to match EC import licences with BFA export certificates is inconsistent with the requirements of Article I:1 of GATT (paragraph 7.241).
- the issuance of hurricane licences exclusively to EC producers and producer organizations or operators including or directly representing them is inconsistent with the requirements of Article III:4 of GATT (paragraph 7.250).
- the issuance of hurricane licences exclusively to traditional ACP producers and producer organizations or operators including or directly representing them is inconsistent with the requirements of Article I:1 of GATT (paragraph 7.256).
- it was not unreasonable for the EC to conclude that the Lomé waiver waives its obligations under Article I:1 of GATT in respect of the issuance of hurricane licences to traditional ACP producers and producer organizations (paragraph 7.259).
- the issuance of hurricane licences exclusively to ACP and EC producers and producer organizations or operators including or di-

rectly representing them is inconsistent with the requirements of Article 1.3 of the Licensing Agreement (paragraph 7.263).

VIII. FINAL REMARKS

8.1 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 conclusions with regard to the legal consistency with WTO rules of the EC's common market organization for bananas.

8.2 Throughout our proceedings we were aware of the economic and social effects of the EC measures at issue in this case, particularly for the ACP and the Latin American banana exporting countries. In recognizing this, we decided to grant third parties participatory rights in our proceedings which were substantially broader than those normally afforded to them under the DSU.

8.3 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.

IX. CONCLUSIONS

9.1 The Panel concludes that for the reasons outlined in this Report aspects of the European Communities' import regime for bananas are inconsistent with its obligations under Articles I:1, III:4, X:3 and XIII:1 of GATT, Article 1.3 of the Licensing Agreement and Articles II and XVII of the GATS. These conclusions are also described briefly in the summary of findings.

9.2 The Panel *recommends* that the Dispute Settlement Body request the European Communities to bring its import regime for bananas into conformity with its obligations under GATT, the Licensing Agreement and the GATS.

ATTACHMENT

SOURCES OF EC-12 AND EFTA-3[1] BANANA IMPORTS AND THEIR SHARES IN WORLD EXPORTS, 1994

(per cent, based on volume of trade reported by FAO, excluding intra-EC-12 trade)

Source	Share of EC-12 imports (%) (a)	Share of EFTA-3 imports (%) (b)	Share of world exports (%) (c)	Ratio	
				(a) ÷ (c)	(b) ÷ (c)
ACP countries	22.7	0.0	6.5	3.5	0.0
BFA countries	37.9	45.4	36.9	1.0	1.2
Other Latin American countries	34.9	54.2	42.1	0.8	1.3
Other	4.5	0.4	14.5	0.3	0.0
TOTAL	100.0	100.0	100.0	1.0	1.0

[1] Austria, Finland and Sweden (prior to their accession to the EC in 1995).

Source: FAO.

BANANA EXPORTS TO THE EC AS PERCENTAGE OF TOTAL BANANA EXPORTS

Source	1986	1988	1990
ACP countries	94	94	94
Cameroon	99	97	94
Côte d'Ivoire	97	97	97
Jamaica	100	100	100
Suriname	100	100	100
Windward Islands	99	95	100
Somalia	63	79	64

Source: Submitted by the EC (based on FAO).

IMPORTS OF BANANAS TO THE EC
(Tonnes)

Source	1989		1990		1991		1992		1993		1994		1995 (provisional)
	EC-12	EC-15	EC-12	EC-15	EC-12	EC-15	EC-12	EC-15	EC-12	EC-15	EC-12	EC-15	EC-15
ACP	544,441	544,491	621,875	621,912	596,416	596,437	680,191	680,211	748,118	748,133	726,921	726,990	678,311[1]
Belize	26,580	26,580	24,040	24,040	19,617	19,617	28,494	28,494	38,517	38,517	46,980	46,980	40,000
Cameroon	56,071	56,071	77,628	77,628	115,115	115,115	110,357	110,357	146,902	146,902	158,167	158,167	154,980
Cape Verde	2,734	2,734	2,715	2,715	3,011	3,011	1,876	1,876	684	684	73	73	0
Dominica	51,315	51,315	52,415	52,415	54,155	54,155	51,605	51,605	52,699	52,699	42,868	42,868	32,843
Dominican Rep.	855	855	3,829	3,836	9,682	9,703	38,493	38,513	61,664	61,679	86,007	86,076	
Grenada	8,268	8,268	8,189	8,189	8,187	8,187	6,016	6,016	6,720	6,720	5,325	5,325	4,489
Côte d'Ivoire	85,160	85,188	95,158	95,188	116,406	116,406	144,307	144,307	161,257	161,257	149,085	149,085	155,000
Jamaica	39,219	39,219	63,181	63,181	70,116	70,116	74,827	74,827	77,390	77,390	76,294	76,294	79,750
Madagascar	68	68	0	0	0	0	10	10	19	19	0	0	0
Somalia	59,388	59,388	57,785	57,785	8,080	8,080	181	181	501	501	4,634	4,634	21,430
St. Lucia	116,286	116,286	127,225	127,225	99,823	99,823	122,066	122,066	113,304	113,304	91,541	91,541	104,290
St. Vincent & the Grenadines	67,595	67,595	81,535	81,535	62,263	62,263	71,320	71,320	57,609	57,609	32,054	32,054	50,620
Suriname	29,945	29,945	27,705	27,705	27,744	27,744	29,950	29,950	27,984	27,984	32,721	32,721	34,909
Other ACP	957	979	470	470	2,217	2,217	689	689	2,868	2,868	1,172	1,172	
OTHERS	1,715,945	2,041,289	2,024,168	2,362,735	2,285,149	2,639,812	2,365,874	2,729,945	2,219,632	2,560,387	2,102,287	2,450,006	2,653,441[2]
Colombia	330,390	353,172	401,902	420,918	495,166	518,161	499,834	533,200	417,905	451,778	461,247	511,316	
Costa Rica	450,052	537,021	548,518	643,064	528,302	607,795	451,847	520,331	480,325	564,984	621,999	726,805	
Ecuador	273,898	304,421	352,148	381,015	578,212	646,210	674,528	745,058	605,243	650,628	549,387	612,040	
Honduras	148,813	210,064	123,489	174,298	138,271	181,391	194,609	239,184	193,529	204,048	26,902	27,535	
Guatemala	61,827	81,413	9,370	15,994	13,186	17,667	33,429	39,701	26,947	32,539	19,907	20,041	
Nicaragua	29,072	34,273	47,600	49,532	57,849	59,519	25,638	28,816	9,621	10,554	8	8	
Panama	400,447	495,739	527,464	648,939	469,193	591,393	470,655	601,096	413,132	568,701	299,045	426,933	
Venezuela	179	179	50	50	41	41	45	45	147	147	1,083	1,854	
Mexico	19	19	41	41	39	39	11,046	11,046	112	112	58	58	
Philippines	20,079	20,079	5,024	5,024	165	165	0	0	1,858	1,858	0	0	
Others	1,059	1,059	8,562	8,562	4,725	4,725	3,338	3,338	5,399	5,399	3,913	3,913	
Unspecified	110	3,850	0	15,298	0	12,706	905	8,130	65,414	69,639	118,738	119,503	
TOTAL	2,260,386	2,585,780	2,646,043	2,984,647	2,881,565	3,236,249	3,046,065	3,410,156	2,967,750	3,308,520	2,829,208	3,176,996	3,331,752

Notes: [1] Traditional ACP imports.
[2] Tariff quota imports based on licences used.

Source: Eurostat data supplied by the EC in response to a Panel question.

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

(COMPLAINT BY MEXICO)

Report of the Panel

WT/DS27/R/MEX

Adopted by the Dispute Settlement Body on 25 September 1997
as modified by the Appellate Body Report

NB: For Parts I to V of this report, see Parts I to V of the Panel Report in European Communities - Regime for the Importation, Sale and Distribution of Bananas, Complaint by Ecuador, WT/DS27/R/ECU, DSR 1997:III, 1093-1445.

TABLE OF CONTENTS

VI. INTERIM REVIEW

6.1 On 2 April 1997, the European Communities, Ecuador, Guatemala, Honduras, Mexico and United States requested the Panel to review in accordance with Article 15.2 of the DSU precise aspects of the interim reports that had been issued to the parties on 18 March 1997. The European Communities also requested the Panel to hold a further meeting with the parties on the issues identified in its written comments. The Panel met with the parties on 14 April 1997 in order to hear their arguments concerning the interim reports. We carefully reviewed the arguments presented by the EC and by the Complaining parties, jointly or individually, and the responses offered by the other side.

6.2 With respect to procedural matters, the Complaining parties commented on the Panel's interpretation of the requisite degree of specificity of a panel request in light of the requirements of Article 6.2 of the DSU. They also raised concerns as to the Panel's refusal to consider claims made or endorsed by one or

more of them after the filing of the first written submissions. As regards those claims which the Panel had found unnecessary to address, the Complaining parties further argued that several of them, e.g., allegations regarding overfiling under the activity function rules and the distribution of licences to producers, were not issues of secondary importance and should be addressed by the Panel in addition to those aspects of the licensing procedures which had been found to be inconsistent with WTO rules. Furthermore, they suggested several drafting changes. We carefully considered these arguments and where we agreed, we modified the Findings in response in paragraphs 7.40, 7.42 and 7.49.

6.3 The EC and the Complaining parties asked for a number of specific modifications or additions to those paragraphs in the Findings which summarize their legal arguments. Since these proposed changes concerned the representation of the parties' own legal arguments, we generally accepted them. In particular, in reaction to suggestions by the EC, we modified or expanded paragraphs 7.65, 7.78, 7.104, 7.169, 7.200, 7.205, 7.224, 7.287, 7.301 and 7.313. In our view, these adjustments in general did not entail repercussions for the legal analysis in the Findings. However, in the context of the applicability of the Lomé waiver to licensing procedures and of the interpretation of Article II of GATS, we added more detail to the legal reasoning in paragraphs 7.198 and 7.301-7.302.

6.4 In respect of the discussion of Article XIII in the Findings, the Complaining parties asked the Panel to expand its findings on "Members with a substantial interest" and "New members". The EC commented on the Panel's treatment of issues such as "previous representative period", "special factors" or the EC enlargement. To the extent we accepted these suggestions, we adjusted the Findings, e.g., in paragraphs 7.91-7.94.

6.5 The Complaining parties also commented on the application of the Lomé waiver to Article XIII, on the one hand, and to the tariff treatment of non-traditional imports of ACP bananas, on the other. To the extent that we agreed with those comments, we made adjustments to paragraphs 7.104-7.110 and paragraphs 7.135 and 7.139. The EC also raised arguments concerning the interpretation of the coverage of the waiver. In response to the EC's comments, we revised paragraphs 7.197-7.199.

6.6 Both sides requested the Panel to expand the factual discussion of the differences between the licensing procedures applied to traditional ACP imports as opposed to those applied to third-country and non-traditional ACP imports. We broadly followed these suggestions by adding more factual information from, or cross-referring to, specific parts of the descriptive section of the panel report on which our findings are based. We inserted additions in paragraphs 7.190-7.192. Other modifications along the same lines are reflected in paragraphs 7.211, 7.221 and 7.230.

6.7 With respect to the part of the Findings dealing with GATS issues, the Complaining parties proposed several specific drafting changes. We accepted these suggestions where we considered them appropriate and modified language in the discussion of "measures affecting trade in services", (paragraphs 7.281,

7.282 and 7.285), of "wholesale trade services" (paragraphs 7.287 and 7.291) and of certain other issues (see, e.g., paragraphs 7.316, 7.324, 7.347, 7.377 and 7.391). Further to that, the Complaining parties also commented on the application of the concept of "conditions of competition" to services. We revised the report accordingly in paragraphs 7.335-7.236 where we found merit in the suggestions. Finally, they clarified their claims as being based on allegations of less favourable treatment accorded to their service suppliers, not their services. In light of this, we modified the Findings accordingly, particularly in paragraphs 7.294, 7.297, 7.298, 7.306, 7.314, 7.317, 7.324, 7.329, 7.341 and 7.353.

6.8 The EC commented extensively on the part of the Findings dealing with GATS issues. Paragraphs 7.301-7.302 and 7.308 reflect our responses to the EC's concerns about the interpretation of Article II of GATS and the effective date of GATS obligations.

6.9 With respect to the sections addressing specific claims under Articles II and XVII of GATS against certain aspects of its licensing procedures, the EC suggested that the factual information it had submitted was not sufficiently reflected and discussed in the Findings of the interim report. In particular, the EC referred to information concerning nationality, ownership or control of trading companies and ripeners. Moreover, the EC asked the Panel to take more account of the information it had provided concerning the evolution in recent years of market shares of suppliers of EC/ACP origin as opposed to suppliers of Complaining parties' origin in the EC/ACP and the third-country market segments. In response to these comments, we significantly revised paragraphs 7.329-7.339 and also changed paragraphs 7.362-7.363. The revised paragraphs address in more detail the information submitted by the EC and indicate specifically how we evaluated it. We also expanded our discussion of exactly why the Panel draws conclusions from the information submitted by the parties which are different from the conclusions advocated by the EC.

6.10 In respect of the interim reports' descriptive section, the EC and the Complaining parties suggested further changes which we took into account in reexamining that part of the reports. As to the EC's request for a section describing the EC's view of the facts, we were of the view that the EC's interpretation of the facts is already reflected in a comprehensive manner in the section of the panel report which contains the legal arguments. However, where we saw the need to follow specific suggestions for changes by either side, we revised the descriptive section of the interim reports.

6.11 Guatemala also suggested changes to the Findings in respect of our discussion of its claims relating to the EC's substitution in the Uruguay Round of specific tariff rates on bananas for its pre-Uruguay Round ad valorem tariff rates. We modified paragraph 7.139 to indicate that our finding is limited to the specific circumstances surrounding the Uruguay Round of Multilateral Trade Negotiations.

VII. FINDINGS

7.1 This case is an exceedingly complex one. There are six parties (one representing 15 member States) and 20 third parties, meaning that almost one-third of Members are involved in the case. In addition to claims under the General Agreement on Tariffs and Trade 1994, claims are made for the first time in dispute settlement under four other WTO agreements: The Agreement on Agriculture, the Agreement on Import Licensing Procedures, the Agreement on Trade-Related Investment Measures and the General Agreement on Trade in Services. The submissions by the Complainants[1] and the EC totalled several thousand pages. Moreover, the unprecedented number and complexity of the claims and arguments has meant that the organization and presentation of our work has not been easy.

7.2 The findings are divided into three main parts. First we address various organizational issues that arose in the course of the Panel's work. Second, we consider preliminary issues raised by the EC concerning the validity of the establishment of this Panel and the lack of a legal interest in some issues on the part of the United States. Finally, we address the substantive issues presented by this case.

A. Organizational Issues

7.3 In the course of these proceedings, we considered two issues related to the organization of our work. These concerned the extent of the participatory rights to be afforded third parties and the presence in Panel meetings of private lawyers representing third parties.

1. Participation of Third Parties

7.4 At the meeting of the Dispute Settlement Body on 8 May 1996, Belize, Cameroon, Colombia, Costa Rica, Côte d'Ivoire, Dominica, Dominican Republic, Ghana, Grenada, Jamaica, Nicaragua, Saint Vincent and the Grenadines, Saint Lucia, Senegal, Suriname and Venezuela requested to be allowed to participate more fully in the work of the Panel, i.e., these Members requested to be present at all meetings between the Panel and the parties to the dispute; to be able to present their point of view at each of these meetings; to receive copies of all submissions and other written material; and to be allowed to present written submissions both to the first and to the second meetings of the Panel. While the DSB took note of these statements, there was no consensus on such participation.[2] Several

[1] Our use of the term Complainants in these Findings is explained in para. 7.59 infra. In respect of organizational and preliminary issues, it is used to refer to all five Complaining parties.

[2] WT/DSB/M/16, item 1, pp. 1-5.

of these countries later confirmed their requests in letters addressed to the Chairman of the DSB.

7.5 Subsequently, we considered the above requests. The rights of third parties are dealt with in Article 10 and Appendix 3 of the Dispute Settlement Understanding. Article 10 provides that third parties "shall have an opportunity to be heard by the panel and to make written submissions to the panel". It also provides that third parties are entitled to receive the submissions of the parties made to the first substantive panel meeting. Paragraph 6 of Appendix 3 specifies that third parties shall be invited "to present their views during a session of the first substantive meeting of the panel set aside for that purpose. All such third parties may be present during the entirety of this session". Under prior GATT practice, more expansive rights were granted to third parties in several disputes, including the two prior disputes involving bananas and in the *Semiconductors* case.[3] In those cases, however, the extension of such rights had been the subject of agreement between the parties at that time. No such agreement existed between the parties in the present dispute.

7.6 Having considered representations by the Complainants, the EC and third parties, we decided prior to our first substantive meeting with the parties that, in addition to the rights specifically provided for in the DSU, third parties in this dispute would be invited to observe the whole of the proceedings at that meeting and not just the one session thereof set aside for hearing third-party arguments.

7.7 At the first substantive meeting of the Panel, the EC requested that third parties be allowed to participate in future panel meetings as set out in paragraph 7.4 above. The Complainants expressed the view that third party rights were sufficiently safeguarded by the normal procedures as set out in Article 10 of the DSU. We consulted the parties on this issue, but they maintained their opposing viewpoints.

7.8 We thereafter ruled as follows:

> "(a) The Panel has decided, after consultations with the parties in conformity with DSU Article 12.1, that members of governments of third parties will be permitted to observe the second substantive meeting of the Panel with the parties. The Panel envisages that the observers will have the opportunity also to make a brief statement at a suitable moment during the second meeting. The Panel does not expect

[3] Panel Report on "EEC - Import Regime for Bananas", issued on 11 February 1994 (not adopted), DS38/R, p.4, para. 8; Panel Report on "EEC - Member States' Import Regimes for Bananas", issued on 3 June 1993 (not adopted), DS32/R, p.2, para. 9; Panel Report on "Japan - Trade in Semiconductors", adopted on 4 May 1988, BISD 35S/116, 116-117, para. 5. See also Panel Report on "EEC - Tariff Treatment on Imports of Citrus Products from Certain Countries in the Mediterranean Region", issued on 7 February 1985 (not adopted), L/5776, p.2, para. 1.5; Interim Panel Report on "United Kingdom - Dollar Area Quotas", adopted on 30 July 1973, BISD 20S/230, 231, para. 3.

them to submit additional written material beyond responses to the questions already posed during the first meeting.

(b) The Panel based its decision, *inter alia*, on the following considerations:

(i) the economic effect of the disputed EC banana regime on certain third parties appeared to be very large;

(ii) the economic benefits to certain third parties from the EC banana regime were claimed to derive from an international treaty between them and the EC;

(iii) past practice in panel proceedings involving the banana regimes of the EC and its member States; and

(iv) the parties to the dispute could not agree on the issue".

As a consequence of our ruling, the third parties in these proceedings enjoyed broader participatory rights than are granted to third parties under the DSU.

7.9 Following the second substantive meeting of the Panel with the parties, several of the third parties asked for further participatory rights, including participation in the interim review process. We consulted the parties and found that, as before, they had diverging views on the appropriateness of granting this request. We decided that no further participatory rights should be extended to third parties, except, in accord with normal practice, to permit them to review the draft of the summary of their arguments in the Descriptive Part. In this regard, we noted that Article 15 of the DSU, which deals with the interim review process, refers only to parties as participants in that process. In our view, to give third parties all of the rights of parties would inappropriately blur the distinction drawn in the DSU between parties and third parties.

2. Presence of Private Lawyers

7.10 At the beginning of the Panel's first substantive meeting on 10 September 1996, one of the Complainants objected to the alleged presence of private lawyers in the Panel meeting. In accordance with Article 12.1 of the DSU and the Working Procedures of Appendix 3, we held consultations with the Complainants and the EC on this issue and the Complainants expressed opposition to allowing private lawyers to be present.

7.11 We thereafter asked parties and third parties to observe the guidelines contained in our working procedures and that only members of governments (including the European Commission and an international civil servant of the ACP Secretariat) attend the Panel meeting. We based our request on the following considerations:

(a) It has been past practice in GATT and WTO dispute settlement proceedings not to admit private lawyers to panel meetings if any

party objected to their presence and in this case the Complainants did so object.

(b) In the working procedures of the Panel, which were adopted at the Panel's organizational meeting, we had expressed our expectation that only members of governments would be present at Panel meetings.

(c) The presence of private lawyers in delegations of some third parties would be unfair to those parties and other third parties who had utilized the services of private lawyers in preparing their submissions, but who were not accompanied by those lawyers because they assumed that all participants at the meeting would comply with our expectations as expressed in the working procedures adopted by the Panel at its organizational meeting.

(d) Given that private lawyers may not be subject to disciplinary rules such as those that applied to members of governments, their presence in Panel meetings could give rise to concerns about breaches of confidentiality.

(e) There was a question in our minds whether the admission of private lawyers to Panel meetings, if it became a common practice, would be in the interest of smaller Members as it could entail disproportionately large financial burdens for them.

(f) Moreover, we had concerns about whether the presence of private lawyers would change the intergovernmental character of WTO dispute settlement proceedings.

7.12 We noted that our request would not in any respect adversely affect the right of parties or third parties to meet and consult with their private lawyers in the course of panel proceedings, nor to receive legal or other advice in the preparation of written submissions from non-governmental experts.

B. Preliminary Issues

7.13 First, the EC claims that the consultations held in this matter between the Complainants and the EC did not fulfil their minimum function of affording a possibility for arriving at a mutually satisfactory solution and a clear setting out of the different claims of which a dispute consists. Second, it claims that the request for the establishment of this Panel was unacceptably vague and failed to comply with the requirements of Article 6.2 of the DSU. Third, it claims that the United States has no legal right or interest in a resolution of certain of its claims and therefore should not be permitted to raise them. Fourth, the EC claims that it is entitled to separate panel reports under Article 9 of the DSU.

7.14 As the Appellate Body has made clear in its first two decisions, under Article 3.2 of the DSU the starting point for the interpretation of treaty provisions is the Vienna Convention on the Law of Treaties (the "Vienna Convention").[4] Article 31 of the Vienna Convention provides in relevant part as follows:

> "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 light of its object and purpose.
>
> ...
>
> 3. There shall be taken into account, together with the context: ... (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; ...".

Article 32 of the Vienna Convention permits recourse to

> "supplementary means of interpretation ... 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".

7.15 In addition, Article XVI of the Marrakesh Agreement Establishing the World Trade Organization provides as follows:

> "Except as otherwise provided under this Agreement or the Multilateral Trade Agreements, the WTO shall be guided by the decisions, procedures and customary practices followed by the CONTRACTING PARTIES to GATT 1947 and the bodies established in the framework of GATT 1947".

7.16 In light of this framework for interpretation, we turn to the arguments of the EC.

1. Adequacy of the Consultations

7.17 Consultations under Article 4 of the DSU are normally required as the first step in the WTO dispute settlement process.[5] Article 4.2 of the DSU requires a Member "to accord sympathetic consideration to and afford adequate opportunity for consultation regarding any representations made by another Member ...". Article 4.5 of the DSU specifies that "[i]n the course of the consultations ... before resorting to further action under this Understanding, Members should at-

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[4] 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, DSR 1996:I, 97 at 104-106; Appellate Body Report on "United States - Standards for Reformulated and Conventional Gasoline", adopted on 20 May 1996, WT/DS2/AB/R, DSR 1996:I, 3 at 15-16.

[5] Under Article 8.10 of the Agreement on Textiles and Clothing, a matter may be taken to the DSB without prior consultations under the DSU.

tempt to obtain satisfactory adjustment of the matter". However, if consultations fail to settle a dispute within 60 days of the request for consultations, Article 4.7 of the DSU authorizes the complaining party to request the DSB to establish a panel.[6]

7.18 The EC argues that the consultations that were held in this matter between the Complainants and the EC did not fulfil their minimum function of affording a possibility for arriving at a mutually satisfactory solution and a clear setting out of the different claims of which a dispute consists. The Complainants argue that Article 4.5 of the DSU only requires that an "attempt" be made to resolve the matter. Since consultations were held on 14-15 March 1996, the Complainants argue that they complied with the DSU and were authorized to request the DSB to establish a panel when those consultations failed to produce a mutually agreed solution to the dispute. We note that the EC did not raise this issue in the DSB.[7]

7.19 Consultations play a critical role in the WTO dispute settlement process as they did under GATT. Experience under the DSU to date has shown that consultations frequently enable disputes between Members to be resolved without resort to the dispute settlement panel process.[8] Since the DSU provides in Article 3.7 that "[a] solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred", disputing parties should consult in good faith and attempt to reach such a solution. Consultations are, however, a matter reserved for the parties. The DSB is not involved; no panel is involved; and the consultations are held in the absence of the Secretariat. In these circumstances, we are not in a position to evaluate the consultation process in order to determine if it functioned in a particular way. While a mutually agreed solution is to be preferred, in some cases it is not possible for parties to agree upon one. In those cases, it is our view that the function of a panel is only to ascertain that consultations, if required, were in fact held or, at least, requested.[9]

7.20 As to the EC argument that consultations must lead to an adequate explanation of the Complainants' case, we cannot agree. Consultations are the first step in the dispute settlement process. While one function of the consultations may be to clarify what the case is about, there is nothing in the DSU that provides that a complainant cannot request a panel unless its case is adequately explained in the consultations. The fulfilment of such a requirement would be difficult, if not impossible, for a complainant to demonstrate if a respondent chose to claim a lack of understanding of the case, a result which would undermine the automatic nature of panel establishment under the DSU. The only prerequisite for requesting a panel is that the consultations have "fail[ed] to settle a dispute within 60 days of

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[6] If there is a failure to consult, Article 4.3 of the DSU provides that a panel may be requested after 30 days.

[7] Minutes of DSB Meeting of 24 April 1996, WT/DSB/M/15, item 1, pp.1-2; Minutes of DSB Meeting of 8 May 1996, WT/DSB/M/16, item 1, pp.1-5.

[8] WT/DBS/8, p.17 (1996 Annual Report of the DSB).

[9] DSU, art. 4.3.

receipt of the request for consultations ...".[10] Ultimately, the function of providing notice to a respondent of a complainant's claims and arguments is served by the request for establishment of a panel and by the complainant's submissions to that panel.

7.21 We reject the EC's claim that the Complainants' case should be dismissed because the consultations held concerning this dispute did not perform their minimum function of affording a possibility for arriving at a mutually satisfactory solution and a clear setting out of the different claims of which a dispute consists.

2. Specificity of the Request for Panel Establishment

(a) Article 6.2 and the Request for Establishment of the Panel

7.22 Article 6.2 of the DSU provides in relevant part as follows:

> "The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a brief legal basis of the complaint sufficient to present the problem clearly. ... ".

The EC claims that the request for the establishment of the Panel in this case fails to "identify the specific measures at issue" and does not "provide a brief legal basis of the complaint sufficient to present the problem clearly".

7.23 The relevant parts of the Complainants' request for the establishment of this Panel read as follows:

> "The European Communities maintains a regime for the importation, sale and distribution of bananas established by Regulation 404/93 (O.J. L 47 of 25 February 1993, p. 1), and subsequent EC legislation, regulations and administrative measures, including those reflecting the provisions of the Framework Agreement on bananas, which implement, supplement and amend that regime. The regime and related measures appear to be inconsistent with the obligations of the EC under, *inter alia*, the General Agreement on Tariffs and Trade 1994 ("GATT 1994"), the Agreement on Import Licensing Procedures, the Agreement on Agriculture, the General Agreement on Trade in Services ("GATS") and the Agreement on Trade-Related Investment Measures ("TRIMs Agreement").
>
> [Description of consultations omitted]
>
> The Governments of Ecuador, Guatemala, Honduras, Mexico and the United States, acting jointly and severally, each in the exercise of the rights accruing to it as a member of the WTO, therefore, re-

[10] DSU, art. 4.7.

spectfully request the establishment of a panel to examine this matter in light of the GATT 1994, the Agreement on Import Licensing Procedures, the Agreement on Agriculture, the GATS, and the TRIMs Agreement, and find that the EC's measures are inconsistent with the following Agreements and provisions among others:

(1) Articles I, II, III, X, XI and XIII of the GATT 1994,

(2) Articles 1 and 3 of the Agreement on Import Licensing Procedures,

(3) the Agreement on Agriculture,

(4) Articles II, XVI and XVII of the GATS, and

(5) Article 2 of the TRIMs Agreement.

These measures also produce distortions which nullify or impair benefits accruing to Ecuador, Guatemala, Honduras, Mexico and the United States, directly or indirectly, under the cited Agreements; and these measures impede the objectives of the GATT 1994 and the other cited Agreements".[11]

(b) The Arguments of the Parties

7.24 The EC claims that the Complainants' request for the establishment of this Panel fails to comply with the requirements of Article 6.2 of the DSU. The EC notes that the request refers specifically to only one EC regulation and describes that regulation and related, but unspecified, measures as a "regime". The EC further notes that while the request refers to some specific agreements and provisions, it suggests that there might be other unspecified provisions and agreements that are relevant, and that it fails to explain which part of the EC regime is inconsistent with the requirements of which provision of which agreement. The EC argues that for these reasons the panel request is inadequate to serve as the basis for the terms of reference of the Panel and inadequate to give appropriate notice to the EC and potential third parties of which claims may be put forward by the Complainants. In support of its arguments, the EC cites two panel reports issued under the Tokyo Round Agreement on the Interpretation of Article VI (the "Tokyo Round Anti-Dumping Code"), one of which was adopted by the Committee on Anti-Dumping Practices and one of which was not.[12]

7.25 In response, the Complainants argue that their request refers to the basic EC regulation that establishes the EC rules on banana imports and that this refer-

[11] WT/DS27/6.

[12] Panel Report on "United States - Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway", adopted on 26 April 1994, ADP/87, p.99, paras. 333-335; Panel Report on "EC - Anti-Dumping Duties on Audiotapes in Cassettes Originating in Japan", issued on 28 April 1995, ADP/136, p.53, para. 295.

ence is sufficient to identify the measures at issue. They argue, in addition, that Article 6.2 does not require a panel request to tie each part of a contested measure to a specific provision of a WTO agreement that it is inconsistent with, but rather that submissions to panels serve that purpose. The Complainants further argue that the Tokyo Round Anti-Dumping Code cases are irrelevant. Moreover, they note that the EC did not raise this issue at either DSB meeting at which the panel request was presented and cannot now claim that it was prejudiced by not knowing the claims of the Complainants. Finally, the Complainants argue that this Panel may not rule on this claim because it is outside the Panel's terms of reference.

(c) Analysis of the Article 6.2 Claim

7.26 We examine first the argument by the Complainants that we have no authority to consider the EC claim. As noted above, panels under GATT 1947 and the Tokyo Round agreements considered similar claims.[13] We see no reason to deviate from that practice. Because of the application of "reverse" consensus decision-making applicable in the case of panel establishment in the DSB, the DSB is not likely to be an effective body for resolving disputes over whether a request for the establishment of a panel meets the requirements of Article 6.2 of the DSU. Therefore, as a practical matter only the panel established on the basis of the request (and thereafter the Appellate Body) can perform that function. Moreover, the issue we are asked to resolve can be viewed in essence as a decision on the scope of our terms of reference, which is clearly a proper subject for consideration by a panel.[14] We turn therefore to an analysis of the EC claim in light of the interpretative rule of the Vienna Convention and of Article XVI of the WTO Agreement. In this connection, we examine (i) the ordinary meaning of the terms of Article 6.2, (ii) the context of the terms of Article 6.2, (iii) the object and purpose of Article 6.2 and (iv) past practice under Article 6.2 and its predecessor.

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[13] Panel Report on "United States - Denial of Most-Favoured Nation Treatment as to Non-Rubber Footwear from Brazil", adopted on 19 June 1992, BISD 39S/128, pp.147-148, paras. 6.1-6.2. Panels under Tokyo Round agreements include: Panel Report on "European Communities - Imposition of Anti-Dumping Duties on Imports of Cotton Yarn from Brazil", adopted on 4 July 1995, ADP/137, pp.105-109, paras. 438-466; Panel Report on "United States - Countervailing Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway", adopted on 27 April 1994, SCM/153, pp.68-69, paras. 208-214; Panel Report on "United States - Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway", adopted on 26 April 1994, ADP/87, p.99, paras. 333-335; Panel Report on "United States - Anti-Dumping Duties on Imports of Gray Portland Cement and Cement Clinker from Mexico", issued on 7 September 1992, ADP/82, pp.49-50, para. 5.12.

[14] The Appellate Body has considered terms of reference issues. Appellate Body Report on "Brazil - Measures Affecting Desiccated Coconut", issued on 21 February 1997, WT/DS22/AB/R, DSR 1997:I, 167 at 186.

(i) Ordinary Meaning of Treaty Terms

7.27 Article 6.2 of the DSU requires that the "specific measures at issue" be "identif[ied]" and that there be "a brief summary of the legal basis of the complaint sufficient to present the problem clearly". The EC challenges the panel request on both grounds. As to the first requirement, the panel request does identify the basic EC regulation at issue by place and date of publication. In our view, this complies with the requirements of Article 6.2. While the request does not identify the subsequent EC legislation, regulations and administrative measures that further refine and implement the basic regulation, we believe that the "banana regime" that the Complainants are contesting is adequately identified.

7.28 As to the second requirement of Article 6.2, a complete elaboration of the complainant's legal argument is not required. Article 6.2 specifies only that the request must include a "summary" of the legal basis of the complaint and that the summary need only be "brief". However, Article 6.2 does require that summary to "present the *problem* clearly". In undertaking an analysis of whether the panel request in this case complies with the terms of Article 6.2 of the DSU, we find it useful to divide the request into three categories of specificity. First, in most cases, the request alleges that the EC banana regime is inconsistent with the requirements of a specific provision of a specific agreement. Second, in the case of the Agreement on Agriculture, the request simply alleges that the regime is inconsistent with that agreement. Third, the panel request indicates that the list of provisions specified in the request is not exclusive. We examine the compliance of the request with Article 6.2 in each of these three situations.

7.29 Where the panel request alleges that the banana regime is inconsistent with the requirements of a specific article of a specific agreement, we believe that the request is sufficiently specific to comply with the minimum standards established by the terms of Article 6.2 of the DSU. For example, the request claims that the regime is inconsistent with the requirements of six GATT provisions: Articles I, II, III, X, XI and XIII, as well as inconsistent with the requirements of specific provisions of the Agreement on Import Licensing Procedures, the Agreement on Trade-Related Investment Measures and the General Agreement on Trade in Services. Generally, each of these provisions is concerned with a distinct obligation. For example, Article I of GATT bans discrimination on the basis of origin in respect of certain specified matters. A fair reading of the panel request's reference to Article I would be that there is an allegation that the EC banana regime is inconsistent with the requirements of Article I because it contains elements that discriminate in favour of some countries to the detriment of Members. Such an allegation can be described as a "brief summary of the legal basis of the complaint", which arguably presents the "problem" clearly, i.e. there is discrimination on the basis of product origin which is inconsistent with the requirements of Article I. However, a panel request that does no more than identify a measure and specify the provision with which it is alleged to be inconsistent is, in our view, at the outer limits of what is acceptable under Article 6.2. Nonetheless, particularly in light of our analysis below of the object and purpose and of the context of Article 6.2 and of past GATT and WTO practice, we believe

that this conclusion is the appropriate interpretation of the terms of Article 6.2. In this regard, we note that there is no explicit requirement in Article 6.2 to explain how the measure at issue is inconsistent with the requirements of a specific WTO provision and the EC concedes in its response to our questions that a simple listing of the provision and agreement alleged to have been violated may suffice for the purposes of Article 6.2.[15]

7.30 The panel request alleges an inconsistency with the requirements of the Agreement on Agriculture, without specifying any provision thereof. It also states that "the EC's measures are inconsistent with the following Agreements and provisions *among others*", suggesting that there may be inconsistencies with unspecified agreements and inconsistencies with unspecified provisions of the specified agreements. In these two situations, it is not possible at the panel request stage, even in the broadest generic terms, to describe what legal "problem" is asserted. While a reference to a specific provision of a specific agreement may not be essential if the problem or legal claim is otherwise clearly described, in the absence of some description of the problem, a mere reference to an entire agreement or simply to "other" unspecified agreements or provisions is inadequate under the terms of Article 6.2. Accordingly, we find that references to a WTO agreement without mentioning any provisions or to unidentified "other" provisions are too vague to meet the standards of Article 6.2 of the DSU.

7.31 Thus, we preliminarily find that, given the ordinary meaning of the terms of Article 6.2 of the DSU, the panel request made by Complainants was generally sufficient to meet its requirements. We note, however, that since the invocation of the Agreement on Agriculture in the panel request did not indicate a specific provision thereof, we will not consider the claim raised by Ecuador in its first written submission under that Agreement. We will also not consider the claims raised by Ecuador, Guatemala and Honduras, and the United States in their first written submissions under Article 5 of the TRIMs Agreement since the panel request referred only to Article 2 of the TRIMs Agreement.[16] We now consider whether this preliminary finding is supported by the context and the object and

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[15] In its response, the EC seems to accept that the following panel requests under the DSU meet the requirements of Article 6.2 even though they only list the WTO provisions that the challenged measures are alleged to be inconsistent with, without explaining why: Canada - Certain Measures Concerning Periodicals, Request for the Establishment of a Panel, 24 May 1996, WT/DS31/2; EC - Measures Concerning Meat and Meat Products (Hormones), Request for the Establishment of a Panel, WT/DS26/6; EC - Trade Description of Scallops, Request for the Establishment of a Panel by Chile, WT/DS14/5; EC - Trade Description of Scallops, Request for the Establishment of a Panel by Peru, WT/DS12/7; EC - Trade Description of Scallops, Request for the Establishment of a Panel by Canada, WT/DS7/7. We would note that at least one of the EC's three panel requests under the DSU has mentioned only the agreement and provisions alleged to have been violated, i.e., United States - Tariff Increases on Products from the EC, Request for the Establishment of a Panel by the EC, WT/DS39/2.

[16] Given that the request for consultations did list Article 5 of the TRIMs Agreement, the omission of that article in the panel request could be understood as a decision by the Complainants not to pursue this claim in the light of a more thorough legal assessment and/or the consultations.

purpose of Article 6.2. We also consider past practice under Article 6.2 and its predecessor.

(ii) Context

7.32 The terms of Article 6.2 of the DSU must be interpreted in light of their context in the WTO dispute settlement system. First and foremost, that system is designed to settle disputes.[17] Article 3.2 of the DSU specifies that "[t]he dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. ...". Article 3.3 continues in the same vein (emphasis added):

> "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".

In our view, the DSU must be interpreted so as to promote the prompt settlement of disputes, without adopting a reading of DSU provisions that would prolong disputes unnecessarily or make the DSU overly difficult for Members, including developing country Members, to use. A clear test of specificity, such as we apply in this case, is required.

7.33 The problems presented by other interpretations of Article 6.2 are readily apparent in this case. While no one would contest that there is a real dispute between the Complainants and the EC over the EC's import regime for bananas, if we were to rule that the panel request did not meet the requirements of Article 6.2 of the DSU and that the Complainants' panel request was accordingly invalid, the resolution of this dispute would be delayed by at least 6 or 7 months. Yet, what purpose would that serve? Once the Complainants filed their first submission, there could be no doubt exactly what their claims were. To the extent that a respondent could legitimately claim surprise in what was contained in a complainant's submission, the efficient solution would be to grant the respondent several more weeks to file its initial submission, not to start the entire consultation/panel request process over. This is particularly true given that a reading of Article 6.2 of the DSU such as the EC proposes could result in some parts of the case being accepted, while others were relegated to a different proceeding, something completely contrary to the DSU's philosophy of resolving all related issues together, as expressed in Article 9 of the DSU.[18] Moreover, such a reading

[17] Appellate Body Report on "United States - Measure Affecting Imports of Woven Wool Shirts and Blouses from India", issued on 25 April 1997, WT/DS33/AB/R, DSR 1997:I, 323 at 340.

[18] Article 9 of the DSU provides that "1. Where more than one Member requests the establishment of a panel related to the same matter, a single panel may be established to examine these complaints taking into account the rights of all Members concerned. A single panel should be established to

could make it more difficult for Members, and particularly developing-country Members, to use the dispute settlement system, except by incurring the expense of private legal experts at the earliest stage of the proceedings.

7.34 Thus, a consideration of the context of the terms of Article 6.2 supports the preliminary finding reached in paragraph 7.31 above.

(iii) Object and Purpose

7.35 We see three purposes for Article 6.2 of the DSU. First, the request for the establishment of a panel under Article 6.2 will usually serve to set the terms of reference of the panel under Article 7 of the DSU. Second, the request informs the responding Member of the scope of the case against it. Third, the request informs potential third parties of the scope of the case, so that they can better decide whether they wish to assert third-party rights.

7.36 In this case, we believe that the request for establishment of a panel adequately serves these three purposes. First, we have already found that Article 6.2 of the DSU requires a complainant to specify the provision of the WTO agreements that it is relying upon by agreement and article. Thus, a panel will always be able to understand which claims it is required to examine under its terms of reference. Given this interpretation of Article 6.2, we understand our terms of reference without difficulty in this case.

7.37 Second, it appears that the panel request adequately informed the EC of the case against it. We reach this conclusion in light of the facts that the EC did not complain about the request's specificity until it filed its first submission, it did not ask for time beyond the normal periods indicated in the DSU to file its submission and it did not claim in its written submissions that its defence was prejudiced in any particular way by a lack of specificity in the panel request. The EC stated at the Panel's hearings, however, that it had been prejudiced in that the lack of minimal clarity handicapped the EC in the preparation of its defence. However, as pointed out by the Complainants, the EC's oral presentation at the first meeting of the Panel, its responses to our questions and its rebuttal submission essentially followed the line of argument made in its initial submissions, suggesting that it had sufficient time to develop its line of defence. In these circumstances, we believe that the object and purpose of Article 6.2 of the DSU was served by the Complainants' panel request, suggesting that such request was adequately specific under Article 6.2.

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examine such complaints whenever feasible. ... 3. 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".

7.38 Third, it appears that the panel request adequately informed third parties of the case against the EC, as 20 third parties participated in this panel process.[19]

7.39 Thus, a consideration of the object and purpose of Article 6.2 supports the preliminary finding reached in paragraph 7.31 above.

(iv) Past Practice

7.40 Article XVI:1 of the WTO Agreement provides, as noted above, that the "WTO shall be guided by the decisions, procedures and customary practices" of GATT. In the case of adopted panel reports, the Appellate Body has indicated that

> "Adopted panel reports are an important part of the GATT *acquis*. They are often taken into account by subsequent panels. They create legitimate expectations among WTO Members, and, therefore should be taken into account where they are relevant to any dispute. However, they are not binding, except with respect to resolving the particular dispute between the parties to that dispute".[20]

There are two GATT/WTO cases that consider issues related to the one we face here. In 1992 a panel declined to consider claims based on GATT Articles X and XXIII(b)-(c) because they were not within its terms of reference, which it noted were defined by the request for the establishment of the panel.[21] More recently, a WTO panel reached a similar result in respect of a claim that consultations had not been properly held under Article XXIII, rejecting the claim because a fair reading of the documents that were used to establish its terms of reference showed that the issue had not been raised in those documents.[22] Although treated as a "terms of reference" issue in both cases, the results were in effect determined on the basis of the panel request. The terms of reference were found not to encompass the claim because the provision or issue had not been referred to in the panel request (and related documents in one case), which in both cases had served to establish the panels' terms of reference. Our reading of the terms of Article 6.2 of the DSU is not inconsistent with these past GATT/WTO panel decisions, nor with a recent Appellate Body decision affirming the above-

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[19] Belize, Cameroon, Canada, Colombia, Costa Rica, Côte d'Ivoire, Dominica, Dominican Republic, Ghana, Grenada, India, Jamaica, Japan, Nicaragua, Philippines, Saint Vincent and the Grenadines, Saint Lucia, Senegal, Suriname and Venezuela. Thailand indicated a third-party interest in the proceedings, but later withdrew.

[20] 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, DSR 1996:I, 97 at 108.

[21] Panel Report on "United States - Denial of Most-favoured-nation Treatment as to Non-rubber Footwear from Brazil", adopted on 19 June 1992, BISD 39S/128, 147-148, paras. 6.1-6.2.

[22] Panel Report on "Brazil - Measures Affecting Desiccated Coconut", issued on 17 October 1996, WT/DS22/R, pp.77-78, paras. 286-290.

mentioned WTO panel decision.[23] In this connection, we note that the power of a panel to interpret its terms of reference is not negated by the requirement in Article 7.2 of the DSU that a panel address the "relevant" provisions of covered agreements cited by the parties.

7.41 With respect to practice of GATT contracting parties and Members in requesting panels, numerous examples may be found in the period from 1989[24] to date of panel requests containing only an allegation that a measure is inconsistent with the requirements of a specific provision of a specific agreement, without a more detailed description of the problem.[25] Indeed, as noted above, the EC concedes as much in its response to our questions where it examines panel requests in eight WTO cases and finds that in most cases there is no specific explanation given as to how the contested measure is inconsistent with the requirements of the specified provisions of the specified agreements. To date, no GATT or WTO panel has found such requests to be inadequate, except in respect of the anti-dumping and countervailing duty claims discussed in the following paragraph. Thus, our reading of the terms of Article 6.2 of the DSU is consistent with the practice followed by GATT contracting parties and WTO Members in requesting panels under Article 6.2 and the similar language of its predecessor provision, which was adopted by the GATT CONTRACTING PARTIES in 1989.

7.42 It can be argued, however, that our reading of the terms of Article 6.2 may not be consistent with several panel decisions (adopted and unadopted) under the Tokyo Round Agreement on Implementation of Article VI (the "Tokyo Round Anti-Dumping Code").[26] We find these cases to be of limited relevance in the

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[23] Appellate Body Report on "Brazil - Measures Affecting Desiccated Coconut", issued on 21 February 1997, WT/DS22/AB/R, DSR 1997:I, 167 at 186.

[24] In 1989, the GATT CONTRACTING PARTIES adopted Improvements to the GATT Dispute Settlement Rules and Procedures (BISD 36S/61), including the following language, which is quite similar to that contained in Article 6.2 of the DSU:

> "F.(a) The request for a panel or a working party shall be made in writing. It shall indicate whether consultations were held, and provide a brief summary of the factual and legal basis of the complaint sufficient to present the problem clearly".

There were no specific rules on the form of requests for the establishment of panels prior to 1989.

[25] See examples cited in note 15 supra. See also EC - Measures Affecting Livestock and Meat (Hormones), Request for the Establishment of a Panel, WT/DS48/5; Brazil - Measures Affecting Desiccated Coconut, Request for the Establishment of a Panel, WT/DS22/2; European Communities - Duties on Imports of Grains, Request for the Establishment of a Panel, WT/DS13/2; Japan - Taxes on Alcoholic Beverages, Request for the Establishment of a Panel by the United States, WT/DS11/2; European Communities - Duties on Imports of Cereals, Request for the Establishment of a Panel, WT/DS9/2; United States - Standards for Reformulated and Conventional Gasoline, Request for the Establishment of a Panel, WT/DS4/2; United States - Measures Affecting the Importation and Internal Sale and Use of Tobacco, Recourse to Article XXIII:2 by Argentina, DS44/8; EEC - Restrictions on Imports of Apples, Communication from Chile, DS39/2 & DS41/2.

[26] Panel Report on "United States - Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway", adopted 26 April 1994, ADP/87, paras. 333-335; Panel Report on "European Communities - Imposition of Anti-Dumping Duties on Imports of Cotton Yarn from Brazil", ADP/137, adopted on 4 July 1995, paras. 438-466; Panel Report on "United States - Anti-Dumping Duties on Imports of Gray Portland Cement and Cement Clinker from Mexico", issued on

interpretation of the terms of Article 6.2 of the DSU. In the first place, the Tokyo Round Anti-Dumping Code had different rules for the initiation of panel procedures than were applicable in the case of GATT 1947 panels. More fundamentally, Article 15 of the Tokyo Round Anti-Dumping Code required a so-called conciliation procedure, involving the disputing parties and the Committee charged with supervising the operations of the Code, between the end of the consultation period and the filing of a request to establish a panel. The practice under this conciliation procedure involved the preparation of a detailed statement of issues by the complaining party, which was circulated to the members of the Committee so that they might attempt to solve the dispute through conciliation. Article 15.5 of the Tokyo Round Anti-Dumping Code referred to the conciliation process as involving a "detailed examination by the Committee". In order to make the conciliation process meaningful, it may have been appropriate to insist that all claims brought before a panel have been considered in the conciliation process. Such a conciliation requirement does not exist under the DSU and did not exist under GATT 1947 rules. There has never been a practice of preparing such a statement of claims. Moreover, the nature of antidumping cases is different from this case.

7.43 In any event, we recognize that past practice under the Tokyo Round Anti-Dumping Code may have been inconsistent with the result we reach. We recall that Article 3.3 of the DSU states that the prompt settlement of disputes is essential to the effective functioning of the WTO and we believe that our interpretation of Article 6.2 of the DSU best achieves that objective.

(v) Cure

7.44 Finally, we note that at the second substantive Panel meeting, we expressed the preliminary view that even if there was some uncertainty whether the panel request had met the requirements of Article 6.2, the first written submissions of the Complainants "cured" that uncertainty because their submissions were sufficiently detailed to present all the factual and legal issues clearly. We considered that at the time that the EC filed its first written submission to the Panel, it had complete knowledge of the Complainants' case through their sub-

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7 September 1992 (not adopted), ADP/82, para. 5.12; Panel Report on "EC - Anti-Dumping Duties on Audiotapes in Cassettes Originating in Japan", issued on 28 April 1995 (not adopted), ADP/136, para. 295. In addition, there was one case involving this issue under the Tokyo Round Agreement on Interpretation and Application of Articles VI, XVI and XXIII. Panel Report on "United States - Countervailing Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway", adopted 27 April 1994, SCM/153, paras. 208-214 (following the approach of the Salmon antidumping case cited above). A claim of noncompliance with Article 6.2 was made in the Panel Report on "Measures Affecting Desiccated Coconut", dated 17 October 1996, WT/DS22/R, para. 290, but the panel did not reach the Article 6.2 issue, except as noted above, by finding that the failure to allege that a measure was inconsistent with the requirements of a specific provision of GATT meant that a claim based on that provision was not within the panel's terms of reference, a result which we follow.

missions. In light of our analysis of the panel request and Article 6.2 as outlined above, we confirm our preliminary view.[27]

7.45 We therefore find that the panel request made by the Complainants was sufficient to meet the requirements of Article 6.2 of the DSU to the extent that it alleged inconsistencies with the requirements of specific provisions of specific WTO agreements.

7.46 In light of the foregoing finding, since the invocation of the Agreement on Agriculture in the panel request did not indicate a specific provision thereof, we will not consider the claim raised by Ecuador in its first written submission under that Agreement. We will also not consider the claims raised by Ecuador, Guatemala and Honduras, and the United States in their first written submissions under Article 5 of the TRIMs Agreement since the panel request referred only to Article 2 of the TRIMs Agreement.[28]

3. Requirement of Legal Interest

7.47 The EC argues that the US claims concerning trade in goods should be rejected because US banana production is minimal, its banana exports are nil and that for climatic reasons this situation is not likely to change. As a result, the EC suggests that the United States has not suffered any nullification or impairment of WTO benefits in respect of trade in bananas as required by Article 3.3 and 3.7 of the DSU.[29] Moreover, the EC argues that the United States would have no effective WTO remedy under Article 22 of the DSU. With no effective remedy and absent any notion of a declaratory judgment or advisory opinion in the WTO dispute settlement system, the EC claims that the United States cannot raise "goods" issues because it has "no legal right or interest" therein. The EC argues that there must be a requirement in the WTO dispute settlement system that a complaining party have such a "legal interest" because the absence of such a requirement would undermine the DSU by leading to litigation "by all against all". The EC also suggests that the interests of Members in any given case can be adequately protected through assertion of a third party interest in the case.

7.48 In response, the Complainants argue that there is no basis in the DSU for the EC's claim and that their claims are covered by the Panel's terms of reference. They argue that Article 3.8 of the DSU presupposes a finding of infringement

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[27] We exclude from this confirmation any suggestion that the panel request was sufficient to allow claims based on the Agreement on Agriculture and Article 5 of the TRIMs Agreement since as to those provisions, the panel request did not comply at all with the requirements of Article 6.2 and, accordingly, there was no uncertainty that could be cured.

[28] The panel request listed Article XI of GATT, but no claims under Article XI were pursued by the Complainants.

[29] Article 3.3 of the DSU provides that the prompt settlement of disputes is essential "in situations where a Member considers that benefits accruing to it directly or indirectly under the covered agreements are being impaired". Article 3.7 of the DSU requires Members to exercise judgment as to whether invocation of the DSU would be "fruitful".

prior to a consideration of the nullification-or-impairment issue, suggesting that even if no compensation were due, an infringement finding could be made. Moreover, they argue that it is inappropriate to try to define potential trade. They also mention that in a past case the EC advanced a broad notion of nullification or impairment, which if generally accepted would permit the Complainants to claim nullification or impairment in this case.

7.49 In examining this issue, we note that neither Article 3.3 nor 3.7 of the DSU nor any other provision of the DSU contain any explicit requirement that a Member must have a "legal interest" as a prerequisite for requesting a panel. The reference in Article XXIII of GATT to nullification or impairment (or the impeding of the attainment of any GATT objective) does not establish a procedural requirement. Moreover, Article 3.8 of the DSU provides that nullification or impairment is normally presumed if there is an infringement of the obligations of a WTO agreement.[30]

7.50 We fail to see that there is, or should be, a legal interest test under the DSU. This view is corroborated by past GATT practice, which suggests that if a complainant claims that a measure is inconsistent with the requirements of GATT rules, there is not a requirement to show actual trade effects. GATT rules have been consistently interpreted to protect "competitive opportunities" as opposed to actual trade flows. For example, in the 1949 Working Party Report on Brazilian Internal Taxes, a number of the members of the working party took the view that

> "the absence of imports from contracting parties ... would not necessarily be an indication that they had no interest in the exports of the product affected by the tax, since their potentialities as exporters, given national treatment, should be taken into account".[31]

This view was confirmed in the 1958 *Italian Agricultural Machinery* case, where the panel noted that Article III of GATT applied to "any laws or regulations which might adversely modify the conditions of competition between the domestic and imported products".[32] The *Section 337* case notes that Article III is concerned with "effective equality of opportunities for imported products".[33] These cases confirm that WTO rules are not concerned with actual trade, but rather with competitive opportunities. Generally, it would be difficult to conclude that a Member had no possibility of competing in respect of a product or service. The United States does produce bananas in Puerto Rico and Hawaii. Moreover, even if the United States did not have even a potential export interest, its internal market for bananas could be affected by the EC regime and that regime's effect on

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[30] See Panel Report on "United States - Taxes on Petroleum and Certain Imported Substances", adopted on 17 June 1987, BISD 34S/136, 158, para. 5.1.9.

[31] GATT/CP.3/42, adopted 30 June 1949, II/181, 185, para. 16.

[32] Panel Report on "Italian Discrimination Against Imported Agricultural Machinery", adopted 23 October 1958, 7S/60, 64, para. 12.

[33] Panel Report on "United States - Section 337 of the Tariff Act of 1930", adopted on 7 November 1989, BISD 36S/345, 386-387, para. 5.11.

world supplies and prices. Indeed, with the increased interdependence of the global economy, which means that actions taken in one country are likely to have significant effects on trade and foreign direct investment flows in others, Members have a greater stake in enforcing WTO rules than in the past since any deviation from the negotiated balance of rights and obligations is more likely than ever to affect them, directly or indirectly. Since the United States is likely to be affected by the EC regime, it would have an interest in a determination of whether the EC regime is inconsistent with the requirements of WTO rules. Thus, in our view a Member's potential interest in trade in goods or services and its interest in a determination of rights and obligations under the WTO Agreement are each sufficient to establish a right to pursue a WTO dispute settlement proceeding. Moreover, we note that this result is consistent with decisions of international tribunals.[34]

7.51 As to the EC's suggestions that the absence of a legal interest test (defined to exclude the US "goods" claims in this case) would undermine the DSU because it would lead to litigation "by all against all" and that the interests of Members in any given case can be adequately protected through assertion of a third party rights in the case, we note that all Members have an interest in ensuring that other Members comply with their obligations. That interest is not completely served by the possible assertion of third party rights since there may be no occasion to assert such rights unless another Member initiates a DSU proceeding and since third party rights are more limited than the rights of parties. The likelihood of litigation by all against all seems unlikely, as Members are admonished by Article 3.7 of the DSU to exercise restraint in bringing cases and the cost of bringing cases is such, especially in a case like this one, that this admonition is likely to be followed. In our view, it is also unlikely that significant numbers of cases will be initiated by Members that have no immediate trade interest in their results.

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[34] The International Court of Justice has not defined the concept of legal interest in specific terms. However, a number of its cases would support finding a legal interest in this case. For example, in the *Wimbledon* case, the Permanent Court of International Justice found that a state could raise a claim with respect to the Kiel Canal even though its fleet did not want to use it, suggesting that a potential interest was sufficient for a legal interest. PCIJ (1923), Ser. A, no. 1, 20. In *Northern Cameroons* (*Preliminary Objections*), the ICJ stated:

> "The function of the Court is to state the law, but it may pronounce judgment only in connection with concrete cases where there exists at the time of adjudication an actual controversy involving a conflict of legal interest between the parties. The Court's judgment must have some practical consequence in the sense that it can affect existing legal rights or obligations of the parties, thus removing uncertainty from their legal relations" (ICJ Reports (1963), 33-34).

Here, our decision will have such an effect to the extent that the EC is obligated to revise the challenged measures. See also Part II of the Draft Articles on State Responsibility, art. 40.2(e)-(f), provisionally adopted by the Drafting Committee of the International Law Commission. A/CN.4/L.524, 21 June 1996.

7.52 Thus, we find that under the DSU the United States has a right to advance the claims that it has raised in this case.

4. Number of Panel Reports

7.53 The EC requested the Panel, pursuant to Article 9 of the DSU, to prepare four panel reports in this case-one each for the claims of Ecuador, Guatemala and Honduras (who filed a joint first submission), Mexico and the United States. The Complainants suggested that, even if the EC had a right to insist on separate reports under Article 9, it should not do so because of the increased administrative burden that would be placed upon the Panel. Moreover, they requested that the Panel should make the same findings and conclusions with respect to the same claims.

7.54 Article 9 of the DSU provides in relevant part as follows:

> "1. Where more than one Member requests the establishment of a panel related to the same matter, a single panel may be established to examine these complaints taking into account the rights of all Members concerned. ...
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> 2. The single panel shall organize its examination and present its findings to the DSB in such a manner that the rights the parties to the dispute would have enjoyed had separate panels examined the complaints are in no way impaired. If one of the parties to the dispute so requests, the panel shall submit separate reports on the dispute concerned. ...".

7.55 We interpret the terms of Article 9 to require us to grant the EC request. However, in light of the fact that the Complainants presented joint oral submissions to the Panel, joint responses to questions and a joint rebuttal submission, as well as the fact that they have collectively endorsed the arguments made in each other's first submissions, we must also take account of the close interrelationship of the Complainants' arguments.

7.56 In our view, one of the objectives of Article 9 is to ensure that a respondent is not later faced with a demand for compensation or threatened by retaliation under Article 22 of the DSU in respect of uncured inconsistencies with WTO rules that were not complained of by one of the complaining parties participating in a panel proceeding. Our reports must bear this objective in mind.

7.57 For purposes of determining whether a Complainant in this matter has made a claim, we have examined its first written submission, as we consider that document determines the claims made by a complaining party. To allow the assertion of additional claims after that point would be unfair to the respondent, as it would have little or no time to prepare a response to such claims. In this regard, we note that paragraph 12(c) of the Appendix 3 to the DSU on "Working Procedures" foresees the simultaneous submission of the written rebuttals by complaining and respondent parties, a procedure that was followed in this case. To allow claims to be presented in the rebuttal submissions would mean that the re-

spondent would have an opportunity to rebut the claims only in its oral presentation during the second meeting. In our view, the failure to make a claim in the first written submission cannot be remedied by later submissions or by incorporating the claims and arguments of other complainants.

7.58 Accordingly, we have decided that the description of the Panel's proceedings, the factual aspects and the parties' arguments should be identical in the four reports. In the "Findings" section, however, the reports differ to the extent that the Complainants' initial written submissions to the Panel differ in respect of alleging inconsistencies with the requirements of specific provisions of specific agreements. Thus, to take an example, the report for Guatemala and Honduras does not discuss GATS issues because their initial written submission did not allege inconsistencies with the requirements of GATS provisions.

7.59 In light of the foregoing, in the "Findings" we use the term "the Complainants" to refer to all of the Complaining parties who have made a particular claim. In discussing the claim, when we refer to the Complainants' arguments, we mean all arguments made in support of the claim by the various Complaining parties, who have incorporated each other's arguments into their own. Thus, the term "the Complainants" in this report means Mexico and one or more of the other Complaining parties. In the case where only Mexico has made a claim, we refer to that claim as having been made by Mexico.

7.60 As explained above, when one of the Complaining parties has not claimed that a specific provision of a specific agreement has been violated in its initial written submission to the Panel, we do not discuss our findings with respect to that claim in the report for that party. However, for the convenience of readers of the four reports, we have used the same paragraph numbers and footnote numbers for the substantive discussions of the same issues in the four reports. Where an issue has not been raised by Mexico, we indicate in this report which reports and which paragraph numbers in those reports discuss that issue.

C. Substantive Issues

7.61 We now turn to an examination of the substantive issues raised by the Complainants in respect of the EC's regime for the importation, sale and distribution of bananas. We first address claims related to the EC's quantitative allocations for bananas, including the shares assigned to the ACP countries and to signatories of the Framework Agreement on Bananas ("BFA"). Second, we consider tariff issues, including preferences afforded to imports of certain ACP bananas. We then consider the claims made in respect of the EC licensing procedures for bananas. Finally, we examine the claims raised in respect of the General Agreement on Trade in Services.

7.62 Before doing so, we consider 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. 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.[35] 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.

7.63 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.

1. The EC Market for Bananas: Article XIII of GATT

7.64 As of 1995, bananas could be marketed in the EC as follows:

a. First, up to 857,700 tonnes of bananas were permitted to enter duty-free from traditional ACP suppliers.

b. Second, pursuant to its GATT Article II Schedule, the EC permitted the entry of a total of up to 2.2 million tonnes of bananas at a tariff of 75 ECU per tonne. This quota was allocated as follows: (i) 49.4 per cent to the countries who are parties to the BFA; (ii) 90,000 tonnes to ACP countries in respect of amounts that they did not traditionally supply to EC member States (admitted duty-free); and (iii) the rest (46.5 per cent) to other banana exporters. In 1995 and 1996, the EC increased the 2.2 million tonne tariff quota by 353,000 tonnes to take account of the enlargement of the EC to include Austria, Finland and Sweden, although no change has been made in the EC's Schedule. Additional quantities were permitted at the in-quota tariff via hurricane licences.

c. Third, imports of bananas in excess of the above-mentioned amounts were subject in 1995 to a tariff of 822 ECU per tonne (722 ECU for ACP bananas). The 822 ECU per tonne tariff will fall in equal instalments to 680 ECU per tonne on full implementation of the EC's Uruguay Round commitments.

d. Finally, bananas from EC territories could be sold on the EC market without restriction. In 1995, 658,200 tonnes of such bananas were marketed in the EC.

7.65 The Complainants claim that the EC has failed to allocate country-specific tariff quota shares to those Complainants that export bananas to the EC and that the EC's allocation of tariff quota shares to the ACP and BFA countries is inconsistent with the requirements of the tariff quota allocation rules of Article XIII of

[35] 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, 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, DSR 1996:I, 97 at 113-115.

GATT. The EC responds that it has complied with the terms of Article XIII. In particular, the EC argues that the preferences it provides to traditional ACP bananas are permitted under the Lomé waiver and its treatment of BFA and other bananas is provided pursuant to the EC's Schedule into which the BFA is incorporated.

7.66 We first consider how Article XIII of GATT should be interpreted and whether the EC's banana tariff quota shares conform to its requirements. We then consider whether any inconsistencies with Article XIII are waived by the Lomé waiver or permitted as a result of the negotiation of the BFA and its inclusion in the EC's Schedule.

(a) Article XIII

7.67 Article XIII of GATT generally regulates the administration of quotas and tariff quotas. In relevant parts, it provides as follows:

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

> or formalities shall be imposed which would prevent any Member from utilizing fully the share of any such total quantity or value which has been allotted to it, subject to importation being made within any prescribed period to which the quota may relate.*[36]
>
> ...
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> 4. With regard to restrictions applied in accordance with paragraph 2 (*d*) of this Article or under paragraph 2 (*c*) of Article XI, the selection of a representative period for any product and the appraisal of any special factors*[37] affecting the trade in the product shall be made initially by the Member applying the restriction; *Provided* that such Member shall, upon the request of any other Member having a substantial interest in supplying that product or upon the request of the [CONTRACTING PARTIES], consult promptly with the other Member or the [CONTRACTING PARTIES] regarding the need for an adjustment of the proportion determined or of the base period selected, or for the reappraisal of the special factors involved, or for the elimination of conditions, formalities or any other provisions established unilaterally relating to the allocation of an adequate quota or its unrestricted utilization.
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> 5. The provisions of this Article shall apply to any tariff quota instituted or maintained by any Member, and, in so far as applicable, the principles of this Article shall also extend to export restrictions.

7.68 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. In the terms of the general rule[38] of the chapeau of Article XIII:2:

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[36] Note Ad Article XIII, Paragraph 2(d), reads: "No mention was made of 'commercial considerations' as a rule for the allocation of quotas because it was considered that its application by governmental authorities might not always be practicable. Moreover, in cases where it is practicable, a Member could apply these considerations in the process of seeking agreement, consistently with the general rule laid down in the opening sentence of paragraph 2".

[37] Note Ad Article XIII, Paragraph 4, provides: "See note relating to 'special factors' in connection with the last subparagraph of paragraph 2 of Article XI". That note reads as follows: "The term 'special factors' includes changes in relative productive efficiency between domestic and foreign producers, or as between different foreign producers, but not changes artificially brought about by means not permitted under the Agreement".

[38] At the 1955 Review Session, a working party considering amendments to Article XIII stated: "The Working Party ... agreed to recognize that the general rule contained in the introduction to paragraph 2 governed the various sub-paragraphs of that paragraph including those of sub-paragraph (d)". Working Party Report on "Quantitative Restrictions", adopted on 2, 4 and 5 March 1955, BISD 3S/170, 176, para. 24.

> "In applying import restrictions to any product, Members shall aim at a distribution of trade in such product approaching as closely as possible the shares which the various Members might be expected to obtain in the absence of such restrictions ... ".

In this case, we are concerned with tariff quotas, which are permitted under GATT rules, and not quantitative restrictions *per se*. However, Article XIII:5 makes it clear, and the parties agree, that Article XIII applies to the administration of tariff quotas. In light of the terms of Article XIII, it can be said that the object and purpose of Article XIII: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. 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.

7.69 While previous panels have dealt with specific aspects of Article XIII, this is the first case in which a broad challenge to a quota or tariff quota system has been made. Therefore, we must in the first instance consider in general terms how the various subdivisions of Article XIII work together. 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. 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. The only directly relevant panel report dealt with this issue briefly, but confirms this interpretation of Article XIII:1. The report found an inconsistency with the requirements of Article XIII:1 where a GATT contracting party negotiated export restrictions on imports of products from some countries but imposed unilateral import restrictions on the like products from another country. The report also noted differences in administration (import restrictions versus export restraint) and in transparency between the two measures.[39]

7.70 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 possi-

[39] 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. See also Panel Report on "EEC - Quantitative Restrictions Against Imports of Certain Products from Hong Kong", adopted 12 July 1983, BISD 30S/129, 139-140, para. 33.

ble the shares which Members might be expected to obtain in the absence of such restrictions" (chapeau of Article XIII:2(d)).

7.71 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.

7.72 The terms of Article XIII:2(d) make clear that the combined use of agreements and unilateral allocations to Members with substantial interests is not permitted. The text of Article XIII:2(d) provides that where the first "method", i.e., agreement, is not reasonably practicable, then an allocation must be made. Thus, in the absence of agreements with all Members having a substantial interest in supplying the product, the Member applying the restriction must allocate shares in accordance with the rules of Article XIII:2(d), second sentence. In the absence of this rule, the Member allocating shares could reach agreements with some Members having a substantial interest in supplying the product that discriminated against other Members having a substantial interest supplying the product, even if those other Members objected to the shares they were to be allocated.

7.73 The question then is whether 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. 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 restricted as required by Article XIII:1.[40] 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.

7.74 The allocation of country-specific tariff quota shares to all supplying countries on the basis of the first method (agreement) may in practice be difficult since there will likely be demand for more than 100 per cent of the tariff quota

[40] 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.

and, furthermore, there would be no possibility to make provision for new suppliers. This would leave the second method as the only practical alternative-a result that, however, runs counter to the provision of Article XIII:2(d) to first seek agreement with all Members having a substantial interest in supplying the product concerned.

7.75 The consequence of the foregoing analysis is that Members may be effectively required to use a general "others" category for all suppliers other than Members with a substantial interest in supplying the product. The fact that in this situation tariff quota shares are allocated to some Members, notably those having a substantial interest in supplying the product, but not to others that do not have a substantial interest in supplying the product, would not necessarily be in conflict with Article XIII:1. While the requirement of Article XIII:2(d) is not expressed as an exception to the requirements of Article XIII:1, it may be regarded, to the extent that its practical application is inconsistent with it, as *lex specialis* in respect of Members with a substantial interest in supplying the product concerned.

7.76 In so far as this in practice results in the use of an "others" category for all Members not having a substantial interest in supplying the product, it comports well with the object and purpose of Article XIII, as expressed in the general rule to the chapeau to Article XIII:2. When a significant share of a tariff quota is assigned to "others", the import market will evolve with the minimum amount of distortion. Members not having a substantial supplying interest will be able, if sufficiently competitive, to gain market share in the "others" category and possibly achieve "substantial supplying interest" status which, in turn, would provide them the opportunity to receive a country-specific allocation by invoking the provisions of Article XIII:4. New entrants will be able to compete in the market, and likewise have an opportunity to gain "substantial supplying interest" status. For the share of the market allocated to Members with a substantial interest in supplying the product, the situation may also evolve in light of adjustments following consultations under Article XIII:4. In comparison to a situation where country-specific shares are allocated to all supplying countries, including Members with minor market shares, this result is less likely to lead to a long-term freezing of market shares. This is, in our view, consistent with the terms, object and purpose, and context of Article XIII.

7.77 In this case, we are confronted with the following situation: with respect to its common market organization for bananas, the EC reached an agreement on shares in its bound tariff quota for bananas with the BFA countries, allocated shares of that tariff quota in respect of non-traditional ACP bananas and created an "others" category in that tariff quota for other Members (and non-Members). In addition, it also allocated tariff quota quantities to traditional ACP suppliers of bananas. To evaluate this situation in light of the foregoing discussion of Article XIII, it is necessary to consider (i) whether the EC market organization for imported bananas should be analyzed as one or two regimes for purposes of Article XIII, (ii) which Members could be considered to have had a substantial interest in supplying bananas to the EC at the time the EC regulation was put in place

and how they were treated by the EC, (iii) how Members without such a substantial interest were treated and (iv) the position of new Members.

(i) Separate Regimes

7.78 The EC has one common market organisation for bananas established by Regulation 404/93. It has argued, however, that it has two separate regimes for imported bananas - one for bananas traditionally supplied by certain ACP countries, and one for bananas from non-traditional ACP, BFA and other third-country sources. In its view, the Panel should separately examine the consistency of each of these regimes with the requirements of Article XIII. The EC claims that the regime for traditional supplies of ACP bananas has a different legal basis than the bound tariff quota for bananas because it is a preferential regime in that different tariff rates apply to ACP bananas as compared to other bananas. The Complainants argue that nothing in the language of Article XIII supports such a distinction, that recognizing it would undermine the purpose of that Article and that Article implies that there cannot be separate regimes because if there were, imports under the separate regimes would not be similarly restricted as required by Article XIII:1.

7.79 We note that Article XIII:1 provides that no restriction shall be applied by any Member on the importation of any product of another Member "unless the importation of the like product of all third countries ... is similarly ... restricted". Article XIII:2 requires Members when allocating tariff quota shares to "aim at a distribution of trade ... approaching as closely as possible the shares which the various Members might be expected to obtain in the absence of such restrictions". By their terms, these two provisions of Article XIII do not provide a basis for analysing quota allocation regimes separately because they have different legal bases or because different tariff rates are applicable. Article XIII applies to allocations of shares in an import market for a particular product which is restricted by a quota or tariff quota. In our view, its non-discrimination requirements apply to that market for that product, irrespective of whether or how a Member subdivides it for administrative or other reasons. Indeed, 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.

7.80 Similarly, in our view, the existence of different tariff rates does not imply that the EC import measures applied to bananas must or should be treated as two separate regimes. The object and purpose of Article XIII:2 is to attempt to approximate under a tariff quota regime the trade shares that would have occurred in the absence of the tariff quota. To the extent that a preferential tariff benefits imports from certain countries, their trade shares should already reflect that preference. Thus, the fact that different tariff rates may apply to imports from different Members does not justify separate analysis of the allocation of tariff quota shares on the basis of the tariff applicable to the Member in question, without reference to the allocations to Members subject to a different tariff rate. While it

is true that non-beneficiaries of the tariff preference by definition cannot benefit from that preference, they may be affected by the way in which tariff quota shares benefitting from the tariff preference are allocated. For example, an allocation of shares could be made in a way that would allow beneficiaries of the tariff preference to compete more effectively than would the tariff preference alone. Not to apply Article XIII in such a situation would mean that preferential treatment in addition to the tariff preference was being afforded to those Members.

7.81 Past GATT and WTO practice suggests that Members have typically distinguished between tariff preferences and non-tariff preferences. For example, in the so-called Enabling Clause, preferential tariff treatment on a unilateral basis is authorized for developing countries in general terms in accordance with the Generalized System of Preferences, while non-tariff preferences are permitted only to the extent governed by instruments multilaterally negotiated under GATT/WTO auspices.[41] As noted below (paragraph 7.106), most current waivers allowing preferential treatment have been limited to preferential tariff treatment. The "separate regimes" argument of the EC blurs these distinctions and would result in a tariff preference providing preferential treatment in addition to a tariff advantage.

7.82 We find that the EC has only one regime for banana imports for purposes of analysing whether its allocation of tariff quota shares is consistent with the requirements of Article XIII.

(ii) Members with a Substantial Interest

7.83 The following statistics supplied by the EC indicate the shares of suppliers to the EC banana market during the 1989-1991 period. We use 1989-1991 statistics because the EC claims that at the time it negotiated the BFA, 1992 statistics were not available. Although the Complainants contest this assertion, they have not convinced us that such statistics were in fact available.

[41] Decision of the CONTRACTING PARTIES of 28 November 1979 on "Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries", BISD 26S/203.

GATT Contracting Party 1993	1989-1991 Average Volume (tonnes)	1989-1991 Average of Shares %
Costa Rica	508,957	19.7
Colombia	409,153	15.7
St. Lucia	114,445	4.5
Côte d'Ivoire	98,908	3.8
Cameroon	82,938	3.1
St.Vincent & the Grenadines	70,464	2.7
Jamaica	57,505	2.2
Dominica	52,628	2.0
Nicaragua	44,840	1.7
Suriname	28,465	1.1
Guatemala	28,128	1.2
Belize	23,412	0.9
Grenada	8,215	0.3
Dominican Republic	4,789	0.2
Venezuela	90	0.0
Madagascar	23	0.0
Other ACP countries	1,215	0.1
Total	1,534,062	59.2

Non - GATT Contracting Party 1993	1989-1991 Average Volume (tonnes)	1989-1991 Average of Shares %
Panama	465,701	18
Ecuador	401,419	15.2
Honduras	136,858	5.4
Somalia	41,751	1.7
Cape Verde	2,820	0.1
Total	1,048,549	40.4

The EC argues that only Colombia and Costa Rica had a "substantial interest in supplying the product" in the sense of Article XIII:2(d), in that they were the only GATT contracting parties at the time with market shares of more than 10 per cent

and that, analogously to practice under Article XXVIII of GATT, a market share of 10 per cent could be considered as the threshold for a country to establish a substantial interest.[42] The other major suppliers to the EC market-Ecuador and Panama-were not GATT contracting parties at the time. The remaining suppliers had relatively minor shares. The Complainants argue that the EC cannot claim compliance with Article XIII:2(d), first sentence, because there were GATT contracting parties with which the EC did not reach agreement and that they in some cases had more significant market shares of EC banana imports than some of the countries with which the EC did reach agreement in the BFA.

7.84 We do not find it necessary to set a precise import share for determination of whether a Member has a substantial interest in supplying a product. A determination of substantial interest might well vary somewhat based on the structure of the market.[43]

7.85 Given the particular circumstances of this case, we find that it was not unreasonable for the EC to conclude that at the time the BFA was negotiated Colombia and Costa Rica were the only contracting parties that had a substantial interest in supplying the EC banana market in terms of Article XIII:2(d). We also find that it is not reasonable to conclude that at the time the BFA was negotiated Nicaragua and Venezuela had a substantial interest in supplying the EC banana market in the terms of Article XIII:2(d).

7.86 Before turning to the consequences of the above finding, we must consider whether it would be possible for other Members to challenge an agreement reached under Article XIII:2(d), first sentence. The EC argues that since it negotiated an agreement with Colombia and Costa Rica in compliance with Article XIII:2(d), first sentence, the provisions of that agreement may not be challenged as not complying with other provisions of Article XIII. However, even though the EC did negotiate an agreement as foreseen in Article XIII:2(d), first sentence, it is necessary to keep in mind that the goal of any such agreement is provided in the general rule in the chapeau to Article XIII:2. We would not rule out the possibility that an agreement that does not generally achieve this goal may be open to challenge by Members who are not parties to the agreement, even if there is no requirement to include such Members in the negotiations because they do not have a substantial interest in supplying the product concerned. For example, in our view, it would be possible for other Members to challenge an agreement be-

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[42] Paragraph 7 to the Note Ad Article XXVIII:1 states that "[t]he expression 'substantial interest' is not capable of a precise definition ... It is, however, intended to be construed to cover only those Members which have ... a significant share in the market ...". It was indicated in 1985, however, that a 10 per cent rule has been applied generally. Analytical Index: Guide to GATT Law and Practice, 6th rev. ed. 1995, p.941, citing TAR/M/16, p.10.

[43] We note that in the case of Article XXVIII, the Uruguay Round Understanding on the Interpretation of Article XXVIII of the General Agreement on Tariffs and Trade 1994 provides that the Member which has the highest ratio of exports affected by the concession to its total exports shall be deemed to have principal supplying interest in the product at issue for purposes of negotiations under Article XXVIII. There is so far no similar understanding applicable to Article XIII.

tween the EC, Colombia and Costa Rica if it divided the bound tariff quota between only Colombia and Costa Rica. Support for allowing for the possibility of such a challenge is found in past GATT practice.[44]

7.87 In this case, however, we find it unnecessary to specify in detail under what circumstances an agreement reached pursuant to Article XIII:2(d) may be challenged. If our findings on the use of separate regimes (paragraph 7.82), on the shares assigned to Members without a substantial interest (paragraph 7.90) and the rights of new Members under Article XIII (paragraph 7.92), as well as those relating to the EC's licensing procedures, are adopted by the DSB, it will be necessary for the EC to reconsider its treatment of banana imports, including the allocation of tariff quota shares.

7.88 Accordingly, we make no finding on whether the allocation of shares to Colombia and Costa Rica is consistent with the requirements of the general rule in the chapeau to Article XIII:2(d).

(iii) Members without a Substantial Interest

7.89 As noted above (paragraph 7.73), Article XIII:1 would permit the EC to allocate a tariff quota share to all supplying Members without a substantial interest in the form of an "others" category, without specific shares. In this case, the EC allocated tariff quota shares by agreement and assignment to some Members (e.g., ACP countries (in respect of traditional and non-traditional exports), Nicaragua and Venezuela) without allocating such shares to other Members (e.g., Guatemala). Moreover, under the BFA, the BFA countries were given special rights in respect of reallocation of tariff quota shares[45] that were not given to

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[44] For example, in a case involving Norwegian quotas on textiles products, the panel found that Norway had reached agreement on the limitation of textiles imports from six countries, but not Hong Kong. The panel found that the quantitative restrictions limiting Hong Kong exports were subject to Article XIII:2 and ruled that

> "Norway's reservation of market shares for these six countries therefore represented a partial allocation of quotas under an existing regime of import restrictions of the product in question and that Norway must therefore be considered to have acted under Article XIII:2(d). ... The Panel was of the view that to the extent that Norway had acted with effect to allocate import quotas for these products to six countries but had failed to allocate a share to Hong Kong, its ... action was inconsistent with Article XIII".

This report's conclusion was based in part on the fact that Hong Kong had a substantial interest in supplying most of the products at issue. Nonetheless, the report supports the argument that Article XIII:2(d) agreements may be challenged by Members not having a substantial interest, as the panel report drew no distinction between products where Hong Kong had a substantial interest and those where it did not. Panel Report on "Norway - Restrictions on Imports of Certain Textiles Products", adopted on 18 June 1980, BISD 27S/119, 125-126, paras. 15-16.

[45] Under the BFA, there is a general provision that provides that if a country with a country-specific share of the tariff quota indicates to the EC that it will be unable to deliver the allocated quantity, the amount of the short-fall is to be allocated in accordance with the BFA allocations (including to the "others" category). The BFA also provides that countries with country-specific shares

other Members (e.g., Guatemala). For the reasons noted above (paragraphs 7.69 and 7.73), such differential treatment of like products from Members is inconsistent with the requirements of Article XIII:1.

7.90 Accordingly, we find that (i) the EC's allocation of tariff quota shares by agreement and by assignment to some Members not having a substantial interest in supplying bananas to the EC (including Nicaragua and Venezuela and certain ACP countries in respect of traditional and non-traditional exports) but not to other Members (such as Guatemala) and (ii) the tariff quota reallocation rules of the BFA, are inconsistent with the requirements of Article XIII:1.

(iv) New Members

7.91 We now consider the position of a Member who acceded to the WTO or GATT after the implementation of the EC common market organization for bananas (a "new" Member). As noted above, the general rule in the chapeau to Article XIII:2 indicates that the aim of Article XIII:2 is to give to Members the share of trade that they might be expected to obtain in the absence of a tariff quota. There is no requirement that a Member allocating shares of a tariff quota negotiate with non-Members, but when such countries accede to the WTO, they acquire rights, just as any other Member has under Article XIII whether or not they have a substantial interest in supplying the product in question.

7.92 Thus, although the EC reached an agreement with all Members who had a substantial interest in supplying the product at one point in time, under the consultation provisions of Article XIII:4, the EC would have to consider the interests of a new Member who had a substantial interest in supplying the product if that new Member requested it to do so.[46] The provisions on consultations and adjustments in Article XIII:4 mean in any event that the BFA could not be invoked to justify a permanent allocation of tariff quota shares. Moreover, while new Members cannot challenge the EC's agreements with Colombia and Costa Rica in the BFA on the grounds that the EC failed to negotiate and reach agreement with them, they otherwise have the same rights as those Complainants who were GATT contracting parties at the time the BFA was negotiated to challenge its

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of the tariff quota may jointly request the EC to allocate the short-fall differently, in which case the EC is required to do so. As a result, according to the Complainants, in 1995 and 1996, all of the tariff quota share allocated to Nicaragua, and 70 and 30 per cent, respectively, of the share allocated to Venezuela, have been reallocated to Colombia.

[46] While the provisions of Article XIII:4 on consultations and adjustments seem to be primarily aimed at adjustments to quota shares allocated pursuant to Article XIII:2(d), second sentence, they also apply in the case where agreements were reached pursuant to Article XIII:2(d), first sentence, with Members having a substantial interest in supplying the product concerned. In addition, in so far as a new Member has a substantial interest in supplying that product, its share of the "others" category can be viewed, for purposes of Article XIII:4, as a provision established unilaterally relating to the allocation of an adequate quota.

consistency with Article XIII. Generally speaking, all Members benefit from all WTO rights.

7.93 In this connection, we find that the failure of Ecuador's Protocol of Accession to address banana-related issues does not mean that Ecuador must accept the validity of the BFA as contained in the EC's Schedule or that it is precluded from invoking Article XIII:2 or XIII:4.

(v) Other Arguments

7.94 In light of our findings in respect of Article XIII:1, we find it unnecessary to address the claims and arguments in respect of the interpretation of Article XIII:2(d), second sentence (e.g., the use of a "previous representative period" and "special factors") or in respect of the EC's enlargement to include Austria, Finland and Sweden.[47] We would note, however, that in order to bring its banana import regulations into line with Article XIII, the EC would have to take account of Article XIII:1 and XIII:2(d). In order to allocate country-specific tariff quota shares consistently with the requirements of Article XIII, the EC would have to base such shares on an appropriate previous representative period[48] and any special factors would have to be applied on a non-discriminatory basis (see paragraph 7.69).

(b) The Allocation of Tariff Quota Shares to ACP Countries: the Lomé Waiver

7.95 In light of the finding that the EC's allocation of country-specific tariff quota shares for bananas to the ACP countries for both traditional and non-traditional bananas is not consistent with the requirements of Article XIII (paragraph 7.90), we now consider whether that inconsistency is covered by the Lomé

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[47] The Appellate Body has stated that "[a] panel need only address those claims which must be addressed in order to resolve the matter in issue in the dispute". Appellate Body Report on "United States - Measure Affecting Imports of Woven Wool Shirts and Blouses from India", issued on 25 April 1997, WT/DS33/AB/R, DSR 1997:I, 323 at 340.

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

> "[I]n keeping with normal GATT practice, the Panel considered it appropriate to use as a 'representative period' a three-year period previous to 1979, the year in which the EC measures were in effect. Due to the existence of restrictions in 1976, the Panel held that that year could not be considered as representative, and that the year immediately preceding 1976 should be used instead. The Panel thus chose the years 1975, 1977, 1978 as a 'representative period'".

Panel Report on "EEC Restrictions on Imports of Dessert Apples - Complaint by Chile", adopted on 10 November 1980, BISD 27S/98, 113, para. 4.8. In the report of the "Panel on Poultry", issued on 21 November 1963, GATT Doc. L/2088, para. 10, the panel stated: "[T]he shares in the reference period of the various exporting countries in the Swiss market, which was free and competitive, afforded a fair guide as to the proportion of the increased German poultry consumption likely to be taken up by United States exports". See also Panel Report on "Japan - Restrictions on Imports of Certain Agricultural Products", adopted on 22 March 1988, BISD 35S/163, 226-227, para. 5.1.3.7.

waiver. In this connection, we recall the findings of the second *Banana* panel report.[49] It found that (i) the specific duties levied by the EC on imports of bananas were inconsistent with Article II, (ii) the preferential tariff rates for banana imports from ACP countries were inconsistent with the requirements of Article I and (iii) certain procedures regarding the allocation of licences were inconsistent with the requirements of Articles I and III. It also found that the then effective EC rules did not discriminate between sources of supply in the sense of Article XIII because the licences issued to import bananas could be used to import bananas from any source. After the issuance of the panel report, which was not adopted by the GATT CONTRACTING PARTIES, the EC and the ACP countries that were GATT contracting parties requested a waiver (although they were and still are of the opinion that such a waiver is not needed) of the EC's Article I:1 obligations in order to permit the EC to provide preferential treatment to the ACP countries as required by the Lomé Convention.[50]

7.96 Subsequently, the Lomé waiver was adopted by the GATT CONTRACTING PARTIES in December 1994 and was extended by the WTO General Council in October 1996.[51] Under the operative paragraph of the Lomé waiver,

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

In order to determine whether the EC may allocate tariff quota shares to the ACP countries inconsistently with the requirements of Article XIII, we must determine whether those allocations are covered by the Lomé waiver. This determination involves resolving two interpretative issues. First, what preferential treatment in respect of bananas is "required" by the Lomé Convention? Second, does the

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[49] Panel Report on "EEC - Import Regime for Bananas", issued 11 February 1994 (not adopted), DS38/R, p.52, paras. 169-170.

[50] The EC's Uruguay Round Schedule substituted a specific tariff in place of its prior *ad valorem* tariff binding for bananas. The consistency of that substitution with GATT rules is examined in para. 7.137 *et seq*. of the Guatemala-Honduras report. In respect of the panel's finding that the EC regime was inconsistent with the requirements of Article III, the EC did not change the regime and we examine that issue in para. 7.171.

[51] EC - The Fourth ACP-EEC Convention of Lomé, Waiver Decision of 9 December 1994, L/7604, 19 December 1994; Extension of the Waiver, Decision of 14 October 1996, WT/L/186. Although the Lomé waiver was initially approved by the GATT CONTRACTING PARTIES until 29 February 2000, it was necessary for the WTO General Council to consider whether to extend it because under the Uruguay Round Understanding in Respect of Waivers of Obligations under the General Agreement on Tariffs and Trade 1994, all waivers in effect on the entry into force of the WTO Agreement expired two years thereafter (i.e., on 1 January 1997) unless extended.

Lomé waiver, which refers only to Article I:1 of GATT, encompass a waiver of Article XIII obligations as well?

(i) Preferential Treatment Required by the Lomé Convention

7.97 As a preliminary matter, the EC and the ACP countries argue that the Panel is not authorized to interpret the Lomé Convention. We accept that we are not directed in our terms of reference to interpret the Lomé Convention. We recall that we have found that the EC's allocation of tariff quota shares to ACP countries is inconsistent with the requirements of Article XIII (paragraph 7.90). However, in order to determine whether or not the EC's Article XIII obligations are waived, we must determine whether or not the Lomé waiver applies. That requires an interpretation of the Lomé waiver, which is a decision of the GATT CONTRACTING PARTIES, later extended by a WTO General Council decision. Since the waiver applies to action "necessary ... to provide preferential treatment ... *as required by the relevant provisions of the Fourth Lomé Convention*" (emphasis added), we must also determine what preferential treatment is required by the Lomé Convention.

7.98 The EC argues that the Panel must accept the EC and the ACP countries' interpretation of the Lomé Convention as valid since they are the parties to the Lomé Convention. We note that since the GATT CONTRACTING PARTIES incorporated a reference to the Lomé Convention into the Lomé waiver, the meaning of the Lomé Convention became a GATT/WTO issue, at least to that extent. Thus, we have no alternative but to examine the provisions of the Lomé Convention ourselves in so far as it is necessary to interpret the Lomé waiver. Moreover, we note that in their submissions to us, it appears that the EC and the ACP countries are not in accord on some aspects of what is required by the Lomé Convention.

7.99 We note that the Lomé Convention permits the EC to limit duty-free ACP country exports to the EC of products subject to common market organizations in the EC, i.e., many agricultural products. In respect of those products, Article 168(2)(a)(ii) of the Lomé Convention requires the EC to:

> "take necessary measures to ensure more favourable treatment than that granted to third countries benefitting from the most-favoured-nation clause for the same products".

Moreover, in the case of bananas, Protocol 5 to the Lomé Convention places some restraints on the EC's right to limit imports of ACP bananas. It specifies in Article 1:

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

Since the Lomé Convention was signed in 1989 and was expected to enter into force in 1990, we believe that the words "at present" should be interpreted to refer to 1990. A Joint Declaration to Protocol 5 provides that "Article 1 of Protocol 5 does not prevent the Community from establishing common rules for bananas as long as no ACP State, traditional supplier to the Community, is placed as regards access to, and advantages in, the Community in a less favourable situation than in the past or at present". The fact that the EC has done so obviously makes the meaning of Protocol 5 more difficult to ascertain since what was a system of individual EC member State markets has been transformed into one EC-wide market.

7.100 In allocating country-specific shares of the banana tariff quota to traditional ACP banana supplying countries, the EC set the shares at the level of each ACP country's "best-ever" exports to the EC, adjusted for certain other factors. The issue is whether it was required to do so by the Lomé Convention. The Complainants correctly point out that Protocol 5 does not guarantee that a certain level of banana exports will be achieved, and in response to questions of the Panel, the EC did not disagree. We recall that generally speaking, ACP countries formerly competed for the most part on either the French or UK markets and that on these markets they were protected by and large from import competition from other banana exporters. Given this degree of market access and advantage, the issue is how the EC could fulfil its obligations under Protocol 5 on an EC-wide market.

7.101 It appears that prior to Regulation 404/93 there were no set maximum levels for ACP exports to EC member State markets. While the ACP countries did not have specific quotas, they generally did enjoy protected access to one EC member State market (e.g., France, in the case of Cameroon and Côte d'Ivoire; Italy, in the case of Somalia; the UK, in the case of several Caribbean ACP countries).[52] Access to these markets was essentially controlled by ad hoc decisions.[53] We think that it can be reasonably contended that an EC-wide equivalent of the market access and advantages enjoyed by ACP countries in the past would be a country-specific tariff quota share, which may be assimilated to the past advantage of a protected EC member State market, set at their pre-1991 best-ever export levels. We note that since the pre-1991 best-ever export levels of the ACP countries occurred in different years for different countries (and in some cases, many years ago), there was no way for the EC to provide tariff quota shares covering such amounts consistently with the requirements of Article XIII:2, which requires shares to be based on a previous representative period, which has generally been interpreted to mean the most recent three years.[54] If the EC had (i) pro-

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[52] Panel Report on "EEC - Member States' Import Regime for Bananas", issued on 3 June 1993 (not adopted), DS32/R, p.3, para. 12.

[53] Id., pp.4-5, 7, paras. 19-22, 37-38.

[54] See Panel Report on "EEC - Restrictions on Imports of Apples from Chile", adopted on 10 November 1980, BISD 27S/98, 113, para. 4.8.

vided only a non-country-specific share for ACP countries or (ii) set shares for ACP countries at a level lower than their pre-1991 best-ever levels, an ACP country with the ability to export at its pre-1991 best-ever level might have been effectively prevented from doing so either by lack of the protected market provided by a specific-country share allocation or by the volume limit of its share allocation. Thus, in order not to place an ACP country in a less favourable situation as regards access to and advantages on its traditional markets, which is the EC's obligation under the Lomé Convention, it was not unreasonable for the EC to conclude that the Lomé Convention requires the allocation of country-specific tariff quota shares to the ACP countries in an amount of their pre-1991 best-ever exports of bananas to the EC. We accept that interpretation for purposes of our analysis of this issue.

7.102 There is, however, nothing in Protocol 5 that suggests that the EC is required to apply other factors to increase the shares of ACP countries above their best-ever export levels prior to 1991. While the Lomé Convention contains various provisions concerning trade promotion and assistance to ACP countries, there are no specific provisions established in the Lomé Convention that can be said to require country-specific tariff quota shares in excess of past exports. Thus, in our view, the EC is not required by the Lomé Convention to assign tariff quota shares to ACP countries in excess of their pre-1991 best-ever exports to the EC.

7.103 Accordingly, we find that it was not unreasonable for the EC to conclude that the Lomé Convention requires the EC to allocate country-specific tariff quota shares to traditional ACP banana supplying countries in an amount of their pre-1991 best-ever exports to the EC. However, we do find that the allocation of tariff quota shares to ACP countries in excess of their pre-1991 best-ever exports to the EC is not required by the Lomé Convention.

(ii) Application of the Lomé Waiver to the EC's Article XIII Obligations

7.104 The Lomé waiver, as quoted above, permits the EC to provide preferential treatment to ACP countries as required by the Lomé Convention. However, by its terms, the Lomé waiver only waives compliance with the provisions of Article I:1. Thus, the issue arises whether the EC's obligations under Article XIII are also waived in connection with preferential treatment required by the Lomé Convention. The Complainants argue that they are not and that such an interpretation would be unprecedented. Indeed, the EC has not argued that the Lomé waiver should be interpreted to waive its obligations under Article XIII. In its response to a question from the Panel, the EC stated that it did not claim and "has no need to suggest" that the Lomé waiver covers a violation of Article XIII. Rather the EC argued that (i) it has not acted inconsistently with the requirements of Article XIII and (ii) the Lomé waiver permits the preferential treatment required by the Lomé Convention. Since we have rejected the EC's argument that it has complied with Article XIII and have found that the EC's allocation of country-specific shares to ACP countries is inconsistent with Article XIII, we believe that it is

appropriate to consider also whether this inconsistency is covered by the Lomé waiver. In this regard, we note that the EC has also argued that where 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 (see paragraph 7.205).

7.105 In interpreting the scope of the Lomé waiver, we are mindful that the only GATT panel to interpret a waiver recalled that waivers are to be granted only in exceptional circumstances[55] and concluded that "their terms and conditions consequently have to be interpreted narrowly".[56] The waiver at issue in that case had no expiration date and permitted imposition of restrictions on a number of important agricultural products. A GATT working party on the waiver noted:

> "Since the Decision [approving the waiver] refers to the provisions of Articles II and XI of the Agreement, it does not affect the obligations of the United States under any other provisions of the Agreement. In particular, as its obligations under Article XIII are not affected, the United States would acquire no right by virtue of this waiver to deviate from the rule of non-discrimination provided for in that Article".[57]

In light of this practice, we now consider the scope of the Lomé waiver, and, in particular, whether it waives the obligations of the EC under Article XIII in respect of the allocation of tariff quota shares based on the best-ever exports of bananas by the ACP countries to the EC.

7.106 We recall that Article 168(2)(a)(ii) of the Lomé Convention requires some preferential treatment for products from ACP sources. As we have found above, Protocol 5 to the Lomé Convention expands this general obligation in respect of traditional ACP banana exports in that it is not unreasonable for the EC to interpret it to require the EC to provide access opportunities to the EC market for the ACP countries in a volume no greater than their pre-1991 best-ever exports to the EC. As explained above, this can be accomplished only by country-specific tariff quota shares and by tariff quota shares that are larger than would be allowed under Article XIII (assuming that the best-ever exports did not occur within a representative period). If the Lomé waiver is interpreted to waive only compliance with the obligations of Article I:1, the waiver would effectively limit preferential treatment to tariff preferences. In our view, in light of the 75 ECU per tonne rate applicable to the EC's bound tariff quota, tariff preferences alone would not allow the EC to provide market access opportunities and advantages required of it by

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55 GATT, art. XXV:5; WTO, art. IX:3-4.

56 Panel Report on "US - 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 on 7 November 1990, BISD 37S/228, 256-257, para. 5.9.

57 Working Party Report on "Import Restrictions Imposed by the United States Under Section 22 of the United States Agricultural Adjustment Act", adopted on 5 March 1955, BISD 3S/141, 144, para. 10.

the Lomé Convention. In other words, in order to give real effect to the Lomé waiver, it needs to cover Article XIII to the extent necessary to allow the EC to allocate country-specific tariff quota shares to the ACP countries in the amount of their pre-1991 best-ever banana exports to the EC. Otherwise, the EC could not practically fulfil its basic obligation under the Lomé Convention in respect of bananas, as we have found that it was not unreasonable for the EC to conclude that the Lomé Convention may be interpreted to require country-specific tariff quota shares at levels not compatible with Article XIII. Since it was the objective of the Lomé waiver to permit the EC to fulfil that basic obligation, logically we have no choice therefore but to interpret the waiver so that it accomplishes that objective. In fact, such an interpretation would be consistent with the terms of this particular waiver as it applies to preferential treatment generally and not, as is mostly the case with other currently effective waivers, only to preferential *tariff* treatment.[58]

7.107 Such an interpretation is also supported by the close relationship between Articles I and XIII:1, both of which 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,[59] 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.

7.108 The foregoing considerations suggest that the Lomé waiver should be interpreted so as to waive compliance with the obligations of Article XIII, to the extent indicated above. We must consider, however, whether such a conclusion is consistent with past GATT practice that waivers are to be interpreted narrowly. Our interpretation of the Lomé waiver is narrow in the sense that the Lomé waiver itself has been qualified by the fact that it is applicable only to preferential treatment "required" by the Lomé Convention and does not extend to all prefer-

[58] There are three other waivers now in force for preferential treatment to groups of developing countries. These waivers cover Canadian preferences to Caribbean countries and US preferences to Caribbean countries and to Andean countries. In each of these three cases, the waiver is limited by its terms to preferential *tariff* treatment. CARIBCAN, WT/L/185; Caribbean Basin Economic Recovery Act, WT/L/104; Andean Trade Preference Act, WT/L/184. The waiver in respect of United States - Former Trust Territory of the Pacific Islands, WT/L/183, applies also to non-tariff preferential treatment.

[59] Panel Report on "United States - Denial of Most-favoured-nation Treatment as to Non-rubber Footwear from Brazil", adopted on 19 June 1992, BISD 39S/128, 150, para. 6.8 (Article I:1 applies to rules for revocation of countervailing duties).

ential treatment that the EC might wish to give to the ACP countries. Thus, there is no danger of an overly broad interpretation of its scope. In our view, we only acknowledge what is implied in the decision to grant the waiver in the first place.

7.109 In reaching this conclusion, however, we note our view that the scope of the Lomé waiver lacks precision. Future waiver negotiations will have to deal more precisely with the issues raised in this case in order to reduce differences in interpretation.

7.110 In light of these factors, to the extent that we have found that the EC has acted inconsistently with the requirements of Article XIII:1 (paragraph 7.90), we find that the Lomé waiver waives that inconsistency with Article XIII:1 to the extent necessary to permit the EC 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 EC.

(c) The Allocation of Tariff Quota Shares to BFA Countries

7.111 In our general discussion above of Article XIII (paragraph 7.90), we found that the EC's allocation of shares in its tariff quota to the BFA countries not having a substantial interest in supplying bananas and in respect of non-traditional ACP bananas is inconsistent with the requirements of Article XIII. In this section, we consider whether any such inconsistency may be permitted because of (i) the inclusion of the banana tariff quota allocation to BFA countries and in respect of non-traditional ACP bananas in the EC's Schedule attached to the Marrakesh Protocol or (ii) the priority provision of the Agreement on Agriculture.

(i) Inclusion of the BFA Tariff Quota Shares in the EC Schedule

7.112 The EC argues that even if the tariff quota share allocations to the BFA countries and in respect of non-traditional ACP bananas do not satisfy the requirements of Article XIII, they are consistent with GATT rules because of their inclusion in the EC's Schedule as a result of the Uruguay Round negotiations. The Complainants argue that a prior adopted GATT panel report (the so-called *Sugar Headnote* case)[60] supports the conclusion that tariff bindings in schedules cannot justify inconsistencies with the requirements of generally applicable GATT rules. The EC responds that the Uruguay Round Schedules are of a different nature than past GATT tariff protocols, thereby undermining the legal reasoning underpinning the *Sugar Headnote* case, and that, in any event, the inclusion of the BFA tariff quota shares in its Schedule overrides Article XIII because of the priority provision of the Agreement on Agriculture.

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[60] Panel Report on "US - Restrictions on Imports of Sugar", adopted on 22 June 1989, BISD 36S/331, 341-343, paras. 5.2-5.7.

7.113 The panel in the *Sugar Headnote* case found that qualifications on tariff bindings do not override other GATT provisions after an analysis of the wording of Article II, its object, purpose and context, and the drafting history of the provision. Although it made no mention of the Vienna Convention, it seems to have followed closely Articles 31 and 32 thereof.[61] Its analysis was as follows:

> 5.1 ... The *United States* argues that the proviso "subject to the terms, conditions or qualifications set forth in that Schedule" in Article II:1(b) permits contracting parties to include qualifications relating to quantitative restrictions in their Schedule. The United States had made use of this possibility by reserving in its Schedule of Concessions the right to impose quota limitations on imports of sugar in certain circumstances. Since the restrictions on the importation of sugar conformed to the qualifications set out in the Schedule of the United States, and the Schedules of Concessions were, according to Article II:7, an integral part of the General Agreement, the restrictions were consistent with the United States obligations under that Agreement. *Australia* argues that qualifications to concessions made in accordance with Article II:1(b) cannot justify measures contrary to other provisions of the General Agreement, in particular not quantitative restrictions inconsistent with Article XI:1.
>
> ...
>
> 5.2 The Panel first examined the issue in the light of the wording of Article II. It noted that in Article II:1(b), the words "subject to the ... qualifications set forth in that Schedule" are used in conjunction with the words "shall ... be exempt from ordinary customs duties in excess of those set forth in [the Schedule]". This suggests that Article II:1(b) permits contracting parties to qualify the obligation to exempt products from customs duties in excess of the levels specified in the Schedule, not however to qualify their obligations under other Articles of the General Agreement. The Panel further noted that the title of Article II is "Schedules of Concessions" and that the ordinary meaning of the word "to concede" is "to grant or yield". This also suggests in the view of the Panel that Article II permits contracting parties to incorporate into their Schedules acts yielding rights under the General Agreement but not acts diminishing obligations under that Agreement.
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> 5.3 The Panel then examined the issue in the light of the purpose of the General Agreement. It noted that one of the basic functions of the General Agreement is, according to its Preamble, to provide a legal framework enabling contracting parties to enter into

[61] These provisions of the Vienna Convention are quoted in para. 7.14 supra.

"reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade". Where the General Agreement mentions specific types of negotiations, it refers to negotiations aimed at the reduction of barriers to trade (Articles IV(d), XVII:3 and XXVIII bis). This supports in the view of the Panel the assumption that Article II gives contracting parties the possibility to incorporate into the legal framework of the General Agreement commitments additional to those already contained in the General Agreement and to qualify such additional commitments, not however to reduce their commitments under other provisions of that Agreement.

5.4 The Panel then examined the issue in the context of the provisions of the General Agreement related to Article II. It noted that negotiations on obstacles to trade created by the operation of state-trading enterprises may be conducted under Article XVII:3 and that a note to that provision provides that such negotiations

> "may be directed towards the reduction of duties and other charges on imports and exports or towards the conclusion of *any other mutually satisfactory arrangement consistent with the provisions of this Agreement* (See paragraph 4 of Article II and the note to that paragraph)." (emphasis added).

The negotiations foreseen in Article XVII:3 are thus not to result in arrangements inconsistent with the General Agreement, in particular not quantitative restrictions made effective through state-trading that are not justified by an exception to Article XI:1. The Panel saw no reason why a different principle should apply to quantitative restrictions made effective by other means.

5.5 The Panel then examined the issue in the light of the practice of the CONTRACTING PARTIES. The Panel noted that the CONTRACTING PARTIES adopted in 1955 the report of the Review Working Party on Other Barriers to Trade, which had concluded that:

> "there was nothing to prevent contracting parties, when they negotiate for the binding or reduction of tariffs, from negotiating on matters, such as subsidies, which might affect the practical effects of tariff concessions, and from incorporating in the appropriate schedule annexed to the Agreement the results of such negotiations; *provided that the results of such negotiations should not conflict with other provisions of the Agreement*." (emphasis added) (BISD 3S/225).

Whether the proviso in this decision is regarded as a policy recommendation, as the United States argues, or as the confirmation of a legal requirement, as Australia claims, it does support, in the

> view of the Panel, the conclusion that the CONTRACTING PARTIES did not envisage that qualifications in Schedules established in accordance with Article II:1(b) could justify measures inconsistent with the other Articles of the General Agreement.
>
> 5.6 The Panel finally examined the issue in the light of the drafting history. It noted that the reference to "terms and qualifications" was included in a draft of the present Article II:1(b) during the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment. The original draft had referred only to "conditions". This amendment was proposed and adopted "in order to provide more generally for the sort of qualifications actually provided in the form of notes in the specimen Schedule. A number of these notes are, in effect, additional concessions rather than *conditions* governing the tariff bindings to which they relate" (E/PC/T/153 and E/PC/T/W/295). Schedule provisions qualifying obligations under the General Agreement were not included in the specimen Schedule nor was the possibility of such Schedule provisions mentioned by the drafters. The Panel therefore found that the drafting history did not support the interpretation advanced by the United States.
>
> 5.7 For the reasons stated in the preceding paragraphs, the Panel found that Article II:1(b) does not permit contracting parties to qualify their obligations under other provisions of the General Agreement and that the provisions in the United States GATT Schedule of Concessions can consequently not justify the maintenance of quantitative restrictions on the importation of certain sugars inconsistent with the application of Article XI:1".

7.114 We agree with the analysis of the *Sugar Headnote* panel report and note that Article II was not changed in any relevant way as a result of the Uruguay Round. Thus, based on the *Sugar Headnote* case, we conclude that the EC's inclusion of allocations inconsistent with the requirements of Article XIII in its Schedule does not prevent them from being challenged by other Members. We note in this regard that the Uruguay Round tariff schedules were prepared with full knowledge of the *Sugar Headnote* panel report, which was adopted by the GATT CONTRACTING PARTIES in the middle of the Round (June 1989). This is particularly significant in light of the Appellate Body's statement that "[a]dopted panel reports are an important part of the GATT *acquis*. They are often taken into account by subsequent panels. They create legitimate expectations among Members, and, therefore should be taken into account where they are relevant to any dispute".[62]

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[62] 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, DSR 1996:I, 97 at 108.

7.115 The EC further argues that the principle of *pacta sunt servanda* supports its position that the BFA should override GATT rules. However, in our view, that principle applies as well to Article II, as interpreted by the *Sugar Headnote* case. We cannot accept that a conflict between Article II and the BFA should necessarily be resolved in the BFA's favour. It was to ensure consistency with the basic GATT rules that the *Sugar Headnote* panel reached the conclusions it did. As that panel stated (paragraph 5.2): "Article II permits contracting parties to incorporate into their Schedules acts yielding rights under the General Agreement but not acts diminishing obligations under that Agreement". That rule is a basic agreement of the Members that must be enforced.

7.116 The EC also notes that Article II:7 of GATT incorporates schedules into Part I of GATT, which contains Articles I and II, and argues that one provision of Part I such as Article II may not be given priority over another (i.e., the schedules). However, we are of the opinion that if there is a conflict between a schedule and GATT rules, it is necessary to resolve it, and that is what the *Sugar Headnote* panel did.[63]

7.117 Finally, the EC argues that the result in the *Sugar Headnote* case was necessary under GATT practice because tariff protocols, which added tariff commitments to schedules, were not accepted by all GATT contracting parties. It further argues that such a result is not necessary in the context of the WTO because all Members accepted all the results of the Uruguay Round. The *Sugar Headnote* panel's analysis was, in our view, a straightforward exercise in treaty interpretation under Vienna Convention principles. It made no mention that the result it reached was "necessary" under GATT practice. Moreover, the US measure at issue in the *Sugar Headnote* case first appeared in the Annecy and Torquay Protocols, both of which were signed by all GATT contracting parties at the time.[64] Thus, these Protocols were in this respect similar to the schedules attached to the WTO Agreement.

7.118 Thus, we find that the inclusion of the BFA tariff quota shares in the EC's Schedule does not permit the EC to act inconsistently with the requirements of Article XIII of GATT.

7.119 [Used in the Guatemala-Honduras report.]

(ii) Agreement on Agriculture

7.120 The EC argues that the provisions of the Agreement on Agriculture prevail over GATT rules such as Article XIII and that the inclusion by the EC of the BFA tariff quota shares in its tariff schedules means that they prevail over Article

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[63] The incorporation of schedules into Part I was done only because "it was intended that Part II [of GATT] would be immediately superseded by the [Havana] Charter provisions when the Charter entered into force". Analytical Index: Guide to GATT Law and Practice, 6th rev. ed. 1995, p.99.

[64] Contracting Parties to the General Agreement on Tariffs and Trade, Status of Legal Instruments, pp. xxi, 3-2.1-2.4, 3-3.1-3.4.

XIII, even if the *Sugar Headnote* case remains a valid interpretation of GATT rules.

7.121 In examining this argument, we note that the Agreement on Agriculture was intended to make agricultural products subject to strengthened and more operationally effective GATT rules. In the Preamble to the Agreement, Members recall:

> "their long-term objective as agreed at the Mid-Term Review of the Uruguay Round 'is to establish a fair and market-oriented agricultural trading system and that a reform process should be initiated through the negotiation of commitments on support and protection and through the establishment of strengthened and more operationally effective GATT rules and disciplines' ".

7.122 In some cases, the results of the agricultural negotiations were not consistent with the rules found in other WTO agreements. For example, Article 4.2 of the Agreement on Agriculture prohibits the use of certain measures that might otherwise be authorized by Article XI:2 of GATT; Article 5 of the Agreement on Agriculture permits the use of certain measures that might otherwise be questioned under Articles II and XIX of GATT and the Agreement on Safeguards. In order to establish priority for rules of the Agreement on Agriculture, Article 21.1 of that Agreement specifies:

> "The provisions of GATT 1994 and of other Multilateral Trade Agreements in Annex 1A to the WTO Agreement shall apply subject to the provisions of this Agreement [i.e., the Agreement on Agriculture]".

It is clear from Article 21.1 that the provisions of the Agreement on Agriculture prevail over GATT and the other Annex 1A agreements. But there must be a provision of the Agreement on Agriculture that is relevant in order for this priority provision to apply. It is not the case that Article 21.1 of the Agreement on Agriculture means that no GATT/WTO rules apply to trade in agricultural products unless they are explicitly incorporated into the Agreement on Agriculture. We note that one of the purposes of the Agreement on Agriculture is to bring agriculture under regular GATT/WTO disciplines. It is against this background that we consider the EC's argument.

7.123 There is no provision of the Agreement on Agriculture that incorporates tariff bindings related to agricultural products into the Agreement on Agriculture. While the Annexes to the Agreement are incorporated into the Agreement by Article 21.2 thereof, tariff bindings are not. Indeed, under paragraph 1 of the Marrakesh Protocol, the Uruguay Round schedules attached to that protocol, which include the agricultural tariff bindings, are explicitly made schedules to GATT.

7.124 An examination of the Agreement on Agriculture reveals that most of its provisions and annexes are concerned with domestic support and export subsidies and do not relate to market access concessions generally except for Articles 4 (market access) and 5 (special safeguard provisions) and Annex 5 (special treat-

ment with respect to paragraph 2 of Article 4). Since we are not concerned here with special treatment or special safeguard measures, only Article 4 itself might be relevant. It reads as follows:

> "1. Market access concessions contained in Schedules relate to bindings and reductions of tariffs, and to other market access commitments specified therein.
>
> 2. Members shall not maintain, resort to, or revert to any measures of the kind which have been required to be converted into ordinary customs duties [footnote omitted], except as otherwise provided for in Article 5 and Annex 5".

In our view, Article 4.1 is not a substantive provision, but is a statement of where market access commitments can be found. The definition of "market access concessions" (Article 1(g) of the Agreement on Agriculture) makes it clear that the Schedules annexed to Article II of GATT also contain the import quota commitments undertaken pursuant to Annex 5 of the Agreement on Agriculture (as well as an identification of the tariff lines which are eligible for the special safeguard provisions of Article 5 of the Agreement on Agriculture). If the Agreement on Agriculture would have allowed for country-specific allocations of tariff quotas there would have been a specific provision to this effect in deviation from Article XIII:2(d) as with the special treatment provisions of Annex 5. In contrast, Article 4.2 is a substantive provision in that it prohibits the use of certain non-tariff barriers, subject to certain qualifications. As a substantive provision, it prevails over such GATT provisions as Article XI:2(c).

7.125 Moreover, neither Article 4.1 nor 4.2 of the Agreement on Agriculture provides that agricultural tariff bindings have a special standing vis à vis other tariff bindings or that a market access commitment included therein is absolved from complying with other GATT rules. Indeed, we note that there are a number of provisions in the Agreement on Agriculture which simply refer to other agreements or decisions that are not incorporated into the Agreement on Agriculture. The reference in Article 14 to the Agreement on Sanitary and Phytosanitary Measures is one example; the reference to the Decision on Measures Covering the Possible Negative Effects of the Reform Programme on Least-Developed and Net Food-Importing Developing Countries in Article 16 is another example. These "cross-reference" provisions may be explained by the attempt of the framers of the Agreement on Agriculture to provide a complete overview of the Uruguay Round results in agriculture, since these matters are referred to generally in the preamble to the Agreement.

7.126 Finally, we note that, pursuant to Article 21 of the Agreement on Agriculture, GATT rules apply "subject to" the provisions of the Agreement on Agriculture, a wording that clearly suggests priority for the latter. But giving priority to Article 4.1 of the Agreement on Agriculture, which simply "relates" market access concessions to Members' goods schedules as attached to GATT by the Marrakesh Protocol, does not necessitate, or even suggest, a limitation on the

application of Article XIII. The provisions are complementary, and do not clash. Thus, Article 21 of the Agreement on Agriculture is not relevant in this case.

7.127 Accordingly, we find that neither the negotiation of the BFA and its inclusion in the EC's Schedule nor the Agreement on Agriculture permit the EC to act inconsistently with the requirements of Article XIII of GATT.

(d) Tariff Quota Share Allocations and Article I:1

7.128-7.130 [Used in the Guatemala-Honduras report.]

2. Tariff Issues

7.131 The Complainants have not challenged the tariff preferences accorded by the EC to traditional ACP bananas, i.e., bananas in traditional amounts from ACP countries that traditionally supplied the EC market. They have, however, claimed that the tariff preferences granted by the EC to non-traditional ACP bananas, i.e., bananas from ACP countries that have not traditionally supplied the EC market and bananas from historical suppliers in excess of their traditional supplies, are inconsistent with the requirements of Article I:1 of GATT. The tariff preference in the case of non-traditional ACP bananas imported under the relevant EC tariff quota share (90,000 tonnes) is 75 ECU per tonne (0 versus 75 ECU), while for over-quota bananas it is 100 ECU per tonne (in 1995: 822 ECU versus 722 ECU). The EC responds that to the extent that these tariff preferences are inconsistent with Article I:1, the inconsistency is permitted by the Lomé waiver.

7.132 Article I:1 provides in relevant part as follows:

> "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 Member to any product originating in ... any other country shall be accorded immediately and unconditionally to the like product originating in ... the territories of all other Members".

7.133 It is clear that the above-described tariff preferences for ACP bananas are inconsistent with Article I:1 since ACP and other bananas are like products and the lower tariffs on ACP-origin bananas are not provided unconditionally to bananas from other Members. The issue is whether the Lomé waiver covers the inconsistency. As noted above, the Lomé waiver provides:

> "the provisions of paragraph 1 of Article I of the General Agreement shall be waived, until 29 February 2000, to the extent necessary to permit the European Communities to provide preferential treatment for products originating in ACP States as required by the relevant provisions of the Fourth Lomé Convention, without being

> required to extend the same preferential treatment to like products of any other contracting party".[65]

7.134 In this regard, we note that Article 168(2)(a)(ii) of the Lomé Convention provides that the EC:

> "shall take the necessary measures to ensure more favourable treatment than that granted to third countries benefitting from the most-favoured-nation clause for the same products".

While Members in granting the Lomé waiver could have limited the extent to which the EC could provide preferential tariff treatment under Article I:1, they did not do so. Thus, even though waivers must be interpreted strictly,[66] it seems to us that the preferential tariff for non-traditional ACP bananas is clearly a tariff preference of the sort that the Lomé waiver was designed to cover. In our view, in light of the requirement of Article 168(2)(a)(ii) of the Lomé Convention, the Lomé waiver permits the EC to grant tariff preferences to ACP countries on non-traditional bananas.

7.135 The Complainants argue, however, that the EC Court of Justice has ruled that Protocol 5 of the Lomé Convention supersedes Article 168(2)(a)(ii) with the result that the EC is not required to give non-traditional ACP bananas more favourable treatment pursuant to that provision. We do not agree with this characterization of the Court of Justice decision.[67] In the part of the decision cited by the Complainants, the Court of Justice rejected the argument that the EC Council could not rely on Article 168(2)(a) in adopting the EC banana regime. Indeed, the Court states "the import of bananas from ACP States falls under Article 168(2)(a)(ii) of the Lomé Convention". The issue in the case was whether the Lomé Convention required that all ACP bananas had to be admitted duty-free, and the Court ruled that Protocol 5 did not require that. It did not rule that Article 168(2)(a)(ii), which generally requires some preferential treatment of ACP products, did not apply to bananas not covered by Protocol 5.

7.136 Accordingly, we find that to the extent that the EC's preferential tariff treatment of non-traditional ACP bananas is inconsistent with its obligations under Article I:1, those obligations have been waived by the Lomé waiver.

7.137-7.141 [Used in the Guatemala-Honduras report.]

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[65] EC - The Fourth ACP-EEC Convention of Lomé, Waiver Decision of 9 December 1994, L/7604, 19 December 1994; Extension of the Waiver, Decision of 14 October 1996, WT/L/186.

[66] Panel Report on "US - 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 on 7 November 1990, BISD 37 S/228, 256-257, para. 5.9.

[67] Germany v. Council, Case C-280/93, para. 101 (Judgment of 5 October 1994).

3. The EC Banana Import Licensing Procedures

7.142 We turn now to an examination of the EC's banana import licensing procedures.[68] We give an overview of the claims of the Complainants and explain how we will organize our discussion of the numerous issues raised by those claims.

7.143 Altogether, the Complainants, jointly or severally, have raised more than 40 different claims against the EC licensing regime in general, or against specific elements thereof, under provisions of GATT, the Licensing Agreement and the TRIMs Agreement.[69]

7.144 We begin by considering three general issues: (i) whether the Licensing Agreement covers licences relating to tariff quotas; (ii) the relationship between claims under GATT 1994 and the Annex 1A Agreements in light of the General Interpretative Note to Annex 1A; and (iii) whether the EC licensing procedures should be analysed as one or two regimes.

(a) General Issues

(i) Scope of the Licensing Agreement

7.145 The first general interpretative issue is whether the Licensing Agreement applies to tariff quotas. The Complainants argue that the administration of tariff quotas is subject to the disciplines embodied in the Licensing Agreement and have raised claims under Articles 1.2, 1.3, 3.2 and 3.5 of that Agreement. The EC takes the opposite view. It argues that the Licensing Agreement applies to "import restrictions". Since in its view tariff quotas do not constitute import restrictions, tariff quotas are not subject to the provisions of the Licensing Agreement. It also argues that import licences are tradeable and are not a "prior condition for importation" within the meaning of Article 1.1 of the Licensing Agreement since import licences are required only for the purpose of benefitting from the in-quota duty rate.

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[68] The EC common organisation of the banana market, including the licensing regime and its administrative application, encompass more than 100 different regulations. The most important ones are: Council Regulation (EC) No. 404/93 of 13 February 1993 on the common organization of the market in bananas (O.J. L 47/1 of 25 February 1993); 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 (O.J. L 142/6 of 12 June 1993); 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 (O.J. L 349/105 of 31 December 1994); and Commission Regulation (EC) No. 478/95 on additional rules for the application of Council Regulation (EEC) No. 404/93 as regards the tariff quota arrangements for imports of bananas into the Community and amending Regulation (EEC) No. 1442/93 (O.J. L 49/13 of 4 March 1995).

[69] We recall that we decided not to consider claims under Article 5 of the TRIMs Agreement and under Article 4.2 of the Agreement on Agriculture because they were not or not adequately raised in the request for the establishment of the Panel. See para. 7.46 supra.

7.146 We therefore turn to an examination of the terms of the Licensing Agreement, interpreted in light of their context and of the object and purpose of the Agreement. Article 1.1 of the Licensing Agreement provides (footnote omitted):

> "For the purpose of this Agreement, import licensing is defined as administrative procedures used for the operation of import licensing regimes requiring the submission of an application or other documentation (other than that required for customs purposes) to the relevant administrative body as a prior condition for importation into the customs territory of the importing Member".

7.147 The terms of Article 1.1 do not explicitly include, or exclude, the administration of tariff quotas from the coverage of the Licensing Agreement. Its terms define "import licensing" as "administrative procedures used for the operation of import licensing regimes". However, footnote 1 to Article 1.1 further defines "administrative procedures" to include "those procedures referred to as 'licensing' as well as other similar administrative procedures". Accordingly, irrespective of whether the term "licensing" is used, in our opinion, administrative procedures are covered by the Licensing Agreement provided that they have a purpose similar to licensing. In other words, Article 1 of the Licensing Agreement, as further elaborated by footnote 1 thereto, clearly follows a functional approach. It embodies a comprehensive coverage of the Licensing Agreement, except as specifically limited.

7.148 Two limitations on the scope of the Licensing Agreement may be derived from the terms of Article 1.1. First, the notion of "import licensing" is limited to procedures "requiring the submission of an application or other documentation (other than that required for customs purposes) to the relevant administrative body". The licensing procedures used by the EC for the administration of the in-quota imports of bananas meet the terms of this limitation because they require the submission of an application, as well as other documentation.

7.149 Second, Article 1.1 limits "import licensing" to regimes requiring the "submission of an application or other documentation" as a "prior condition for importation into the customs territory of the importing Member". In our view, the requirement to present an import licence upon importation constitutes a "prior condition for importation", irrespective of whether that requirement applies to the administration of a quantitative restriction or a tariff quota. The mere possibility to import a particular product at a higher tariff rate outside a tariff quota without being subjected to the same or any licensing requirement does not alter the fact that the importation of a particular product within a tariff quota at a lower duty rate is made dependent upon the presentation of an import licence as a prior condition for importation at that lower rate.[70]

[70] According to Article 18 of Regulation 1442/93, imports outside of the EC bound tariff quota are subject to automatic licensing.

7.150 Thus, while Article 1.1 does not specifically include licences for tariff quotas within its scope, it does not exclude them. Indeed, the general definition of the scope of application in Article 1.1 of the Licensing Agreement is formulated in a comprehensive manner: import licensing procedures are mentioned without any reference to the underlying measure for whose administration they are employed. Moreover, procedures which are not in explicit terms labelled as "licensing" but pursue a similar purpose are included in the scope of the Licensing Agreement by virtue of footnote 1 to Article 1.1.[71]

7.151 Article 3.1 of the Licensing Agreement also defines the coverage of the Agreement by providing that non-automatic licensing is covered by the Agreement as follows:

> "The following provisions, in addition to those in paragraphs 1 through 11 of Article 1, shall apply to non-automatic import licensing procedures. Non-automatic import licensing procedures are defined as import licensing not falling within the definition contained in paragraph 1 of Article 2".

Article 2:1 of the Licensing Agreement, in turn, reads:

> "Automatic import licensing is defined as import licensing where approval of the application is granted in all cases, and which is in accordance with the requirements of paragraph 2(a)".

Given that the approval of an application for an import licence is not, in the sense of Article 2.1 of the Licensing Agreement, granted by the relevant administrative bodies in all cases, the EC licensing procedures fall within the category of non-automatic import licensing.

7.152 Further indication of the scope of Article 3 of the Licensing Agreement can be derived from the wording of the first sentence of Article 3.2:

> "Non-automatic licensing shall not have trade-restrictive or -distortive effects on imports additional to those caused by the imposition of the *restriction*" (emphasis added).

This raises the question whether the term "restriction" should be interpreted narrowly so as to encompass only quantitative restrictions, or whether it should be read to include also other measures such as tariff quotas.

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[71] While it is true that the EC import licences for bananas are transferable and tradeable, it is also clear that a trader, regardless of whatever his classification might be with respect to operator categories and/or activity functions, at some point in time has to file an application for an import licence. That trader can use the licence he has obtained or sell it on the marketplace. Thus the trader who applies for a particular import licence is not necessarily the one who actually effectuates the importation of bananas. However, there is no requirement under Article 1.1 of the Licensing Agreement that the natural or legal person who files the application for a licence must also carry out the transaction of actually importing bananas. Moreover, in respect of transferability and tradeability of licences, there is no difference between the administration of quantitative restrictions and of tariff quotas.

7.153 In this context, Article 3.3 of the Licensing Agreement offers implicit guidance:

> "In the case of licensing requirements for purposes other than the implementation of quantitative restrictions, Members shall publish sufficient information for other Members and traders to know the basis for granting and/or allocating licences".

The phrase "other than the implementation of quantitative restrictions" makes clear that the coverage of Article 3 of the Licensing Agreement is not limited to procedures used in the implementation of quantitative restrictions. On the contrary, the wording of Article 3.3 implies that the disciplines concerning non-automatic licensing also cover procedures used for the administration of other measures.

7.154 Moreover, the use of the term "restriction" in Article 3.2 is not a reason to give a narrow reading to the scope of the Licensing Agreement. Past GATT panel reports support giving the term "restriction" an expansive interpretation.[72] The introductory words of Article XI of GATT provide as follows:

> "No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures ...".

Thus, tariffs and tariff quotas are restrictions as that term is used in Article XI, although "duties, taxes or other charges" are excepted from Article XI's requirements. A similar reading is appropriate in the case of the Licensing Agreement. Article 3.2 of the Licensing Agreement refers to "restrictions" and Article 3.3 of the Licensing Agreement applies to "licensing requirements for purposes other than the implementation of quantitative restrictions". Accordingly, we find that licensing procedures used for the implementation of measures other than quantitative restrictions, including tariff quotas, are subject to the disciplines of the Licensing Agreement.[73] We also note that our argument that tariff quotas are "restrictions" does not imply that they are not, in principle, legitimate trade measures under the agreements covered by the WTO in the same sense that tariffs are.

7.155 This finding is in accord with a consideration of the object and purpose and the context of the Licensing Agreement. The preamble to the Licensing Agreement makes it clear that the Licensing Agreement is to further the objectives of GATT. It is equally explicitly noted that the provisions of GATT apply to import licensing and then stated that Members desire that import licensing procedures not be used contrary to the principles and objectives of GATT. Since

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[72] Panel Report on "Japan - Trade in Semiconductors", adopted on 4 May 1988, BISD 35S/116, 153, paras. 104-105; Panel Report on "EEC - Programme of Minimum Import Prices, Licences and Surety Deposits for Certain Processed Fruits and Vegetables", adopted on 18 October 1978, BISD 25S/68, 98-100, para. 4.9.

[73] We note that past GATT/WTO practice in respect of this issue is not helpful in clarifying the meaning of the Licensing Agreement.

one of the principal GATT provisions dealing with import licensing is Article XIII, which by the explicit terms of Article XIII:5 applies to tariff quotas, it follows from the preamble to the Licensing Agreement that the Licensing Agreement should also apply to tariff quotas. There would not seem to be any reason to treat licensing procedures for quantitative restrictions differently from those for tariff quotas. The concerns raised in the preamble about the possible negative consequences of the inappropriate use of import licensing regimes would apply equally to both.

7.156 Accordingly, we find that the Licensing Agreement applies to licensing procedures for tariff quotas.

(ii) GATT 1994 and the Annex 1A Agreements

7.157 The Complainants have raised claims in respect of the EC's import licensing regime under GATT 1994, the Licensing Agreement and the TRIMs Agreement. Having found that the Licensing Agreement applies to tariff quotas, a further threshold question is whether both GATT 1994, as well as the Licensing Agreement and the TRIMs Agreement, apply to the EC's import licensing procedures. This requires us to consider the interrelationship of GATT 1994, on the one hand, and the Licensing Agreement and the TRIMs Agreement, on the other.

7.158 The General Interpretative Note to Annex 1A of the Agreement Establishing the WTO ("General Interpretative Note") reads:

> "In the event of conflict between a provision of the General Agreement on Tariffs and Trade 1994 and a provision of another agreement in Annex 1A to the Agreement Establishing the WTO ... , the provision of the other agreement shall prevail to the extent of the conflict".

Both the Licensing Agreement and the TRIMs Agreement are "agreement[s] in Annex 1A to the Agreement Establishing the WTO".

7.159 As a preliminary issue, it is necessary to define the notion of "conflict" laid down in the General Interpretative Note. In light of the wording, the context, the object and the purpose of this Note, we consider that it is designed to deal with (i) clashes between obligations contained in GATT 1994 and obligations contained in agreements listed in Annex 1A, where those obligations are mutually exclusive in the sense that a Member cannot comply with both obligations at the same time, and (ii) the situation where a rule in one agreement prohibits what a rule in another agreement explicitly permits.[74]

[74] For instance, Article XI:1 of GATT 1994 prohibits the imposition of quantitative restrictions, while Article XI:2 of GATT 1994 contains a rather limited catalogue of exceptions. Article 2 of the Agreement on Textiles and Clothing ("ATC") authorizes the imposition of quantitative restrictions in the textiles and clothing sector, subject to conditions specified in Article 2:1-21 of the ATC. In other words, Article XI:1 of GATT 1994 prohibits what Article 2 of the ATC permits in equally explicit

7.160 However, we are of the view that the concept of "conflict" as embodied in the General Interpretative Note does not relate to situations where rules contained in one of the Agreements listed in Annex 1A provide for different or complementary obligations in addition to those contained in GATT 1994. In such a case, the obligations arising from the former and GATT 1994 can both be complied with at the same time without the need to renounce explicit rights or authorizations. In this latter case, there is no reason to assume that a Member is not capable of, or not required to, meet the obligations of both GATT 1994 and the relevant Annex 1A Agreement.

7.161 Proceeding on this basis, we have to ascertain whether the provisions of the Licensing Agreement and the TRIMs Agreement, to the extent they are within the coverage of the terms of reference of this Panel, contain any conflicting obligations which are contrary to those stipulated by Articles I, III, X, or XIII of GATT 1994, in the sense that Members could not comply with the obligations resulting from both Agreements at the same time or that WTO Members are authorized to act in a manner that would be inconsistent with the requirements of GATT rules. Wherever the answer to this question is affirmative, the obligation or authorization contained in the Licensing or TRIMs Agreement would, in accordance with the General Interpretative Note, prevail over the provisions of the relevant article of GATT 1994. Where the answer is negative, both provisions would apply equally.

7.162 Based on our detailed examination of the provisions of the Licensing Agreement, Article 2 of the TRIMs Agreement as well as GATT 1994, we find that no conflicting, i.e. mutually exclusive, obligations arise from the provisions of the three Agreements that the parties to the dispute have put before us. Indeed, we note that the first substantive provision of the Licensing Agreement, Article 1.2, requires Members to conform to GATT rules applicable to import licensing.

7.163 In the light of the foregoing discussion, we find that the provisions of GATT 1994, the Licensing Agreement and Article 2 of the TRIMS Agreement all apply to the EC's import licensing procedures for bananas.

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terms. It is true that Members could theoretically comply with Article XI:1 of GATT, as well as with Article 2 of the ATC, simply by refraining from invoking the right to impose quantitative restrictions in the textiles sector because Article 2 of the ATC authorizes rather than mandates the imposition of quantitative restrictions. However, such an interpretation would render whole Articles or sections of Agreements covered by the WTO meaningless and run counter to the object and purpose of many agreements listed in Annex 1A which were negotiated with the intent to create rights and obligations which in parts differ substantially from those of the GATT 1994. Therefore, in the case described above, we consider that the General Interpretative Note stipulates that an obligation or authorization embodied in the ATC or any other of the agreements listed in Annex 1A prevails over the conflicting obligation provided for by GATT 1994.

(iii) Separate Regimes

7.164 The EC argues that for purposes of Article I:1 of GATT and other non-discrimination provisions the traditional ACP licensing procedures should not be compared with the third-country and non-traditional ACP licensing procedures because they are separate regimes. We note that licensing procedures applicable to all banana imports are embodied in the same Regulation 1442/93. Furthermore, administrative decisions applying the EC banana import procedures are not always contained in separate regulations depending on whether they relate to traditional ACP licensing or third-country and non-traditional ACP licensing procedures. This would also suggest that all EC licensing procedures for banana imports constitute a single regime.

7.165 Moreover, we have refuted the same argument in paragraph 7.78 *et seq.* above in the context of Article XIII's application to allocation of tariff quota shares. The object and purpose of Article I, Article X, Article XIII and similar non-discrimination provisions are to preclude the creation of different systems for imports from different Members, as explained in a 1968 Note by the GATT Director-General on Article X:3(a).[75] We discuss this Note in more detail in paragraph 7.209, 228 *et seq.*, *infra*, but in our view, it is clear that the object and purpose of the non-discrimination provisions would be defeated if Members were permitted to create separate regimes for imports of like products based on origin.

7.166 This is not to say that Members may not create import licensing regimes that vary in technical aspects. For example, the information required to establish origin for purposes of demonstrating an entitlement to a preferential tariff rate may differ from the information collected generally to establish origin. However, the measures for implementing a preferential tariff permitted under WTO rules should not in themselves create non-tariff preferences in addition to the tariff preference.

7.167 Accordingly, we find that the EC licensing procedures for traditional ACP bananas and third-country and non-traditional ACP bananas should be examined as one licensing regime.

(iv) Examination of the Licensing Claims

7.168 In light of the foregoing, we organize our examination of the EC's import licensing procedures for bananas as follows.[76] In respect of each of the four principal components of the procedures to which the Complainants have objected - operator categories, activity functions, export certificates and hurricane licences, we first consider whether the EC's procedures are inconsistent with the general non-discrimination rules of Articles I and III of GATT. We then examine their

[75] Note by the Director-General of 29 November 1968, L/3149.

[76] In considering how to organize our findings, we note that Article 1.2 of the Licensing Agreement requires Members to conform to GATT rules applicable to import licensing procedures.

consistency, where necessary, with Articles X:3 and XIII of GATT and the more specific provisions of the Licensing Agreement. We treat the claims under Article 2 of the TRIMs Agreement together with our consideration of the claims under Article III of GATT. We discuss the claims relating to operator categories in section (b), those relating to activity functions in section (c), those relating to export certificates in section (d) and those relating to hurricane licences in section (e). The remaining claims in respect of the EC licensing procedures are addressed in section (f).

(b) Operator Categories

7.169 For purposes of the distribution of licences the EC established three types of "operators": operators who have during a preceding three-year period marketed third-country bananas and non-traditional ACP bananas are classified in Category A. Those who have marketed bananas from EC and traditional ACP sources during a preceding three-year period fall within Category B. Operators who have marketed third-country and non-traditional ACP bananas as well as traditional ACP and EC bananas qualify for both categories. New market entrants who start marketing third-country or non-traditional ACP bananas may qualify as Category C operators. Article 19 of EC Regulation 404/93 earmarks 66.5 per cent of the licences allowing imports of third-country and non-traditional ACP bananas at the lower tariff rates within the tariff quota for Category A operators. Another 30 per cent is allocated to Category B operators, while 3.5 per cent is reserved for the new market entrants of Category C. Subject to limitations, import licences for third-country and non-traditional ACP bananas are transferable and tradeable within and between operator categories.

7.170 The Complaining parties raise claims against the operator category rules under Articles I, III, X and XIII of GATT and Article 2 of the TRIMs Agreement, as well as claims under the Licensing Agreement. In the case of Mexico, we consider the claims it has raised under Article III of GATT, Article 2 of the TRIMs Agreement and Articles I and X of GATT.

(i) Article III:4 of GATT

7.171 The Complainants claim that the rules introducing operator categories, the eligibility criteria for Category B operators and the allocation to Category B operators of 30 per cent of the licences required for the importation of third-country and non-traditional ACP bananas at the lower duty rate within the bound tariff quota are inconsistent with Article III:4 of GATT because this licence allocation amounts to a requirement or incentive to purchase EC bananas in order to be eligible to import the bananas of Complainants' origin.

7.172 The EC responds that the licensing regime applied to third-country imports within the tariff quota does not force any trader to purchase any quantity of EC bananas, but provides a tool for managing correctly the importation of third-country bananas according to the demand on the EC market. Likewise, the op-

erator category rules and the allocation of 30 per cent of the licences required for imports from third-country sources form part of the EC's overall economic strategy and do not affect the volume of imports from third-country sources. Moreover, the EC reiterates that the licensing regime is applied at the border at the moment of importation, and not after the bananas have cleared customs and that, accordingly, all allegations concerning operator category rules under Article III are unfounded.

7.173 The relevant part of Article III:4 of GATT provides:

> "The products of the territory of any Member imported into the territory of any other Member shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use".

7.174 In addressing these claims concerning licensing procedures, we first examine the issue whether import licensing procedures are subject to the requirements of Article III. In this regard, we note that a GATT panel considered "... that the intention of the drafters of the Agreement was clearly to treat the imported products in the same way as the like domestic products once they had been cleared through customs. Otherwise indirect protection could be given."[77] In view of this interpretation of Article III:4, the fact that imported products may be subject to the collection of tariffs or the imposition of a licensing requirement taken as such, whereas the marketing of domestic products is obviously not, cannot per se violate Article III:4 of GATT.

7.175 The next question that arises is whether the EC procedures and requirements for the allocation of import licences for foreign products to eligible operators are measures that are included in the notion of "all laws, regulations and requirements affecting their internal sale, offering for sale, purchase ..." in the meaning of Article III:4. In our view, the word "affecting" suggests a coverage of Article III:4, beyond legislation directly regulating or governing the sale of domestic and like imported products. We further have to take into account the context of Article III, i.e., the Interpretative Note Ad Article III which makes clear that the mere fact that an internal charge is collected or a regulation is enforced in the case of an imported product at the time or point of importation does not prevent it from being subject to the provisions of Article III.[78] A GATT panel interpreted the Note as follows:

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[77] Panel Report on "Italian Discrimination against Imported Agricultural Machinery", adopted on 23 October 1958, BISD 7S/60, 63-64, para. 11.

[78] "... any law, regulation or requirement of the kind referred to in paragraph 1 which applies to an imported product and to the like domestic product and is ... enforced in the case of the imported product at the time or point of importation, is nevertheless to be regarded as ... law, regulation or requirement of the kind referred to in paragraph 1, and is accordingly subject to the provisions of Article III."

> "The fact that Section 337 is used as a means for the enforcement of United States patent law at the border does not provide an escape from the applicability of Article III:4; the interpretative note to Article III states that any law, regulation or requirement affecting the internal sale of products that is enforced in the case of the imported product at the time or point of importation is nevertheless subject to the provisions of Article III. Nor could the applicability of Article III:4 be denied on the ground that most of the procedures in the case before the Panel are applied to *persons* rather than *products*, since the factor determining whether persons might be susceptible to Section 337 proceedings or federal district court procedures is the source of the challenged products, that is whether they are of United States origin or imported."[79] (emphasis added)

This interpretation is in line with the interpretation of the term "affecting" in other past GATT panel reports.[80]

7.176 We further note that our interpretation is confirmed by the fact that the coverage of Articles I and III with respect to governmental measures is not necessarily mutually exclusive, as demonstrated by Article I:1's incorporation into the GATT most favoured nation clause of "all matters referred to in paragraphs 2 and 4 of Article III". To put it differently, under GATT internal matters may be within the purview of the MFN obligations and border measures may be within the purview of the national treatment clause.

7.177 In the light of the foregoing, we have to distinguish the mere requirement to present a licence upon importation of a product as such from the procedures applied by the EC in the context of the licence allocation which are internal laws, regulations and requirements affecting the internal sale of imported products. In the alternative, if the mere fact that the EC regulations on the introduction of the common market organization for bananas include or are related to a border measure such as a licensing requirement would mean that the Article III cannot apply, it would not be difficult to evade the GATT national treatment obligation. Such a result would run counter to the object and purpose of Article III, i.e., the obligation of Members to accord foreign products no less favourable treatment than like domestic products in the application of any measure affecting the internal sale of products, regardless of whether it applies internally or at the border.

7.178 In turning to the specific measures at issue, we note that operators address claims for reference quantities of bananas marketed during a preceding three-year period and applications for the allocation of quarterly licences to competent

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[79] Panel Report on "US - Section 337 of the Tariff Act of 1930", adopted on 7 November 1989, BISD 36S/345, 385, para. 5.10.

[80] Panel Report on "Italian Discrimination against Imported Agricultural Machinery", adopted on 23 October 1958, BISD 7S/60, 63-64, para. 11; Panel Report on "EEC - on Imports of Parts and Components", adopted on 16 May 1990, BISD 37S/132, 197, paras. 5.20-5.21.

member State authorities. The administration of the licence allocation procedures is carried out in cooperation between these authorities and the European Commission within the EC territory. Consequently, although licences are a condition for the importation of bananas into the EC at in-quota tariff rates, we find that the administration of licence distribution procedures and the eligibility criteria for the allocation of licences to operators form part of the EC's internal legislation and are "laws, regulations and requirements affecting the internal sale, ... purchase, ... distribution" of imported bananas in the meaning of Article III:4. Therefore, the argument that licensing procedures are beyond the purview of the GATT national treatment clause cannot, in our view, be sustained in light of the wording, context, object or purpose of Article III or with the findings of past GATT panel reports.

7.179 Turning now to the basic Article III claim of Complainants in respect of operator categories, we first recall the findings of the panel on *EEC - Import Regime for Bananas*[81] ("second *Banana* panel"), which held with regard to operator categories:

> "144. The Panel first examined the operation of the EEC import licensing system and noted the following. The quantity of bananas that an operator may import, pursuant to licences granted under the tariff quota, depends on the origin of the bananas that the operator has marketed during the preceding three-year period.[82] In particular, 30 per cent of the tariff quota is apportioned among operators who, during the preceding period, have purchased bananas from domestic or traditional ACP sources. As a result, operators wishing to increase their future share of bananas benefiting from the tariff quota would be required to increase their current purchases of EEC or traditional ACP bananas.
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> 145. The Panel noted that the General Agreement does not contain provisions specifically regulating the allocation of tariff quota licences among importers and that contracting parties are, therefore, in principle free to choose the beneficiaries of the tariff quota. They could, for instance, allocate the licences to enterprises on the basis of their previous trade shares. However, the absence of any provisions in the General Agreement specifically regulating the allocation of tariff quota licences also meant that contracting parties, in allocating such licences, had to fully observe the generally applicable provisions of the General Agreement, in particular those of Article III:4, which prescribes treatment of imported products no less favourable than that accorded to domestic products, and

[81] Panel Report on "EEC - Import Regime for Bananas", issued on 11 February 1994 (not adopted), DS38/R.

[82] Council Regulation (EEC) No 404/93, Article 19 (original footnote).

Article I:1, which requires most-favoured-nation treatment with respect to internal regulations.

146. The Panel then proceeded to examine the EEC licensing scheme in the light of the incentive provided under the regulations to buy bananas from domestic sources. The Panel noted that Article III:4 had been interpreted consistently by previous panels as establishing the obligation to accord imported products competitive opportunities no less favourable than those accorded to domestic products. A previous panel has stated:

> 'The words 'treatment no less favourable' in paragraph 4 call for effective equality of opportunities for imported products in respect of the application of laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products.'[83]

The Panel further noted that previous panels had found consistently that this obligation applies to any requirement imposed by a contracting party, including requirements 'which an enterprise voluntarily accepts to obtain an advantage from the government'.[84] In the view of the Panel, a requirement to purchase a domestic product in order to obtain the right to import a product at a lower rate of duty under a tariff quota is therefore a requirement affecting the purchase of a product within the meaning of Article III:4. The Panel further noted that, in judging whether effective equality of opportunities for imported products under Article III:4 was accorded, the trade impact of the measure was not relevant. The CONTRACTING PARTIES determined in 1949 that the obligations of Article III:4 'were equally applicable whether imports from other contracting parties were substantial, small or non-existent',[85] and they have confirmed this view in subsequent cases.[86] Thus it was not relevant that, at present, the incentive under the EEC regulations to buy domestic or traditional ACP bananas may only result in raising their price, and not in reducing the exports of the third-country bananas, since these exports, because of the high over-quota tariff, were limited *de facto* to the amount allocated un-

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[83] Report of the panel on United States - Section 337 of the Tariff Act of 1930, BISD 36S/345, 386, para. 5.11, adopted on 17 June 1987 (original footnote).

[84] Report of the panel on EEC - Regulation on Imports of Parts and Components, BISD 37S/132, 197, para. 5.21, adopted on 16 May 1990 (original footnote).

[85] Report of the working party on Brazilian Internal Taxes, BISD II/181, 185, para. 16, adopted on 30 June 1949 (original footnote).

[86] Report of the panel on United States - Taxes on petroleum and certain imported substances, BISD 34S/136, 158, para. 5.1.9, adopted on 17 June 1987; Report of the panel on United States - Measures affecting alcoholic and malt beverages, DS23/R, para. 5.65, adopted on 19 June 1992 (original footnote).

> der the tariff quota. The discrimination of imported bananas under the licensing scheme could therefore not be justified by measures on the importation that currently prevented, *de facto*, bananas from entering into the internal market. The Panel therefore found that the preferred allocation of part of the tariff quota to importers who purchase EEC bananas was inconsistent with Article III:4.
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> 147. The Panel then examined the EEC licensing scheme in the light of the incentive provided under the regulations to buy bananas of ACP origin in preference to other foreign origins. The Panel noted that Article I:1 obliges contracting parties, with respect to all matters referred to in Article III:4, to accord any advantage, granted to any product originating in any country, to the like product originating in the territories of all other contracting parties. As under Article III, the Panel considered that actual trade flows were not relevant to determine conformity with Article I:1. The Panel therefore found that the preferred allocation of licences to operators who purchase bananas from ACP countries was inconsistent with the EEC's obligations under Article I:1.
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> 148. The Panel noted that the EEC's licensing system, by reserving 66.5 per cent of the tariff quota to operators who had marketed third-country or non-traditional ACP bananas during a preceding period, included also incentives to continue importation of third-country bananas, even though these incentives may not have trade-distorting effects at present in view of the undisputed greater competitiveness of these third-country bananas. The Panel was of the view that, regardless of the trade effects, the apportioning of 66.5 per cent of the tariff quota to operators who had marketed third-country or non-traditional ACP bananas could not offset or legally justify the inconsistencies of the licensing system with Articles III:4 and I:1. The Panel agreed in this respect with a previous panel that had found that 'an element of more favourable treatment would only be relevant if it would always accompany and offset an element of differential treatment causing less favourable treatment'."[87]

7.180 While the second *Banana* panel report was not adopted by the GATT CONTRACTING PARTIES, the Appellate Body has stated in another context:

> "[W]e agree with the panel's conclusion ... that unadopted panel reports 'have no legal status in the GATT or WTO system since they have not been endorsed through decisions by the

[87] Report of the panel on United States Section 337 of the Tariff Act of 1930, BISD 36S/345, 388, para. 5.16, adopted on 7 November 1989 (original footnote).

> CONTRACTING PARTIES to GATT or WTO Members'.[88] Likewise, we agree that 'a panel could nevertheless find useful guidance in the reasoning of an unadopted panel report that it considered to be relevant'.[89]."[90]

Neither the EC nor the Complainants have claimed that the rules concerning operator categories have significantly changed[91] since the second *Banana* panel report was issued on 11 February 1994 in a way that would affect the soundness of that panel's findings and conclusions with respect to Article III:4. Nor does the adoption of the Lomé waiver by the GATT CONTRACTING PARTIES and its extension by the WTO General Council, in our view, affect our examination of the allocation of licences to different operator categories in the light of Article III:4. Accordingly, we adopt the findings of the second *Banana* panel on Article III:4 of GATT in respect of operator categories as our own findings.

7.181 However, before finding whether 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 is inconsistent with Article III:4, we need to consider that Article III:1 is a "general principle that informs the rest of Article III", as the Appellate Body has recently stated.[92] Since Article III:1 constitutes part of the context of Article III:4, it must be taken into account in our interpretation of the latter. Article III:1 articulates a general principle that internal measures should not be applied so as to afford protection to domestic production.[93] As noted by the Appellate Body, the protective application of a measure can most often be discerned from the design, the architecture, and the revealing structure of the measure.[94] We consider that the design, architecture and structure of the EC measure that provides for 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 all indicate that the measure is also applied so as to afford protection to EC producers.

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88 Panel Report on "Japan - Taxes on Alcoholic Beverages", adopted on 1 November 1996, WT/DS8/R, WT/DS10/R, WT/DS11/R, para. 6.10 (original footnote).

89 *Ibid*.

90 Appellate Body Report on "Japan - Taxes on Alcoholic Beverages", adopted on 8 November 1996, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, AB-1996-2, DSR 1996:I, 97 at 107-108.

91 While provisions such as Article 19 of Regulation 404/93 of 13 February 1993 and Articles 3 and 4 of Regulation 1442/93 of 12 June 1993 have been implemented and modified through subsequent EC legislation, these rules are still in essence in force in the EC legal order without having been affected by subsequent legislation.

92 Appellate Body Report on *Japan - Taxes on Alcoholic Beverages*, DSR 1996:I, 97 at 111. The Report states: "The purpose of Article III:1 is to establish this general principle as a guide to understanding and interpreting the specific obligations contained in Article III:2 and in the other paragraphs of Article III, while respecting, and not diminishing in any way, the meaning of words actually used in the texts of those other paragraphs".

93 *Ibid*.

94 *Ibid.*, 120.

7.182 Thus, we find 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 is inconsistent with the requirements of Article III:4 of GATT.

(ii) Article 2 of the TRIMs Agreement

7.183 Proceeding on the assumption that the operator category rules are inconsistent with the requirements of Article III:4, the Complainants allege that the conditions for operator B eligibility and the 30 per cent tariff quota allocation for Category B operators are inconsistent with Article 2.1 of the TRIMs Agreement. The fact that the allocation of 30 per cent of the licences required for the importation of third-country bananas is contingent upon the marketing of EC (and traditional ACP) bananas amounts, in the view of the Complainants, to a purchasing requirement which falls within the first category of the Illustrative List in the Annex to the TRIMs Agreement of those trade-related investment measures which are inconsistent with Article III:4 of GATT.

7.184 In the EC's view, no breach of Article 2 of the TRIMs Agreement can be found because no breach of Article III:4 has occurred. In the alternative, the EC argues that rules establishing operator categories do not fall within the ambit of the TRIMs Agreement because there is no requirement to make an investment within a particular country; nor is there a requirement for purchase or use by an enterprise of products of domestic origin or from any domestic source in order to be allowed to make the investment.

7.185 In considering these arguments, we first examine the relationship of the TRIMs Agreement to the provisions of GATT. We note that with the exception of its transition provisions[95] the TRIMs Agreement essentially interprets and clarifies the provisions of Article III (and also Article XI) where trade-related investment measures are concerned. Thus the TRIMs Agreement does not add to or subtract from those GATT obligations, although it clarifies that Article III:4 may cover investment-related matters.

7.186 We emphasize that in view of the importance of the TRIMs Agreement in the framework of the agreements covered by the WTO, we have examined the claims and legal arguments advanced by the parties under the TRIMs Agreement carefully. However, for the reasons stated in the previous paragraph, we do not consider it necessary to make a specific ruling under the TRIMs Agreement with respect to the eligibility criteria for the different categories of operators and the allocation of certain percentages of import licences based on operator categories. On the one hand, a finding that the measure in question would not be considered

[95] We have already dismissed the Complainants' claim under the transition provisions of Article 5 of the TRIMs Agreement because Article 5 was not listed in the request for the establishment of the Panel as required by Article 6.2 of the DSU, see para. 7.46.

a trade-related investment measure for the purposes of the TRIMs Agreement would not affect our findings in respect of Article III:4 since the scope of that provision is not limited to TRIMs and, on the other hand, steps taken to bring EC licensing procedures into conformity with Article III:4 would also eliminate the alleged non-conformity with obligations under the TRIMs Agreement.

7.187 Therefore, we do not consider it necessary to make a specific ruling under the TRIMs Agreement with respect to 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.

(iii) Article I of GATT

7.188 The Complainants claim that (i) the conditions for operator B eligibility based on marketing of ACP bananas, (ii) the exemption of traditional ACP imports from operator category rules and (iii) the allocation of 30 per cent of the licences allowing imports of third-country bananas at in-quota tariff rates to Category B operators, are inconsistent with the requirements of Article I:1 of GATT. They argue: (a) that the comparatively less complex licensing procedures that apply to imports of bananas from traditional ACP sources are an "advantage" that the EC fails to accord to imports of third-country bananas, and (b) that these aspects of the EC licensing system provide an incentive or requirement to purchase bananas from traditional ACP sources over those originating in third countries. The EC responds that the existence of Category B licences *per se* does not create an incentive to purchase any particular product, but is designed to mitigate the effects of oligopolistic market structures and to stimulate competition between operators. Since licences allocated to particular operators are tradeable, the EC concludes that such licences do not constitute an impediment to imports from any specific source. In the alternative, the EC maintains that the Lomé waiver covers any inconsistency with the requirements of Article I:1 because Category B licences are required under the Lomé Convention in order to maintain existing advantages for traditional ACP bananas on the EC market.

7.189 Article I:1 provides as follows:

> "With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed in 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 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 Members".

In our view, import licensing procedures, including the operator category rules, are "rules and formalities in connection with importation" in the meaning of Arti-

cle I:1. A panel found, for example, that comparatively more favourable rules for revoking countervailing duties were an "advantage" for purposes of Article I:1 and that "making a regulatory advantage available to imports from some countries while not making it available to others" is inconsistent with Article I:1.[96]

7.190 In our view, the operator category and activity function rules contained in the licensing procedures for third-country and non-traditional ACP bananas require substantially more data to be submitted to show entitlement to a licence for third-country and non-traditional ACP bananas than is required by the procedures applicable to traditional ACP bananas. This is clearly demonstrated by comparing the data that needs to be maintained and submitted under the two systems.

7.191 In respect of traditional ACP bananas, we note that, according to the EC,[97] operators need only to obtain special certificates of origin from the issuing authority in the relevant ACP State for traditional ACP imports. In this regard, Article 14(4) of Regulation 1442/93 on "Detailed Rules Applicable to Imports of Traditional ACP Bananas" (as amended by Regulation 875/96) provides:

> "4. Import licence applications shall only be admissible where:
>
> (a) they are accompanied by the original of a certificate drawn up by the competent authorities of the ACP country concerned testifying to the origin of the bananas ...
>
> (b) they contain
>
> - the words 'traditional ACP bananas - Regulation (EEC) No 404/93' ...
> - an indication of the country of origin ..."

7.192 In contrast, in respect of third-country and non-traditional ACP imports, operators need to apply for a reference quantity by sending details of banana volumes marketed during a preceding three-year period to the relevant competent authority. Article 19(2) of Regulation 404/93 on "Detailed Rules for the Application of the Tariff Quota Arrangements" provides in respect of imports of third-country and non-traditional ACP bananas that:

> "On the basis of separate calculations for each of the categories of operators ... each operator shall obtain import licences on the basis of the average quantities of bananas that he has sold in the three most recent years for which figures are available. For the category of [A] operators ..., the quantities to be taken into consideration shall be the sales of third-country and/or non-traditional ACP bananas. In the case of category [B] operators ..., sales of traditional

[96] Panel Report on "US - Denial of MFN Treatment as to Non-Rubber Footwear from Brazil", adopted on 19 June 1992, BISD 39S/128, 150-151, paras. 6.8-6.11.

[97] See the first item on the chart submitted by the EC which is reproduced at para. 4.274.

ACP and/or Community bananas shall be taken into consideration. ...".

Article 4 of Regulation 1442/93 provides:

"1. The competent authorities of the Member States shall draw up separate lists of operators in Category A and B and the quantities which each operators has marketed in each of the three years prior to that preceding the year for which the tariff quota is opened, broken down according to economic activity as described in Article 3(1).

Operators shall register themselves and shall establish quantities they have marketed by submitting individual written applications on their own initiative in a single Member State of their choice.

...

2. The operators concerned shall notify the competent authorities at the latest by ... each year thereafter of the overall quantities of bananas marketed in each of the years referred to in paragraph 1, breaking them down clearly:

(a) according to origin, pursuant to the definition laid down in Article 15 of Regulation (EEC) No 404/93,[98] as follows:

- of imports from non-ACP third countries and non-traditional imports from ACP States,
- traditional imports from ACP States within the quantities set out in the Annex to Regulation (EEC) No. 404/93, specifying the quantities by State,
- Community bananas, specifying the region of production;

(b) according to the economic activity as described in Article 3(1).

3. The operators concerned shall make the supporting documents specified in Article 7 available to the authorities."

Article 7 of Regulation 1442/93 provides:

"At the request of the competent authorities of the Member States, the following documents may be submitted to establish the quantities marketed by each operator in Category A and B registered with them:

[98] Article 15 of Regulation 404/93 provides for definitions of, inter alia, "traditional imports from ACP States'", "non-traditional imports from ACP States", "imports from non ACP-third countries", "Community bananas".

- the copy delivered to the importer of the Single Administrative Document (SAD) or, where applicable, his copy of the document for simplified declarations,
- a copy of the T2 declaration issued pursuant to ... for transactions effected during the reference period,
- original sales invoices or certified copies thereof,
- any relevant supporting documents such as national import documents issued and used before the entry into force of these arrangements,
- import licences issued pursuant to this Regulation and documents testifying to the marketing of bananas produced in the Community."

The information required to support claims in respect of activity functions (e.g., ripening) is not specified in this provision, but such information also must be maintained and submitted. We further note that the filing of data concerning the past volumes of traditional ACP and/or EC bananas marketed for purposes of the calculation of reference quantities for Category B operators relates to the eligibility of such operators for the allocation of licences allowing the importation of third-country and non-traditional ACP bananas at in-quota tariff rates. However, this filing of data on past banana volumes marketed is not a prerequisite for the importation of traditional ACP bananas, for the issuance of traditional ACP import licences, or for the marketing of EC bananas.

7.193 From the foregoing, in our view, it is clear that the procedural and administrative requirements for imports of third-country and non-traditional ACP bananas arising from the application of the operator category rules differ from, and go significantly beyond, those required in respect of traditional ACP bananas. Thus, we believe that the licensing procedures applied by the EC to traditional ACP banana imports, when compared to the licensing procedures imposed on third-country and non-traditional ACP imports with its operator category rules, can be considered as an "advantage" which the EC does not accord to third-country and non-traditional ACP imports. The EC thereby acts inconsistently with the requirements of Article I:1.

7.194 In addition, Article I:1 obliges a Member to accord any advantage granted to any product originating in any country to the like product originating in the territories of all other Members, in respect of matters referred to in Article III:4. The matters referred to in Article III:4 are "laws, regulations and requirements affecting [the] internal sale, offering for sale, purchase, transportation, distribution and use [of a product]". In our view, the allocation to Category B operators of 30 per cent of the licences allowing for the importation within the tariff quota of third-country bananas means *ceteris paribus* that operators who in the future wish to maintain or increase their share of licences for the importation of third-country and non-traditional ACP bananas at in-quota tariff rates would be required to maintain or increase their current purchases and sales of traditional ACP (or EC) bananas in order to claim that they market traditional ACP (or EC)

bananas for purposes of the operator category rules. Such a requirement to purchase and sell a product from one country (i.e., a source of traditional ACP imports) in order to obtain the right to import a product from any other country (i.e., a third country or a source of non-traditional ACP imports) at a lower rate of duty under a tariff quota is a requirement affecting the purchase of a product within the meaning of Articles III:4 and I:1. The allocation of licences allowing imports of third-country and non-traditional ACP bananas at in-quota tariff rates to operators who purchase and sell traditional ACP bananas is inconsistent with the EC's obligations under Article I:1 because it constitutes an advantage of the type covered by Article I that is accorded to traditional ACP bananas but which is not accorded to like products from all Members (i.e., non-traditional ACP and third-country bananas). We note that this result was also reached in the second *Banana* panel report as quoted above.[99]

7.195 Thus, we find that 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, are inconsistent with the requirements of Article I:1 of GATT.

(iv) Application of the Lomé Waiver to the EC's Article I Obligations

7.196 In light of the foregoing finding that the operator category rules contained in the EC's licensing procedures for bananas are inconsistent with the requirements of Article I:1, we must consider whether the EC's obligations in this respect have been waived by the Lomé waiver. We have already found that the Lomé waiver covers (i) tariff preferences that the EC currently affords to traditional and non-traditional ACP bananas, which would otherwise be inconsistent with its obligations under Article I:1 (paragraph 7.136) and (ii) to a limited extent, the banana tariff quota share allocations made by the EC to certain ACP countries, which would otherwise be inconsistent with its obligations under Article XIII (paragraph 7.110). As we noted in our discussion of this issue in the context of Article XIII, we must first determine whether the EC licensing procedures that we have found to be inconsistent with the requirements of Article I:1 are required by the Lomé Convention. If it is not, then the Lomé waiver is not applicable.

7.197 We recall that the operative paragraph of the Lomé waiver provides as follows:

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[99] Panel Report on "EEC - Import Regime for Bananas", issued on 11 February 1994 (not adopted), DS38/R, p.42ff, paras. 143-148, especially para. 147.

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

For purposes of examining the issue of what is required by the Lomé Convention, we must examine the provisions of Article 168 and Protocol 5 of the Lomé Convention. In addition, we also consider whether the Lomé waiver should be interpreted to cover other provisions of the Lomé Convention that might be read to require such licensing procedures for ACP countries.

7.198 Article 168 of the Lomé Convention requires in general that ACP products be admitted duty-free to the EC. However, in the case of products, such as bananas, that are subject to specific rules as a result of the common agricultural policy, under Article 168(2)(a) they are to be (i) accorded duty-free treatment if there are no non-tariff measures applicable to their import or (ii) if (i) is not applicable (as is the case for bananas), given "more favourable treatment than that granted to third countries benefitting from the most-favoured-nation clause for the same products". The importation of traditional ACP bananas and non-traditional ACP bananas within the EC tariff quota is duty-free. Thus, for those imports, the basic requirement of Article 168, as expressed in its first paragraph, has been met, and we see no requirement in Article 168 that the EC must provide favourable treatment beyond such duty-free treatment. The Lomé waiver should not be interpreted to permit breaches of WTO rules that are not clearly required to satisfy the provisions of the Lomé Convention. This reading is confirmed by the terms of the waiver itself, which states in its fourth preambular paragraph: "Considering that the preferential treatment ... required by the Convention is designed ... not to raise undue barriers or to create undue difficulties for the trade of other contracting parties". In our view, the EC licensing procedures at issue do create undue difficulties for the trade of other Members. Accordingly, since Article 168 of the Lomé Convention does not specifically require these licensing procedures, it cannot be invoked as a justification for applying the Lomé waiver to such procedures.

7.199 Protocol 5 of the Lomé Convention provides:

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

Protocol 5 suggests that each ACP country must be protected as regards its traditional markets and advantages thereon, nothing in the Lomé Convention specifically requires a licensing system for third-country and non-traditional ACP banana imports, such as is provided by the application of the operator category-activity function system to third-country and non-traditional ACP imports. It is,

however, necessary to consider whether these licensing procedures were one of the advantages, as that term is used in Protocol 5, formerly enjoyed by the ACP countries under member States' banana import regimes.

7.200 The first *Banana* panel report provided detailed information on the licensing systems that were applied in the EC member States prior to the implementation of its common market organization for bananas. Prior to the implementation of Regulation 404/93, ACP bananas were primarily imported by France and the United Kingdom.[100] The panel report described the French regime as follows:

> "19. A banana import régime was first established in France by a Decree of 9 December 1931. This provided for the imposition of temporary quotas on imports of bananas from third countries. It was complemented by a law of 7 January 1932, on safeguard of production of bananas in colonies, protectorates or territories under French mandate. By Decree No. 60-460 of 16 May 1960, a special import régime was established for countries of the "zone franc" (i.e. former colonies). By an *arbitration* of the President of the Republic of 1962, the general supply of the French market was divided as follows: two thirds for national production (Guadeloupe, Martinique) and one third for imports from African suppliers (Cameroon, Côte d'Ivoire and Madagascar). Bananas from the Latin American countries were imported only to make up for any shortfall from the regions or countries mentioned above. When imported, the Latin American bananas were subject to the bound 20 per cent tariff and to licences.
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> 20. In order to manage the banana market, an Interprofessional Committee for Bananas (Comité Interprofessionnel Bananier "CIB") was established on 5 December 1932. It was recognized as an agricultural interprofessional organization on 1 April 1989. The CIB brought together producers and importers, ripeners and distributors, including representatives of the African producers, as well as associated members (i.e., transporters). Since 1970, the GIEB (Groupement d'Intérêt Economique Bananier - Banana Economic Interest Group) has administered the existing quotas and import licences.
>
> 21. The CIB was responsible for assessing the demand for bananas on the French market on a yearly basis. A restricted Committee *(Conseil d'Administration)* of the CIB met every month to examine the quantities to buy the following month and to make a forecast for two months. In case of shortage of supply from one of

[100] Panel Report on "EEC - Member States' Import Regimes for Bananas", issued on 3 June 1993 (not adopted), DS32/R, p.3, para. 12.

> the domestic or African sources, the CIB requested the GIEB to import from other third countries. In addition, the Ministry of Economics and Finance published notices to importers concerning the opening of quotas administered through licences. These licences were valid for a period of six months and were primarily designed to cover indirect imports made through other member States, as direct imports were made by the GIEB.
>
> 22. Import licences were granted to the GIEB by the government. The GIEB was exclusively responsible for purchasing and importing bananas directly from third countries. Imported quantities were then sold by the GIEB at the domestic market price. The "mark-up" was transferred to the Treasury. In addition to the national market organization, France was authorized, under the provisions of Article 115 of the Treaty of Rome, not to grant EEC treatment to bananas originating in certain third countries and put into free circulation in another EEC member State".[101]

It described the regime of the United Kingdom as follows:

> "37. The banana import régime dated back to the early 1930's when the United Kingdom introduced preferential duties on imports of British Empire bananas. Traditionally, and before it joined the EEC, the United Kingdom imported most of its bananas from the Windward Islands and Jamaica, formerly part of the British Empire. These countries were now regarded as ACP countries under the Lomé Convention. Imports of bananas from ACP countries entered in unrestricted quantities and duty free. Between 1940 and 1958, there was a total ban on imports of bananas from Latin American countries. Thereafter, imports from third countries, usually Latin American bananas, had been subject to a quota, since 1985 an annual quota, and a licensing system, as well as the common external tariff of 20 per cent. Licences were granted under Section 2 of "The Import of Goods (Control) Order" of 1954. There was a guaranteed minimum quantity for third country banana imports which, in 1992, amounted to 38,868 tons. Additional imports from third countries occurred when there was a short-fall of supplies. Upon its accession to the EEC, the United Kingdom was authorized, by the Commission of the EC, under Article 115 of the Treaty of Rome, to apply restrictions to imports, through other member States, of bananas from third countries, put into free circulation in the EEC.

[101] Panel Report on "EEC - Member States' Import Regimes for Bananas", issued on 3 June 1993 (not adopted), DS32/R, pp.4-5, paras. 19-22.

> 38. At the beginning of every calendar year, the government authorities fixed the level of bananas that could be imported from all suppliers, according to the domestic needs determined by the Ministry of Agriculture, Fisheries and Food. On the basis of these parameters, monthly supply and demand conditions were established by the Banana Trade Advisory Committee (BTAC), set up in 1973 as a consultative committee for trade in bananas. Under the existing rules, the Department of Trade and Industry (DTI) was responsible for administering the import licensing system which controlled the quantity of banana imports from third country suppliers. The DTI issued public notices to importers. Since 1985, this took the form of an annual Notice to Importers, inviting applications for licences for the importation of bananas of non-preferential origin. Importers who fulfilled certain well-established criteria were eligible to obtain these licences. Once licences were allocated, for the annual basic import quota, management of further imports from third countries was done on a monthly basis. The BTAC met to consider updated forecasts of supply and demand. The DTI was then advised on the issue of further licences to cover shortfalls in supply and increases in demand".[102]

Based on the foregoing description of the UK and French procedures, it appears that when licences for banana imports were used, they were issued on a discretionary basis from time to time to established importers. Thus, prior to or as of 1990 (the reference period in the Lomé Convention for past or present advantages), neither the French nor the UK procedures appears to contain anything at all similar to the operator category-activity function system. Thus, in our view, licensing procedures of the kind presently applied were not an "advantage" that ACP countries formerly enjoyed in the EC or in individual member State markets.

7.201 In this connection, the EC argues that its licensing system is necessary to provide that the quantities for which access opportunities were given could actually be sold thereby guaranteeing traditional ACP bananas their existing advantages. We note that it appears that the ACP countries have enjoyed greater collective success on the EC market under Regulation 404/93 than in the years prior to 1993.[103] In any event, we believe that there are other methods consistent with WTO rules by which the EC could assist the ACP countries to compete on the EC market. As noted above, in our view, the Lomé waiver should not be inter-

[102] Panel Report on "EEC - Member States' Import Regimes for Bananas", issued on 3 June 1993 (not adopted), DS32/R, p.7, paras. 37-38.

[103] According to statistics submitted by the EC, the ACP countries' average share of the EC-12 market for imported bananas averaged 611,000 tonnes in the years 1989-1992, or 22.8 per cent. For 1993-1994, it averaged 737,000 tonnes, or 25.4 per cent. The Complainants suggest that the ACP share is understated in the EC statistics.

preted to permit breaches of WTO rules that are not clearly required to satisfy the provisions of the Lomé Convention. This reading is, in our view, confirmed by the terms of the waiver itself, which states in its fourth preambular paragraph: "Considering that the preferential treatment ... required by the Convention is designed ... not to raise undue barriers or to create undue difficulties for the trade of other contracting parties". In our view, these licensing procedures do create undue difficulties for the trade of other Members. Since licensing procedures are not an advantage formerly enjoyed by ACP countries and they are not required to provide access to traditional markets, such procedures are not covered by the Lomé waiver.

7.202 There are other provisions of the Lomé Convention, such as Articles 15(a) and 167, that call for the promotion of trade between the EC and ACP countries. However, they are too general to impose specific requirements on the EC. Thus, we do not agree that those provisions can be read to require a particular licensing system such as the operator category-activity function system.

7.203 Finally, we note that a finding that the Lomé waiver does not apply to the EC's licensing procedures for banana imports is in accordance with past panel practice that waivers should be interpreted narrowly.[104]

7.204 Thus, we find that the Lomé waiver does not waive the EC's obligations under Article I:1 of GATT in respect of licensing procedures applied to third-country and non-traditional ACP imports, including those related to operator category rules.

(v) Article X:3(a) of GATT

7.205 The Complainants claim that the EC licensing procedures are inconsistent with the requirements of Articles X:3 of GATT because they are not administered in a uniform, impartial and reasonable manner. The EC responds that Article X:3 only applies to internal measures and therefore is not applicable in this case. Alternatively, it argues that a system permitted under Article I by the Lomé waiver cannot be found to breach another GATT provision imposing MFN-like obligations similar to those waived. We note that we found in the preceding section that the EC licensing procedures were not permitted under Article I by the Lomé waiver.

7.206 Article X:3(a) provides:

> "Each Member shall administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings of the kind described in paragraph 1 of this Article".

Article X:1 defines the coverage of Article X:3(a) as follows:

[104] Panel Report on "US - 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 on 7 November 1990, BISD 37S/228, 256-257, para. 5.9.

> "Laws, regulations, judicial decisions and administrative rulings of general application, made effective by any Member, pertaining to the classification or the valuation of products for customs purposes, or to rates of duty, taxes or other charges, or to requirements, restrictions or prohibitions on imports or exports or on the transfer of payments therefor, or affecting their sale, distribution, transportation, insurance, warehousing, inspection, exhibition, processing, mixing or other use ...".

Given that this provision enumerates national legislation regarding border measures as well as internal measures, and customs tariffs as well as quantitative measures, the coverage of Article X could hardly be more comprehensive. Accordingly, internal laws regulating border measures constitute "... requirements ... on imports ..." in the meaning of Article X:1 and cannot be excluded from its scope.

7.207 Consequently, we find that the EC import licensing procedures are subject to the requirements of Article X of GATT.

7.208 More specifically, the Complainants claim that the rules establishing operator categories on the basis of the source of bananas marketed during a preceding three-year period are inconsistent with the requirements of Article X:3(a) because the EC applies them to imports of third-country and non-traditional ACP bananas but not to traditional ACP imports. According to the Complainants, these rules are inconsistent with the standards of "uniform, impartial and reasonable administration" of domestic laws, regulations, decisions and rulings and thus are inconsistent with the requirements of Article X:3(a). The EC maintains that the rules applying operator categories are administered in a uniform, impartial and reasonable manner among the third countries which are subject to that separate licensing regime and that the Complainants have failed to provide evidence to the contrary.

7.209 The Complainants support their argument by referring to a 1968 Note by the GATT Director-General, which stated that Article X:3(a)

> "would not permit, in the treatment accorded to imported goods, discrimination based on country of origin, nor would they permit the application of one set of regulations and procedures with respect to some contracting parties and a different set with respect to the others". [105]

The EC responds that the 1968 Note cannot be considered as an authoritative interpretation of GATT rules because it was never endorsed by a formal decision of the CONTRACTING PARTIES.

7.210 We note that a prior panel in discussing the interpretation of Article X:3(a) found that its terms would be met if regulations were applied "in a sub-

[105] Note by the GATT Director-General of 29 November 1968, L/3149.

stantially uniform manner, although there were some minor administrative variations, e.g. concerning the form in which licence applications could be made and the requirement of pro-forma invoices".[106] In that case, the panel found that such differences were minimal and did not in themselves establish a breach of Article X:3(a).

7.211 In our view, the Director-General's Note correctly describes the reach of Article X:3(a) and is consistent with the quoted panel decision. While minor "administrative variations" in the application of regulations may not be inconsistent with the requirements of Article X:3(a), as suggested by the above-mentioned panel report, two different sets of rules would be inconsistent with the requirements of Article X:3(a). In this case, we are confronted with a system for the importation of bananas into the EC with two different origin-based sets of import licensing procedures. These sets of licensing procedures differ significantly from one another, depending on whether imports of bananas are from traditional ACP sources or from third countries and non-traditional ACP sources, particularly with respect to the application of the rules on operator categories. The operator category (and activity function) rules contained in the licensing procedures for third-country and non-traditional ACP bananas (but not in the procedures applicable to traditional ACP bananas) mean that substantially more data must be maintained and submitted to show entitlement to a licence for third-country and non-traditional ACP bananas (see paragraph 7.190 *et seq.*). These differences are not consistent with Article X:3(a)'s requirement of "uniform" administration.

7.212 As a result, we find that 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, is inconsistent with the requirements of Article X:3(a) of GATT.

(vi) Other Claims

7.213 In light of the foregoing findings on operator category rules and the allocation of certain percentages of import licences on the basis thereof, we do not consider it necessary to address the other claims raised by the Complaining parties against these EC measures.[107] We further note that a finding that operator

[106] Panel Report on "EEC - Restrictions on Imports of Dessert Apples", Complaint by Chile, adopted on 22 June 1989, BISD 36S/93, 133, para. 12.30. In the descriptive part of the *Chilean Apples* case, "concerning Article X:3, Chile argued that there were differences among the ten member states of the EEC as to the requirements they imposed on applications for licences for imports of dessert apples. It cited examples, such as a French requirement for licence applications to be accompanied by a pro forma invoice, which effectively meant that licences could not be applied for until after ships had been loaded. Other examples cited by Chile included acceptance of telexed licence applications by some member states and not others; differing procedures for bank guarantees; and the refusal by one member state to accept a licence issued by another". Id. at page 116, para. 6.3.

[107] See note 47 supra.

category rules are or are not inconsistent with the requirements of other provisions of GATT or the Licensing Agreement would not affect the findings we have made in respect of operator category rules.

(c) Activity Functions

7.214 Activity function rules apply to Category A operators as well as to Category B operators. Article 3 of Regulation 1442/93 defines three categories of economic activities, i.e. (1) "primary" importers, (2) "secondary" importers and (3) ripeners. Fixed percentages of the licences required for the importation of bananas from third countries or non-traditional ACP sources at lower duty rates within the tariff quota are allocated on the basis of these "activity functions": Article 5 of Regulation 1442/93 provides for a weighting coefficient of 57 per cent for "primary" importers, 15 per cent for "secondary" importers, and 28 per cent for ripeners of bananas. The EC notes that "the Commission is guided by the principle whereby the licences must be granted to natural or legal persons who have undertaken the commercial risk of marketing bananas and by the necessity of avoiding disturbing normal trading relations between persons occupying different points in the marketing chain".[108]

7.215 The Complaining parties raise claims against the activity function rules under Articles I, III, X and XIII of GATT as well as claims under the Licensing Agreement. In the case of Mexico, we consider the claim it has raised under Article X of GATT.

(i) Article III:4 of GATT

7.216-7.219 [Used in the Guatemala-Honduras report.]

(ii) Article I:1 of GATT

7.220-7.223 [Used in the Ecuador, Guatemala-Honduras and United States reports.]

(iii) Article X:3(a) of GATT

7.224 The Complainants claim that the differences in the licensing procedures applied by the EC to traditional ACP imports and those applied to third-country and non-traditional ACP imports and in particular the rules establishing activity functions are inconsistent with the requirements of Article X:3 of GATT because they are not administered in a uniform, impartial and reasonable manner. The EC responds that Article X only applies to internal measures and therefore is not applicable in this case. Alternatively, it argues that a system permitted under Ar-

[108] Recital 15 of Council Regulation 404/93.

ticle I by the Lomé waiver cannot be found to breach another GATT provision imposing MFN-like obligations similar to those waived. The EC maintains that the activity function rules are administered in a uniform, impartial and reasonable manner among the third countries which are subject to that separate licensing regime and that the Complainants have failed to provide evidence to the contrary.

7.225 Article X:3(a) provides:

> "Each Member shall administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings of the kind described in paragraph 1 of this Article".

Article X:1 defines the coverage of Article X:3(a) as follows:

> "Laws, regulations, judicial decisions and administrative rulings of general application, made effective by any Member, pertaining to the classification or the valuation of products for customs purposes, or to rates of duty, taxes or other charges, or to requirements, restrictions or prohibitions on imports or exports or on the transfer of payments therefor, or affecting their sale, distribution, transportation, insurance, warehousing, inspection, exhibition, processing, mixing or other use ...".

Given that this provision enumerates national legislation regarding border measures as well as internal measures, and customs tariffs as well as quantitative measures, the coverage of Article X could hardly be more comprehensive. Accordingly, internal laws regulating border measures constitute "... requirements ... on imports ..." in the meaning of Article X:1 and cannot be excluded from its scope.

7.226 Consequently, we find that the EC import licensing procedures are subject to the requirements of Article X of GATT.

7.227 More specifically, the Complainants claim that the rules establishing activity functions are inconsistent with the requirements of Article X:3(a) because the EC applies them to imports of third-country and non-traditional ACP bananas but not to traditional ACP imports. According to the Complainants, these rules are inconsistent with the standards of "uniform, impartial and reasonable administration" of domestic laws, regulations, decisions and rulings and thus are inconsistent with the requirements of Article X:3(a). The EC maintains that the rules applying activity functions are administered in a uniform, impartial and reasonable manner among the third countries which are subject to that separate licensing regime and that the Complainants have failed to provide evidence to the contrary.

7.228 The Complainants support their argument by referring to a 1968 Note by the GATT Director-General, which stated that Article X:3(a)

> "would not permit, in the treatment accorded to imported goods, discrimination based on country of origin, nor would they permit the application of one set of regulations and procedures with re-

> spect to some contracting parties and a different set with respect to the others". [109]

The EC responds that the 1968 Note cannot be considered as an authoritative interpretation of GATT rules because it was never endorsed by a formal decision of the CONTRACTING PARTIES.

7.229 We note that a prior panel in discussing the interpretation of Article X:3(a) found that its terms would be met if regulations were applied "in a substantially uniform manner, although there were some minor administrative variations, e.g. concerning the form in which licence applications could be made and the requirement of pro-forma invoices".[110] In that case, the panel found that such differences were minimal and did not in themselves establish a breach of Article X:3(a).

7.230 In our view, the Director-General's Note correctly describes the reach of Article X:3(a) and is consistent with the quoted panel decision. While minor "administrative variations" in the application of regulations may not be inconsistent with the requirements of Article X:3(a), as suggested by the above-mentioned panel report, two different sets of rules would be inconsistent with the requirements of Article X:3(a). In this case, we are confronted with a common regime for the importation of bananas into the EC with two different origin-based sets of import licensing procedures. These sets of licensing procedures differ from one another, depending on whether imports of bananas are from traditional ACP sources or from third countries and non-traditional ACP sources, including with respect to the application of activity function rules. As noted earlier, (paragraph 7.190 *et seq*., e.g., Article 4:2(b) of Regulation 1442/93), in our view, the procedural and administrative requirements for imports of third-country and non-traditional ACP bananas arising from the activity function rules differ from, and go significantly beyond, those required in respect of traditional ACP bananas. More specifically, the activity function rules contained in the licensing procedures for third-country and non-traditional ACP bananas (but not in the procedures applicable to traditional ACP bananas) mean that substantially more data must be maintained and submitted to show entitlement to a licence for third-country and non-traditional ACP bananas. These differences are not merely minor administrative variations in the application of regulations but are two differ-

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[109] Note by the GATT Director-General of 29 November 1968, L/3149.

[110] Panel Report on "EEC - Restrictions on Imports of Dessert Apples", Complaint by Chile, adopted on 22 June 1989, BISD 36S/93, 133, para. 12.30. In the descriptive part of the *Chilean Apples* case, "concerning Article X:3, Chile argued that there were differences among the ten member states of the EEC as to the requirements they imposed on applications for licences for imports of dessert apples. It cited examples, such as a French requirement for licence applications to be accompanied by a pro forma invoice, which effectively meant that licences could not be applied for until after ships had been loaded. Other examples cited by Chile included acceptance of telexed licence applications by some member states and not others; differing procedures for bank guarantees; and the refusal by one member state to accept a licence issued by another". Id. at p.116, para. 6.3.

ent sets of rules which are inconsistent with the requirement of "uniform" administration as required by Article X:3(a).

7.231 As a result, we find that 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, is inconsistent with the requirements of Article X:3(a) of GATT.

(iv) Other Claims

7.232 In light of the foregoing findings on activity function rules under Articles I and X, we do not consider it necessary to address the other claims raised by the Complaining parties against these EC measures.[111] We further note that a finding that activity function rules are or are not inconsistent with the requirements of other provisions of GATT or the Licensing Agreement would not affect the findings we have made in respect of activity function rules.

(d) BFA Export Certificates

7.233 As part of the EC import licensing procedures, Category A and C operators are required, for imports from Colombia, Costa Rica or Nicaragua, to present export certificates issued by these countries. Category B operators are exempted from this requirement.

The relevant part of Article 6 of the BFA provides that:

> "... supplying countries with country quotas may deliver special export certificates for up to 70% of their quota, which, in turn, constitute a prerequisite for the issuance, by the Community, of certificates for the importation of bananas from said countries by "Category A" and "Category C" operators. ...".

The relevant part of Article 3.2 of EC Regulation 478/95 reads as follows:

> "For goods originating in Colombia, Costa Rica or Nicaragua, the application for an import licence of category A or C ... shall also not be admissible unless it is accompanied by an export licence currently valid for a quantity at least equal to that of the goods, issued by the competent authorities listed in Annex II."[112]

In light of these provisions, we consider the claims raised the Complaining parties, who have alleged that the export certificate requirement is inconsistent with the requirements of Articles I, III and X of GATT and Articles 1.2, 1.3 and 3.2 of

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[111] See note 47 supra.

[112] Regulation 478/95 of 1 March 1995 on additional rules for the application of Council Regulation (EEC) No. 404/93 as regards the tariff quota arrangements for imports of bananas into the Community and amending Regulations (EEC) No. 1442/93, O.J. L 49/13 of 4 March 1995.

the Licensing Agreement. In the case of Mexico, we consider the claim it raised under Article I.

7.234 Initially, the EC argues that a consideration of export certificates is outside the Panel's terms of reference because such certificates are not issued by the EC and therefore not part of the EC banana import regime. We agree that to the extent that the administration of export certificates is carried out by the authorities of Colombia, Costa Rica or Nicaragua, as appropriate,[113] it is not within the terms of reference of this Panel. However, we cannot agree with the EC's argument that export certificates are completely outside the EC's sphere of competence and their legal examination thus entirely excluded from the mandate of this Panel. On the contrary, Article 3 of Regulation 478/95 states clearly that an application for an EC import licence is not admissible unless it is accompanied by an export certificate. Thus the requirement to match EC import licences with BFA export certificates and the exemption of Category B operators therefrom are part of the EC legal system and, accordingly, are within our terms of reference, to the extent they fall within the EC's responsibility.

(i) Article I:1 of GATT

7.235 The Complainants claim that the fact that the EC recognizes only export certificates issued by BFA signatories as prerequisites for importation, amounts to the conferral of a "privilege" (i.e., a commercial benefit) not enjoyed by other Members. This is alleged to be inconsistent with the requirements of Article I:1.

7.236 The EC responds that the Complainants have failed to prove that the export certificate requirement constitutes an "advantage" in the meaning of Article I:1 accorded to BFA signatories which is not conferred on other third countries. The EC concedes that the administration of the export certificates by BFA signatories can generate quota rents, but only among operators who are interested in marketing BFA bananas. However, the EC takes the position that the WTO agreements do not contain rules on the sharing and allocation of quota rents, e.g., by means of a licensing scheme. Therefore, in its view, any government is entitled to pursue its own policies in the distribution of quota rents provided that there is no discrimination between products originating in different Members.

7.237 The issue presented is whether the export certificate requirement constitutes an advantage in respect of rules and formalities in connection with importation accorded to BFA bananas that is not accorded to third-country bananas as required by Article I:1.

[113] According to Annex II of Regulation 478/95, the bodies authorized to issue special export certificates are: for Colombia: Instituto Colombiano de Comercio Exterior; for Costa Rica: Corporación Bananera S.A.; and for Nicaragua: Ministerio de Economia y Desarrollo, Dirección de Comercio Exterior.

7.238 On its face, it would appear that there is discrimination against BFA bananas because they are subject to a requirement that is not imposed on other third-country bananas. However, closer analysis suggests that the export certificate requirement may in fact constitute a favour, advantage, privilege or immunity in the meaning of Article I. It is a commonplace, which no party to the dispute contests, that tariff quotas are likely to generate quota rents. The allocation of licences used in the administration of such tariff quotas can be viewed as a mechanism for the distribution of such rents. In fact, the parties do not contest that the export certificate requirement serves the purpose, or at least has the effect, of transferring part of the quota rent which would normally accrue to initial EC import licence holders to the suppliers who are initial holders of export certificates for bananas originating in the three BFA countries. The EC argues that the WTO agreements do not contain any rules governing the distribution of quota rents which are generated by trade measures, e.g., tariff quotas, whose imposition is legitimate under those agreements. We nevertheless have to ascertain whether the particular mechanisms implemented for the purposes of rent transfer directly or indirectly entail inconsistencies with the obligations Members have to respect under the WTO agreements.

7.239 The requirement to match EC import licences with BFA export certificates means that those BFA banana suppliers who are initial holders of export certificates enjoy a commercial advantage compared to banana suppliers from other third countries.[114] We note that it is not possible to ascertain how many of the initial BFA export certificate holders are BFA banana producers or to what extent the tariff quota rent share that accrues to initial holders of BFA export certificates is passed on to the producers of BFA bananas in a way to create more favourable competitive opportunities for *bananas* of BFA origin. However, we also note that the possibility does exist to pass on tariff quota rent to BFA banana producers in such a way, whereas there is no such possibility in respect of non-BFA third-country banana producers. Thus, the EC's requirement affects the competitive relationship between *bananas* of non-BFA third-country origin and bananas of BFA origin. It is certainly true that Article I of GATT is concerned with the treatment of foreign *products* originating from different foreign sources rather than with the treatment of the suppliers of these products. In this respect, we note that the transfer of tariff quota rents which would normally accrue to initial holders of EC import licences to initial holders of BFA export certificates does occur when *bananas* originating in Colombia, Costa Rica and Nicaragua are, at some point, traded to the EC. Therefore, in our view, the requirement to match EC import licences with BFA export certificates and thus the commercial

[114] "Whereas the framework agreement provides that the signatory countries are authorized to issue export licences for seventy percent of their allocations, which licences are to be presented in order to obtain import licences of Category A and C for import into the Community, *in conditions which may improve the regularity and stability of commercial transactions* and guarantee the absence of any discriminatory treatment among operators" (emphasis added). Recital 8 of Regulation 478/95.

value of export certificates are linked to the *product* at issue as required under Article I. In practice, from the perspective of EC *importers* who are Category A or C operators, bananas of non-BFA third-country origin appear to be more profitable than bananas of BFA origin. This is confirmed by the fact that EC import licences for non-BFA third-country bananas and Category B licences for BFA bananas are typically oversubscribed in the first round of licence allocations, while Category A and C licences for BFA bananas are usually exhausted only in the second round of the quarterly licence allocation procedure. The EC argues that the fact that licences allowing the importation of non-BFA bananas at in-quota tariff rates are usually exhausted in the first round amounts to an advantage for bananas of Complainants' origin. While we do not endorse the EC's view, even if this were to constitute an advantage, we note "that Article I:1 does not permit balancing more favourable treatment under some procedure against a less favourable treatment under others".[115]

7.240 Indeed, one could argue that if the export certificate requirement is beneficial to BFA countries, non-BFA third countries could autonomously introduce a similar requirement in order to reap quota rent benefits. In this case, however, since the allocation of the "others" category of the BFA is not country-specific under the current EC regime, operators could switch to alternative sources within this category which are not subject to an export certificate requirement. Therefore, we consider that the requirement to match BFA export certificates with EC import licences in connection with the country-specific allocation of tariff quota shares under the BFA is an advantage or privilege in the terms of Article I:1 in respect of rules and formalities in connection with importation. Since the EC accords this advantage to products originating in Colombia, Costa Rica and Nicaragua "while denying the same advantage to a like product originating in the territories of other [Members],"[116] i.e., the Complainants' countries, the requirement to match EC import licences with BFA export certificates as provided for in Article 3 of Regulation 478/95 is inconsistent with Article I:1.

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[115] "The Panel ... considered that Article I:1 does not permit balancing more favourable treatment under some procedure against a less favourable treatment under others. If such a balancing were accepted, it would entitle a contracting party to derogate from the most-favoured nation obligation in one case, in respect of one contracting party, on the ground that it accords more favourable treatment in some other case in respect of another contracting party. In the view of the Panel, such an interpretation of the most-favoured-nation obligation of Article I:1 would defeat the very purpose underlying the unconditionality of that obligation". Panel Report on "United States - Denial of Most-favoured-nation Treatment as to Non-rubber Footwear from Brazil", adopted on 19 June 1992, BISD 39S/128, 151, para. 6.10. Likewise, in the context of Article III a panel found that "an element of more favourable treatment would only be relevant if it would always accompany and offset an element of differential treatment causing less favourable treatment." Panel Report on "United States - Section 377 of the Tariff Act of 1930", adopted on 7 November 1989, BISD 36S/345, 388, para. 5.16.

[116] Panel Report on "United States - Denial of Most-favoured-nation Treatment as to Non-rubber Footwear from Brazil", adopted on 19 June 1992, BISD 39S/128, 151, para. 6.11.

7.241 For these reasons, we find that the requirement to match EC import licences with BFA export certificates is inconsistent with the requirements of Article I:1 of GATT.

(ii) Other Claims

7.242 In light of our finding that the requirement to match EC import licences with BFA export certificates is inconsistent with the requirements of Article I:1, one of the fundamental provisions of GATT, we consider it unnecessary to make specific rulings on the other claims raised by the Complaining parties with respect to the same EC measures, including the claim that the exemption of Category B operators from the matching requirement violates Article I also.[117] A finding that these measures are or are not inconsistent with the requirements of Articles III and X of GATT and the Licensing Agreement would not affect our findings in respect of Article I. Moreover, steps taken by the EC to bring the measures into conformity with Article I should also eliminate the alleged non-conformity with these other obligations.

(e) Hurricane Licences

7.243 Hurricane licences[118] authorize operators who include or represent EC and ACP producers, or producer organizations "to import in compensation third-country bananas and non-traditional ACP bananas for the benefit of the operators who directly suffered damage as a result of the impossibility of the supplying the Community market with bananas originating in affected producer regions" because of the impact of tropical storms.[119] In the aftermath of the hurricanes Deb-

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[117] See note 47 supra.

[118] See, e.g., Commission Regulation (EC) No. 2791/94 of 16 November 1994 on the exceptional allocation of a quantity additional to the tariff quota for imports of bananas in 1994 as a result of tropical storm Debbie. Commission Regulation (EC) No. 510/95 of 7 March 1995 on the exceptional allocation of a quantity additional to the tariff quota for imports of bananas during the first quarter of 1995 as a result of tropical storm Debbie. Commission Regulation (EC) No. 1163/95 of 23 May 1995 on the exceptional allocation of a quantity additional to the tariff quota for imports of bananas during the second quarter of 1995 as a result of tropical storm Debbie. Commission Regulation (EC) No. 2358/95 of 6 October 1995 on the exceptional allocation of a quantity additional to the tariff quota for imports of bananas during the fourth quarter of 1995 as a result of tropical storms Iris, Luis and Marilyn. Commission Regulation (EC) No. 127/96 of 25 January 1996 on the exceptional allocation of a quantity additional to the tariff quota for imports of bananas during the first quarter of 1996 as a result of tropical storms Iris, Luis and Marilyn. Commission Regulation (EC) No. 822/96 of 3 May 1996 on the exceptional allocation of a quantity additional to the tariff quota for imports of bananas during the second quarter of 1996 as a result of tropical storms Iris, Luis and Marilyn.

[119] "Whereas ... these measures should be to the benefit of the operators who have directly suffered actual damage, without the possibility of compensation, and as a function of the extent of the damage." Recital 9 of Commission Regulation (EC) No. 510/95 of 7 March 1995 on the exceptional allocation of a quantity additional to the tariff quota for imports of bananas during the first quarter of 1995 as a result of tropical storm Debbie.

bie, Iris, Luis and Marilyn, 281,605 tonnes[120] of third-country or non-traditional ACP imports were authorized between November 1994 and May 1996. The Complaining parties have raised claims under Article I, III and X of GATT and Articles 1.2, 1.3 and 3.5(h) of the Licensing Agreement. In the case of Mexico, we consider the claims that it raised under Article III of GATT and Article 1.3 of the Licensing Agreement.

(i) Article III:4 of GATT

7.244 The Complainants allege that the issuance of hurricane licences by the EC is inconsistent with the requirements of Article III:4 of GATT because EC producers are treated more favourably than third-country suppliers. The EC argues that the distribution of hurricane licences does not discriminate against bananas from third countries because hurricane licences are used for the importation of third-country or non-traditional ACP bananas.

7.245 We recall that it is the purpose of the national treatment clause to protect foreign *products* from being treated less favourably than like domestic products. Therefore, we have to examine whether the EC, by issuing hurricane licences, treats third-country bananas less favourably than domestic bananas.[121] We note that hurricane licences can be used to import third-country bananas or non-traditional ACP bananas. Therefore, by issuing hurricane licences, the EC in effect authorizes imports of third-country (and non-traditional ACP) bananas at the lower duty rates in addition to the imports under the EC bound tariff quota.

7.246 In turning to the substance of this claim, we note that only operators including or directly representing EC (or traditional ACP) banana producers or producer organizations who have suffered damage caused by a tropical storm are eligible for the allocation of hurricane licences. We consider that it is not possible to ascertain to what extent such operators pass on the tariff quota rents linked to the hurricane licences to EC (or ACP) banana producers in a way to create more favourable competitive opportunities for *bananas* of EC (or traditional ACP) origin. However, we also note that it is the object and purpose of the EC hurricane licence regulations to pass on tariff quota rents to EC (or ACP) producers, whereas no such possibility exists in respect of third-country banana pro-

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[120] Total quantities of authorized third-country and non-traditional ACP imports:

Regulation No. 2791/94 of 18 November 1994:	53,400 tonnes
Regulation No. 510/95 of 7 March 1995:	45,500 tonnes
Regulation No. 1163/95 of 23 May 1995:	19,465 tonnes
Regulation No. 2358/95 of 6 October 1995:	90,800 tonnes
Regulation No. 127/96 of 25 January 1996:	51,350 tonnes
Regulation No. 822/96 of 3 May 1996:	21,090 tonnes
Total:	281,605 tonnes

[121] The exception of Article III:8(b) of GATT could be relevant where production aids to domestic production would accrue only to the producers, but not to processors of a domestic product. However, no such defense was raised in this case.

ducers. Thus, competitive opportunities for *bananas* of Complainants' origin are less favourable than those that the EC provides to bananas of EC (or traditional ACP) origin, additional production of which may be encouraged in hurricane-prone regions because of the reduced risk of financial losses for such EC (or traditional ACP) banana producers in the event of a tropical storm.

7.247 Furthermore, since hurricane licences are issued only to operators who include or directly represent EC (or ACP) producers or producer organizations affected by a tropical storm,[122] Category A operators who have historically marketed third-country and non-traditional ACP bananas will not be allocated hurricane licences at all, irrespective of whether they include or represent third-country producers affected by a hurricane. Therefore, the fact that hurricane licences are issued only to operators who include or directly represent EC (or ACP) producers affected by a hurricane, although such licences might be used for the immediate importation of third-country (or non-traditional ACP) bananas, may provide an incentive for operators to market more EC (or traditional ACP) bananas grown in hurricane-prone areas than they otherwise would, in preference to third-country bananas, since the issuance of hurricane licences to eligible operators ensures that they can maintain, or do not lose, reference quantities for the purpose of establishing their entitlements to Category B licences in the future. Consequently, even if tariff quota rents linked to the hurricane licences are not fully passed on to producers by initial holders of hurricane licences who may only represent affected EC (or ACP) banana producers without being producers themselves, the greater incentive to market such EC (or traditional ACP) bananas arising from the fact that losses of such bananas caused by tropical storms can be expected to be compensated for through the allocation of hurricane licences, nevertheless, adversely affects conditions of competition for *bananas* of Complainants' origin in respect of which the risk of loss due to hurricanes cannot be expected to be reduced by the EC's hurricane licence allocations.

7.248 In light of the foregoing, we now consider whether the above-described practice of issuing hurricane licences is inconsistent with the requirements of Article III:4. To establish an inconsistency with Article III:4, it would be suffi-

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[122] "1. The quantities referred to in Article 1(2) shall be allocated to the operators who:
- include or directly represent banana producers affected by tropical storm Debbie.
- and who, during the last quarter of 1994, are unable to supply, on their own account, the Community market with bananas originating in the regions or countries referred to 1(2) on account of the damage caused by tropical storm Debbie.

2. The competent authorities in the Member States concerned shall determine the beneficiary operators who meet the requirements of paragraph 1 and shall make an allocation to each of them pursuant to this Regulation on the basis of:
- the quantities allocated to the producer regions or countries referred to in Article 1(2) and of
- the damage sustained as a result of tropical storm Debbie.

3. The competent authorities shall assess the damage sustained on the basis of all supporting documents and information collected from the operators concerned." Article 2 of Commission Regulation No. 2791/94 of 16 November 1994 on the "exceptional allocation of a quantity additional to the tariff quota for imports of bananas in 1994 as a result of tropical storm Debbie.

cient for the Complainants to show that third-country bananas are treated less favourably than EC bananas in respect of a law, regulation or requirement affecting their internal sale, etc. We recall that we have agreed with the findings of the second *Banana* panel, which stated (paragraph 7.179): "A requirement to purchase a domestic product in order to obtain the right to import a product at a lower rate of duty under a tariff quota is therefore a requirement affecting the purchase of a product within the meaning of Article III:4". We note that this is the case in respect of the conditions attached to eligibility for hurricane licences. Since the practice of issuing hurricane licences may create an incentive for operators to purchase bananas of EC (and ACP) origin for marketing in the EC rather than bananas of third-country origin, this practice is an advantage accorded to bananas of EC origin that is not accorded to bananas of third-country origin. Thus, in terms of Article III:4, third-country bananas are treated less favourably than EC (and ACP) bananas in respect of a law, regulation or requirement affecting their internal sale.

7.249 However, before deciding whether the practice of issuing hurricane licences is inconsistent with Article III:4, we need to consider that Article III:1 is a general principle that informs the rest of Article III, as the Appellate Body has recently stated.[123] Since Article III:1 constitutes part of the context of Article III:4, it must be taken into account in our interpretation of the latter. Article III:1 articulates a general principle that internal measures should not be applied so as to afford protection to domestic production.[124] According to the Appellate Body, the protective application of a measure can most often be discerned from the design, the architecture, and the revealing structure of the measure.[125] We consider that the design, architecture and structure of the EC practice of issuing hurricane licences all indicate that the measure is applied so as to afford protection to EC (and ACP) producers.

7.250 Thus, we find that the issuance of hurricane licences exclusively to EC producers and producer organizations or operators including or directly representing them is inconsistent with the requirements of Article III:4 of GATT.

(ii) Article I:1 of GATT

7.251-7.256 [Used in the Guatemala-Honduras report.]

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[123] Appellate Body Report on *Japan - Taxes on Alcoholic Beverages*, DSR 1996:I, 97 at 111. The Report states: "The purpose of Article III:1 is to establish this general principle as a guide to understanding and interpreting the specific obligations contained in Article III:2 and in the other paragraphs of Article III, while respecting, and not diminishing in any way, the meaning of words actually used in the texts of those other paragraphs".

[124] *Ibid*.

[125] *Ibid.*, 120.

(iii) Application of the Lomé Waiver

7.257-7.259 [Used in the Guatemala-Honduras report.]

(iv) Article 1.3 of the Licensing Agreement

7.260 The Complainants claim that the issuance of hurricane licences by the EC exclusively to EC and ACP producers and producer organizations as well as operators who include or directly represent them is inconsistent with the requirements of Article 1.3 which requires the neutral application and the fair and equitable administration of import licensing procedures. The EC argues that no discrimination occurs in connection with the issuance of hurricane licences because the eligibility for hurricane licences is based on objective criteria.

7.261 Article 1.3 of the Licensing Agreement provides:

> "The rules for import licensing procedures shall be neutral in application and administered in a fair and equitable manner".

To apply Article 1.3, we must interpret the terms "neutrality" in application, as well as "fairness" and "equity" in administration. In this regard, we recall our interpretation of Article X:3(a) of GATT (paragraph 7.211, 230). Using the reasoning developed there, we interpret the phrase "neutrality in application" to preclude the imposition of one system of import licensing procedures in respect of a product originating in certain Members and a different system of import licensing procedures on the same product originating in other Members.[126] In particular, we consider that the issuance of hurricane licences exclusively to ACP and EC producers and organizations or operators including or directly representing them in respect of bananas lost to hurricanes, but not to third-country producers and producer organizations or operators including or directly representing them, is inconsistent with the requirement of neutral application as contained in Article 1.3. In the light of the foregoing, we find it unnecessary to consider whether the EC hurricane licensing system meets Article 1.3's requirement of "fairness" and "equity".

7.262 The question then becomes whether the Lomé waiver applies so as to waive the EC's obligations under Article 1.3 in this regard. We note that the Lomé waiver was initially approved by the CONTRACTING PARTIES of GATT 1947, who had no power over the Tokyo Round Agreement on Import Licensing Procedures, which, at the time, was administered by a committee of signatories and contained no waiver provision. In the light of these considerations, the Lomé waiver from Article I of GATT cannot be read to waive the EC's obligations under Article 1.3 of the Licensing Agreement. We also note that the

[126] We recall that we considered that minor "administrative variations" in the application of regulations may not be inconsistent with Article X:3(a) of GATT (para. 7.211, 230). In our view, the same consideration applies in the context of Article 1.3 of the Licensing Agreement.

extension of the waiver by the General Council of the WTO has not altered that fact.

7.263 As a result, we find that the issuance of hurricane licences exclusively to ACP and EC producers and producer organizations or operators including or directly representing them is inconsistent with the requirements of Article 1.3 of the Licensing Agreement.

(v) Other Claims

7.264 In light of our findings that the issuance of hurricane licences exclusively to EC and ACP producers and producer organizations or operators including or directly representing them is inconsistent with the requirements of Article III:4 of GATT and Article 1.3 of the Licensing Agreement, we consider it unnecessary to make specific rulings on the other claims raised by the Complaining parties with respect to the same EC measures.[127] We further note that a finding that these measures are or are not inconsistent with the requirements of Article X:3(a) of GATT or Article 3:5(h) of the Licensing Agreement would not affect the findings we have made in respect of hurricane licences. Moreover, steps taken by the EC to bring the measures into conformity with the requirements of these articles should also eliminate the alleged non-conformity with Article X:3(a) of GATT and Article 3:5(h) of the Licensing Agreement.

(f) Other Claims

i) General

7.265 In light of the findings we have made on operator categories, activity functions, export certificates and hurricane licences under Articles I, III and X of GATT and Article 1.3 of the Licensing Agreement, we do not consider it necessary to address the other claims raised by the Complaining parties against the EC licensing procedures.[128] These claims are largely dependent on the existence of the operator category and activity function rules. For example, the alleged overfiling and unnecessary burdens and the alleged restrictive and distortive effects claimed to be inconsistent with the requirements of Article 3.2 of the Licensing Agreement and the alleged discouragement of tariff quota use claimed to be inconsistent with the requirements of Article 3.5(h) of the Licensing Agreement arise from the application of those rules. We further note that a finding that these EC measures are or are not inconsistent with the requirements of other provisions of GATT or the Licensing Agreement would not affect the findings we have made in respect of the EC licensing procedures.

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[127] See note 47 supra.
[128] See note 47 supra.

7.266 We examine only the claim based on Article 1.2 of the Licensing Agreement, which we are required to do by Article 12.11 of the DSU since the claim relates to developing country Members.

(ii) Article 1.2 of the Licensing Agreement

7.267 The Complainants allege that the EC import licensing regime in general and the distribution of licences on the basis of operator categories as well as the application of activity function rules to operators importing third-country and non-traditional ACP bananas in particular, are inconsistent with the requirements of Article 1.2 of the Licensing Agreement. Moreover, in their view, economic development purposes and financial and trade needs of developing country Members are not sufficiently taken into account by the EC licensing procedures. In response, the EC recalls its position that the Licensing Agreement does not apply to tariff quota regimes, and furthermore submits Article 1.2 is merely a generic reminder that import licensing procedures should be in conformity with GATT rules. In the EC's view, Article 1.2 does not in itself create obligations additional to those arising from GATT.

7.268 Article 1.2 reads:

> "Members shall ensure that the administrative procedures used to implement import licensing regimes are in conformity with the relevant provisions of GATT 1994 including its annexes and protocols, as interpreted by this Agreement, with a view to preventing trade distortions that may arise from an inappropriate operation of those procedures, taking into account the economic development purposes and financial and trade needs of developing country Members".[129]

This provision derives from the 1979 Tokyo Round Agreement on Import Licensing Procedures which was negotiated as a self-standing agreement without a formal legal link to GATT 1947. Accordingly, membership was open not only to GATT contracting parties and the European Communities, but also to any other government.[130] Therefore, provisions of GATT 1947 applied between the signatories of the 1979 Licensing Agreement, by virtue of that agreement, only to the extent that they had been explicitly referred to and incorporated into the 1979 Licensing Agreement. In this context, Articles 1.10 and 4.2 of the 1979 Licensing Agreement mention, *inter alia*, Articles XXI, XXII and XXIII of GATT 1947. Accordingly, the general rule that administrative procedures used to implement import licensing regimes had to conform with the relevant GATT provisions in fact added only to the obligations which any non-GATT contracting parties

[129] The footnote to Article 1.2 of the Licensing Agreement provides: "Nothing in this Agreement shall be taken as implying that the basis, scope and duration of a measure being implemented by a licensing procedure is subject to question under this Agreement."
[130] 1979 Licensing Agreement, Article 5.

among the signatories of the 1979 Licensing Agreement would have been subject to.[131]

7.269 The wording of Article 1.2 remained unchanged in the Uruguay Round. Given that the Agreement Establishing the WTO and all the agreements listed in Annexes 1 through 3 thereto constitute a single undertaking, however, Article 1.2 of the WTO Licensing Agreement has become largely duplicative of the obligations already provided for in GATT, except for the reference to developing country Members. Given this context, Article 1.2 of the WTO Licensing Agreement has lost most of its legal significance.

7.270 However, the Appellate Body has endorsed the principle of effective treaty interpretation by stating that "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".[132] In light of this, we have to give effect and meaning to Article 1.2 of the Licensing Agreement.

7.271 For this reason, to the extent that we find that specific aspects of the EC licensing procedures are not in conformity with Articles I, III or X of GATT, we necessarily also find an inconsistency with the requirements of Article 1.2 of the Licensing Agreement.

7.272 With respect to Article 1.2's requirement that account should be taken of "economic development purposes and financial and trade needs of developing country Members", the Licensing Agreement does not give guidance as to how that obligation should be applied in specific cases. We believe that this provision could be interpreted as a recognition of the difficulties that might arise for developing country Members, in imposing licensing procedures, to comply fully with the provisions of GATT and the Licensing Agreement. In the alternative, Article 1.2 could also be read to authorize, but not to require, developed country Members to apply preferential licensing procedures to imports from developing country Members. In any event, even if we accept the latter interpretation, we have not been presented with evidence suggesting that, in its licensing procedures, there were factors that the EC should have but did not take into account under Article 1.2.

7.273 Therefore, we do not make a finding on whether the EC failed to take into account the needs of developing countries in a manner inconsistent with the requirements of Article 1.2 of the Licensing Agreement.

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[131] In fact, there were no such signatories.

[132] Appellate Body Report on "US - Standards for Reformulated and Conventional Gasoline", adopted 20 May 1996, AB-1996-1, WT/DS2/AB/R, DSR 1996:I, 3 at 21.

4. The EC Banana Import Licensing Procedures and the GATS

(a) Introduction

7.274 The Complainants[133] claim that the EC regime for the importation, sale and distribution of bananas is inconsistent with the EC's obligations under Articles II (Most-Favoured-Nation Treatment) and XVII (National Treatment) of GATS in that it discriminates against distributors of Latin American and non-traditional ACP bananas in favour of distributors of EC and traditional ACP bananas. The Complainants consider such distributors to be suppliers of "wholesale trade services", a service sector in which the EC has undertaken a full commitment on national treatment in its Schedule. They also consider both groups of distributors to be "like" service suppliers within the meaning of Articles II and XVII. The Complainants have made claims with respect to four specific measures of the EC regime that we have analyzed in the preceding section on import licensing procedures: operator category allocations, activity function rules, BFA export certificates and hurricane licences.

7.275 The EC rejects the claims with respect to the GATS arguing, *inter alia*, that the measures in respect of which the Complainants have made claims were measures directed at trade in goods and not trade in services. Therefore, they could not be considered "measures affecting trade in services" within the meaning of the GATS. Moreover, the EC argues that "wholesale trade services" covers only the distribution of ripened (yellow) bananas, while the measures at issue relate to the import of unripened (green) bananas. In addition, the EC contests that the Complainants' services and service suppliers have been given less favourable treatment in the meaning of the GATS. In its view, the Complainants are contesting the allocation of tariff quota rents, a matter not dealt with by the GATS.

7.276 In our consideration of the claims raised under the GATS, we first examine seven general issues: (i) whether the four measures cited by the Complainants constitute "measures affecting trade in services" within the meaning of the GATS; (ii) the definition of "wholesale trade services"; (iii) the supply of services through different modes; (iv) the scope of Article II obligations; (v) the scope of Article XVII obligations; (vi) the effective date of GATS obligations; and (vii) the admissibility of Mexico's claims. Second, we examine the consistency of four specific measures - operator category allocations, activity function rules, BFA export certificates and "hurricane licences - with the EC's obligations under Article II and its commitments under Article XVII.

[133] In this section on services, the term "Complainants" refers to Ecuador and the United States, and to Mexico except in respect of claims under Article XVII of GATS concerning activity function rules, export certificates and hurricane licences.

(b) General Issues

(i) Measures Affecting Trade in Services

7.277 The EC claims that the four measures complained against by the Complainants are not "measures affecting trade in services" since they regulate the importation of goods and not the provision of services. The EC argues that the objective of the GATS is to regulate trade in services as such and that it covers the supply of services as products in their own right. Furthermore, it argues the GATS is not concerned with the indirect effects of measures relating to trade in goods on the supply of services.

7.278 The EC also argues that a measure could not be covered by both GATT and the GATS since the coverage of the two agreements was intended, in the EC's view, to be mutually exclusive. In this connection, the EC notes that if a measure relating to trade in goods was covered by a GATT exception or a waiver, such exception or waiver could be rendered ineffectual by a finding against the measure relating to goods under the GATS and asserting its illegality in that context. The EC also considers that the illustrative definition of "measures affecting trade in services" in Article XXVIII(c) of GATS mentions measures as they relate to the supply of services and not the supply of goods. In the EC's view, in Article XXVIII(c), the term "affecting", which is used in Article I to define the scope of the GATS, should be interpreted narrowly so as to mean "in respect of", which is a much narrower concept indicating that the measure in question has to have the purpose and aim of regulating, or at least directly influencing, services as services.

7.279 In examining these issues we note the following: Article I (Scope and Definition), which defines the scope of the GATS, states in paragraph 1:

> "This Agreement applies to measures by Members affecting trade in services".

Article XXVIII(c) of GATS further defines the term by stating:

> "'measures by Members affecting trade in services' *include* measures in respect of:
>
> (i) the purchase, payment or use of a service;
>
> (ii) the access to and use of, in connection with the supply of a service, services which are required by those Members to be offered to the public generally;
>
> (iii) the presence, including commercial presence, of persons of a Member for the supply of a service in the territory of another Member;" (emphasis added).

7.280 In accordance with Article 31 of the Vienna Convention on the Law of Treaties,[134] we note that the ordinary meaning of the term "affecting", in Article

[134] See para. 7.14 supra.

I:1 of GATS, does not convey any notion of limiting the scope of the GATS to certain types of measures or to a certain regulatory domain. On the contrary, Article I:1 refers to measures in terms of their effect, which means they could be of any type or relate to any domain of regulation. Like GATT, the GATS is an umbrella agreement which applies to all sectors of trade in services and all types of regulations. We also note that the definition of "measures by Members affecting trade in services" in Article XXVIII(c) has been drafted in an illustrative manner by the use of the term "include". Sub-paragraphs (i)-(iii) do not contain a definition of "measures by Members affecting trade in services" as such, but rather are an illustrative list of matters in respect of which such measures could be taken. In other words, the term "in respect of" does not describe any measures affecting trade in services, but rather describes what such measures might regulate. For example, sub-paragraph (i) refers to "the purchase, payment or use of a service", which are matters that could be regulated by different types of measures affecting trade in services, such as licensing requirements, numerical limitations, foreign exchange regulations or others. We, therefore, do not agree with the view of the EC that Article XXVIII(c) narrows the meaning of the term "affecting" to "in respect of".

7.281 In accordance with Article 32 of the Vienna Convention,[135] we note that the preparatory work of the GATS confirms the foregoing interpretation. In the Uruguay Round, the drafters of the GATS were aware that the term *affecting* had been interpreted in prior GATT panel reports to cover not only laws and regulations which directly govern the conditions of sale or purchase but also any laws or regulations which might adversely modify conditions of competition between like domestic and imported products on the internal market.[136] Another indication of the wish of the drafters to widen the scope of the GATS in terms of the regulatory measures it covers is the use of the concept of "supply" of services rather than "delivery". The text of Article XXVIII(b)[137] as well as the preparatory work[138] indicate that the choice of the term "supply of a service" involved the

[135] See para. 7.14 supra.

[136] MTN.GNS/W/139 (Definitions in the Draft General Agreement on Trade in Services - Note by the Secretariat), p.4, para. xii, states: "The term 'affecting' has been interpreted in Article III of the GATT to mean an effect on the competitive relationship between like products, not on the subsequent trade volumes in those products (BISD 36S/345 at paragraph 5.11; BISD 34S/136 at paragraph 5.19)". For example, in the *Italian Agriculture Machinery* case, the panel report stated: "[T]he drafters of [Article III] intended to cover in paragraph 4 not only the laws and regulations which directly govern the conditions of sale or purchase but also any laws or regulations which might adversely modify the conditions of competition between the domestic and imported products on the internal market". Panel Report on "Italian Discrimination Against Imported Agricultural Machinery", adopted on 23 October 1958, BISD 7S/60, 64, para. 12. This interpretation has also been confirmed in subsequent GATT panel reports.

[137] Article XXVIII(b) provides: " 'supply of a service' includes the production, distribution, marketing, sale and delivery of a service".

[138] MTN.GNS/W/139 (Definitions in the Draft General Agreement on Trade in Services), p.3, para. xi, states: "The notion of 'supply' is intended to encompass the whole range of activities necessary to produce and deliver a service. The definition is illustrative, not comprehensive. The use of the

coverage of a wider range of activities than the case would have been had the drafters chosen to use the term "delivery". That has made a wider range of regulations subject to the application of the GATS. In sum, we believe that, consistently with their general approach, the drafters consciously adopted the terms "affecting" and "supply of a service" to ensure that the disciplines of the GATS would cover any measure bearing upon conditions of competition in supply of a service, regardless of whether the measure directly governs or indirectly affects the supply of the service.

7.282 With respect to the claim by the EC that GATT and the GATS cannot overlap, we note that such a view is not reflected in any of the provisions of the two agreements. On the contrary, the provisions of the GATS referred to above explicitly take the approach of being inclusive of any measure that affects trade in services whether directly or indirectly. These provisions do not make any distinction between measures which directly govern or regulate services and measures that otherwise affect trade in services.

7.283 Furthermore, it is our view that if we were to find the scope of the GATS and that of GATT to be mutually exclusive, in other words, if we were to find that a measure considered to fall within the scope of one agreement could not at the same time fall within the scope of the other, the value of Members' obligations and commitments would be undermined and the object and purpose of both agreements would be frustrated. Obligations could be circumvented by the adoption of measures under one agreement with indirect effects on trade covered by the other without the possibility of any legal recourse. For example, a measure in the transport sector regulating the transportation of merchandise in the territory of a Member could subject imported products to less favourable transportation conditions compared to those applicable to like domestic products. Such a measure would adversely affect the competitive position of imported products in a manner which would not be consistent with that Member's obligation to provide national treatment to such products. If the scope of GATT and the GATS were interpreted to be mutually exclusive, that Member could escape its national treatment obligation and the Members whose products have been discriminated against would have no possibility of legal recourse on account that the measure regulates "services" and not goods. It is also our view that if the drafters of the GATS had intended to impose such a serious limitation on its scope, particularly in the light of how the term "affecting" had been interpreted in past GATT panel reports and their deliberate choice of the concept of "supply" as explained above, they would have provided for the limitation explicitly in the text of the GATS itself or in the provisions of the Agreement Establishing the World Trade Or-

term 'supply', in place of 'delivery' in prior versions of the text, suggests a wider range of activities than the word delivery".

ganization. In the absence of such a provision, it is our view that the claim by the EC that the scope of the GATS and GATT cannot overlap has no legal basis.[139]

7.284 With respect to the EC's view that bringing a measure relating to goods under the GATS might undermine the effectiveness of an exception or a waiver under GATT, we note that there are no applicable exceptions or waivers at issue under the GATS claims in this case.[140] In the case of waivers, the problem raised by the EC could be avoided by appropriate drafting of waivers. In the case of exceptions, we note that Articles XII, XX and XXI of GATT and Articles XII, XIV and XIVbis of GATS are similar, thus reducing the likelihood of a conflict between GATT and GATS provisions. In any event, we need not decide in this case how to resolve a conflict that may never arise.

7.285 In the light of the above, we find that, in principle, no measures are excluded *a priori* from the scope of the GATS as defined by its provisions. The scope of the GATS encompasses any measure of a Member to the extent it affects the supply of a service regardless of whether such measure directly governs the supply of a service or whether it regulates other matters but nevertheless affects trade in services.

7.286 We therefore find that there is no legal basis for an *a priori* exclusion of measures within the EC banana import licensing regime from the scope of the GATS.

(ii) Wholesale Trade Services

7.287 The EC takes the view that, in the banana trade, wholesale trading starts only after the ripening process is completed and that any activity prior to ripening should not be defined as wholesaling of bananas, but rather as part of their production or "remanufacturing" process. The EC further argues that the normal meaning of wholesale is distributing goods with a view to sale to the consumer and, therefore, in a form which is ready for the consumer. In the EC's view, the wholesale trade stage for bananas was excluded from the scope of the contested measures since the importation of bananas normally takes place before they are ripened. The EC further argues that wholesalers, who according to this definition would only be trading in yellow bananas, are not operators within the meaning of the EC regime since import licences cover only green bananas and not yellow ones.

7.288 In addressing this issue we need to examine the definition of "wholesale trade services" for the purposes of this case. In this respect we note the following:

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[139] For support of this view, see Panel Report on "Canada - Certain Measures Concerning Periodicals", issued on 14 March 1997 (not adopted, subject to appeal), WT/DS31/R, paras. 5.13-5.19.

[140] We have found that the Lomé waiver does not cover the EC licensing measures which are at issue under the GATS (para. 7.204).

The sectoral coverage of the GATS is, in principle, universal. Article I establishes this in paragraph 3(b) where it states:

> "'Services' include any service *in any sector* except services supplied in the exercise of governmental authority" (emphasis added).

Exceptions to this principle are explicitly provided for in the text of the GATS, such as in the case of "services supplied in the exercise of governmental authority" (Article I:3(b)) and "services directly related to the exercise of traffic rights" (Annex on Air Transport Services, paragraph 2(b)). No such exceptions exist for "wholesale trade services". Therefore, "wholesale trade services" are in principle fully covered by the GATS.

7.289 In the Uruguay Round negotiations participants agreed to follow a set of guidelines for the scheduling of specific commitments under the GATS.[141] With respect to the classification of services sectors for the purpose of scheduling commitments, the guidelines encouraged participants to use the Services Sectoral Classification List developed during the Uruguay Round,[142] which is largely based on the United Nations Central Product Classification system (CPC). Although the use of the Services Sectoral Classification List is not mandatory, most Members, including the EC, have adopted it as the basis for scheduling their commitments. Furthermore, in scheduling commitments on "wholesale trade services", the EC inscribed the CPC item number (622) in its services schedule. Therefore, any breakdown of the sector should be based on the CPC. Consequently, any legal definition of the scope of the EC's commitment in wholesale services should be based on the CPC description of the sector and the activities it covers.

7.290 The CPC classification describes "wholesale trade services" as a sub-set of the broader sector of "distributive trade services" which is described in a headnote to section 6 as:

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[141] MTN.GNS/W/164 & Add. 1 (Scheduling of Initial Commitments in Trade in Services: Explanatory Note).

[142] MTN.GNS/W/164 (Scheduling of Initial Commitments in Trade in Services: Explanatory Note), para. 16, states: "The legal nature of a schedule as well as the need to evaluate commitments, require the greatest possible degree of clarity in the description of each sector or sub-sector scheduled. In general the classification of sectors and sub-sectors should be based on the Secretariat's *revised Services Sectoral Classification List*[3]. Each sector contained in the Secretariat list is identified by the corresponding Central Product Classification (CPC) number. Where it is necessary to refine further a sectoral classification, this should be done on the basis of the CPC or other internationally recognised classification (e.g., Financial Services Annex). The most recent breakdown of the CPC, including explanatory notes for each sub-sector, is contained in the UN *Provisional Central Product Classification*[4].

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[3] Document MTN.GNS/W/120, dated 10 July 1991.

[4] *Statistical Papers Series M No. 77, Provisional Central Product Classification*, Department of International Economic and Social Affairs, Statistical Office of the United Nations, New York, 1991".

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

Under this section, the CPC contains a sub-sector entitled "wholesale trade services of food, beverages and tobacco" (6222). A further breakdown of this subsector includes a separate item relating to "wholesale trade service of fruit and vegetables" (CPC 62221) which is described as:

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

Item (013) of the CPC classification of goods relates to "fruit and nuts" and under its sub-classification (01310) it refers to:

> "dates, figs, *bananas*, coconuts, brazil nuts, cashew nuts, pineapples, avocados, mangoes, guavas, mangosteens, fresh or dried" (emphasis added).

7.291 The CPC description of "wholesale trade services" is based on the identification of a core activity, that is "reselling merchandise", which could be accompanied by a variety of other related subordinate activities the objective of which would be to facilitate the delivery of the described services (i.e., reselling merchandise). In many instances, in order to resell merchandise it may be necessary to maintain inventories of goods, to sort and grade goods, to break bulk, refrigerate, and deliver goods to the purchaser. Thus, the subordinate activities listed in the headnote to CPC section 6 (such as maintaining inventories, breaking bulk, etc.), when they accompany the reselling of merchandise and are not performed as a separate service in their own right, are within the scope of wholesale trade service commitments. However, a distinction is made between performing any of these subordinate activities as a component of supplying a "wholesale trade service" and performing any of them as a service in its own right. In the case of the latter, that activity is classified in a separate CPC category with a different number and would be treated under the GATS as such.

7.292 Finally, we note that the CPC descriptions do not make any distinction between green and ripened bananas. As mentioned above, item 62221 of the CPC relating to "wholesale trade services of fruit and vegetables" cross refers to goods

classified in CPC 013 which in turn refers in its sub-classification CPC 01310 to "bananas" without making any distinction between green and ripened bananas.

7.293 We find that the distribution of bananas, regardless of whether they are green or ripened, falls within the scope of category CPC 622 "wholesale trade services" as inscribed in the EC's GATS Schedule of Commitments so long as it involves the sale of bananas to retailers, to industrial, commercial, institutional or other professional business users, or other wholesalers.

(iii) Modes of Supply

7.294 Article I:2 of GATS defines its coverage as including four modes of supply of services: cross-border supply, consumption abroad, commercial presence and presence of natural persons.[143] The Complainants submit that the measures of the EC banana regime that they have challenged have an impact on the wholesale trade services they can supply through commercial presence. Such impact is claimed to be inconsistent with the unqualified national treatment commitment in the EC's Schedule covering the supply of "wholesale trade services" in relation to that mode. It is also claimed to be inconsistent with the EC's obligations under Article II of GATS. In the view of the Complainants, the supply of wholesale trade services through commercial presence includes all activities associated with delivering bananas to the EC from abroad and reselling them there. That would cover all the activities associated with reselling bananas as described in the headnote to Section 6 of the CPC (e.g., maintaining inventories, physically assembling, sorting, grading in large lots, breaking bulk, redistribution in smaller lots, refrigeration and delivery services).

7.295 With respect to supply through commercial presence, we note that Article I:2(c) of GATS[144] defines supply through commercial presence as the supply of a service by a service supplier of one Member, through commercial presence, in the territory of another Member. Article XXVIII(f)(ii)[145] defines a "service of

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[143] Article I:2 of GATS provides:

> "For the purposes of this Agreement, trade in services is defined as the supply of a service:
>
> (a) from the territory of one Member into the territory of any other Member;
>
> (b) in the territory of one Member to the service consumer of any other Member;
>
> (c) by a service supplier of one Member, through commercial presence in the territory of any other Member;
>
> (d) by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member".

[144] See note 143 supra.

[145] Article XXVIII(f) provides: "'service of another Member' means a service which is supplied,

> (i) from or in the territory of that other Member, or in the case of maritime transport, by a vessel registered under the laws of that other Member, or by a person of that other Member which supplies the service through the operation of a vessel and/or use in whole or in part; or

another Member" in the case of a supply of a service through commercial presence as a service which is supplied by a service supplier of that other Member. In addition to these provisions, explanation of the modes of supply has been provided in the explanatory note on the scheduling of commitments referred to above.[146] These definitions as well as the explanation of the supply of a service through commercial presence in the explanatory note rely on the territorial presence of the service supplier as a basis for drawing distinctions between modes. In other words, in the case of supply through commercial presence, the service supplier would have to be physically present in the territory where the service is being supplied. In such cases, the origin of the service is to be determined on the basis of the origin of the supplier. And the origin of the service supplier is to be determined on the basis of the definitions laid down in Article XXVIII(g), (j), (m) and (n) which provide:

> "(g) 'service supplier' means any person that supplies a service;[11]
>
> (j) 'person' means either a natural person or a juridical person;
>
> (m) 'juridical person of another Member' means a juridical person which is either:
>
> (i) constituted or otherwise organized under the law of that other Member, and is engaged in substantive business operations in the territory of that Member or any other Member; or
>
> (ii) in the case of the supply of a service through commercial presence, owned or controlled by:
>
> 1. natural persons of that Member; or
>
> 2. juridical persons of that other Member identified under subparagraph (i).
>
> (n) a juridical person is:
>
> (i) 'owned' by persons of a Member if more than 50 per cent of the equity interest in it is beneficially owned by persons of that Member;
>
> (ii) 'controlled' by persons of a Member if such persons have the power to name a majority of its directors or otherwise legally to direct its actions;

(ii) in the case of the supply of a service through commercial presence or through the presence of natural persons, by a service supplier of that other Member".

[146] MTN.GNS/W/164 (Scheduling of Initial Commitments in Trade in Services: Explanatory Note), para. 18, states (emphasis original): "The four modes of supply listed in the schedules correspond to the scope of the GATS as set out in Article I.2. The modes are essentially defined on the basis of the *origin* of the service supplier and consumer, and the degree and type of *territorial presence* which they have at the moment the service is delivered".

(iii) 'affiliated' with another person when it controls, or is controlled by, that other person; or when it and the other person are both controlled by the same person.

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[11] Where the service is not supplied directly by a juridical person but through other forms of commercial presence such as a branch or a representative office, the service supplier (i.e. the juridical person) shall, nonetheless, through such presence be accorded the treatment provided for service suppliers under the Agreement. Such treatment shall be extended to the presence through which the service is supplied and need not be extended to any other parts of the supplier located outside the territory where the service is supplied."

7.296 Therefore, with respect to situations of supply through commercial presence, Members' obligations under the GATS cover the treatment of services and service suppliers. We note that Article II requires a Member to extend to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country. And Article XVII requires a Member, subject to any limitations inscribed in its schedule, to accord services and service suppliers of any other Member treatment no less favourable than it accords to its own like services and service suppliers.

7.297 Consequently, we find that the EC's obligations under Article II of GATS and commitments under Article XVII of GATS cover the treatment of suppliers of wholesale trade services within the jurisdiction of the EC.

(iv) The Scope of the Article II Obligation

7.298 Article II:1 of GATS states:

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

We note that this provision refers to "any measures covered by this Agreement". This term could only be interpreted to mean all measures falling within the scope of the GATS. According to Article I:1 which defines the scope of the GATS, it applies to "measures by Members affecting trade in services". We also note that this provision constitutes a general obligation which is, in principle, applicable across the board by all Members to all services sectors, not only in sectors or sub-sectors where specific commitments have been undertaken. Any exception to this general obligation would have to be provided for explicitly in accordance with the terms of the GATS. Article II:2 provides for the possibility of exempting specific measures from this obligation where it states that

> "A Member may maintain a measure inconsistent with paragraph 1 provided that such a measure is listed in, and meets the conditions of, the Annex on Article II Exemptions".

We note that the EC has not listed in that Annex any measures relating to "wholesale trade services" which are inconsistent with paragraph 1 of Article II. Therefore, the EC is fully bound by its obligations under Article II:1 in relation to "wholesale trade services".[147]

7.299 The Complainants submit that the term "treatment no less favourable" contained in paragraph 1 of Article II of GATS should be interpreted in the light of the language contained in paragraphs 2 and 3 of Article XVII of GATS.[148] In their view although Article II does not contain the type of elaboration found in paragraphs 2 and 3 of Article XVII concerning formally identical and formally different treatment and modification of conditions of competition, the standard of treatment in Article II should be interpreted to be the same as that of paragraph 1 of Article XVII. They consider that paragraphs 2 and 3 of Article XVII do not set up any additional substantive rules but rather serve as guidance for the application of the national treatment rule articulated in the first paragraph. They also note that Article II of GATS deviated from the formulation used in Article I:1 of

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[147] In the EC's understanding there are no MFN exemptions which would limit its obligation to provide MFN treatment in respect of the subsector of wholesale trade services, whereas in the Complainants' view there are no relevant MFN exemptions for the whole range of distribution services. By the terms of the GATS, the MFN treatment clause covers, subject to each Member's MFN exemption list, all services on a general basis. Accordingly, the range of the service transactions which are directly or indirectly related to trade in bananas is potentially wider than the sector of distribution services or the subsector of wholesale trade services. Likewise, a broader range of the exemptions which have been inscribed in the EC's MFN exemption list could be relevant to service transactions related to trade in bananas. However, in the light of the legal arguments advanced by the Complainants we proceed on the assumption that the scope of their claims under the GATS MFN clause is limited to the supply of wholesale trade services by commercial presence and that none of the MFN exemptions scheduled by the EC carves out components of the relevant CPC description.

[148] Article XVII of GATS (National Treatment) provides:

> "1. In the sectors inscribed in its Schedule, and subject to any conditions and qualifications set out therein, each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers.[10]
>
> 2. A Member may meet the requirement of paragraph 1 by according to services and service suppliers of any other Member, either formally identical treatment or formally different treatment to that it accords to its own like services and service suppliers.
>
> 3. Formally identical or formally different treatment shall be considered to be less favourable if it modifies the conditions of competition in favour of services or service suppliers of the Member compared to like services or service suppliers of any other Member.

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[10] Specific commitments assumed under this Article shall not be construed to require any Member to compensate for any inherent competitive disadvantages which result from the foreign character of the relevant services or service suppliers".

GATT[149] and refer to "treatment no less favourable" instead of "any advantage, favour, privilege or immunity". In their view that indicates a deliberate choice by the drafters to follow the same standard of treatment set in paragraph 1 of Article XVII.

7.300 The EC maintains that Article II:1 of GATS applies to "any measure covered by this Agreement" and Article I:1 defines the scope of the GATS by stating that it applies "to measures by Members affecting trade in services". The definition in Article XXVIII(c),[150] in particular under sub-paragraph (i), indicates that the measures concerned had to affect trade in services as such and could not be measures taken in other areas with repercussions on services such as measures in respect of the purchase of goods. Moreover, the EC considers that the use of the terms "in respect of" in the chapeau of Article XXVIII(c) demonstrates that the term "affecting" has to be interpreted in a narrow sense that did not include the reference to measures which modified the conditions of competition. Third, in the view of the EC, if the drafters had wished to make the "modification of competitive conditions" requirement an integral part of the "no less favourable treatment" test under the most-favoured-nation clause, they would have done so explicitly as it was done for the national treatment clause in Article XVII:3. Therefore, if it were to be established that certain EC measures violate the MFN obligation, it would have to be demonstrated that there was formally discriminatory treatment as between foreign services and service suppliers, which is not the case in this dispute.

7.301 With respect to the first two arguments of the EC, we recall our discussion in paragraph 7.280 *et seq.* In addressing the third argument, we note that the standard of "no less favourable treatment" in paragraph 1 of Article XVII is meant to provide for no less favourable conditions of competition regardless of whether that is achieved through the application of formally identical or formally different measures. Paragraphs 2 and 3 of Article XVII serve the purpose of codifying this interpretation, and in our view, do not impose new obligations on Members additional to those contained in paragraph 1. In essence, the "treatment no less favourable" standard of Article XVII:1 is clarified and reinforced in the language of paragraphs 2 and 3. The absence of similar language in Article II is not, in our view, a justification for giving a different ordinary meaning in terms of Article 31(1) of the Vienna Convention to the words "treatment no less favourable", which are identical in both Articles II:1 and XVII:1.

7.302 We also note that, while the object and purpose of paragraph 1 of Article XVII is to prohibit discrimination against foreign services and service suppliers to the advantage of like services and service suppliers of national origin, paragraph 1 of Article II has a similar objective of prohibiting discrimination against

[149] Article I:1 of GATT provides: "... any advantage, favour, privilege or immunity granted by any Member to any product originating in or destined for any other country shall be accorded immediately and unconditionally...".

[150] Article XXVIII(c) is quoted in para 7.279 supra.

services and service suppliers of a Member in favour of like services or service suppliers of any other country. In addition, while the drafters of the GATS have been guided by GATT concepts, provisions and past practice, they have chosen to use identical operative language of "treatment no less favourable" in both Articles II and XVII, departing in the case of Article II from the formulation used in the GATT MFN clause in Article I which refers to "any advantage, favour, privilege or immunity ...". Thus, the formulation of both Articles II and XVII of GATS derives from the "treatment no less favourable" standard of the GATT national treatment provisions in Article III of GATT, which has been consistently interpreted by past panel reports to be concerned with conditions of competition between like domestic and imported products on internal markets.[151]

7.303 We also note that if the standard of "no less favourable treatment" in Article II were to be interpreted narrowly to require only formally identical treatment, that could lead in many situations to the frustration of the objective behind Article II which is to prohibit discrimination between like services and service suppliers of other Members. It would not be difficult for regulators to contemplate regulatory measures which are identical on their face while in effect provide less favourable competitive opportunities to a group of service suppliers to the advantage of others.

7.304 Therefore, we find that the obligation contained in Article II:1 of GATS to extend "treatment no less favourable" should be interpreted *in casu* to require providing no less favourable conditions of competition.

(v) The Scope of the Article XVII Commitment

7.305 Article XVII of the GATS is a specific commitment in the sense that it would be binding on a Member only in sectors or sub-sectors which that Member has inscribed in its schedule and to the extent specified therein. Article XVII:1 states:

> "1. In the sectors inscribed in its schedule, and subject to any conditions and qualifications set out therein, each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers".

We note that in its schedule of specific commitments[152] the EC has inscribed in the first column under the heading "Sector or Sub-sector" the sector of "Wholesale Trade Services". The related CPC classification number (CPC 622) has also

[151] Panel Report on "Italian Discrimination of Imported Agricultural Machinery", adopted on 23 October 1958, BISD 7S/60, 63, para. 12. See also para. 7.327.

[152] European Communities and Their Member States - Schedule of Specific Commitments - April 1994.

been inscribed. As previously mentioned, this constitutes the basis on which the scope of the EC's national treatment commitment is to be determined. We also note that, with respect to the first mode (cross-border supply) and the third mode (supply through commercial presence) the EC has entered "none" in the third column of the schedule relating to limitations on national treatment. The EC, therefore, has undertaken a full commitment on national treatment in the sector of "Wholesale Trade Services" with respect of cross-border supply and supply through commercial presence.

7.306 Thus, we find that the EC has undertaken a full commitment on national treatment in the sector of "Wholesale Trade Services" with respect to supply through commercial presence.

(vi) Effective date of GATS Obligations

7.307 The EC argues that, given that the GATS entered into force on 1 January 1995, only the EC banana import regime as it existed in late 1994 and afterwards (rather than 1992 and before) should be examined in the light of Articles II and XVII of GATS.

7.308 We are not certain of the precise relevance of this argument. The EC does not argue that the introduction of the EC common market organization for bananas resulted in a single, non-recurring adjustment of the market which was completed by 31 December 1994. To the contrary, the EC banana regulations remained in force or were enacted or amended also after 1 January 1995 (e.g., Regulation 478/95 on the export certificate requirement) and, more importantly, they foresee a recurring and ongoing process of import licence allocations according to annually recalculated reference quantities on the basis of operator categories and activity functions. Consequently, the fact that the EC common market organization was introduced in 1993, prior to the entry into force of the GATS, is not relevant for our legal analysis. Thus, we examine the consistency of the EC banana regulations as they currently stand with the EC's obligations arising from the GATS. Therefore, the scope of our legal examination includes only actions which the EC took or continued to take, or measures that remained in force or continued to be applied by the EC, and thus did not cease to exist after the entry into force of the GATS.[153] Likewise, any finding of consistency or inconsistency with the requirements of Articles II and XVII of GATS would be made with respect to the period after the entry into force of the GATS. Moreover, in this connection we note that there is no grandfather clause in the WTO Agree-

[153] Article 28 of the Vienna Convention embodies the general international law principle that "[u]nless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to ... any situation which ceased to exist before the date of entry into force of the treaty ...". Under this rule, the EC measures at issue may be considered as continuing measures, which in some cases were enacted before the entry into force of GATS but which did *not* cease to exist after that date (the opposite of the situation envisaged in Article 28).

ment that would permit Members to maintain indefinitely national legislation that is inconsistent with WTO rules. Indeed, Article XVI:4 of the WTO Agreement provides that "[e]ach Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements".

(vii) Claims by Mexico

7.309 The EC argues that, in view of the brevity of its first submission, Mexico has failed to establish a *prima facie* case of nullification or impairment in the meaning of Article 3.8 of the DSU and that Mexico's complaint under the GATS should, therefore, not be sustained.

7.310 We agree that Mexico's first submission is not detailed. However, in its first submission, Mexico has raised claims under Article XVII of GATS with respect to operator category rules and under Article II of GATS with respect to the allocation of import licences on the basis of operator categories as well as activity functions, the export certificate requirement and the exemption of Category B operators thereof, and the issuance of hurricane licences to ACP producers. Moreover, Mexico has co-authored the Complainants' joint second submission and, further to that, endorsed all legal arguments concerning services which were advanced by Ecuador and the United States in these proceedings during the second substantive meeting of the Panel with the parties.

7.311 Therefore, we examine Mexico's claims under the GATS along with those raised by Ecuador and the United States, except in the case of activity function rules, export certificates and hurricane licences, where we do not include Mexico in our discussion of the Article XVII claims.

(c) Operator Categories

(i) Article XVII of GATS

7.312 The Complainants claim that the allocation of the third-country import licences on the basis of operator categories and the eligibility criteria for Category B operators discriminate against like third-country service suppliers. The EC is alleged to be in breach of Article XVII of GATS in respect of its commitments on wholesale service supply in that it accords more favourable treatment to wholesale service suppliers of EC origin because Category B operators are largely EC owned or controlled and Category A operators are largely in the Complainants' ownership or control.

7.313 The EC responds that the allocation of licences on the basis of operator categories does not automatically entail the transfer of market shares to Category B operators because licences are freely tradeable. Therefore, the allocation of licences to certain operators does not necessarily mean that these operators will actually carry out the physical importation. The EC emphasizes that the rules establishing operator categories do not classify companies as such but aim at dis-

tributing import licences according to past marketing of traditional ACP and EC or third-country and non-traditional ACP bananas. Consequently, the allocation of Category A and B licences is not mutually exclusive. Certain large operator companies are registered in both categories and hence receive both Category A and B licences. Therefore, the EC argues that the Complainants' insistence on equating Category A with firms of non-EC origin and Category B with firms of EC origin is misleading. Furthermore, the EC notes that the WTO agreements do not provide for rules governing the sharing of quota rents which are generated by a legitimate tariff quota and that, consequently, the EC retains its discretion to allocate quota rents among EC, ACP and third country producers and traders. In the EC's view, the Complainants fail to prove that quota rents and market shares have been reallocated at the expense of third-country firms, given that no evidence has been provided on how particular companies are linked through registration, ownership or control to the Complainants. In contrast, the EC notes that it submitted information on market shares of third-country firms, which in its view demonstrate that those firms have not lost market share in recent years.

7.314 In light of these arguments, we turn to an examination of the issues arising under this Article XVII claim. In order to establish a breach of the national treatment obligation of Article XVII, three elements need to be demonstrated: (i) the EC has undertaken a commitment in a relevant sector and mode of supply; (ii) the EC has adopted or applied a measure affecting the supply of services in that sector and/or mode of supply; and (iii) the measure accords to service suppliers of any other Member treatment less favourable than that it accords to the EC's own like service suppliers.

7.315 In respect of the first element, we recall that the EC has bound the wholesale trade service subsector as regards service supply across borders and through commercial presence without conditions and qualifications in the meaning of Article XVII:1 (paragraph 7.306).

7.316 As to the second element, i.e., whether the EC measures implementing the operator category rules constitute measures affecting the supply of services, we recall that we have found that the term "affecting" should be interpreted broadly (paragraphs 7.277 *et seq*.). In this connection, we also note that supply of services through cross-border delivery or commercial presence is defined to include the production, distribution, marketing, sale and delivery of such services.[154] As a consequence, in our view, the EC measures, and more specifically the rules on operator categories, are measures affecting Complainants' trade in services in the meaning of the GATS.

7.317 We now turn to the third element that must be demonstrated to establish a breach of Article XVII, i.e., less favourable treatment of service suppliers of another Member than the treatment given to its own like service suppliers. There

[154] Article XXVIII:(b) of GATS provides: "'Supply of a service' includes the production, distribution, marketing, sale and delivery of a service."

are four preliminary matters that should be addressed: (i) the definition of commercial presence and service suppliers; (ii) whether operators in the meaning of the EC banana regulations are service suppliers under GATS, (iii) the definition of services covered by EC commitments; and (iv) to what extent services and service suppliers of different origin are like.

7.318 First, it is necessary to clarify what is meant by "commercial presence", as used in Article I:2, and "services and service suppliers of any other Member", as used in Article XVII:1. "Commercial presence" in general covers any type of business or professional establishment, including through (i) the constitution, acquisition or maintenance of a juridical person, or (ii) the creation or maintenance of a branch or representative office, within the EC territory for the purpose of supplying wholesale services.[155] Therefore, in the current dispute, we are concerned with the commercial presence of service suppliers that are "persons", or owned or controlled by such persons, of the Complainants. These include subsidiary companies owned[156] or controlled[157] by natural persons[158] of a Complainant and subsidiary companies owned or controlled by parent companies that are constituted or otherwise organized under the law of a Complainant[159] and are

[155] Article XXVIII(d) of GATS provides:

"'Commercial presence' means any type of business or professional establishment, including through

(i) the constitution, acquisition or maintenance of a juridical person, or

(ii) the creation or maintenance of a branch or a representative office,

within the territory of a Member for the purpose of supplying a service;

[156] Article XXVIII(n) provides: "A juridical person is (i) 'owned' by persons of a Member if more than 50 per cent of the equity interest in it is beneficially owned by persons of that Member".

[157] Article XXVIII(n) provides: " A juridical person is (ii) 'controlled' by persons of a Member if such persons have the power to name a majority of its directors or otherwise to legally direct its actions".

[158] Article XXVIII(k) provides: "'Natural person of another Member' means a natural person who resides in the territory of that other Member or any other Member, and who under the law of that other Member:

(i) is a national of that other Member; or

(ii) has the right of permanent residence in that other Member, in the case of a Member which:

1. does not have nationals; or

2. accords substantially the same treatment to its permanent residents as it does to its nationals in respect of measures affecting trade in services, as notified in its acceptance of or accession to the WTO Agreement, provided that no Member is obligated to accord to such permanent residents treatment more favourable than would be accorded by that other Member to such permanent residents. Such notification shall include the assurance to assume, in accordance with its laws and regulations, the same responsibilities that other Member bears with respect to its nationals".

[159] Article XXVIII(l) provides: "'[J]uridical person' means any legal entity duly constituted or otherwise organized under applicable laws, whether for profit or otherwise, and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, joint venture, sole proprietorship or association. For the definition of "juridical person of another Member", see para. 7.295 supra.

engaged in substantive business operations in the territory of any other Member.[160]

7.319 In this respect, we emphasize that in the following discussion, we will refer to service suppliers that are owned or controlled by persons of the Complainants as "suppliers of Complainants' origin", and service suppliers that are owned or controlled by persons of the EC will be referred to as "suppliers of EC origin".

7.320 Second, in the context of this case, operators in the meaning of Article 19 of Regulation 404/93 and operators performing the activities defined in Article 5 of Regulation 1442/93 are service suppliers in the meaning of Article I:2(c) of GATS provided that they are owned or controlled by natural persons or juridical persons of other Members and supply wholesale services. When operators provide wholesale services with respect to bananas which they have imported or acquired for marketing, cleared in customs or ripened, they are actual wholesale service suppliers. Where operators form part of vertically integrated companies, they have the capability and opportunity to enter the wholesale service market. They could at any time decide to re-sell bananas which they have imported or acquired from EC producers, or cleared in customs, or ripened instead of further transferring or processing bananas within an integrated company.[161] Since Article XVII of GATS is concerned with conditions of competition, it is appropriate for us to consider these vertically integrated companies as service suppliers for the purposes of analysing the claims made in this case.

7.321 Third, as discussed above (paragraphs 7.290 *et seq*.), the services at issue in this case are wholesale trade services and the related subordinated services specified in headnote 6 to the CPC classification.

7.322 Fourth, in our view, the nature and the characteristics of wholesale transactions as such, as well as of each of the different subordinated services mentioned in the headnote to section 6 of the CPC, are "like" when supplied in connection with wholesale services, irrespective of whether these services are supplied with respect to bananas of EC and traditional ACP origin, on the one hand, or with respect to bananas of third-country or non-traditional ACP origin, on the other. Indeed, it seems that each of the different service activities taken individually is virtually the same and can only be distinguished by referring to the origin of the bananas in respect of which the service activity is being performed. Simi-

[160] As a result, suppliers which are commercially present within the EC territory and owned or controlled by, for example, Del Monte Mexico would be entitled to benefit from GATS rights because it would not matter under Article XXVIII(m) of GATS whether Del Monte Mexico was owned or controlled by natural or juridical persons of Jordan, i.e. a WTO non-Member, as long as Del Monte Mexico was incorporated in Mexico and engaged in substantive business operations in the territory of Mexico or any other Member.

[161] Operators who always sell or resell bananas directly to consumers supply *retail* services which are not covered by the EC commitments on wholesale services under Article XVII.

larly, in our view, to the extent that entities provide these like services, they are like service suppliers.

7.323 We now have to ascertain whether, by applying operator category rules, the EC accords services supplied across borders or through commercial presence less favourable treatment than it accords its own like services or service suppliers in the meaning of Article XVII.

7.324 We note that the categorization of A and B operators is based on whether they have during a previous three-year period marketed EC and traditional ACP bananas or third-country and non-traditional ACP bananas. The operator category rules apply to service suppliers regardless of their nationality, ownership or control. In so far as the supply of wholesale trade services in respect of third-country and non-traditional ACP bananas is concerned, service suppliers of EC origin are equally subject to operator category rules as service suppliers of Complainants' origin. Likewise, with respect to the supply of wholesale trade services in respect of EC or traditional ACP bananas, service suppliers of EC origin are treated in the same way under the operator category rules as service suppliers of Complainants' origin. Thus, the EC rules establishing operator categories do not formally discriminate against Complainants' wholesale service suppliers on the basis of their origin.

7.325 We note, however, that service suppliers of Complainants' origin that provide wholesale services in respect of only third-country or non-traditional ACP bananas are subject to operator category rules, while service suppliers of EC origin that provide the same services in respect of EC or traditional ACP bananas are not. However, service suppliers of Complainants' origin that have in the past provided wholesale trade services in respect of only third-country or non-traditional ACP bananas are not legally prevented from supplying wholesale trade services with respect to EC and traditional ACP bananas.

7.326 By supplying wholesale trade services to the traditional ACP and EC market segment, suppliers of any origin can avoid, or reduce the extent to which they are subject to, operator category rules. In addition they will be eligible for the allocation of 30 per cent of the in-quota licences required for third-country and non-traditional ACP imports which are earmarked for Category B operators. Nothing in the operator category rules requires operators who are, on the basis of their previous marketing of EC and traditional ACP bananas, beneficiaries of the allocation of 30 per cent of the licences required for the in-quota importation of third-country and non-traditional ACP bananas regardless of whether they have previously dealt in that market segment, to be service suppliers in EC ownership or control. In other words, service suppliers of foreign as well as EC origin are arguably subject to formally identical treatment in the meaning of Article XVII:2 of GATS. Likewise, under the EC operator category rules services of foreign

origin which are supplied across-borders are arguably subject to treatment that is formally identical to the treatment of domestic services.

7.327 We now turn to the question whether the application of formally identical operator category rules, nevertheless, modifies conditions of competition[162] in favour of service or service suppliers of EC origin, or at the expense of services or service suppliers of third-country origin, in the meaning of paragraphs 2 and 3 of Article XVII of GATS which provide as follows:

> "2. A Member may meet the requirement of paragraph 1 by according to services and service suppliers of any other Member, either *formally identical* treatment or *formally different* treatment to that it accords to its own like services and service suppliers.[163]
>
> 3. Formally identical or formally different treatment shall be considered to be less favourable if it *modifies the conditions of competition* in favour of services or service suppliers of the Member compared to like services or service suppliers of any other Member" (emphasis and footnotes added).[164]

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[162] "The Panel, however, believes that an evaluation of the *trade effects* was not directly relevant to its findings because a breach of a GATT rules is presumed to have an adverse impact on other contracting parties ..." (emphasis added). Panel Report on "Canada - Administration of the Foreign Investment Review Act", adopted on 7 February 1984, BISD 30S/140, 167, para. 6.6.

"[Article III:2 of GATT] protects *expectations on the competitive relationship* between imported and domestic products. A change in the competitive relationship contrary to that provision must consequently be regarded *ipso facto* as a nullification or impairment of benefits accruing under the General Agreement". (emphasis added). Panel Report on "US - Taxes on Petroleum and Certain Imported Substances", adopted on 17 June 1987, BISD 34S/136, 158-159, para. 5.1.9.

"[T]he panel noted that previous panels had rejected arguments of de minimis trade consequences and had found that the size of the trade impact of a measure was not relevant to its consistency with Article III [GATT]". Panel Report on "US - Measures Affecting the Importation, Internal Sale and Use of Tobacco", adopted on 4 October 1994, DS 44/R, p.32, para. 99.

[163] The wording of paragraph 2 of Article XVII of GATS draws on the interpretation developed by a GATT panel with respect to Article III of GATT: "[T]he 'no less favourable' treatment requirement set out in Article III:4, is unqualified. These words are to be found throughout the General Agreement ... as an expression of the underlying principle of equality of treatment of imported products as compared to the treatment given either to other foreign products, under the most favoured nation treatment standard, or to domestic products, under the national treatment standard of Article III. The words 'treatment no less favourable' in paragraph 4 [of GATT Article III] call for *effective equality of opportunities* for imported products in respect of the application of laws, regulations and requirements affecting internal sale, offering for sale, purchase, transportation, distribution or use of products. This clearly sets a minimum permissible standard as a basis. On the one hand, contracting parties may apply to imported products different formal legal requirements if doing so would accord imported products more favourable treatment. On the other hand, it also has to be recognized that there may be cases where application of *formally identical legal provisions would in practice accord less favourable treatment to imported products* and a contracting party might thus have to apply different legal provisions to imported products to ensure that the treatment accorded to them is in fact no less favourable" (emphasis added). Panel Report on "US - Section 337 of the Tariff Act of 1930", adopted on 7 November 1989, BISD 36S/345, 386, para. 5.11.

[164] The wording of paragraph 3 of Article XVII of GATS draws on the interpretation developed by a GATT panel with respect to Article III of GATT: "[T]he text of paragraph 4 [of GATT Article III]

Thus, according to Article XVII, formally identical treatment may, nevertheless, be considered to be less favourable treatment if it adversely modifies conditions of competition for foreign services or service suppliers. Therefore, we also have to examine whether the operator category (and activity function) rules have an impact on the conditions of competition for foreign-owned or controlled service suppliers. In order to do so, we must consider in the first instance whether there are non EC-owned or controlled service suppliers for GATS purposes that provide wholesale trade services in bananas in and to the EC.

7.328 The EC states that the European Commission does not have records of the actual ownership of companies registered to receive licences of whatever category. The EC submits that in the case of transnational companies, the nationality of parent and subsidiary companies is usually not the same. Article XXVIII(m)(ii) of GATS defines the origin of a service supplier according to its ownership or control by a natural or juridical person of a Member. While the fact that subsidiaries in foreign ownership or control have a registered seat in their host country might matter in other legal contexts, this fact is not relevant for rights under Article XVII. If the parent company is registered in a Member and engages in substantive business operations there (or in another Member), the Member where the parent company is registered may invoke Article XVII in respect of any of the parent company's subsidiaries which are owned or controlled by the Member in the meaning of Article XXVIII(n).

7.329 In order for the Complainants to establish that there are non EC-owned or controlled service suppliers commercially present in the EC for GATS purposes that provide wholesale trade services in bananas in and to the EC, it would be sufficient for them to show that (i) entities of Complainants' origin (ii) control subsidiaries established in the EC that supply such services. In this case, we are of the opinion that the Complainants have submitted sufficient evidence to show that companies registered in the Complainants' countries provide wholesale trade services in respect of bananas to and in the EC through commercially present owned or controlled subsidiaries in the meaning of Article XXVIII(n).

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referred both in English and in French to laws and regulations and requirements *affecting* internal sale, purchase, etc., and to laws, regulations and requirements governing the conditions of sale or purchase. The selection of the word "*affecting*" would imply, in the opinion of the Panel, that the drafters of the Article intended to cover in paragraph 4 not only the laws and regulations which directly *governed* the conditions of sale or purchase but also any laws or regulations which might *adversely modify the conditions of competition* between the domestic and imported products on the internal markets" (emphasis added). Panel Report on "Italian Discrimination of Imported Agricultural Machinery", adopted on 23 October 1958, BISD 7S/60, 63, para. 12.

"The Panel also noted that if the Italian contention were correct, and if the scope of Article III were limited in the way the Italian delegation suggested to a specific type of law and regulations, the value of the bindings under Article II of the Agreement and of the general rules of non-discrimination as between imported and domestic products could be easily evaded". Id., p.64, para. 15.

7.330 As to the first point, the evidence presented and the statements by both parties indicate that there are entities of non EC-origin involved in the banana trade. In particular, both parties seem to accept that Chiquita and Dole are US companies, Del Monte is a Mexican company and Noboa is an Ecuadorian company, and no evidence suggesting the contrary has been presented by the EC.[165]

7.331 As to the second point, i.e., whether these non-EC companies control subsidiaries that supply wholesale trade services in bananas and are commercially present in the EC, the Complainants submitted a list entitled "Principal banana wholesaling companies established in the EC that were owned or controlled by the Complainants' services suppliers, 1992". The EC notes that no formal records of shareholders and company registrations were submitted by the Complainants. However, we recall that, according to Article IIIbis of GATS, "nothing in GATS requires any Member to provide confidential information, the disclosure of which ... would prejudice legitimate commercial interests of particular enterprises". According to the Complainants, their information was limited in part based on confidentiality concerns. Nonetheless, we believe that the Complainants' evidence is sufficient to establish that there are non-EC companies that control subsidiaries that supply wholesale trade services in bananas and that are commercially present in the EC. In this regard, we note that while the EC argued that more evidence should have been submitted by the Complainants, it did not present information that would cast doubt on the evidence presented by the Complainants. As a consequence, we must assess whether that evidence is sufficiently credible to be accepted by us. In making our objective assessment (Article 11 of the DSU), we are persuaded that the Complainants have sufficiently established that entities of Complainants' origin control subsidiaries established in the EC that provide wholesale trade services in bananas in and to the EC.

7.332 Recalling that under Article XVII of GATS, formally identical treatment may be considered to be less favourable treatment if it adversely modifies conditions of competition for foreign services or service suppliers, we now examine whether the rules establishing operator categories (and activity functions) have an impact on the conditions of competition for foreign-owned or controlled service suppliers. The EC notes that under the operator category rules companies may qualify as both Category A and B operators, thus making it difficult to categorize companies of any nationality as either A or B operators.

7.333 In this regard, the Complainants submit that before the introduction of the EC banana regime companies controlled or owned by natural or juridical persons of their nationalities held a market share of over 95 per cent of the imports of Latin American bananas to the EC. Accordingly, the Complainants argue, companies in EC and ACP ownership or control had a market share of less than 5 per

[165] For example, the first submission of the EC, in referring to statistics in an Arthur D. Little study, refers to Chiquita and Dole as "US owned or controlled". A.D. Little, "Etude de l'evolution des effets de la remise en place de l'OCM bananes sur la filière dans l'Union européenne", 13 septembre 1995.

cent of imports from Latin America. The EC questions the accuracy of these figures, but it does not submit comparable evidence of its own.[166] In our view, even if we accept the EC argument that the Complainants' 95 per cent figure may be somewhat too high, we believe that the Complainants have adequately demonstrated that companies of the Complainants' origin had by far the vast majority of the market for imports of Latin American bananas.

7.334 In respect of the EC market for EC and ACP bananas, the Complainants submit that prior to the introduction of the EC common market organization, the share of the three large banana companies (i.e., Chiquita, Dole and Del Monte) in the EC/ACP market segment was only 6 per cent and that the share for all non-ACP foreign-owned companies was less than 10 per cent. While the EC states that in 1994, 28 per cent of the EC/ACP production was controlled by three large banana companies, for our purposes what is important is the relative share of service suppliers of the Complainants' origin of the EC market for EC/ACP bananas.[167] On either view, we conclude that most of the suppliers of Complainants' origin are classified in Category A for the vast majority of their past marketing of bananas,[168] and that most of the suppliers of EC (or ACP) origin are classified in Category B for the vast majority of their past marketing of bananas.[169]

7.335 In light of the foregoing, we now consider whether the rules establishing operator categories (and activity functions) have an impact on the conditions of competition for foreign-owned or controlled service suppliers. Under the EC rules, based on their marketing during a preceding three-year period of EC and traditional ACP bananas, Category B operators are eligible for 30 per cent of the licences required for the importation of third-country (i.e., Latin American) and non-traditional ACP bananas at lower in-quota duty rates, regardless of whether they have previously traded in the latter market segment. Therefore, most beneficiaries of this allocation to Category B operators are service suppliers of EC origin. At the same time, most Category A operators, who historically traded third-country and non-traditional ACP bananas but who are eligible to receive only 66.5 per cent of the licences allowing in-quota imports of bananas from these sources, are service suppliers of third-country origin. Furthermore, we also note that there is no allocation of an EC/ACP market share for Category A operators

[166] Pursuant to Regulations 404/93 and 1442/93, the EC Commission and competent member State authorities have to keep information concerning the reference quantities of past volumes of bananas marketed for which companies are registered in particularlized form. We note that, according to the EC, these records do not include information on the ownership or control of the companies categorized or registered for reference quantities.

[167] As noted below, the difference in statistics may be a result of the EC rules. See para. 7.340.

[168] Operators classified in Category A for most of their past trade volume: Chiquita Brands (US), Dole Foods (US), Noboa (Ecuador), Del Monte (Mexico), Uniban (Colombia), Banacol (Colombia). (Information submitted by the Complainants).

[169] Operators classified in Category B for most of their past trade volume: e.g., Geest (UK), Fyffes (Ireland), Pomona (France), Compagnie Fruitière (France), CDB/Durand (France), Gipam (France), Coplaca (Spain), Bargoso SA (Spain). (Information submitted by the Complainants).

equivalent to the allocation of 30 per cent of the third-country and non-traditional ACP import licences to Category B operators. Thus, at first sight it appears that the operator category rules would seem to modify conditions of competition in the EC wholesale services market for bananas in favour of service suppliers of EC origin.

7.336 Given that import licences are tradeable and transferable, the allocation of fixed percentages of licences according to operator categories does not automatically determine the new distribution of market shares between Category A and B operators. However, while Category B operators, on the basis of previous marketing of EC and traditional ACP bananas, obtain access to 30 per cent of the licences required for third-country imports regardless of whether they have previously marketed bananas in that market segment, at the same time, Category A operators, on the basis of their previous imports of third-country and non-traditional ACP bananas, obtain access to only 66.5 per cent of the licences required for the importation of third-country and non-traditional ACP bananas at in-quota tariff rates. Accordingly, when licences authorizing in-quota imports of third-country and non-traditional ACP bananas are traded, sellers of licences will usually be Category B operators and purchasers of licences will usually be Category A operators.[170] Indeed, both sides agree that large numbers of import licences are being traded on the market place. Thus, in general, Category A operators are able to purchase the licences they need in addition to their annual licence entitlement if they wish to maintain their previous market share.[171] However, initial licence holders who carry out the physical importation of bananas or sell the licences in any case reap tariff quota rents, whereas licence transferees have to purchase these licences for a price up to the amount of the tariff quota

[170] "The Council [of the European Communities] is ... correct in contending that the traditional dealers [in Latin American bananas] have the opportunity to buy 'market shares' back from those who have received a share of the 30 per cent quota. But again it must not be overlooked that that only confirms that the regulation, by means of the allocation of the quota, transfers the profit potential from the traditional dealers in third-country bananas to the traditional dealers in Community/ACP bananas ...". Opinion of Advocate General Gulman of the European Court of Justice, in Federal Republic of Germany v. Council, p.24.

"The principal source of licences which are actually sold has been Community producer interests. Individual producers and producers' organizations which are not themselves necessarily 'importers' of bananas have been allocated Category B licences. Since in general they have no interest in importing dollar bananas, these licences are sold, providing a supplement to their income in addition to the support provided by the provisions on aid to compensate their loss of income. The main purchasers of licences appear to be the multinational companies themselves and certain German operators including newcomers." European Commission, Report on the EC Banana Regime, VI/5671/94, p.10f.

[171] "Transferability of licences is an essential feature of the regime so that operators who have not traditionally traded in EC or ACP fruit can have access to the Category B licence under partnership arrangements right from the start, before they have had the opportunity to develop their own trade in EC and ACP fruit." European Commission, Report on the EC Banana Regime, VI/5671/94, p.10.

rent from initial licence holders.[172] Thus a licence transferee does not have the opportunity to benefit from tariff quota rents equivalent to that which accrues to an initial licence holder. Given that licence transferees are usually Category A operators who are most often service suppliers of foreign origin and since licence sellers are usually Category B operators who are most often service suppliers of EC (or ACP) origin, we conclude that service suppliers of Complainants' origin are subject to less favourable conditions of competition in their ability to compete in the wholesale services market for bananas than service suppliers of EC (or ACP) origin.

7.337 The EC notes that it presented evidence that in fact the EC market shares of the three major international banana traders do not reflect any adverse effect coming from the EC import licensing procedures. According to the EC, between 1991 and 1994 there was an increase in the EC market shares of Dole (11 per cent to 15 per cent) and Del Monte (7.5 per cent to 8 per cent), while that of Chiquita fell (25 per cent to 18.5 per cent) due to faulty business strategy. Thus, there was only a slight overall decline in the market share of the three companies from 43.5 per cent to 41.5 per cent. Moreover, the EC suggests that more recent data also indicates the lack of an effect on market shares. It notes that as of 1997 four of the biggest banana import companies have together claimed primary importer status for 64 per cent, 58 per cent and 63 per cent of the total primary importer reference quantity of bananas for the EC-15 for 1993, 1994 and 1995 respectively. In our view, this evidence does not counter the analysis outlined above. Because of the possibility (or even incentive) of purchasing licences or taking other action (such as entering into licence "pooling", investment or contractual arrangements with operators entitled to initial licence allocations) to preserve market share, a lack of significant change in market share does not demonstrate that there has not been a significant change in the conditions of competition.

7.338 For all these reasons, although operator category rules arguably apply on a formally identical basis regardless of the origin of the service or the service supplier concerned, service suppliers of Complainants' origin are subject to less favourable conditions of competition in the meaning of Article XVII:2-3 than service suppliers of EC origin, as a result of the allocation to Category B operators of 30 per cent of the licences required for in-quota imports of third-country and non-traditional ACP bananas.

7.339 While the foregoing analysis is sufficient for us to find that the operator category rules are inconsistent with the requirements of Article XVII of GATS, we consider that it is useful to note that our conclusions are confirmed by factual information submitted by the parties, such as considerations advanced by the EC

[172] In the alternative, primary importers in the meaning of the activity function rules also have the option of "pooling" licences by entering into partnership arrangements with, or by investing in companies engaged in customs clearing or in ripening activities.

in the context of the introduction of the licensing system for third-country and non-traditional ACP imports. According to EC sources,[173] the allocation of 30 per cent of the licences required for the importation of third-country and non-traditional ACP bananas at in-quota tariff rates to those operators who have previously marketed EC and traditional ACP bananas is intended to "cross-subsidize" the latter category of operators with tariff quota rents in order to offset the higher costs of production, to strengthen their competitive position and to encourage them to continue marketing bananas of EC and traditional ACP origin. In this regard, the EC Council noted that "... the [licensing] allocation formula is intended ... to strengthen the competitive position of operators who have previously marketed Community or ACP bananas, vis-à-vis their competitors who have previously marketed Latin American bananas ...".[174]

7.340 As noted above, the EC states that in 1994, 28 per cent of the EC/ACP production was controlled by three large integrated banana trading companies (i.e., Chiquita, Dole and Del Monte) which are ultimately in the Complainants' ownership or control. The Complainants submit that prior to the introduction of the EC common market organization, the share of the three large banana companies in the EC/ACP market segment was only 6 per cent and that it was less than 10 per cent for all non-ACP foreign-owned companies. If we assume, absent evidence to the contrary, that these figures are accurate, we believe that the significant increase in the market share of foreign-owned suppliers in the EC/ACP market segment may well be a result of the "cross-subsidization" between operator categories which creates an incentive for service suppliers to become Category B operators.[175]

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[173] "1 ... From the range of alternative methods which could be used to achieve this goal, the approach of cross-subsidization, through issuing licences to import 'dollar' bananas to those who traded in Community or ACP bananas was chosen because it not only provides some financial compensation for the higher production costs of these bananas, but also acts as an incentive for the market to become more integrated, and to encourage operators to trade in both 'dollar' and EU/ACP fruit. ...

2 ... Reserving a proportion of tariff quota licences for those operators who have marketed ACP and/or EU bananas is a means of transferring some of the quota rent to them, in order to offset the higher costs of production and therefore to make marketing fruit from these sources a viable commercial proposition. ...

3 ... From the producers' viewpoint, some of the larger dollar suppliers are building up interests in EU and ACP countries, either through establishing plantations, ... or through contractual arrangements with producer groups ... . These links demonstrate the success of the cross-subsidization principle of encouraging integration of the different sources supplying the market". European Commission, Impact of cross-subsidization within the banana regime, Note for information, p.1.

[174] Written observation of the Council of the European Communities before the Court of Justice of the European Communities concerning the application for interim relief pursuant to Articles 185 and 186 of the EEC Treaty, 14 June 1993, in Case No C-276/93R, Chiquita Banana Company B.V. and Others v. Council, p.15.

[175] "At the same time, bananas from EU and ACP sources are starting to penetrate markets outside those Member States which granted them preferential treatment, although these bananas are still primarily sold in their traditional markets. This latter observation might in part reflect the strategies of the multinational companies to become increasingly involved in the marketing of EU and ACP

7.341 Consequently, we find 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 creates less favourable conditions of competition for like service suppliers of Complainants' origin and is therefore inconsistent with the requirements of Article XVII of GATS.

(ii) Article II of GATS

7.342 The Complainants claim that the allocation of the third-country import licences on the basis of operator categories and the eligibility criteria for Category B operators discriminate against like service suppliers. As a result, the EC is alleged to be in violation of Article II of GATS because more favourable treatment is accorded to like service suppliers of ACP origin.

7.343 The EC responds with the same arguments that it raised in respect of the Complainants' claims concerning operator categories under Article XVII (see paragraph 7.313). In addition, the EC reiterates that, in the absence of a cross-reference to Article XVII, Article II cannot be interpreted using the "modification of competitive conditions" standard found in Article XVII:3.

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

7.345 As to the first element, we have already determined that the EC measures implementing the operator category rules constitute measures affecting trade in services (paragraphs 7.277 *et seq.*). We also recall our discussion on the absence of MFN exemptions in the EC list of Article II exemptions which would be relevant to the claims before us (paragraph 7.298).

7.346 Turning to the second element, we must consider whether the EC, by applying operator category rules, accords services or service suppliers of any Member treatment less favourable than that it accords to like services or service suppliers of any other country, such as an ACP country.[176] In this connection, we recall that we have found that Category A, B and C operators who are engaged in the marketing of bananas are actual service suppliers and that operators that form

bananas. Since 1993, these companies have established joint ventures with or taken important stakes in organizations both producing and marketing from the Canary Islands, the French Antilles, Jamaica and Somalia. These new interests are in addition to those established in Cameroon and the Ivory Coast before 1993." European Commission, Report on the Operation of the Banana Regime, SEC(95) 1565 final, Brussels, 11 October 1995, p.7f.

[176] Operators in ACP ownership or control: e.g. Jamaica Producers, Winban/Wibdeco. (Information submitted by the Complainants). According to the EC, at least one of the subsidiaries of Jamaica Producers is not in ACP ownership or control.

part of vertically integrated companies have the capability and opportunity to become at any time service suppliers by entering the wholesale service supply market (paragraph 7.320). Finally, we recall our findings that wholesale transactions as well as each of the different subordinated services mentioned in the headnote to section 6 of the CPC are "like" when supplied in connection with wholesale services, irrespective of whether these services are supplied in respect of bananas of EC and traditional ACP origin, on the one hand, or with respect to bananas of third-country or non-traditional ACP origin, on the other, and that, in our view, at least to the extent that entities provide these like services, they are like service suppliers (paragraph 7.322).

7.347 In examining the Article II issues presented, we note that the categorization of operators and the allocation of licences to them is based on whether they have, during a previous three-year period, marketed EC and traditional ACP bananas or third-country and non-traditional ACP bananas. We recall our finding that operator category rules arguably apply on a formally identical basis to all services regardless of their origin and to all service suppliers regardless of their nationality, ownership or control (paragraph 7.324). Thus, the EC rules establishing operator categories do not formally accord treatment less favourable to Complainants' services and service suppliers than to services and services suppliers of ACP countries on the basis of their origin.

7.348 As in the case of the Article XVII claim, we also note that it is true that service suppliers of Complainants' origin who provide wholesale trade services only with respect to third-country or non-traditional ACP bananas are subject to operator category rules, while service suppliers of ACP origin that market traditional ACP (or EC) bananas are not. However, operators who have supplied wholesale trade services only with respect to third-country and non-traditional ACP bananas are not legally prevented from supplying such services with respect to EC and traditional ACP bananas. By supplying such services to the traditional ACP and EC market segment, suppliers can avoid, or reduce the extent to which they are affected by, operator category rules.

7.349 We then turn to the question whether the application of arguably formally identical operator category rules might nonetheless result in services or service suppliers of Complainants' origin being accorded less favourable treatment than like services or service suppliers of ACP origin in a manner inconsistent with Article II of GATS. In this context, we recall our finding that the obligations contained in Article II:1 of GATS to extend "treatment no less favourable" should be interpreted to require providing no less favourable conditions of competition (paragraph 7.304). Thus, the same analysis used to evaluate the Article XVII claim in respect of operator category rules is applicable here as well.

7.350 Therefore, we recall our reasoning in the context of the parallel claim under Article XVII. Category B operators are eligible for the allocation of 30 per cent of the licences required for third-country or non-traditional ACP imports at in-quota tariff rates regardless of whether they have previously traded at all in third-country bananas. Based on their past import performance in third-country

and non-traditional ACP bananas, Category A operators are eligible for only 66.5 per cent of the licences allowing third-country or non-traditional ACP imports at in-quota tariff rates. Accordingly, we found that, when third-country licences are traded, Category B operators will usually sell, and Category A operators will usually purchase, licences. Furthermore, we concluded that operators who are initial licence holders have a greater opportunity to benefit from tariff quota rents than operators who are licence transferees and that most licence transferees are Category A operators. We further found that most service suppliers of Complainants' origin are classified for most of their past marketing of bananas as Category A operators, while most service suppliers of ACP (and EC) origin are registered for most of their past marketing of bananas as Category B operators.[177]

7.351 For these reasons, although operator category rules apply regardless of the origin of the service or the service supplier concerned, service suppliers of Complainants' origin are subject to less favourable treatment than service suppliers of ACP origin as a result of the allocation to Category B operators of 30 per cent of the licences required for in-quota imports of third-country and non-traditional ACP bananas.

7.352 While the foregoing analysis is sufficient for us to find that the operator category rules are inconsistent with the requirements of Article II of GATS, we consider it useful to note that our conclusions are supported by the considerations advanced by the EC in the context of the introduction of the licensing system applicable to third-country and non-traditional ACP imports. According to EC sources,[178] the allocation of 30 per cent of the licences required for the importation of third-country and non-traditional ACP bananas at in-quota tariff rates to those operators who have previously marketed traditional ACP and EC bananas is intended to "cross-subsidize" the latter category of operators with tariff quota rents in order to offset the higher costs of production, to strengthen their competitive position and to encourage them to continue marketing bananas of traditional ACP (and EC) origin.

7.353 Consequently, we find 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 creates less favourable conditions of competition for like service suppliers of Complainants' origin and is therefore inconsistent with the requirements of Article II of GATS.

(d) Activity Functions

7.354 Activity function rules apply to Category A operators as well as to Category B operators. Article 3 of Regulation 1442/93 defines three categories of

[177] Operators classified for most of their past trade volume as Category B operators: e.g. Jamaica Producers (Jamaica), Winban/Wibdeco (Windward Islands). (Information submitted by the Complainants).

[178] The impact of cross-subsidization within the banana regime (cited in note 173 supra).

economic activity, i.e., (1) "primary" importers, (2) "secondary" importers (i.e., customs clearers) and (3) ripeners. Fixed percentages of the licences required for the importation originating in third countries or non-traditional ACP countries at in-quota tariff rates are allocated on the basis of these "activity functions": Article 5 of Regulation 1442/93 provides for a weighting coefficient of 57 per cent for primary importers, 15 per cent for secondary importers and 28 per cent for ripeners. In introducing activity functions the EC states that "the Commission is guided by the principle whereby the licences must be granted to natural or legal persons who have undertaken the commercial risk of marketing bananas and by the necessity of avoiding disturbing normal trading relations between persons occupying different points in the marketing chain".[179]

(i) Article XVII of GATS

7.355-7.368 [Used in the Ecuador and United States reports.]

(ii) Article II of GATS

7.369 In the view of Mexico, the allocation of third-country tariff quota licences based on activity functions serves the purpose of re-allocating market shares previously held by third-country firms and modifies the conditions of competition in favour of like services suppliers of EC origin. Therefore, Mexico claims that the activity function rules violate Article II of GATS vis-à-vis like ACP services and service suppliers.

7.370 The EC argues that the creation of activity functions aims at avoiding the concentration of economic bargaining power - which results from the allocation of import licences - in the hands of a few privileged recipients at a specific stage of the supply chain.

7.371 We have not been presented with information on the nationality, origin, ownership or control of customs clearers, nor has Mexico submitted information on the extent to which ripening facilities are owned or controlled by countries which are traditional sources of ACP bananas. Therefore, we do not believe that the application of arguably formally identical activity function rules and the allocation of certain percentages of the licences allowing imports of third-country and non-traditional ACP bananas at in-quota tariff rates according to the activity functions performed by operators modify the conditions of conditions of competition in favour of ACP owned or controlled service suppliers.

7.372 Accordingly, we make no finding on whether or not the allocation according to activity functions of fixed percentages of licences allowing the importation of third-country and non-traditional ACP bananas at in-quota tariff rates

[179] Recital 15 of Regulation 404/93.

creates less favourable conditions of competition for service suppliers of Mexican origin.

(e) Export Certificates

7.373 The Complainants claim that the exemption of Category B operators from the requirement imposed on other operators by Regulation 478/95 to match EC import licences with BFA export certificates with respect to imports from Colombia, Costa Rica and Nicaragua accords less favourable treatment to service suppliers of third country origin. As a result, the EC is alleged to be in violation of Article II of GATS with respect to like service suppliers of ACP origin, and Article XVII of GATS with respect to like service suppliers of EC origin.

7.374 The EC responds along the same lines that it has in respect of the other GATS claims. It points out that neither all Category A licence holders are in third-country ownership, nor are all Category B licences holders - that benefit from a BFA export certificate exemption - in EC/ACP control. It also argues that the GATS does not contain any rules governing the allocation or distribution of quota rents which are generated by trade instruments such as tariff quotas whose imposition is legitimate under WTO agreements.

(i) Article XVII of GATS

7.375-7.380 [Used in the Ecuador and United States reports.]

(ii) Article II of GATS

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

7.382 As to the first element, i.e., whether the EC measures implementing the export certificate requirement are measures covered by GATS, we recall that we have found that the phrase "affecting trade in services" should be interpreted broadly (paragraphs 7.277 *et seq.*). In this connection, we also note that supply of services through cross-border supply or commercial presence is defined broadly to include the production, distribution, marketing, sale and delivery of such services.[180] As a consequence, in our view, the EC measures are "measures affecting trade in services" in the meaning of the GATS. More specifically, the rules establishing export certificate requirements constitute measures affecting

[180] GATS, Art. XXVIII:(b).

the Complainants' trade in services for the same reasons as do operator category and activity function rules and are therefore covered by GATS.

7.383 We turn now to the second element of whether the export certificate requirement accords to service suppliers of the Complainants treatment less favourable than that it accords to like service suppliers of ACP origin. We note that the parties do not disagree that the requirement to match EC import licences with BFA export certificates serves the purpose, or at least has the effect, of transferring part of the tariff quota rent which would normally accrue to initial EC import licence holders to the suppliers from Colombia, Costa Rica and Nicaragua who are initial holders of BFA export certificates. According to Article 3 of Regulation 478/95, Category A and C operators are subject to the EC's requirement to match import licences with BFA export certificates, whereas Category B operators are not subject to a similar requirement. Therefore, Category B operators who are initial holders of EC import licences do not have to share part of the tariff quota rent with initial holders of BFA export certificates. However, Category A and C operators must obtain export certificates from holders of BFA export certificates issued by the competent authorities of Colombia, Costa Rica or Nicaragua. When Category A and C operators are initial holders of EC import licences they share part of the tariff quota rent with initial holders of BFA export certificates. Consequently, the exemption of Category B operators from the BFA export certificate requirement ensures that tariff quota rent shares that would normally accrue to initial EC import licence holders are transferred exclusively from such holders who are Category A and C operators to initial holders of BFA export certificates.

7.384 In this context, we recall that operator category rules apply on an arguably formally identical basis to all service suppliers regardless of their nationality, ownership or control (paragraph 7.324). By the same token, we conclude that the exemption of Category B operators from the requirement to match EC import licences with BFA export certificates also arguably applies on a formally identical basis irrespective of the origin of the service suppliers concerned. However, we also recall that most service suppliers of Complainants' origin are classified as Category A operators for most of their previous trade volume and that most of the "like" service suppliers of ACP origin are classified as Category B operators for most of the bananas they have marketed during a preceding three-year period. Accordingly, we conclude that the exemption of Category B operators from the requirement to match EC import licences with BFA export certificates constitutes less favourable treatment for suppliers of Complainants' origin because it modifies conditions of competition in favour of "like" service suppliers or ACP origin.

7.385 Accordingly, we find that the exemption of Category B operators of ACP origin from the requirement to match EC import licences with BFA export certificates creates less favourable conditions of competition for like service suppliers of Complainants' origin and is therefore inconsistent with the requirements of Article II of GATS.

(f) Hurricane Licences

7.386 Hurricane licences[181] authorize operators who include or represent EC and ACP producers, or producer organizations "to import in compensation third-country bananas and non-traditional ACP bananas for the benefit of the operators who directly suffered damage as a result of the impossibility of supplying the Community market with bananas originating in affected producer regions" because of the impact of tropical storms. In the aftermath of the hurricanes Debbie, Iris, Luis and Marilyn, 281,605 tonnes of third-country or non-traditional ACP imports were authorized between 16 November 1994 and May 1996.[182]

7.387 The Complainants claim that the award of large amounts of hurricane licences by the EC exclusively to Category B operators and EC producers accords less favourable treatment to third country service suppliers. Therefore, the EC is alleged to be in violation of Article II of GATS because of its treatment of ACP suppliers, and in violation of Article XVII of GATS because of its treatment of EC suppliers.

7.388 The EC responds that the issuance of hurricane licences is required by the Lomé Convention. Further, the EC argues that the allocation of hurricane licences is directly linked to trade in goods. Therefore, inconsistencies with Article II or XVII of GATS cannot occur because the hurricane licences are not covered by the GATS in the EC's view.

(i) Article XVII of GATS

7.389-7.393 [Used in the Ecuador and United States reports.]

(ii) Article II of GATS

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

7.395 As to the first element, i.e., whether the EC has adopted or applied a measures covered by GATS, we recall that we have found that the phrase "affecting trade in services" should be interpreted broadly (paragraphs 7.277 *et seq.*). In this connection, we also note that supply of services through cross-border supply or commercial presence is defined broadly to include the production, distribution, marketing, sale and delivery of such services. As a consequence, in our view, the EC banana regulations are "measures affecting trade in

[181] See EC regulations cited in note 118 supra.
[182] See note 120 supra.

services" in the meaning of the GATS. More specifically, the rules establishing hurricane licences constitute measures affecting the Complainants' trade in services and are therefore covered by GATS.

7.396 We now turn to the second element of whether the issuance of hurricane licences accords to service suppliers of the Complainants treatment less favourable than that it accords to like service suppliers of ACP origin. In addressing this issue, we note that while only operators who include or directly represent EC or ACP producers or producer organizations affected by a tropical storm are eligible for the allocation of hurricane licences,[183] the EC regulations authorizing the issuance of certain quantities of hurricane licences apply on an arguably formally identical basis to services and service suppliers regardless of their origin, nationality, ownership or control. However, like Category B operators in general, we find that the vast majority of operators who "include or directly represent" EC or ACP producers are service suppliers of ACP (or EC) origin. We further note that hurricane licences allow for the importation of third-country and non-traditional ACP bananas at in-quota tariff rates outside and additional to the tariff quota. Thus service suppliers of ACP (or EC) origin obtain access to an additional entitlement of licences allowing the importation of third-country and non-traditional ACP bananas at in-quota tariff rates beyond the existing allocation to Category B operators of 30 per cent of the licences allowing imports of such bananas within the tariff quota. To put it differently, the allocation of hurricane licences gives service suppliers of ACP (and EC) origin the opportunity to benefit from tariff quota rents in addition to the tariff quota rents generated by the allocation of 30 per cent of the in-quota import licences to them. Thus the fact that only operators who include or directly represent ACP (or EC) producers are eligible for such licences modifies conditions of competition in favour of wholesale services suppliers of EC (and ACP) origin, since like service suppliers of Complainants' origin, if and when affected by a hurricane, do not enjoy a similar rent-making opportunity. We further note that our findings are limited to the present factual situation where hurricane licences are issued to operators who exclusively include or represent ACP (or EC) producers.

7.397 Consequently, we find that the allocation of hurricane licences exclusively to operators who include or directly represent ACP producers creates less favourable conditions of competition for like service suppliers of Complainants' origin and is therefore inconsistent with the requirements of Article II of GATS.

5. Nullification or Impairment

7.398 The measures taken by the EC affecting the importation of bananas from the Complainants, because of the infringement of obligations by the EC under a number of WTO agreements, are a *prima facie* case of nullification or impair-

[183] See note 120 supra.

ment of benefits in the meaning of Article 3.8 of the DSU, which provides that "there is normally a presumption that a breach of the rules has an adverse impact on other Members parties to that covered agreement". To the extent that this presumption can be rebutted,[184] in our view the EC has not succeeded in rebutting the presumption that its breaches of GATT, GATS and Licensing Agreement rules have nullified or impaired benefits of the Complainants.

D. Summary of Findings

7.399 The complexity of this case, and the unprecedented number of claims, arguments and Agreements involved, has resulted in a long report with an unprecedented number of findings. To assist the reader, the findings on the various procedural and substantive issues are repeated here. In summary we find that

1. Preliminary Issues

- the EC's claim that the Complainants' case should be dismissed because the consultations held concerning this dispute did not perform their minimum function of affording a possibility for arriving at a mutually satisfactory solution and a clear setting out of the different claims of which a dispute consists shall be rejected (paragraph 7.21).

- the panel request made by the Complainants was sufficient to meet the requirements of Article 6.2 of the DSU to the extent that it alleged inconsistencies with the requirements of specific provisions of specific WTO agreements (paragraph 7.45).

- under the DSU the United States has a right to advance the claims that it has raised in this case (paragraph 7.52).

- the description of the Panel's proceedings, the factual aspects and the parties' arguments should be identical in the four reports. In the "Findings" section, however, the reports differ to the extent that the Complainants' initial written submissions to the Panel differ in respect of alleging inconsistencies with the requirements of specific provisions of specific agreements (paragraph 7.58).

2. The EC Market for Bananas: Article XIII of GATT

- 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 (paragraph 7.63).

[184] See Panel Report on "United States - Taxes on Petroleum and Certain Imported Substances", adopted on 17 June 1987, BISD 34S/136, 158, para. 5.1.9.

- the EC has only one regime for banana imports for purposes of analysing whether its allocation of tariff quota shares is consistent with the requirements of Article XIII (paragraph 7.82).

- it was not unreasonable for the EC to conclude that at the time the BFA was negotiated Colombia and Costa Rica were the only contracting parties that had a substantial interest in supplying the EC banana market in terms of Article XIII:2(d) (paragraph 7.85).

- it is not reasonable to conclude that at the time the BFA was negotiated Nicaragua and Venezuela had a substantial interest in supplying the EC banana market in the terms of Article XIII:2(d) (paragraph 7.85).

- the EC's allocation of tariff quota shares by agreement and by assignment to some Members not having a substantial interest in supplying bananas to the EC (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 BFA, are inconsistent with the requirements of Article XIII:1 (paragraph 7.90).

- the failure of Ecuador's Protocol of Accession to address banana-related issues does not mean that Ecuador must accept the validity of the BFA as contained in the EC's Schedule or that it is precluded from invoking Article XIII:2 or XIII:4 (paragraph 7.93).

- it was not unreasonable for the EC to conclude that the Lomé Convention requires the EC to allocate country-specific tariff quota shares to traditional ACP banana supplying countries in an amount of their pre-1991 best-ever exports to the EC (paragraph 7.103).

- the allocation of tariff quota shares to ACP countries in excess of their pre-1991 best-ever exports to the EC is not required by the Lomé Convention (paragraph 7.103).

- to the extent that we have found that the EC has acted inconsistently with the requirements of Article XIII:1 (paragraph 7.90), we find that the Lomé waiver waives that inconsistency with Article XIII:1 to the extent necessary to permit the EC 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 EC (paragraph 7.110).

- the inclusion of the BFA tariff quota shares in the EC's Schedule does not permit the EC to act inconsistently with the requirements of Article XIII of GATT (paragraph 7.118).

- neither the negotiation of the BFA and its inclusion in the EC's Schedule nor the Agreement on Agriculture permit the EC to act inconsistently with the requirements of Article XIII of GATT (paragraph 7.127).

3. Tariff Issues

- to the extent that the EC's preferential tariff treatment of non-traditional ACP bananas is inconsistent with its obligations under Article I:1, those obligations have been waived by the Lomé waiver (paragraph 7.136).

4. The EC Banana Import Licensing Procedures

- the Licensing Agreement applies to licensing procedures for tariff quotas (paragraph 7.156).

- the provisions of GATT 1994, the Licensing Agreement and Article 2 of the TRIMS Agreement all apply to the EC's import licensing procedures for bananas (paragraph 7.163).

- the EC licensing procedures for traditional ACP bananas and third-country and non-traditional ACP bananas should be examined as one licensing regime (paragraph 7.167).

- 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 is inconsistent with the requirements of Article III:4 of GATT (paragraph 7.182).

- 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, are inconsistent with the requirements of Article I:1 of GATT (paragraph 7.195).

- the Lomé waiver does not waive the EC's obligations under Article I:1 of GATT in respect of licensing procedures applied to third-country and non-traditional ACP imports, including those related to operator category rules (paragraph 7.204).

- the EC import licensing procedures are subject to the requirements of Article X of GATT (paragraphs 7.207, 7.226).

- 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, is inconsistent with the requirements of Article X:3(a) of GATT (paragraph 7.212).

- 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, is inconsistent with the requirements of Article X:3(a) of GATT (paragraph 7.231).

- the requirement to match EC import licences with BFA export certificates is inconsistent with the requirements of Article I:1 of GATT (paragraph 7.241).

- the issuance of hurricane licences exclusively to EC producers and producer organizations or operators including or directly representing them is inconsistent with the requirements of Article III:4 of GATT (paragraph 7.250).

- the issuance of hurricane licences exclusively to ACP and EC producers and producer organizations or operators including or directly representing them is inconsistent with the requirements of Article 1.3 of the Licensing Agreement (paragraph 7.263).

- to the extent that we find that specific aspects of the EC licensing procedures are not in conformity with Articles I, III or X of GATT, we necessarily also find an inconsistency with the requirements of Article 1.2 of the Licensing Agreement (paragraph 7.271).

- we do not make a finding on whether the EC failed to take into account the needs of developing countries in a manner inconsistent with the requirements of Article 1.2 of the Licensing Agreement (paragraph 7.273).

5. The EC Banana Import Licensing Procedures and the GATS

- there is no legal basis for an *a priori* exclusion of measures within the EC banana import licensing regime from the scope of the GATS (paragraph 7.286).

- the distribution of bananas, regardless of whether they are green or ripened, falls within the scope of category CPC 622 "wholesale trade services" as inscribed in the EC's GATS Schedule of Commitments so long as it involves the sale of bananas to retailers, to industrial, commercial, institutional or other professional business users, or other wholesalers (paragraph 7.293).

- the EC's obligations under Article II of GATS and commitments under Article XVII of GATS cover the treatment of suppliers of wholesale trade services within the jurisdiction of the EC (paragraph 7.297).

- the obligation contained in Article II:1 of GATS to extend "treatment no less favourable" should be interpreted *in casu* to require providing no less favourable conditions of competition (paragraph 7.304).

- the EC has undertaken a full commitment on national treatment in the sector of "Wholesale Trade Services" with respect to supply through commercial presence (paragraph 7.306).

- 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 creates less favourable conditions of competition for like service suppliers of Complainants' origin and is therefore inconsistent with the requirements of Article XVII of GATS (paragraph 7.341).

- 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 creates less favourable conditions of competition for like service suppliers of Complainants' origin and is therefore inconsistent with the requirements of Article II of GATS (paragraph 7.353).

- the exemption of Category B operators of ACP origin from the requirement to match EC import licences with BFA export certificates creates less favourable conditions of competition for like service suppliers of Complainants' origin and is therefore inconsistent with the requirements of Article II of GATS (paragraph 7.385).

- the allocation of hurricane licences exclusively to operators who include or directly represent ACP producers creates less favourable conditions of competition for like service suppliers of Complainants' origin and is therefore inconsistent with the requirements of Article II of GATS (paragraph 7.397).

VIII. FINAL REMARKS

8.1 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 conclusions with regard to the legal consistency with WTO rules of the EC's common market organization for bananas.

8.2 Throughout our proceedings we were aware of the economic and social effects of the EC measures at issue in this case, particularly for the ACP and the Latin American banana exporting countries. In recognizing this, we decided to grant third parties participatory rights in our proceedings which were substantially broader than those normally afforded to them under the DSU.

8.3 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.

IX. CONCLUSIONS

9.1 The Panel concludes that for the reasons outlined in this Report aspects of the European Communities' import regime for bananas are inconsistent with its obligations under Articles I:1, III:4, X:3 and XIII:1 of GATT, Articles 1.2 and 1.3 of the Licensing Agreement and Articles II and XVII of the GATS. These conclusions are also described briefly in the summary of findings.

9.2 The Panel *recommends* that the Dispute Settlement Body request the European Communities to bring its import regime for bananas into conformity with its obligations under GATT, the Licensing Agreement and the GATS.

ATTACHMENT

SOURCES OF EC-12 AND EFTA-3[1] BANANA IMPORTS AND THEIR SHARES IN WORLD EXPORTS, 1994

(per cent, based on volume of trade reported by FAO, excluding intra-EC-12 trade)

Source	Share of EC-12 imports (%) (a)	Share of EFTA-3 imports (%) (b)	Share of world exports (%) (c)	Ratio	
				(a) ÷ (c)	(b) ÷ (c)
ACP countries	22.7	0.0	6.5	3.5	0.0
BFA countries	37.9	45.4	36.9	1.0	1.2
Other Latin American countries	34.9	54.2	42.1	0.8	1.3
Other	4.5	0.4	14.5	0.3	0.0
TOTAL	100.0	100.0	100.0	1.0	1.0

[1] Austria, Finland and Sweden (prior to their accession to the EC in 1995).

Source: FAO.

BANANA EXPORTS TO THE EC AS PERCENTAGE OF TOTAL BANANA EXPORTS

Source	1986	1988	1990
ACP countries	94	94	94
Cameroon	99	97	94
Côte d'Ivoire	97	97	97
Jamaica	100	100	100
Suriname	100	100	100
Windward Islands	99	95	100
Somalia	63	79	64

Source: Submitted by the EC (based on FAO).

IMPORTS OF BANANAS TO THE EC
(Tonnes)

Source	1989		1990		1991		1992		1993		1994		1995 (provisional)
	EC-12	EC-15	EC-12	EC-15	EC-12	EC-15	EC-12	EC-15	EC-12	EC-15	EC-12	EC-15	EC-15
ACP	544,441	544,491	621,875	621,912	596,416	596,437	680,191	680,211	748,118	748,133	726,921	726,990	678,311[1]
Belize	26,580	26,580	24,040	24,040	19,617	19,617	28,494	28,494	38,517	38,517	46,980	46,980	40,000
Cameroon	56,071	56,071	77,628	77,628	115,115	115,115	110,357	110,357	146,902	146,902	158,167	158,167	154,980
Cape Verde	2,734	2,734	2,715	2,715	3,011	3,011	1,876	1,876	684	684	73	73	0
Dominica	51,315	51,315	52,415	52,415	54,155	54,155	51,605	51,605	52,699	52,699	42,868	42,868	32,843
Dominican Rep.	855	855	3,829	3,836	9,682	9,703	38,493	38,513	61,664	61,679	86,007	86,076	
Grenada	8,268	8,268	8,189	8,189	8,187	8,187	6,016	6,016	6,720	6,720	5,325	5,325	4,489
Côte d'Ivoire	85,160	85,188	95,158	95,188	116,406	116,406	144,307	144,307	161,257	161,257	149,085	149,085	155,000
Jamaica	39,219	39,219	63,181	63,181	70,116	70,116	74,827	74,827	77,390	77,390	76,294	76,294	79,750
Madagascar	68	68	0	0	0	0	10	10	19	19	0	0	0
Somalia	59,388	59,388	57,785	57,785	8,080	8,080	181	181	501	501	4,634	4,634	21,430
St. Lucia	116,286	116,286	127,225	127,225	99,823	99,823	122,066	122,066	113,304	113,304	91,541	91,541	104,290
St. Vincent & the Grenadines	67,595	67,595	81,535	81,535	62,263	62,263	71,320	71,320	57,609	57,609	32,054	32,054	50,620
Suriname	29,945	29,945	27,705	27,705	27,744	27,744	29,950	29,950	27,984	27,984	32,721	32,721	34,909
Other ACP	957	979	470	470	2,217	2,217	689	689	2,868	2,868	1,172	1,172	
OTHERS	1,715,945	2,041,289	2,024,168	2,362,735	2,285,149	2,639,812	2,365,874	2,729,945	2,219,632	2,560,387	2,102,287	2,450,006	2,653,441[2]
Colombia	330,390	353,172	401,902	420,918	495,166	518,161	499,834	533,200	417,905	451,778	461,247	511,316	
Costa Rica	450,052	537,021	548,518	643,064	528,302	607,795	451,847	520,331	480,325	564,984	621,999	726,805	
Ecuador	273,898	304,421	352,148	381,015	578,212	646,210	674,528	745,058	605,243	650,628	549,387	612,040	
Honduras	148,813	210,064	123,489	174,298	138,271	181,391	194,609	239,184	193,529	204,048	26,902	27,535	
Guatemala	61,827	81,413	9,370	15,994	13,186	17,667	33,429	39,701	26,947	32,539	19,907	20,041	
Nicaragua	29,072	34,273	47,600	49,532	57,849	59,519	25,638	28,816	9,621	10,554	8	8	
Panama	400,447	495,739	527,464	648,939	469,193	591,393	470,655	601,096	413,132	568,701	299,045	426,933	
Venezuela	179	179	50	50	41	41	45	45	147	147	1,083	1,854	
Mexico	19	19	41	41	39	39	11,046	11,046	112	112	58	58	
Philippines	20,079	20,079	5,024	5,024	165	165	0	0	1,858	1,858	0	0	
Others	1,059	1,059	8,562	8,562	4,725	4,725	3,338	3,338	5,399	5,399	3,913	3,913	
Unspecified	110	3,850	0	15,298	0	12,706	905	8,130	65,414	69,639	118,738	119,503	
TOTAL	2,260,386	2,585,780	2,646,043	2,984,647	2,881,565	3,236,249	3,046,065	3,410,156	2,967,750	3,308,520	2,829,208	3,176,996	3,331,752

Notes: [1] Traditional ACP imports.
[2] Tariff quota imports based on licences used.

Source: Eurostat data supplied by the EC in response to a Panel question.

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

(COMPLAINT BY THE UNITED STATES)

Report of the Panel
WT/DS27/R/USA

Adopted by the Dispute Settlement Body on 25 September 1997
as modified by the Appellate Body Report

NB: For Parts I to V of this report, see Parts I to V of the Panel Report in European Communities - Regime for the Importation, Sale and Distribution of Bananas, Complaint by Ecuador, WT/DS27/R/ECU, DSR 1997:III, 1093-1445.

TABLE OF CONTENTS

VI. INTERIM REVIEW

6.1 On 2 April 1997, the European Communities, Ecuador, Guatemala, Honduras, Mexico and United States requested the Panel to review in accordance with Article 15.2 of the DSU precise aspects of the interim reports that had been issued to the parties on 18 March 1997. The European Communities also requested the Panel to hold a further meeting with the parties on the issues identified in its written comments. The Panel met with the parties on 14 April 1997 in order to hear their arguments concerning the interim reports. We carefully reviewed the arguments presented by the EC and by the Complaining parties, jointly or individually, and the responses offered by the other side.

6.2 With respect to procedural matters, the Complaining parties commented on the Panel's interpretation of the requisite degree of specificity of a panel request in light of the requirements of Article 6.2 of the DSU. They also raised concerns as to the Panel's refusal to consider claims made or endorsed by one or

more of them after the filing of the first written submissions. As regards those claims which the Panel had found unnecessary to address, the Complaining parties further argued that several of them, e.g., allegations regarding overfiling under the activity function rules and the distribution of licences to producers, were not issues of secondary importance and should be addressed by the Panel in addition to those aspects of the licensing procedures which had been found to be inconsistent with WTO rules. Furthermore, they suggested several drafting changes. We carefully considered these arguments and where we agreed, we modified the Findings in response in paragraphs 7.40, 7.42 and 7.49.

6.3 The EC and the Complaining parties asked for a number of specific modifications or additions to those paragraphs in the Findings which summarize their legal arguments. Since these proposed changes concerned the representation of the parties' own legal arguments, we generally accepted them. In particular, in reaction to suggestions by the EC, we modified or expanded paragraphs 7.65, 7.78, 7.104, 7.169, 7.200, 7.205, 7.224, 7.287, 7.301 and 7.313. In our view, these adjustments in general did not entail repercussions for the legal analysis in the Findings. However, in the context of the applicability of the Lomé waiver to licensing procedures and of the interpretation of Article II of GATS, we added more detail to the legal reasoning in paragraphs 7.198 and 7.301-7.302.

6.4 In respect of the discussion of Article XIII in the Findings, the Complaining parties asked the Panel to expand its findings on "Members with a substantial interest" and "New members". The EC commented on the Panel's treatment of issues such as "previous representative period", "special factors" or the EC enlargement. To the extent we accepted these suggestions, we adjusted the Findings, e.g., in paragraphs 7.91-7.94.

6.5 The Complaining parties also commented on the application of the Lomé waiver to Article XIII, on the one hand, and to the tariff treatment of non-traditional imports of ACP bananas, on the other. To the extent that we agreed with those comments, we made adjustments to paragraphs 7.104-7.110 and paragraphs 7.135 and 7.139. The EC also raised arguments concerning the interpretation of the coverage of the waiver. In response to the EC's comments, we revised paragraphs 7.197-7.199.

6.6 Both sides requested the Panel to expand the factual discussion of the differences between the licensing procedures applied to traditional ACP imports as opposed to those applied to third-country and non-traditional ACP imports. We broadly followed these suggestions by adding more factual information from, or cross-referring to, specific parts of the descriptive section of the panel report on which our findings are based. We inserted additions in paragraphs 7.190-7.192. Other modifications along the same lines are reflected in paragraphs 7.211, 7.221 and 7.230.

6.7 With respect to the part of the Findings dealing with GATS issues, the Complaining parties proposed several specific drafting changes. We accepted these suggestions where we considered them appropriate and modified language in the discussion of "measures affecting trade in services", (paragraphs 7.281,

7.282 and 7.285), of "wholesale trade services" (paragraphs 7.287 and 7.291) and of certain other issues (see, e.g., paragraphs 7.316, 7.324, 7.347, 7.377 and 7.391). Further to that, the Complaining parties also commented on the application of the concept of "conditions of competition" to services. We revised the report accordingly in paragraphs 7.335-7.236 where we found merit in the suggestions. Finally, they clarified their claims as being based on allegations of less favourable treatment accorded to their service suppliers, not their services. In light of this, we modified the Findings accordingly, particularly in paragraphs 7.294, 7.297, 7.298, 7.306, 7.314, 7.317, 7.324, 7.329, 7.341 and 7.353.

6.8 The EC commented extensively on the part of the Findings dealing with GATS issues. Paragraphs 7.301-7.302 and 7.308 reflect our responses to the EC's concerns about the interpretation of Article II of GATS and the effective date of GATS obligations.

6.9 With respect to the sections addressing specific claims under Articles II and XVII of GATS against certain aspects of its licensing procedures, the EC suggested that the factual information it had submitted was not sufficiently reflected and discussed in the Findings of the interim report. In particular, the EC referred to information concerning nationality, ownership or control of trading companies and ripeners. Moreover, the EC asked the Panel to take more account of the information it had provided concerning the evolution in recent years of market shares of suppliers of EC/ACP origin as opposed to suppliers of Complaining parties' origin in the EC/ACP and the third-country market segments. In response to these comments, we significantly revised paragraphs 7.329-7.339 and also changed paragraphs 7.362-7.363. The revised paragraphs address in more detail the information submitted by the EC and indicate specifically how we evaluated it. We also expanded our discussion of exactly why the Panel draws conclusions from the information submitted by the parties which are different from the conclusions advocated by the EC.

6.10 In respect of the interim reports' descriptive section, the EC and the Complaining parties suggested further changes which we took into account in reexamining that part of the reports. As to the EC's request for a section describing the EC's view of the facts, we were of the view that the EC's interpretation of the facts is already reflected in a comprehensive manner in the section of the panel report which contains the legal arguments. However, where we saw the need to follow specific suggestions for changes by either side, we revised the descriptive section of the interim reports.

6.11 Guatemala also suggested changes to the Findings in respect of our discussion of its claims relating to the EC's substitution in the Uruguay Round of specific tariff rates on bananas for its pre-Uruguay Round ad valorem tariff rates. We modified paragraph 7.139 to indicate that our finding is limited to the specific circumstances surrounding the Uruguay Round of Multilateral Trade Negotiations.

VII. FINDINGS

7.1 This case is an exceedingly complex one. There are six parties (one representing 15 member States) and 20 third parties, meaning that almost one-third of Members are involved in the case. In addition to claims under the General Agreement on Tariffs and Trade 1994, claims are made for the first time in dispute settlement under four other WTO agreements: The Agreement on Agriculture, the Agreement on Import Licensing Procedures, the Agreement on Trade-Related Investment Measures and the General Agreement on Trade in Services. The submissions by the Complainants[1] and the EC totalled several thousand pages. Moreover, the unprecedented number and complexity of the claims and arguments has meant that the organization and presentation of our work has not been easy.

7.2 The findings are divided into three main parts. First we address various organizational issues that arose in the course of the Panel's work. Second, we consider preliminary issues raised by the EC concerning the validity of the establishment of this Panel and the lack of a legal interest in some issues on the part of the United States. Finally, we address the substantive issues presented by this case.

A. Organizational Issues

7.3 In the course of these proceedings, we considered two issues related to the organization of our work. These concerned the extent of the participatory rights to be afforded third parties and the presence in Panel meetings of private lawyers representing third parties.

1. Participation of Third Parties

7.4 At the meeting of the Dispute Settlement Body on 8 May 1996, Belize, Cameroon, Colombia, Costa Rica, Côte d'Ivoire, Dominica, Dominican Republic, Ghana, Grenada, Jamaica, Nicaragua, Saint Vincent and the Grenadines, Saint Lucia, Senegal, Suriname and Venezuela requested to be allowed to participate more fully in the work of the Panel, i.e., these Members requested to be present at all meetings between the Panel and the parties to the dispute; to be able to present their point of view at each of these meetings; to receive copies of all submissions and other written material; and to be allowed to present written submissions both to the first and to the second meetings of the Panel. While the DSB took note of these statements, there was no consensus on such participation.[2] Several

[1] Our use of the term Complainants in these Findings is explained in para. 7.59 infra. In respect of organizational and preliminary issues, it is used to refer to all five Complaining parties.

[2] WT/DSB/M/16, item 1, pp. 1-5.

of these countries later confirmed their requests in letters addressed to the Chairman of the DSB.

7.5 Subsequently, we considered the above requests. The rights of third parties are dealt with in Article 10 and Appendix 3 of the Dispute Settlement Understanding. Article 10 provides that third parties "shall have an opportunity to be heard by the panel and to make written submissions to the panel". It also provides that third parties are entitled to receive the submissions of the parties made to the first substantive panel meeting. Paragraph 6 of Appendix 3 specifies that third parties shall be invited "to present their views during a session of the first substantive meeting of the panel set aside for that purpose. All such third parties may be present during the entirety of this session". Under prior GATT practice, more expansive rights were granted to third parties in several disputes, including the two prior disputes involving bananas and in the *Semiconductors* case.[3] In those cases, however, the extension of such rights had been the subject of agreement between the parties at that time. No such agreement existed between the parties in the present dispute.

7.6 Having considered representations by the Complainants, the EC and third parties, we decided prior to our first substantive meeting with the parties that, in addition to the rights specifically provided for in the DSU, third parties in this dispute would be invited to observe the whole of the proceedings at that meeting and not just the one session thereof set aside for hearing third-party arguments.

7.7 At the first substantive meeting of the Panel, the EC requested that third parties be allowed to participate in future panel meetings as set out in paragraph 7.4 above. The Complainants expressed the view that third party rights were sufficiently safeguarded by the normal procedures as set out in Article 10 of the DSU. We consulted the parties on this issue, but they maintained their opposing viewpoints.

7.8 We thereafter ruled as follows:

> "(a) The Panel has decided, after consultations with the parties in conformity with DSU Article 12.1, that members of governments of third parties will be permitted to observe the second substantive meeting of the Panel with the parties. The Panel envisages that the observers will have the opportunity also to make a brief statement at a suitable moment during the second meeting. The Panel does not expect

[3] Panel Report on "EEC - Import Regime for Bananas", issued on 11 February 1994 (not adopted), DS38/R, p.4, para. 8; Panel Report on "EEC - Member States' Import Regimes for Bananas", issued on 3 June 1993 (not adopted), DS32/R, p.2, para. 9; Panel Report on "Japan - Trade in Semiconductors", adopted on 4 May 1988, BISD 35S/116, 116-117, para. 5. See also Panel Report on "EEC - Tariff Treatment on Imports of Citrus Products from Certain Countries in the Mediterranean Region", issued on 7 February 1985 (not adopted), L/5776, p.2, para. 1.5; Interim Panel Report on "United Kingdom - Dollar Area Quotas", adopted on 30 July 1973, BISD 20S/230, 231, para. 3.

them to submit additional written material beyond responses to the questions already posed during the first meeting.

(b) The Panel based its decision, *inter alia*, on the following considerations:

(i) the economic effect of the disputed EC banana regime on certain third parties appeared to be very large;

(ii) the economic benefits to certain third parties from the EC banana regime were claimed to derive from an international treaty between them and the EC;

(iii) past practice in panel proceedings involving the banana regimes of the EC and its member States; and

(iv) the parties to the dispute could not agree on the issue".

As a consequence of our ruling, the third parties in these proceedings enjoyed broader participatory rights than are granted to third parties under the DSU.

7.9 Following the second substantive meeting of the Panel with the parties, several of the third parties asked for further participatory rights, including participation in the interim review process. We consulted the parties and found that, as before, they had diverging views on the appropriateness of granting this request. We decided that no further participatory rights should be extended to third parties, except, in accord with normal practice, to permit them to review the draft of the summary of their arguments in the Descriptive Part. In this regard, we noted that Article 15 of the DSU, which deals with the interim review process, refers only to parties as participants in that process. In our view, to give third parties all of the rights of parties would inappropriately blur the distinction drawn in the DSU between parties and third parties.

2. Presence of Private Lawyers

7.10 At the beginning of the Panel's first substantive meeting on 10 September 1996, one of the Complainants objected to the alleged presence of private lawyers in the Panel meeting. In accordance with Article 12.1 of the DSU and the Working Procedures of Appendix 3, we held consultations with the Complainants and the EC on this issue and the Complainants expressed opposition to allowing private lawyers to be present.

7.11 We thereafter asked parties and third parties to observe the guidelines contained in our working procedures and that only members of governments (including the European Commission and an international civil servant of the ACP Secretariat) attend the Panel meeting. We based our request on the following considerations:

(a) It has been past practice in GATT and WTO dispute settlement proceedings not to admit private lawyers to panel meetings if any

party objected to their presence and in this case the Complainants did so object.

(b) In the working procedures of the Panel, which were adopted at the Panel's organizational meeting, we had expressed our expectation that only members of governments would be present at Panel meetings.

(c) The presence of private lawyers in delegations of some third parties would be unfair to those parties and other third parties who had utilized the services of private lawyers in preparing their submissions, but who were not accompanied by those lawyers because they assumed that all participants at the meeting would comply with our expectations as expressed in the working procedures adopted by the Panel at its organizational meeting.

(d) Given that private lawyers may not be subject to disciplinary rules such as those that applied to members of governments, their presence in Panel meetings could give rise to concerns about breaches of confidentiality.

(e) There was a question in our minds whether the admission of private lawyers to Panel meetings, if it became a common practice, would be in the interest of smaller Members as it could entail disproportionately large financial burdens for them.

(f) Moreover, we had concerns about whether the presence of private lawyers would change the intergovernmental character of WTO dispute settlement proceedings.

7.12 We noted that our request would not in any respect adversely affect the right of parties or third parties to meet and consult with their private lawyers in the course of panel proceedings, nor to receive legal or other advice in the preparation of written submissions from non-governmental experts.

B. Preliminary Issues

7.13 First, the EC claims that the consultations held in this matter between the Complainants and the EC did not fulfil their minimum function of affording a possibility for arriving at a mutually satisfactory solution and a clear setting out of the different claims of which a dispute consists. Second, it claims that the request for the establishment of this Panel was unacceptably vague and failed to comply with the requirements of Article 6.2 of the DSU. Third, it claims that the United States has no legal right or interest in a resolution of certain of its claims and therefore should not be permitted to raise them. Fourth, the EC claims that it is entitled to separate panel reports under Article 9 of the DSU.

7.14 As the Appellate Body has made clear in its first two decisions, under Article 3.2 of the DSU the starting point for the interpretation of treaty provisions is the Vienna Convention on the Law of Treaties (the "Vienna Convention").[4] Article 31 of the Vienna Convention provides in relevant part as follows:

> "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 light of its object and purpose.
>
> ...
>
> 3. There shall be taken into account, together with the context: ... (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; ...".

Article 32 of the Vienna Convention permits recourse to

> "supplementary means of interpretation ... 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".

7.15 In addition, Article XVI of the Marrakesh Agreement Establishing the World Trade Organization provides as follows:

> "Except as otherwise provided under this Agreement or the Multilateral Trade Agreements, the WTO shall be guided by the decisions, procedures and customary practices followed by the CONTRACTING PARTIES to GATT 1947 and the bodies established in the framework of GATT 1947".

7.16 In light of this framework for interpretation, we turn to the arguments of the EC.

1. Adequacy of the Consultations

7.17 Consultations under Article 4 of the DSU are normally required as the first step in the WTO dispute settlement process.[5] Article 4.2 of the DSU requires a Member "to accord sympathetic consideration to and afford adequate opportunity for consultation regarding any representations made by another Member ...". Article 4.5 of the DSU specifies that "[i]n the course of the consultations ... before resorting to further action under this Understanding, Members should at-

[4] 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, DSR 1996:I, 97 at 104-106; Appellate Body Report on "United States - Standards for Reformulated and Conventional Gasoline", adopted on 20 May 1996, WT/DS2/AB/R, DSR 1996:I, 3 at 15-16.

[5] Under Article 8.10 of the Agreement on Textiles and Clothing, a matter may be taken to the DSB without prior consultations under the DSU.

tempt to obtain satisfactory adjustment of the matter". However, if consultations fail to settle a dispute within 60 days of the request for consultations, Article 4.7 of the DSU authorizes the complaining party to request the DSB to establish a panel.[6]

7.18 The EC argues that the consultations that were held in this matter between the Complainants and the EC did not fulfil their minimum function of affording a possibility for arriving at a mutually satisfactory solution and a clear setting out of the different claims of which a dispute consists. The Complainants argue that Article 4.5 of the DSU only requires that an "attempt" be made to resolve the matter. Since consultations were held on 14-15 March 1996, the Complainants argue that they complied with the DSU and were authorized to request the DSB to establish a panel when those consultations failed to produce a mutually agreed solution to the dispute. We note that the EC did not raise this issue in the DSB.[7]

7.19 Consultations play a critical role in the WTO dispute settlement process as they did under GATT. Experience under the DSU to date has shown that consultations frequently enable disputes between Members to be resolved without resort to the dispute settlement panel process.[8] Since the DSU provides in Article 3.7 that "[a] solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred", disputing parties should consult in good faith and attempt to reach such a solution. Consultations are, however, a matter reserved for the parties. The DSB is not involved; no panel is involved; and the consultations are held in the absence of the Secretariat. In these circumstances, we are not in a position to evaluate the consultation process in order to determine if it functioned in a particular way. While a mutually agreed solution is to be preferred, in some cases it is not possible for parties to agree upon one. In those cases, it is our view that the function of a panel is only to ascertain that consultations, if required, were in fact held or, at least, requested.[9]

7.20 As to the EC argument that consultations must lead to an adequate explanation of the Complainants' case, we cannot agree. Consultations are the first step in the dispute settlement process. While one function of the consultations may be to clarify what the case is about, there is nothing in the DSU that provides that a complainant cannot request a panel unless its case is adequately explained in the consultations. The fulfilment of such a requirement would be difficult, if not impossible, for a complainant to demonstrate if a respondent chose to claim a lack of understanding of the case, a result which would undermine the automatic nature of panel establishment under the DSU. The only prerequisite for requesting a panel is that the consultations have "fail[ed] to settle a dispute within 60 days of

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[6] If there is a failure to consult, Article 4.3 of the DSU provides that a panel may be requested after 30 days.

[7] Minutes of DSB Meeting of 24 April 1996, WT/DSB/M/15, item 1, pp.1-2; Minutes of DSB Meeting of 8 May 1996, WT/DSB/M/16, item 1, pp.1-5.

[8] WT/DBS/8, p.17 (1996 Annual Report of the DSB).

[9] DSU, Article 4.3.

receipt of the request for consultations ...".[10] Ultimately, the function of providing notice to a respondent of a complainant's claims and arguments is served by the request for establishment of a panel and by the complainant's submissions to that panel.

7.21 We reject the EC's claim that the Complainants' case should be dismissed because the consultations held concerning this dispute did not perform their minimum function of affording a possibility for arriving at a mutually satisfactory solution and a clear setting out of the different claims of which a dispute consists.

2. Specificity of the Request for Panel Establishment

(a) Article 6.2 and the Request for Establishment of the Panel

7.22 Article 6.2 of the DSU provides in relevant part as follows:

> "The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a brief legal basis of the complaint sufficient to present the problem clearly. ... ".

The EC claims that the request for the establishment of the Panel in this case fails to "identify the specific measures at issue" and does not "provide a brief legal basis of the complaint sufficient to present the problem clearly".

7.23 The relevant parts of the Complainants' request for the establishment of this Panel read as follows:

> "The European Communities maintains a regime for the importation, sale and distribution of bananas established by Regulation 404/93 (O.J. L 47 of 25 February 1993, p. 1), and subsequent EC legislation, regulations and administrative measures, including those reflecting the provisions of the Framework Agreement on bananas, which implement, supplement and amend that regime. The regime and related measures appear to be inconsistent with the obligations of the EC under, *inter alia*, the General Agreement on Tariffs and Trade 1994 ("GATT 1994"), the Agreement on Import Licensing Procedures, the Agreement on Agriculture, the General Agreement on Trade in Services ("GATS") and the Agreement on Trade-Related Investment Measures ("TRIMs Agreement").
>
> [Description of consultations omitted]
>
> The Governments of Ecuador, Guatemala, Honduras, Mexico and the United States, acting jointly and severally, each in the exercise of the rights accruing to it as a member of the WTO, therefore, re-

[10] DSU, Article 4.7.

spectfully request the establishment of a panel to examine this matter in light of the GATT 1994, the Agreement on Import Licensing Procedures, the Agreement on Agriculture, the GATS, and the TRIMs Agreement, and find that the EC's measures are inconsistent with the following Agreements and provisions among others:

(1) Articles I, II, III, X, XI and XIII of the GATT 1994,

(2) Articles 1 and 3 of the Agreement on Import Licensing Procedures,

(3) the Agreement on Agriculture,

(4) Articles II, XVI and XVII of the GATS, and

(5) Article 2 of the TRIMs Agreement.

These measures also produce distortions which nullify or impair benefits accruing to Ecuador, Guatemala, Honduras, Mexico and the United States, directly or indirectly, under the cited Agreements; and these measures impede the objectives of the GATT 1994 and the other cited Agreements".[11]

(b) The Arguments of the Parties

7.24 The EC claims that the Complainants' request for the establishment of this Panel fails to comply with the requirements of Article 6.2 of the DSU. The EC notes that the request refers specifically to only one EC regulation and describes that regulation and related, but unspecified, measures as a "regime". The EC further notes that while the request refers to some specific agreements and provisions, it suggests that there might be other unspecified provisions and agreements that are relevant, and that it fails to explain which part of the EC regime is inconsistent with the requirements of which provision of which agreement. The EC argues that for these reasons the panel request is inadequate to serve as the basis for the terms of reference of the Panel and inadequate to give appropriate notice to the EC and potential third parties of which claims may be put forward by the Complainants. In support of its arguments, the EC cites two panel reports issued under the Tokyo Round Agreement on the Interpretation of Article VI (the "Tokyo Round Anti-Dumping Code"), one of which was adopted by the Committee on Anti-Dumping Practices and one of which was not.[12]

7.25 In response, the Complainants argue that their request refers to the basic EC regulation that establishes the EC rules on banana imports and that this refer-

[11] WT/DS27/6.

[12] Panel Report on "United States - Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway", adopted on 26 April 1994, ADP/87, p.99, paras. 333-335; Panel Report on "EC - Anti-Dumping Duties on Audiotapes in Cassettes Originating in Japan", issued on 28 April 1995, ADP/136, p.53, para. 295.

ence is sufficient to identify the measures at issue. They argue, in addition, that Article 6.2 does not require a panel request to tie each part of a contested measure to a specific provision of a WTO agreement that it is inconsistent with, but rather that submissions to panels serve that purpose. The Complainants further argue that the Tokyo Round Anti-Dumping Code cases are irrelevant. Moreover, they note that the EC did not raise this issue at either DSB meeting at which the panel request was presented and cannot now claim that it was prejudiced by not knowing the claims of the Complainants. Finally, the Complainants argue that this Panel may not rule on this claim because it is outside the Panel's terms of reference.

(c) Analysis of the Article 6.2 Claim

7.26 We examine first the argument by the Complainants that we have no authority to consider the EC claim. As noted above, panels under GATT 1947 and the Tokyo Round agreements considered similar claims.[13] We see no reason to deviate from that practice. Because of the application of "reverse" consensus decision-making applicable in the case of panel establishment in the DSB, the DSB is not likely to be an effective body for resolving disputes over whether a request for the establishment of a panel meets the requirements of Article 6.2 of the DSU. Therefore, as a practical matter only the panel established on the basis of the request (and thereafter the Appellate Body) can perform that function. Moreover, the issue we are asked to resolve can be viewed in essence as a decision on the scope of our terms of reference, which is clearly a proper subject for consideration by a panel.[14] We turn therefore to an analysis of the EC claim in light of the interpretative rule of the Vienna Convention and of Article XVI of the WTO Agreement. In this connection, we examine (i) the ordinary meaning of the terms of Article 6.2, (ii) the context of the terms of Article 6.2, (iii) the object and purpose of Article 6.2 and (iv) past practice under Article 6.2 and its predecessor.

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[13] Panel Report on "United States - Denial of Most-Favoured Nation Treatment as to Non-Rubber Footwear from Brazil", adopted on 19 June 1992, BISD 39S/128, pp.147-148, paras. 6.1-6.2. Panels under Tokyo Round agreements include: Panel Report on "European Communities - Imposition of Anti-Dumping Duties on Imports of Cotton Yarn from Brazil", adopted on 4 July 1995, ADP/137, pp.105-109, paras. 438-466; Panel Report on "United States - Countervailing Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway", adopted on 27 April 1994, SCM/153, pp.68-69, paras. 208-214; Panel Report on "United States - Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway", adopted on 26 April 1994, ADP/87, p.99, paras. 333-335; Panel Report on "United States - Anti-Dumping Duties on Imports of Gray Portland Cement and Cement Clinker from Mexico", issued on 7 September 1992, ADP/82, pp.49-50, para. 5.12.

[14] The Appellate Body has considered terms of reference issues. Appellate Body Report on "Brazil - Measures Affecting Desiccated Coconut", issued on 21 February 1997, WT/DS22/AB/R, DSR 1997:I, 167 at 186.

(i) Ordinary Meaning of Treaty Terms

7.27 Article 6.2 of the DSU requires that the "specific measures at issue" be "identif[ied]" and that there be "a brief summary of the legal basis of the complaint sufficient to present the problem clearly". The EC challenges the panel request on both grounds. As to the first requirement, the panel request does identify the basic EC regulation at issue by place and date of publication. In our view, this complies with the requirements of Article 6.2. While the request does not identify the subsequent EC legislation, regulations and administrative measures that further refine and implement the basic regulation, we believe that the "banana regime" that the Complainants are contesting is adequately identified.

7.28 As to the second requirement of Article 6.2, a complete elaboration of the complainant's legal argument is not required. Article 6.2 specifies only that the request must include a "summary" of the legal basis of the complaint and that the summary need only be "brief". However, Article 6.2 does require that summary to "present the *problem* clearly". In undertaking an analysis of whether the panel request in this case complies with the terms of Article 6.2 of the DSU, we find it useful to divide the request into three categories of specificity. First, in most cases, the request alleges that the EC banana regime is inconsistent with the requirements of a specific provision of a specific agreement. Second, in the case of the Agreement on Agriculture, the request simply alleges that the regime is inconsistent with that agreement. Third, the panel request indicates that the list of provisions specified in the request is not exclusive. We examine the compliance of the request with Article 6.2 in each of these three situations.

7.29 Where the panel request alleges that the banana regime is inconsistent with the requirements of a specific article of a specific agreement, we believe that the request is sufficiently specific to comply with the minimum standards established by the terms of Article 6.2 of the DSU. For example, the request claims that the regime is inconsistent with the requirements of six GATT provisions: Articles I, II, III, X, XI and XIII, as well as inconsistent with the requirements of specific provisions of the Agreement on Import Licensing Procedures, the Agreement on Trade-Related Investment Measures and the General Agreement on Trade in Services. Generally, each of these provisions is concerned with a distinct obligation. For example, Article I of GATT bans discrimination on the basis of origin in respect of certain specified matters. A fair reading of the panel request's reference to Article I would be that there is an allegation that the EC banana regime is inconsistent with the requirements of Article I because it contains elements that discriminate in favour of some countries to the detriment of Members. Such an allegation can be described as a "brief summary of the legal basis of the complaint", which arguably presents the "problem" clearly, i.e. there is discrimination on the basis of product origin which is inconsistent with the requirements of Article I. However, a panel request that does no more than identify a measure and specify the provision with which it is alleged to be inconsistent is, in our view, at the outer limits of what is acceptable under Article 6.2. Nonetheless, particularly in light of our analysis below of the object and purpose and of the context of Article 6.2 and of past GATT and WTO practice, we believe

that this conclusion is the appropriate interpretation of the terms of Article 6.2. In this regard, we note that there is no explicit requirement in Article 6.2 to explain how the measure at issue is inconsistent with the requirements of a specific WTO provision and the EC concedes in its response to our questions that a simple listing of the provision and agreement alleged to have been violated may suffice for the purposes of Article 6.2.[15]

7.30 The panel request alleges an inconsistency with the requirements of the Agreement on Agriculture, without specifying any provision thereof. It also states that "the EC's measures are inconsistent with the following Agreements and provisions *among others*", suggesting that there may be inconsistencies with unspecified agreements and inconsistencies with unspecified provisions of the specified agreements. In these two situations, it is not possible at the panel request stage, even in the broadest generic terms, to describe what legal "problem" is asserted. While a reference to a specific provision of a specific agreement may not be essential if the problem or legal claim is otherwise clearly described, in the absence of some description of the problem, a mere reference to an entire agreement or simply to "other" unspecified agreements or provisions is inadequate under the terms of Article 6.2. Accordingly, we find that references to a WTO agreement without mentioning any provisions or to unidentified "other" provisions are too vague to meet the standards of Article 6.2 of the DSU.

7.31 Thus, we preliminarily find that, given the ordinary meaning of the terms of Article 6.2 of the DSU, the panel request made by Complainants was generally sufficient to meet its requirements. We note, however, that since the invocation of the Agreement on Agriculture in the panel request did not indicate a specific provision thereof, we will not consider the claim raised by Ecuador in its first written submission under that Agreement. We will also not consider the claims raised by Ecuador, Guatemala and Honduras, and the United States in their first written submissions under Article 5 of the TRIMs Agreement since the panel request referred only to Article 2 of the TRIMs Agreement.[16] We now consider whether this preliminary finding is supported by the context and the object and

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[15] In its response, the EC seems to accept that the following panel requests under the DSU meet the requirements of Article 6.2 even though they only list the WTO provisions that the challenged measures are alleged to be inconsistent with, without explaining why: Canada - Certain Measures Concerning Periodicals, Request for the Establishment of a Panel, 24 May 1996, WT/DS31/2; EC - Measures Concerning Meat and Meat Products (Hormones), Request for the Establishment of a Panel, WT/DS26/6; EC - Trade Description of Scallops, Request for the Establishment of a Panel by Chile, WT/DS14/5; EC - Trade Description of Scallops, Request for the Establishment of a Panel by Peru, WT/DS12/7; EC - Trade Description of Scallops, Request for the Establishment of a Panel by Canada, WT/DS7/7. We would note that at least one of the EC's three panel requests under the DSU has mentioned only the agreement and provisions alleged to have been violated, i.e., United States - Tariff Increases on Products from the EC, Request for the Establishment of a Panel by the EC, WT/DS39/2.

[16] Given that the request for consultations did list Article 5 of the TRIMs Agreement, the omission of that article in the panel request could be understood as a decision by the Complainants not to pursue this claim in the light of a more thorough legal assessment and/or the consultations.

purpose of Article 6.2. We also consider past practice under Article 6.2 and its predecessor.

(ii) Context

7.32 The terms of Article 6.2 of the DSU must be interpreted in light of their context in the WTO dispute settlement system. First and foremost, that system is designed to settle disputes.[17] Article 3.2 of the DSU specifies that "[t]he dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. ...". Article 3.3 continues in the same vein (emphasis added):

> "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".

In our view, the DSU must be interpreted so as to promote the prompt settlement of disputes, without adopting a reading of DSU provisions that would prolong disputes unnecessarily or make the DSU overly difficult for Members, including developing country Members, to use. A clear test of specificity, such as we apply in this case, is required.

7.33 The problems presented by other interpretations of Article 6.2 are readily apparent in this case. While no one would contest that there is a real dispute between the Complainants and the EC over the EC's import regime for bananas, if we were to rule that the panel request did not meet the requirements of Article 6.2 of the DSU and that the Complainants' panel request was accordingly invalid, the resolution of this dispute would be delayed by at least 6 or 7 months. Yet, what purpose would that serve? Once the Complainants filed their first submission, there could be no doubt exactly what their claims were. To the extent that a respondent could legitimately claim surprise in what was contained in a complainant's submission, the efficient solution would be to grant the respondent several more weeks to file its initial submission, not to start the entire consultation/panel request process over. This is particularly true given that a reading of Article 6.2 of the DSU such as the EC proposes could result in some parts of the case being accepted, while others were relegated to a different proceeding, something completely contrary to the DSU's philosophy of resolving all related issues together, as expressed in Article 9 of the DSU.[18] Moreover, such a reading

[17] Appellate Body Report on "United States - Measure Affecting Imports of Woven Wool Shirts and Blouses from India", issued on 25 April 1997, WT/DS33/AB/R, DSR 1997:I, 323 at 340.

[18] Article 9 of the DSU provides that "1. Where more than one Member requests the establishment of a panel related to the same matter, a single panel may be established to examine these complaints taking into account the rights of all Members concerned. A single panel should be established to

could make it more difficult for Members, and particularly developing-country Members, to use the dispute settlement system, except by incurring the expense of private legal experts at the earliest stage of the proceedings.

7.34 Thus, a consideration of the context of the terms of Article 6.2 supports the preliminary finding reached in paragraph 7.31 above.

(iii) Object and Purpose

7.35 We see three purposes for Article 6.2 of the DSU. First, the request for the establishment of a panel under Article 6.2 will usually serve to set the terms of reference of the panel under Article 7 of the DSU. Second, the request informs the responding Member of the scope of the case against it. Third, the request informs potential third parties of the scope of the case, so that they can better decide whether they wish to assert third-party rights.

7.36 In this case, we believe that the request for establishment of a panel adequately serves these three purposes. First, we have already found that Article 6.2 of the DSU requires a complainant to specify the provision of the WTO agreements that it is relying upon by agreement and article. Thus, a panel will always be able to understand which claims it is required to examine under its terms of reference. Given this interpretation of Article 6.2, we understand our terms of reference without difficulty in this case.

7.37 Second, it appears that the panel request adequately informed the EC of the case against it. We reach this conclusion in light of the facts that the EC did not complain about the request's specificity until it filed its first submission, it did not ask for time beyond the normal periods indicated in the DSU to file its submission and it did not claim in its written submissions that its defence was prejudiced in any particular way by a lack of specificity in the panel request. The EC stated at the Panel's hearings, however, that it had been prejudiced in that the lack of minimal clarity handicapped the EC in the preparation of its defence. However, as pointed out by the Complainants, the EC's oral presentation at the first meeting of the Panel, its responses to our questions and its rebuttal submission essentially followed the line of argument made in its initial submissions, suggesting that it had sufficient time to develop its line of defence. In these circumstances, we believe that the object and purpose of Article 6.2 of the DSU was served by the Complainants' panel request, suggesting that such request was adequately specific under Article 6.2.

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examine such complaints whenever feasible. ... 3. 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".

7.38 Third, it appears that the panel request adequately informed third parties of the case against the EC, as 20 third parties participated in this panel process.[19]

7.39 Thus, a consideration of the object and purpose of Article 6.2 supports the preliminary finding reached in paragraph 7.31 above.

(iv) Past Practice

7.40 Article XVI:1 of the WTO Agreement provides, as noted above, that the "WTO shall be guided by the decisions, procedures and customary practices" of GATT. In the case of adopted panel reports, the Appellate Body has indicated that

> "Adopted panel reports are an important part of the GATT *acquis*. They are often taken into account by subsequent panels. They create legitimate expectations among WTO Members, and, therefore should be taken into account where they are relevant to any dispute. However, they are not binding, except with respect to resolving the particular dispute between the parties to that dispute".[20]

There are two GATT/WTO cases that consider issues related to the one we face here. In 1992 a panel declined to consider claims based on GATT Articles X and XXIII(b)-(c) because they were not within its terms of reference, which it noted were defined by the request for the establishment of the panel.[21] More recently, a WTO panel reached a similar result in respect of a claim that consultations had not been properly held under Article XXIII, rejecting the claim because a fair reading of the documents that were used to establish its terms of reference showed that the issue had not been raised in those documents.[22] Although treated as a "terms of reference" issue in both cases, the results were in effect determined on the basis of the panel request. The terms of reference were found not to encompass the claim because the provision or issue had not been referred to in the panel request (and related documents in one case), which in both cases had served to establish the panels' terms of reference. Our reading of the terms of Article 6.2 of the DSU is not inconsistent with these past GATT/WTO panel decisions, nor with a recent Appellate Body decision affirming the above-

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[19] Belize, Cameroon, Canada, Colombia, Costa Rica, Côte d'Ivoire, Dominica, Dominican Republic, Ghana, Grenada, India, Jamaica, Japan, Nicaragua, Philippines, Saint Vincent and the Grenadines, Saint Lucia, Senegal, Suriname and Venezuela. Thailand indicated a third-party interest in the proceedings, but later withdrew.

[20] 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, DSR 1996:I, 97 at 108.

[21] Panel Report on "United States - Denial of Most-favoured-nation Treatment as to Non-rubber Footwear from Brazil", adopted on 19 June 1992, BISD 39S/128, 147-148, paras. 6.1-6.2.

[22] Panel Report on "Brazil - Measures Affecting Desiccated Coconut", issued on 17 October 1996, WT/DS22/R, paras. 286-290.

mentioned WTO panel decision.[23] In this connection, we note that the power of a panel to interpret its terms of reference is not negated by the requirement in Article 7.2 of the DSU that a panel address the "relevant" provisions of covered agreements cited by the parties.

7.41 With respect to practice of GATT contracting parties and Members in requesting panels, numerous examples may be found in the period from 1989[24] to date of panel requests containing only an allegation that a measure is inconsistent with the requirements of a specific provision of a specific agreement, without a more detailed description of the problem.[25] Indeed, as noted above, the EC concedes as much in its response to our questions where it examines panel requests in eight WTO cases and finds that in most cases there is no specific explanation given as to how the contested measure is inconsistent with the requirements of the specified provisions of the specified agreements. To date, no GATT or WTO panel has found such requests to be inadequate, except in respect of the anti-dumping and countervailing duty claims discussed in the following paragraph. Thus, our reading of the terms of Article 6.2 of the DSU is consistent with the practice followed by GATT contracting parties and WTO Members in requesting panels under Article 6.2 and the similar language of its predecessor provision, which was adopted by the GATT CONTRACTING PARTIES in 1989.

7.42 It can be argued, however, that our reading of the terms of Article 6.2 may not be consistent with several panel decisions (adopted and unadopted) under the Tokyo Round Agreement on Implementation of Article VI (the "Tokyo Round Anti-Dumping Code").[26] We find these cases to be of limited relevance in the

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[23] Appellate Body Report on "Brazil - Measures Affecting Desiccated Coconut", issued on 21 February 1997, WT/DS22/AB/R, DSR 1997:I, 167 at 186.

[24] In 1989, the GATT CONTRACTING PARTIES adopted Improvements to the GATT Dispute Settlement Rules and Procedures (BISD 36S/61), including the following language, which is quite similar to that contained in Article 6.2 of the DSU:

> "F.(a) The request for a panel or a working party shall be made in writing. It shall indicate whether consultations were held, and provide a brief summary of the factual and legal basis of the complaint sufficient to present the problem clearly".

There were no specific rules on the form of requests for the establishment of panels prior to 1989.

[25] See examples cited in note 15 supra. See also EC - Measures Affecting Livestock and Meat (Hormones), Request for the Establishment of a Panel, WT/DS48/5; Brazil - Measures Affecting Desiccated Coconut, Request for the Establishment of a Panel, WT/DS22/2; European Communities - Duties on Imports of Grains, Request for the Establishment of a Panel, WT/DS13/2; Japan - Taxes on Alcoholic Beverages, Request for the Establishment of a Panel by the United States, WT/DS11/2; European Communities - Duties on Imports of Cereals, Request for the Establishment of a Panel, WT/DS9/2; United States - Standards for Reformulated and Conventional Gasoline, Request for the Establishment of a Panel, WT/DS4/2; United States - Measures Affecting the Importation and Internal Sale and Use of Tobacco, Recourse to Article XXIII:2 by Argentina, DS44/8; EEC - Restrictions on Imports of Apples, Communication from Chile, DS39/2 & DS41/2.

[26] Panel Report on "United States - Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway", adopted 26 April 1994, ADP/87, paras. 333-335; Panel Report on "European Communities - Imposition of Anti-Dumping Duties on Imports of Cotton Yarn from Brazil", ADP/137, adopted on 4 July 1995, paras. 438-466; Panel Report on "United States - Anti-Dumping Duties on Imports of Gray Portland Cement and Cement Clinker from Mexico", issued on

interpretation of the terms of Article 6.2 of the DSU. In the first place, the Tokyo Round Anti-Dumping Code had different rules for the initiation of panel procedures than were applicable in the case of GATT 1947 panels. More fundamentally, Article 15 of the Tokyo Round Anti-Dumping Code required a so-called conciliation procedure, involving the disputing parties and the Committee charged with supervising the operations of the Code, between the end of the consultation period and the filing of a request to establish a panel. The practice under this conciliation procedure involved the preparation of a detailed statement of issues by the complaining party, which was circulated to the members of the Committee so that they might attempt to solve the dispute through conciliation. Article 15.5 of the Tokyo Round Anti-Dumping Code referred to the conciliation process as involving a "detailed examination by the Committee". In order to make the conciliation process meaningful, it may have been appropriate to insist that all claims brought before a panel have been considered in the conciliation process. Such a conciliation requirement does not exist under the DSU and did not exist under GATT 1947 rules. There has never been a practice of preparing such a statement of claims. Moreover, the nature of antidumping cases is different from this case.

7.43 In any event, we recognize that past practice under the Tokyo Round Anti-Dumping Code may have been inconsistent with the result we reach. We recall that Article 3.3 of the DSU states that the prompt settlement of disputes is essential to the effective functioning of the WTO and we believe that our interpretation of Article 6.2 of the DSU best achieves that objective.

(v) Cure

7.44 Finally, we note that at the second substantive Panel meeting, we expressed the preliminary view that even if there was some uncertainty whether the panel request had met the requirements of Article 6.2, the first written submissions of the Complainants "cured" that uncertainty because their submissions were sufficiently detailed to present all the factual and legal issues clearly. We considered that at the time that the EC filed its first written submission to the Panel, it had complete knowledge of the Complainants' case through their sub-

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7 September 1992 (not adopted), ADP/82, para. 5.12; Panel Report on "EC - Anti-Dumping Duties on Audiotapes in Cassettes Originating in Japan", issued on 28 April 1995 (not adopted), ADP/136, para. 295. In addition, there was one case involving this issue under the Tokyo Round Agreement on Interpretation and Application of Articles VI, XVI and XXIII. Panel Report on "United States - Countervailing Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway", adopted 27 April 1994, SCM/153, paras. 208-214 (following the approach of the Salmon antidumping case cited above). A claim of non-compliance with Article 6.2 was made in the Panel Report on "Measures Affecting Desiccated Coconut", dated 17 October 1996, WT/DS22/R, para. 290, but the panel did not reach the Article 6.2 issue, except as noted above, by finding that the failure to allege that a measure was inconsistent with the requirements of a specific provision of GATT meant that a claim based on that provision was not within the panel's terms of reference, a result which we follow.

missions. In light of our analysis of the panel request and Article 6.2 as outlined above, we confirm our preliminary view.[27]

7.45 We therefore find that the panel request made by the Complainants was sufficient to meet the requirements of Article 6.2 of the DSU to the extent that it alleged inconsistencies with the requirements of specific provisions of specific WTO agreements.

7.46 In light of the foregoing finding, since the invocation of the Agreement on Agriculture in the panel request did not indicate a specific provision thereof, we will not consider the claim raised by Ecuador in its first written submission under that Agreement. We will also not consider the claims raised by Ecuador, Guatemala and Honduras, and the United States in their first written submissions under Article 5 of the TRIMs Agreement since the panel request referred only to Article 2 of the TRIMs Agreement.[28]

3. Requirement of Legal Interest

7.47 The EC argues that the US claims concerning trade in goods should be rejected because US banana production is minimal, its banana exports are nil and that for climatic reasons this situation is not likely to change. As a result, the EC suggests that the United States has not suffered any nullification or impairment of WTO benefits in respect of trade in bananas as required by Article 3.3 and 3.7 of the DSU.[29] Moreover, the EC argues that the United States would have no effective WTO remedy under Article 22 of the DSU. With no effective remedy and absent any notion of a declaratory judgment or advisory opinion in the WTO dispute settlement system, the EC claims that the United States cannot raise "goods" issues because it has "no legal right or interest" therein. The EC argues that there must be a requirement in the WTO dispute settlement system that a complaining party have such a "legal interest" because the absence of such a requirement would undermine the DSU by leading to litigation "by all against all". The EC also suggests that the interests of Members in any given case can be adequately protected through assertion of a third party interest in the case.

7.48 In response, the Complainants argue that there is no basis in the DSU for the EC's claim and that their claims are covered by the Panel's terms of reference. They argue that Article 3.8 of the DSU presupposes a finding of infringement

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[27] We exclude from this confirmation any suggestion that the panel request was sufficient to allow claims based on the Agreement on Agriculture and Article 5 of the TRIMs Agreement since as to those provisions, the panel request did not comply at all with the requirements of Article 6.2 and, accordingly, there was no uncertainty that could be cured.

[28] The panel request listed Article XI of GATT, but no claims under Article XI were pursued by the Complainants.

[29] Article 3.3 of the DSU provides that the prompt settlement of disputes is essential "in situations where a Member considers that benefits accruing to it directly or indirectly under the covered agreements are being impaired". Article 3.7 of the DSU requires Members to exercise judgment as to whether invocation of the DSU would be "fruitful".

prior to a consideration of the nullification-or-impairment issue, suggesting that even if no compensation were due, an infringement finding could be made. Moreover, they argue that it is inappropriate to try to define potential trade. They also mention that in a past case the EC advanced a broad notion of nullification or impairment, which if generally accepted would permit the Complainants to claim nullification or impairment in this case.

7.49 In examining this issue, we note that neither Article 3.3 nor 3.7 of the DSU nor any other provision of the DSU contain any explicit requirement that a Member must have a "legal interest" as a prerequisite for requesting a panel. The reference in Article XXIII of GATT to nullification or impairment (or the impeding of the attainment of any GATT objective) does not establish a procedural requirement. Moreover, Article 3.8 of the DSU provides that nullification or impairment is normally presumed if there is an infringement of the obligations of a WTO agreement.[30]

7.50 We fail to see that there is, or should be, a legal interest test under the DSU. This view is corroborated by past GATT practice, which suggests that if a complainant claims that a measure is inconsistent with the requirements of GATT rules, there is not a requirement to show actual trade effects. GATT rules have been consistently interpreted to protect "competitive opportunities" as opposed to actual trade flows. For example, in the 1949 Working Party Report on Brazilian Internal Taxes, a number of the members of the working party took the view that

> "the absence of imports from contracting parties ... would not necessarily be an indication that they had no interest in the exports of the product affected by the tax, since their potentialities as exporters, given national treatment, should be taken into account".[31]

This view was confirmed in the 1958 *Italian Agricultural Machinery* case, where the panel noted that Article III of GATT applied to "any laws or regulations which might adversely modify the conditions of competition between the domestic and imported products".[32] The *Section 337* case notes that Article III is concerned with "effective equality of opportunities for imported products".[33] These cases confirm that WTO rules are not concerned with actual trade, but rather with competitive opportunities. Generally, it would be difficult to conclude that a Member had no possibility of competing in respect of a product or service. The United States does produce bananas in Puerto Rico and Hawaii. Moreover, even if the United States did not have even a potential export interest, its internal market for bananas could be affected by the EC regime and that regime's effect on

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[30] See Panel Report on "United States - Taxes on Petroleum and Certain Imported Substances", adopted on 17 June 1987, BISD 34S/136, 158, para. 5.1.9.

[31] GATT/CP.3/42, adopted 30 June 1949, II/181, 185, para. 16.

[32] Panel Report on "Italian Discrimination Against Imported Agricultural Machinery", adopted 23 October 1958, 7S/60, 64, para. 12.

[33] Panel Report on "United States - Section 337 of the Tariff Act of 1930", adopted on 7 November 1989, BISD 36S/345, 386-387, para. 5.11.

world supplies and prices. Indeed, with the increased interdependence of the global economy, which means that actions taken in one country are likely to have significant effects on trade and foreign direct investment flows in others, Members have a greater stake in enforcing WTO rules than in the past since any deviation from the negotiated balance of rights and obligations is more likely than ever to affect them, directly or indirectly. Since the United States is likely to be affected by the EC regime, it would have an interest in a determination of whether the EC regime is inconsistent with the requirements of WTO rules. Thus, in our view a Member's potential interest in trade in goods or services and its interest in a determination of rights and obligations under the WTO Agreement are each sufficient to establish a right to pursue a WTO dispute settlement proceeding. Moreover, we note that this result is consistent with decisions of international tribunals.[34]

7.51 As to the EC's suggestions that the absence of a legal interest test (defined to exclude the US "goods" claims in this case) would undermine the DSU because it would lead to litigation "by all against all" and that the interests of Members in any given case can be adequately protected through assertion of a third party rights in the case, we note that all Members have an interest in ensuring that other Members comply with their obligations. That interest is not completely served by the possible assertion of third party rights since there may be no occasion to assert such rights unless another Member initiates a DSU proceeding and since third party rights are more limited than the rights of parties. The likelihood of litigation by all against all seems unlikely, as Members are admonished by Article 3.7 of the DSU to exercise restraint in bringing cases and the cost of bringing cases is such, especially in a case like this one, that this admonition is likely to be followed. In our view, it is also unlikely that significant numbers of cases will be initiated by Members that have no immediate trade interest in their results.

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[34] The International Court of Justice has not defined the concept of legal interest in specific terms. However, a number of its cases would support finding a legal interest in this case. For example, in the *Wimbledon* case, the Permanent Court of International Justice found that a state could raise a claim with respect to the Kiel Canal even though its fleet did not want to use it, suggesting that a potential interest was sufficient for a legal interest. PCIJ (1923), Ser. A, no. 1, 20. In *Northern Cameroons (Preliminary Objections)*, the ICJ stated:

> "The function of the Court is to state the law, but it may pronounce judgment only in connection with concrete cases where there exists at the time of adjudication an actual controversy involving a conflict of legal interest between the parties. The Court's judgment must have some practical consequence in the sense that it can affect existing legal rights or obligations of the parties, thus removing uncertainty from their legal relations" (ICJ Reports (1963), 33-34).

Here, our decision will have such an effect to the extent that the EC is obligated to revise the challenged measures. See also Part II of the Draft Articles on State Responsibility, art. 40.2(e)-(f), provisionally adopted by the Drafting Committee of the International Law Commission. A/CN.4/L.524, 21 June 1996.

7.52 Thus, we find that under the DSU the United States has a right to advance the claims that it has raised in this case.

4. Number of Panel Reports

7.53 The EC requested the Panel, pursuant to Article 9 of the DSU, to prepare four panel reports in this case-one each for the claims of Ecuador, Guatemala and Honduras (who filed a joint first submission), Mexico and the United States. The Complainants suggested that, even if the EC had a right to insist on separate reports under Article 9, it should not do so because of the increased administrative burden that would be placed upon the Panel. Moreover, they requested that the Panel should make the same findings and conclusions with respect to the same claims.

7.54 Article 9 of the DSU provides in relevant part as follows:

> "1. Where more than one Member requests the establishment of a panel related to the same matter, a single panel may be established to examine these complaints taking into account the rights of all Members concerned. ...
>
> 2. The single panel shall organize its examination and present its findings to the DSB in such a manner that the rights the parties to the dispute would have enjoyed had separate panels examined the complaints are in no way impaired. If one of the parties to the dispute so requests, the panel shall submit separate reports on the dispute concerned. ...".

7.55 We interpret the terms of Article 9 to require us to grant the EC request. However, in light of the fact that the Complainants presented joint oral submissions to the Panel, joint responses to questions and a joint rebuttal submission, as well as the fact that they have collectively endorsed the arguments made in each other's first submissions, we must also take account of the close interrelationship of the Complainants' arguments.

7.56 In our view, one of the objectives of Article 9 is to ensure that a respondent is not later faced with a demand for compensation or threatened by retaliation under Article 22 of the DSU in respect of uncured inconsistencies with WTO rules that were not complained of by one of the complaining parties participating in a panel proceeding. Our reports must bear this objective in mind.

7.57 For purposes of determining whether a Complainant in this matter has made a claim, we have examined its first written submission, as we consider that document determines the claims made by a complaining party. To allow the assertion of additional claims after that point would be unfair to the respondent, as it would have little or no time to prepare a response to such claims. In this regard, we note that paragraph 12(c) of the Appendix 3 to the DSU on "Working Procedures" foresees the simultaneous submission of the written rebuttals by complaining and respondent parties, a procedure that was followed in this case. To allow claims to be presented in the rebuttal submissions would mean that the re-

spondent would have an opportunity to rebut the claims only in its oral presentation during the second meeting. In our view, the failure to make a claim in the first written submission cannot be remedied by later submissions or by incorporating the claims and arguments of other complainants.

7.58 Accordingly, we have decided that the description of the Panel's proceedings, the factual aspects and the parties' arguments should be identical in the four reports. In the "Findings" section, however, the reports differ to the extent that the Complainants' initial written submissions to the Panel differ in respect of alleging inconsistencies with the requirements of specific provisions of specific agreements. Thus, to take an example, the report for Guatemala and Honduras does not discuss GATS issues because their initial written submission did not allege inconsistencies with the requirements of GATS provisions.

7.59 In light of the foregoing, in the "Findings" we use the term "the Complainants" to refer to all of the Complaining parties who have made a particular claim. In discussing the claim, when we refer to the Complainants' arguments, we mean all arguments made in support of the claim by the various Complaining parties, who have incorporated each other's arguments into their own. Thus, the term "the Complainants" in this report means the United States and one or more of the other Complaining parties.

7.60 As explained above, when one of the Complaining parties has not claimed that a specific provision of a specific agreement has been violated in its initial written submission to the Panel, we do not discuss our findings with respect to that claim in the report for that party. However, for the convenience of readers of the four reports, we have used the same paragraph numbers and footnote numbers for the substantive discussions of the same issues in the four reports. Where an issue has not been raised by the United States, we indicate in this report which reports and which paragraph numbers in those reports discuss that issue.

C. Substantive Issues

7.61 We now turn to an examination of the substantive issues raised by the Complainants in respect of the EC's regime for the importation, sale and distribution of bananas. We first address claims related to the EC's quantitative allocations for bananas, including the shares assigned to the ACP countries and to signatories of the Framework Agreement on Bananas ("BFA"). Second, we consider tariff issues, including preferences afforded to imports of certain ACP bananas. We then consider the claims made in respect of the EC licensing procedures for bananas. Finally, we examine the claims raised in respect of the General Agreement on Trade in Services.

7.62 Before doing so, we consider 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. 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.[35] 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.

7.63 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.

1. The EC Market for Bananas: Article XIII of GATT

7.64 As of 1995, bananas could be marketed in the EC as follows:

a. First, up to 857,700 tonnes of bananas were permitted to enter duty-free from traditional ACP suppliers.

b. Second, pursuant to its GATT Article II Schedule, the EC permitted the entry of a total of up to 2.2 million tonnes of bananas at a tariff of 75 ECU per tonne. This quota was allocated as follows: (i) 49.4 per cent to the countries who are parties to the BFA; (ii) 90,000 tonnes to ACP countries in respect of amounts that they did not traditionally supply to EC member States (admitted duty-free); and (iii) the rest (46.5 per cent) to other banana exporters. In 1995 and 1996, the EC increased the 2.2 million tonne tariff quota by 353,000 tonnes to take account of the enlargement of the EC to include Austria, Finland and Sweden, although no change has been made in the EC's Schedule. Additional quantities were permitted at the in-quota tariff via hurricane licences.

c. Third, imports of bananas in excess of the above-mentioned amounts were subject in 1995 to a tariff of 822 ECU per tonne (722 ECU for ACP bananas). The 822 ECU per tonne tariff will fall in equal instalments to 680 ECU per tonne on full implementation of the EC's Uruguay Round commitments.

d. Finally, bananas from EC territories could be sold on the EC market without restriction. In 1995, 658,200 tonnes of such bananas were marketed in the EC.

7.65 The Complainants claim that the EC has failed to allocate country-specific tariff quota shares to those Complainants that export bananas to the EC and that the EC's allocation of tariff quota shares to the ACP and BFA countries is inconsistent with the requirements of the tariff quota allocation rules of Article XIII of GATT. The EC responds that it has complied with the terms of Article XIII. In

[35] 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, 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, DSR 1996:I, 97 at 113-115.

particular, the EC argues that the preferences it provides to traditional ACP bananas are permitted under the Lomé waiver and its treatment of BFA and other bananas is provided pursuant to the EC's Schedule into which the BFA is incorporated.

7.66 We first consider how Article XIII of GATT should be interpreted and whether the EC's banana tariff quota shares conform to its requirements. We then consider whether any inconsistencies with Article XIII are waived by the Lomé waiver or permitted as a result of the negotiation of the BFA and its inclusion in the EC's Schedule.

(a) Article XIII

7.67 Article XIII of GATT generally regulates the administration of quotas and tariff quotas. In relevant parts, it provides as follows:

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

> any Member from utilizing fully the share of any such total quantity or value which has been allotted to it, subject to importation being made within any prescribed period to which the quota may relate.*[36]
>
> ...
>
> 4. With regard to restrictions applied in accordance with paragraph 2 (*d*) of this Article or under paragraph 2 (*c*) of Article XI, the selection of a representative period for any product and the appraisal of any special factors*[37] affecting the trade in the product shall be made initially by the Member applying the restriction; *Provided* that such Member shall, upon the request of any other Member having a substantial interest in supplying that product or upon the request of the [CONTRACTING PARTIES], consult promptly with the other Member or the [CONTRACTING PARTIES] regarding the need for an adjustment of the proportion determined or of the base period selected, or for the reappraisal of the special factors involved, or for the elimination of conditions, formalities or any other provisions established unilaterally relating to the allocation of an adequate quota or its unrestricted utilization.
>
> 5. The provisions of this Article shall apply to any tariff quota instituted or maintained by any Member, and, in so far as applicable, the principles of this Article shall also extend to export restrictions.

7.68 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. In the terms of the general rule[38] of the chapeau of Article XIII:2:

> "In applying import restrictions to any product, Members shall aim at a distribution of trade in such product approaching as closely as

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[36] Note Ad Article XIII, Paragraph 2(d), reads: "No mention was made of 'commercial considerations' as a rule for the allocation of quotas because it was considered that its application by governmental authorities might not always be practicable. Moreover, in cases where it is practicable, a Member could apply these considerations in the process of seeking agreement, consistently with the general rule laid down in the opening sentence of paragraph 2".

[37] Note Ad Article XIII, Paragraph 4, provides: "See note relating to 'special factors' in connection with the last subparagraph of paragraph 2 of Article XI". That note reads as follows: "The term 'special factors' includes changes in relative productive efficiency between domestic and foreign producers, or as between different foreign producers, but not changes artificially brought about by means not permitted under the Agreement".

[38] At the 1955 Review Session, a working party considering amendments to Article XIII stated: "The Working Party ... agreed to recognize that the general rule contained in the introduction to paragraph 2 governed the various sub-paragraphs of that paragraph including those of sub-paragraph (d)". Working Party Report on "Quantitative Restrictions", adopted on 2, 4 and 5 March 1955, BISD 3S/170, 176, para. 24.

possible the shares which the various Members might be expected to obtain in the absence of such restrictions ... ".

In this case, we are concerned with tariff quotas, which are permitted under GATT rules, and not quantitative restrictions *per se*. However, Article XIII:5 makes it clear, and the parties agree, that Article XIII applies to the administration of tariff quotas. In light of the terms of Article XIII, it can be said that the object and purpose of Article XIII: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. 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.

7.69 While previous panels have dealt with specific aspects of Article XIII, this is the first case in which a broad challenge to a quota or tariff quota system has been made. Therefore, we must in the first instance consider in general terms how the various subdivisions of Article XIII work together. 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. 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. The only directly relevant panel report dealt with this issue briefly, but confirms this interpretation of Article XIII:1. The report found an inconsistency with the requirements of Article XIII:1 where a GATT contracting party negotiated export restrictions on imports of products from some countries but imposed unilateral import restrictions on the like products from another country. The report also noted differences in administration (import restrictions versus export restraint) and in transparency between the two measures.[39]

7.70 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)).

[39] 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. See also Panel Report on "EEC - Quantitative Restrictions Against Imports of Certain Products from Hong Kong", adopted 12 July 1983, BISD 30S/129, 139-140, para. 33.

7.71 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.

7.72 The terms of Article XIII:2(d) make clear that the combined use of agreements and unilateral allocations to Members with substantial interests is not permitted. The text of Article XIII:2(d) provides that where the first "method", i.e., agreement, is not reasonably practicable, then an allocation must be made. Thus, in the absence of agreements with all Members having a substantial interest in supplying the product, the Member applying the restriction must allocate shares in accordance with the rules of Article XIII:2(d), second sentence. In the absence of this rule, the Member allocating shares could reach agreements with some Members having a substantial interest in supplying the product that discriminated against other Members having a substantial interest supplying the product, even if those other Members objected to the shares they were to be allocated.

7.73 The question then is whether 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. 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 restricted as required by Article XIII:1.[40] 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.

7.74 The allocation of country-specific tariff quota shares to all supplying countries on the basis of the first method (agreement) may in practice be difficult since there will likely be demand for more than 100 per cent of the tariff quota and, furthermore, there would be no possibility to make provision for new suppliers. This would leave the second method as the only practical alternative-a

[40] 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.

result that, however, runs counter to the provision of Article XIII:2(d) to first seek agreement with all Members having a substantial interest in supplying the product concerned.

7.75 The consequence of the foregoing analysis is that Members may be effectively required to use a general "others" category for all suppliers other than Members with a substantial interest in supplying the product. The fact that in this situation tariff quota shares are allocated to some Members, notably those having a substantial interest in supplying the product, but not to others that do not have a substantial interest in supplying the product, would not necessarily be in conflict with Article XIII:1. While the requirement of Article XIII:2(d) is not expressed as an exception to the requirements of Article XIII:1, it may be regarded, to the extent that its practical application is inconsistent with it, as *lex specialis* in respect of Members with a substantial interest in supplying the product concerned.

7.76 In so far as this in practice results in the use of an "others" category for all Members not having a substantial interest in supplying the product, it comports well with the object and purpose of Article XIII, as expressed in the general rule to the chapeau to Article XIII:2. When a significant share of a tariff quota is assigned to "others", the import market will evolve with the minimum amount of distortion. Members not having a substantial supplying interest will be able, if sufficiently competitive, to gain market share in the "others" category and possibly achieve "substantial supplying interest" status which, in turn, would provide them the opportunity to receive a country-specific allocation by invoking the provisions of Article XIII:4. New entrants will be able to compete in the market, and likewise have an opportunity to gain "substantial supplying interest" status. For the share of the market allocated to Members with a substantial interest in supplying the product, the situation may also evolve in light of adjustments following consultations under Article XIII:4. In comparison to a situation where country-specific shares are allocated to all supplying countries, including Members with minor market shares, this result is less likely to lead to a long-term freezing of market shares. This is, in our view, consistent with the terms, object and purpose, and context of Article XIII.

7.77 In this case, we are confronted with the following situation: with respect to its common market organization for bananas, the EC reached an agreement on shares in its bound tariff quota for bananas with the BFA countries, allocated shares of that tariff quota in respect of non-traditional ACP bananas and created an "others" category in that tariff quota for other Members (and non-Members). In addition, it also allocated tariff quota quantities to traditional ACP suppliers of bananas. To evaluate this situation in light of the foregoing discussion of Article XIII, it is necessary to consider (i) whether the EC market organization for imported bananas should be analyzed as one or two regimes for purposes of Article XIII, (ii) which Members could be considered to have had a substantial interest in supplying bananas to the EC at the time the EC regulation was put in place and how they were treated by the EC, (iii) how Members without such a substantial interest were treated and (iv) the position of new Members.

(i) Separate Regimes

7.78 The EC has one common market organisation for bananas established by Regulation 404/93. It has argued, however, that it has two separate regimes for imported bananas - one for bananas traditionally supplied by certain ACP countries, and one for bananas from non-traditional ACP, BFA and other third-country sources. In its view, the Panel should separately examine the consistency of each of these regimes with the requirements of Article XIII. The EC claims that the regime for traditional supplies of ACP bananas has a different legal basis than the bound tariff quota for bananas because it is a preferential regime in that different tariff rates apply to ACP bananas as compared to other bananas. The Complainants argue that nothing in the language of Article XIII supports such a distinction, that recognizing it would undermine the purpose of that Article and that Article implies that there cannot be separate regimes because if there were, imports under the separate regimes would not be similarly restricted as required by Article XIII:1.

7.79 We note that Article XIII:1 provides that no restriction shall be applied by any Member on the importation of any product of another Member "unless the importation of the like product of all third countries ... is similarly ... restricted". Article XIII:2 requires Members when allocating tariff quota shares to "aim at a distribution of trade ... approaching as closely as possible the shares which the various Members might be expected to obtain in the absence of such restrictions". By their terms, these two provisions of Article XIII do not provide a basis for analysing quota allocation regimes separately because they have different legal bases or because different tariff rates are applicable. Article XIII applies to allocations of shares in an import market for a particular product which is restricted by a quota or tariff quota. In our view, its non-discrimination requirements apply to that market for that product, irrespective of whether or how a Member subdivides it for administrative or other reasons. Indeed, 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.

7.80 Similarly, in our view, the existence of different tariff rates does not imply that the EC import measures applied to bananas must or should be treated as two separate regimes. The object and purpose of Article XIII:2 is to attempt to approximate under a tariff quota regime the trade shares that would have occurred in the absence of the tariff quota. To the extent that a preferential tariff benefits imports from certain countries, their trade shares should already reflect that preference. Thus, the fact that different tariff rates may apply to imports from different Members does not justify separate analysis of the allocation of tariff quota shares on the basis of the tariff applicable to the Member in question, without reference to the allocations to Members subject to a different tariff rate. While it is true that non-beneficiaries of the tariff preference by definition cannot benefit from that preference, they may be affected by the way in which tariff quota shares benefitting from the tariff preference are allocated. For example, an allocation of shares could be made in a way that would allow beneficiaries of the tariff prefer-

ence to compete more effectively than would the tariff preference alone. Not to apply Article XIII in such a situation would mean that preferential treatment in addition to the tariff preference was being afforded to those Members.

7.81 Past GATT and WTO practice suggests that Members have typically distinguished between tariff preferences and non-tariff preferences. For example, in the so-called Enabling Clause, preferential tariff treatment on a unilateral basis is authorized for developing countries in general terms in accordance with the Generalized System of Preferences, while non-tariff preferences are permitted only to the extent governed by instruments multilaterally negotiated under GATT/WTO auspices.[41] As noted below (paragraph 7.106), most current waivers allowing preferential treatment have been limited to preferential tariff treatment. The "separate regimes" argument of the EC blurs these distinctions and would result in a tariff preference providing preferential treatment in addition to a tariff advantage.

7.82 We find that the EC has only one regime for banana imports for purposes of analysing whether its allocation of tariff quota shares is consistent with the requirements of Article XIII.

(ii) Members with a Substantial Interest

7.83 The following statistics supplied by the EC indicate the shares of suppliers to the EC banana market during the 1989-1991 period. We use 1989-1991 statistics because the EC claims that at the time it negotiated the BFA, 1992 statistics were not available. Although the Complainants contest this assertion, they have not convinced us that such statistics were in fact available.

[41] Decision of the CONTRACTING PARTIES of 28 November 1979 on "Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries", BISD 26S/203.

GATT Contracting Party 1993	1989-1991 Average Volume (tonnes)	1989-1991 Average of Shares %
Costa Rica	508,957	19.7
Colombia	409,153	15.7
St. Lucia	114,445	4.5
Côte d'Ivoire	98,908	3.8
Cameroon	82,938	3.1
St.Vincent & the Grenadines	70,464	2.7
Jamaica	57,505	2.2
Dominica	52,628	2.0
Nicaragua	44,840	1.7
Suriname	28,465	1.1
Guatemala	28,128	1.2
Belize	23,412	0.9
Grenada	8,215	0.3
Dominican Republic	4,789	0.2
Venezuela	90	0.0
Madagascar	23	0.0
Other ACP countries	1,215	0.1
Total	1,534,062	59.2

Non - GATT Contracting Party 1993	1989-1991 Average Volume (tonnes)	1989-1991 Average of Shares %
Panama	465,701	18
Ecuador	401,419	15.2
Honduras	136,858	5.4
Somalia	41,751	1.7
Cape Verde	2,820	0.1
Total	1,048,549	40.4

The EC argues that only Colombia and Costa Rica had a "substantial interest in supplying the product" in the sense of Article XIII:2(d), in that they were the only GATT contracting parties at the time with market shares of more than 10 per cent and that, analogously to practice under Article XXVIII of GATT, a market share of 10 per cent could be considered as the threshold for a country to establish a

substantial interest.[42] The other major suppliers to the EC market-Ecuador and Panama-were not GATT contracting parties at the time. The remaining suppliers had relatively minor shares. The Complainants argue that the EC cannot claim compliance with Article XIII:2(d), first sentence, because there were GATT contracting parties with which the EC did not reach agreement and that they in some cases had more significant market shares of EC banana imports than some of the countries with which the EC did reach agreement in the BFA.

7.84 We do not find it necessary to set a precise import share for determination of whether a Member has a substantial interest in supplying a product. A determination of substantial interest might well vary somewhat based on the structure of the market.[43]

7.85 Given the particular circumstances of this case, we find that it was not unreasonable for the EC to conclude that at the time the BFA was negotiated Colombia and Costa Rica were the only contracting parties that had a substantial interest in supplying the EC banana market in terms of Article XIII:2(d). We also find that it is not reasonable to conclude that at the time the BFA was negotiated Nicaragua and Venezuela had a substantial interest in supplying the EC banana market in the terms of Article XIII:2(d).

7.86 Before turning to the consequences of the above finding, we must consider whether it would be possible for other Members to challenge an agreement reached under Article XIII:2(d), first sentence. The EC argues that since it negotiated an agreement with Colombia and Costa Rica in compliance with Article XIII:2(d), first sentence, the provisions of that agreement may not be challenged as not complying with other provisions of Article XIII. However, even though the EC did negotiate an agreement as foreseen in Article XIII:2(d), first sentence, it is necessary to keep in mind that the goal of any such agreement is provided in the general rule in the chapeau to Article XIII:2. We would not rule out the possibility that an agreement that does not generally achieve this goal may be open to challenge by Members who are not parties to the agreement, even if there is no requirement to include such Members in the negotiations because they do not have a substantial interest in supplying the product concerned. For example, in our view, it would be possible for other Members to challenge an agreement between the EC, Colombia and Costa Rica if it divided the bound tariff quota be-

[42] Paragraph 7 to the Note Ad Article XXVIII:1 states that "[t]he expression 'substantial interest' is not capable of a precise definition ... It is, however, intended to be construed to cover only those Members which have ... a significant share in the market ...". It was indicated in 1985, however, that a 10 per cent rule has been applied generally. Analytical Index: Guide to GATT Law and Practice, 6th rev. ed. 1995, p. 941, citing TAR/M/16, p. 10.

[43] We note that in the case of Article XXVIII, the Uruguay Round Understanding on the Interpretation of Article XXVIII of the General Agreement on Tariffs and Trade 1994 provides that the Member which has the highest ratio of exports affected by the concession to its total exports shall be deemed to have principal supplying interest in the product at issue for purposes of negotiations under Article XXVIII. There is so far no similar understanding applicable to Article XIII.

tween only Colombia and Costa Rica. Support for allowing for the possibility of such a challenge is found in past GATT practice.[44]

7.87 In this case, however, we find it unnecessary to specify in detail under what circumstances an agreement reached pursuant to Article XIII:2(d) may be challenged. If our findings on the use of separate regimes (paragraph 7.82), on the shares assigned to Members without a substantial interest (paragraph 7.90) and the rights of new Members under Article XIII (paragraph 7.92), as well as those relating to the EC's licensing procedures, are adopted by the DSB, it will be necessary for the EC to reconsider its treatment of banana imports, including the allocation of tariff quota shares.

7.88 Accordingly, we make no finding on whether the allocation of shares to Colombia and Costa Rica is consistent with the requirements of the general rule in the chapeau to Article XIII:2(d).

(iii) Members without a Substantial Interest

7.89 As noted above (paragraph 7.73), Article XIII:1 would permit the EC to allocate a tariff quota share to all supplying Members without a substantial interest in the form of an "others" category, without specific shares. In this case, the EC allocated tariff quota shares by agreement and assignment to some Members (e.g., ACP countries (in respect of traditional and non-traditional exports), Nicaragua and Venezuela) without allocating such shares to other Members (e.g., Guatemala). Moreover, under the BFA, the BFA countries were given special rights in respect of reallocation of tariff quota shares[45] that were not given to

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[44] For example, in a case involving Norwegian quotas on textiles products, the panel found that Norway had reached agreement on the limitation of textiles imports from six countries, but not Hong Kong. The panel found that the quantitative restrictions limiting Hong Kong exports were subject to Article XIII:2 and ruled that

> "Norway's reservation of market shares for these six countries therefore represented a partial allocation of quotas under an existing regime of import restrictions of the product in question and that Norway must therefore be considered to have acted under Article XIII:2(d). ... The Panel was of the view that to the extent that Norway had acted with effect to allocate import quotas for these products to six countries but had failed to allocate a share to Hong Kong, its ... action was inconsistent with Article XIII".

This report's conclusion was based in part on the fact that Hong Kong had a substantial interest in supplying most of the products at issue. Nonetheless, the report supports the argument that Article XIII:2(d) agreements may be challenged by Members not having a substantial interest, as the panel report drew no distinction between products where Hong Kong had a substantial interest and those where it did not. Panel Report on "Norway - Restrictions on Imports of Certain Textiles Products", adopted on 18 June 1980, BISD 27S/119, 125-126, paras. 15-16.

[45] Under the BFA, there is a general provision that provides that if a country with a country-specific share of the tariff quota indicates to the EC that it will be unable to deliver the allocated quantity, the amount of the short-fall is to be allocated in accordance with the BFA allocations (including to the "others" category). The BFA also provides that countries with country-specific shares of the tariff quota may jointly request the EC to allocate the short-fall differently, in which case the EC is required to do so. As a result, according to the Complainants, in 1995 and 1996, all of the

other Members (e.g., Guatemala). For the reasons noted above (paragraphs 7.69 and 7.73), such differential treatment of like products from Members is inconsistent with the requirements of Article XIII:1.

7.90 Accordingly, we find that (i) the EC's allocation of tariff quota shares by agreement and by assignment to some Members not having a substantial interest in supplying bananas to the EC (including Nicaragua and Venezuela and certain ACP countries in respect of traditional and non-traditional exports) but not to other Members (such as Guatemala) and (ii) the tariff quota reallocation rules of the BFA, are inconsistent with the requirements of Article XIII:1.

(iv) New Members

7.91 We now consider the position of a Member who acceded to the WTO or GATT after the implementation of the EC common market organization for bananas (a "new" Member). As noted above, the general rule in the chapeau to Article XIII:2 indicates that the aim of Article XIII:2 is to give to Members the share of trade that they might be expected to obtain in the absence of a tariff quota. There is no requirement that a Member allocating shares of a tariff quota negotiate with non-Members, but when such countries accede to the WTO, they acquire rights, just as any other Member has under Article XIII whether or not they have a substantial interest in supplying the product in question.

7.92 Thus, although the EC reached an agreement with all Members who had a substantial interest in supplying the product at one point in time, under the consultation provisions of Article XIII:4, the EC would have to consider the interests of a new Member who had a substantial interest in supplying the product if that new Member requested it to do so.[46] The provisions on consultations and adjustments in Article XIII:4 mean in any event that the BFA could not be invoked to justify a permanent allocation of tariff quota shares. Moreover, while new Members cannot challenge the EC's agreements with Colombia and Costa Rica in the BFA on the grounds that the EC failed to negotiate and reach agreement with them, they otherwise have the same rights as those Complainants who were GATT contracting parties at the time the BFA was negotiated to challenge its consistency with Article XIII. Generally speaking, all Members benefit from all WTO rights.

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tariff quota share allocated to Nicaragua, and 70 and 30 per cent, respectively, of the share allocated to Venezuela, have been reallocated to Colombia.

[46] While the provisions of Article XIII:4 on consultations and adjustments seem to be primarily aimed at adjustments to quota shares allocated pursuant to Article XIII:2(d), second sentence, they also apply in the case where agreements were reached pursuant to Article XIII:2(d), first sentence, with Members having a substantial interest in supplying the product concerned. In addition, in so far as a new Member has a substantial interest in supplying that product, its share of the "others" category can be viewed, for purposes of Article XIII:4, as a provision established unilaterally relating to the allocation of an adequate quota.

7.93 In this connection, we find that the failure of Ecuador's Protocol of Accession to address banana-related issues does not mean that Ecuador must accept the validity of the BFA as contained in the EC's Schedule or that it is precluded from invoking Article XIII:2 or XIII:4.

(v) Other Arguments

7.94 In light of our findings in respect of Article XIII:1, we find it unnecessary to address the claims and arguments in respect of the interpretation of Article XIII:2(d), second sentence (e.g., the use of a "previous representative period" and "special factors") or in respect of the EC's enlargement to include Austria, Finland and Sweden.[47] We would note, however, that in order to bring its banana import regulations into line with Article XIII, the EC would have to take account of Article XIII:1 and XIII:2(d). In order to allocate country-specific tariff quota shares consistently with the requirements of Article XIII, the EC would have to base such shares on an appropriate previous representative period[48] and any special factors would have to be applied on a non-discriminatory basis (see paragraph 7.69).

(b) The Allocation of Tariff Quota Shares to ACP Countries: the Lomé Waiver

7.95 In light of the finding that the EC's allocation of country-specific tariff quota shares for bananas to the ACP countries for both traditional and non-traditional bananas is not consistent with the requirements of Article XIII (paragraph 7.90), we now consider whether that inconsistency is covered by the Lomé waiver. In this connection, we recall the findings of the second *Banana* panel

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[47] The Appellate Body has stated that "[a] panel need only address those claims which must be addressed in order to resolve the matter in issue in the dispute". Appellate Body Report on "United States - Measure Affecting Imports of Woven Wool Shirts and Blouses from India", issued on 25 April 1997, WT/DS33/AB/R, DSR 1997:I, 323 at 340.

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

> "[I]n keeping with normal GATT practice, the Panel considered it appropriate to use as a 'representative period' a three-year period previous to 1979, the year in which the EC measures were in effect. Due to the existence of restrictions in 1976, the Panel held that that year could not be considered as representative, and that the year immediately preceding 1976 should be used instead. The Panel thus chose the years 1975, 1977, 1978 as a 'representative period'".

Panel Report on "EEC Restrictions on Imports of Dessert Apples - Complaint by Chile", adopted on 10 November 1980, BISD 27S/98, 113, para. 4.8. In the report of the "Panel on Poultry", issued on 21 November 1963, GATT Doc. L/2088, para. 10, the panel stated: "[T]he shares in the reference period of the various exporting countries in the Swiss market, which was free and competitive, afforded a fair guide as to the proportion of the increased German poultry consumption likely to be taken up by United States exports". See also Panel Report on "Japan - Restrictions on Imports of Certain Agricultural Products", adopted on 22 March 1988, BISD 35S/163, 226-227, para. 5.1.3.7.

report.[49] It found that (i) the specific duties levied by the EC on imports of bananas were inconsistent with Article II, (ii) the preferential tariff rates for banana imports from ACP countries were inconsistent with the requirements of Article I and (iii) certain procedures regarding the allocation of licences were inconsistent with the requirements of Articles I and III. It also found that the then effective EC rules did not discriminate between sources of supply in the sense of Article XIII because the licences issued to import bananas could be used to import bananas from any source. After the issuance of the panel report, which was not adopted by the GATT CONTRACTING PARTIES, the EC and the ACP countries that were GATT contracting parties requested a waiver (although they were and still are of the opinion that such a waiver is not needed) of the EC's Article I:1 obligations in order to permit the EC to provide preferential treatment to the ACP countries as required by the Lomé Convention.[50]

7.96 Subsequently, the Lomé waiver was adopted by the GATT CONTRACTING PARTIES in December 1994 and was extended by the WTO General Council in October 1996.[51] Under the operative paragraph of the Lomé waiver,

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

In order to determine whether the EC may allocate tariff quota shares to the ACP countries inconsistently with the requirements of Article XIII, we must determine whether those allocations are covered by the Lomé waiver. This determination involves resolving two interpretative issues. First, what preferential treatment in respect of bananas is "required" by the Lomé Convention? Second, does the

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[49] Panel Report on "EEC - Import Regime for Bananas", issued 11 February 1994 (not adopted), DS38/R, p.52, paras. 169-170.

[50] The EC's Uruguay Round Schedule substituted a specific tariff in place of its prior *ad valorem* tariff binding for bananas. The consistency of that substitution with GATT rules is examined in para. 7.137 *et seq*. of the Guatemala-Honduras report. In respect of the panel's finding that the EC regime was inconsistent with the requirements of Article III, the EC did not change the regime and we examine that issue in para. 7.171.

[51] EC - The Fourth ACP-EEC Convention of Lomé, Waiver Decision of 9 December 1994, L/7604, 19 December 1994; Extension of the Waiver, Decision of 14 October 1996, WT/L/186. Although the Lomé waiver was initially approved by the GATT CONTRACTING PARTIES until 29 February 2000, it was necessary for the WTO General Council to consider whether to extend it because under the Uruguay Round Understanding in Respect of Waivers of Obligations under the General Agreement on Tariffs and Trade 1994, all waivers in effect on the entry into force of the WTO Agreement expired two years thereafter (i.e., on 1 January 1997) unless extended.

Lomé waiver, which refers only to Article I:1 of GATT, encompass a waiver of Article XIII obligations as well?

(i) Preferential Treatment Required by the Lomé Convention

7.97 As a preliminary matter, the EC and the ACP countries argue that the Panel is not authorized to interpret the Lomé Convention. We accept that we are not directed in our terms of reference to interpret the Lomé Convention. We recall that we have found that the EC's allocation of tariff quota shares to ACP countries is inconsistent with the requirements of Article XIII (paragraph 7.90). However, in order to determine whether or not the EC's Article XIII obligations are waived, we must determine whether or not the Lomé waiver applies. That requires an interpretation of the Lomé waiver, which is a decision of the GATT CONTRACTING PARTIES, later extended by a WTO General Council decision. Since the waiver applies to action "necessary ... to provide preferential treatment ... *as required by the relevant provisions of the Fourth Lomé Convention*" (emphasis added), we must also determine what preferential treatment is required by the Lomé Convention.

7.98 The EC argues that the Panel must accept the EC and the ACP countries' interpretation of the Lomé Convention as valid since they are the parties to the Lomé Convention. We note that since the GATT CONTRACTING PARTIES incorporated a reference to the Lomé Convention into the Lomé waiver, the meaning of the Lomé Convention became a GATT/WTO issue, at least to that extent. Thus, we have no alternative but to examine the provisions of the Lomé Convention ourselves in so far as it is necessary to interpret the Lomé waiver. Moreover, we note that in their submissions to us, it appears that the EC and the ACP countries are not in accord on some aspects of what is required by the Lomé Convention.

7.99 We note that the Lomé Convention permits the EC to limit duty-free ACP country exports to the EC of products subject to common market organizations in the EC, i.e., many agricultural products. In respect of those products, Article 168(2)(a)(ii) of the Lomé Convention requires the EC to:

> "take necessary measures to ensure more favourable treatment than that granted to third countries benefitting from the most-favoured-nation clause for the same products".

Moreover, in the case of bananas, Protocol 5 to the Lomé Convention places some restraints on the EC's right to limit imports of ACP bananas. It specifies in Article 1:

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

Since the Lomé Convention was signed in 1989 and was expected to enter into force in 1990, we believe that the words "at present" should be interpreted to refer to 1990. A Joint Declaration to Protocol 5 provides that "Article 1 of Protocol 5 does not prevent the Community from establishing common rules for bananas as long as no ACP State, traditional supplier to the Community, is placed as regards access to, and advantages in, the Community in a less favourable situation than in the past or at present". The fact that the EC has done so obviously makes the meaning of Protocol 5 more difficult to ascertain since what was a system of individual EC member State markets has been transformed into one EC-wide market.

7.100 In allocating country-specific shares of the banana tariff quota to traditional ACP banana supplying countries, the EC set the shares at the level of each ACP country's "best-ever" exports to the EC, adjusted for certain other factors. The issue is whether it was required to do so by the Lomé Convention. The Complainants correctly point out that Protocol 5 does not guarantee that a certain level of banana exports will be achieved, and in response to questions of the Panel, the EC did not disagree. We recall that generally speaking, ACP countries formerly competed for the most part on either the French or UK markets and that on these markets they were protected by and large from import competition from other banana exporters. Given this degree of market access and advantage, the issue is how the EC could fulfil its obligations under Protocol 5 on an EC-wide market.

7.101 It appears that prior to Regulation 404/93 there were no set maximum levels for ACP exports to EC member State markets. While the ACP countries did not have specific quotas, they generally did enjoy protected access to one EC member State market (e.g., France, in the case of Cameroon and Côte d'Ivoire; Italy, in the case of Somalia; the UK, in the case of several Caribbean ACP countries).[52] Access to these markets was essentially controlled by ad hoc decisions.[53] We think that it can be reasonably contended that an EC-wide equivalent of the market access and advantages enjoyed by ACP countries in the past would be a country-specific tariff quota share, which may be assimilated to the past advantage of a protected EC member State market, set at their pre-1991 best-ever export levels. We note that since the pre-1991 best-ever export levels of the ACP countries occurred in different years for different countries (and in some cases, many years ago), there was no way for the EC to provide tariff quota shares covering such amounts consistently with the requirements of Article XIII:2, which requires shares to be based on a previous representative period, which has generally been interpreted to mean the most recent three years.[54] If the EC had (i) pro-

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[52] Panel Report on "EEC - Member States' Import Regime for Bananas", issued on 3 June 1993 (not adopted), DS32/R, p.3, para. 12.

[53] Idem, pp.4-5, 7, paras. 19-22, 37-38.

[54] See Panel Report on "EEC - Restrictions on Imports of Apples from Chile", adopted on 10 November 1980, BISD 27S/98, 113, para. 4.8.

vided only a non-country-specific share for ACP countries or (ii) set shares for ACP countries at a level lower than their pre-1991 best-ever levels, an ACP country with the ability to export at its pre-1991 best-ever level might have been effectively prevented from doing so either by lack of the protected market provided by a specific-country share allocation or by the volume limit of its share allocation. Thus, in order not to place an ACP country in a less favourable situation as regards access to and advantages on its traditional markets, which is the EC's obligation under the Lomé Convention, it was not unreasonable for the EC to conclude that the Lomé Convention requires the allocation of country-specific tariff quota shares to the ACP countries in an amount of their pre-1991 best-ever exports of bananas to the EC. We accept that interpretation for purposes of our analysis of this issue.

7.102 There is, however, nothing in Protocol 5 that suggests that the EC is required to apply other factors to increase the shares of ACP countries above their best-ever export levels prior to 1991. While the Lomé Convention contains various provisions concerning trade promotion and assistance to ACP countries, there are no specific provisions established in the Lomé Convention that can be said to require country-specific tariff quota shares in excess of past exports. Thus, in our view, the EC is not required by the Lomé Convention to assign tariff quota shares to ACP countries in excess of their pre-1991 best-ever exports to the EC.

7.103 Accordingly, we find that it was not unreasonable for the EC to conclude that the Lomé Convention requires the EC to allocate country-specific tariff quota shares to traditional ACP banana supplying countries in an amount of their pre-1991 best-ever exports to the EC. However, we do find that the allocation of tariff quota shares to ACP countries in excess of their pre-1991 best-ever exports to the EC is not required by the Lomé Convention.

(ii) Application of the Lomé Waiver to the EC's Article XIII Obligations

7.104 The Lomé waiver, as quoted above, permits the EC to provide preferential treatment to ACP countries as required by the Lomé Convention. However, by its terms, the Lomé waiver only waives compliance with the provisions of Article I:1. Thus, the issue arises whether the EC's obligations under Article XIII are also waived in connection with preferential treatment required by the Lomé Convention. The Complainants argue that they are not and that such an interpretation would be unprecedented. Indeed, the EC has not argued that the Lomé waiver should be interpreted to waive its obligations under Article XIII. In its response to a question from the Panel, the EC stated that it did not claim and "has no need to suggest" that the Lomé waiver covers a violation of Article XIII. Rather the EC argued that (i) it has not acted inconsistently with the requirements of Article XIII and (ii) the Lomé waiver permits the preferential treatment required by the Lomé Convention. Since we have rejected the EC's argument that it has complied with Article XIII and have found that the EC's allocation of country-specific shares to ACP countries is inconsistent with Article XIII, we believe that it is

appropriate to consider also whether this inconsistency is covered by the Lomé waiver. In this regard, we note that the EC has also argued that where 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 (see paragraph 7.205).

7.105 In interpreting the scope of the Lomé waiver, we are mindful that the only GATT panel to interpret a waiver recalled that waivers are to be granted only in exceptional circumstances[55] and concluded that "their terms and conditions consequently have to be interpreted narrowly".[56] The waiver at issue in that case had no expiration date and permitted imposition of restrictions on a number of important agricultural products. A GATT working party on the waiver noted:

> "Since the Decision [approving the waiver] refers to the provisions of Articles II and XI of the Agreement, it does not affect the obligations of the United States under any other provisions of the Agreement. In particular, as its obligations under Article XIII are not affected, the United States would acquire no right by virtue of this waiver to deviate from the rule of non-discrimination provided for in that Article".[57]

In light of this practice, we now consider the scope of the Lomé waiver, and, in particular, whether it waives the obligations of the EC under Article XIII in respect of the allocation of tariff quota shares based on the best-ever exports of bananas by the ACP countries to the EC.

7.106 We recall that Article 168(2)(a)(ii) of the Lomé Convention requires some preferential treatment for products from ACP sources. As we have found above, Protocol 5 to the Lomé Convention expands this general obligation in respect of traditional ACP banana exports in that it is not unreasonable for the EC to interpret it to require the EC to provide access opportunities to the EC market for the ACP countries in a volume no greater than their pre-1991 best-ever exports to the EC. As explained above, this can be accomplished only by country-specific tariff quota shares and by tariff quota shares that are larger than would be allowed under Article XIII (assuming that the best-ever exports did not occur within a representative period). If the Lomé waiver is interpreted to waive only compliance with the obligations of Article I:1, the waiver would effectively limit preferential treatment to tariff preferences. In our view, in light of the 75 ECU per tonne rate applicable to the EC's bound tariff quota, tariff preferences alone would not allow the EC to provide market access opportunities and advantages required of it by

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[55] GATT, Article XXV:5; WTO, Article IX:3-4.

[56] Panel Report on "US - 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 on 7 November 1990, BISD 37S/228, 256-257, para. 5.9.

[57] Working Party Report on "Import Restrictions Imposed by the United States Under Section 22 of the United States Agricultural Adjustment Act", adopted on 5 March 1955, BISD 3S/141, 144, para. 10.

the Lomé Convention. In other words, in order to give real effect to the Lomé waiver, it needs to cover Article XIII to the extent necessary to allow the EC to allocate country-specific tariff quota shares to the ACP countries in the amount of their pre-1991 best-ever banana exports to the EC. Otherwise, the EC could not practically fulfil its basic obligation under the Lomé Convention in respect of bananas, as we have found that it was not unreasonable for the EC to conclude that the Lomé Convention may be interpreted to require country-specific tariff quota shares at levels not compatible with Article XIII. Since it was the objective of the Lomé waiver to permit the EC to fulfil that basic obligation, logically we have no choice therefore but to interpret the waiver so that it accomplishes that objective. In fact, such an interpretation would be consistent with the terms of this particular waiver as it applies to preferential treatment generally and not, as is mostly the case with other currently effective waivers, only to preferential *tariff* treatment.[58]

7.107 Such an interpretation is also supported by the close relationship between Articles I and XIII:1, both of which 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,[59] 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.

7.108 The foregoing considerations suggest that the Lomé waiver should be interpreted so as to waive compliance with the obligations of Article XIII, to the extent indicated above. We must consider, however, whether such a conclusion is consistent with past GATT practice that waivers are to be interpreted narrowly. Our interpretation of the Lomé waiver is narrow in the sense that the Lomé waiver itself has been qualified by the fact that it is applicable only to preferential treatment "required" by the Lomé Convention and does not extend to all prefer-

[58] There are three other waivers now in force for preferential treatment to groups of developing countries. These waivers cover Canadian preferences to Caribbean countries and US preferences to Caribbean countries and to Andean countries. In each of these three cases, the waiver is limited by its terms to preferential *tariff* treatment. CARIBCAN, WT/L/185; Caribbean Basin Economic Recovery Act, WT/L/104; Andean Trade Preference Act, WT/L/184. The waiver in respect of United States - Former Trust Territory of the Pacific Islands, WT/L/183, applies also to non-tariff preferential treatment.

[59] Panel Report on "United States - Denial of Most-favoured-nation Treatment as to Non-rubber Footwear from Brazil", adopted on 19 June 1992, BISD 39S/128, 150, para. 6.8 (Article I:1 applies to rules for revocation of countervailing duties).

ential treatment that the EC might wish to give to the ACP countries. Thus, there is no danger of an overly broad interpretation of its scope. In our view, we only acknowledge what is implied in the decision to grant the waiver in the first place.

7.109 In reaching this conclusion, however, we note our view that the scope of the Lomé waiver lacks precision. Future waiver negotiations will have to deal more precisely with the issues raised in this case in order to reduce differences in interpretation.

7.110 In light of these factors, to the extent that we have found that the EC has acted inconsistently with the requirements of Article XIII:1 (paragraph 7.90), we find that the Lomé waiver waives that inconsistency with Article XIII:1 to the extent necessary to permit the EC 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 EC.

(c) The Allocation of Tariff Quota Shares to BFA Countries

7.111 In our general discussion above of Article XIII (paragraph 7.90), we found that the EC's allocation of shares in its tariff quota to the BFA countries not having a substantial interest in supplying bananas and in respect of non-traditional ACP bananas is inconsistent with the requirements of Article XIII. In this section, we consider whether any such inconsistency may be permitted because of (i) the inclusion of the banana tariff quota allocation to BFA countries and in respect of non-traditional ACP bananas in the EC's Schedule attached to the Marrakesh Protocol or (ii) the priority provision of the Agreement on Agriculture.

(i) Inclusion of the BFA Tariff Quota Shares in the EC Schedule

7.112 The EC argues that even if the tariff quota share allocations to the BFA countries and in respect of non-traditional ACP bananas do not satisfy the requirements of Article XIII, they are consistent with GATT rules because of their inclusion in the EC's Schedule as a result of the Uruguay Round negotiations. The Complainants argue that a prior adopted GATT panel report (the so-called *Sugar Headnote* case)[60] supports the conclusion that tariff bindings in schedules cannot justify inconsistencies with the requirements of generally applicable GATT rules. The EC responds that the Uruguay Round Schedules are of a different nature than past GATT tariff protocols, thereby undermining the legal reasoning underpinning the *Sugar Headnote* case, and that, in any event, the inclusion of the BFA tariff quota shares in its Schedule overrides Article XIII because of the priority provision of the Agreement on Agriculture.

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[60] Panel Report on "US - Restrictions on Imports of Sugar", adopted on 22 June 1989, BISD 36S/331, 341-343, paras. 5.2-5.7.

7.113 The panel in the *Sugar Headnote* case found that qualifications on tariff bindings do not override other GATT provisions after an analysis of the wording of Article II, its object, purpose and context, and the drafting history of the provision. Although it made no mention of the Vienna Convention, it seems to have followed closely Articles 31 and 32 thereof.[61] Its analysis was as follows:

> 5.1 ... The *United States* argues that the proviso "subject to the terms, conditions or qualifications set forth in that Schedule" in Article II:1(b) permits contracting parties to include qualifications relating to quantitative restrictions in their Schedule. The United States had made use of this possibility by reserving in its Schedule of Concessions the right to impose quota limitations on imports of sugar in certain circumstances. Since the restrictions on the importation of sugar conformed to the qualifications set out in the Schedule of the United States, and the Schedules of Concessions were, according to Article II:7, an integral part of the General Agreement, the restrictions were consistent with the United States obligations under that Agreement. *Australia* argues that qualifications to concessions made in accordance with Article II:1(b) cannot justify measures contrary to other provisions of the General Agreement, in particular not quantitative restrictions inconsistent with Article XI:1. ...
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> 5.2 The Panel first examined the issue in the light of the wording of Article II. It noted that in Article II:1(b), the words "subject to the ... qualifications set forth in that Schedule" are used in conjunction with the words "shall ... be exempt from ordinary customs duties in excess of those set forth in [the Schedule]". This suggests that Article II:1(b) permits contracting parties to qualify the obligation to exempt products from customs duties in excess of the levels specified in the Schedule, not however to qualify their obligations under other Articles of the General Agreement. The Panel further noted that the title of Article II is "Schedules of Concessions" and that the ordinary meaning of the word "to concede" is "to grant or yield". This also suggests in the view of the Panel that Article II permits contracting parties to incorporate into their Schedules acts yielding rights under the General Agreement but not acts diminishing obligations under that Agreement.
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> 5.3 The Panel then examined the issue in the light of the purpose of the General Agreement. It noted that one of the basic functions of the General Agreement is, according to its Preamble, to provide a legal framework enabling contracting parties to enter into "reciprocal and mutually advantageous arrangements directed to

[61] These provisions of the Vienna Convention are quoted in para. 7.14 supra.

the substantial reduction of tariffs and other barriers to trade". Where the General Agreement mentions specific types of negotiations, it refers to negotiations aimed at the reduction of barriers to trade (Articles IV(d), XVII:3 and XXVIII bis). This supports in the view of the Panel the assumption that Article II gives contracting parties the possibility to incorporate into the legal framework of the General Agreement commitments additional to those already contained in the General Agreement and to qualify such additional commitments, not however to reduce their commitments under other provisions of that Agreement.

5.4 The Panel then examined the issue in the context of the provisions of the General Agreement related to Article II. It noted that negotiations on obstacles to trade created by the operation of state-trading enterprises may be conducted under Article XVII:3 and that a note to that provision provides that such negotiations

> "may be directed towards the reduction of duties and other charges on imports and exports or towards the conclusion of *any other mutually satisfactory arrangement consistent with the provisions of this Agreement* (See paragraph 4 of Article II and the note to that paragraph)." (emphasis added).

The negotiations foreseen in Article XVII:3 are thus not to result in arrangements inconsistent with the General Agreement, in particular not quantitative restrictions made effective through state-trading that are not justified by an exception to Article XI:1. The Panel saw no reason why a different principle should apply to quantitative restrictions made effective by other means.

5.5 The Panel then examined the issue in the light of the practice of the CONTRACTING PARTIES. The Panel noted that the CONTRACTING PARTIES adopted in 1955 the report of the Review Working Party on Other Barriers to Trade, which had concluded that:

> "there was nothing to prevent contracting parties, when they negotiate for the binding or reduction of tariffs, from negotiating on matters, such as subsidies, which might affect the practical effects of tariff concessions, and from incorporating in the appropriate schedule annexed to the Agreement the results of such negotiations; *provided that the results of such negotiations should not conflict with other provisions of the Agreement*." (emphasis added) (BISD 3S/225).

Whether the proviso in this decision is regarded as a policy recommendation, as the United States argues, or as the confirmation of a legal requirement, as Australia claims, it does support, in the view of the Panel, the conclusion that the CONTRACTING

> PARTIES did not envisage that qualifications in Schedules established in accordance with Article II:1(b) could justify measures inconsistent with the other Articles of the General Agreement.
>
> 5.6 The Panel finally examined the issue in the light of the drafting history. It noted that the reference to "terms and qualifications" was included in a draft of the present Article II:1(b) during the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment. The original draft had referred only to "conditions". This amendment was proposed and adopted "in order to provide more generally for the sort of qualifications actually provided in the form of notes in the specimen Schedule. A number of these notes are, in effect, additional concessions rather than *conditions* governing the tariff bindings to which they relate" (E/PC/T/153 and E/PC/T/W/295). Schedule provisions qualifying obligations under the General Agreement were not included in the specimen Schedule nor was the possibility of such Schedule provisions mentioned by the drafters. The Panel therefore found that the drafting history did not support the interpretation advanced by the United States.
>
> 5.7 For the reasons stated in the preceding paragraphs, the Panel found that Article II:1(b) does not permit contracting parties to qualify their obligations under other provisions of the General Agreement and that the provisions in the United States GATT Schedule of Concessions can consequently not justify the maintenance of quantitative restrictions on the importation of certain sugars inconsistent with the application of Article XI:1".

7.114 We agree with the analysis of the *Sugar Headnote* panel report and note that Article II was not changed in any relevant way as a result of the Uruguay Round. Thus, based on the *Sugar Headnote* case, we conclude that the EC's inclusion of allocations inconsistent with the requirements of Article XIII in its Schedule does not prevent them from being challenged by other Members. We note in this regard that the Uruguay Round tariff schedules were prepared with full knowledge of the *Sugar Headnote* panel report, which was adopted by the GATT CONTRACTING PARTIES in the middle of the Round (June 1989). This is particularly significant in light of the Appellate Body's statement that "[a]dopted panel reports are an important part of the GATT *acquis*. They are often taken into account by subsequent panels. They create legitimate expectations among Members, and, therefore should be taken into account where they are relevant to any dispute".[62]

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[62] 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, DSR 1996:I, 97 at 108.

7.115 The EC further argues that the principle of *pacta sunt servanda* supports its position that the BFA should override GATT rules. However, in our view, that principle applies as well to Article II, as interpreted by the *Sugar Headnote* case. We cannot accept that a conflict between Article II and the BFA should necessarily be resolved in the BFA's favour. It was to ensure consistency with the basic GATT rules that the *Sugar Headnote* panel reached the conclusions it did. As that panel stated (paragraph 5.2): "Article II permits contracting parties to incorporate into their Schedules acts yielding rights under the General Agreement but not acts diminishing obligations under that Agreement". That rule is a basic agreement of the Members that must be enforced.

7.116 The EC also notes that Article II:7 of GATT incorporates schedules into Part I of GATT, which contains Articles I and II, and argues that one provision of Part I such as Article II may not be given priority over another (i.e., the schedules). However, we are of the opinion that if there is a conflict between a schedule and GATT rules, it is necessary to resolve it, and that is what the *Sugar Headnote* panel did.[63]

7.117 Finally, the EC argues that the result in the *Sugar Headnote* case was necessary under GATT practice because tariff protocols, which added tariff commitments to schedules, were not accepted by all GATT contracting parties. It further argues that such a result is not necessary in the context of the WTO because all Members accepted all the results of the Uruguay Round. The *Sugar Headnote* panel's analysis was, in our view, a straightforward exercise in treaty interpretation under Vienna Convention principles. It made no mention that the result it reached was "necessary" under GATT practice. Moreover, the US measure at issue in the *Sugar Headnote* case first appeared in the Annecy and Torquay Protocols, both of which were signed by all GATT contracting parties at the time.[64] Thus, these Protocols were in this respect similar to the schedules attached to the WTO Agreement.

7.118 Thus, we find that the inclusion of the BFA tariff quota shares in the EC's Schedule does not permit the EC to act inconsistently with the requirements of Article XIII of GATT.

7.119 [Used in the Guatemala-Honduras report.]

(ii) Agreement on Agriculture

7.120 The EC argues that the provisions of the Agreement on Agriculture prevail over GATT rules such as Article XIII and that the inclusion by the EC of the BFA tariff quota shares in its tariff schedules means that they prevail over Article

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[63] The incorporation of schedules into Part I was done only because "it was intended that Part II [of GATT] would be immediately superseded by the [Havana] Charter provisions when the Charter entered into force". Analytical Index: Guide to GATT Law and Practice, 6th rev. ed. 1995, p.99.

[64] Contracting Parties to the General Agreement on Tariffs and Trade, Status of Legal Instruments, pp. xxi, 3-2.1-2.4, 3-3.1-3.4.

XIII, even if the *Sugar Headnote* case remains a valid interpretation of GATT rules.

7.121 In examining this argument, we note that the Agreement on Agriculture was intended to make agricultural products subject to strengthened and more operationally effective GATT rules. In the Preamble to the Agreement, Members recall:

> "their long-term objective as agreed at the Mid-Term Review of the Uruguay Round 'is to establish a fair and market-oriented agricultural trading system and that a reform process should be initiated through the negotiation of commitments on support and protection and through the establishment of strengthened and more operationally effective GATT rules and disciplines' ".

7.122 In some cases, the results of the agricultural negotiations were not consistent with the rules found in other WTO agreements. For example, Article 4.2 of the Agreement on Agriculture prohibits the use of certain measures that might otherwise be authorized by Article XI:2 of GATT; Article 5 of the Agreement on Agriculture permits the use of certain measures that might otherwise be questioned under Articles II and XIX of GATT and the Agreement on Safeguards. In order to establish priority for rules of the Agreement on Agriculture, Article 21.1 of that Agreement specifies:

> "The provisions of GATT 1994 and of other Multilateral Trade Agreements in Annex 1A to the WTO Agreement shall apply subject to the provisions of this Agreement [i.e., the Agreement on Agriculture]".

It is clear from Article 21.1 that the provisions of the Agreement on Agriculture prevail over GATT and the other Annex 1A agreements. But there must be a provision of the Agreement on Agriculture that is relevant in order for this priority provision to apply. It is not the case that Article 21.1 of the Agreement on Agriculture means that no GATT/WTO rules apply to trade in agricultural products unless they are explicitly incorporated into the Agreement on Agriculture. We note that one of the purposes of the Agreement on Agriculture is to bring agriculture under regular GATT/WTO disciplines. It is against this background that we consider the EC's argument.

7.123 There is no provision of the Agreement on Agriculture that incorporates tariff bindings related to agricultural products into the Agreement on Agriculture. While the Annexes to the Agreement are incorporated into the Agreement by Article 21.2 thereof, tariff bindings are not. Indeed, under paragraph 1 of the Marrakesh Protocol, the Uruguay Round schedules attached to that protocol, which include the agricultural tariff bindings, are explicitly made schedules to GATT.

7.124 An examination of the Agreement on Agriculture reveals that most of its provisions and annexes are concerned with domestic support and export subsidies and do not relate to market access concessions generally except for Articles 4 (market access) and 5 (special safeguard provisions) and Annex 5 (special treat-

ment with respect to paragraph 2 of Article 4). Since we are not concerned here with special treatment or special safeguard measures, only Article 4 itself might be relevant. It reads as follows:

> "1. Market access concessions contained in Schedules relate to bindings and reductions of tariffs, and to other market access commitments specified therein.
>
> 2. Members shall not maintain, resort to, or revert to any measures of the kind which have been required to be converted into ordinary customs duties [footnote omitted], except as otherwise provided for in Article 5 and Annex 5".

In our view, Article 4.1 is not a substantive provision, but is a statement of where market access commitments can be found. The definition of "market access concessions" (Article 1(g) of the Agreement on Agriculture) makes it clear that the Schedules annexed to Article II of GATT also contain the import quota commitments undertaken pursuant to Annex 5 of the Agreement on Agriculture (as well as an identification of the tariff lines which are eligible for the special safeguard provisions of Article 5 of the Agreement on Agriculture). If the Agreement on Agriculture would have allowed for country-specific allocations of tariff quotas there would have been a specific provision to this effect in deviation from Article XIII:2(d) as with the special treatment provisions of Annex 5. In contrast, Article 4.2 is a substantive provision in that it prohibits the use of certain non-tariff barriers, subject to certain qualifications. As a substantive provision, it prevails over such GATT provisions as Article XI:2(c).

7.125 Moreover, neither Article 4.1 nor 4.2 of the Agreement on Agriculture provides that agricultural tariff bindings have a special standing vis à vis other tariff bindings or that a market access commitment included therein is absolved from complying with other GATT rules. Indeed, we note that there are a number of provisions in the Agreement on Agriculture which simply refer to other agreements or decisions that are not incorporated into the Agreement on Agriculture. The reference in Article 14 to the Agreement on Sanitary and Phytosanitary Measures is one example; the reference to the Decision on Measures Covering the Possible Negative Effects of the Reform Programme on Least-Developed and Net Food-Importing Developing Countries in Article 16 is another example. These "cross-reference" provisions may be explained by the attempt of the framers of the Agreement on Agriculture to provide a complete overview of the Uruguay Round results in agriculture, since these matters are referred to generally in the preamble to the Agreement.

7.126 Finally, we note that, pursuant to Article 21 of the Agreement on Agriculture, GATT rules apply "subject to" the provisions of the Agreement on Agriculture, a wording that clearly suggests priority for the latter. But giving priority to Article 4.1 of the Agreement on Agriculture, which simply "relates" market access concessions to Members' goods schedules as attached to GATT by the Marrakesh Protocol, does not necessitate, or even suggest, a limitation on the

application of Article XIII. The provisions are complementary, and do not clash. Thus, Article 21 of the Agreement on Agriculture is not relevant in this case.

7.127 Accordingly, we find that neither the negotiation of the BFA and its inclusion in the EC's Schedule nor the Agreement on Agriculture permit the EC to act inconsistently with the requirements of Article XIII of GATT.

(d) Tariff Quota Share Allocations and Article I:1

7.128-7.130 [Used in the Guatemala-Honduras report.]

2. Tariff Issues

7.131 The Complainants have not challenged the tariff preferences accorded by the EC to traditional ACP bananas, i.e., bananas in traditional amounts from ACP countries that traditionally supplied the EC market. They have, however, claimed that the tariff preferences granted by the EC to non-traditional ACP bananas, i.e., bananas from ACP countries that have not traditionally supplied the EC market and bananas from historical suppliers in excess of their traditional supplies, are inconsistent with the requirements of Article I:1 of GATT. The tariff preference in the case of non-traditional ACP bananas imported under the relevant EC tariff quota share (90,000 tonnes) is 75 ECU per tonne (0 versus 75 ECU), while for over-quota bananas it is 100 ECU per tonne (in 1995: 822 ECU versus 722 ECU). The EC responds that to the extent that these tariff preferences are inconsistent with Article I:1, the inconsistency is permitted by the Lomé waiver.

7.132 Article I:1 provides in relevant part as follows:

> "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 Member to any product originating in ... any other country shall be accorded immediately and unconditionally to the like product originating in ... the territories of all other Members".

7.133 It is clear that the above-described tariff preferences for ACP bananas are inconsistent with Article I:1 since ACP and other bananas are like products and the lower tariffs on ACP-origin bananas are not provided unconditionally to bananas from other Members. The issue is whether the Lomé waiver covers the inconsistency. As noted above, the Lomé waiver provides:

> "the provisions of paragraph 1 of Article I of the General Agreement shall be waived, until 29 February 2000, to the extent necessary to permit the European Communities to provide preferential treatment for products originating in ACP States as required by the relevant provisions of the Fourth Lomé Convention, without being

> required to extend the same preferential treatment to like products of any other contracting party".[65]

7.134 In this regard, we note that Article 168(2)(a)(ii) of the Lomé Convention provides that the EC:

> "shall take the necessary measures to ensure more favourable treatment than that granted to third countries benefitting from the most-favoured-nation clause for the same products".

While Members in granting the Lomé waiver could have limited the extent to which the EC could provide preferential tariff treatment under Article I:1, they did not do so. Thus, even though waivers must be interpreted strictly,[66] it seems to us that the preferential tariff for non-traditional ACP bananas is clearly a tariff preference of the sort that the Lomé waiver was designed to cover. In our view, in light of the requirement of Article 168(2)(a)(ii) of the Lomé Convention, the Lomé waiver permits the EC to grant tariff preferences to ACP countries on non-traditional bananas.

7.135 The Complainants argue, however, that the EC Court of Justice has ruled that Protocol 5 of the Lomé Convention supersedes Article 168(2)(a)(ii) with the result that the EC is not required to give non-traditional ACP bananas more favourable treatment pursuant to that provision. We do not agree with this characterization of the Court of Justice decision.[67] In the part of the decision cited by the Complainants, the Court of Justice rejected the argument that the EC Council could not rely on Article 168(2)(a) in adopting the EC banana regime. Indeed, the Court states "the import of bananas from ACP States falls under Article 168(2)(a)(ii) of the Lomé Convention". The issue in the case was whether the Lomé Convention required that all ACP bananas had to be admitted duty-free, and the Court ruled that Protocol 5 did not require that. It did not rule that Article 168(2)(a)(ii), which generally requires some preferential treatment of ACP products, did not apply to bananas not covered by Protocol 5.

7.136 Accordingly, we find that to the extent that the EC's preferential tariff treatment of non-traditional ACP bananas is inconsistent with its obligations under Article I:1, those obligations have been waived by the Lomé waiver.

7.137-7.141 [Used in the Guatemala-Honduras report.]

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[65] EC - The Fourth ACP-EEC Convention of Lomé, Waiver Decision of 9 December 1994, L/7604, 19 December 1994; Extension of the Waiver, Decision of 14 October 1996, WT/L/186.

[66] Panel Report on "US - 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 on 7 November 1990, BISD 37 S/228, 256-257, para. 5.9.

[67] Germany v. Council, Case C-280/93, para. 101 (Judgment of 5 October 1994).

3. The EC Banana Import Licensing Procedures

7.142 We turn now to an examination of the EC's banana import licensing procedures.[68] We give an overview of the claims of the Complainants and explain how we will organize our discussion of the numerous issues raised by those claims.

7.143 Altogether, the Complainants, jointly or severally, have raised more than 40 different claims against the EC licensing regime in general, or against specific elements thereof, under provisions of GATT, the Licensing Agreement and the TRIMs Agreement.[69]

7.144 We begin by considering three general issues: (i) whether the Licensing Agreement covers licences relating to tariff quotas; (ii) the relationship between claims under GATT 1994 and the Annex 1A Agreements in light of the General Interpretative Note to Annex 1A; and (iii) whether the EC licensing procedures should be analysed as one or two regimes.

(a) General Issues

(i) Scope of the Licensing Agreement

7.145 The first general interpretative issue is whether the Licensing Agreement applies to tariff quotas. The Complainants argue that the administration of tariff quotas is subject to the disciplines embodied in the Licensing Agreement and have raised claims under Articles 1.2, 1.3, 3.2 and 3.5 of that Agreement. The EC takes the opposite view. It argues that the Licensing Agreement applies to "import restrictions". Since in its view tariff quotas do not constitute import restrictions, tariff quotas are not subject to the provisions of the Licensing Agreement. It also argues that import licences are tradeable and are not a "prior condition for importation" within the meaning of Article 1.1 of the Licensing Agreement since import licences are required only for the purpose of benefitting from the in-quota duty rate.

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[68] The EC common organisation of the banana market, including the licensing regime and its administrative application, encompass more than 100 different regulations. The most important ones are: Council Regulation (EC) No. 404/93 of 13 February 1993 on the common organization of the market in bananas (O.J. L 47/1 of 25 February 1993); 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 (O.J. L 142/6 of 12 June 1993); 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 (O.J. L 349/105 of 31 December 1994); and Commission Regulation (EC) No. 478/95 on additional rules for the application of Council Regulation (EEC) No. 404/93 as regards the tariff quota arrangements for imports of bananas into the Community and amending Regulation (EEC) No. 1442/93 (O.J. L 49/13 of 4 March 1995).

[69] We recall that we decided not to consider claims under Article 5 of the TRIMs Agreement and under Article 4.2 of the Agreement on Agriculture because they were not or not adequately raised in the request for the establishment of the Panel. See para. 7.46 supra.

7.146 We therefore turn to an examination of the terms of the Licensing Agreement, interpreted in light of their context and of the object and purpose of the Agreement. Article 1.1 of the Licensing Agreement provides (footnote omitted):

> "For the purpose of this Agreement, import licensing is defined as administrative procedures used for the operation of import licensing regimes requiring the submission of an application or other documentation (other than that required for customs purposes) to the relevant administrative body as a prior condition for importation into the customs territory of the importing Member".

7.147 The terms of Article 1.1 do not explicitly include, or exclude, the administration of tariff quotas from the coverage of the Licensing Agreement. Its terms define "import licensing" as "administrative procedures used for the operation of import licensing regimes". However, footnote 1 to Article 1.1 further defines "administrative procedures" to include "those procedures referred to as 'licensing' as well as other similar administrative procedures". Accordingly, irrespective of whether the term "licensing" is used, in our opinion, administrative procedures are covered by the Licensing Agreement provided that they have a purpose similar to licensing. In other words, Article 1 of the Licensing Agreement, as further elaborated by footnote 1 thereto, clearly follows a functional approach. It embodies a comprehensive coverage of the Licensing Agreement, except as specifically limited.

7.148 Two limitations on the scope of the Licensing Agreement may be derived from the terms of Article 1.1. First, the notion of "import licensing" is limited to procedures "requiring the submission of an application or other documentation (other than that required for customs purposes) to the relevant administrative body". The licensing procedures used by the EC for the administration of the in-quota imports of bananas meet the terms of this limitation because they require the submission of an application, as well as other documentation.

7.149 Second, Article 1.1 limits "import licensing" to regimes requiring the "submission of an application or other documentation" as a "prior condition for importation into the customs territory of the importing Member". In our view, the requirement to present an import licence upon importation constitutes a "prior condition for importation", irrespective of whether that requirement applies to the administration of a quantitative restriction or a tariff quota. The mere possibility to import a particular product at a higher tariff rate outside a tariff quota without being subjected to the same or any licensing requirement does not alter the fact that the importation of a particular product within a tariff quota at a lower duty rate is made dependent upon the presentation of an import licence as a prior condition for importation at that lower rate.[70]

[70] According to Article 18 of Regulation 1442/93, imports outside of the EC bound tariff quota are subject to automatic licensing.

7.150 Thus, while Article 1.1 does not specifically include licences for tariff quotas within its scope, it does not exclude them. Indeed, the general definition of the scope of application in Article 1.1 of the Licensing Agreement is formulated in a comprehensive manner: import licensing procedures are mentioned without any reference to the underlying measure for whose administration they are employed. Moreover, procedures which are not in explicit terms labelled as "licensing" but pursue a similar purpose are included in the scope of the Licensing Agreement by virtue of footnote 1 to Article 1.1.[71]

7.151 Article 3.1 of the Licensing Agreement also defines the coverage of the Agreement by providing that non-automatic licensing is covered by the Agreement as follows:

> "The following provisions, in addition to those in paragraphs 1 through 11 of Article 1, shall apply to non-automatic import licensing procedures. Non-automatic import licensing procedures are defined as import licensing not falling within the definition contained in paragraph 1 of Article 2".

Article 2:1 of the Licensing Agreement, in turn, reads:

> "Automatic import licensing is defined as import licensing where approval of the application is granted in all cases, and which is in accordance with the requirements of paragraph 2(a)".

Given that the approval of an application for an import licence is not, in the sense of Article 2.1 of the Licensing Agreement, granted by the relevant administrative bodies in all cases, the EC licensing procedures fall within the category of non-automatic import licensing.

7.152 Further indication of the scope of Article 3 of the Licensing Agreement can be derived from the wording of the first sentence of Article 3.2:

> "Non-automatic licensing shall not have trade-restrictive or -distortive effects on imports additional to those caused by the imposition of the *restriction*" (emphasis added).

This raises the question whether the term "restriction" should be interpreted narrowly so as to encompass only quantitative restrictions, or whether it should be read to include also other measures such as tariff quotas.

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[71] While it is true that the EC import licences for bananas are transferable and tradeable, it is also clear that a trader, regardless of whatever his classification might be with respect to operator categories and/or activity functions, at some point in time has to file an application for an import licence. That trader can use the licence he has obtained or sell it on the marketplace. Thus the trader who applies for a particular import licence is not necessarily the one who actually effectuates the importation of bananas. However, there is no requirement under Article 1.1 of the Licensing Agreement that the natural or legal person who files the application for a licence must also carry out the transaction of actually importing bananas. Moreover, in respect of transferability and tradeability of licences, there is no difference between the administration of quantitative restrictions and of tariff quotas.

7.153 In this context, Article 3.3 of the Licensing Agreement offers implicit guidance:

> "In the case of licensing requirements for purposes other than the implementation of quantitative restrictions, Members shall publish sufficient information for other Members and traders to know the basis for granting and/or allocating licences".

The phrase "other than the implementation of quantitative restrictions" makes clear that the coverage of Article 3 of the Licensing Agreement is not limited to procedures used in the implementation of quantitative restrictions. On the contrary, the wording of Article 3.3 implies that the disciplines concerning non-automatic licensing also cover procedures used for the administration of other measures.

7.154 Moreover, the use of the term "restriction" in Article 3.2 is not a reason to give a narrow reading to the scope of the Licensing Agreement. Past GATT panel reports support giving the term "restriction" an expansive interpretation.[72] The introductory words of Article XI of GATT provide as follows:

> "No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures ...".

Thus, tariffs and tariff quotas are restrictions as that term is used in Article XI, although "duties, taxes or other charges" are excepted from Article XI's requirements. A similar reading is appropriate in the case of the Licensing Agreement. Article 3.2 of the Licensing Agreement refers to "restrictions" and Article 3.3 of the Licensing Agreement applies to "licensing requirements for purposes other than the implementation of quantitative restrictions". Accordingly, we find that licensing procedures used for the implementation of measures other than quantitative restrictions, including tariff quotas, are subject to the disciplines of the Licensing Agreement.[73] We also note that our argument that tariff quotas are "restrictions" does not imply that they are not, in principle, legitimate trade measures under the agreements covered by the WTO in the same sense that tariffs are.

7.155 This finding is in accord with a consideration of the object and purpose and the context of the Licensing Agreement. The preamble to the Licensing Agreement makes it clear that the Licensing Agreement is to further the objectives of GATT. It is equally explicitly noted that the provisions of GATT apply to import licensing and then stated that Members desire that import licensing procedures not be used contrary to the principles and objectives of GATT. Since

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[72] Panel Report on "Japan - Trade in Semiconductors", adopted on 4 May 1988, BISD 35S/116, 153, paras. 104-105; Panel Report on "EEC - Programme of Minimum Import Prices, Licences and Surety Deposits for Certain Processed Fruits and Vegetables", adopted on 18 October 1978, BISD 25S/68, 98-100, para. 4.9.

[73] We note that past GATT/WTO practice in respect of this issue is not helpful in clarifying the meaning of the Licensing Agreement.

one of the principal GATT provisions dealing with import licensing is Article XIII, which by the explicit terms of Article XIII:5 applies to tariff quotas, it follows from the preamble to the Licensing Agreement that the Licensing Agreement should also apply to tariff quotas. There would not seem to be any reason to treat licensing procedures for quantitative restrictions differently from those for tariff quotas. The concerns raised in the preamble about the possible negative consequences of the inappropriate use of import licensing regimes would apply equally to both.

7.156 Accordingly, we find that the Licensing Agreement applies to licensing procedures for tariff quotas.

(ii) GATT 1994 and the Annex 1A Agreements

7.157 The Complainants have raised claims in respect of the EC's import licensing regime under GATT 1994, the Licensing Agreement and the TRIMs Agreement. Having found that the Licensing Agreement applies to tariff quotas, a further threshold question is whether both GATT 1994, as well as the Licensing Agreement and the TRIMs Agreement, apply to the EC's import licensing procedures. This requires us to consider the interrelationship of GATT 1994, on the one hand, and the Licensing Agreement and the TRIMs Agreement, on the other.

7.158 The General Interpretative Note to Annex 1A of the Agreement Establishing the WTO ("General Interpretative Note") reads:

> "In the event of conflict between a provision of the General Agreement on Tariffs and Trade 1994 and a provision of another agreement in Annex 1A to the Agreement Establishing the WTO ... , the provision of the other agreement shall prevail to the extent of the conflict".

Both the Licensing Agreement and the TRIMs Agreement are "agreement[s] in Annex 1A to the Agreement Establishing the WTO".

7.159 As a preliminary issue, it is necessary to define the notion of "conflict" laid down in the General Interpretative Note. In light of the wording, the context, the object and the purpose of this Note, we consider that it is designed to deal with (i) clashes between obligations contained in GATT 1994 and obligations contained in agreements listed in Annex 1A, where those obligations are mutually exclusive in the sense that a Member cannot comply with both obligations at the same time, and (ii) the situation where a rule in one agreement prohibits what a rule in another agreement explicitly permits.[74]

[74] For instance, Article XI:1 of GATT 1994 prohibits the imposition of quantitative restrictions, while Article XI:2 of GATT 1994 contains a rather limited catalogue of exceptions. Article 2 of the Agreement on Textiles and Clothing ("ATC") authorizes the imposition of quantitative restrictions in the textiles and clothing sector, subject to conditions specified in Article 2:1-21 of the ATC. In other words, Article XI:1 of GATT 1994 prohibits what Article 2 of the ATC permits in equally explicit

7.160 However, we are of the view that the concept of "conflict" as embodied in the General Interpretative Note does not relate to situations where rules contained in one of the Agreements listed in Annex 1A provide for different or complementary obligations in addition to those contained in GATT 1994. In such a case, the obligations arising from the former and GATT 1994 can both be complied with at the same time without the need to renounce explicit rights or authorizations. In this latter case, there is no reason to assume that a Member is not capable of, or not required to, meet the obligations of both GATT 1994 and the relevant Annex 1A Agreement.

7.161 Proceeding on this basis, we have to ascertain whether the provisions of the Licensing Agreement and the TRIMs Agreement, to the extent they are within the coverage of the terms of reference of this Panel, contain any conflicting obligations which are contrary to those stipulated by Articles I, III, X, or XIII of GATT 1994, in the sense that Members could not comply with the obligations resulting from both Agreements at the same time or that WTO Members are authorized to act in a manner that would be inconsistent with the requirements of GATT rules. Wherever the answer to this question is affirmative, the obligation or authorization contained in the Licensing or TRIMs Agreement would, in accordance with the General Interpretative Note, prevail over the provisions of the relevant article of GATT 1994. Where the answer is negative, both provisions would apply equally.

7.162 Based on our detailed examination of the provisions of the Licensing Agreement, Article 2 of the TRIMs Agreement as well as GATT 1994, we find that no conflicting, i.e. mutually exclusive, obligations arise from the provisions of the three Agreements that the parties to the dispute have put before us. Indeed, we note that the first substantive provision of the Licensing Agreement, Article 1.2, requires Members to conform to GATT rules applicable to import licensing.

7.163 In the light of the foregoing discussion, we find that the provisions of GATT 1994, the Licensing Agreement and Article 2 of the TRIMS Agreement all apply to the EC's import licensing procedures for bananas.

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terms. It is true that Members could theoretically comply with Article XI:1 of GATT, as well as with Article 2 of the ATC, simply by refraining from invoking the right to impose quantitative restrictions in the textiles sector because Article 2 of the ATC authorizes rather than mandates the imposition of quantitative restrictions. However, such an interpretation would render whole Articles or sections of Agreements covered by the WTO meaningless and run counter to the object and purpose of many agreements listed in Annex 1A which were negotiated with the intent to create rights and obligations which in parts differ substantially from those of the GATT 1994. Therefore, in the case described above, we consider that the General Interpretative Note stipulates that an obligation or authorization embodied in the ATC or any other of the agreements listed in Annex 1A prevails over the conflicting obligation provided for by GATT 1994.

(iii) Separate Regimes

7.164 The EC argues that for purposes of Article I:1 of GATT and other non-discrimination provisions the traditional ACP licensing procedures should not be compared with the third-country and non-traditional ACP licensing procedures because they are separate regimes. We note that licensing procedures applicable to all banana imports are embodied in the same Regulation 1442/93. Furthermore, administrative decisions applying the EC banana import procedures are not always contained in separate regulations depending on whether they relate to traditional ACP licensing or third-country and non-traditional ACP licensing procedures. This would also suggest that all EC licensing procedures for banana imports constitute a single regime.

7.165 Moreover, we have refuted the same argument in paragraph 7.78 *et seq.* above in the context of Article XIII's application to allocation of tariff quota shares. The object and purpose of Article I, Article X, Article XIII and similar non-discrimination provisions are to preclude the creation of different systems for imports from different Members, as explained in a 1968 Note by the GATT Director-General on Article X:3(a).[75] We discuss this Note in more detail in paragraph 7.209 *et seq.*, *infra*, but in our view, it is clear that the object and purpose of the non-discrimination provisions would be defeated if Members were permitted to create separate regimes for imports of like products based on origin.

7.166 This is not to say that Members may not create import licensing regimes that vary in technical aspects. For example, the information required to establish origin for purposes of demonstrating an entitlement to a preferential tariff rate may differ from the information collected generally to establish origin. However, the measures for implementing a preferential tariff permitted under WTO rules should not in themselves create non-tariff preferences in addition to the tariff preference.

7.167 Accordingly, we find that the EC licensing procedures for traditional ACP bananas and third-country and non-traditional ACP bananas should be examined as one licensing regime.

(iv) Examination of the Licensing Claims

7.168 In light of the foregoing, we organize our examination of the EC's import licensing procedures for bananas as follows.[76] In respect of each of the four principal components of the procedures to which the Complainants have objected - operator categories, activity functions, export certificates and hurricane licences, we first consider whether the EC's procedures are inconsistent with the general non-discrimination rules of Articles I and III of GATT. We then examine their

[75] Note by the Director-General of 29 November 1968, L/3149.

[76] In considering how to organize our findings, we note that Article 1.2 of the Licensing Agreement requires Members to conform to GATT rules applicable to import licensing procedures.

consistency, where necessary, with Articles X:3 and XIII of GATT and the more specific provisions of the Licensing Agreement. We treat the claims under Article 2 of the TRIMs Agreement together with our consideration of the claims under Article III of GATT. We discuss the claims relating to operator categories in section (b), those relating to activity functions in section (c), those relating to export certificates in section (d) and those relating to hurricane licences in section (e). The remaining claims in respect of the EC licensing procedures are addressed in section (f).

(b) Operator Categories

7.169 For purposes of the distribution of licences the EC established three types of "operators": operators who have during a preceding three-year period marketed third-country bananas and non-traditional ACP bananas are classified in Category A. Those who have marketed bananas from EC and traditional ACP sources during a preceding three-year period fall within Category B. Operators who have marketed third-country and non-traditional ACP bananas as well as traditional ACP and EC bananas qualify for both categories. New market entrants who start marketing third-country or non-traditional ACP bananas may qualify as Category C operators. Article 19 of EC Regulation 404/93 earmarks 66.5 per cent of the licences allowing imports of third-country and non-traditional ACP bananas at the lower tariff rates within the tariff quota for Category A operators. Another 30 per cent is allocated to Category B operators, while 3.5 per cent is reserved for the new market entrants of Category C. Subject to limitations, import licences for third-country and non-traditional ACP bananas are transferable and tradeable within and between operator categories.

7.170 The Complaining parties raise claims against the operator category rules under Articles I, III, X and XIII of GATT and Article 2 of the TRIMs Agreement, as well as claims under the Licensing Agreement. In the case of the United States, we consider the claims it has raised under Article III of GATT, Article 2 of the TRIMs Agreement and Articles I and X of GATT.

(i) Article III:4 of GATT

7.171 The Complainants claim that the rules introducing operator categories, the eligibility criteria for Category B operators and the allocation to Category B operators of 30 per cent of the licences required for the importation of third-country and non-traditional ACP bananas at the lower duty rate within the bound tariff quota are inconsistent with Article III:4 of GATT because this licence allocation amounts to a requirement or incentive to purchase EC bananas in order to be eligible to import the bananas of Complainants' origin.

7.172 The EC responds that the licensing regime applied to third-country imports within the tariff quota does not force any trader to purchase any quantity of EC bananas, but provides a tool for managing correctly the importation of third-country bananas according to the demand on the EC market. Likewise, the op-

erator category rules and the allocation of 30 per cent of the licences required for imports from third-country sources form part of the EC's overall economic strategy and do not affect the volume of imports from third-country sources. Moreover, the EC reiterates that the licensing regime is applied at the border at the moment of importation, and not after the bananas have cleared customs and that, accordingly, all allegations concerning operator category rules under Article III are unfounded.

7.173 The relevant part of Article III:4 of GATT provides:

> "The products of the territory of any Member imported into the territory of any other Member shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use".

7.174 In addressing these claims concerning licensing procedures, we first examine the issue whether import licensing procedures are subject to the requirements of Article III. In this regard, we note that a GATT panel considered "... that the intention of the drafters of the Agreement was clearly to treat the imported products in the same way as the like domestic products once they had been cleared through customs. Otherwise indirect protection could be given."[77] In view of this interpretation of Article III:4, the fact that imported products may be subject to the collection of tariffs or the imposition of a licensing requirement taken as such, whereas the marketing of domestic products is obviously not, cannot per se violate Article III:4 of GATT.

7.175 The next question that arises is whether the EC procedures and requirements for the allocation of import licences for foreign products to eligible operators are measures that are included in the notion of "all laws, regulations and requirements affecting their internal sale, offering for sale, purchase ..." in the meaning of Article III:4. In our view, the word "affecting" suggests a coverage of Article III:4, beyond legislation directly regulating or governing the sale of domestic and like imported products. We further have to take into account the context of Article III, i.e., the Interpretative Note Ad Article III which makes clear that the mere fact that an internal charge is collected or a regulation is enforced in the case of an imported product at the time or point of importation does not prevent it from being subject to the provisions of Article III.[78] A GATT panel interpreted the Note as follows:

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[77] Panel Report on "Italian Discrimination against Imported Agricultural Machinery", adopted on 23 October 1958, BISD 7S/60, 63-64, para. 11.

[78] "... any law, regulation or requirement of the kind referred to in paragraph 1 which applies to an imported product and to the like domestic product and is ... enforced in the case of the imported product at the time or point of importation, is nevertheless to be regarded as ... law, regulation or requirement of the kind referred to in paragraph 1, and is accordingly subject to the provisions of Article III."

> "The fact that Section 337 is used as a means for the enforcement of United States patent law at the border does not provide an escape from the applicability of Article III:4; the interpretative note to Article III states that any law, regulation or requirement affecting the internal sale of products that is enforced in the case of the imported product at the time or point of importation is nevertheless subject to the provisions of Article III. Nor could the applicability of Article III:4 be denied on the ground that most of the procedures in the case before the Panel are applied to *persons* rather than *products*, since the factor determining whether persons might be susceptible to Section 337 proceedings or federal district court procedures is the source of the challenged products, that is whether they are of United States origin or imported."[79] (emphasis added)

This interpretation is in line with the interpretation of the term "affecting" in other past GATT panel reports.[80]

7.176 We further note that our interpretation is confirmed by the fact that the coverage of Articles I and III with respect to governmental measures is not necessarily mutually exclusive, as demonstrated by Article I:1's incorporation into the GATT most favoured nation clause of "all matters referred to in paragraphs 2 and 4 of Article III". To put it differently, under GATT internal matters may be within the purview of the MFN obligations and border measures may be within the purview of the national treatment clause.

7.177 In the light of the foregoing, we have to distinguish the mere requirement to present a licence upon importation of a product as such from the procedures applied by the EC in the context of the licence allocation which are internal laws, regulations and requirements affecting the internal sale of imported products. In the alternative, if the mere fact that the EC regulations on the introduction of the common market organization for bananas include or are related to a border measure such as a licensing requirement would mean that the Article III cannot apply, it would not be difficult to evade the GATT national treatment obligation. Such a result would run counter to the object and purpose of Article III, i.e., the obligation of Members to accord foreign products no less favourable treatment than like domestic products in the application of any measure affecting the internal sale of products, regardless of whether it applies internally or at the border.

7.178 In turning to the specific measures at issue, we note that operators address claims for reference quantities of bananas marketed during a preceding three-year period and applications for the allocation of quarterly licences to competent

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[79] Panel Report on "US - Section 337 of the Tariff Act of 1930", adopted on 7 November 1989, BISD 36S/345, 385, para. 5.10.

[80] Panel Report on "Italian Discrimination against Imported Agricultural Machinery", adopted on 23 October 1958, BISD 7S/60, 63-64, para. 11; Panel Report on "EEC - on Imports of Parts and Components", adopted on 16 May 1990, BISD 37S/132, 197, paras. 5.20-5.21.

member State authorities. The administration of the licence allocation procedures is carried out in cooperation between these authorities and the European Commission within the EC territory. Consequently, although licences are a condition for the importation of bananas into the EC at in-quota tariff rates, we find that the administration of licence distribution procedures and the eligibility criteria for the allocation of licences to operators form part of the EC's internal legislation and are "laws, regulations and requirements affecting the internal sale, ... purchase, ... distribution" of imported bananas in the meaning of Article III:4. Therefore, the argument that licensing procedures are beyond the purview of the GATT national treatment clause cannot, in our view, be sustained in light of the wording, context, object or purpose of Article III or with the findings of past GATT panel reports.

7.179 Turning now to the basic Article III claim of Complainants in respect of operator categories, we first recall the findings of the panel on *EEC - Import Regime for Bananas*[81] ("second *Banana* panel"), which held with regard to operator categories:

> "144. The Panel first examined the operation of the EEC import licensing system and noted the following. The quantity of bananas that an operator may import, pursuant to licences granted under the tariff quota, depends on the origin of the bananas that the operator has marketed during the preceding three-year period.[82] In particular, 30 per cent of the tariff quota is apportioned among operators who, during the preceding period, have purchased bananas from domestic or traditional ACP sources. As a result, operators wishing to increase their future share of bananas benefiting from the tariff quota would be required to increase their current purchases of EEC or traditional ACP bananas.
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> 145. The Panel noted that the General Agreement does not contain provisions specifically regulating the allocation of tariff quota licences among importers and that contracting parties are, therefore, in principle free to choose the beneficiaries of the tariff quota. They could, for instance, allocate the licences to enterprises on the basis of their previous trade shares. However, the absence of any provisions in the General Agreement specifically regulating the allocation of tariff quota licences also meant that contracting parties, in allocating such licences, had to fully observe the generally applicable provisions of the General Agreement, in particular those of Article III:4, which prescribes treatment of imported products no less favourable than that accorded to domestic products, and

[81] Panel Report on "EEC - Import Regime for Bananas", issued on 11 February 1994 (not adopted), DS38/R.

[82] Council Regulation (EEC) No 404/93, Article 19 (original footnote).

Article I:1, which requires most-favoured-nation treatment with respect to internal regulations.

146. The Panel then proceeded to examine the EEC licensing scheme in the light of the incentive provided under the regulations to buy bananas from domestic sources. The Panel noted that Article III:4 had been interpreted consistently by previous panels as establishing the obligation to accord imported products competitive opportunities no less favourable than those accorded to domestic products. A previous panel has stated:

> 'The words 'treatment no less favourable' in paragraph 4 call for effective equality of opportunities for imported products in respect of the application of laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products.'[83]

The Panel further noted that previous panels had found consistently that this obligation applies to any requirement imposed by a contracting party, including requirements 'which an enterprise voluntarily accepts to obtain an advantage from the government'.[84] In the view of the Panel, a requirement to purchase a domestic product in order to obtain the right to import a product at a lower rate of duty under a tariff quota is therefore a requirement affecting the purchase of a product within the meaning of Article III:4. The Panel further noted that, in judging whether effective equality of opportunities for imported products under Article III:4 was accorded, the trade impact of the measure was not relevant. The CONTRACTING PARTIES determined in 1949 that the obligations of Article III:4 'were equally applicable whether imports from other contracting parties were substantial, small or non-existent',[85] and they have confirmed this view in subsequent cases.[86] Thus it was not relevant that, at present, the incentive under the EEC regulations to buy domestic or traditional ACP bananas may only result in raising their price, and not in reducing the exports of the third-country bananas, since these exports, because of the high over-quota tariff, were limited *de facto* to the amount allocated un-

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[83] Report of the panel on United States - Section 337 of the Tariff Act of 1930, BISD 36S/345, 386, paragraph 5.11, adopted on 17 June 1987 (original footnote).

[84] Report of the panel on EEC - Regulation on Imports of Parts and Components, BISD 37S/132, 197, paragraph 5.21, adopted on 16 May 1990 (original footnote).

[85] Report of the working party on Brazilian Internal Taxes, BISD II/181, 185, paragraph 16, adopted on 30 June 1949 (original footnote).

[86] Report of the panel on United States - Taxes on petroleum and certain imported substances, BISD 34S/136, 158, para. 5.1.9, adopted on 17 June 1987; Report of the panel on United States - Measures affecting alcoholic and malt beverages, DS23/R, para. 5.65, adopted on 19 June 1992 (original footnote).

> der the tariff quota. The discrimination of imported bananas under the licensing scheme could therefore not be justified by measures on the importation that currently prevented, *de facto*, bananas from entering into the internal market. The Panel therefore found that the preferred allocation of part of the tariff quota to importers who purchase EEC bananas was inconsistent with Article III:4.
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> 147. The Panel then examined the EEC licensing scheme in the light of the incentive provided under the regulations to buy bananas of ACP origin in preference to other foreign origins. The Panel noted that Article I:1 obliges contracting parties, with respect to all matters referred to in Article III:4, to accord any advantage, granted to any product originating in any country, to the like product originating in the territories of all other contracting parties. As under Article III, the Panel considered that actual trade flows were not relevant to determine conformity with Article I:1. The Panel therefore found that the preferred allocation of licences to operators who purchase bananas from ACP countries was inconsistent with the EEC's obligations under Article I:1.
>
> 148. The Panel noted that the EEC's licensing system, by reserving 66.5 per cent of the tariff quota to operators who had marketed third-country or non-traditional ACP bananas during a preceding period, included also incentives to continue importation of third-country bananas, even though these incentives may not have trade-distorting effects at present in view of the undisputed greater competitiveness of these third-country bananas. The Panel was of the view that, regardless of the trade effects, the apportioning of 66.5 per cent of the tariff quota to operators who had marketed third-country or non-traditional ACP bananas could not offset or legally justify the inconsistencies of the licensing system with Articles III:4 and I:1. The Panel agreed in this respect with a previous panel that had found that 'an element of more favourable treatment would only be relevant if it would always accompany and offset an element of differential treatment causing less favourable treatment'."[87]

7.180 While the second *Banana* panel report was not adopted by the GATT CONTRACTING PARTIES, the Appellate Body has stated in another context:

> "[W]e agree with the panel's conclusion ... that unadopted panel reports 'have no legal status in the GATT or WTO system since they have not been endorsed through decisions by the

[87] Report of the panel on United States Section 337 of the Tariff Act of 1930, BISD 36S/345, 388, para. 5.16, adopted on 7 November 1989 (original footnote).

> CONTRACTING PARTIES to GATT or WTO Members'.[88] Likewise, we agree that 'a panel could nevertheless find useful guidance in the reasoning of an unadopted panel report that it considered to be relevant'.[89]."[90]

Neither the EC nor the Complainants have claimed that the rules concerning operator categories have significantly changed[91] since the second *Banana* panel report was issued on 11 February 1994 in a way that would affect the soundness of that panel's findings and conclusions with respect to Article III:4. Nor does the adoption of the Lomé waiver by the GATT CONTRACTING PARTIES and its extension by the WTO General Council, in our view, affect our examination of the allocation of licences to different operator categories in the light of Article III:4. Accordingly, we adopt the findings of the second *Banana* panel on Article III:4 of GATT in respect of operator categories as our own findings.

7.181 However, before finding whether 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 is inconsistent with Article III:4, we need to consider that Article III:1 is a "general principle that informs the rest of Article III", as the Appellate Body has recently stated.[92] Since Article III:1 constitutes part of the context of Article III:4, it must be taken into account in our interpretation of the latter. Article III:1 articulates a general principle that internal measures should not be applied so as to afford protection to domestic production.[93] As noted by the Appellate Body, the protective application of a measure can most often be discerned from the design, the architecture, and the revealing structure of the measure.[94] We consider that the design, architecture and structure of the EC measure that provides for 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 all indicate that the measure is also applied so as to afford protection to EC producers.

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88 Panel Report on "Japan - Taxes on Alcoholic Beverages", adopted on 1 November 1996, WT/DS8/R, WT/DS10/R, WT/DS11/R, para. 6.10 (original footnote).

89 *Ibid*.

90 Appellate Body Report on "Japan - Taxes on Alcoholic Beverages", adopted on 8 November 1996, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, AB-1996-2, DSR 1996:I, 97 at 107-108.

91 While provisions such as Article 19 of Regulation 404/93 of 13 February 1993 and Articles 3 and 4 of Regulation 1442/93 of 12 June 1993 have been implemented and modified through subsequent EC legislation, these rules are still in essence in force in the EC legal order without having been affected by subsequent legislation.

92 Appellate Body Report on "Japan - Taxes on Alcoholic Beverages", DSR 1996:I, 97 at 111. The Report states: "The purpose of Article III:1 is to establish this general principle as a guide to understanding and interpreting the specific obligations contained in Article III:2 and in the other paragraphs of Article III, while respecting, and not diminishing in any way, the meaning of words actually used in the texts of those other paragraphs".

93 *Ibid*.

94 *Ibid*., 120.

7.182 Thus, we find 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 is inconsistent with the requirements of Article III:4 of GATT.

(ii) Article 2 of the TRIMs Agreement

7.183 Proceeding on the assumption that the operator category rules are inconsistent with the requirements of Article III:4, the Complainants allege that the conditions for operator B eligibility and the 30 per cent tariff quota allocation for Category B operators are inconsistent with Article 2.1 of the TRIMs Agreement. The fact that the allocation of 30 per cent of the licences required for the importation of third-country bananas is contingent upon the marketing of EC (and traditional ACP) bananas amounts, in the view of the Complainants, to a purchasing requirement which falls within the first category of the Illustrative List in the Annex to the TRIMs Agreement of those trade-related investment measures which are inconsistent with Article III:4 of GATT.

7.184 In the EC's view, no breach of Article 2 of the TRIMs Agreement can be found because no breach of Article III:4 has occurred. In the alternative, the EC argues that rules establishing operator categories do not fall within the ambit of the TRIMs Agreement because there is no requirement to make an investment within a particular country; nor is there a requirement for purchase or use by an enterprise of products of domestic origin or from any domestic source in order to be allowed to make the investment.

7.185 In considering these arguments, we first examine the relationship of the TRIMs Agreement to the provisions of GATT. We note that with the exception of its transition provisions[95] the TRIMs Agreement essentially interprets and clarifies the provisions of Article III (and also Article XI) where trade-related investment measures are concerned. Thus the TRIMs Agreement does not add to or subtract from those GATT obligations, although it clarifies that Article III:4 may cover investment-related matters.

7.186 We emphasize that in view of the importance of the TRIMs Agreement in the framework of the agreements covered by the WTO, we have examined the claims and legal arguments advanced by the parties under the TRIMs Agreement carefully. However, for the reasons stated in the previous paragraph, we do not consider it necessary to make a specific ruling under the TRIMs Agreement with respect to the eligibility criteria for the different categories of operators and the allocation of certain percentages of import licences based on operator categories. On the one hand, a finding that the measure in question would not be considered

[95] We have already dismissed the Complainants' claim under the transition provisions of Article 5 of the TRIMs Agreement because Article 5 was not listed in the request for the establishment of the Panel as required by Article 6.2 of the DSU, see para. 7.46.

a trade-related investment measure for the purposes of the TRIMs Agreement would not affect our findings in respect of Article III:4 since the scope of that provision is not limited to TRIMs and, on the other hand, steps taken to bring EC licensing procedures into conformity with Article III:4 would also eliminate the alleged non-conformity with obligations under the TRIMs Agreement.

7.187 Therefore, we do not consider it necessary to make a specific ruling under the TRIMs Agreement with respect to 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.

(iii) Article I of GATT

7.188 The Complainants claim that (i) the conditions for operator B eligibility based on marketing of ACP bananas, (ii) the exemption of traditional ACP imports from operator category rules and (iii) the allocation of 30 per cent of the licences allowing imports of third-country bananas at in-quota tariff rates to Category B operators, are inconsistent with the requirements of Article I:1 of GATT. They argue: (a) that the comparatively less complex licensing procedures that apply to imports of bananas from traditional ACP sources are an "advantage" that the EC fails to accord to imports of third-country bananas, and (b) that these aspects of the EC licensing system provide an incentive or requirement to purchase bananas from traditional ACP sources over those originating in third countries. The EC responds that the existence of Category B licences *per se* does not create an incentive to purchase any particular product, but is designed to mitigate the effects of oligopolistic market structures and to stimulate competition between operators. Since licences allocated to particular operators are tradeable, the EC concludes that such licences do not constitute an impediment to imports from any specific source. In the alternative, the EC maintains that the Lomé waiver covers any inconsistency with the requirements of Article I:1 because Category B licences are required under the Lomé Convention in order to maintain existing advantages for traditional ACP bananas on the EC market.

7.189 Article I:1 provides as follows:

> "With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed in 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 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 Members".

In our view, import licensing procedures, including the operator category rules, are "rules and formalities in connection with importation" in the meaning of Arti-

cle I:1. A panel found, for example, that comparatively more favourable rules for revoking countervailing duties were an "advantage" for purposes of Article I:1 and that "making a regulatory advantage available to imports from some countries while not making it available to others" is inconsistent with Article I:1.[96]

7.190 In our view, the operator category and activity function rules contained in the licensing procedures for third-country and non-traditional ACP bananas require substantially more data to be submitted to show entitlement to a licence for third-country and non-traditional ACP bananas than is required by the procedures applicable to traditional ACP bananas. This is clearly demonstrated by comparing the data that needs to be maintained and submitted under the two systems.

7.191 In respect of traditional ACP bananas, we note that, according to the EC,[97] operators need only to obtain special certificates of origin from the issuing authority in the relevant ACP State for traditional ACP imports. In this regard, Article 14(4) of Regulation 1442/93 on "Detailed Rules Applicable to Imports of Traditional ACP Bananas" (as amended by Regulation 875/96) provides:

> "4. Import licence applications shall only be admissible where:
>
> (a) they are accompanied by the original of a certificate drawn up by the competent authorities of the ACP country concerned testifying to the origin of the bananas ...
>
> (b) they contain
>
> - the words 'traditional ACP bananas - Regulation (EEC) No 404/93' ...
> - an indication of the country of origin ..."

7.192 In contrast, in respect of third-country and non-traditional ACP imports, operators need to apply for a reference quantity by sending details of banana volumes marketed during a preceding three-year period to the relevant competent authority. Article 19(2) of Regulation 404/93 on "Detailed Rules for the Application of the Tariff Quota Arrangements" provides in respect of imports of third-country and non-traditional ACP bananas that:

> "On the basis of separate calculations for each of the categories of operators ... each operator shall obtain import licences on the basis of the average quantities of bananas that he has sold in the three most recent years for which figures are available. For the category of [A] operators ..., the quantities to be taken into consideration shall be the sales of third-country and/or non-traditional ACP bananas. In the case of category [B] operators ..., sales of traditional

[96] Panel Report on "US - Denial of MFN Treatment as to Non-Rubber Footwear from Brazil", adopted on 19 June 1992, BISD 39S/128, 150-151, paras. 6.8-6.11.

[97] See the first item on the chart submitted by the EC which is reproduced at para. 4.274.

ACP and/or Community bananas shall be taken into consideration. ...".

Article 4 of Regulation 1442/93 provides:

"1. The competent authorities of the Member States shall draw up separate lists of operators in Category A and B and the quantities which each operators has marketed in each of the three years prior to that preceding the year for which the tariff quota is opened, broken down according to economic activity as described in Article 3(1).

Operators shall register themselves and shall establish quantities they have marketed by submitting individual written applications on their own initiative in a single Member State of their choice.

...

2. The operators concerned shall notify the competent authorities at the latest by ... each year thereafter of the overall quantities of bananas marketed in each of the years referred to in paragraph 1, breaking them down clearly:

(a) according to origin, pursuant to the definition laid down in Article 15 of Regulation (EEC) No 404/93,[98] as follows:

- of imports from non-ACP third countries and non- traditional imports from ACP States,
- traditional imports from ACP States within the quantities set out in the Annex to Regulation (EEC) No. 404/93, specifying the quantities by State,
- Community bananas, specifying the region of production;

(b) according to the economic activity as described in Article 3(1).

3. The operators concerned shall make the supporting documents specified in Article 7 available to the authorities."

Article 7 of Regulation 1442/93 provides:

"At the request of the competent authorities of the Member States, the following documents may be submitted to establish the quantities marketed by each operator in Category A and B registered with them:

[98] Article 15 of Regulation 404/93 provides for definitions of, inter alia, "traditional imports from ACP States"', "non-traditional imports from ACP States", "imports from non ACP-third countries", "Community bananas".

- the copy delivered to the importer of the Single Administrative Document (SAD) or, where applicable, his copy of the document for simplified declarations,
- a copy of the T2 declaration issued pursuant to ... for transactions effected during the reference period,
- original sales invoices or certified copies thereof,
- any relevant supporting documents such as national import documents issued and used before the entry into force of these arrangements,
- import licences issued pursuant to this Regulation and documents testifying to the marketing of bananas produced in the Community."

The information required to support claims in respect of activity functions (e.g., ripening) is not specified in this provision, but such information also must be maintained and submitted. We further note that the filing of data concerning the past volumes of traditional ACP and/or EC bananas marketed for purposes of the calculation of reference quantities for Category B operators relates to the eligibility of such operators for the allocation of licences allowing the importation of third-country and non-traditional ACP bananas at in-quota tariff rates. However, this filing of data on past banana volumes marketed is not a prerequisite for the importation of traditional ACP bananas, for the issuance of traditional ACP import licences, or for the marketing of EC bananas.

7.193 From the foregoing, in our view, it is clear that the procedural and administrative requirements for imports of third-country and non-traditional ACP bananas arising from the application of the operator category rules differ from, and go significantly beyond, those required in respect of traditional ACP bananas. Thus, we believe that the licensing procedures applied by the EC to traditional ACP banana imports, when compared to the licensing procedures imposed on third-country and non-traditional ACP imports with its operator category rules, can be considered as an "advantage" which the EC does not accord to third-country and non-traditional ACP imports. The EC thereby acts inconsistently with the requirements of Article I:1.

7.194 In addition, Article I:1 obliges a Member to accord any advantage granted to any product originating in any country to the like product originating in the territories of all other Members, in respect of matters referred to in Article III:4. The matters referred to in Article III:4 are "laws, regulations and requirements affecting [the] internal sale, offering for sale, purchase, transportation, distribution and use [of a product]". In our view, the allocation to Category B operators of 30 per cent of the licences allowing for the importation within the tariff quota of third-country bananas means *ceteris paribus* that operators who in the future wish to maintain or increase their share of licences for the importation of third-country and non-traditional ACP bananas at in-quota tariff rates would be required to maintain or increase their current purchases and sales of traditional ACP (or EC) bananas in order to claim that they market traditional ACP (or EC)

bananas for purposes of the operator category rules. Such a requirement to purchase and sell a product from one country (i.e., a source of traditional ACP imports) in order to obtain the right to import a product from any other country (i.e., a third country or a source of non-traditional ACP imports) at a lower rate of duty under a tariff quota is a requirement affecting the purchase of a product within the meaning of Articles III:4 and I:1. The allocation of licences allowing imports of third-country and non-traditional ACP bananas at in-quota tariff rates to operators who purchase and sell traditional ACP bananas is inconsistent with the EC's obligations under Article I:1 because it constitutes an advantage of the type covered by Article I that is accorded to traditional ACP bananas but which is not accorded to like products from all Members (i.e., non-traditional ACP and third-country bananas). We note that this result was also reached in the second *Banana* panel report as quoted above.[99]

7.195 Thus, we find that 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, are inconsistent with the requirements of Article I:1 of GATT.

(iv) Application of the Lomé Waiver to the EC's Article I Obligations

7.196 In light of the foregoing finding that the operator category rules contained in the EC's licensing procedures for bananas are inconsistent with the requirements of Article I:1, we must consider whether the EC's obligations in this respect have been waived by the Lomé waiver. We have already found that the Lomé waiver covers (i) tariff preferences that the EC currently affords to traditional and non-traditional ACP bananas, which would otherwise be inconsistent with its obligations under Article I:1 (paragraph 7.136) and (ii) to a limited extent, the banana tariff quota share allocations made by the EC to certain ACP countries, which would otherwise be inconsistent with its obligations under Article XIII (paragraph 7.110). As we noted in our discussion of this issue in the context of Article XIII, we must first determine whether the EC licensing procedures that we have found to be inconsistent with the requirements of Article I:1 are required by the Lomé Convention. If it is not, then the Lomé waiver is not applicable.

7.197 We recall that the operative paragraph of the Lomé waiver provides as follows:

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[99] Panel Report on "EEC - Import Regime for Bananas", issued on 11 February 1994 (not adopted), DS38/R, p.42ff, paras. 143-148, especially para.147.

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

For purposes of examining the issue of what is required by the Lomé Convention, we must examine the provisions of Article 168 and Protocol 5 of the Lomé Convention. In addition, we also consider whether the Lomé waiver should be interpreted to cover other provisions of the Lomé Convention that might be read to require such licensing procedures for ACP countries.

7.198 Article 168 of the Lomé Convention requires in general that ACP products be admitted duty-free to the EC. However, in the case of products, such as bananas, that are subject to specific rules as a result of the common agricultural policy, under Article 168(2)(a) they are to be (i) accorded duty-free treatment if there are no non-tariff measures applicable to their import or (ii) if (i) is not applicable (as is the case for bananas), given "more favourable treatment than that granted to third countries benefitting from the most-favoured-nation clause for the same products". The importation of traditional ACP bananas and non-traditional ACP bananas within the EC tariff quota is duty-free. Thus, for those imports, the basic requirement of Article 168, as expressed in its first paragraph, has been met, and we see no requirement in Article 168 that the EC must provide favourable treatment beyond such duty-free treatment. The Lomé waiver should not be interpreted to permit breaches of WTO rules that are not clearly required to satisfy the provisions of the Lomé Convention. This reading is confirmed by the terms of the waiver itself, which states in its fourth preambular paragraph: "Considering that the preferential treatment ... required by the Convention is designed ... not to raise undue barriers or to create undue difficulties for the trade of other contracting parties". In our view, the EC licensing procedures at issue do create undue difficulties for the trade of other Members. Accordingly, since Article 168 of the Lomé Convention does not specifically require these licensing procedures, it cannot be invoked as a justification for applying the Lomé waiver to such procedures.

7.199 Protocol 5 of the Lomé Convention provides:

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

Protocol 5 suggests that each ACP country must be protected as regards its traditional markets and advantages thereon, nothing in the Lomé Convention specifically requires a licensing system for third-country and non-traditional ACP banana imports, such as is provided by the application of the operator category-activity function system to third-country and non-traditional ACP imports. It is,

however, necessary to consider whether these licensing procedures were one of the advantages, as that term is used in Protocol 5, formerly enjoyed by the ACP countries under member States' banana import regimes.

7.200 The first *Banana* panel report provided detailed information on the licensing systems that were applied in the EC member States prior to the implementation of its common market organization for bananas. Prior to the implementation of Regulation 404/93, ACP bananas were primarily imported by France and the United Kingdom.[100] The panel report described the French regime as follows:

> "19. A banana import régime was first established in France by a Decree of 9 December 1931. This provided for the imposition of temporary quotas on imports of bananas from third countries. It was complemented by a law of 7 January 1932, on safeguard of production of bananas in colonies, protectorates or territories under French mandate. By Decree No. 60-460 of 16 May 1960, a special import régime was established for countries of the "zone franc" (i.e. former colonies). By an *arbitration* of the President of the Republic of 1962, the general supply of the French market was divided as follows: two thirds for national production (Guadeloupe, Martinique) and one third for imports from African suppliers (Cameroon, Côte d'Ivoire and Madagascar). Bananas from the Latin American countries were imported only to make up for any shortfall from the regions or countries mentioned above. When imported, the Latin American bananas were subject to the bound 20 per cent tariff and to licences.
>
> 20. In order to manage the banana market, an Interprofessional Committee for Bananas (Comité Interprofessionnel Bananier "CIB") was established on 5 December 1932. It was recognized as an agricultural interprofessional organization on 1 April 1989. The CIB brought together producers and importers, ripeners and distributors, including representatives of the African producers, as well as associated members (i.e., transporters). Since 1970, the GIEB (Groupement d'Intérêt Economique Bananier - Banana Economic Interest Group) has administered the existing quotas and import licences.
>
> 21. The CIB was responsible for assessing the demand for bananas on the French market on a yearly basis. A restricted Committee *(Conseil d'Administration)* of the CIB met every month to examine the quantities to buy the following month and to make a forecast for two months. In case of shortage of supply from one of

[100] Panel Report on "EEC - Member States' Import Regimes for Bananas", issued on 3 June 1993 (not adopted), DS32/R, p.3, para. 12.

> the domestic or African sources, the CIB requested the GIEB to import from other third countries. In addition, the Ministry of Economics and Finance published notices to importers concerning the opening of quotas administered through licences. These licences were valid for a period of six months and were primarily designed to cover indirect imports made through other member States, as direct imports were made by the GIEB.
>
> 22. Import licences were granted to the GIEB by the government. The GIEB was exclusively responsible for purchasing and importing bananas directly from third countries. Imported quantities were then sold by the GIEB at the domestic market price. The "mark-up" was transferred to the Treasury. In addition to the national market organization, France was authorized, under the provisions of Article 115 of the Treaty of Rome, not to grant EEC treatment to bananas originating in certain third countries and put into free circulation in another EEC member State".[101]

It described the regime of the United Kingdom as follows:

> "37. The banana import régime dated back to the early 1930's when the United Kingdom introduced preferential duties on imports of British Empire bananas. Traditionally, and before it joined the EEC, the United Kingdom imported most of its bananas from the Windward Islands and Jamaica, formerly part of the British Empire. These countries were now regarded as ACP countries under the Lomé Convention. Imports of bananas from ACP countries entered in unrestricted quantities and duty free. Between 1940 and 1958, there was a total ban on imports of bananas from Latin American countries. Thereafter, imports from third countries, usually Latin American bananas, had been subject to a quota, since 1985 an annual quota, and a licensing system, as well as the common external tariff of 20 per cent. Licences were granted under Section 2 of "The Import of Goods (Control) Order" of 1954. There was a guaranteed minimum quantity for third country banana imports which, in 1992, amounted to 38,868 tons. Additional imports from third countries occurred when there was a short-fall of supplies. Upon its accession to the EEC, the United Kingdom was authorized, by the Commission of the EC, under Article 115 of the Treaty of Rome, to apply restrictions to imports, through other member States, of bananas from third countries, put into free circulation in the EEC.

[101] Panel Report on "EEC - Member States' Import Regimes for Bananas", issued on 3 June 1993 (not adopted), DS32/R, pp. 4-5, paras. 19-22.

> 38. At the beginning of every calendar year, the government authorities fixed the level of bananas that could be imported from all suppliers, according to the domestic needs determined by the Ministry of Agriculture, Fisheries and Food. On the basis of these parameters, monthly supply and demand conditions were established by the Banana Trade Advisory Committee (BTAC), set up in 1973 as a consultative committee for trade in bananas. Under the existing rules, the Department of Trade and Industry (DTI) was responsible for administering the import licensing system which controlled the quantity of banana imports from third country suppliers. The DTI issued public notices to importers. Since 1985, this took the form of an annual Notice to Importers, inviting applications for licences for the importation of bananas of non-preferential origin. Importers who fulfilled certain well-established criteria were eligible to obtain these licences. Once licences were allocated, for the annual basic import quota, management of further imports from third countries was done on a monthly basis. The BTAC met to consider updated forecasts of supply and demand. The DTI was then advised on the issue of further licences to cover shortfalls in supply and increases in demand".[102]

Based on the foregoing description of the UK and French procedures, it appears that when licences for banana imports were used, they were issued on a discretionary basis from time to time to established importers. Thus, prior to or as of 1990 (the reference period in the Lomé Convention for past or present advantages), neither the French nor the UK procedures appears to contain anything at all similar to the operator category-activity function system. Thus, in our view, licensing procedures of the kind presently applied were not an "advantage" that ACP countries formerly enjoyed in the EC or in individual member State markets.

7.201 In this connection, the EC argues that its licensing system is necessary to provide that the quantities for which access opportunities were given could actually be sold thereby guaranteeing traditional ACP bananas their existing advantages. We note that it appears that the ACP countries have enjoyed greater collective success on the EC market under Regulation 404/93 than in the years prior to 1993.[103] In any event, we believe that there are other methods consistent with WTO rules by which the EC could assist the ACP countries to compete on the EC market. As noted above, in our view, the Lomé waiver should not be inter-

[102] Panel Report on "EEC - Member States' Import Regimes for Bananas", issued on 3 June 1993 (not adopted), DS32/R, p. 7, paras. 37-38.

[103] According to statistics submitted by the EC, the ACP countries' average share of the EC-12 market for imported bananas averaged 611,000 tonnes in the years 1989-1992, or 22.8 per cent. For 1993-1994, it averaged 737,000 tonnes, or 25.4 per cent. The Complainants suggest that the ACP share is understated in the EC statistics.

preted to permit breaches of WTO rules that are not clearly required to satisfy the provisions of the Lomé Convention. This reading is, in our view, confirmed by the terms of the waiver itself, which states in its fourth preambular paragraph: "Considering that the preferential treatment ... required by the Convention is designed ... not to raise undue barriers or to create undue difficulties for the trade of other contracting parties". In our view, these licensing procedures do create undue difficulties for the trade of other Members. Since licensing procedures are not an advantage formerly enjoyed by ACP countries and they are not required to provide access to traditional markets, such procedures are not covered by the Lomé waiver.

7.202 There are other provisions of the Lomé Convention, such as Articles 15(a) and 167, that call for the promotion of trade between the EC and ACP countries. However, they are too general to impose specific requirements on the EC. Thus, we do not agree that those provisions can be read to require a particular licensing system such as the operator category-activity function system.

7.203 Finally, we note that a finding that the Lomé waiver does not apply to the EC's licensing procedures for banana imports is in accordance with past panel practice that waivers should be interpreted narrowly.[104]

7.204 Thus, we find that the Lomé waiver does not waive the EC's obligations under Article I:1 of GATT in respect of licensing procedures applied to third-country and non-traditional ACP imports, including those related to operator category rules.

(v) Article X:3(a) of GATT

7.205 The Complainants claim that the EC licensing procedures are inconsistent with the requirements of Articles X:3 of GATT because they are not administered in a uniform, impartial and reasonable manner. The EC responds that Article X:3 only applies to internal measures and therefore is not applicable in this case. Alternatively, it argues that a system permitted under Article I by the Lomé waiver cannot be found to breach another GATT provision imposing MFN-like obligations similar to those waived. We note that we found in the preceding section that the EC licensing procedures were not permitted under Article I by the Lomé waiver.

7.206 Article X:3(a) provides:

> "Each Member shall administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings of the kind described in paragraph 1 of this Article".

Article X:1 defines the coverage of Article X:3(a) as follows:

[104] Panel Report on "US - 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 on 7 November 1990, BISD 37S/228, 256-257, para. 5.9.

> "Laws, regulations, judicial decisions and administrative rulings of general application, made effective by any Member, pertaining to the classification or the valuation of products for customs purposes, or to rates of duty, taxes or other charges, or to requirements, restrictions or prohibitions on imports or exports or on the transfer of payments therefor, or affecting their sale, distribution, transportation, insurance, warehousing, inspection, exhibition, processing, mixing or other use ...".

Given that this provision enumerates national legislation regarding border measures as well as internal measures, and customs tariffs as well as quantitative measures, the coverage of Article X could hardly be more comprehensive. Accordingly, internal laws regulating border measures constitute "... requirements ... on imports ..." in the meaning of Article X:1 and cannot be excluded from its scope.

7.207 Consequently, we find that the EC import licensing procedures are subject to the requirements of Article X of GATT.

7.208 More specifically, the Complainants claim that the rules establishing operator categories on the basis of the source of bananas marketed during a preceding three-year period are inconsistent with the requirements of Article X:3(a) because the EC applies them to imports of third-country and non-traditional ACP bananas but not to traditional ACP imports. According to the Complainants, these rules are inconsistent with the standards of "uniform, impartial and reasonable administration" of domestic laws, regulations, decisions and rulings and thus are inconsistent with the requirements of Article X:3(a). The EC maintains that the rules applying operator categories are administered in a uniform, impartial and reasonable manner among the third countries which are subject to that separate licensing regime and that the Complainants have failed to provide evidence to the contrary.

7.209 The Complainants support their argument by referring to a 1968 Note by the GATT Director-General, which stated that Article X:3(a)

> "would not permit, in the treatment accorded to imported goods, discrimination based on country of origin, nor would they permit the application of one set of regulations and procedures with respect to some contracting parties and a different set with respect to the others". [105]

The EC responds that the 1968 Note cannot be considered as an authoritative interpretation of GATT rules because it was never endorsed by a formal decision of the CONTRACTING PARTIES.

7.210 We note that a prior panel in discussing the interpretation of Article X:3(a) found that its terms would be met if regulations were applied "in a sub-

[105] Note by the GATT Director-General of 29 November 1968, L/3149.

stantially uniform manner, although there were some minor administrative variations, e.g. concerning the form in which licence applications could be made and the requirement of pro-forma invoices".[106] In that case, the panel found that such differences were minimal and did not in themselves establish a breach of Article X:3(a).

7.211 In our view, the Director-General's Note correctly describes the reach of Article X:3(a) and is consistent with the quoted panel decision. While minor "administrative variations" in the application of regulations may not be inconsistent with the requirements of Article X:3(a), as suggested by the above-mentioned panel report, two different sets of rules would be inconsistent with the requirements of Article X:3(a). In this case, we are confronted with a system for the importation of bananas into the EC with two different origin-based sets of import licensing procedures. These sets of licensing procedures differ significantly from one another, depending on whether imports of bananas are from traditional ACP sources or from third countries and non-traditional ACP sources, particularly with respect to the application of the rules on operator categories. The operator category (and activity function) rules contained in the licensing procedures for third-country and non-traditional ACP bananas (but not in the procedures applicable to traditional ACP bananas) mean that substantially more data must be maintained and submitted to show entitlement to a licence for third-country and non-traditional ACP bananas (see paragraph 7.190 *et seq*.). These differences are not consistent with Article X:3(a)'s requirement of "uniform" administration.

7.212 As a result, we find that 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, is inconsistent with the requirements of Article X:3(a) of GATT.

(vi) Other Claims

7.213 In light of the foregoing findings on operator category rules and the allocation of certain percentages of import licences on the basis thereof, we do not consider it necessary to address the other claims raised by the Complaining parties against these EC measures.[107] We further note that a finding that operator

[106] Panel Report on "EEC - Restrictions on Imports of Dessert Apples", Complaint by Chile, adopted on 22 June 1989, BISD 36S/93, 133, para. 12.30. In the descriptive part of the *Chilean Apples* case, "concerning Article X:3, Chile argued that there were differences among the ten member states of the EEC as to the requirements they imposed on applications for licences for imports of dessert apples. It cited examples, such as a French requirement for licence applications to be accompanied by a pro forma invoice, which effectively meant that licences could not be applied for until after ships had been loaded. Other examples cited by Chile included acceptance of telexed licence applications by some member states and not others; differing procedures for bank guarantees; and the refusal by one member state to accept a licence issued by another". Idem at page 116, para. 6.3.

[107] See note 47 supra.

category rules are or are not inconsistent with the requirements of other provisions of GATT or the Licensing Agreement would not affect the findings we have made in respect of operator category rules.

(c) Activity Functions

7.214 Activity function rules apply to Category A operators as well as to Category B operators. Article 3 of Regulation 1442/93 defines three categories of economic activities, i.e. (1) "primary" importers, (2) "secondary" importers and (3) ripeners. Fixed percentages of the licences required for the importation of bananas from third countries or non-traditional ACP sources at lower duty rates within the tariff quota are allocated on the basis of these "activity functions": Article 5 of Regulation 1442/93 provides for a weighting coefficient of 57 per cent for "primary" importers, 15 per cent for "secondary" importers, and 28 per cent for ripeners of bananas. The EC notes that "the Commission is guided by the principle whereby the licences must be granted to natural or legal persons who have undertaken the commercial risk of marketing bananas and by the necessity of avoiding disturbing normal trading relations between persons occupying different points in the marketing chain".[108]

7.215 The Complaining parties raise claims against the activity function rules under Articles I, III, X and XIII of GATT as well as claims under the Licensing Agreement. In the case of the United States, we consider the claims it has raised under Article I of GATT.

(i) Article III:4 of GATT

7.216-7.219 [Used in the Guatemala-Honduras report.]

(ii) Article I:1 of GATT

7.220 The Complainants claim that activity function rules are inconsistent with the requirements of Article I:1 because import licences for bananas from third countries are issued to Category A and B operators according to the economic activities performed by them, while the licensing system applied to imports of traditional ACP bananas does not utilize activity functions as a criteria for issuing licences. The EC argues that it is necessary to issue licences on the basis of activity functions so that certain operators in the supply chain do not obtain extraordinary bargaining power due to the commercial and financial power associated with import licences and that the use of activity functions as a criteria for issuing licences has no direct impact on the imports of bananas from any source. In the EC's view, the absence of a licence allocation based on activity functions under the traditional ACP licensing procedures cannot be regarded as an "ad-

[108] Recital 15 of Council Regulation 404/93.

vantage" in the meaning of Article I and thus there is no inconsistency with the requirements of Article I. In the alternative, the EC takes the position that activity function rules are covered by the Lomé waiver.

7.221 In our view, import licensing procedures, including the activity function rules, are "rules and formalities in connection with importation" in the meaning of Article I:1. For example, a panel found that comparatively less favourable rules for revoking countervailing duties were an "advantage" for purposes of Article I:1 and that "making a regulatory advantage available to imports from some countries while not making it available to others" is inconsistent with Article I:1.[109] As noted earlier (paragraph 7.190 *et seq*.), in our view, the procedural and administrative requirements for imports of third-country and non-traditional ACP bananas arising from the application of the activity function rules differ from, and go significantly beyond, those required in respect of traditional ACP bananas. More specifically, the activity function rules contained in the licensing procedures for third-country and non-traditional ACP bananas (but not in the procedures applicable to traditional ACP bananas) mean that substantially more data must be maintained and submitted to show entitlement to a licence for third-country and non-traditional ACP bananas. In particular, in respect of past banana imports, Article 4(2) of Regulation 1442/93 requires a breakdown by origin, by category *and* activity function. Thus, we believe that the licensing procedures applied by the EC to traditional ACP banana imports, when compared to the licensing procedures imposed on third-country and non-traditional ACP imports with its activity function rules, can be considered as an "advantage" which the EC does not accord to third-country and non-traditional ACP imports..

7.222 We consider that imports of third-country and non-traditional ACP bananas are treated less favourably than traditional ACP imports since the latter are not subject to activity function rules. Finally, for the reasons given above, we reiterate our finding that the Lomé waiver does not waive the EC's obligations under Article I:1 in respect of licensing procedures (paragraph 7.204).

7.223 Accordingly, we find that 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, is inconsistent with the requirements of Article I:1 of GATT.

(iii) Article X:3(a) of GATT

7.224-7.231 [Used in the Ecuador, Guatemala-Honduras and Mexico reports.]

[109] Panel Report on "US - Denial of MFN Treatment as to Non-Rubber Footwear from Brazil", adopted on 19 June 1992, BISD 39S/128, 150-151, paras. 6.8-6.14.

(iv) Other Claims

7.232 In light of the foregoing findings on activity function rules under Articles I and X, we do not consider it necessary to address the other claims raised by the Complaining parties against these EC measures.[110] We further note that a finding that activity function rules are or are not inconsistent with the requirements of other provisions of GATT or the Licensing Agreement would not affect the findings we have made in respect of activity function rules.

(d) BFA Export Certificates

7.233 As part of the EC import licensing procedures, Category A and C operators are required, for imports from Colombia, Costa Rica or Nicaragua, to present export certificates issued by these countries. Category B operators are exempted from this requirement.

The relevant part of Article 6 of the BFA provides that:

> "... supplying countries with country quotas may deliver special export certificates for up to 70% of their quota, which, in turn, constitute a prerequisite for the issuance, by the Community, of certificates for the importation of bananas from said countries by "Category A" and "Category C" operators. ...".

The relevant part of Article 3.2 of EC Regulation 478/95 reads as follows:

> "For goods originating in Colombia, Costa Rica or Nicaragua, the application for an import licence of category A or C ... shall also not be admissible unless it is accompanied by an export licence currently valid for a quantity at least equal to that of the goods, issued by the competent authorities listed in Annex II."[111]

In light of these provisions, we consider the claims raised the Complaining parties, who have alleged that the export certificate requirement is inconsistent with the requirements of Articles I:1, III:4 and X:3 of GATT and Articles 1.2, 1.3 and 3.2 of the Licensing Agreement. In the case of the United States, we consider the claim it raised under Article I:1.

7.234 Initially, the EC argues that a consideration of export certificates is outside the Panel's terms of reference because such certificates are not issued by the EC and therefore not part of the EC banana import regime. We agree that to the extent that the administration of export certificates is carried out by the authorities of Colombia, Costa Rica or Nicaragua, as appropriate,[112] it is not within the

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[110] See note 47 supra.

[111] Regulation 478/95 of 1 March 1995 on additional rules for the application of Council Regulation (EEC) No. 404/93 as regards the tariff quota arrangements for imports of bananas into the Community and amending Regulations (EEC) No. 1442/93, O.J. L 49/13 of 4 March 1995.

[112] According to Annex II of Regulation 478/95, the bodies authorized to issue special export certificates are: for Colombia: Instituto Colombiano de Comercio Exterior; for Costa Rica: Corporación

terms of reference of this Panel. However, we cannot agree with the EC's argument that export certificates are completely outside the EC's sphere of competence and their legal examination thus entirely excluded from the mandate of this Panel. On the contrary, Article 3 of Regulation 478/95 states clearly that an application for an EC import licence is not admissible unless it is accompanied by an export certificate. Thus the requirement to match EC import licences with BFA export certificates and the exemption of Category B operators therefrom are part of the EC legal system and, accordingly, are within our terms of reference, to the extent they fall within the EC's responsibility.

(i) Article I:1 of GATT

7.235 The Complainants claim that the fact that the EC recognizes only export certificates issued by BFA signatories as prerequisites for importation, amounts to the conferral of a "privilege" (i.e., a commercial benefit) not enjoyed by other Members. This is alleged to be inconsistent with the requirements of Article I:1.

7.236 The EC responds that the Complainants have failed to prove that the export certificate requirement constitutes an "advantage" in the meaning of Article I:1 accorded to BFA signatories which is not conferred on other third countries. The EC concedes that the administration of the export certificates by BFA signatories can generate quota rents, but only among operators who are interested in marketing BFA bananas. However, the EC takes the position that the WTO agreements do not contain rules on the sharing and allocation of quota rents, e.g., by means of a licensing scheme. Therefore, in its view, any government is entitled to pursue its own policies in the distribution of quota rents provided that there is no discrimination between products originating in different Members.

7.237 The issue presented is whether the export certificate requirement constitutes an advantage in respect of rules and formalities in connection with importation accorded to BFA bananas that is not accorded to third-country bananas as required by Article I:1.

7.238 On its face, it would appear that there is discrimination against BFA bananas because they are subject to a requirement that is not imposed on other third-country bananas. However, closer analysis suggests that the export certificate requirement may in fact constitute a favour, advantage, privilege or immunity in the meaning of Article I. It is a commonplace, which no party to the dispute contests, that tariff quotas are likely to generate quota rents. The allocation of licences used in the administration of such tariff quotas can be viewed as a mechanism for the distribution of such rents. In fact, the parties do not contest that the export certificate requirement serves the purpose, or at least has the effect, of transferring part of the quota rent which would normally accrue to initial

Bananera S.A.; and for Nicaragua: Ministerio de Economia y Desarrollo, Dirección de Comercio Exterior.

EC import licence holders to the suppliers who are initial holders of export certificates for bananas originating in the three BFA countries. The EC argues that the WTO agreements do not contain any rules governing the distribution of quota rents which are generated by trade measures, e.g., tariff quotas, whose imposition is legitimate under those agreements. We nevertheless have to ascertain whether the particular mechanisms implemented for the purposes of rent transfer directly or indirectly entail inconsistencies with the obligations Members have to respect under the WTO agreements.

7.239 The requirement to match EC import licences with BFA export certificates means that those BFA banana suppliers who are initial holders of export certificates enjoy a commercial advantage compared to banana suppliers from other third countries.[113] We note that it is not possible to ascertain how many of the initial BFA export certificate holders are BFA banana producers or to what extent the tariff quota rent share that accrues to initial holders of BFA export certificates is passed on to the producers of BFA bananas in a way to create more favourable competitive opportunities for *bananas* of BFA origin. However, we also note that the possibility does exist to pass on tariff quota rent to BFA banana producers in such a way, whereas there is no such possibility in respect of non-BFA third-country banana producers. Thus, the EC's requirement affects the competitive relationship between *bananas* of non-BFA third-country origin and bananas of BFA origin. It is certainly true that Article I of GATT is concerned with the treatment of foreign *products* originating from different foreign sources rather than with the treatment of the suppliers of these products. In this respect, we note that the transfer of tariff quota rents which would normally accrue to initial holders of EC import licences to initial holders of BFA export certificates does occur when *bananas* originating in Colombia, Costa Rica and Nicaragua are, at some point, traded to the EC. Therefore, in our view, the requirement to match EC import licences with BFA export certificates and thus the commercial value of export certificates are linked to the *product* at issue as required under Article I. In practice, from the perspective of EC *importers* who are Category A or C operators, bananas of non-BFA third-country origin appear to be more profitable than bananas of BFA origin. This is confirmed by the fact that EC import licences for non-BFA third-country bananas and Category B licences for BFA bananas are typically oversubscribed in the first round of licence allocations, while Category A and C licences for BFA bananas are usually exhausted only in the second round of the quarterly licence allocation procedure. The EC argues that the fact that licences allowing the importation of non-BFA bananas at in-quota tariff rates are usually exhausted in the first round amounts to an advantage

[113] "Whereas the framework agreement provides that the signatory countries are authorized to issue export licences for seventy percent of their allocations, which licences are to be presented in order to obtain import licences of Category A and C for import into the Community, *in conditions which may improve the regularity and stability of commercial transactions* and guarantee the absence of any discriminatory treatment among operators" (emphasis added). Recital 8 of Regulation 478/95.

for bananas of Complainants' origin. While we do not endorse the EC's view, even if this were to constitute an advantage, we note "that Article I:1 does not permit balancing more favourable treatment under some procedure against a less favourable treatment under others".[114]

7.240 Indeed, one could argue that if the export certificate requirement is beneficial to BFA countries, non-BFA third countries could autonomously introduce a similar requirement in order to reap quota rent benefits. In this case, however, since the allocation of the "others" category of the BFA is not country-specific under the current EC regime, operators could switch to alternative sources within this category which are not subject to an export certificate requirement. Therefore, we consider that the requirement to match BFA export certificates with EC import licences in connection with the country-specific allocation of tariff quota shares under the BFA is an advantage or privilege in the terms of Article I:1 in respect of rules and formalities in connection with importation. Since the EC accords this advantage to products originating in Colombia, Costa Rica and Nicaragua "while denying the same advantage to a like product originating in the territories of other [Members],"[115] i.e., the Complainants' countries, the requirement to match EC import licences with BFA export certificates as provided for in Article 3 of Regulation 478/95 is inconsistent with Article I:1.

7.241 For these reasons, we find that the requirement to match EC import licences with BFA export certificates is inconsistent with the requirements of Article I:1 of GATT.

(ii) Other Claims

7.242 In light of our finding that the requirement to match EC import licences with BFA export certificates is inconsistent with the requirements of Article I:1, one of the fundamental provisions of GATT, we consider it unnecessary to make specific rulings on the other claims raised by the Complaining parties with respect to the same EC measures, including the claim that the exemption of Cate-

[114] "The Panel ... considered that Article I:1 does not permit balancing more favourable treatment under some procedure against a less favourable treatment under others. If such a balancing were accepted, it would entitle a contracting party to derogate from the most-favoured nation obligation in one case, in respect of one contracting party, on the ground that it accords more favourable treatment in some other case in respect of another contracting party. In the view of the Panel, such an interpretation of the most-favoured-nation obligation of Article I:1 would defeat the very purpose underlying the unconditionality of that obligation". Panel Report on "United States - Denial of Most-favoured-nation Treatment as to Non-rubber Footwear from Brazil", adopted on 19 June 1992, BISD 39S/128, 151, para. 6.10. Likewise, in the context of Article III a panel found that "an element of more favourable treatment would only be relevant if it would always accompany and offset an element of differential treatment causing less favourable treatment." Panel Report on "United States - Section 377 of the Tariff Act of 1930", adopted on 7 November 1989, BISD 36S/345, 388, para. 5.16.

[115] Panel Report on "United States - Denial of Most-favoured-nation Treatment as to Non-rubber Footwear from Brazil", adopted on 19 June 1992, BISD 39S/128, 151, para. 6.11.

gory B operators from the matching requirement violates Article I also.[116] A finding that these measures are or are not inconsistent with the requirements of Articles III and X of GATT and the Licensing Agreement would not affect our findings in respect of Article I. Moreover, steps taken by the EC to bring the measures into conformity with Article I should also eliminate the alleged non-conformity with these other obligations.

(e) Hurricane Licences

7.243 Hurricane licences[117] authorize operators who include or represent EC and ACP producers, or producer organizations "to import in compensation third-country bananas and non-traditional ACP bananas for the benefit of the operators who directly suffered damage as a result of the impossibility of the supplying the Community market with bananas originating in affected producer regions" because of the impact of tropical storms.[118] In the aftermath of the hurricanes Debbie, Iris, Luis and Marilyn, 281,605 tonnes[119] of third-country or non-traditional ACP imports were authorized between November 1994 and May 1996. The Complaining parties have raised claims under Article I, III and X of GATT and Articles 1.2, 1.3 and 3.5(h) of the Licensing Agreement. In the case of the United

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[116] See note 47 supra.

[117] See, e.g., Commission Regulation (EC) No. 2791/94 of 16 November 1994 on the exceptional allocation of a quantity additional to the tariff quota for imports of bananas in 1994 as a result of tropical storm Debbie. Commission Regulation (EC) No. 510/95 of 7 March 1995 on the exceptional allocation of a quantity additional to the tariff quota for imports of bananas during the first quarter of 1995 as a result of tropical storm Debbie. Commission Regulation (EC) No. 1163/95 of 23 May 1995 on the exceptional allocation of a quantity additional to the tariff quota for imports of bananas during the second quarter of 1995 as a result of tropical storm Debbie. Commission Regulation (EC) No. 2358/95 of 6 October 1995 on the exceptional allocation of a quantity additional to the tariff quota for imports of bananas during the fourth quarter of 1995 as a result of tropical storms Iris, Luis and Marilyn. Commission Regulation (EC) No. 127/96 of 25 January 1996 on the exceptional allocation of a quantity additional to the tariff quota for imports of bananas during the first quarter of 1996 as a result of tropical storms Iris, Luis and Marilyn. Commission Regulation (EC) No. 822/96 of 3 May 1996 on the exceptional allocation of a quantity additional to the tariff quota for imports of bananas during the second quarter of 1996 as a result of tropical storms Iris, Luis and Marilyn.

[118] "Whereas ... these measures should be to the benefit of the operators who have directly suffered actual damage, without the possibility of compensation, and as a function of the extent of the damage." Recital 9 of Commission Regulation (EC) No. 510/95 of 7 March 1995 on the exceptional allocation of a quantity additional to the tariff quota for imports of bananas during the first quarter of 1995 as a result of tropical storm Debbie.

[119] Total quantities of authorized third-country and non-traditional ACP imports:

Regulation No. 2791/94 of 18 November 1994:	53,400 tonnes
Regulation No. 510/95 of 7 March 1995:	45,500 tonnes
Regulation No. 1163/95 of 23 May 1995:	19,465 tonnes
Regulation No. 2358/95 of 6 October 1995:	90,800 tonnes
Regulation No. 127/96 of 25 January 1996:	51,350 tonnes
Regulation No. 822/96 of 3 May 1996:	21,090 tonnes
Total:	281,605 tonnes

States, we consider the claim it raised under Article 1.3 of the Licensing Agreement.

(i) Article III:4 of GATT

7.244-7.250 [Used in the Guatemala-Honduras and Mexico reports.]

(ii) Article I:1 of GATT

7.251-7.256 [Used in the Guatemala-Honduras report.]

(iii) Application of the Lomé Waiver

7.257-7.259 [Used in the Guatemala-Honduras report.]

(iv) Article 1.3 of the Licensing Agreement

7.260 The Complainants claim that the issuance of hurricane licences by the EC exclusively to EC and ACP producers and producer organizations as well as operators who include or directly represent them is inconsistent with the requirements of Article 1.3 which requires the neutral application and the fair and equitable administration of import licensing procedures. The EC argues that no discrimination occurs in connection with the issuance of hurricane licences because the eligibility for hurricane licences is based on objective criteria.

7.261 Article 1.3 of the Licensing Agreement provides:

> "The rules for import licensing procedures shall be neutral in application and administered in a fair and equitable manner".

To apply Article 1.3, we must interpret the terms "neutrality" in application, as well as "fairness" and "equity" in administration. In this regard, we recall our interpretation of Article X:3(a) of GATT (paragraph 7.211). Using the reasoning developed there, we interpret the phrase "neutrality in application" to preclude the imposition of one system of import licensing procedures in respect of a product originating in certain Members and a different system of import licensing procedures on the same product originating in other Members.[120] In particular, we consider that the issuance of hurricane licences exclusively to ACP and EC producers and organizations or operators including or directly representing them in respect of bananas lost to hurricanes, but not to third-country producers and producer organizations or operators including or directly representing them, is inconsistent with the requirement of neutral application as contained in Article 1.3. In the light of the foregoing, we find it unnecessary to consider whether the

[120] We recall that we considered that minor "administrative variations" in the application of regulations may not be inconsistent with Article X:3(a) of GATT (para. 7.211). In our view, the same consideration applies in the context of Article 1.3 of the Licensing Agreement.

EC hurricane licensing system meets Article 1.3's requirement of "fairness" and "equity".

7.262 The question then becomes whether the Lomé waiver applies so as to waive the EC's obligations under Article 1.3 in this regard. We note that the Lomé waiver was initially approved by the CONTRACTING PARTIES of GATT 1947, who had no power over the Tokyo Round Agreement on Import Licensing Procedures, which, at the time, was administered by a committee of signatories and contained no waiver provision. In the light of these considerations, the Lomé waiver from Article I of GATT cannot be read to waive the EC's obligations under Article 1.3 of the Licensing Agreement. We also note that the extension of the waiver by the General Council of the WTO has not altered that fact.

7.263 As a result, we find that the issuance of hurricane licences exclusively to ACP and EC producers and producer organizations or operators including or directly representing them is inconsistent with the requirements of Article 1.3 of the Licensing Agreement.

(v) Other Claims

7.264 In light of our findings that the issuance of hurricane licences exclusively to EC and ACP producers and producer organizations or operators including or directly representing them is inconsistent with the requirements of Article 1.3 of the Licensing Agreement, we consider it unnecessary to make specific rulings on the other claims raised by the Complaining parties with respect to the same EC measures.[121] We further note that a finding that these measures are or are not inconsistent with the requirements of Article X:3(a) of GATT or Article 3:5(h) of the Licensing Agreement would not affect the findings we have made in respect of hurricane licences. Moreover, steps taken by the EC to bring the measures into conformity with the requirements of these articles should also eliminate the alleged non-conformity with Article X:3(a) of GATT and Article 3:5(h) of the Licensing Agreement.

(f) Other Claims

(i) General

7.265 In light of the findings we have made on operator categories, activity functions, export certificates and hurricane licences under Articles I, III and X of GATT and Article 1.3 of the Licensing Agreement, we do not consider it necessary to address the other claims raised by the Complaining parties against the EC licensing procedures.[122] These claims are largely dependent on the existence of

[121] See note 47 supra.
[122] See note 47 supra.

the operator category and activity function rules. For example, the alleged over-filing and unnecessary burdens and the alleged restrictive and distortive effects claimed to be inconsistent with the requirements of Article 3.2 of the Licensing Agreement and the alleged discouragement of tariff quota use claimed to be inconsistent with the requirements of Article 3.5(h) of the Licensing Agreement arise from the application of those rules. We further note that a finding that these EC measures are or are not inconsistent with the requirements of other provisions of GATT or the Licensing Agreement would not affect the findings we have made in respect of the EC licensing procedures.

7.266 We examine only the claim based on Article 1.2 of the Licensing Agreement, which we are required to do by Article 12.11 of the DSU since the claim relates to developing country Members.

(ii) Article 1.2 of the Licensing Agreement

7.267-7.273 [Used in the Ecuador and Mexico reports.]

4. The EC Banana Import Licensing Procedures and the GATS

(a) Introduction

7.274 The Complainants[123] claim that the EC regime for the importation, sale and distribution of bananas is inconsistent with the EC's obligations under Articles II (Most-Favoured-Nation Treatment) and XVII (National Treatment) of GATS in that it discriminates against distributors of Latin American and non-traditional ACP bananas in favour of distributors of EC and traditional ACP bananas. The Complainants consider such distributors to be suppliers of "wholesale trade services", a service sector in which the EC has undertaken a full commitment on national treatment in its Schedule. They also consider both groups of distributors to be "like" service suppliers within the meaning of Articles II and XVII. The Complainants have made claims with respect to four specific measures of the EC regime that we have analyzed in the preceding section on import licensing procedures: operator category allocations, activity function rules, BFA export certificates and hurricane licences.

7.275 The EC rejects the claims with respect to the GATS arguing, *inter alia*, that the measures in respect of which the Complainants have made claims were measures directed at trade in goods and not trade in services. Therefore, they could not be considered "measures affecting trade in services" within the meaning of the GATS. Moreover, the EC argues that "wholesale trade services" covers

[123] In this section on services, the term "Complainants" refers to Ecuador and the United States, and to Mexico except in respect of claims under Article XVII of GATS concerning activity function rules, export certificates and hurricane licences.

only the distribution of ripened (yellow) bananas, while the measures at issue relate to the import of unripened (green) bananas. In addition, the EC contests that the Complainants' services and service suppliers have been given less favourable treatment in the meaning of the GATS. In its view, the Complainants are contesting the allocation of tariff quota rents, a matter not dealt with by the GATS.

7.276 In our consideration of the claims raised under the GATS, we first examine seven general issues: (i) whether the four measures cited by the Complainants constitute "measures affecting trade in services" within the meaning of the GATS; (ii) the definition of "wholesale trade services"; (iii) the supply of services through different modes; (iv) the scope of Article II obligations; (v) the scope of Article XVII obligations; (vi) the effective date of GATS obligations; and (vii) the admissibility of Mexico's claims. Second, we examine the consistency of four specific measures - operator category allocations, activity function rules, BFA export certificates and "hurricane licences - with the EC's obligations under Article II and its commitments under Article XVII.

(b) General Issues

(i) Measures Affecting Trade in Services

7.277 The EC claims that the four measures complained against by the Complainants are not "measures affecting trade in services" since they regulate the importation of goods and not the provision of services. The EC argues that the objective of the GATS is to regulate trade in services as such and that it covers the supply of services as products in their own right. Furthermore, it argues the GATS is not concerned with the indirect effects of measures relating to trade in goods on the supply of services.

7.278 The EC also argues that a measure could not be covered by both GATT and the GATS since the coverage of the two agreements was intended, in the EC's view, to be mutually exclusive. In this connection, the EC notes that if a measure relating to trade in goods was covered by a GATT exception or a waiver, such exception or waiver could be rendered ineffectual by a finding against the measure relating to goods under the GATS and asserting its illegality in that context. The EC also considers that the illustrative definition of "measures affecting trade in services" in Article XXVIII(c) of GATS mentions measures as they relate to the supply of services and not the supply of goods. In the EC's view, in Article XXVIII(c), the term "affecting", which is used in Article I to define the scope of the GATS, should be interpreted narrowly so as to mean "in respect of", which is a much narrower concept indicating that the measure in question has to have the purpose and aim of regulating, or at least directly influencing, services as services.

7.279 In examining these issues we note the following: Article I (Scope and Definition), which defines the scope of the GATS, states in paragraph 1:

> "This Agreement applies to measures by Members affecting trade in services".

Article XXVIII(c) of GATS further defines the term by stating:

> "'measures by Members affecting trade in services' *include* measures in respect of:
>
> (i) the purchase, payment or use of a service;
>
> (ii) the access to and use of, in connection with the supply of a service, services which are required by those Members to be offered to the public generally;
>
> (iii) the presence, including commercial presence, of persons of a Member for the supply of a service in the territory of another Member;" (emphasis added).

7.280 In accordance with Article 31 of the Vienna Convention on the Law of Treaties,[124] we note that the ordinary meaning of the term "affecting", in Article I:1 of GATS, does not convey any notion of limiting the scope of the GATS to certain types of measures or to a certain regulatory domain. On the contrary, Article I:1 refers to measures in terms of their effect, which means they could be of any type or relate to any domain of regulation. Like GATT, the GATS is an umbrella agreement which applies to all sectors of trade in services and all types of regulations. We also note that the definition of "measures by Members affecting trade in services" in Article XXVIII(c) has been drafted in an illustrative manner by the use of the term "include". Sub-paragraphs (i)-(iii) do not contain a definition of "measures by Members affecting trade in services" as such, but rather are an illustrative list of matters in respect of which such measures could be taken. In other words, the term "in respect of" does not describe any measures affecting trade in services, but rather describes what such measures might regulate. For example, sub-paragraph (i) refers to "the purchase, payment or use of a service", which are matters that could be regulated by different types of measures affecting trade in services, such as licensing requirements, numerical limitations, foreign exchange regulations or others. We, therefore, do not agree with the view of the EC that Article XXVIII(c) narrows the meaning of the term "affecting" to "in respect of".

7.281 In accordance with Article 32 of the Vienna Convention,[125] we note that the preparatory work of the GATS confirms the foregoing interpretation. In the Uruguay Round, the drafters of the GATS were aware that the term *affecting* had been interpreted in prior GATT panel reports to cover not only laws and regulations which directly govern the conditions of sale or purchase but also any laws or regulations which might adversely modify conditions of competition between

[124] See para. 7.14 supra.
[125] See para. 7.14 supra.

like domestic and imported products on the internal market.[126] Another indication of the wish of the drafters to widen the scope of the GATS in terms of the regulatory measures it covers is the use of the concept of "supply" of services rather than "delivery". The text of Article XXVIII(b)[127] as well as the preparatory work[128] indicate that the choice of the term "supply of a service" involved the coverage of a wider range of activities than the case would have been had the drafters chosen to use the term "delivery". That has made a wider range of regulations subject to the application of the GATS. In sum, we believe that, consistently with their general approach, the drafters consciously adopted the terms "affecting" and "supply of a service" to ensure that the disciplines of the GATS would cover any measure bearing upon conditions of competition in supply of a service, regardless of whether the measure directly governs or indirectly affects the supply of the service.

7.282 With respect to the claim by the EC that GATT and the GATS cannot overlap, we note that such a view is not reflected in any of the provisions of the two agreements. On the contrary, the provisions of the GATS referred to above explicitly take the approach of being inclusive of any measure that affects trade in services whether directly or indirectly. These provisions do not make any distinction between measures which directly govern or regulate services and measures that otherwise affect trade in services.

7.283 Furthermore, it is our view that if we were to find the scope of the GATS and that of GATT to be mutually exclusive, in other words, if we were to find that a measure considered to fall within the scope of one agreement could not at the same time fall within the scope of the other, the value of Members' obligations and commitments would be undermined and the object and purpose of both agreements would be frustrated. Obligations could be circumvented by the adoption of measures under one agreement with indirect effects on trade covered by

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[126] MTN.GNS/W/139 (Definitions in the Draft General Agreement on Trade in Services - Note by the Secretariat), p.4, para. xii, states: "The term 'affecting' has been interpreted in Article III of the GATT to mean an effect on the competitive relationship between like products, not on the subsequent trade volumes in those products (BISD 36S/345 at para. 5.11; BISD 34S/136 at paragraph 5.19)". For example, in the *Italian Agriculture Machinery* case, the panel report stated: "[T]he drafters of [Article III] intended to cover in paragraph 4 not only the laws and regulations which directly govern the conditions of sale or purchase but also any laws or regulations which might adversely modify the conditions of competition between the domestic and imported products on the internal market". Panel Report on "Italian Discrimination Against Imported Agricultural Machinery", adopted on 23 October 1958, BISD 7S/60, 64, para. 12. This interpretation has also been confirmed in subsequent GATT panel reports.

[127] Article XXVIII(b) provides: "'supply of a service' includes the production, distribution, marketing, sale and delivery of a service".

[128] MTN.GNS/W/139 (Definitions in the Draft General Agreement on Trade in Services), p.3, para. xi, states: "The notion of 'supply' is intended to encompass the whole range of activities necessary to produce and deliver a service. The definition is illustrative, not comprehensive. The use of the term 'supply', in place of 'delivery' in prior versions of the text, suggests a wider range of activities than the word delivery".

the other without the possibility of any legal recourse. For example, a measure in the transport sector regulating the transportation of merchandise in the territory of a Member could subject imported products to less favourable transportation conditions compared to those applicable to like domestic products. Such a measure would adversely affect the competitive position of imported products in a manner which would not be consistent with that Member's obligation to provide national treatment to such products. If the scope of GATT and the GATS were interpreted to be mutually exclusive, that Member could escape its national treatment obligation and the Members whose products have been discriminated against would have no possibility of legal recourse on account that the measure regulates "services" and not goods. It is also our view that if the drafters of the GATS had intended to impose such a serious limitation on its scope, particularly in the light of how the term "affecting" had been interpreted in past GATT panel reports and their deliberate choice of the concept of "supply" as explained above, they would have provided for the limitation explicitly in the text of the GATS itself or in the provisions of the Agreement Establishing the World Trade Organization. In the absence of such a provision, it is our view that the claim by the EC that the scope of the GATS and GATT cannot overlap has no legal basis.[129]

7.284 With respect to the EC's view that bringing a measure relating to goods under the GATS might undermine the effectiveness of an exception or a waiver under GATT, we note that there are no applicable exceptions or waivers at issue under the GATS claims in this case.[130] In the case of waivers, the problem raised by the EC could be avoided by appropriate drafting of waivers. In the case of exceptions, we note that Articles XII, XX and XXI of GATT and Articles XII, XIV and XIVbis of GATS are similar, thus reducing the likelihood of a conflict between GATT and GATS provisions. In any event, we need not decide in this case how to resolve a conflict that may never arise.

7.285 In the light of the above, we find that, in principle, no measures are excluded *a priori* from the scope of the GATS as defined by its provisions. The scope of the GATS encompasses any measure of a Member to the extent it affects the supply of a service regardless of whether such measure directly governs the supply of a service or whether it regulates other matters but nevertheless affects trade in services.

7.286 We therefore find that there is no legal basis for an a priori exclusion of measures within the EC banana import licensing regime from the scope of the GATS.

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[129] For support of this view, see Panel Report on "Canada - Certain Measures Concerning Periodicals", issued on 14 March 1997 (not adopted, subject to appeal), WT/DS31/R, pp.69-71, paras. 5.13-5.19.

[130] We have found that the Lomé waiver does not cover the EC licensing measures which are at issue under the GATS (para. 7.204).

(ii) Wholesale Trade Services

7.287 The EC takes the view that, in the banana trade, wholesale trading starts only after the ripening process is completed and that any activity prior to ripening should not be defined as wholesaling of bananas, but rather as part of their production or "remanufacturing" process. The EC further argues that the normal meaning of wholesale is distributing goods with a view to sale to the consumer and, therefore, in a form which is ready for the consumer. In the EC's view, the wholesale trade stage for bananas was excluded from the scope of the contested measures since the importation of bananas normally takes place before they are ripened. The EC further argues that wholesalers, who according to this definition would only be trading in yellow bananas, are not operators within the meaning of the EC regime since import licences cover only green bananas and not yellow ones.

7.288 In addressing this issue we need to examine the definition of "wholesale trade services" for the purposes of this case. In this respect we note the following: The sectoral coverage of the GATS is, in principle, universal. Article I establishes this in paragraph 3(b) where it states:

> "'Services' include any service *in any sector* except services supplied in the exercise of governmental authority" (emphasis added).

Exceptions to this principle are explicitly provided for in the text of the GATS, such as in the case of "services supplied in the exercise of governmental authority" (Article I:3(b)) and "services directly related to the exercise of traffic rights" (Annex on Air Transport Services, paragraph 2(b)). No such exceptions exist for "wholesale trade services". Therefore, "wholesale trade services" are in principle fully covered by the GATS.

7.289 In the Uruguay Round negotiations participants agreed to follow a set of guidelines for the scheduling of specific commitments under the GATS.[131] With respect to the classification of services sectors for the purpose of scheduling commitments, the guidelines encouraged participants to use the Services Sectoral Classification List developed during the Uruguay Round,[132] which is largely

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[131] MTN.GNS/W/164 & Add.1 (Scheduling of Initial Commitments in Trade in Services: Explanatory Note).

[132] MTN.GNS/W/164 (Scheduling of Initial Commitments in Trade in Services: Explanatory Note), para. 16, states: "The legal nature of a schedule as well as the need to evaluate commitments, require the greatest possible degree of clarity in the description of each sector or sub-sector scheduled. In general the classification of sectors and sub-sectors should be based on the Secretariat's revised *Services Sectoral Classification List*[3]. Each sector contained in the Secretariat list is identified by the corresponding Central Product Classification (CPC) number. Where it is necessary to refine further a sectoral classification, this should be done on the basis of the CPC or other internationally recognised classification (e.g., Financial Services Annex). The most recent breakdown of the CPC, including explanatory notes for each sub-sector, is contained in the UN *Provisional Central Product Classification*[4].

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[3] Document MTN.GNS/W/120, dated 10 July 1991.

based on the United Nations Central Product Classification system (CPC). Although the use of the Services Sectoral Classification List is not mandatory, most Members, including the EC, have adopted it as the basis for scheduling their commitments. Furthermore, in scheduling commitments on "wholesale trade services", the EC inscribed the CPC item number (622) in its services schedule. Therefore, any breakdown of the sector should be based on the CPC. Consequently, any legal definition of the scope of the EC's commitment in wholesale services should be based on the CPC description of the sector and the activities it covers.

7.290 The CPC classification describes "wholesale trade services" as a sub-set of the broader sector of "distributive trade services" which is described in a headnote to section 6 as:

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

Under this section, the CPC contains a sub-sector entitled "wholesale trade services of food, beverages and tobacco" (6222). A further breakdown of this sub-sector includes a separate item relating to "wholesale trade service of fruit and vegetables" (CPC 62221) which is described as:

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

Item (013) of the CPC classification of goods relates to "fruit and nuts" and under its sub-classification (01310) it refers to:

> "dates, figs, *bananas*, coconuts, brazil nuts, cashew nuts, pineapples, avocados, mangoes, guavas, mangosteens, fresh or dried" (emphasis added).

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[4] *Statistical Papers Series M No. 77, Provisional Central Product Classification*, Department of International Economic and Social Affairs, Statistical Office of the United Nations, New York, 1991".

7.291 The CPC description of "wholesale trade services" is based on the identification of a core activity, that is "reselling merchandise", which could be accompanied by a variety of other related subordinate activities the objective of which would be to facilitate the delivery of the described services (i.e., reselling merchandise). In many instances, in order to resell merchandise it may be necessary to maintain inventories of goods, to sort and grade goods, to break bulk, refrigerate, and deliver goods to the purchaser. Thus, the subordinate activities listed in the headnote to CPC section 6 (such as maintaining inventories, breaking bulk, etc.), when they accompany the reselling of merchandise and are not performed as a separate service in their own right, are within the scope of wholesale trade service commitments. However, a distinction is made between performing any of these subordinate activities as a component of supplying a "wholesale trade service" and performing any of them as a service in its own right. In the case of the latter, that activity is classified in a separate CPC category with a different number and would be treated under the GATS as such.

7.292 Finally, we note that the CPC descriptions do not make any distinction between green and ripened bananas. As mentioned above, item 62221 of the CPC relating to "wholesale trade services of fruit and vegetables" cross refers to goods classified in CPC 013 which in turn refers in its sub-classification CPC 01310 to "bananas" without making any distinction between green and ripened bananas.

7.293 We find that the distribution of bananas, regardless of whether they are green or ripened, falls within the scope of category CPC 622 "wholesale trade services" as inscribed in the EC's GATS Schedule of Commitments so long as it involves the sale of bananas to retailers, to industrial, commercial, institutional or other professional business users, or other wholesalers.

(iii) Modes of Supply

7.294 Article I:2 of GATS defines its coverage as including four modes of supply of services: cross-border supply, consumption abroad, commercial presence and presence of natural persons.[133] The Complainants submit that the measures of the EC banana regime that they have challenged have an impact on the wholesale trade services they can supply through commercial presence. Such impact is claimed to be inconsistent with the unqualified national treatment commitment in

[133] Article I:2 of GATS provides:

"For the purposes of this Agreement, trade in services is defined as the supply of a service:

(a) from the territory of one Member into the territory of any other Member;

(b) in the territory of one Member to the service consumer of any other Member;

(c) by a service supplier of one Member, through commercial presence in the territory of any other Member;

(d) by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member".

the EC's Schedule covering the supply of "wholesale trade services" in relation to that mode. It is also claimed to be inconsistent with the EC's obligations under Article II of GATS. In the view of the Complainants, the supply of wholesale trade services through commercial presence includes all activities associated with delivering bananas to the EC from abroad and reselling them there. That would cover all the activities associated with reselling bananas as described in the head-note to Section 6 of the CPC (e.g., maintaining inventories, physically assembling, sorting, grading in large lots, breaking bulk, redistribution in smaller lots, refrigeration and delivery services).

7.295 With respect to supply through commercial presence, we note that Article I:2(c) of GATS[134] defines supply through commercial presence as the supply of a service by a service supplier of one Member, through commercial presence, in the territory of another Member. Article XXVIII(f)(ii)[135] defines a "service of another Member" in the case of a supply of a service through commercial presence as a service which is supplied by a service supplier of that other Member. In addition to these provisions, explanation of the modes of supply has been provided in the explanatory note on the scheduling of commitments referred to above.[136] These definitions as well as the explanation of the supply of a service through commercial presence in the explanatory note rely on the territorial presence of the service supplier as a basis for drawing distinctions between modes. In other words, in the case of supply through commercial presence, the service supplier would have to be physically present in the territory where the service is being supplied. In such cases, the origin of the service is to be determined on the basis of the origin of the supplier. And the origin of the service supplier is to be determined on the basis of the definitions laid down in Article XXVIII(g), (j), (m) and (n) which provide:

> "(g) 'service supplier' means any person that supplies a service;[11]
>
> (j) 'person' means either a natural person or a juridical person;
>
> (m) 'juridical person of another Member' means a juridical person which is either:

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[134] See note 133 supra.

[135] Article XXVIII(f) provides: "'service of another Member' means a service which is supplied,

> (i) from or in the territory of that other Member, or in the case of maritime transport, by a vessel registered under the laws of that other Member, or by a person of that other Member which supplies the service through the operation of a vessel and/or use in whole or in part; or
>
> (ii) in the case of the supply of a service through commercial presence or through the presence of natural persons, by a service supplier of that other Member".

[136] MTN.GNS/W/164 (Scheduling of Initial Commitments in Trade in Services: Explanatory Note), para. 18, states (emphasis original): "The four modes of supply listed in the schedules correspond to the scope of the GATS as set out in Article I.2. The modes are essentially defined on the basis of the *origin* of the service supplier and consumer, and the degree and type of *territorial presence* which they have at the moment the service is delivered".

(i) constituted or otherwise organized under the law of that other Member, and is engaged in substantive business operations in the territory of that Member or any other Member; or

(ii) in the case of the supply of a service through commercial presence, owned or controlled by:

1. natural persons of that Member; or
2. juridical persons of that other Member identified under subparagraph (i).

(n) a juridical person is:

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

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

(iii) 'affiliated' with another person when it controls, or is controlled by, that other person; or when it and the other person are both controlled by the same person.

[11] Where the service is not supplied directly by a juridical person but through other forms of commercial presence such as a branch or a representative office, the service supplier (i.e. the juridical person) shall, nonetheless, through such presence be accorded the treatment provided for service suppliers under the Agreement. Such treatment shall be extended to the presence through which the service is supplied and need not be extended to any other parts of the supplier located outside the territory where the service is supplied."

7.296 Therefore, with respect to situations of supply through commercial presence, Members' obligations under the GATS cover the treatment of services and service suppliers. We note that Article II requires a Member to extend to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country. And Article XVII requires a Member, subject to any limitations inscribed in its schedule, to accord services and service suppliers of any other Member treatment no less favourable than it accords to its own like services and service suppliers.

7.297 Consequently, we find that the EC's obligations under Article II of GATS and commitments under Article XVII of GATS cover the treatment of suppliers of wholesale trade services within the jurisdiction of the EC.

(iv) The Scope of the Article II Obligation

7.298 Article II:1 of GATS states:

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

We note that this provision refers to "any measures covered by this Agreement". This term could only be interpreted to mean all measures falling within the scope of the GATS. According to Article I:1 which defines the scope of the GATS, it applies to "measures by Members affecting trade in services". We also note that this provision constitutes a general obligation which is, in principle, applicable across the board by all Members to all services sectors, not only in sectors or sub-sectors where specific commitments have been undertaken. Any exception to this general obligation would have to be provided for explicitly in accordance with the terms of the GATS. Article II:2 provides for the possibility of exempting specific measures from this obligation where it states that

> "A Member may maintain a measure inconsistent with paragraph 1 provided that such a measure is listed in, and meets the conditions of, the Annex on Article II Exemptions".

We note that the EC has not listed in that Annex any measures relating to "wholesale trade services" which are inconsistent with paragraph 1 of Article II. Therefore, the EC is fully bound by its obligations under Article II:1 in relation to "wholesale trade services".[137]

7.299 The Complainants submit that the term "treatment no less favourable" contained in paragraph 1 of Article II of GATS should be interpreted in the light of the language contained in paragraphs 2 and 3 of Article XVII of GATS.[138] In

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[137] In the EC's understanding there are no MFN exemptions which would limit its obligation to provide MFN treatment in respect of the subsector of wholesale trade services, whereas in the Complainants' view there are no relevant MFN exemptions for the whole range of distribution services. By the terms of the GATS, the MFN treatment clause covers, subject to each Member's MFN exemption list, all services on a general basis. Accordingly, the range of the service transactions which are directly or indirectly related to trade in bananas is potentially wider than the sector of distribution services or the subsector of wholesale trade services. Likewise, a broader range of the exemptions which have been inscribed in the EC's MFN exemption list could be relevant to service transactions related to trade in bananas. However, in the light of the legal arguments advanced by the Complainants we proceed on the assumption that the scope of their claims under the GATS MFN clause is limited to the supply of wholesale trade services by commercial presence and that none of the MFN exemptions scheduled by the EC carves out components of the relevant CPC description.

[138] Article XVII of GATS (National Treatment) provides:

> "1. In the sectors inscribed in its Schedule, and subject to any conditions and qualifications set out therein, each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers.[10]
>
> 2. A Member may meet the requirement of paragraph 1 by according to services and service suppliers of any other Member, either formally identical treat-

their view although Article II does not contain the type of elaboration found in paragraphs 2 and 3 of Article XVII concerning formally identical and formally different treatment and modification of conditions of competition, the standard of treatment in Article II should be interpreted to be the same as that of paragraph 1 of Article XVII. They consider that paragraphs 2 and 3 of Article XVII do not set up any additional substantive rules but rather serve as guidance for the application of the national treatment rule articulated in the first paragraph. They also note that Article II of GATS deviated from the formulation used in Article I:1 of GATT[139] and refer to "treatment no less favourable" instead of "any advantage, favour, privilege or immunity". In their view that indicates a deliberate choice by the drafters to follow the same standard of treatment set in paragraph 1 of Article XVII.

7.300 The EC maintains that Article II:1 of GATS applies to "any measure covered by this Agreement" and Article I:1 defines the scope of the GATS by stating that it applies "to measures by Members affecting trade in services". The definition in Article XXVIII(c),[140] in particular under sub-paragraph (i), indicates that the measures concerned had to affect trade in services as such and could not be measures taken in other areas with repercussions on services such as measures in respect of the purchase of goods. Moreover, the EC considers that the use of the terms "in respect of" in the chapeau of Article XXVIII(c) demonstrates that the term "affecting" has to be interpreted in a narrow sense that did not include the reference to measures which modified the conditions of competition. Third, in the view of the EC, if the drafters had wished to make the "modification of competitive conditions" requirement an integral part of the "no less favourable treatment" test under the most-favoured-nation clause, they would have done so explicitly as it was done for the national treatment clause in Article XVII:3. Therefore, if it were to be established that certain EC measures violate the MFN obligation, it would have to be demonstrated that there was formally discriminatory treatment as between foreign services and service suppliers, which is not the case in this dispute.

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ment or formally different treatment to that it accords to its own like services and service suppliers.

3. Formally identical or formally different treatment shall be considered to be less favourable if it modifies the conditions of competition in favour of services or service suppliers of the Member compared to like services or service suppliers of any other Member.

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[10] Specific commitments assumed under this Article shall not be construed to require any Member to compensate for any inherent competitive disadvantages which result from the foreign character of the relevant services or service suppliers".

[139] Article I:1 of GATT provides: "... any advantage, favour, privilege or immunity granted by any Member to any product originating in or destined for any other country shall be accorded immediately and unconditionally...".

[140] Article XXVIII(c) is quoted in para 7.279 supra.

7.301 With respect to the first two arguments of the EC, we recall our discussion in paragraph 7.280 *et seq.* In addressing the third argument, we note that the standard of "no less favourable treatment" in paragraph 1 of Article XVII is meant to provide for no less favourable conditions of competition regardless of whether that is achieved through the application of formally identical or formally different measures. Paragraphs 2 and 3 of Article XVII serve the purpose of codifying this interpretation, and in our view, do not impose new obligations on Members additional to those contained in paragraph 1. In essence, the "treatment no less favourable" standard of Article XVII:1 is clarified and reinforced in the language of paragraphs 2 and 3. The absence of similar language in Article II is not, in our view, a justification for giving a different ordinary meaning in terms of Article 31(1) of the Vienna Convention to the words "treatment no less favourable", which are identical in both Articles II:1 and XVII:1.

7.302 We also note that, while the object and purpose of paragraph 1 of Article XVII is to prohibit discrimination against foreign services and service suppliers to the advantage of like services and service suppliers of national origin, paragraph 1 of Article II has a similar objective of prohibiting discrimination against services and service suppliers of a Member in favour of like services or service suppliers of any other country. In addition, while the drafters of the GATS have been guided by GATT concepts, provisions and past practice, they have chosen to use identical operative language of "treatment no less favourable" in both Articles II and XVII, departing in the case of Article II from the formulation used in the GATT MFN clause in Article I which refers to "any advantage, favour, privilege or immunity ...". Thus, the formulation of both Articles II and XVII of GATS derives from the "treatment no less favourable" standard of the GATT national treatment provisions in Article III of GATT, which has been consistently interpreted by past panel reports to be concerned with conditions of competition between like domestic and imported products on internal markets.[141]

7.303 We also note that if the standard of "no less favourable treatment" in Article II were to be interpreted narrowly to require only formally identical treatment, that could lead in many situations to the frustration of the objective behind Article II which is to prohibit discrimination between like services and service suppliers of other Members. It would not be difficult for regulators to contemplate regulatory measures which are identical on their face while in effect provide less favourable competitive opportunities to a group of service suppliers to the advantage of others.

7.304 Therefore, we find that the obligation contained in Article II:1 of GATS to extend "treatment no less favourable" should be interpreted in casu to require providing no less favourable conditions of competition.

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[141] Panel Report on "Italian Discrimination of Imported Agricultural Machinery", adopted on 23 October 1958, BISD 7S/60, 63, para. 12. See also para. 7.327.

(v) The Scope of the Article XVII Commitment

7.305 Article XVII of the GATS is a specific commitment in the sense that it would be binding on a Member only in sectors or sub-sectors which that Member has inscribed in its schedule and to the extent specified therein. Article XVII:1 states:

> "1. In the sectors inscribed in its schedule, and subject to any conditions and qualifications set out therein, each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers".

We note that in its schedule of specific commitments[142] the EC has inscribed in the first column under the heading "Sector or Sub-sector" the sector of "Wholesale Trade Services". The related CPC classification number (CPC 622) has also been inscribed. As previously mentioned, this constitutes the basis on which the scope of the EC's national treatment commitment is to be determined. We also note that, with respect to the first mode (cross-border supply) and the third mode (supply through commercial presence) the EC has entered "none" in the third column of the schedule relating to limitations on national treatment. The EC, therefore, has undertaken a full commitment on national treatment in the sector of "Wholesale Trade Services" with respect of cross-border supply and supply through commercial presence.

7.306 Thus, we find that the EC has undertaken a full commitment on national treatment in the sector of "Wholesale Trade Services" with respect to supply through commercial presence.

(vi) Effective Date of GATS Obligations

7.307 The EC argues that, given that the GATS entered into force on 1 January 1995, only the EC banana import regime as it existed in late 1994 and afterwards (rather than 1992 and before) should be examined in the light of Articles II and XVII of GATS.

7.308 We are not certain of the precise relevance of this argument. The EC does not argue that the introduction of the EC common market organization for bananas resulted in a single, non-recurring adjustment of the market which was completed by 31 December 1994. To the contrary, the EC banana regulations remained in force or were enacted or amended also after 1 January 1995 (e.g., Regulation 478/95 on the export certificate requirement) and, more importantly, they foresee a recurring and ongoing process of import licence allocations according to annually recalculated reference quantities on the basis of operator

[142] European Communities and Their Member States - Schedule of Specific Commitments - April 1994.

categories and activity functions. Consequently, the fact that the EC common market organization was introduced in 1993, prior to the entry into force of the GATS, is not relevant for our legal analysis. Thus, we examine the consistency of the EC banana regulations as they currently stand with the EC's obligations arising from the GATS. Therefore, the scope of our legal examination includes only actions which the EC took or continued to take, or measures that remained in force or continued to be applied by the EC, and thus did not cease to exist after the entry into force of the GATS.[143] Likewise, any finding of consistency or inconsistency with the requirements of Articles II and XVII of GATS would be made with respect to the period after the entry into force of the GATS. Moreover, in this connection we note that there is no grandfather clause in the WTO Agreement that would permit Members to maintain indefinitely national legislation that is inconsistent with WTO rules. Indeed, Article XVI:4 of the WTO Agreement provides that "[e]ach Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements".

(vii) Claims by Mexico

7.309-7.311 [Used in the Mexico report.]

(c) Operator Categories

(i) Article XVII of GATS

7.312 The Complainants claim that the allocation of the third-country import licences on the basis of operator categories and the eligibility criteria for Category B operators discriminate against like third-country service suppliers. The EC is alleged to be in breach of Article XVII of GATS in respect of its commitments on wholesale service supply in that it accords more favourable treatment to wholesale service suppliers of EC origin because Category B operators are largely EC owned or controlled and Category A operators are largely in the Complainants' ownership or control.

7.313 The EC responds that the allocation of licences on the basis of operator categories does not automatically entail the transfer of market shares to Category B operators because licences are freely tradeable. Therefore, the allocation of licences to certain operators does not necessarily mean that these operators will actually carry out the physical importation. The EC emphasizes that the rules

[143] Article 28 of the Vienna Convention embodies the general international law principle that "[u]nless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to ... any situation which ceased to exist before the date of entry into force of the treaty ...". Under this rule, the EC measures at issue may be considered as continuing measures, which in some cases were enacted before the entry into force of GATS but which did *not* cease to exist after that date (the opposite of the situation envisaged in Article 28).

establishing operator categories do not classify companies as such but aim at distributing import licences according to past marketing of traditional ACP and EC or third-country and non-traditional ACP bananas. Consequently, the allocation of Category A and B licences is not mutually exclusive. Certain large operator companies are registered in both categories and hence receive both Category A and B licences. Therefore, the EC argues that the Complainants' insistence on equating Category A with firms of non-EC origin and Category B with firms of EC origin is misleading. Furthermore, the EC notes that the WTO agreements do not provide for rules governing the sharing of quota rents which are generated by a legitimate tariff quota and that, consequently, the EC retains its discretion to allocate quota rents among EC, ACP and third country producers and traders. In the EC's view, the Complainants fail to prove that quota rents and market shares have been reallocated at the expense of third-country firms, given that no evidence has been provided on how particular companies are linked through registration, ownership or control to the Complainants. In contrast, the EC notes that it submitted information on market shares of third-country firms, which in its view demonstrate that those firms have not lost market share in recent years.

7.314 In light of these arguments, we turn to an examination of the issues arising under this Article XVII claim. In order to establish a breach of the national treatment obligation of Article XVII, three elements need to be demonstrated: (i) the EC has undertaken a commitment in a relevant sector and mode of supply; (ii) the EC has adopted or applied a measure affecting the supply of services in that sector and/or mode of supply; and (iii) the measure accords to service suppliers of any other Member treatment less favourable than that it accords to the EC's own like service suppliers.

7.315 In respect of the first element, we recall that the EC has bound the wholesale trade service subsector as regards service supply across borders and through commercial presence without conditions and qualifications in the meaning of Article XVII:1 (paragraph 7.306).

7.316 As to the second element, i.e., whether the EC measures implementing the operator category rules constitute measures affecting the supply of services, we recall that we have found that the term "affecting" should be interpreted broadly (paragraphs 7.277 *et seq*.). In this connection, we also note that supply of services through cross-border delivery or commercial presence is defined to include the production, distribution, marketing, sale and delivery of such services.[144] As a consequence, in our view, the EC measures, and more specifically the rules on operator categories, are measures affecting Complainants' trade in services in the meaning of the GATS.

7.317 We now turn to the third element that must be demonstrated to establish a breach of Article XVII, i.e., less favourable treatment of service suppliers of an-

[144] Article XXVIII:(b) of GATS provides: "'Supply of a service' includes the production, distribution, marketing, sale and delivery of a service."

other Member than the treatment given to its own like service suppliers. There are four preliminary matters that should be addressed: (i) the definition of commercial presence and service suppliers; (ii) whether operators in the meaning of the EC banana regulations are service suppliers under GATS, (iii) the definition of services covered by EC commitments; and (iv) to what extent services and service suppliers of different origin are like.

7.318 First, it is necessary to clarify what is meant by "commercial presence", as used in Article I:2, and "services and service suppliers of any other Member", as used in Article XVII:1. "Commercial presence" in general covers any type of business or professional establishment, including through (i) the constitution, acquisition or maintenance of a juridical person, or (ii) the creation or maintenance of a branch or representative office, within the EC territory for the purpose of supplying wholesale services.[145] Therefore, in the current dispute, we are concerned with the commercial presence of service suppliers that are "persons", or owned or controlled by such persons, of the Complainants. These include subsidiary companies owned[146] or controlled[147] by natural persons[148] of a Complainant and subsidiary companies owned or controlled by parent companies that are constituted or otherwise organized under the law of a Complainant[149] and are

[145] Article XXVIII(d) of GATS provides:

"'Commercial presence' means any type of business or professional establishment, including through

(i) the constitution, acquisition or maintenance of a juridical person, or

(ii) the creation or maintenance of a branch or a representative office,

within the territory of a Member for the purpose of supplying a service;

[146] Article XXVIII(n) provides: "A juridical person is (i) 'owned' by persons of a Member if more than 50 per cent of the equity interest in it is beneficially owned by persons of that Member".

[147] Article XXVIII(n) provides: " A juridical person is (ii) 'controlled' by persons of a Member if such persons have the power to name a majority of its directors or otherwise to legally direct its actions".

[148] Article XXVIII(k) provides: "'Natural person of another Member' means a natural person who resides in the territory of that other Member or any other Member, and who under the law of that other Member:

(i) is a national of that other Member; or

(ii) has the right of permanent residence in that other Member, in the case of a Member which:

1. does not have nationals; or

2. accords substantially the same treatment to its permanent residents as it does to its nationals in respect of measures affecting trade in services, as notified in its acceptance of or accession to the WTO Agreement, provided that no Member is obligated to accord to such permanent residents treatment more favourable than would be accorded by that other Member to such permanent residents. Such notification shall include the assurance to assume, in accordance with its laws and regulations, the same responsibilities that other Member bears with respect to its nationals".

[149] Article XXVIII(l) provides: "'[J]uridical person' means any legal entity duly constituted or otherwise organized under applicable laws, whether for profit or otherwise, and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, joint venture, sole

engaged in substantive business operations in the territory of any other Member.[150]

7.319 In this respect, we emphasize that in the following discussion, we will refer to service suppliers that are owned or controlled by persons of the Complainants as "suppliers of Complainants' origin", and service suppliers that are owned or controlled by persons of the EC will be referred to as "suppliers of EC origin".

7.320 Second, in the context of this case, operators in the meaning of Article 19 of Regulation 404/93 and operators performing the activities defined in Article 5 of Regulation 1442/93 are service suppliers in the meaning of Article I:2(c) of GATS provided that they are owned or controlled by natural persons or juridical persons of other Members and supply wholesale services. When operators provide wholesale services with respect to bananas which they have imported or acquired for marketing, cleared in customs or ripened, they are actual wholesale service suppliers. Where operators form part of vertically integrated companies, they have the capability and opportunity to enter the wholesale service market. They could at any time decide to re-sell bananas which they have imported or acquired from EC producers, or cleared in customs, or ripened instead of further transferring or processing bananas within an integrated company.[151] Since Article XVII of GATS is concerned with conditions of competition, it is appropriate for us to consider these vertically integrated companies as service suppliers for the purposes of analysing the claims made in this case.

7.321 Third, as discussed above (paragraphs 7.290 *et seq*.), the services at issue in this case are wholesale trade services and the related subordinated services specified in headnote 6 to the CPC classification.

7.322 Fourth, in our view, the nature and the characteristics of wholesale transactions as such, as well as of each of the different subordinated services mentioned in the headnote to section 6 of the CPC, are "like" when supplied in connection with wholesale services, irrespective of whether these services are supplied with respect to bananas of EC and traditional ACP origin, on the one hand, or with respect to bananas of third-country or non-traditional ACP origin, on the other. Indeed, it seems that each of the different service activities taken individually is virtually the same and can only be distinguished by referring to the origin

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proprietorship or association. For the definition of "juridical person of another Member", see para. 7.295 supra.

[150] As a result, suppliers which are commercially present within the EC territory and owned or controlled by, for example, Del Monte Mexico would be entitled to benefit from GATS rights because it would not matter under Article XXVIII(m) of GATS whether Del Monte Mexico was owned or controlled by natural or juridical persons of Jordan, i.e. a WTO non-Member, as long as Del Monte Mexico was incorporated in Mexico and engaged in substantive business operations in the territory of Mexico or any other Member.

[151] Operators who always sell or resell bananas directly to consumers supply *retail* services which are not covered by the EC commitments on wholesale services under Article XVII.

of the bananas in respect of which the service activity is being performed. Similarly, in our view, to the extent that entities provide these like services, they are like service suppliers.

7.323 We now have to ascertain whether, by applying operator category rules, the EC accords services supplied across borders or through commercial presence less favourable treatment than it accords its own like services or service suppliers in the meaning of Article XVII.

7.324 We note that the categorization of A and B operators is based on whether they have during a previous three-year period marketed EC and traditional ACP bananas or third-country and non-traditional ACP bananas. The operator category rules apply to service suppliers regardless of their nationality, ownership or control. In so far as the supply of wholesale trade services in respect of third-country and non-traditional ACP bananas is concerned, service suppliers of EC origin are equally subject to operator category rules as service suppliers of Complainants' origin. Likewise, with respect to the supply of wholesale trade services in respect of EC or traditional ACP bananas, service suppliers of EC origin are treated in the same way under the operator category rules as service suppliers of Complainants' origin. Thus, the EC rules establishing operator categories do not formally discriminate against Complainants' wholesale service suppliers on the basis of their origin.

7.325 We note, however, that service suppliers of Complainants' origin that provide wholesale services in respect of only third-country or non-traditional ACP bananas are subject to operator category rules, while service suppliers of EC origin that provide the same services in respect of EC or traditional ACP bananas are not. However, service suppliers of Complainants' origin that have in the past provided wholesale trade services in respect of only third-country or non-traditional ACP bananas are not legally prevented from supplying wholesale trade services with respect to EC and traditional ACP bananas.

7.326 By supplying wholesale trade services to the traditional ACP and EC market segment, suppliers of any origin can avoid, or reduce the extent to which they are subject to, operator category rules. In addition they will be eligible for the allocation of 30 per cent of the in-quota licences required for third-country and non-traditional ACP imports which are earmarked for Category B operators. Nothing in the operator category rules requires operators who are, on the basis of their previous marketing of EC and traditional ACP bananas, beneficiaries of the allocation of 30 per cent of the licences required for the in-quota importation of third-country and non-traditional ACP bananas regardless of whether they have previously dealt in that market segment, to be service suppliers in EC ownership or control. In other words, service suppliers of foreign as well as EC origin are arguably subject to formally identical treatment in the meaning of Article XVII:2 of GATS. Likewise, under the EC operator category rules services of foreign origin which are supplied across-borders are arguably subject to treatment that is formally identical to the treatment of domestic services.

7.327 We now turn to the question whether the application of formally identical operator category rules, nevertheless, modifies conditions of competition[152] in favour of service or service suppliers of EC origin, or at the expense of services or service suppliers of third-country origin, in the meaning of paragraphs 2 and 3 of Article XVII of GATS which provide as follows:

> "2. A Member may meet the requirement of paragraph 1 by according to services and service suppliers of any other Member, either *formally identical* treatment or *formally different* treatment to that it accords to its own like services and service suppliers.[153]
>
> 3. Formally identical or formally different treatment shall be considered to be less favourable if it *modifies the conditions of competition* in favour of services or service suppliers of the Member compared to like services or service suppliers of any other Member" (emphasis and footnotes added).[154]

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[152] "The Panel, however, believes that an evaluation of the *trade effects* was not directly relevant to its findings because a breach of a GATT rules is presumed to have an adverse impact on other contracting parties ..." (emphasis added). Panel Report on "Canada - Administration of the Foreign Investment Review Act", adopted on 7 February 1984, BISD 30S/140, 167, para. 6.6.

"[Article III:2 of GATT] protects *expectations on the competitive relationship* between imported and domestic products. A change in the competitive relationship contrary to that provision must consequently be regarded *ipso facto* as a nullification or impairment of benefits accruing under the General Agreement". (emphasis added). Panel Report on "US - Taxes on Petroleum and Certain Imported Substances", adopted on 17 June 1987, BISD 34S/136, 158-159, para. 5.1.9.

"[T]he panel noted that previous panels had rejected arguments of de minimis trade consequences and had found that the size of the trade impact of a measure was not relevant to its consistency with Article III [GATT]". Panel Report on "US - Measures Affecting the Importation, Internal Sale and Use of Tobacco", adopted on 4 October 1994, DS 44/R, p.32, para. 99.

[153] The wording of paragraph 2 of Article XVII of GATS draws on the interpretation developed by a GATT panel with respect to Article III of GATT: "[T]he 'no less favourable' treatment requirement set out in Article III:4, is unqualified. These words are to be found throughout the General Agreement ... as an expression of the underlying principle of equality of treatment of imported products as compared to the treatment given either to other foreign products, under the most favoured nation treatment standard, or to domestic products, under the national treatment standard of Article III. The words 'treatment no less favourable' in paragraph 4 [of GATT Article III] call for *effective equality of opportunities* for imported products in respect of the application of laws, regulations and requirements affecting internal sale, offering for sale, purchase, transportation, distribution or use of products. This clearly sets a minimum permissible standard as a basis. On the one hand, contracting parties may apply to imported products different formal legal requirements if doing so would accord imported products more favourable treatment. On the other hand, it also has to be recognized that there may be cases where application of *formally identical legal provisions would in practice accord less favourable treatment to imported products* and a contracting party might thus have to apply different legal provisions to imported products to ensure that the treatment accorded to them is in fact no less favourable" (emphasis added). Panel Report on "US - Section 337 of the Tariff Act of 1930", adopted on 7 November 1989, BISD 36S/345, 386, para. 5.11.

[154] The wording of paragraph 3 of Article XVII of GATS draws on the interpretation developed by a GATT panel with respect to Article III of GATT: "[T]he text of paragraph 4 [of GATT Article III] referred both in English and in French to laws and regulations and requirements *affecting* internal sale, purchase, etc., and to laws, regulations and requirements governing the conditions of sale or purchase. The selection of the word "*affecting*" would imply, in the opinion of the Panel, that the

Thus, according to Article XVII, formally identical treatment may, nevertheless, be considered to be less favourable treatment if it adversely modifies conditions of competition for foreign services or service suppliers. Therefore, we also have to examine whether the operator category (and activity function) rules have an impact on the conditions of competition for foreign-owned or controlled service suppliers. In order to do so, we must consider in the first instance whether there are non EC-owned or controlled service suppliers for GATS purposes that provide wholesale trade services in bananas in and to the EC.

7.328 The EC states that the European Commission does not have records of the actual ownership of companies registered to receive licences of whatever category. The EC submits that in the case of transnational companies, the nationality of parent and subsidiary companies is usually not the same. Article XXVIII(m)(ii) of GATS defines the origin of a service supplier according to its ownership or control by a natural or juridical person of a Member. While the fact that subsidiaries in foreign ownership or control have a registered seat in their host country might matter in other legal contexts, this fact is not relevant for rights under Article XVII. If the parent company is registered in a Member and engages in substantive business operations there (or in another Member), the Member where the parent company is registered may invoke Article XVII in respect of any of the parent company's subsidiaries which are owned or controlled by the Member in the meaning of Article XXVIII(n).

7.329 In order for the Complainants to establish that there are non EC-owned or controlled service suppliers commercially present in the EC for GATS purposes that provide wholesale trade services in bananas in and to the EC, it would be sufficient for them to show that (i) entities of Complainants' origin (ii) control subsidiaries established in the EC that supply such services. In this case, we are of the opinion that the Complainants have submitted sufficient evidence to show that companies registered in the Complainants' countries provide wholesale trade services in respect of bananas to and in the EC through commercially present owned or controlled subsidiaries in the meaning of Article XXVIII(n).

7.330 As to the first point, the evidence presented and the statements by both parties indicate that there are entities of non EC-origin involved in the banana trade. In particular, both parties seem to accept that Chiquita and Dole are US

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drafters of the Article intended to cover in paragraph 4 not only the laws and regulations which directly *governed* the conditions of sale or purchase but also any laws or regulations which might *adversely modify the conditions of competition* between the domestic and imported products on the internal markets" (emphasis added). Panel Report on "Italian Discrimination of Imported Agricultural Machinery", adopted on 23 October 1958, BISD 7S/60, 63, para.12.

"The Panel also noted that if the Italian contention were correct, and if the scope of Article III were limited in the way the Italian delegation suggested to a specific type of law and regulations, the value of the bindings under Article II of the Agreement and of the general rules of non-discrimination as between imported and domestic products could be easily evaded". Idem, p.64, para. 15.

companies, Del Monte is a Mexican company and Noboa is an Ecuadorian company, and no evidence suggesting the contrary has been presented by the EC.[155]

7.331 As to the second point, i.e., whether these non-EC companies control subsidiaries that supply wholesale trade services in bananas and are commercially present in the EC, the Complainants submitted a list entitled "Principal banana wholesaling companies established in the EC that were owned or controlled by the Complainants' services suppliers, 1992". The EC notes that no formal records of shareholders and company registrations were submitted by the Complainants. However, we recall that, according to Article IIIbis of GATS, "nothing in GATS requires any Member to provide confidential information, the disclosure of which ... would prejudice legitimate commercial interests of particular enterprises". According to the Complainants, their information was limited in part based on confidentiality concerns. Nonetheless, we believe that the Complainants' evidence is sufficient to establish that there are non-EC companies that control subsidiaries that supply wholesale trade services in bananas and that are commercially present in the EC. In this regard, we note that while the EC argued that more evidence should have been submitted by the Complainants, it did not present information that would cast doubt on the evidence presented by the Complainants. As a consequence, we must assess whether that evidence is sufficiently credible to be accepted by us. In making our objective assessment (Article 11 of the DSU), we are persuaded that the Complainants have sufficiently established that entities of Complainants' origin control subsidiaries established in the EC that provide wholesale trade services in bananas in and to the EC.

7.332 Recalling that under Article XVII of GATS, formally identical treatment may be considered to be less favourable treatment if it adversely modifies conditions of competition for foreign services or service suppliers, we now examine whether the rules establishing operator categories (and activity functions) have an impact on the conditions of competition for foreign-owned or controlled service suppliers. The EC notes that under the operator category rules companies may qualify as both Category A and B operators, thus making it difficult to categorize companies of any nationality as either A or B operators.

7.333 In this regard, the Complainants submit that before the introduction of the EC banana regime companies controlled or owned by natural or juridical persons of their nationalities held a market share of over 95 per cent of the imports of Latin American bananas to the EC. Accordingly, the Complainants argue, companies in EC and ACP ownership or control had a market share of less than 5 per cent of imports from Latin America. The EC questions the accuracy of these figures, but it does not submit comparable evidence of its own.[156] In our view, even

[155] For example, the first submission of the EC, in referring to statistics in an Arthur D. Little study, refers to Chiquita and Dole as "US owned or controlled". A.D. Little, "Etude de l'évolution des effets de la remise en place de l'OCM bananes sur la filière dans l'Union européenne", 13 septembre 1995.

[156] Pursuant to Regulations 404/93 and 1442/93, the EC Commission and competent member State authorities have to keep information concerning the reference quantities of past volumes of bananas

if we accept the EC argument that the Complainants' 95 per cent figure may be somewhat too high, we believe that the Complainants have adequately demonstrated that companies of the Complainants' origin had by far the vast majority of the market for imports of Latin American bananas.

7.334 In respect of the EC market for EC and ACP bananas, the Complainants submit that prior to the introduction of the EC common market organization, the share of the three large banana companies (i.e., Chiquita, Dole and Del Monte) in the EC/ACP market segment was only 6 per cent and that the share for all non-ACP foreign-owned companies was less than 10 per cent. While the EC states that in 1994, 28 per cent of the EC/ACP production was controlled by three large banana companies, for our purposes what is important is the relative share of service suppliers of the Complainants' origin of the EC market for EC/ACP bananas.[157] On either view, we conclude that most of the suppliers of Complainants' origin are classified in Category A for the vast majority of their past marketing of bananas,[158] and that most of the suppliers of EC (or ACP) origin are classified in Category B for the vast majority of their past marketing of bananas.[159]

7.335 In light of the foregoing, we now consider whether the rules establishing operator categories (and activity functions) have an impact on the conditions of competition for foreign-owned or controlled service suppliers. Under the EC rules, based on their marketing during a preceding three-year period of EC and traditional ACP bananas, Category B operators are eligible for 30 per cent of the licences required for the importation of third-country (i.e., Latin American) and non-traditional ACP bananas at lower in-quota duty rates, regardless of whether they have previously traded in the latter market segment. Therefore, most beneficiaries of this allocation to Category B operators are service suppliers of EC origin. At the same time, most Category A operators, who historically traded third-country and non-traditional ACP bananas but who are eligible to receive only 66.5 per cent of the licences allowing in-quota imports of bananas from these sources, are service suppliers of third-country origin. Furthermore, we also note that there is no allocation of an EC/ACP market share for Category A operators equivalent to the allocation of 30 per cent of the third-country and non-traditional ACP import licences to Category B operators. Thus, at first sight it appears that the operator category rules would seem to modify conditions of competition in

marketed for which companies are registered in particularlized form. We note that, according to the EC, these records do not include information on the ownership or control of the companies categorized or registered for reference quantities.

[157] As noted below, the difference in statistics may be a result of the EC rules. See para. 7.340.

[158] Operators classified in Category A for most of their past trade volume: Chiquita Brands (US), Dole Foods (US), Noboa (Ecuador), Del Monte (Mexico), Uniban (Colombia), Banacol (Colombia). (Information submitted by the Complainants).

[159] Operators classified in Category B for most of their past trade volume: e.g., Geest (UK), Fyffes (Ireland), Pomona (France), Compagnie Fruitière (France), CDB/Durand (France), Gipam (France), Coplaca (Spain), Bargoso SA (Spain). (Information submitted by the Complainants).

the EC wholesale services market for bananas in favour of service suppliers of EC origin.

7.336 Given that import licences are tradeable and transferable, the allocation of fixed percentages of licences according to operator categories does not automatically determine the new distribution of market shares between Category A and B operators. However, while Category B operators, on the basis of previous marketing of EC and traditional ACP bananas, obtain access to 30 per cent of the licences required for third-country imports regardless of whether they have previously marketed bananas in that market segment, at the same time, Category A operators, on the basis of their previous imports of third-country and non-traditional ACP bananas, obtain access to only 66.5 per cent of the licences required for the importation of third-country and non-traditional ACP bananas at in-quota tariff rates. Accordingly, when licences authorizing in-quota imports of third-country and non-traditional ACP bananas are traded, sellers of licences will usually be Category B operators and purchasers of licences will usually be Category A operators.[160] Indeed, both sides agree that large numbers of import licences are being traded on the market place. Thus, in general, Category A operators are able to purchase the licences they need in addition to their annual licence entitlement if they wish to maintain their previous market share.[161] However, initial licence holders who carry out the physical importation of bananas or sell the licences in any case reap tariff quota rents, whereas licence transferees have to purchase these licences for a price up to the amount of the tariff quota rent from initial licence holders.[162] Thus a licence transferee does not have the opportunity to benefit from tariff quota rents equivalent to that which accrues to an initial licence holder. Given that licence transferees are usually Category A

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[160] "The Council [of the European Communities] is ... correct in contending that the traditional dealers [in Latin American bananas] have the opportunity to buy 'market shares' back from those who have received a share of the 30 per cent quota. But again it must not be overlooked that that only confirms that the regulation, by means of the allocation of the quota, transfers the profit potential from the traditional dealers in third-country bananas to the traditional dealers in Community/ACP bananas ...". Opinion of Advocate General Gulman of the European Court of Justice, in Federal Republic of Germany v. Council, p.24.

"The principal source of licences which are actually sold has been Community producer interests. Individual producers and producers' organizations which are not themselves necessarily 'importers' of bananas have been allocated Category B licences. Since in general they have no interest in importing dollar bananas, these licences are sold, providing a supplement to their income in addition to the support provided by the provisions on aid to compensate their loss of income. The main purchasers of licences appear to be the multinational companies themselves and certain German operators including newcomers." European Commission, Report on the EC Banana Regime, VI/5671/94, p.10f.

[161] "Transferability of licences is an essential feature of the regime so that operators who have not traditionally traded in EC or ACP fruit can have access to the Category B licence under partnership arrangements right from the start, before they have had the opportunity to develop their own trade in EC and ACP fruit." European Commission, Report on the EC Banana Regime, VI/5671/94, p.10.

[162] In the alternative, primary importers in the meaning of the activity function rules also have the option of "pooling" licences by entering into partnership arrangements with, or by investing in companies engaged in customs clearing or in ripening activities.

operators who are most often service suppliers of foreign origin and since licence sellers are usually Category B operators who are most often service suppliers of EC (or ACP) origin, we conclude that service suppliers of Complainants' origin are subject to less favourable conditions of competition in their ability to compete in the wholesale services market for bananas than service suppliers of EC (or ACP) origin.

7.337 The EC notes that it presented evidence that in fact the EC market shares of the three major international banana traders do not reflect any adverse effect coming from the EC import licensing procedures. According to the EC, between 1991 and 1994 there was an increase in the EC market shares of Dole (11 per cent to 15 per cent) and Del Monte (7.5 per cent to 8 per cent), while that of Chiquita fell (25 per cent to 18.5 per cent) due to faulty business strategy. Thus, there was only a slight overall decline in the market share of the three companies from 43.5 per cent to 41.5 per cent. Moreover, the EC suggests that more recent data also indicates the lack of an effect on market shares. It notes that as of 1997 four of the biggest banana import companies have together claimed primary importer status for 64 per cent, 58 per cent and 63 per cent of the total primary importer reference quantity of bananas for the EC-15 for 1993, 1994 and 1995 respectively. In our view, this evidence does not counter the analysis outlined above. Because of the possibility (or even incentive) of purchasing licences or taking other action (such as entering into licence "pooling", investment or contractual arrangements with operators entitled to initial licence allocations) to preserve market share, a lack of significant change in market share does not demonstrate that there has not been a significant change in the conditions of competition.

7.338 For all these reasons, although operator category rules arguably apply on a formally identical basis regardless of the origin of the service or the service supplier concerned, service suppliers of Complainants' origin are subject to less favourable conditions of competition in the meaning of Article XVII:2-3 than service suppliers of EC origin, as a result of the allocation to Category B operators of 30 per cent of the licences required for in-quota imports of third-country and non-traditional ACP bananas.

7.339 While the foregoing analysis is sufficient for us to find that the operator category rules are inconsistent with the requirements of Article XVII of GATS, we consider that it is useful to note that our conclusions are confirmed by factual information submitted by the parties, such as considerations advanced by the EC in the context of the introduction of the licensing system for third-country and non-traditional ACP imports. According to EC sources,[163] the allocation of 30

[163] "1 ... From the range of alternative methods which could be used to achieve this goal, the approach of cross-subsidization, through issuing licences to import 'dollar' bananas to those who traded in Community or ACP bananas was chosen because it not only provides some financial compensation for the higher production costs of these bananas, but also acts as an incentive for the market to become more integrated, and to encourage operators to trade in both 'dollar' and EU/ACP fruit. ...

per cent of the licences required for the importation of third-country and non-traditional ACP bananas at in-quota tariff rates to those operators who have previously marketed EC and traditional ACP bananas is intended to "cross-subsidize" the latter category of operators with tariff quota rents in order to offset the higher costs of production, to strengthen their competitive position and to encourage them to continue marketing bananas of EC and traditional ACP origin. In this regard, the EC Council noted that "... the [licensing] allocation formula is intended ... to strengthen the competitive position of operators who have previously marketed Community or ACP bananas, vis-à-vis their competitors who have previously marketed Latin American bananas ...".[164]

7.340 As noted above, the EC states that in 1994, 28 per cent of the EC/ACP production was controlled by three large integrated banana trading companies (i.e., Chiquita, Dole and Del Monte) which are ultimately in the Complainants' ownership or control. The Complainants submit that prior to the introduction of the EC common market organization, the share of the three large banana companies in the EC/ACP market segment was only 6 per cent and that it was less than 10 per cent for all non-ACP foreign-owned companies. If we assume, absent evidence to the contrary, that these figures are accurate, we believe that the significant increase in the market share of foreign-owned suppliers in the EC/ACP market segment may well be a result of the "cross-subsidization" between operator categories which creates an incentive for service suppliers to become Category B operators.[165]

7.341 Consequently, we find that the allocation to Category B operators of 30 per cent of the licences allowing the importation of third-country and non-

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2 ... Reserving a proportion of tariff quota licences for those operators who have marketed ACP and/or EU bananas is a means of transferring some of the quota rent to them, in order to offset the higher costs of production and therefore to make marketing fruit from these sources a viable commercial proposition. ...

3 ... From the producers' viewpoint, some of the larger dollar suppliers are building up interests in EU and ACP countries, either through establishing plantations, ... or through contractual arrangements with producer groups ... . These links demonstrate the success of the cross-subsidization principle of encouraging integration of the different sources supplying the market". European Commission, Impact of cross-subsidization within the banana regime, Note for information, p.1.

[164] Written observation of the Council of the European Communities before the Court of Justice of the European Communities concerning the application for interim relief pursuant to Articles 185 and 186 of the EEC Treaty, 14 June 1993, in Case No. C-276/93R, Chiquita Banana Company B.V. and Others v. Council, p.15.

[165] "At the same time, bananas from EU and ACP sources are starting to penetrate markets outside those Member States which granted them preferential treatment, although these bananas are still primarily sold in their traditional markets. This latter observation might in part reflect the strategies of the multinational companies to become increasingly involved in the marketing of EU and ACP bananas. Since 1993, these companies have established joint ventures with or taken important stakes in organizations both producing and marketing from the Canary Islands, the French Antilles, Jamaica and Somalia. These new interests are in addition to those established in Cameroon and the Ivory Coast before 1993." European Commission, Report on the Operation of the Banana Regime, SEC(95) 1565 final, Brussels, 11 October 1995, p.7f.

traditional ACP bananas at in-quota tariff rates creates less favourable conditions of competition for like service suppliers of Complainants' origin and is therefore inconsistent with the requirements of Article XVII of GATS.

(ii) Article II of GATS

7.342 The Complainants claim that the allocation of the third-country import licences on the basis of operator categories and the eligibility criteria for Category B operators discriminate against like service suppliers. As a result, the EC is alleged to be in violation of Article II of GATS because more favourable treatment is accorded to like service suppliers of ACP origin.

7.343 The EC responds with the same arguments that it raised in respect of the Complainants' claims concerning operator categories under Article XVII (see paragraph 7.313). In addition, the EC reiterates that, in the absence of a cross-reference to Article XVII, Article II cannot be interpreted using the "modification of competitive conditions" standard found in Article XVII:3.

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

7.345 As to the first element, we have already determined that the EC measures implementing the operator category rules constitute measures affecting trade in services (paragraphs 7.277 *et seq.*). We also recall our discussion on the absence of MFN exemptions in the EC list of Article II exemptions which would be relevant to the claims before us (paragraph 7.298).

7.346 Turning to the second element, we must consider whether the EC, by applying operator category rules, accords services or service suppliers of any Member treatment less favourable than that it accords to like services or service suppliers of any other country, such as an ACP country.[166] In this connection, we recall that we have found that Category A, B and C operators who are engaged in the marketing of bananas are actual service suppliers and that operators that form part of vertically integrated companies have the capability and opportunity to become at any time service suppliers by entering the wholesale service supply market (paragraph 7.320). Finally, we recall our findings that wholesale transactions as well as each of the different subordinated services mentioned in the headnote to section 6 of the CPC are "like" when supplied in connection with wholesale services, irrespective of whether these services are supplied in respect

[166] Operators in ACP ownership or control: e.g. Jamaica Producers, Winban/Wibdeco. (Information submitted by the Complainants). According to the EC, at least one of the subsidiaries of Jamaica Producers is not in ACP ownership or control.

of bananas of EC and traditional ACP origin, on the one hand, or with respect to bananas of third-country or non-traditional ACP origin, on the other, and that, in our view, at least to the extent that entities provide these like services, they are like service suppliers (paragraph 7.322).

7.347 In examining the Article II issues presented, we note that the categorization of operators and the allocation of licences to them is based on whether they have, during a previous three-year period, marketed EC and traditional ACP bananas or third-country and non-traditional ACP bananas. We recall our finding that operator category rules arguably apply on a formally identical basis to all services regardless of their origin and to all service suppliers regardless of their nationality, ownership or control (paragraph 7.324). Thus, the EC rules establishing operator categories do not formally accord treatment less favourable to Complainants' services and service suppliers than to services and services suppliers of ACP countries on the basis of their origin.

7.348 As in the case of the Article XVII claim, we also note that it is true that service suppliers of Complainants' origin who provide wholesale trade services only with respect to third-country or non-traditional ACP bananas are subject to operator category rules, while service suppliers of ACP origin that market traditional ACP (or EC) bananas are not. However, operators who have supplied wholesale trade services only with respect to third-country and non-traditional ACP bananas are not legally prevented from supplying such services with respect to EC and traditional ACP bananas. By supplying such services to the traditional ACP and EC market segment, suppliers can avoid, or reduce the extent to which they are affected by, operator category rules.

7.349 We then turn to the question whether the application of arguably formally identical operator category rules might nonetheless result in services or service suppliers of Complainants' origin being accorded less favourable treatment than like services or service suppliers of ACP origin in a manner inconsistent with Article II of GATS. In this context, we recall our finding that the obligations contained in Article II:1 of GATS to extend "treatment no less favourable" should be interpreted to require providing no less favourable conditions of competition (paragraph 7.304). Thus, the same analysis used to evaluate the Article XVII claim in respect of operator category rules is applicable here as well.

7.350 Therefore, we recall our reasoning in the context of the parallel claim under Article XVII. Category B operators are eligible for the allocation of 30 per cent of the licences required for third-country or non-traditional ACP imports at in-quota tariff rates regardless of whether they have previously traded at all in third-country bananas. Based on their past import performance in third-country and non-traditional ACP bananas, Category A operators are eligible for only 66.5 per cent of the licences allowing third-country or non-traditional ACP imports at in-quota tariff rates. Accordingly, we found that, when third-country licences are traded, Category B operators will usually sell, and Category A operators will usually purchase, licences. Furthermore, we concluded that operators who are initial licence holders have a greater opportunity to benefit from tariff quota rents

than operators who are licence transferees and that most licence transferees are Category A operators. We further found that most service suppliers of Complainants' origin are classified for most of their past marketing of bananas as Category A operators, while most service suppliers of ACP (and EC) origin are registered for most of their past marketing of bananas as Category B operators.[167]

7.351 For these reasons, although operator category rules apply regardless of the origin of the service or the service supplier concerned, service suppliers of Complainants' origin are subject to less favourable treatment than service suppliers of ACP origin as a result of the allocation to Category B operators of 30 per cent of the licences required for in-quota imports of third-country and non-traditional ACP bananas.

7.352 While the foregoing analysis is sufficient for us to find that the operator category rules are inconsistent with the requirements of Article II of GATS, we consider it useful to note that our conclusions are supported by the considerations advanced by the EC in the context of the introduction of the licensing system applicable to third-country and non-traditional ACP imports. According to EC sources,[168] the allocation of 30 per cent of the licences required for the importation of third-country and non-traditional ACP bananas at in-quota tariff rates to those operators who have previously marketed traditional ACP and EC bananas is intended to "cross-subsidize" the latter category of operators with tariff quota rents in order to offset the higher costs of production, to strengthen their competitive position and to encourage them to continue marketing bananas of traditional ACP (and EC) origin.

7.353 Consequently, we find 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 creates less favourable conditions of competition for like service suppliers of Complainants' origin and is therefore inconsistent with the requirements of Article II of GATS.

(d) Activity Functions

7.354 Activity function rules apply to Category A operators as well as to Category B operators. Article 3 of Regulation 1442/93 defines three categories of economic activity, i.e., (1) "primary" importers, (2) "secondary" importers (i.e., customs clearers) and (3) ripeners. Fixed percentages of the licences required for the importation originating in third countries or non-traditional ACP countries at in-quota tariff rates are allocated on the basis of these "activity functions": Article 5 of Regulation 1442/93 provides for a weighting coefficient of 57 per cent for primary importers, 15 per cent for secondary importers and 28 per cent for

[167] Operators classified for most of their past trade volume as Category B operators: e.g. Jamaica Producers (Jamaica), Winban/Wibdeco (Windward Islands). (Information submitted by the Complainants).
[168] The impact of cross-subsidization within the banana regime (cited in note 163 supra).

ripeners. In introducing activity functions the EC states that "the Commission is guided by the principle whereby the licences must be granted to natural or legal persons who have undertaken the commercial risk of marketing bananas and by the necessity of avoiding disturbing normal trading relations between persons occupying different points in the marketing chain".[169]

(i) Article XVII of GATS

7.355 In the view of the Complainants, the allocation of third-country tariff quota licences based on activity functions-in particular the reservation of 15 per cent for secondary importers and of 28 per cent for ripeners, most of which they claim, are EC firms - serves the purpose of re-allocating market shares previously held by third-country firms and modifies the conditions of competition in favour of like services suppliers of EC origin. Therefore, the Complainants claim that the activity function rules violate Article XVII of GATS vis-à-vis like EC service suppliers of services covered by the EC commitments on national treatment.

7.356 The EC argues that the creation of activity functions aims at avoiding the concentration of economic bargaining power - which results from the allocation of import licences - in the hands of a few privileged recipients at a specific stage of the supply chain.

7.357 In light of these arguments we turn to an examination of the issues arising under this Article XVII claim. In order to establish a breach of the national treatment obligation of Article XVII, three elements need to be demonstrated: (i) the EC has undertaken a commitment in a relevant sector and mode of supply; (ii) the EC has adopted or applied a measure affecting the supply of services in that sector and/or mode of supply; and (iii) the EC's measure accords to service suppliers of any other Member treatment less favourable than that it accords to the EC's own like service suppliers.

7.358 As to the first two elements, we have already determined that the EC has made a commitment in respect of wholesale trade services with respect to service supply across borders and through commercial presence without conditions or qualifications in the meaning of Article XVII (paragraph 7.306). We find that the EC measures implementing the activity function rules constitute measures affecting trade in services for the same reasons that we found that the operator category rules constitute measures affecting trade in services (paragraphs 7.277 *et seq.*).

7.359 Turning to the third element, we must consider whether the EC, by applying the activity function rules, accords service suppliers of any Complainant treatment less favourable than that it accords to like service suppliers of the EC. In this connection, we recall that we have found that Category A, B and C operators who are engaged in the marketing of bananas are actual service suppliers

[169] Recital 15 of Regulation 404/93.

and that operators that form part of vertically integrated companies have the capability and opportunity to become at any time service suppliers by entering the wholesale service supply market (paragraph 7.320). Finally, we recall our findings (paragraph 7.322) that wholesale transactions as well as each of the different subordinated services mentioned in the headnote to section 6 of the CPC are "like" when supplied in connection with wholesale services, irrespective of whether these services are supplied in respect of bananas of EC and traditional ACP origin, on the one hand, or with respect to bananas of third-country or non-traditional ACP origin, on the other, and that, in our view, at least to the extent that entities provide these like services, they are like service suppliers.

7.360 In examining the issues presented by the Complainants, we recall that under the EC activity function rules, claims for reference quantities of EC and traditional ACP bananas marketed during a preceding three-year period by Category B operators as well as claims as to quantities of third-country and non-traditional ACP bananas imported during that period by Category A operators are weighted according to the activity functions performed by these operators. The weighting coefficient of 57 per cent for primary importers, 15 per cent for secondary importers and 28 per cent for ripeners relates to the importation, customs clearance and ripening activities performed by Category A and B operators during the previous three-year period. Activity function rules apply to all service suppliers regardless of their nationality, ownership or control. Suppliers of EC origin who supply wholesale services with respect to third-country and non-traditional ACP bananas are equally subject to activity function rules as suppliers of Complainants' origin who provide wholesale services with respect to third-country and non-traditional ACP bananas. Likewise, suppliers of EC origin are treated in the same way by activity function rules when they sell or market EC or traditional ACP bananas as suppliers of Complainants' origin that deal in EC or traditional ACP bananas. Accordingly, we conclude that the EC rules establishing activity functions do not discriminate against Complainants' like service suppliers on the basis of their origin and thus are arguably formally identical in the meaning of Article XVII:2 for service suppliers of domestic as well as foreign origin.

7.361 We then turn to the question whether the application of arguably formally identical activity function rules to service suppliers of Complainants' origin modifies, in the meaning of Article XVII, conditions of competition in favour of like service suppliers of EC origin. In this context, we note that service suppliers of Complainants' origin who sell third-country or non-traditional ACP bananas are subject to activity function rules, while like service suppliers of EC origin who sell EC bananas are not. However, operators who have supplied wholesale services exclusively or mainly with respect to third-country and non-traditional ACP bananas are not legally prevented from choosing to begin supplying or to supply more such services with respect to EC (and traditional ACP) bananas. By supplying wholesale services to the EC (and traditional ACP) banana market seg-

ment, suppliers can avoid, or reduce the extent to which they are, subject to activity function rules.[170]

7.362 However, we also have to examine the impact of the introduction of activity function rules on market conditions. As noted above, the EC states that the European Commission does not have a record of the actual ownership or control of companies registered to receive licences under whatever activity function. We note that a company may claim reference quantities for the calculation of their annual licence entitlement at the same time for primary importation, customs clearance as well as ripening activities. But we also have to consider the information submitted by the Complainants according to which in 1992 overall about 83 per cent of bananas imported or marketed in the EC - and between 57 and 100 per cent in individual EC Member States[171] - were ripened by EC owned or controlled ripeners before the introduction of the common market organization. The EC challenges these statistics as exaggerated. But even the EC statistics[172] suggest that 74 to 80 per cent of ripeners are EC controlled. Thus, we conclude that the vast majority of the ripening capacity in the EC is owned or controlled by natural or juridical persons of the EC and that most of the bananas produced in or imported to the EC are ripened in EC owned or controlled ripening facilities. Indeed, as noted above by the EC itself, the activity function rules were put in place to prevent a concentration of economic bargaining power in the hands of the large multinational companies, which the EC elsewhere in its submission de-

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[170] Furthermore, these suppliers will become eligible for the allocation of 30 per cent of the in-quota licences required for third-country and non-traditional ACP imports which are allocated to Category B operators.

[171] *Average estimated volume ripened by EC owned ripeners in 1992* (Information submitted by the Complainants):

[Austria:	100.0%]
Belgium/Luxembourg:	73.1%
Denmark:	100.0%
[Finland:	100.0%]
France:	87.5%
Germany:	57.0%
Greece:	100.0%
Ireland:	94.5%
Italy:	100.0%
Netherlands:	87.0%
Portugal:	100.0%
Spain:	94.9%
[Sweden:	100.0%]
United Kingdom:	100.0%
EC total:	83.7%

We note that Austria, Finland and Sweden did not become EC member States until 1995.

[172] In its second oral statement, the EC stated that "the ripening sector has always been ... penetrated by foreign suppliers of ripening services or of ripeners for the account of integrated firms (around 20%)". At the interim hearing, the EC stated that "[a]t present, our best indications are that the some 50 ripening companies owned or controlled by Chiquita and Dole and the 5 Del Monte companies count for 26 per cent of ripening declarations in the EC-15".

scribes as Chiquita, Dole and Del Monte. Therefore, most of the claims as to ripening activities performed will be filed by ripeners of EC origin who are actual or potential wholesale service suppliers. Likewise, we are convinced that most of the service suppliers of Complainants' origin will usually be able to claim reference quantities only for primary importation and possibly for customs clearance, but not for the performance of ripening activities. We further note that we have not been presented with sufficient information to ascertain whether companies carrying out customs clearance activities are predominantly in EC or third-country ownership or control. Nor are we in a position to determine whether self-employed natural persons performing customs clearance activities are mainly EC or third-country nationals. Therefore, service suppliers of EC as well as third-country origin do have comparable opportunities to file claims as to primary and secondary importation activities performed with the EC authorities, whereas service suppliers of Complainants' origin do not enjoy equal competitive opportunities to make claims for the performance of ripening activities as service suppliers of EC origin.

7.363 Under the activity function rules, primary importers may obtain access to an amount of A and B licences equivalent to 57 per cent of their past import volumes unless they also perform customs clearance or ripening activities. At the same time, customs clearers are allocated 15 per cent, and ripeners are eligible for 28 per cent of the A and B licences required for the importation of third-country or non-traditional ACP bananas at in-quota tariff rates, regardless of whether they have imported bananas in the past. However, we also have to take into account that import licences are tradeable and transferable. Thus, the allocation of fixed percentages of licences through the application of weighting coefficients (to claims for reference quantities) to the performers of particular activity functions does not automatically determine the distribution of import shares between operators performing these different types of economic activity in the supply chain. In fact, both parties agree that large numbers of import licences are being traded on the market place. Consequently, primary importers are, in general, able to purchase the amount of the licences they need in addition to their annual licence entitlement if they wish to maintain their previous market share, e.g. from ripeners who have not imported bananas themselves. Thus we believe that, when licences are being traded, sellers of licences will usually be ripeners and purchasers of licences will usually be primary importers. Accordingly, most of the licence transferees will be primary importers, while most of those initial licence holders who do not carry out the physical importation themselves but sell the licences issued to them will be ripeners. However, while an initial licence holder who carries out the physical importation of bananas or sells the licence will in any case reap tariff quota rents, a licence transferee will have purchased the licence for an amount up to the tariff quota rent from the initial licence holder. Thus a licence transferee does not have the opportunity to benefit from tariff quota rents equivalent to those of an initial licence holder. Given that licence transferees are usually primary importers and that licence sellers are usually ripeners which, as noted above, are overwhelmingly EC owned or controlled,

suppliers of EC origin, albeit being subject to formally identical treatment, enjoy more favourable conditions of competition in the meaning of Article XVII:3 of GATS than like wholesale service suppliers of Complainants' origin.

7.364 Primary importers who wish to maintain their previous market share also have the options of entering into contractual arrangements with, or investing in, companies performing customs clearing or ripening activities. However, whatever option primary importers choose in order to obtain licences in addition to their initial entitlement, e.g., ad hoc purchases of licences from, or long-term investment or partnership arrangements with, secondary importers or ripeners, the fact that licence transferees are subject to less favourable conditions of competition than initial licence holders remains the same. Thus, the availability of alternative options to obtain access to additional licences does not detract from our conclusion in the preceding paragraph that the vast majority of ripeners are EC owned or controlled and enjoy more favourable conditions of competition than like wholesale service suppliers of foreign origin.

7.365 Under operator category rules, on the basis of their third-country and non-traditional ACP imports during a preceding three-year period, primary importers classified in operator Category A are eligible for licences for 66.5 per cent of the licences allowing imports of third-country and non-traditional ACP bananas at in-quota tariff rates. Under activity function rules, the entitlements of operators who are primary importers are reduced to 57 per cent of the bananas marketed during a preceding three-year period unless such operators also engage in customs clearance or ripening activities. While primary importers who are Category B operators are subject to the same weighting coefficients as Category A operators, these Category B operators have, on the basis of their marketing of EC and traditional ACP bananas during a preceding three-year period, access to 30 per cent of the licences allowing imports of third-country and non-traditional ACP bananas at in-quota tariff rates regardless of whether they have previously traded in the latter market segment. Therefore, the purchasers of licences will be more often primary importers who are Category A operators than primary importers who are Category B operators. Thus, the allocation of licences according to activity functions is capable of aggravating the adverse impact of the licence allocation to different operator categories for those service suppliers who are of Complainants' origin.

7.366 Therefore, we conclude that the allocation of fixed percentages of licences according to activity functions performed by operators arguably applies on a formally identical basis to all wholesale service suppliers regardless of their origin, nationality, ownership or control. However, the allocation of such licences according to activity functions modifies conditions of competition in favour of service suppliers of EC origin given that the vast majority of ripeners who are actually supplying, or capable of supplying, wholesale services are of EC origin.

7.367 The foregoing analysis is sufficient for us to find that the activity function rules are inconsistent with the requirements of Article XVII of GATS. Nevertheless, we consider it useful to note that our conclusions are supported by the fact that according to EC sources, the allocation of 28 per cent of the A and B li-

cences allowing third-country and non-traditional ACP imports at in-quota tariff rates to ripeners regardless of whether they have previously imported bananas is intended to strengthen their bargaining position in the supply chain towards primary importers.[173]

7.368 Consequently, we find that 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 creates less favourable conditions of competition for like service suppliers of Complainants' origin and is therefore inconsistent with the requirements of Article XVII of GATS.

(ii) Article II of GATS

7.369-7.372 [Used in the Mexico report.]

(e) Export Certificates

7.373 The Complainants claim that the exemption of Category B operators from the requirement imposed on other operators by Regulation 478/95 to match EC import licences with BFA export certificates with respect to imports from Colombia, Costa Rica and Nicaragua accords less favourable treatment to service suppliers of third country origin. As a result, the EC is alleged to be in violation of Article II of GATS with respect to like service suppliers of ACP origin, and Article XVII of GATS with respect to like service suppliers of EC origin.

7.374 The EC responds along the same lines that it has in respect of the other GATS claims. It points out that neither all Category A licence holders are in third-country ownership, nor are all Category B licences holders - that benefit from a BFA export certificate exemption - in EC/ACP control. It also argues that the GATS does not contain any rules governing the allocation or distribution of quota rents which are generated by trade instruments such as tariff quotas whose imposition is legitimate under WTO agreements.

(i) Article XVII of GATS

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

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[173] "At the ripener level, holders of Category B licences will use their licences to aid in their negotiations with their suppliers of bananas, be they dollar, ACP or EC". European Commission, Report on the EC Banana Regime, VI/5671/94, p.10f.

7.376 In respect of the first element, we recall that the EC has bound the wholesale trade service subsector as regards service supply across borders and through commercial presence without conditions or qualifications limiting the scope of the commitments.

7.377 As to the second element, i.e., whether the EC measures implementing the export certificate requirement are measures affecting the supply of services, we recall that we have found that the term "affecting" should be interpreted broadly (paragraphs 7.277 *et seq.*). In this connection, we also note that supply of services through cross-border supply or commercial presence is defined broadly to include the production, distribution, marketing, sale and delivery of such services.[174] As a consequence, in our view, the EC measures establishing export certificate requirements are "measures affecting trade in services" in the meaning of the GATS and are measures affecting Complainants' trade in services for the same reasons as are operator category and activity function rules.

7.378 We turn now to the third element of whether the export certificate requirement accords to service suppliers of the Complainants treatment less favourable than that it accords to the EC's own like service suppliers. We note that the parties do not disagree that the requirement to match EC import licences with BFA export certificates serves the purpose, or at least has the effect, of transferring part of the tariff quota rent which would normally accrue to initial EC import licence holders to the suppliers from Colombia, Costa Rica and Nicaragua who are initial holders of BFA export certificates. According to Article 3 of Regulation 478/95, Category A and C operators are subject to the EC's requirement to match import licences with BFA export certificates, whereas Category B operators are not subject to a similar requirement. Therefore, Category B operators who are initial holders of EC import licences do not have to share part of the tariff quota rent with initial holders of BFA export certificates. However, Category A and C operators must obtain export certificates from holders of BFA export certificates issued by the competent authorities of Colombia, Costa Rica or Nicaragua. When Category A and C operators are initial holders of EC import licences they share part of the tariff quota rent with initial holders of BFA export certificates. Consequently, the exemption of Category B operators from the BFA export certificate requirement ensures that tariff quota rent shares that would normally accrue to initial EC import licence holders are transferred exclusively from such holders who are Category A and C operators to initial holders of BFA export certificates.

7.379 In this context, we recall that operator category rules apply on an arguably formally identical basis to all service suppliers regardless of their nationality, ownership or control (paragraph 7.324). By the same token, we conclude that the exemption of Category B operators from the requirement to match EC import licences with BFA export certificates also arguably applies on a formally identi-

[174] GATS, Article XXVIII:(b).

cal basis irrespective of the origin of the service suppliers concerned. However, we also recall that most service suppliers of Complainants' origin are classified as Category A operators for most of their previous trade volume and that most of the "like" service suppliers of EC origin are classified as Category B operators for most of the bananas they have marketed during a preceding three-year period. Accordingly, we conclude that the exemption of Category B operators from the requirement to match EC import licences with BFA export certificates constitutes less favourable treatment for suppliers of Complainants' origin because it modifies conditions of competition in the meaning of Article XVII:3 of GATS in favour of "like" service suppliers or EC origin.

7.380 For these reasons, we find that the exemption of Category B operators of EC origin from the requirement to match EC import licences with BFA export certificates creates less favourable conditions of competition for like service suppliers of Complainants' origin and is therefore inconsistent with the requirements of Article XVII of GATS.

(ii) Article II of GATS

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

7.382 As to the first element, i.e., whether the EC measures implementing the export certificate requirement are measures covered by GATS, we recall that we have found that the phrase "affecting trade in services" should be interpreted broadly (paragraphs 7.277 *et seq.*). In this connection, we also note that supply of services through cross-border supply or commercial presence is defined broadly to include the production, distribution, marketing, sale and delivery of such services.[175] As a consequence, in our view, the EC measures are "measures affecting trade in services" in the meaning of the GATS. More specifically, the rules establishing export certificate requirements constitute measures affecting the Complainants' trade in services for the same reasons as do operator category and activity function rules and are therefore covered by GATS.

7.383 We turn now to the second element of whether the export certificate requirement accords to service suppliers of the Complainants treatment less favourable than that it accords to like service suppliers of ACP origin. We note that the parties do not disagree that the requirement to match EC import licences with BFA export certificates serves the purpose, or at least has the effect, of transferring part of the tariff quota rent which would normally accrue to initial EC import

[175] GATS, Article XXVIII:(b).

licence holders to the suppliers from Colombia, Costa Rica and Nicaragua who are initial holders of BFA export certificates. According to Article 3 of Regulation 478/95, Category A and C operators are subject to the EC's requirement to match import licences with BFA export certificates, whereas Category B operators are not subject to a similar requirement. Therefore, Category B operators who are initial holders of EC import licences do not have to share part of the tariff quota rent with initial holders of BFA export certificates. However, Category A and C operators must obtain export certificates from holders of BFA export certificates issued by the competent authorities of Colombia, Costa Rica or Nicaragua. When Category A and C operators are initial holders of EC import licences they share part of the tariff quota rent with initial holders of BFA export certificates. Consequently, the exemption of Category B operators from the BFA export certificate requirement ensures that tariff quota rent shares that would normally accrue to initial EC import licence holders are transferred exclusively from such holders who are Category A and C operators to initial holders of BFA export certificates.

7.384 In this context, we recall that operator category rules apply on an arguably formally identical basis to all service suppliers regardless of their nationality, ownership or control (paragraph 7.324). By the same token, we conclude that the exemption of Category B operators from the requirement to match EC import licences with BFA export certificates also arguably applies on a formally identical basis irrespective of the origin of the service suppliers concerned. However, we also recall that most service suppliers of Complainants' origin are classified as Category A operators for most of their previous trade volume and that most of the "like" service suppliers of ACP origin are classified as Category B operators for most of the bananas they have marketed during a preceding three-year period. Accordingly, we conclude that the exemption of Category B operators from the requirement to match EC import licences with BFA export certificates constitutes less favourable treatment for suppliers of Complainants' origin because it modifies conditions of competition in favour of "like" service suppliers or ACP origin.

7.385 Accordingly, we find that the exemption of Category B operators of ACP origin from the requirement to match EC import licences with BFA export certificates creates less favourable conditions of competition for like service suppliers of Complainants' origin and is therefore inconsistent with the requirements of Article II of GATS.

(f) Hurricane Licences

7.386 Hurricane licences[176] authorize operators who include or represent EC and ACP producers, or producer organizations "to import in compensation third-country bananas and non-traditional ACP bananas for the benefit of the operators

[176] See EC regulations cited in note 117 supra.

who directly suffered damage as a result of the impossibility of supplying the Community market with bananas originating in affected producer regions" because of the impact of tropical storms. In the aftermath of the hurricanes Debbie, Iris, Luis and Marilyn, 281,605 tonnes of third-country or non-traditional ACP imports were authorized between 16 November 1994 and May 1996.[177]

7.387 The Complainants claim that the award of large amounts of hurricane licences by the EC exclusively to Category B operators and EC producers accords less favourable treatment to third country service suppliers. Therefore, the EC is alleged to be in violation of Article II of GATS because of its treatment of ACP suppliers, and in violation of Article XVII of GATS because of its treatment of EC suppliers.

7.388 The EC responds that the issuance of hurricane licences is required by the Lomé Convention. Further, the EC argues that the allocation of hurricane licences is directly linked to trade in goods. Therefore, inconsistencies with Article II or XVII of GATS cannot occur because the hurricane licences are not covered by the GATS in the EC's view.

(i) Article XVII of GATS

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

7.390 In respect of the first element, we recall that the EC has bound the wholesale trade service subsector as regards service supply across borders and through commercial presence without conditions or qualifications limiting the scope of the commitments.

7.391 As to the second element, i.e., whether the EC measures implementing hurricane licences are measures affecting the supply of services, we recall that we have found that the term "affecting" should be interpreted broadly (paragraphs 7.277 *et seq.*). In this connection, we also note that supply of services through cross-border supply or commercial presence is defined broadly to include the production, distribution, marketing, sale and delivery of such services. As a consequence, in our view, the EC banana regulations are "measures affecting trade in services" in the meaning of the GATS. More specifically, the rules establishing hurricane licences constitute measures affecting Complainants' trade in services.

7.392 We now turn to the third element of whether the issuance of hurricane licences accords to service suppliers of the Complainants treatment less favour-

[177] See note 119 supra.

able than that it accords to the EC's own like service suppliers. In addressing this issue, we note that while only operators who include or directly represent EC or ACP producers or producer organizations affected by a tropical storm are eligible for the allocation of hurricane licences,[178] the EC regulations authorizing the issuance of certain quantities of hurricane licences apply on an arguably formally identical basis to services and service suppliers regardless of their origin, nationality, ownership or control. However, like Category B operators in general, we find that the vast majority of operators who "include or directly represent" EC or ACP producers are service suppliers of EC (or ACP) origin. We further note that hurricane licences allow for the importation of third-country and non-traditional ACP bananas at in-quota tariff rates outside and additional to the tariff quota. Thus service suppliers of EC (or ACP) origin obtain access to an additional entitlement of licences allowing the importation of third-country and non-traditional ACP bananas at in-quota tariff rates beyond the existing allocation to Category B operators of 30 per cent of the licences allowing imports of such bananas within the tariff quota. To put it differently, the allocation of hurricane licences gives service suppliers of EC (and ACP) origin the opportunity to benefit from tariff quota rents in addition to the tariff quota rents generated by the allocation of 30 per cent of the in-quota import licences to them. Thus the fact that only operators who include or directly represent EC (or ACP) producers are eligible for such licences modifies conditions of competition in favour of wholesale services suppliers of EC (and ACP) origin, since like service suppliers of Complainants' origin, if and when affected by a hurricane, do not enjoy a similar rent-making opportunity. We further note that our findings are limited to the present factual situation where hurricane licences are issued to operators who exclusively include or represent EC (or ACP) producers. Our legal analysis would not necessarily apply to a situation where hurricane licences were issued directly and exclusively to EC (or ACP) producers.

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[178] "1. The quantities referred to in Article 1(2) shall be allocated to the operators who:

- include or directly represent banana producers affected by tropical storm Debbie.
- and who, during the last quarter of 1994, are unable to supply, on their own account, the Community market with bananas originating in the regions or countries referred to 1(2) on account of the damage caused by tropical storm Debbie.

2. The competent authorities in the Member States concerned shall determine the beneficiary operators who meet the requirements of paragraph 1 and shall make an allocation to each of them pursuant to this Regulation on the basis of:

- the quantities allocated to the producer regions or countries referred to in Article 1(2) and of
- the damage sustained as a result of tropical storm Debbie.

3. The competent authorities shall assess the damage sustained on the basis of all supporting documents and information collected from the operators concerned." Article 2 of Commission Regulation (EC) No. 2791/94 of 16 November 1994 on the exceptional allocation of a quantity additional to the tariff quota for imports of bananas in 1994 as a result of tropical storm Debbie." Idem, Article 4.

7.393 Consequently, we find that the allocation of hurricane licences exclusively to operators who include or directly represent EC producers creates less favourable conditions of competition for like service suppliers of Complainants' origin and is therefore inconsistent with the requirements of Article XVII of GATS.

(ii) Article II of GATS

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

7.395 As to the first element, i.e., whether the EC has adopted or applied a measures covered by GATS, we recall that we have found that the phrase "affecting trade in services" should be interpreted broadly (paragraphs 7.277 *et seq.*). In this connection, we also note that supply of services through cross-border supply or commercial presence is defined broadly to include the production, distribution, marketing, sale and delivery of such services. As a consequence, in our view, the EC banana regulations are "measures affecting trade in services" in the meaning of the GATS. More specifically, the rules establishing hurricane licences constitute measures affecting the Complainants' trade in services and are therefore covered by GATS.

7.396 We now turn to the second element of whether the issuance of hurricane licences accords to service suppliers of the Complainants treatment less favourable than that it accords to like service suppliers of ACP origin. In addressing this issue, we note that while only operators who include or directly represent EC or ACP producers or producer organizations affected by a tropical storm are eligible for the allocation of hurricane licences,[179] the EC regulations authorizing the is-

[179] "1. The quantities referred to in Article 1(2) shall be allocated to the operators who:
- include or directly represent banana producers affected by tropical storm Debbie.
- and who, during the last quarter of 1994, are unable to supply, on their own account, the Community market with bananas originating in the regions or countries referred to 1(2) on account of the damage caused by tropical storm Debbie.

2. The competent authorities in the Member States concerned shall determine the beneficiary operators who meet the requirements of paragraph 1 and shall make an allocation to each of them pursuant to this Regulation on the basis of:
- the quantities allocated to the producer regions or countries referred to in Article 1(2) and of
- the damage sustained as a result of tropical storm Debbie.

3. The competent authorities shall assess the damage sustained on the basis of all supporting documents and information collected from the operators concerned." Article 2 of Commission Regulation (EC) No. 2791/94 of 16 November 1994 on the exceptional allocation of a quantity ad-

suance of certain quantities of hurricane licences apply on an arguably formally identical basis to services and service suppliers regardless of their origin, nationality, ownership or control. However, like Category B operators in general, we find that the vast majority of operators who "include or directly represent" EC or ACP producers are service suppliers of ACP (or EC) origin. We further note that hurricane licences allow for the importation of third-country and non-traditional ACP bananas at in-quota tariff rates outside and additional to the tariff quota. Thus service suppliers of ACP (or EC) origin obtain access to an additional entitlement of licences allowing the importation of third-country and non-traditional ACP bananas at in-quota tariff rates beyond the existing allocation to Category B operators of 30 per cent of the licences allowing imports of such bananas within the tariff quota. To put it differently, the allocation of hurricane licences gives service suppliers of ACP (and EC) origin the opportunity to benefit from tariff quota rents in addition to the tariff quota rents generated by the allocation of 30 per cent of the in-quota import licences to them. Thus the fact that only operators who include or directly represent ACP (or EC) producers are eligible for such licences modifies conditions of competition in favour of wholesale services suppliers of EC (and ACP) origin, since like service suppliers of Complainants' origin, if and when affected by a hurricane, do not enjoy a similar rent-making opportunity. We further note that our findings are limited to the present factual situation where hurricane licences are issued to operators who exclusively include or represent ACP (or EC) producers.

7.397 Consequently, we find that the allocation of hurricane licences exclusively to operators who include or directly represent ACP producers creates less favourable conditions of competition for like service suppliers of Complainants' origin and is therefore inconsistent with the requirements of Article II of GATS.

5. Nullification or Impairment

7.398 The measures taken by the EC affecting the importation of bananas from the Complainants, because of the infringement of obligations by the EC under a number of WTO agreements, are a *prima facie* case of nullification or impairment of benefits in the meaning of Article 3.8 of the DSU, which provides that "there is normally a presumption that a breach of the rules has an adverse impact on other Members parties to that covered agreement". To the extent that this presumption can be rebutted,[180] in our view the EC has not succeeded in rebutting the presumption that its breaches of GATT, GATS and Licensing Agreement rules have nullified or impaired benefits of the Complainants.

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ditional to the tariff quota for imports of bananas in 1994 as a result of tropical storm Debbie." Idem, Article 4.

[180] See Panel Report on "United States - Taxes on Petroleum and Certain Imported Substances", adopted on 17 June 1987, BISD 34S/136, 158, para. 5.1.9.

D. Summary of Findings

7.399 The complexity of this case, and the unprecedented number of claims, arguments and Agreements involved, has resulted in a long report with an unprecedented number of findings. To assist the reader, the findings on the various procedural and substantive issues are repeated here. In summary we find that

1. Preliminary Issues

- the EC's claim that the Complainants' case should be dismissed because the consultations held concerning this dispute did not perform their minimum function of affording a possibility for arriving at a mutually satisfactory solution and a clear setting out of the different claims of which a dispute consists shall be rejected (paragraph 7.21).

- the panel request made by the Complainants was sufficient to meet the requirements of Article 6.2 of the DSU to the extent that it alleged inconsistencies with the requirements of specific provisions of specific WTO agreements (paragraph 7.45).

- under the DSU the United States has a right to advance the claims that it has raised in this case (paragraph 7.52).

- the description of the Panel's proceedings, the factual aspects and the parties' arguments should be identical in the four reports. In the "Findings" section, however, the reports differ to the extent that the Complainants' initial written submissions to the Panel differ in respect of alleging inconsistencies with the requirements of specific provisions of specific agreements (paragraph 7.58).

2. The EC Market for Bananas: Article XIII of GATT

- 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 (paragraph 7.63).

- the EC has only one regime for banana imports for purposes of analysing whether its allocation of tariff quota shares is consistent with the requirements of Article XIII (paragraph 7.82).

- it was not unreasonable for the EC to conclude that at the time the BFA was negotiated Colombia and Costa Rica were the only contracting parties that had a substantial interest in supplying the EC banana market in terms of Article XIII:2(d) (paragraph 7.85).

- it is not reasonable to conclude that at the time the BFA was negotiated Nicaragua and Venezuela had a substantial interest in supplying the EC banana market in the terms of Article XIII:2(d) (paragraph 7.85).

- the EC's allocation of tariff quota shares by agreement and by assignment to some Members not having a substantial interest in supplying bananas to the

EC (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 BFA, are inconsistent with the requirements of Article XIII:1 (paragraph 7.90).

- the failure of Ecuador's Protocol of Accession to address banana-related issues does not mean that Ecuador must accept the validity of the BFA as contained in the EC's Schedule or that it is precluded from invoking Article XIII:2 or XIII:4 (paragraph 7.93).

- it was not unreasonable for the EC to conclude that the Lomé Convention requires the EC to allocate country-specific tariff quota shares to traditional ACP banana supplying countries in an amount of their pre-1991 best-ever exports to the EC (paragraph 7.103).

- the allocation of tariff quota shares to ACP countries in excess of their pre-1991 best-ever exports to the EC is not required by the Lomé Convention (paragraph 7.103).

- to the extent that we have found that the EC has acted inconsistently with the requirements of Article XIII:1 (paragraph 7.90), we find that the Lomé waiver waives that inconsistency with Article XIII:1 to the extent necessary to permit the EC 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 EC (paragraph 7.110).

- the inclusion of the BFA tariff quota shares in the EC's Schedule does not permit the EC to act inconsistently with the requirements of Article XIII of GATT (paragraph 7.118).

- neither the negotiation of the BFA and its inclusion in the EC's Schedule nor the Agreement on Agriculture permit the EC to act inconsistently with the requirements of Article XIII of GATT (paragraph 7.127).

3. Tariff Issues

- to the extent that the EC's preferential tariff treatment of non-traditional ACP bananas is inconsistent with its obligations under Article I:1, those obligations have been waived by the Lomé waiver (paragraph 7.136).

4. The EC Banana Import Licensing Procedures

- the Licensing Agreement applies to licensing procedures for tariff quotas (paragraph 7.156).

- the provisions of GATT 1994, the Licensing Agreement and Article 2 of the TRIMS Agreement all apply to the EC's import licensing procedures for bananas (paragraph 7.163).

- the EC licensing procedures for traditional ACP bananas and third-country and non-traditional ACP bananas should be examined as one licensing regime (paragraph 7.167).

- 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 is inconsistent with the requirements of Article III:4 of GATT (paragraph 7.182).

- 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, are inconsistent with the requirements of Article I:1 of GATT (paragraph 7.195).

- the Lomé waiver does not waive the EC's obligations under Article I:1 of GATT in respect of licensing procedures applied to third-country and non-traditional ACP imports, including those related to operator category rules (paragraph 7.204).

- the EC import licensing procedures are subject to the requirements of Article X of GATT (paragraph 7.207).

- 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, is inconsistent with the requirements of Article X:3(a) of GATT (paragraph 7.212).

- 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, is inconsistent with the requirements of Article I:1 of GATT (paragraph 7.223).

- the requirement to match EC import licences with BFA export certificates is inconsistent with the requirements of Article I:1 of GATT (paragraph 7.241).

- the issuance of hurricane licences exclusively to ACP and EC producers and producer organizations or operators including or directly representing them is inconsistent with the requirements of Article 1.3 of the Licensing Agreement (paragraph 7.263).

5. The EC Banana Import Licensing Procedures and the GATS

- there is no legal basis for an *a priori* exclusion of measures within the EC banana import licensing regime from the scope of the GATS (paragraph 7.286).

- the distribution of bananas, regardless of whether they are green or ripened, falls within the scope of category CPC 622 "wholesale trade services" as inscribed in the EC's GATS Schedule of Commitments so long as it involves the sale of bananas to retailers, to industrial, commercial, institutional or other professional business users, or other wholesalers (paragraph 7.293).

- the EC's obligations under Article II of GATS and commitments under Article XVII of GATS cover the treatment of suppliers of wholesale trade services within the jurisdiction of the EC (paragraph 7.297).

- the obligation contained in Article II:1 of GATS to extend "treatment no less favourable" should be interpreted *in casu* to require providing no less favourable conditions of competition (paragraph 7.304).

- the EC has undertaken a full commitment on national treatment in the sector of "Wholesale Trade Services" with respect to supply through commercial presence (paragraph 7.306).

- 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 creates less favourable conditions of competition for like service suppliers of Complainants' origin and is therefore inconsistent with the requirements of Article XVII of GATS (paragraph 7.341).

- 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 creates less favourable conditions of competition for like service suppliers of Complainants' origin and is therefore inconsistent with the requirements of Article II of GATS (paragraph 7.353).

- 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 creates less favourable conditions of competition for like service suppliers of Complainants' origin and is therefore inconsistent with the requirements of Article XVII of GATS (paragraph 7.368).

- the exemption of Category B operators of EC origin from the requirement to match EC import licences with BFA export certificates creates less favourable conditions of competition for like service suppliers of Complainants' origin and is therefore inconsistent with the requirements of Article XVII of GATS (paragraph 7.380).

- the exemption of Category B operators of ACP origin from the requirement to match EC import licences with BFA export certificates creates less favourable conditions of competition for like service suppliers of Complainants' origin and is therefore inconsistent with the requirements of Article II of GATS (paragraph 7.385).

- the allocation of hurricane licences exclusively to operators who include or directly represent EC producers creates less favourable conditions of competition for like service suppliers of Complainants' origin and is therefore inconsistent with the requirements of Article XVII of GATS (paragraph 7.393).

- the allocation of hurricane licences exclusively to operators who include or directly represent ACP producers creates less favourable conditions of competition for like service suppliers of Complainants' origin and is therefore inconsistent with the requirements of Article II of GATS (paragraph 7.397).

VIII. FINAL REMARKS

8.1 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 conclusions with regard to the legal consistency with WTO rules of the EC's common market organization for bananas.

8.2 Throughout our proceedings we were aware of the economic and social effects of the EC measures at issue in this case, particularly for the ACP and the Latin American banana exporting countries. In recognizing this, we decided to grant third parties participatory rights in our proceedings which were substantially broader than those normally afforded to them under the DSU.

8.3 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.

IX. CONCLUSIONS

9.1 The Panel concludes that for the reasons outlined in this Report aspects of the European Communities' import regime for bananas are inconsistent with its obligations under Articles I:1, III:4, X:3 and XIII:1 of GATT, Article 1.3 of the Licensing Agreement and Articles II and XVII of the GATS. These conclusions are also described briefly in the summary of findings.

9.2 The Panel *recommends* that the Dispute Settlement Body request the European Communities to bring its import regime for bananas into conformity with its obligations under GATT, the Licensing Agreement and the GATS.

ATTACHMENT

SOURCES OF EC-12 AND EFTA-3[1] BANANA IMPORTS AND THEIR SHARES IN WORLD EXPORTS, 1994

(per cent, based on volume of trade reported by FAO, excluding intra-EC-12 trade)

Source	Share of EC-12 imports (%) (a)	Share of EFTA-3 imports (%) (b)	Share of world exports (%) (c)	Ratio	
				(a) ÷ (c)	(b) ÷ (c)
ACP countries	22.7	0.0	6.5	3.5	0.0
BFA countries	37.9	45.4	36.9	1.0	1.2
Other Latin American countries	34.9	54.2	42.1	0.8	1.3
Other	4.5	0.4	14.5	0.3	0.0
TOTAL	100.0	100.0	100.0	1.0	1.0

[1] Austria, Finland and Sweden (prior to their accession to the EC in 1995).

Source: FAO.

BANANA EXPORTS TO THE EC AS PERCENTAGE OF TOTAL BANANA EXPORTS

Source	1986	1988	1990
ACP countries	94	94	94
Cameroon	99	97	94
Côte d'Ivoire	97	97	97
Jamaica	100	100	100
Suriname	100	100	100
Windward Islands	99	95	100
Somalia	63	79	64

Source: Submitted by the EC (based on FAO).

IMPORTS OF BANANAS TO THE EC
(Tonnes)

Source	1989		1990		1991		1992		1993		1994		1995 (provisional)
	EC-12	EC-15	EC-12	EC-15	EC-12	EC-15	EC-12	EC-15	EC-12	EC-15	EC-12	EC-15	EC-15
ACP	544,441	544,491	621,875	621,912	596,416	596,437	680,191	680,211	748,118	748,133	726,921	726,990	678,311[1]
Belize	26,580	26,580	24,040	24,040	19,617	19,617	28,494	28,494	38,517	38,517	46,980	46,980	40,000
Cameroon	56,071	56,071	77,628	77,628	115,115	115,115	110,357	110,357	146,902	146,902	158,167	158,167	154,980
Cape Verde	2,734	2,734	2,715	2,715	3,011	3,011	1,876	1,876	684	684	73	73	0
Dominica	51,315	51,315	52,415	52,415	54,155	54,155	51,605	51,605	52,699	52,699	42,868	42,868	32,843
Dominican Rep.	855	855	3,829	3,836	9,682	9,703	38,493	38,513	61,664	61,679	86,007	86,076	
Grenada	8,268	8,268	8,189	8,189	8,187	8,187	6,016	6,016	6,720	6,720	5,325	5,325	4,489
Côte d'Ivoire	85,160	85,188	95,158	95,188	116,406	116,406	144,307	144,307	161,257	161,257	149,085	149,085	155,000
Jamaica	39,219	39,219	63,181	63,181	70,116	70,116	74,827	74,827	77,390	77,390	76,294	76,294	79,750
Madagascar	68	68	0	0	0	0	10	10	19	19	0	0	0
Somalia	59,388	59,388	57,785	57,785	8,080	8,080	181	181	501	501	4,634	4,634	21,430
St. Lucia	116,286	116,286	127,225	127,225	99,823	99,823	122,066	122,066	113,304	113,304	91,541	91,541	104,290
St. Vincent & the Grenadines	67,595	67,595	81,535	81,535	62,263	62,263	71,320	71,320	57,609	57,609	32,054	32,054	50,620
Suriname	29,945	29,945	27,705	27,705	27,744	27,744	29,950	29,950	27,984	27,984	32,721	32,721	34,909
Other ACP	957	979	470	470	2,217	2,217	689	689	2,868	2,868	1,172	1,172	
OTHERS	1,715,945	2,041,289	2,024,168	2,362,735	2,285,149	2,639,812	2,365,874	2,729,945	2,219,632	2,560,387	2,102,287	2,450,006	2,653,441[2]
Colombia	330,390	353,172	401,902	420,918	495,166	518,161	499,834	533,200	417,905	451,778	461,247	511,316	
Costa Rica	450,052	537,021	548,518	643,064	528,302	607,795	451,847	520,331	480,325	564,984	621,999	726,805	
Ecuador	273,898	304,421	352,148	381,015	578,212	646,210	674,528	745,058	605,243	650,628	549,387	612,040	
Honduras	148,813	210,064	123,489	174,298	138,271	181,391	194,609	239,184	193,529	204,048	26,902	27,535	
Guatemala	61,827	81,413	9,370	15,994	13,186	17,667	33,429	39,701	26,947	32,539	19,907	20,041	
Nicaragua	29,072	34,273	47,600	49,532	57,849	59,519	25,638	28,816	9,621	10,554	8	8	
Panama	400,447	495,739	527,464	648,939	469,193	591,393	470,655	601,096	413,132	568,701	299,045	426,933	
Venezuela	179	179	50	50	41	41	45	45	147	147	1,083	1,854	
Mexico	19	19	41	41	39	39	11,046	11,046	112	112	58	58	
Philippines	20,079	20,079	5,024	5,024	165	165	0	0	1,858	1,858	0	0	
Others	1,059	1,059	8,562	8,562	4,725	4,725	3,338	3,338	5,399	5,399	3,913	3,913	
Unspecified	110	3,850	0	15,298	0	12,706	905	8,130	65,414	69,639	118,738	119,503	
TOTAL	2,260,386	2,585,780	2,646,043	2,984,647	2,881,565	3,236,249	3,046,065	3,410,156	2,967,750	3,308,520	2,829,208	3,176,996	3,331,752

Notes: [1] Traditional ACP imports.
[2] Tariff quota imports based on licences used.

Source: Eurostat data supplied by the EC in response to a Panel question.