WORLD TRADE ORGANIZATION

WT/DS27/RW/ECU
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I. INTRODUCTION

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

II. FACTUAL ASPECTS

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

A. ACCESS QUANTITIES AND COUNTRY ALLOCATIONS

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

(i) Traditional ACP imports

2.3

Table 1 – EC Tariff Quota Allocations

Country	Share (%)	Volume ('000 tonnes)
Colombia	23.03	588.0
Costa Rica	25.61	653.8
Ecuador	26.17	668.1
Panama	15.76	402.4

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

Category of banana imports	Access volume	Source/definition	Tariffs applied	Modifications of the EC tariff quota regime under Regulations 1637 and 2362
Traditional				

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

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

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

2.12 For the purposes of registration, newcomer operators are to provide, *inter alia*, to the competent authority in one of the EC member States certified evidence of having imported the

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

(iii) Import licensing procedures

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

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

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

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

2.19 After the first round, the EC Commission publishes the origins and quantities for which new import licence applications can be made. For licence requests for origins that are subject to a reduction coefficient, operators may either renounce their licence requests or make new licence requests for the unfulfilled portion of their oop

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

D. LOMÉ WAIVER

2.23 The Fourth Lomé Convention, signed on 15 December 1989 between the European Communities and 68 African, Caribbean and Pacific (ACP) developing countries contains a protocol

III. PROCEDURAL ISSUES

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

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

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

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

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

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

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

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

IV. MAIN ARGUMENTS[33]

A. GENERAL

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

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

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

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

4.2 The **European Communities** requested that the Panel reject all the allegations made by Ecuador both under the GATT and the GATS and find that the European Communities had complied

1. Article I Issues

(i) Traditional ACP bananas

4.4 **Ecuador** submitted that the revised system did not comply with Article I of GATT 1994 and the rulings of the panel and the AB, as concerns traditional ACP bananas, in three respects. First, the total allotment of 857,700 tonnes was equal to the sum of the previous individual traditional ACP

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

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

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

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

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

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

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

[46] AB report at paragraph 170.

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

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

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

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

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

(ii) Non-traditional ACP bananas

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

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

4.15 The **European Communities** noted that non-traditional imports of ACP bananas were currently benefiting from duty-free treatment within the tariff quotas (which amounted in practical terms to a preference of 75 Euro per tonne) and a duty preference of 200 Euro per tonne outside the tariff quotas. According to the European Communities, the fact that the AB had mentioned a volume of 90,000 tonnes for duty-free banana imports within the (bound) tariff quota and a figure of 100 Euro for any further preference was not an indication of an upper limit of the preference for non-traditional

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

2. Article XIII issues

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

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

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

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

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

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

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

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

[61] Paragraph 7.90 of the panel report and paragraph 161 of the AB report.
[62] AB report on *United States – Standards for Reformulated and Conventional Gasoline*

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

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

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

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

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

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

[66] Paragraph 178.

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

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

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

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

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

4.30 On the other hand, duty-free imports of *non-traditional* ACP bananas were counted against the MFN quota. However, the EC's tariff binding for bananas specifically referred to imports of such non-traditional ACP bananas, for which a quota share of 90,000 tonnes had been allocated under the binding (see also paragraph 4.17 above). The situation of non-traditional ACP bananas *which were specifically referred to in the EC's tariff binding*, the European Communities submitted, was thus entirely different from that of traditional ACP bananas which were never the subject of any tariff negotiations under *GATT* or the WTO. The AB had recognised

4.32 If Ecuador's approach were correct, the European Communities continued, the European Communities would have to distribute the 857,700 tonnes in part to substantial suppliers, including Ecuador. However, Ecuador would not have access to the preferential zero duty rate. Thus, since this volume was beyond the bound tariff quota of 2.2 million tonnes, the base rate of presently Euro 737 would apply to any quantities imported from Ecuador under such an additional "tariff quota". Of the 857,700 tonnes of the so-called "tariff quota", Ecuador would receive a share of 26.17 per cent (224,460 tonnes). This would be absurd since Ecuador was entitled to import into the EC's *unlimited* quantities of bananas at 737 Euro per tonne. The traditional ACP supplying countries would have access to 9.43 per cent of the same volume which was less than *a tenth* of the volume of imports from those countries that the European Communities was required by the Lomé Convention to allow at a duty-free level. In the view of the European Communities, it was self-evident that Ecuador would

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

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

4.37 The **European Communities** submitted that in accordance with the panel and AB reports, the European Communities applied the same method of allocation of import licences for all categories

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

4.40 According to Ecuador, the amended system still had to conform to these requirements. The EC regulations listed the shares of Ecuador and other substantial supplying countries as a proportion of the 2.553 million tonne tariff rate quota.[78] As a proportion of the entire quota of 3.41 million tonnes, however, the allocations would be different.[79] Ecuador claimed that its share had been limited

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

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

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

4.45 The **European Communities** submitted that the "historical performance" scheme had to be based on some period in the recent past. While it was the least trade-disruptive option, it admittedly

C. ISSUES RELATED TO THE GATS

(i) General

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

4.47 The **European Communities**recalled that under Article 1 of the Licensing Agreement, an import licence was defined as "… an application or other document (other than that required for customs purposes) to the relevant administrative body as a prior condition for importation into a customs territory of the importing Member". Thus, the full utilization of a licence had to refer to the moment in which the use of the licence became indispensable, i.e. the clearance of bananas through customs. *Before* that moment, there was *no*

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

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

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

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

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

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

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

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

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

(ii) Central Product Classification

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

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

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

item 62221 "Wholesale trade services of fruit and vegetables" matched the CPC Version 1.0 to 61121 "Wholesale trade services,

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

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

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

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

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

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

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

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

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

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

(iv) Issues concerning customs clearance

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

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

4.69

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4.84 The discrimination was therefore due to the fact, the European Communities continued, that

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

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

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

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

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

(v) Newcomers

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

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

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

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

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

(vi) Remedial action

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

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

(b) each traditional ACP country would be entitled to duty-free treatment up to a quantity

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

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

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

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

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

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

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

V. ARGUMENTS BY THIRD PARTIES

A. BRAZIL

5.1 **Brazil** submitted that, as the world's second largest producer of bananas, it had an interest in

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

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

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

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

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

(ii) Non-traditional ACP bananas

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

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

5.14

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

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

5.17

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

2. Issues related to the GATS

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

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

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

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

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

5.28 Cameroon and Côte d'Ivoire argued further that it was not correct to claim that all holders of B licences were able to present reference quantities for the period 1994–1996, in conformity with the "traditional importer" criterion, and to recover all the imports rights granted in the past to the detriment of third-country operators, such as Ecuador. According to information available to Cameroon and Côte d'Ivoire, operators holding B licences in the former system had to a very large

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

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

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

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

1. Issues related to the GATT

(i) Traditional ACP bananas

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

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

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

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

5.39 The Caribbean States argued that the individual quotas had been found to have infringed Article III, a violation which was found by the AB not to be covered by the Lomé waiver. This was the reason why the European Communities had dropped country-specific ACP tariff quota allocations. The panel and the AB had considered that their function was not to prescribe the detailed arrangements that must be implemented by the European Communities in order to comply with its Lomé Convention obligations. Rather, their function was to determine whether the methodology chosen by the European Communities to determine tariff quota allocations could reasonably be considered to have been "required" to meet obligations under the Lomé Convention. The AB had

(iii) Article XIII issues

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

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

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

5.45 The Caribbean States argued that the above was confirmed, *inter alia*, by the Lomé waiver, including the context in which it was adopted. Following the finding that the Lomé Convention was not protected by the Article XXIV of GATT exemption for free-trade areas, the European Communities was required to obtain a waiver under Article XXV. The waiver was adopted expressly

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

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

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

5.49 The Caribbean States argued that Article XIII:1 set out the general obligation that restrictions applied to one Member must be "similarly" applied to other Members. The language clearly envisaged that there may be differences in the manner in which restrictions between Members were applied. The restrictions had to be "similar"[152]

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

2. Issues related to the GATS

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

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

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

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

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

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

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

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

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

5.59 The Caribbean States submitted that Ecuador effectively purported that import licences should no longer be awarded to importers, but to exporters. Ecuador expressed the desire that import licences should be based not on the "actual importer" but on the basis of a submission by importers of evidence of their activities, in the form of invoices for purchase of bananas in the country of origin, shipping documents (bills of lading) and commercial invoices proving a first sale on EC territory.[156] The Panel had no authority to accept this suggestion, which must be rejected. It ran contrary to the

demonstrate that LVP would have benefited by an increased award of licences, should the system proposed by the Ecuador, have been adopted. Given that LVP was a member of the Noboa group of

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

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

5.66 The Caribbean States submitted that the essence of Ecuador's claims was that the Panel should close its eyes to the existence of almost six years of trading history and view the position as between competing suppliers of wholesale banana services prior to Regulation 404. What Ecuador sought to do was to convert the WTO system into a legal system which would award damages or undo the wrongs that may have arisen as a result of a previous illegal regime. This was not the purpose of the WTO system. Article 1:1 of GATS provided that the GATS "applies to measures by Members

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

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

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

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

1. Article XIII Issues

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

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

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

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

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

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

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

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

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

5.80 Colombia had demonstrated that the country-specific allocations made by the European Communities complied with its GATT obligations. First, because the EC's obligation was to make a distribution that aimed at, not one that resulted in, the distribution that would exist in the absence of

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

5.85 Costa Rica submitted that the allocation of country-specific quotas and the distribution of the quota shares among Members with a substantial supplying interest were matters on which neither the original panel nor the AB had made any ruling or recommendation and which could therefore not be raised as compliance issues in a proceeding under Article 21.5 of the DSU. Ecuador failed to take into account that there was an important distinction between the scope of ordinary panel procedures and that of procedures initiated in accordance with Article 21.5 of the DSU. In an ordinary panel procedure, a complaint could relate to any measure.[162] Proceedings under Article 21.5 were, however, limited to disputes on measures taken to comply with the recommendations or rulings of the DSB, i.e. exclusively about matters on which a panel or the AB had already made rulings and corresponding recommendations. This followed from the wording of Article 21.5, which accorded Members the right to resort to these procedures only in respect of a "disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings [of the

1. Issues related to the GATT

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

5.90 Costa Rica argued that the allocation of country-specific quotas was a right of the European Communities under Article XIII:2 of GATT. Article XIII:2 did not state that this right may only be exercised when there were no difficulties in establishing a period that was representative. The

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

F. ECUADOR'S RESPONSE TO THIRD PARTIES

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

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

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

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

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

VI. FINDINGS

6.1 This case arises out of a challenge by Ecuador of the WTO-consistency of measures taken by the European Communities to implement the recommendations and rulings of the Dispute Settlement Body ("DSB") in *European Communities – Regime for the Importation, Sale and Distribution of Bananas* (DS/27/R/ECU & DS/27/AB/R). In particular, Ecuador claims that Regulations 1637/98 and

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

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

6.6 As recently explained by the Appellate Body:

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

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

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

> "Where there is disagreement as to the existence or *consistency with a covered agreement of measures taken to comply with the recommendations and rulings* such dispute shall be decided through recourse to these dispute settlement procedures, including wherever possible resort to the original panel."

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

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

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

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[174] WT/DS27/44.

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

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

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

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

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

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

C. ARTICLE XIII OF GATT 1994

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

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

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

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

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

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

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

4. With regard to restrictions applied in accordance with paragraph 2 (*d*) of this Article or under paragraph 2 (*c*) of Article XI, the selection of a representative period for any product and the appraisal of any special factors affecting the trade in the product shall be made initially by the Member applying the restriction; *Provided* that such Member shall, upon the request of any other Member having a substantial interest in supplying that product or upon the request of the CONTRACTING PARTIES, consult promptly with the other Member or the CONTRACTING PARTIES regarding the

(a) The Applicability of Article XIII

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

6.21 In our view, the *Newsprint* case does not affect the applicability of Article XIII to the tariff quota for traditional imports from ACP States. In that case, the European Communities had unilaterally reduced a 1.5 million tonnes tariff quota for newsprint to 500,000 tonnes on the grounds that certain past supplying countries under the tariff quota had entered into free-trade agreements with the European Communities and that the tariff quota should be reduced to reflect that fact. The panel held that the European Communities could not unilaterally make such a change. In passing, the *Newsprint* panel stated: "Imports which are already duty-free, due to a preferential agreement, cannot by their very nature participate in an MFN duty-free quota."[182] The *Newsprint* panel did not deal with the applicability of Article XIII to a case such as this one. Moreover, our findings do not imply tc 0.1c 0.1c

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

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

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

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

(i) Article XIII:1

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

(ii) Article XIII:2

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

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

each and every non-substantial supplier) should be based upon the proportions supplied during a

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

6.34 Ecuador challenges the EC's allocation of the MFN tariff quota to it on the grounds that its share does not approximate the share that it might be expected to obtain in the absence of restrictions. It also argues that given the history of trade-distortive EC banana measures, it is far from clear that

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

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

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

6.40 The panel on

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

(c) Special Factors

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

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

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

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

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

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

[193] Annex II.

[194] Annex II.

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

D. ARTICLE I OF GATT 1994

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

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

1. The Lomé Waiver

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

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

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

2. The Requirements of the Lomé Convention

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

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

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[195] WT/L/186.

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

Protocol 5 in turn provides:

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

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

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

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

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

6.58

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

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

3. Preferences for Traditional ACP Imports

6.60 Ecuador claims that (i) the preferential tariff of zero on 857,700 tonnes of traditional ACP

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

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

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

(b) Collective Allocation to Traditional ACP States

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

6.67 In considering this claim, we note that the Appellate Body explicitly concluded that the European Communities is required under the Lomé Convention to "allocate tariff quota *shares* to the traditional ACP *States* that supplied bananas to the European Communities before 1991 in the amount of their pre-1991 best-ever export *volumes*".[198]

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

4. Preferential Tariffs for Non-Traditional ACP Banana Imports

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

E. GATS ISSUES

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2. Licence Allocation Procedures

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

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

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

(a) Articles II and XVII of GATS

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

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

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

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

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

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

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

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

These findings were upheld by the Appellate Body.

(c) The Revised EC Licensing Regime

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

> "'*[T]raditional operators'* shall mean economic agents established in the European Community during the period for determining their reference quantity … who have

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

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

6.98 Article 5 of Regulation 2362/98 provides:

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

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

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

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

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

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

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

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

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

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

6.103 As to the first element, we have already determined in the original dispute that the EC import licensing procedures for bananas are measures affecting trade in services.[212] We also recall our

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

(e) The Parties' Arguments

(i) Ecuador

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

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

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

(ii) European Communities

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

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

[214] In calculating estimates for third-country service suppliers in their entirety, Ecuador submits that under the previous regime, Category A primary importers obtained 37.905 per cent of the reference quantities under the previous regime (i.e. 57 per cent of 66.5 per cent). With respect to customs clearers, Ecuador assumes that two-thirds of the customs clearers were of non-ACP third-country origin, whereas one-third was of EC/ACPorigin.

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

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

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

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

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

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

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

[218] The EC accepts Ecuador's figures for primary importation and customs clearance, but recalculates Ecuador's figures concerning the distribution of reference quantities for ripening activities as follows. For purposes of breaking down ripening activities by third-country and EC/ACP origin, the ripening activities of both Category A and B operators were subdivided using a ratio of 78.5 per cent for EC/ACP operators and 21.5 per cent for non-ACP third-country operators. This results for Category A operators in 4 per cent for third-country operators and in 14.6 per cent for EC/ACP operators of the 18.6 per cent which represent the licence allocation for Category A ripening activities (i.e. 28 per cent of 66.5 per cent). For Category B operators this

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

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

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

(ii)

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

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

6.126 Therefore, we conclude that the ACP/EC operators who continue to get licences on the basis of the revised regime, remain in a competitively advantaged position compared to non-EC operators

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

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

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

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

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

6.131

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

(iv) Overall evaluation

6.133 In light of all these considerations, we conclude that Ecuador has established a presumption[225] that the revised licence allocation system prolongs - at least in part - less favourable treatment in the meanings of Articles II and XVII for wholesale service suppliers of Ecuadorian origin. Ecuador has also shown that its service suppliers do not have opportunities to obtain access to import licences on

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

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

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

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

[226] Regulation (EC) No. 2806/98 of 23 December 1998, O.J. L 349/32 of 24 December 1998.

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

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

3. The Rules for "Newcomer" Licences

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

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

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

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

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

6.147

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

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

6.153

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

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

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

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

6.158 Third, the European Communities could maintain its current bound and autonomous MFN tariff quotas, either without allocating any country-specific shares or allocating such shares by agreement with all substantial suppliers consistently with the requirements of the chapeau to Article XIII:2. The MFN tariff quota could be combined with the extension of duty-free treatment (or preferential duties) to ACP imports. In respect of such duty-free treatment, the European Communities could consider with the ACP States whether the Lomé Convention can be read to "require" such treatment within the meaning of the Lomé waiver. We recall that some important preferences found by the original panel and Appellate Body reports to be required by the Lomé Convention cannot be implemented consistently with WTO rules (the most important being the

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

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

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

H. CONCLUDING REMARK

6.164 We recall that the fundamental principles of the WTO and WTO rules are designed to foster

VII. CONCLUSIONS

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

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

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

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

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

ANNEX II

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

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

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

Chart 2: Ecuador's Share of World Exports

Year **World exports**

ANNEX III

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

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