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**EUROPEAN COMMUNITIES – THE ACP-EC PARTNERSHIP AGREEMENT –  
SECOND RECOURSE TO ARBITRATION PURSUANT TO THE  
DECISION OF 14 NOVEMBER 2001**

**AWARD OF THE ARBITRATOR**

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## I. INTRODUCTION

1. This arbitration was initiated pursuant to the procedures set out in the Annex to the Waiver Decision with respect to Article I of GATT 1994 contained in the document "European Communities – The ACP-EC Partnership Agreement, Decision of 14 November 2001" (the "Doha Waiver").<sup>1</sup> This is the second recourse to arbitration initiated pursuant to that decision. The procedural background of this proceeding is described in Section II below.

## II. PROCEDURAL BACKGROUND

2. The Arbitrator issued its first award to the parties on 1 August 2005 and notified the award to the General Council later that same day.<sup>2</sup> The mandate of the Arbitrator in the first arbitration was:

... to determine, ... whether the envisaged rebinding of the EC tariff on bananas would result in at least maintaining total market access for MFN banana suppliers, taking into account [all EC WTO market-access commitments relating to bananas].

3. In its first award, the Arbitrator determined "that the European Communities' envisaged rebinding on bananas would not result in at least maintaining total market access for MFN banana suppliers, taking into account all EC WTO market-access commitments relating to bananas."<sup>3</sup>

4. In a letter dated 4 August 2005, the Arbitrator observed that the fifth tiret of the Annex to the Doha Waiver contemplated that "in the absence of a mutually satisfactory solution, the same arbitrator will be asked to determine, within 30 days of the new arbitration request, whether the EC has rectified the matter". In the light9.8907 0banoha Wamibility the Gene thita in Annep tha8(n Annesdetermfoltj)0.1(,)2 TJ-wece

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not the European Communities. Allowing the European Communities to request a second arbitration would also prejudice the procedural rights of the Interested Parties by depriving them of adequate time to review and analyse the new proposal. The European Communities disagreed with the position adopted by Costa Rica, Ecuador, Honduras, Nicaragua and Panama. It pointed to the absence of any specification in the fifth tirt of the Annex to the Doha Waiver as to which parties may, or may not, request a second arbitration. Rather, requests for a second arbitration may be made by any party in the absence of a mutually satisfactory solution. The European Communities also disagrees that the procedural rights of the Interested Parties would be prejudiced if the European Communities were entitled to request the second arbitration. Indeed, preventing the European Communities from doing so would prejudice its procedural rights.

15. Against that background, the Arbitrator notes that the appointment of the Arbitrator for

**IV. MANDATE OF THE ARBITRATOR**

**A. THE MANDATE UNDER THE SECOND ARBITRATION (WHETHER THE EUROPEAN C**



described the proposed tariff quota as an additional measure, to be applied in conjunction with the envisaged rebinding.<sup>16</sup> Nonetheless, this does not necessarily imply that the proposed tariff quota may not be taken into account in the Arbitrator's analysis.

30. As the Arbitrator found in its first award, the total market access for MFN suppliers is affected importantly by the market access for preferential ACP suppliers. The Arbitrator recognized a "direct correlation between the MFN rate and the level of the preferences actually granted ... [and that] the level of the MFN tariff and the margin of preference are, in a sense, two sides of the same coin".<sup>17</sup> The Arbitrator found that "the potential impact of the preferences granted to ACP banana suppliers on the effective opportunities afforded by the existing conditions of entry to the MFN banana suppliers is a necessary consideration in assessing the envisaged rebinding".<sup>18</sup> The Arbitrator also found in its first award that "[t]he benchmark against which the [rebinding of the tariff rate] is to be assessed is not the specific concept of tariff bindings, but the more general concept of 'market access' for MFN suppliers".<sup>19</sup>

31. It follows for this arbitration proceeding that it is relevant to consider not only the European Communities' proposed increase in the extent of the ACP tariff preference from €75 to €187 per metric ton, but also the effect of the proposed "cap" on that preference through the proposed tariff quota for ACP countries, in order to assess whether the European Communities' envisaged rebinding would result in at least maintaining total market access for MFN banana suppliers so as to "rectify the matter". The envisaged rebinding is to be implemented not in isolation but in the broader context of a new EC import regime for bananas. The Arbitrator thus must consider the new proposed market access regime for bananas as a whole to determine whether the proposed rebinding would meet the standard of at least maintaining total market access for MFN banana suppliers.

## **2. Consistency of the proposed tariff quota with the European Communities' WTO obligations and commitments *vis-à-vis* MFN banana suppliers**

32. As noted above, Honduras, Nicaragua and Panama, as well as Colombia, Costa Rica, Ecuador and Guatemala, also asked the Arbitrator to disregard the tariff quota from its analysis because, in the absence of a waiver, it would be inconsistent with the European Communities' WTO obligations under the General Agreement on Tariffs and Trade 1994 (hereafter "GATT 1994") and with the European Communities' commitment to apply a tariff-only regime as of 1 January 2006.<sup>20</sup> Smm tm



respect of Article I of GATT 1994, and that the European Communities also intends to seek a waiver of its obligations under Article XIII of GATT 1994 to implement its proposed tariff quota.<sup>21</sup>

34. In the Arbitrator's view, the fact that the European Communities' proposal includes the proposition that an Article XIII waiver would be sought, and obtained, for the application of the proposed tariff quota is significant in addressing this issue. Even assuming that the establishment of the proposed tariff quota would otherwise be inconsistent with the European Communities' WTO obligations, the European Communities proposed to apply it under circumstances that would no longer involve an unauthorized WTO-inconsistency. The European Communities' proposal incorporates an assumption that the tariff quota would be applied after a collective authorization has been obtained from the WTO Membership, in conformity with the applicable procedures for waiver decisions under the *Marrakech Agreement Establishing the World Trade Organization* (the *WTO Agreement*).<sup>22</sup> In these circumstances, the Arbitrator is not convinced that the alleged inconsistency of the proposed tariff quota with the European Communities' WTO obligations should, in itself, lead it to disregard in its analysis the proposed application of a tariff quota for ACP banana imports. This does not imply any determination, on the part of the Arbitrator, as to the WTO-consistency or otherwise of such a tariff quota, in the absence of a waiver.

35. At the time of this award, the European Communities has requested an Article XIII waiver for the proposed tariff quota, pursuant to Article IX of the *WTO Agreement*. It is not possible, at this point in time, to predict whether or not such a waiver will, in due course, be granted by the WTO Membership. It is, as an abstract matter, possible that such a waiver might be granted, just as it is conceivable that it might not be granted. This is a matter that depends on collective action by the WTO Membership. However, this uncertainty is not an obstacle to the Arbitrator's consideration of the proposed rectification. There is no need to make any assumptions as to the likelihood of an Article XIII waiver being granted to the European Communities for its proposed tariff quota in order to consider whether, *if* it were to be applied as described, the European Communities' proposed rectification would result in at least maintaini

37. For these reasons, the Arbitrator is not persuaded that it is prevented from considering the proposed rebinding in the light of the proposed tariff quota on ACP banana imports. This threshold determination is entirely without prejudice to the question of whether this proposal would result in at

applied, the price gap methodology would be broadl

made available through a publicly accessible database.<sup>35</sup> The Interested Parties had challenged the use of those prices because they were not "actual" prices but were "official" prices derived from price quotations obtained from traders.<sup>36</sup> In the first arbitration, the parties did not appear to differ on the need to use data reflecting actual prices in a price gap calculation.<sup>37</sup> The Arbitrator found that the internal price calculated by the European Communities in order to arrive at its initial rebinding proposal did "not reflect as accurately as possible the actual prices at which bananas are sold on the EC market". In its proposed rectification of the matter, the European Communities addressed this finding of the Arbitrator by discarding FAO data as a basis for calculating internal prices. The European Communities turned instead to price data from Sopisco News, a weekly publication used in the shipping and reefer industry. It then calculated the internal price of the EC-25 for purposes of rectifying its price gap calculation.<sup>38</sup> It did so as described below.

47. First, the internal price was derived from weekly price data from Sopisco News for the period January 2002 to April 2004. Secondly, since Sopisco News provides a range of the "actual prices" of bananas, the European Communities took the mid-point of that range. Thirdly, since Sopisco News published actual prices by bananas brands, the European Communities took the simple (weekly).9(op8cl) (21.)8

during that period tend to be higher than the annual average due to a lack of supplies of competing fruit.<sup>41</sup> The annual price gaps for 2002, 2003 and January to April 2004 (seasonally adjusted) were then averaged to result in the proposed tariff of €87 per metric ton.

51. In addition to the internal price used in the price gap calculation that resulted in the proposed tariff of €87 per metric ton, the European Comm

The internal price shall generally be a representative wholesale price ruling in the domestic market or an estimate of that price where adequate data is not available.

Although the price gap guidelines in the *Agreement on Agriculture* are not binding under the Doha Waiver, they nonetheless provide useful guidance for analyzing the price gap calculation underlying the European Communities' proposed rectification of the matter.<sup>46</sup> These guidelines suggest a certain degree of flexibility in the determination of the internal price, based on the adequacy of available data.

55. In this regard, the Arbitrator stated in its first award:

While the Arbitrator does not discount the difficulties associated with the availability and reliability of actual market prices and does not exclude that an estimation or approximation may be required, it is satisfied that the internal price calculated by the European Communities in order to arrive at its envisaged rebinding does not reflect as accurately as possible the actual prices at which bananas are sold on the EC market.<sup>47</sup>

56. The Interested Parties raised a number of objections to the EC calculations of the internal price. These related to the use of Sopisco News data in general, and also to the appropriateness of the Sopisco News data for the specific purpose to which it is put by the European Communities, namely, calculating the price gap for the EC-25. The objections raised by the Interested Parties will be considered in turn, to determine whether these concerns, individually or collectively, suggest that the European Communities overestimated the internal price.

(a) Use of Sopisco News data as a source of "actual prices"

57. The European Communities based its estimate of the internal price for bananas on data published by Sopisco News. Honduras, Nicaragua and Panama characterized Sopisco News as:

predominately dedicated to shipping information to complement Sopisco's principal business, shipping brokerage. Its readership has been developed almost entirely because of the shipping volume and related information it contains. Only a small fraction of the newsletter's weekly content is dedicated to banana price estimates in various markets around the world.<sup>48</sup>

Further, these Interested Parties pointed to Sopisco's disclaimer that "the collected price estimates are "obtained from [unnamed] sources believed to be reliable, but the publisher is not responsible for errors or omissions contained herein."<sup>49</sup> The European Communities argued that Sopisco News was a subscription-based newsletter and the viability of a subscription-based service in the trade and shipping business is based on its reliability.<sup>50</sup> The European Communities emphasized that Sopisco News was relied upon by the governments of a number of the Interested Parties, international organizations such as the World Bank and International Monetary Fund, and by the insurance industry when assessing costs for maritime losses.<sup>51</sup> At the oral hearing, the relevant ACP Members argued

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<sup>46</sup> The Arbitrator notes that parties have referred ex

that "Sopisco is the most reputable source of information for prices in the banana trade" and that this source should be used to calculate the price gap.<sup>52</sup>

58. In considering the concerns of Honduras, Nicaragua and Panama in this regard, the Arbitrator notes that there is considerable evidence on the record that Sopisco News is a widely accepted source of price information in the banana trade. Indeed, Sopisco News prices were relied upon by Brazil, Colombia, Costa Rica, Ecuador and Guatemala, and also by the relevant ACP Members, during the course of the first arbitration. Accordingly, the Arbitrator has no reason to doubt the reliability of Sopisco News as a source of price information for the banana market.

59. Beyond their general criticism of Sopisco News price data for bananas, certain Interested Parties also questioned Sopisco News data more specifically as a source of information of *actual* prices on the banana market.

60. In this respect, the parties disagreed over the meaning of the expression "actual prices" in Sopisco News. Colombia, Costa Rica, Ecuador and Guatemala argued that these prices could not possibly represent actual selling prices, which were confidential between buyers and sellers, and might also not reflect terms and conditions, such as rebates, unknown to Sopisco News. In their view, Sopisco "actual" prices were in fact price quotes that did not reflect as accurately as possible the actual selling prices of bananas.<sup>53</sup> The Europ10 i.10.90.teD0.00031620.0385 -1D00. TD0.0005 Tc01938 Tw6(at

Communities also questioned the reliability of the audited internal price because it considered the implied weight per box of bananas to be incorrect (18.5 kg rather than 18.14 kg). Adjusting the audited price to account for this issue of box sizing, the European Communities recalculated the price as slightly over €717 per metric ton.<sup>58</sup> Several of the Interested Parties countered that under the tax laws of the European Communities, importers were prohibited from declaring bananas at a weight of 18.14 kg per box.<sup>59</sup>

64. The European Communities argued in particular that it had sought to use a data source that was publicly available with a high degree of reliability, distribution and recognition in the banana trade and which required a minimum amount of adjustment.<sup>60</sup> The European Communities explained to the Arbitrator why it considered Sopisco News to fulfil all of these criteria.

65. In considering this issue, the Arbitrator is mindful of the challenges inherent in having access to exact and complete price information in respect of actual market prices. In particular, complete information in respect of actual prices is in th



70. Having accepted that it was not, in principle, inappropriate to use Sopisco News data as a source of estimates of actual market prices of bananas, the Arbitrator now turns to an examination of the EC's calculation based on that data.

(b) The EC's calculation of the internal price based on the Sopisco price data

71. The European Communities made certain assumptions and adjustments in respect of the Sopisco News data in order to calculate the internal price for bananas on the EC market. The Interested Parties have questioned some of these assumptions and proposed alternative adjustments that should, in their view, have been made to Sopisco data to reflect actual internal prices accurately.

72. The first issue relates to whether the "EU" and "Non EU" prices from Sopisco News, which are described as prices "in Hamburg", can be equated with EC-15 and AC-10 prices, or whether an adjustment to that data is required to make them more representative of EC-15 and AC-10 prices. Honduras, Nicaragua and Panama drew attention to the fact that in the latter part of 2004, Sopisco News' pricing annotations refer to prices "mostly for the Hamburg market or other relevant EU country".<sup>64</sup> In their view, estimates "mostly for the Hamburg market" cannot reliably be equated with EC-15 and AC-10 prices. These Interested Parties noted that during the first arbitration, the European Communities adjusted downwards the FAO prices (which were also Hamburg prices) to take into account the lower prices in the rest of the European Communities. But this time, no adjustment was made by the European Communities, suggesting that the internal price was overestimated.

73. The European Communities contended that the Sopisco price data should be considered as representative wholesale prices in the EC market and that an adjustment is not necessary since bananas are a homogeneous product traded on a single market. According to the European Communities, the phrase "or other relevant EU country" meant that the reported prices cover markets other than Hamburg. This indicated that Sopisco's prices were representative of the EC market.<sup>65</sup> Sopisco News itself stated that its EU prices reflected the market price range "in the northern and southern European market".<sup>66</sup>

74. In the absence of clear indications by Sopisco News regarding the geographical representativeness of the reported prices, the Arbitrator is concerned that the Sopisco News price data for the years 2002-2004 may not be sufficiently representative of the actual market prices in the EC-15 and the AC-10. However, on the basis of the limited evidence provided, the Arbitrator is not in a position to determine whether or not an adjustment to Sopisco price data would have been warranted.

75. The second issue for the Arbitrator to consider is the objection raised by the Interested Parties withTw[4f1amfor t6ne wh05.4( the 58 0 Tj/TT10a4f1am)8.au99[consider isa should0a4o Sopisco pr.





(b) Is Eurostat c.i.f. data "inappropriate"?

(i) *The European Communities' arguments*

87. The European Communities said that it did not question the accuracy of the Eurostat c.i.f. data as such, but rather their appropriateness for a price gap analysis. It identified two problems with the Eurostat c.i.f. data.

88. One problem related to the results that were obtained using the Eurostat c.i.f. data.<sup>76</sup> The European Communities began its price gap analysis by using data from Sopisco News to calculate the internal price and Eurostat data to calculate the external price. The resulting price gaps that the European Communities obtained with these data fell within a range of €3 per metric ton and €88 per metric ton. The European Communities stated that figures below €75 per metric ton were "clearly inappropriate". For the €88 per metric ton result, it stated that "the protective effect of the quota cannot be €3 per metric ton – a figure which cannot be considered realistic ...". The European Communities argued that price gaps that were close to or below the in-quota tariff of €75 per metric ton fell foul of the Arbitrator's finding in its award that a price gap of less than €75 per metric ton was "less than the current-in quota tariff rate, and does not appear to reflect any value for the existence of the tariff quota itself."<sup>77</sup>

89. The second problem the European Communities found was that "the EC-15 CIF price is not consistent with any of the available data for comparable steps in the trading chain. Normally, CIF prices of neighbouring countries will be more or less comparable".<sup>78</sup> Yet it found that the Eurostat c.i.f. price of €638 per metric ton was higher than the €441 per metric ton c.i.f. price given by Eurostat for the AC-10. It also attempted to reconstruct c.i.f. prices from f.o.b. prices provided by the central banks of some of the Interested Parties. Adding Sopisco's estimates of freight and insurance costs from these countries to the European Communities, its reconstructed c.i.f. estimate was €399 per metric ton, which was €239 per metric ton lower than the EC-15 c.i.f. price of €638 per metric ton. Finally, the European Communities examined c.i.f. prices of the United States. Even after adding the estimated freight and insurance cost differential of shipping from Latin America to the European Communities instead of the United States, the amount was only €394 per metric ton, representing a differential of €244 per metric ton. According to the European Communities, all of these calculations led to the same conclusion that the Eurostat c.i.f. price for the EC-15 was in the order of €200 per metric ton higher than one would expect.<sup>79</sup> A similar point about the high c.i.f. prices reported by Eurostat had been made by the relevant ACP countries in their submissions in the first and second arbitrations.

90. The European Communities suggested that the cause for these problems "appears to be ...that some of the quota rent/protective effect of the quotas is included in the Eurostat c.i.f. prices."<sup>80</sup>

(ii) *Arguments of the Interested Parties*

91. Panama, Honduras and Nicaragua pointed out that the European Communities had relied heavily on these Eurostat data throughout its common market organizations. It specifically used Eurostat banana data to create the MFN quota in 1993, to calculate the out-of-quota "tariff equivalent"

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<sup>76</sup> Oral Statement by the European Communities, para. 18.

<sup>77</sup> Award of the Arbitrator, para. 90.

<sup>78</sup> Oral Statement by the European Communities, para. 17.

<sup>79</sup> Response by the European Communities at the oral hearing.

<sup>80</sup> Answers to Questions from the Arbitrat

in the Uruguay Round, to determine enlargement volumes, and, even in this proceeding, to trade-weight its "EU" and "Non EU" Sopisco News estimates.<sup>81</sup>

92. Colombia, Costa Rica, Ecuador and Guatemala questioned the European Communities' justification for rejecting Eurostat data - that the price gap cannot be less than €75 per metric ton. In the European Communities' calculations, the price gap fell in a range between €3 per metric ton and €8 per metric ton. Honduras, Nicaragua and Panama pointed out that, because the applied level of protection for bananas in the AC-10 during the period of January 2002 to April 2004 was lower than in the EC-15, the trade-weighted tariff for bananas in the EC-25 was €66 per metric ton.<sup>82</sup> Hence, in their view the European Communities' reason for rejecting the results of these price gap calculations did not hold.

93. The Interested Parties questioned some of the comparisons that the European Communities undertook to support its determination that Eurostat c.i.f. data was "inappropriate". Honduras, Nicaragua and Panama argued against the use of United States c.i.f. prices as a basis for comparison, since the United States was not a near country. Further, the Interested Parties provided other explanations why Eurostat c.i.f. data may be high, reasons that had nothing to do with the presence of quota rents. According to Colombia, Costa Rica, Ecuador and Guatemala, the European Communities had imposed product standards for bananas that prohibited the sale of lower quality, and hence lower-priced, bananas.<sup>83</sup> Exporters may also have an incentive to change the mix of their products towards higher quality ones when exporting to a market with quota restrictions.<sup>84</sup>

(iii) *Evaluation by the Arbitrator*

94. First, the Arbitrator notes that paragraph 2 of the Attachment to Annex 5 of the *Agreement on Agriculture* provides that "[e]xternal prices shall be, in general, actual average c.i.f. unit values for the importing country" and that the use of the alternatives in subparagraphs (a) and (b) is foreseen only where "average unit values are not available or appropriate." These terms indicate a preference or general rule that average c.i.f. unit values be used. Accordingly, departure from that general rule and recourse to alternative proxies for the external price requires evidence and reasoned explanation showing why c.i.f. unit values are unavailable or shown to be inappropriate.

95. The parties did not disagree that Eurostat c.i.f. data provide a source for "actual average c.i.f. unit values" data for the European Communities within the meaning of the introductory clause of paragraph 2 of the Attachment to Annex 5. This means that the European Communities has to substantiate why Eurostat c.i.f. data is not "appropriate" as "external prices". This is particularly so in the present circumstances because, during the first arbitration, the European Communities itself had used Eurostat c.i.f. data as the basis for calculating the external price. In its first Award, the Arbitrator noted that "the calculation of the external prices based on Eurostat data is not in dispute"<sup>85</sup> and did not direct the European Communities to revise its approach in this respect. The Arbitrator finds the European Communities' position in the second arbitration proceeding that Eurostat c.i.f. data is

using Eurostat c.i.f. data and Sopisco News prices. The second is a series of comparisons of Eurostat c.i.f. prices with near country c.i.f. prices and f.o.b. prices of major banana exporters. The European Communities suggested that Eurostat data appears to incorporate some element of the quota rent, resulting in an artificially high c.i.f. price.

97. The first problem identified by the European Communities concerns the *results* of price gap calculations made using the Eurostat data and Sopisco News prices. Although the Arbitrator agrees that comparisons of the results of various calculations may provide a useful "reality check", it is not of the view that the results of any particular comparison should be the starting point for the analysis of whether c.i.f. unit values for the importing country are "appropriate" or not. Rather, such an assessment should begin with the data *per se*. Thus, Paragraph 2 of the Attachment to Annex 5 envisages a test based on whether actual average c.i.f. unit values *themselves* are "appropriate" as "external prices", not of whether the *results* derived from price gap calculations based on c.i.f. unit values are "appropriate". Indeed, to do otherwise in the context of a price gap calculation would risk









reasons for concluding that Sopisco "Non EU" prices are not "appropriate average c.i.f. unit values of a near country" within the meaning of paragraph 2(a) of the Attachment to Annex 5.

C. CONCLUSION REGARDING THE EUROPEAN COMMUNITIES' PRICE GAP CALCULATION

115. In the preceding sections, the Arbitrator considered all pertinent aspects of the European Communities' price gap calculation. In respect of the internal price, the Arbitrator examined the Interested Parties' general criticisms of the Sopisco News data<sup>103</sup>, including the availability of alternative price data.

the MFN tariff nor the size of the tariff quota; rather it was used to confirm that the revised European Communities' proposal was consistent with at least maintaining total market access for MFN banana suppliers.

120. Like the model that was proposed by Honduras, Nicaragua and Panama in the first arbitration, the European Communities' model is a dynamic and partial equilibrium model of the global banana market. Where it differs in structure from that model is that it is also a "spatial" model. The European Communities claims this makes it "capable of representing policies which apply different treatment to products of different origin. Since one of the key issues in this Arbitration is the effect of the ACP preference on the market access opportunities for MFN suppliers, only a spatial model is capable of accurately reflecting bilateral trade flows and thus providing a satisfactory simulation of the European Communities' proposed regime."<sup>112</sup>

121. The European Communities simulated the effect of an MFN tariff of €187 per metric ton and a tariff quota on ACP imports of 775,000 mt over the period from 2007 to 2013. The results of the model showed that the European Communities' proposal results in MFN exports increasing in 2007 by 360,100 tonnes over the level in 2002. If the projection to 2013 is taken into account, an increase of 771,200 tonnes over the level in 2002 is predicted.<sup>113</sup>

122. In the first arbitration, the Arbitrator noted that "economic modelling affords the analyst the possibility of taking into account a range of factors",<sup>114</sup> but cautioned that

the choice and assignment of specific values to the various parameters in an economic modelling simulation can in itself be a source of complexities. Simulation models require more data than the price gap methodology, and the choice of parameters as well as the assignment of values to them make the results of such modelling as vulnerable (or as solid) as the assumptions upon which they are based.<sup>115</sup>

Thus, "the benefits from their use must be carefully balanced against the technical hurdles and uncertainties posed by the choice of parameters and data."<sup>116</sup>

123. The European Communities stated that, so far as possible, assumptions have been avoided by making use of information provided by sources such as FAO and the World Bank. When this was not possible, the assumptions made were conservative, and were systematically biased against the European Communities. In other words, where the modeller had to make assumptions, those assumptions were made against the interests of the European Communities.

124. But the Interested Parties identified a number of assumptions or features of the model that they found erroneous. Honduras, Nicaragua and Panama objected to the European Communities' assumptions about the values of European Communities' demand and ACP supply elasticities. Colombia, Costa Rica, Ecuador and Guatemala pointed to what they considered erroneous assumptions about transport costs in the European Communities' model that were inconsistent with official data.<sup>117</sup> This "anomaly" seems to have come from the bilateral transaction costs table which estimates the cost of moving bananas from exporting to importing country. The European Communities did not provide any reference or official source of the data represented in the table. In

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<sup>112</sup> Submission by the European Communities, para. 109.

<sup>113</sup> Submission by the European Communities, para. 117.

<sup>114</sup> Award of the Arbitrator, para. 78.

<sup>115</sup> Award of the Arbitrator, para 79.

<sup>116</sup> *Ibid.*

<sup>117</sup> Submission by Colombia, Costa Rica, Ecuador and Guatemala, paras. 214-215.

fact, it admitted that "[i]nformation on transportation and other costs incurred in international trading [of] bananas for all possible trade flows is non-existent."<sup>118</sup>

125. The Arbitrator asked a question regarding the simulation results of the European Communities' model, which predicted that some large MFN suppliers will export zero volumes to the European Communities in some or in all years of the simulation. The Arbitrator noted the European Communities' confirmation of these results and its explanation that this was the most well known limitation of this class of models. It could be argued that, since the attraction of the European Communities' model is precisely its presumed ability to analyze bilateral trade flows, doubts are raised about a model that produces simulation results that are at variance with a reasonable expectation of how future banana exports to the EC-25 are likely to evolve.

126. The Arbitrator notes that there has been less debate over the European Communities' simulation model than over the price gap calculations. It recognizes that this reflects both the technical nature of the model and the complementary role it plays in the analysis. Because of the role that the simulation model plays in the European Communities' arguments, the Arbitrator does not believe that it can be treated as a methodology which is independent of the European Communities' price gap calculation. Having determined that the European Communities' price gap calculation would not result in at least maintaining total market access for MFN banana suppliers, the Arbitrator needs not deal with the simulation model as a separate method to confirm that the proposed tariff of €187 per metric ton and the tariff quota of 775,000 mt on ACP imports will maintain total market access for MFN suppliers.

## **VI. DETERMINATION**

127. For the reasons stated in this award, the Arbitrator determines that the European Communities' proposed rectification, consisting of a new MFN tariff rate on bananas of €187 per metric ton and a 775,000 mt tariff quota on imports of bananas of ACP origin, would not result "in at least maintaining total market access for MFN banana suppliers", taking into account "all EC WTO market-access commitments relating to bananas". Consequently, the Arbitrator fJ152 0 TDper