

11 February 1994

**EEC - IMPORT REGIME FOR BANANAS**

*Report of the Panel*  
(DS38/R)

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## I. INTRODUCTION

1. On 28 January 1993, Colombia, Costa Rica, Guatemala, Nicaragua and Venezuela requested the European Economic Community ("EEC") to hold consultations pursuant to Article XXII:1 of the General Agreement concerning the decision of 17 December 1992 of the Council of Ministers of the EEC on the common organization of the market in bananas (DS38/1). The EEC was not able to accept the request on the grounds that the meeting of the Council of Ministers on 17 December 1992 did not result in a formal decision concerning the banana import régime, only a discussion of future policy in the banana sector. In the view of the EEC, this discussion could not be considered as a *measure* under Articles XXII:1 or XXIII:1 of the General Agreement allowing for formal consultations under one of these provisions (DS/38/4). On 19 February 1993 Colombia, Costa Rica, Guatemala, Nicaragua and Venezuela requested the EEC to hold consultations pursuant to Article XXII:1 of the General Agreement concerning Council Regulation (EEC) No 404/93 on the common organization of the market in bananas, adopted by the EEC Council of Ministers at its session from 9 to 13 February 1993. Consultations were held between 22 March and 19 April 1993. As they did not result in a mutually satisfactory solution of the matter, Colombia, Costa Rica, Guatemala, Nicaragua and Venezuela, in a communication dated 28 April 1993, requested that in accordance with the provisions of Article XXIII:1 of the General Agreement, and pursuant to paragraph 1 of that Article, in particular subparagraphs (a) and (b) thereof, a panel be established to examine the matter.

2. The Council, at its meeting on 16 June 1993, established a panel in accordance with paragraph F(a) of the Decision of the CONTRACTING PARTIES of 12 April 1989 concerning Improvements to the GATT Dispute Settlement Rules and Procedures (BISD 36/61) and authorized the Chairman of the Council to designate the Chairman and the members of the Panel. The Panel would have standard terms of reference unless the parties to the dispute agreed otherwise within twenty days of the establishment of the Panel. Brazil and the Philippines reserved their right to make a submission to the Panel. Other contracting parties requested participation in the Panel proceedings (see paragraph 0 below).

### **Terms of Reference**

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

"To examine, in the light of the relevant provisions of the General Agreement, the matter referred to the CONTRACTING PARTIES by Colombia, Costa Rica, Guatemala, Nicaragua and Venezuela in document DS38/6 and to make such findings as will assist the CONTRACTING PARTIES in making the recommendations or in giving the rulings provided for in Article XXIII:2."

### **Composition**

4. On 6 July 1993, the Director-General was requested by Colombia, Costa Rica, Guatemala, Nicaragua and Venezuela to compose the Panel by virtue of Section F(c)5 of the Decision of the CONTRACTING PARTIES of 12 April 1989 concerning Improvements to the GATT Dispute Settlement Rules and Procedures (BISD 36S/61).

5. On 16 July 1993 the Director-General announced the composition of the Panel as follows:

Chairman: H.E. Mr. K. Kesavapany  
Members: Mr. Thomas Cottier  
Mr. Ulrich Petersmann

6. The Panel met with the Parties on 20 and 21 October, and on 11 and 12 November 1993. It submitted its report to the Parties to the dispute on 18 January 1994.

#### **Participation of other contracting parties**

7. At the meeting of the Council on 16 June 1993, the representatives of Antigua and Barbuda, Barbados, Belize, Cameroon, Côte d'Ivoire, Dominica, Dominican Republic, Ghana, Jamaica, Madagascar, Senegal, St Lucia, St Vincent and the Grenadines, Suriname, Tanzania, Trinidad and Tobago and Uganda expressed their respective governments' wish to participate in the work of the Panel. While the Council took note of these statements, there was no consensus on such participation.

8. Subsequently, the Panel considered, and the Parties agreed that, in the interest of transparency among the contracting parties having a substantial interest in the trade of bananas, it would be reasonable to invite such countries to meetings of the Panel. The Panel, therefore, invited the representatives of the governments of Belize, Brazil, Cameroon, Côte d'Ivoire, Dominica, Dominican Republic, Jamaica, Madagascar, the Philippines, St Lucia, St Vincent and the Grenadines and Suriname to the Panel meetings at which the parties were present. Submissions by such contracting parties were to be made in writing, or if made orally, were to be made available in writing. The representatives of these contracting parties present at Panel meetings received all submissions of the parties. These same contracting parties were also invited by the Panel to make oral statements at the Panel meetings. The Panel, however, was of the view that this procedure should not be considered a precedent for future panels.

## II. FACTUAL ASPECTS

9. The complaint examined by the Panel related to the EEC import régime for bananas introduced on 1 July 1993.

10. Since 1988, the EEC has been the world's largest importer of bananas, followed by the United States and Japan. Total supplies of *fresh* bananas in the EEC in 1991 amounted to some 3.63 million tons, two thirds of which originated in Latin American countries<sup>1</sup>. This was approximately 38 per cent of world trade in bananas, and compared to imports of 2,9 million tons for the United States and 0,8 million tons for Japan<sup>2</sup>. Major suppliers of Latin American bananas to the EEC in 1991 were Ecuador, Costa Rica, Colombia, Panama and Honduras. Domestic producers supplied approximately 19 per cent of the bananas consumed in the EEC, the main producing areas being the Canary Islands, Martinique and Guadeloupe. Sixteen per cent were supplied by African, Caribbean and Pacific countries ("ACP" countries). Major suppliers of ACP bananas to the EEC in 1991 were Cameroon, Côte d'Ivoire, St. Lucia, Jamaica, St. Vincent and Dominica. It is estimated that total supplies of bananas in the EEC in 1992 amounted to some 3,76 million tons<sup>3</sup>, 689,710 tons of which originated in ACP countries and 2,409,255 tons in Latin America, of which the complaining parties provided 1,042,810 tons<sup>4</sup> (for details see the Annex).

11. On 1 July 1993, the EEC introduced a common market organization for bananas (Council Regulation (EEC) 404/93<sup>5</sup> ("the Regulation")), replacing the various national banana import systems in place in the member states previously. The Regulation consisted of five separate titles, which established uniform rules on common quality and marketing standards; producers' organizations and concentration mechanisms; assistance; trade with third countries; and general provisions.

12. The first three titles regulated the internal aspects of the common organization of the market in bananas: (1) the common quality and marketing standards provided for subsequent regulation, laying down that these standards should be mandatory for fresh products. They could also be extended to processed products; (2) rules concerning producers' organizations and concentration mechanisms were intended to promote the creation of organizations to concentrate supply and regulate prices and improve EEC production structures; (3) this would be achieved by assistance to promote the establishment of such organizations and to facilitate their operation. Another incentive was the participation of these organizations in assistance schemes. Also, members of producer organizations could be granted compensation for any loss of income, the maximum quantity for such compensation being fixed at 854.000 tons for the EEC as a whole. Title V contained general provisions.

13. Title IV (Articles 15-20) set out arrangements for trade with third countries and applied to *fresh* bananas, excluding plantains (HS ex 08.03). It established four categories of suppliers: traditional imports from ACP countries; non-traditional imports from ACP countries; imports from non-ACP third countries; and EEC bananas. Imports of bananas from **traditional** ACP-suppliers entered duty-free up to maximum quantity fixed for each traditional supplying country; these maxima collectively amounted to 857.700 tons. Imports of **non-traditional**<sup>6</sup> ACP bananas and bananas from third countries<sup>7</sup> were

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<sup>1</sup> Source: Nimex 1991.

<sup>2</sup> Source: FAO.

<sup>3</sup> Provisional.

<sup>4</sup> Source: Nimex 1992, as revised.

<sup>5</sup> As supplemented by, for instance, Commission Regulations (EEC) 1442/93, 2009/93 and 1858/93.

<sup>6</sup> Non-traditional ACP bananas were both those quantities above traditional quantities supplied by traditional ACP-countries and those quantities supplied by ACP countries which were not traditional suppliers.

<sup>7</sup> Third countries' were banana exporting countries other than ACP countries.

subject to a tariff quota of 2 million tons (net weight).<sup>8</sup> Bananas from ACP countries entered duty-free within this quota whereas third country bananas were subject to a tariff of 100 ECUs per ton. Imports above the tariff quota were subject to a tariff of 750 ECUs per ton for bananas from ACP countries and to 850 ECUs per ton from third countries. The quota could be adjusted on the basis of a supply balance for production and consumption prepared in advance of each year. All imports of bananas from third countries were contingent on an import license and subject to a security deposit.

14. Licenses for third country and/or non-traditional ACP fruit were distributed to three broad categories of operators established in the EEC. Sixty-six point five per cent of the tariff quota was available to operators who had marketed third country and/or non-traditional ACP bananas (category (a)); 30 per cent to operators who had sold EEC and/or traditional ACP bananas (category (b)); and 3.5 per cent to operators established in the EEC who started marketing bananas other than EEC and/or traditional ACP bananas as from 1992 (category (c)). Operators in category (a) and (b) were to obtain import licenses on the basis of the average quantities of bananas that they had sold in the three most recent years for which figures were available.<sup>9</sup> The (a) and (b) operator categories were further subdivided into three types of qualifying entities, *i.e.* those that produced (or purchased from the producer), consigned and sold bananas in the EEC; those that owned, supplied and released bananas for free circulation in the EEC; and those that owned and ripened bananas within the EEC. Each type was assigned a weighting coefficient (57, 15 and 28 per cent, respectively), which, multiplied by the average quantity of bananas sold by each operator in the three most recent years, determined the individual operator's reference quantity entitlement.

15. Between 1963 and 1 July 1993, the EEC maintained a consolidated tariff rate on bananas of 20 per cent *ad valorem*. Initial negotiating rights were held by Brazil. On 19 October 1993, the EEC notified the CONTRACTING PARTIES of its intention to renegotiate the 1963 concession on bananas in accordance with the provisions of Article XXVIII, paragraph 5.

16. By virtue of Article 168(1) of the fourth Lomé Convention, signed in 1989, which was identical to corresponding Articles in previous Conventions, imports of bananas from ACP countries entered the EEC duty free. Under Protocol 5 of the Lomé IV Convention, which was virtually the same as corresponding protocols in the earlier conventions, the EEC was committed to maintain the traditional advantage of ACP banana suppliers on those markets. The Protocol stated: "no ACP State shall be placed, as regards access to its traditional markets and its advantages on these markets, in a less favourable situation than in the past or at present". The successive Lomé Conventions, including the relevant Protocols concerning bananas, had been notified to the GATT and had been discussed in working parties.

### III. MAIN ARGUMENTS

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<sup>8</sup> Article 18 of Council Regulation (EEC) No. 404/93.

<sup>9</sup> Detailed rules concerning imports of bananas inside and outside the quota were to be found in Council Regulation (EEC) No 1442/93, as amended by Commission Regulation (EEC) No 2009/93.

## General

17. **Colombia, Costa Rica, Guatemala, Nicaragua and Venezuela** requested the Panel to find that the import régime for bananas introduced in the EEC on 1 July 1993 was inconsistent with Articles II, XI and XIII of the General Agreement. **Colombia, Costa Rica, Guatemala and Nicaragua** also requested the Panel to find that the import régime was inconsistent with Article I. **Colombia, Guatemala and Venezuela** requested the Panel to find furthermore that the EEC import régime for bananas was not in conformity with the provisions of Articles III and VIII. In addition, **Colombia** considered that the EEC acted inconsistently with the provisions of Article XVI. In the view of the complainants, such infringements of the provisions of the General Agreement implied the nullification or impairment of benefits accruing to Colombia, Costa Rica, Guatemala, Nicaragua and Venezuela. Accordingly, these contracting parties asked the Panel to recommend to the CONTRACTING PARTIES that they request that the EEC modify its banana import régime to bring it into conformity with the provisions of the General Agreement.

18. The EEC requested the Panel to find that the banana import régime was in conformity with the provisions of the General Agreement. The EEC submitted, in particular, that the preferential tariff treatment granted to imports of ACP bananas was justified under Article XXIV:5, read in the light of Part IV of the General Agreement. The EEC was also of the view that the Article XXVIII procedure being initiated by the EEC was not covered by the mandate of the Panel and that the examination by the Panel of the conformity of the banana import régime with the provisions of Article II of the General Agreement had become unnecessary in light of those proceedings.

19. The EEC did not question the jurisdiction of this Panel to examine specific measures. However, the EEC took the view that a GATT Panel established under Article XXIII had no jurisdiction to examine the overall consistency of a free trade area agreement with Article XXIV. More specifically, the EEC was of the view that a party complaining under Article XXIII:1(a) would not normally be in a position to show, in a legally admissible way, that a "preferential treatment" violated Article XXIV:8(b) when that "preferential treatment" related to the constituent elements of a free trade agreement and its compatibility with Article XXIV, paragraphs 5(b) and 8(b). The complainants did not agree with these arguments (see also paragraphs 0 - 0 ).

## Article II - Schedules of Concessions

20. **Colombia, Costa Rica, Guatemala, Nicaragua and Venezuela** were of the view that this Article set forth one of the central legal obligations of the General Agreement, namely the undertaking of contracting parties to respect the tariff concessions, thus prohibiting the application of tariffs for a specific product that were higher than those specified in each country's schedule of concessions. The fundamental principles embodied in the provisions of this Article were essentially the security and predictability of the tariff concessions granted by one contracting party to the remaining contracting parties. With the implementation of the tariff and non-tariff measures of the restrictive nature adopted by the EEC, there was a violation of Article II:1(a) in so far as this régime implied less-favourable treatment than that established in the concession granted by the EEC for bananas, thus affecting the value of that concession. The obligation of preserving the security of tariff concessions was so important that past precedents had always held that any change in the concession, in the tariff structure or in the method of customs valuation could affect the value of the concession and consequently infringe Article II<sup>10</sup> even if the new valuation method did not increase the protection provided by the tariff.<sup>11</sup>

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<sup>10</sup>Report of the panel on Newsprint, BISD 31S/114, paragraph 50, adopted 20 November 1984; report of the panel on Canada-Withdrawal of Tariff Concessions, BISD 25S/42, paragraph 14, adopted on 17 May 1978; report of the panel on Exports of Potatoes to Canada, BISD 11S/88, paragraph 18, adopted on 16 November 1962; report of the working party on Schedules of Concessions, Transposition of Schedule XXXVII - Turkey, adopted on 20 December 1954.

<sup>11</sup>*E.g.*, report of the panel on Newsprint, BISD 31S/114, adopted 20 November 1984.

21. According to the complainants, the critical nature of adherence to GATT bindings was well illustrated by the report of the panel established in 1984 to review the EEC's quota on imports of Newsprint.<sup>12</sup> In this case, Canada had challenged the reduction by the EEC of its duty-free tariff quota on newsprint from the bound minimum of 1.5 million tons to a new quota of 500,000 tons. The EEC claimed that it was merely changing its method of administering the overall quota, by allocating it among different groups of countries, while entirely accommodating Canada's previous level of imports and without in any way diminishing Canada's rights with respect to the concession. The panel disagreed, concluding that "the EC, in unilaterally establishing for 1984 a duty-free quota of 500,000 tonnes, had not acted in conformity with their obligations under Article II of the GATT. The panel shared the view expressed before it relating to the fundamental importance of the security and predictability of GATT tariff bindings, a principle which constitutes a central obligation in the system of the General Agreement." "In light of the foregoing . . . the Panel found that the EC action constituted a *prima facie* case of nullification or impairment under the General Agreement."<sup>13</sup> The complainants considered that the panel's finding was particularly significant because it acknowledged that the change in the EEC's tariff schedule did not increase the protective effect of the tariff quota with respect to Canada.<sup>14</sup>

22. **Venezuela** added that, like the Canadian exporters of newsprint, Venezuelan banana producers had assessed their competitive position on the basis of the bound tariff level. They had made strategic decisions and investments on that basis; they had cultivated substantially more land specifically for this export trade; and they had pursued marketing ties with European importers. The new tariff quota undermined the legitimate expectations upon which these actions were based and severely disrupted the trade conditions upon which the Venezuelan producers had relied, regardless of the actual protective effect of the new régime.

23. The **EEC** submitted that it was unquestionable that the security and predictability of tariff concessions was greatly increased - not reduced - if one party moved from a situation of *ad valorem* into specific rate tariff-bindings. It was a mere formality, which found no support in the way trade was conducted today, to argue that the EEC had impaired the security of the complainants' rights under Article II. None of the previous panel reports cited by the complainants had examined a similar issue. These panel reports all dealt with a situation where a party had changed or amended its tariff binding expressed in a specific amount of duty into a binding expressed in *ad valorem* terms. In the EEC's view, *ad valorem* tariff bindings did not afford the same degree of security and predictability as specific duties, because the former were more volatile to currency fluctuations and varied considerably by reference to the cost structure and sale price of the product concerned.

24. **Colombia, Costa Rica, Guatemala, Nicaragua and Venezuela** submitted that the new monetary conversion<sup>15</sup> rates yielded *ad-valorem* values of the newly introduced specific rates well above the bound rate of 20 per cent for bananas both within and above the quota. The 100 ECUs per ton translated to well over 25 per cent *ad valorem* whereas 850 ECUs per ton were eight to nine times higher than the bound duty. Conversion rates that served to augment the level of protection had been

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<sup>12</sup> *Idem*.

<sup>13</sup> *Idem*, paragraphs 52-53.

<sup>14</sup> *Idem*, paragraph 50.

<sup>15</sup> Commission Regulation (EEC) No 1504 of 18 June 1993.

disavowed by other dispute panels.<sup>16</sup> The establishment of a tariff of 850 ECUs per ton for any imports over and above the established quota exceeded the bound rate and prevented trade in the product in question in the EEC market over the quota.

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<sup>16</sup>Report by the panel on Increase of Import Duties on Products Included in Schedule XXV (Greece) BISD 1S/51, adopted on 3 November 1952.

25. The EEC disagreed with the complainants' calculations. There was no doubt that the 100 ECUs per ton applied to the tariff quota of 2 million tons corresponded to the 20 per cent *ad valorem* duty expressed as a specific duty. In the EEC's view, the correct representative period in this case consisted of the years 1989 to 1991. The year 1992 was not representative because when the Regulation was adopted trade figures did not exist for 1992 and, until very recently, they were artificially inflated. On the basis of the 1989 to 1991 figures, the 20 per cent *ad valorem* duty was on average 105 ECUs per ton, whereas the Regulation provided for a tariff of only 100 ECUs per ton<sup>17</sup> since 1 July 1993. As regards the average volume of exports of bananas from the complaining parties during the period 1989-1991 and in 1992, this represented less than one million tons. The complainants could not, therefore, show that their trade opportunities had been nullified or impaired. The EEC submitted, therefore, that in the absence of such economic effects, the question of the alleged violation of Article II of the General Agreement became a mere formality. As regards the 850 ECUs per ton for imports outside the tariff-quota, it had no actual or potential effects on the trade opportunities of the complainants either, because their average volume of exports during the period of 1989-1991 was less than half of the tariff-quota while in 1992 imports from these countries amounted to only 1.042.810 tons. Moreover, it did not undermine the security and predictability of the complainants' right to trade in bananas but, rather conversely, increased them. The disparate systems of quantitative restrictions applied by some EEC member states before 1 July 1993, although in the opinion of the EEC in conformity with the General Agreement, had tended to obscure transparency. Those quantitative restrictions and the inherent uncertainty of the 20 per cent *ad valorem* duty applied before had since been eliminated.

26. The EEC informed the Panel that since no satisfactory solutions had been found during consultations, the EEC had decided to have recourse to the procedures of Article XXVIII. Notification was made on 19 October 1993 to the Director-General of the GATT to that effect. As a result of that notification, the EEC considered that the issue of the violation of Article II had become moot. Therefore, the maximum the Panel could do in its review was to examine the legal situation that existed from the time the Panel were established until 19 October 1993. Moreover, in the EEC's opinion, Article XXVIII negotiations were the appropriate place for addressing highly technical and complex issues such as when an *ad valorem* duty was converted into a specific duty. Such technical and complex duty calculations were issues that should be analyzed by trade experts from all the parties concerned.

27. **Colombia, Costa Rica, Guatemala, Nicaragua and Venezuela** replied that the problems that were to be considered by GATT panels were in general quite complex and difficult and involved technical analysis of economic, trade and statistical issues. This was precisely why the panel members were carefully selected among international trade specialists. Therefore, the calculation of the *ad valorem* equivalency of a specific tariff was hardly beyond the scope of this Panel's competence. With regard to Article XXVIII, the complainants considered that any attempt by the EEC to give advance legal effects to the action taken under Article XXVIII must be rejected as lacking any legal basis. Otherwise, a dangerous precedent would be established whereby contracting parties could change their bound concessions by simply resorting to Article XXVIII. It conflicted not only with the objectives of security and predictability of concessions which were the purpose of Article II, but also with the content of Article XXVIII itself. Moreover, the language and drafting history of Article XXVIII indicated that negotiations and consultations had to precede any withdrawal of a concession pursuant to that provision. If a contracting party considered it necessary to modify its schedule of concessions before completing the unbinding process provided for in Article XXVIII, GATT practice, in compliance with the rules of the General Agreement, required the contracting party concerned to request to be exempted from this obligation through a waiver under Article XXV. Until some actual change in the binding occurred, this

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<sup>17</sup> According to the EEC, the figure of 105 ECUs (commercial rates) per ton was arrived at by taking into account the average unit value of imports into the EEC from all sources for the period 1989-1991 and that it was established GATT law and practice in such cases to take into account imports from all sources: report of the panel on Canada-Withdrawal of Tariff concessions, BISD 25S/42, paragraph 17, adopted on 17 May 1978. The EEC also explained that it was established GATT law in such cases to take into account, for the calculation of the average imports, a "previous representative period" which in this case was the years 1989 - 1991: see report of the panel on EEC -Restrictions on Imports of Dessert Apples, BISD 36S/93, paragraphs 12.22, adopted on 22 June 1989.

Panel was charged with addressing the issues before it with reference to the 20 per cent bound rate.

28. **Colombia and Guatemala** added that recourse to Article XXVIII would not legitimize the violations of Article II as Article XXVIII could only be pursued to negotiate withdrawal of concessions on a non-discriminatory basis, with due regard to the m.f.n. principle.<sup>18</sup> Fundamental to Article XXVIII was the obligation to maintain "a level of reciprocal and mutually advantageous concessions not less favourable to trade than that provided for in this Agreement."<sup>19</sup> The obligation made clear that Article XXVIII compensation had to be derived from GATT-legal levels of trade. In this case, where the EEC's breach of the binding was interconnected with other violations of the General Agreement, the trade levels guaranteed by Article XXVIII could not be calculated until the Panel issued a comprehensive ruling as to all violations at issue.

#### **Articles I, XXIV and Part IV - Preferential treatment**

29. **Colombia, Costa Rica, Guatemala and Nicaragua** considered that the EEC Regulations<sup>20</sup> introducing and implementing a common organization of the banana market in the EEC violated the principle of the most-favoured-nation treatment in Article I. It provided that traditional ACP imports could enter the EEC market free of any barrier and that non-traditional ACP imports received preferential tariff treatment, through the establishment of a zero tariff within the tariff quota, while the like product from third countries were subject to the application of a tariff quota, which had the effect of a "straightforward quota," and the payment of different, higher and hence discriminatory tariffs. Above the quota which was subject to a tariff of 100 ECUs per ton<sup>21</sup> for bananas from other than ACP countries, imports of third-country bananas were subject to a tariff of 850 ECUs per ton, while imports of non-traditional ACP bananas paid a tariff of 750 ECUs per ton<sup>22</sup>. The complainants felt that the preamble in the Regulation demonstrated that the EEC had established the new tariff levels expressly to restrict the imports of bananas from Latin American suppliers for the benefit of other suppliers, namely those who exported bananas from the ACP countries.

30. The complainants further argued that the licensing system by which this régime was administered constituted charges of an administrative or other nature, and therefore fell within the meaning of "charges of any kind" referred to in Article I. Moreover, none of the exceptions to the most-favoured-nation principle in the General Agreement was applicable to the discriminatory treatment established by the regulations adopted by the EEC. Neither Article I:2, nor Part IV, nor the Enabling Clause, nor Article XXIV, empowered the EEC to discriminate against banana imports from Latin America.

31. **Venezuela** added that its decision not to formulate a legal complaint based on Article I of the General Agreement could not be linked to any alleged interpretation on Venezuela's part that the arguments advanced by the Latin American countries were weak. Venezuela considered on the contrary, that those arguments, like those submitted by the EEC and the ACP countries, had to be carefully examined by the Panel.

32. The **EEC** contended that the tariff preferences accorded to bananas from ACP countries, even if inconsistent with Article I:1 of the General Agreement, were justified under Article XXIV, read in the light of Part IV of the General Agreement. The EEC further explained that nearly all of the countries which were currently parties to the Lomé IV Convention were earlier dependent territories of EEC

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<sup>18</sup>E/PC/T/A/PV/18.

<sup>19</sup>Paragraph 2 of Article XXVIII.

<sup>20</sup>In particular Council Regulation (EEC) No. 404/93 and Commission Regulation (EEC) No. 1442/93.

<sup>21</sup>Council Regulation (EEC) No 404/93, Article 18.2.

<sup>22</sup>Council Regulation (EEC) No 404/93, Article 18.3.

member states. It was for this reason that France and the United Kingdom, who were original members of the General Agreement in 1947, obtained the recognition of the existing preferences in Article I:2 and Annexes A and B to the General Agreement. Moreover, Article XXIV:9 of the General Agreement specifically provided that these preferences could be maintained also in a situation where the contracting party having granted the preference became a party to a customs union or a free trade agreement in accordance with Article XXIV:9.

33. **Colombia, Costa Rica, Guatemala and Nicaragua** submitted that the parameters laid down by Article XXIV were precisely what prevented the trade treatment granted by the EEC to the beneficiaries of the Lomé IV Convention from falling within the scope of that Article. The trade régime established under the Lomé IV Convention was neither a customs union nor a free-trade area between the ACP countries and the EEC but a unilateral and non-reciprocal relationship not provided for in Article XXIV. The report of the panel on EEC - Member States' Import Régimes for Bananas.<sup>23</sup> ("first banana panel") clearly delimited the specific scope of the provisions of Part IV of the General Agreement, rejecting the possibility that they would authorize the suppression of rights accruing to contracting parties under the provisions of the General Agreement, including Article I.<sup>24</sup> Neither the letter of the provisions of Part IV, nor the spirit in which they were adopted could lead to an interpretation thereof enabling it to be used to replace the obligation of the most-favoured-nation clause or the reciprocity requirement laid down in Article XXIV. With the promulgation of Part IV, it was never intended to create new exceptions to Article I, nor was the purpose of Part IV to encourage or permit discrimination among developing countries; it was intended to be applied on an m.f.n. basis to all developing countries.<sup>25</sup>

34. **Colombia, Costa Rica and Nicaragua** argued that the legal arguments advanced by the EEC with regard to the scope of the provisions of Part IV of the General Agreement were inconsistent. At the same time as the EEC tried to give Part IV a scope and legally binding nature that would permit arbitrary and unilateral derogation from the most-favoured-nation principle, it also argued, during the examination carried out by another panel, that the provisions of the same Part IV had a political objective that could not be understood as establishing a legal obligation. This inconsistency also appeared in the proceedings of the working party which studied the Yaoundé Agreement, in which the EEC argued that "Part IV ... did not aim to modify the provisions of Article XXIV"<sup>26</sup>, thereby establishing that it did not constitute a legal basis for justifying infringement of Article I in that particular case. It was unacceptable that the same contracting party should today seek to give part IV a scope and legally binding character such that it even allowed unilateral derogation from the most-favoured-nation principle.

35. The **EEC** noted that imports of bananas originating in ACP countries entered the EEC free of customs duties under Article 168 of the Lomé IV Convention and Protocol 5 on bananas attached thereto. The preferential treatment of those countries was part of the EEC's heritage and at all times since the creation of the EEC such preferences had been granted to ACP countries. This was well known to GATT contracting parties, particularly because the granting of these preferences occupied a prominent place in the examination of the Treaty of Rome by a GATT working party<sup>27</sup>. The preferential treatment of ACP countries was essential for the EEC for political, economic and legal reasons. The EEC market was for all practical purposes the only viable outlet for ACP-bananas, while Latin American bananas were exported to many other destinations. ACP-bananas would be completely

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<sup>23</sup> Report of the panel on EEC Member States' Import Régimes for Bananas, DS32/R, (not yet adopted).

<sup>24</sup> *Idem*, page 82, paragraph 369.

<sup>25</sup> Report of the panel on Tariff Treatment on Imports of Citrus Products from Certain Mediterranean Countries, L/5776, paragraph 3.24, dated 7 February 1985.

<sup>26</sup> Report of the working party on the European Economic Community - Association Agreements with African and Malagasy States and overseas countries and territories, BISD 14S/106, paragraph 14, adopted on 4 April 1966.

<sup>27</sup> Report of sub-group D, BISD 6S/89 - 109.

eliminated from the EEC market by the highly competitive Latin American bananas, if the EEC did not grant preferential treatment to ACP-bananas. This could also lead to a total collapse of the economy of certain ACP countries.

36. **Colombia, Costa Rica, Guatemala and Nicaragua** replied that past panels had consistently held that when called upon, as here, to examine the GATT-legality of a contracting party's rules or regulations "in light of relevant GATT provisions", it could not take into account any "special historical, cultural and socioeconomic circumstances" offered by that contracting party.<sup>28</sup>

37. The **EEC** was of the view that the Lomé IV Convention and its predecessors had created free trade areas between the EEC and the ACP countries, in accordance with the criteria and conditions laid down in Article XXIV:5(b) and :8(b), read in the light of Part IV of the General Agreement. Pursuant to Article 174 of the Lomé IV Convention, the EEC did not expect immediately full reciprocity for the preferential treatment it granted to ACP products. The obligation that duties and other restrictive regulations of commerce should be eliminated "on substantially all trade" had in fact been fulfilled in the case of the Lomé IV Convention because, for example, in 1990 more than 97 per cent of EEC imports from the ACP countries were admitted duty free. In 1991, it was estimated that more than 99 per cent of ACP exports entered the EEC at a zero tariff rate. It was also estimated that of the total two-way trade between the EEC and the ACP states, a very high percentage was admitted duty free. But no precise information was available on the actual percentage of trade conducted by the sixty-nine ACP countries because of their limited technical and organizational capabilities. Although under the Lomé IV Convention ACP states were, according to the EEC, not required to extend immediately full reciprocity "in view of their present development needs"<sup>29</sup>, trade statistics showed that substantially all the trade was covered within the meaning of Article XXIV:8(b). That Article, read in the light of Article XXXVI:8 and the footnote thereto, fully justified the lack of formal reciprocity in the Lomé IV Convention. But it was Article XXIV:8(b) alone, not Part IV or Article XXXVI:8 which in derogation from Article I permitted preferences granted in accordance with the Lomé IV Convention. In this connection, the EEC referred to the Australian-Papua New Guinea free trade agreement<sup>30</sup> as another example of an Article XXIV agreement which had been accepted by the GATT and which did not involve immediate full reciprocity.

38. **Colombia, Costa Rica, Guatemala and Nicaragua** contested that Part IV of the General Agreement could be invoked as an exception in this case, as its application was envisaged solely to establish differences in trade treatment as between developed contracting parties and developing contracting parties, and not as between two groups of developing contracting parties. Furthermore, Part IV provided for specific measures that could be adopted by developed countries with respect to products of export interest to less-developed countries; it did not envisage the granting of tariff preferences, as this was precisely the reason for the existence of the "Enabling Clause".<sup>31</sup> However, the preferential tariff treatment by developed countries, authorized by the Enabling Clause, was limited to concessions granted under the Generalized System of Preferences, which was obviously not applicable.

39. The **EEC** submitted that it was clear from the annotation *ad Article XXXVI:8* that this provision had to be read together with "any other procedure under this Agreement". The exception from Article I found its basis in Article XXIV:5 alone, and the EEC did not suggest that it could be found in Part IV. But Article XXIV, paragraphs 5 and 8 construed in the light of Article XXXVI:8, permitted the establishment of free-trade areas between developed and developing countries without immediate full reciprocity. Without this interpretation it would be extremely difficult to create a free-trade area

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<sup>28</sup> *E.g.*, report of the panel on Japanese Measures on Imports of Leather, BISD 31S/94, 40-44, adopted 15 May 1984; report of the panel on EEC - Quantitative Restrictions Against Imports of Certain Products from Hong Kong, BISD 30S/129, paragraph 27, adopted on 12 July 1983.

<sup>29</sup> Article 174 of the Lomé IV Convention.

<sup>30</sup> BISD 24S/63.

<sup>31</sup> Report of the panel on EEC Member States' Import Régimes for Bananas, DS32/R, page 82, paragraph 369.

between developed and developing countries under the General Agreement. The EEC was, moreover, of the opinion that neither the text, object or purpose, nor the drafting history of Article XXIV supported the view that the General Agreement was intended to exclude free trade agreements in which non-GATT members participated.<sup>32</sup> The reference in paragraph 5 of Article XXIV to "as between the territories of contracting parties" did not appear in either paragraph 4 or paragraph 8 of Article XXIV, which referred only to "as between the constituent territories". Therefore, "constituent territories" could very well include territories of non-GATT members. But in any case, established practice of the CONTRACTING PARTIES confirmed the view defended by the EEC on this issue<sup>33</sup>.

40. The footnote to Article XXXVI:8 had to be interpreted by using the generally accepted principles of treaty interpretation as laid down in the 1969 Vienna Convention on the Law of Treaties. Applying these principles, the EEC had reached the conclusion that the language, context, object, purpose and drafting history of the footnote confirmed the view that the principle of non-reciprocity was meant to be applicable to "any other procedure" under the General Agreement, thus including Article XXIV:8(b). The fact that Article XXIV was not expressly mentioned in the text was not legally relevant in view of its clear language. Also, the text of both paragraph 8 of Article XXXVI and its footnote explicitly stated that the principle of non-reciprocity should be applicable in the course of any type of "trade negotiations" to reduce or remove tariffs and other barriers to trade, and irrespective of whether it would benefit only one, several or all developing contracting parties. The EEC therefore concluded that Article XXXVI:8 also applied to negotiations on the establishment of a free trade area in terms of Article XXIV.

41. **Colombia, Costa Rica, Guatemala and Nicaragua** submitted that the non-reciprocity provided for in Article XXXVI of the General Agreement referred to trade negotiations carried out in a multilateral framework and not to negotiations of any other kind. This was clear from the reference, made in the note to Article XXXVI:8, to Article XVIII, section A (negotiations to modify or withdraw tariff concessions included in the schedule to the General Agreement), Article XXVIII bis (periodic multilateral negotiations) and Article XXXIII (accession to the General Agreement). Hence, no express obligation was being negated by the application of Article XXXVI:8, as would be the case if Article XXXVI:8 were applied to Article XXIV. Moreover, GATT had previously found that reciprocity requirements could not be rescinded by Part IV. When the note to paragraph 8 of Article XXXVI referred to "any other procedure under this Agreement" it had logically to be understood to be referring to other procedures of a similar nature to those of the Articles cited above,<sup>34</sup> in other words, negotiating procedures carried out within the multilateral framework of the General Agreement. That was precisely why the note did not mention Article XXIV which referred not to negotiating procedures within a multilateral context, but rather to bilateral or regional negotiations which had to comply with specified requirements, including that of reciprocity, in order to be able to qualify as an exception to the most-favoured-nation principle. Free trade areas and customs unions established under Article XXIV were designed to eliminate barriers on "substantially all trade" and to achieve a "closer integration between the economies" of its constituent parties. Given these objectives, it was impossible to see how the "non-reciprocity" commitment of Article XXXVI:8 could facilitate the achievement of free trade areas and customs unions. The very concept of non-reciprocity was fundamentally irreconcilable with the notion of a free trade area or customs union. It should be recalled that exceptions to the rules had to be interpreted restrictively. Article XXIV constituted an exception to the fundamental principle of the GATT system, namely the most-favoured-nation principle. Consequently, the provisions set forth in article XXIV were intended to restrict the scope of application of the exception as such, for which

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<sup>32</sup>For instance, U.N. Doc. EPCT/PV.11, at page 37 (1947); U.N. Doc. E/CONF.2/C.6/SR.38, at page 4 (1948); and U.N. Doc. E/CONF.2/C.3/78, at page 7 (1948).

<sup>33</sup>For instance, the report of the working party on "EEC-Agreements of Association with Tunisia and Morocco", BISD 18S/149, 154, paragraph 16, adopted on 29 September 1970. Also the reports of the following working parties: EFTA: BISD 9S/20; LAFTA: BISD 9S/21; Arab Common Market: BISD 14S/20; UK/Ireland FTA: BISD 14S/23.

<sup>34</sup>E.g., Brazil - Renegotiation of Schedule III, BISD 22S/10, Decision of 26 November 1975.

purpose they established a series of requirements which had to be strictly observed. The possibility of a derogation from the most-favoured-nation principle in a case which did not fall within the express requirements laid down in this Article did not follow from either the letter or the spirit of the Article.

42. **Guatemala** added that Article XXIV agreements between developed and developing countries had already been executed on the basis of reciprocity, and many more were expected on that same basis over the next five years.<sup>35</sup> Furthermore, the first banana panel provided four valid reasons why there could be no derogation from the reciprocity requirement in Article XXIV, namely (1) Part IV could not be used to subtract from other parts of the General Agreement; (2) the enabling clause did not extend to Article XXIV; (3) the Lomé IV Convention did not derive from "procedures" under the General Agreement as required under *ad Article XXXVI:8*; and (4) Part IV could not be read to extend treatment more favourable to non-contracting parties than that accorded to contracting parties. Finally, Guatemala argued that the preparatory working documents cited by the EEC did not relate to Article XXIV. They dealt with exceptions described in Annexes A-H of the General Agreement. As to those exceptions, the negotiators took pains to point out that preferences under the General Agreement had to be reciprocal unless expressly indicated otherwise.<sup>36</sup>

43. **Colombia** noted that the first adopted working party report on the Lomé Convention "understood" that the convention "would in no way be considered as affecting the legal rights of contracting parties under the General Agreement." As such, Article XXIV, viewed alone or together with Part IV, could not justify, excuse or otherwise mitigate the EEC Regulations' violations of the Article I rights of the complainants.

44. The **EEC** argued that its interpretation of Article XXIV, read in the light of Article XXXVI:8 and the footnote thereto, would not imply any addition or diminution of rights and obligations under the General Agreement. The EEC did not believe, nor had it ever claimed, that Article XXIV or Part IV or both together would justify the implementation of the Generalized System of Preferences or that they had anything to do with the application of the Enabling Clause. Moreover, the EEC did not agree with the interpretation given by the complainants of the footnote to Article XXXVI:8 and its legal effects, nor with the interpretation of the word "procedure" advanced by them. Economic integration negotiations and procedures directly or indirectly affected the tariff concessions of the parties and thus fell within the scope of "action" and "procedures" mentioned in the footnote to Article XXXVI:8 and that was why, in the opinion of the EEC, Article XXIV:6 mentioned Article XXVIII. Moreover economic integration agreements needed to be notified to, and examined by, the CONTRACTING PARTIES. The language of the footnote to Article XXXVI:8, as the footnote to Article XXXVII:1(b), made it clear that it was applicable to any type of procedures or negotiations under the General Agreement.

45. The **EEC**, moreover, submitted that the Panel had no jurisdiction to examine the overall consistency of the Lomé IV Convention with Article XXIV of the General Agreement. The *prima facie* principle as elaborated by the first banana panel could not be applied to this type of agreement as covered by Article XXIV for substantive, procedural and historic reasons. The substantive reasons were in essence based on the view that Article XXIV-type agreements were complex and technical, thus requiring a careful examination by trade experts. The General Agreement had recognized this truth by requiring the parties to such types of agreements to notify them to the CONTRACTING PARTIES. The practice since the entry into force of the General Agreement had invariably been to examine such agreements in the framework of specially established working parties. Article XXIV:7(b) provided for a special procedure for the examination of agreements in order to ascertain whether they fulfilled the conditions of that Article to be recognized as free-trade agreements. The question whether a given agreement fulfilled the conditions of a free-trade agreement could only be answered after full

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<sup>35</sup> *E.g.*, U.S.-Israel Free Trade Area; North American Free Trade Area; proposed free trade areas between the United States and Latin America; the proposed accession to the EEC Customs Union by Turkey and several Eastern European developing countries.

<sup>36</sup> In U.N. Doc. E/CONF.2/C.3/SR.44 and E/CONF.2/C.3/SR.44, corr. 1, 18 March 1948.

examination of the agreement concerned and not on the basis of a superficial *prima facie* examination. An examination by a working party was also necessary in order to give the notifying contracting parties the legal certainty which they required and which they could not obtain otherwise than by notification, since the panel procedure was not normally accessible to them in a situation where no dispute existed between them. It followed that in the context of proceedings before a panel established under Article XXIII, it was inappropriate to use the *prima facie* criterion in order to judge the consistency of free trade agreements with the substantive provisions of Article XXIV:4 *et seq.*

46. According to the EEC, Article XXIII procedures could not be applied in order to examine the legality of an Article XXIV-type agreement as a whole. Previous reports of working parties had recognized that the procedure of Article XXIII could be used to call into question any individual measure taken by the parties to free trade agreements. But they had not mentioned the possibility of calling into question the free trade agreement as a "whole"<sup>37</sup>. The procedures laid down in Article XXIV:7 excluded, for reasons of legal security and internal coherence of the whole system of the General Agreement, that free trade agreements as such could be examined simultaneously under different procedures of the General Agreement. Some hierarchy of norms had to be applied, and in such a hierarchy usually rules of substance (*i.e.* Article XXIV:7) took precedence over rules of procedure (Article XXIII). Thirdly, the unadopted report of the first panel on bananas based itself on the panel reports examining the complaints of three different parties under Article XVIII:B<sup>38</sup>. The report of the first panel on bananas failed, however, to notice the substantial differences not only in the texts of Article XVIII:B and Article XXIV:7, but also of the different object and purpose of the above two Articles in the legal system of the General Agreement. The *prima facie* criterion was explicitly mentioned in Article XVIII:B (12) (d), but not in Article XXIV:7<sup>39</sup>. The drafting history of Article XVIII also appeared to confirm that the intention of the parties was not to exclude individual measures taken for balance of payments purposes from the scope of Article XVIII:12(d). Moreover, unadopted panel reports had no legal value in the GATT system.

47. The report of the panel on Korea-Restrictions on Imports of Beef ("Korean beef panel") explicitly stated in paragraph 118 that "Article XXIII .... provided for the detailed examination of individual measures by a panel of independent experts whereas (Article XVIII:B) provided for a general review of the country's balance of payments situation by a Committee of government representatives". Thus, in the panel's view, Article XXIII could not be invoked in order to judge the conformity of the balance of payments measures, taken as a whole, with Article XVIII, but only individual (or specific) measures which could not put into doubt the right a party had under Article XVIII to resort to balance of payments restrictions. Therefore, by referring only to paragraph 119 of the panel's report<sup>40</sup>, the first panel on bananas had, in the opinion of the EEC, misread the legal reasoning of the Korean beef panel that Article XVIII provided "for a general review of the country's balance of payments situation by a committee of government representatives" (paragraph 118, *in fine*) was not literally transposable to Article XXIV:7. Also, the Korean beef panel excluded a simultaneous examination of that specific measure under both procedures, for the obvious reason of basic fairness to the respondent party as regards the choice of forum, avoidance of duplication of work in GATT and of contradictory results in the examination of the same issue by more than one GATT body. The EEC further argued that none of the working parties established to examine the Lomé Conventions and its predecessor agreements had concluded that they were contrary to the principles of the General Agreement or Article XXIV. The reports of these working parties recorded "wide sympathy" for the purpose and objectives of the Lomé Conventions and only "some" of the parties, which were not parties to the Lomé Conventions, had certain "doubts" as to whether they were fully justified under the General Agreement.

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<sup>37</sup>For instance, EFTA, BISD 9S/20; LAFTA, BISD 9S/21; Finnish Association with EFTA, BISD 10S/24.

<sup>38</sup>Reports of the panels on Republic of Korea - Restrictions on Imports of Beef - complaints by Australia, New Zealand and the United States, BISD 36S/202, 234 and 268, adopted on 7 November 1989.

<sup>39</sup>*Idem*, paragraphs 118-119 of the U.S. complaint.

<sup>40</sup>Report of the panel on EEC Member States' Import Régime for Bananas, DS32/R, paragraph 365.

48. **Colombia, Costa Rica, Guatemala and Nicaragua** responded that Article XXIII made clear that dispute settlement could be pursued whether or not a special review group were pending. Likewise, the terms of reference for this case instructed a review in light of all relevant provisions of the General Agreement. The complainants did not agree with the EEC's understanding of the Korean beef panel. On the contrary, those cases addressed the exclusivity of special review procedures and asserted that the comprehensive right to Article XXIII dispute settlement was never foregone in the absence of an explicit decision by the contracting parties to that effect. They clearly indicated that special review procedures and dispute settlement were quite different procedures, and could be pursued freely at any time by the contracting parties<sup>41</sup>.

49. The **EEC** considered that there were valid procedural reasons which excluded an examination of the compatibility of the Lomé IV Convention with the provisions and conditions of Article XXIV by the present Panel. The Lomé IV Convention had been notified to the GATT on 16 December 1992<sup>42</sup> and had been examined by a working party. The duplication of a working party procedure and a panel procedure was not only undesirable, but also contrary to the procedural rules contained in the General Agreement. By notifying the Lomé IV Convention to the GATT for examination by a working party, the parties to the Lomé IV Convention had done all that was necessary and possible for them in order to obtain GATT clearance for this Convention. The EEC could not obtain such clearance under Article XXIII, since the procedure of this Article could only be followed in order to resolve a dispute for a particular measure, but not to judge the conformity of the Lomé IV Convention with Article XXIV. For instance, a complainant could not contest under Article XXIII:1(a) the conformity with Article XXIV:8(b) of a tariff preference granted under a free trade agreement because to do so would amount to questioning one of the constituent elements of the agreement.

50. **Costa Rica, Guatemala and Nicaragua** submitted that to accept the EEC's arguments would indeed lead to a situation of total legal insecurity and defencelessness for contracting parties which, in the face of nullification or impairment of benefits accruing to them under the General Agreement, would be deprived of recourse to the dispute-settlement procedures established under Article XXIII when another contracting party failed to fulfil its obligations under the General Agreement, as provided for in paragraph (a) of that Article. Article XXIII of the General Agreement was of general application and there was no provision in the General Agreement which established limitations on the exercise of the rights relating to the protection of concessions and benefits accruing to contracting parties. Nevertheless, and without prejudice to the foregoing, the fact was that in this case the Panel did not need to undertake a comprehensive examination of the Lomé IV Convention in the light of the requirements and obligations provided for in Article XXIV:5 and 8, to conclude that the exception invoked by the EEC was not applicable to this dispute and therefore had to be rejected. For even if it were considered that Article XXIII was not applicable to issues on which the CONTRACTING PARTIES were competent to adopt decisions or recommendations under established procedures, as in the case of Article XXIV, the fact was that in this case the Panel was not dealing with an agreement that was *prima facie* of the kind provided for in that Article. To accept that the invocation of any preferential agreement under Article XXIV could prevent it from being examined under Article XXIII would imply that "any contracting party, merely by invoking Article XXIV, could deprive other contracting parties of their rights under Article XXIII".<sup>43</sup> Given the difference in nature and function of Article XXIV working parties and Article XXIII panels, it was out of the question to conclude that the former was a substitute procedure for the GATT dispute settlement process.

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<sup>41</sup> BISD 36S/268 at paragraphs 118-119. Also report of the panel on Import Restrictions on Almonds, C/M213, 218.

<sup>42</sup> L/7153/Add.1.

<sup>43</sup> Report of the panel on EEC Member States' Import Régimes for Bananas, DS32/R.

## Article XX(h) - Commodity Agreements

51. The EEC endorsed the arguments made by the ACP-countries in paragraphs 0, 0 and 0.

52. **Guatemala** argued that although it was true that the contracting parties had been unable to reach understanding on the detailed principles governing commodity agreements,<sup>44</sup> general principles had nevertheless been enunciated. The 1954 instructions issued by the full GATT membership to the Working Party on Commodity Problems made clear, for example, that such agreements had, at a minimum, to be international, not regional, and negotiated in the context of an international organization<sup>45</sup>. The contracting parties' instruction in this context evolved out of the Havana Charter, which, while not itself adopted, provided essential interpretive understanding.<sup>46</sup> The Charter made clear that "commodity agreements" had to be open to participation by all contracting parties, afford non-discriminatory treatment to all involved, and be initiated by an international conference.<sup>47</sup> The tariff preferences at issue here bore no resemblance to such agreements. They were unilaterally established by the EEC without authority from an international organization. They not only denied benefits to the vast majority of global banana producers, they affirmatively harmed those producers. Moreover, they had never before been notified to the GATT as a "commodity agreement." If such discrimination could be justified under the Article XX(h) exception, any contracting party desiring to discriminate in primary product trade could do so merely by labelling that discrimination a "commodity agreement." This would unravel the obligations of the General Agreement for all primary products.

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<sup>44</sup>Final report of the working party, L/416, 3 October 1955; and report of the working party on Particular Difficulties Associated with Trade in Primary Commodities, L/592/Rev.1 adopted on 17 November 1956. See also GATT Secretariat Note to the Working Group on Environmental Measures and International Trade, TRE/W/17, at paragraph 19, 7 September, 1993.

<sup>45</sup>L/301; 3S/238.

<sup>46</sup>Havana Charter, 1948, at Chapter VI.

<sup>47</sup>*Idem* at Article 60.

## Article XI - General Elimination of Quantitative Restrictions

53. **Colombia, Costa Rica, Guatemala, Nicaragua and Venezuela** held that the clarity of this provision reflected the importance which the General Agreement attached to the non-use of import prohibitions or restrictions in any form. A categorical prohibition of import bans or import restrictions, whether in the form of quotas, import or export licenses or other measures, had been adopted by the CONTRACTING PARTIES because of the pernicious effects of such measures on international trade. Moreover, GATT practice had established that the prohibition referred to in Article XI:1 included measures that were not quotas *strictu sensu*, such as non-automatic licenses or minimum import price mechanisms.<sup>48</sup> The provisions of the Regulation turned what it called a tariff quota into a quantitative restriction that was contrary to Article XI:1 of the General Agreement. The text of this Article banned measures that operated to restrict imports of a product of the territory of another contracting party, whether made effective through licenses, quotas or other measures. In the case under consideration, the authorized volume of imports within the quota, as well as the high tariff level established over the quota, quantitatively restricted imports of bananas from third countries and made it impossible to market any fruit in excess of the 2 million tons, thus making the system a measure of the kind prohibited by Article XI. By design and effect, the new régime exhibited the "rationale," not of a duty, but of a prohibited Article XI quota.

54. Furthermore, it was submitted that the real and practical effect of a quantitative restriction was to prevent continued importation of the good subject to the restriction, once a specified threshold had been reached. The tariff quota established by the EEC had exactly the same effect as a quantitative restriction: once the allocated quota had been filled - and given the level of the tariff quota applicable - it would become absolutely impossible to continue importing Latin American bananas due to prohibitive over-quota tariff levels. Furthermore, the reference to "tariff quotas" in Article XIII:5 was a clear sign that they were assimilated to quantitative restrictions. The reference existed to ensure that Article XIII always governed tariff quotas; Article XI, in contrast, could or could not prohibit a tariff quota, depending on the effect of the tariff quota. The over-quota tariff rate effectively locked Latin American bananas out of the EEC market, as they were not even remotely commercially viable when subject to such a steep rate. The EEC had implicitly acknowledged the quota-like intent and effect of its tariff quota in the preamble to the Regulation since recital 16 of the preamble stated that "Whereas imports not falling within the tariff quota must be subject to sufficiently high rates of duty to ensure that Community production and traditional ACP quantities are disposed of in acceptable conditions."<sup>49</sup> By definition, a tariff quota was not an "ordinary customs duty" or tariff, but a distinct species of trade restriction, consisting of two equally essential components - a tariff and a quota. By its terms, a tariff quota did not fall outside the language of Article XI, which applied to quantitative restrictions and "other measures" a broad category of restrictions that covered far more than just quotas.

55. The EEC considered that Article XI was not relevant in this case. The drafting history confirmed the view that Article XI was never intended to apply to tariff quotas, regardless of their effect on trade. The EEC noted that none of the complaining parties had argued that tariff-quotas were *per se* prohibited by the General Agreement or Article XI. It was only by looking at the "commercial effects of the tariff quota" that they claimed it to be contrary to Article XI. According to the structure and drafting history of the General Agreement, a contracting party, in the absence of a specific binding, was entitled to maintain tariffs at the level it considered appropriate. In case of legally bound tariffs, a party was entitled to bind them at the level that it considered appropriate and subsequently to modify such tariff bindings subject to certain conditions and procedures (Article XXVIII of the General Agreement), as the EEC was doing in the present case.

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<sup>48</sup>Report of the panel on EEC-Programme of Minimum Import Prices, Licenses and Security Deposits for Certain Processed Fruits and Vegetables, BISD 25S/68, paragraph 4.9, adopted on 18 October 1978; report of the panel on Japan-Trade in Semi-Conductors, BISD 35S/116, paragraphs 105 and 118, adopted on 4 May 1988.

<sup>49</sup>Council Regulation (EEC) No. 404/93 at Recital 16.

56. The text of the General Agreement distinguished between the legal treatment to be given to tariffs and to non-tariff barriers. Whereas tariffs were not prohibited and could be bound at any level desired by a party, the rule about non-tariff barriers was, in principle, one of immediate abolition. Article XI concerned itself exclusively with quantitative - not tariff - restrictions. Article XI:1 exempted from its scope "duties, taxes or other charges", and this phrase covered the same type of measures as the phrases "ordinary customs duties" and "duties and charges of any kind" mentioned in Article II:1(b). The fundamental distinction underlying the different legal treatment between tariffs (even prohibitive tariffs) and quantitative restrictions had been a recurrent theme in the drafting of Article XI (at the time Article 20 of the ITO)<sup>50</sup>. From the drafting history, trade law experts had concluded that: "In addition, nothing in Article XI, nor for that matter in Articles XII through XIV, prohibits the use of a "tariff quota", whereby a product may be imported under one tariff rate up to a total amount specified and all amounts over that at a higher rate".<sup>51</sup>

57. Moreover, further support for the view that Article XI did not apply to tariff quotas could be drawn from an interpretation *e contrario* of Article XIII:5, according to which: "The provisions of this Article shall apply to any tariff quota instituted or maintained by any contracting party ...". Precisely because Article XI did not apply to tariff quotas, the need arose to have them specifically mentioned in Article XIII. Paragraph 5 made it clear that only the provisions of "this Article" (i.e. Article XIII), not of Article XI, should apply to tariff quotas.

58. **Colombia, Costa Rica, Guatemala, Nicaragua and Venezuela** submitted that the Regulation also restricted access through import licenses which would cause great distortions in the banana market. Through linkage, weighting coefficients, reduction coefficients and other related mechanisms, the free access of Latin American fruit would be restricted well below the 2 million tons established in the quota, while at the same time forcing down FOB prices, curtailing flexibility in the delivery mechanisms of the fruit, and provoking great uncertainties in the market. Article XI expressly prohibited import licenses as a means of restricting imports, and past panels had not hesitated to identify such licensing schemes as clear violations of the General Agreement.<sup>52</sup> The panels in those cases quite properly looked beyond the particular form of the challenged measures to see if the measures, in effect, constituted quantitative restrictions. Moreover, according to the terms of Article XI there was a presumption of illegality when licenses were not automatic.<sup>53</sup> This presumption was based on the understanding that licenses, however structured, resulted in distortions in the market and created uncertainty.<sup>54</sup>

59. The complainants considered further that none of the exceptions set forth in Article XI:2, paragraphs (a), (b) and (c) were relevant to the present case. The EEC did not argue otherwise.

60. In the EEC's view, none of the previous panel reports referred to by the complainants could be interpreted in the way suggested by the complainants or had any relevance to the facts of this case. Several of the panel reports mentioned referred to measures "other than duties, taxes or other charges" whereas in this case it was a matter of tariffs, i.e. duties. As concerned the alleged non-conformity of the licensing system, the EEC was of the view that the drafting history of Article XI:1 confirmed that it

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<sup>50</sup>For example, U.N. Doc. EPCT/C.II/27, at page 10 (1946); U.N. Doc. EPCT/C.II/36, at page 7 (1946); U.N. Doc. E/CONF.2/C.3/SR.18, at page 2 (1947); and U.N. Doc. E/CONF.2/19, at page 4 (1947).

<sup>51</sup>J. Jackson, page 321. Also W. Reichwald, *Die Deutschen Zollvorschriften*, BFA Köln, page 19 (1966); S. Muhammed, *The Legal Framework of World Trade*, London, page 202 (1958); and M. Rom, *The Tariff Quota and its Treatment in GATT*, 5 *Journal of World Trade Law*, page 131, at 137, 150-151, 156, and 158-159 (1971).

<sup>52</sup>Report of the panel on EEC-Restrictions on Imports of Dessert Apples, BISD 36S/93, paragraph 12.2; Norway - Restrictions on Imports of Apples and Pears, BISD 36S/306, paragraphs 5.1- 5.3.

<sup>53</sup>Report of the panel on EEC-Restrictions on Imports of Dessert Apples, BISD 36S/93, paragraph 12.2, adopted on 22 June 1989; report of the panel on Japan - Trade in Semi-conductors, BISD 35S/116, paragraph 118, adopted on 4 May 1988.

<sup>54</sup>Report of the panel on Japanese Measures on Imports of Leather, BISD 31S/94, paragraph 55, adopted on 15/16 May 1984.

banned prohibitions or restrictions on imports. It did not prohibit licenses, although if the prohibition (or restriction) was effected through quotas or licenses, it was subject to the rules of Article XI<sup>55</sup>. Moreover, at least two previous panel reports had clearly established that automatic licensing did not constitute a restriction within the meaning of Article XI:1 and that an import license issued on the fifth working day following the day on which the license application was lodged could be deemed to have been automatically granted<sup>56</sup>.

61. The EEC explained that licensing was non-automatic for the traditional quantities of bananas from ACP countries, for non-traditional ACP bananas and third country bananas within the tariff quota. Licenses for imports in excess of the tariff quota were granted automatically. According to Commission Regulation (EEC) No 1442/93, the licenses could be used by the operators to import bananas from any third non-ACP country; that Article 13 of the same Regulation allowed transfer of license rights between the three categories of operators established therein; that the licenses were valid for three months and two weeks (Articles 11(2) and 17(1) and (2)); and that the unused quantities of import licenses should be re-allocated on application to the same operators (Articles 10(3) and 17(4)). In light of the above, the EEC considered that the licensing provisions of the EEC system for imports of bananas under the tariff quota in no circumstances could reduce the flexibility of operators or create uncertainty in the market of bananas. Moreover, they were in conformity with the provisions of the Agreement on Import Licensing Procedures ("Licensing Code") and established GATT jurisprudence.

62. **Guatemala** replied that licenses were only "automatic" under the General Agreement if they were freely granted.<sup>57</sup> It noted that the EEC did not claim that the licenses for third country and/or non-traditional fruit were automatic. They were dispensed only to artificially created classes of operators in arbitrarily defined amounts. Eligibility was constrained by purchasing source, past import levels, and artificial activity functions. Any GATT ruling with respect to automatic licenses was, thus, of no relevance. At issue here was a non-automatic licensing scheme. Case law had been clear that non-automatic licensing represented a violation of Article XI:1.<sup>58</sup>

63. The **EEC** did not agree with Guatemala. In particular, the EEC argued that the licensing system applied by Japan in the Semi-conductor panel was found to be illegal because it involved delays of three months, not because of the non-automatic licensing system as such.

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<sup>55</sup>U.N. Doc. EPCT/C.II/QR/PV.1, at page 18; U.N. Doc. EPCT/C.II/Q.R./PV.5, at page 95.

<sup>56</sup>Report of the panel on EEC-Programme of Minimum Import Prices, Licenses and Surety Deposits, BISD 25S/68, paragraph 4.1, adopted on 18 October 1978; report of the panel on Japan-Trade in Semi-Conductors, BISD 35S/116, paragraph 118, adopted on 4 May, 1988.

<sup>57</sup>Agreement on Import Licensing Procedures, Article 2 (1979).

<sup>58</sup>Report of the panel on Japan - Trade in Semi-conductors, BISD 35S/116, paragraph 118, adopted 4 May 1988.

### Article XIII - Non-discriminatory Administration of Quantitative Restrictions

64. **Colombia, Costa Rica, Guatemala, Nicaragua and Venezuela** submitted that the EEC infringed Article XIII since the Regulation contained discriminatory restrictions, distorted trade beyond the levels which would have prevailed in a free market, and relied on import licenses that were not source neutral. Article XIII presupposed that certain quantitative restrictions were justified. Nonetheless, such restrictions had to be applied uniformly to all suppliers, in other words, without discrimination. The EEC Regulations, however, contained numerous non-tariff measures that discriminated among different suppliers. Discrimination was most evident in the external structure of the Regulation, under which Latin American bananas were subject to a quota while traditional ACP fruit was not contingent on either the quota or on tariffs.<sup>59</sup> Secondly, even within the quota, Article 19 of the Regulation provided access to only part of this quota (66.5 per cent) to operators importing bananas from third countries, while banana exporters from ACP countries had access to the entire quota. In addition, 30 per cent of the quota was allocated exclusively to operators who marketed traditional ACP bananas, thereby directly transferring to ACP suppliers the "economic rents" generated by the quota. No portion of these rents was available to operators marketing third country bananas. Finally, the remaining 3.5 per cent of the quota was set aside for operators who started marketing traditional ACP bananas from 1992.

65. Concerning the allegation that the administration of its tariff quota violated Article XIII:1 by granting a preference to traditional ACP bananas, the EEC referred to its reply in paragraphs 0, 0 and 0 above. Furthermore, the EEC argued that its import banana régime was in conformity with the basic obligation of paragraph 2 of Article XIII and with sub-paragraphs (a) and (c) thereof. The figures in Article 19 of the Regulation were used to establish the entitlement rights of each operator to import bananas. Once the entitlement rights had been set and the import licenses had been issued to the operators, each one of them was entirely free to import from any third non-ACP country and from any ACP country (for non-traditional quantities only). In other words, the figures 66.5 per cent, 30 per cent and 3.5 per cent established no link and did not restrict in any way the freedom of the qualified operators holding import licenses to import bananas from the country of their choice. The provisions of Article 19(1) of the Regulation set up a mechanism that related exclusively to the definition of the operators entitled to obtain an import license and did in no way affect, influence or determine externally the country or source of the tariff-quota bananas. The mechanism of distributing the licenses established by the new EEC régime therefore in no way "requires", in the sense of Article XIII:2(c), a certain country or source of import. In addition, Article 13 of Regulation 1442/93 allowed for the free transfer of license rights between the different categories of operators, introducing thus complete flexibility into the system. The import rights acquired by operators of categories (a), (b) or (c) could be used by them to import bananas under the tariff-quota from any third country.

66. **Colombia, Costa Rica, Guatemala, Nicaragua and Venezuela** held that there was further evidence of discriminatory treatment in the licensing system: while licenses for ACP traditional fruit were practically automatic, licenses for all other imports were extremely complex (restrictive operator categories, activity coefficients, reduction coefficients and forecast supply balance factors). Moreover, the system of import licenses not only did not reflect the circumstances that would characterize a free market, but furthermore arbitrarily altered the marketing and distribution chain for bananas to the detriment of Latin American producers and exporters. Also, according to Article 19:2 of the Regulation, entitlement for category (b) import licenses was dependent upon the average volume of traditional ACP or EEC bananas imported during the past three years, thus prescribing that licenses must be utilized to buy the product from a specified source or country. Finally, access could be restricted further through discriminatory safeguards which were designed to limit only third-country fruit.<sup>60</sup>

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<sup>59</sup> Council Regulation (EEC) No. 404/93, Article 18.

<sup>60</sup> *Idem*, Article 23.

67. The EEC did not believe that its system of allocating import licenses introduced discrimination in the administration of the global tariff-quota. Firstly, the cost of bananas imported from the ACP countries was significantly higher than that of Latin American bananas. The 100 ECUs per ton duty for the tariff-quota bananas corresponded to the 20 per cent *ad valorem* tariff binding, expressed as a specific duty and did not take away the Latin American banana exporters competitive advantage due to their much lower price. No category of operator had therefore any real economic incentive to import, within the tariff-quota, non-traditional ACP bananas, even if such bananas could be imported at zero duty. On the other hand, the quantities of traditional ACP bananas were fixed in the Regulation, they were outside the tariff quota and could be imported by any importer at any time. Given the fact that the quantities fixed as traditional ACP bananas covered almost all the quantities of bananas that were actually produced by the ACP countries, there were no incentive for any category of operator to prefer practically non-existent, non-traditional ACP bananas to the fixed, traditional ACP bananas. In reality, there was only one reasonable source to look at, *i.e.* Latin American bananas, for the simple reason that they would fetch the importer much higher profits. Furthermore, there was nothing in the General Agreement, and in particular in Article XIII:2, that would prohibit category (b) or any other category of operators, if they so wished, to continue importing traditional ACP bananas. To discourage them from doing so, would amount to a discrimination against traditional ACP bananas, and this was not required by the General Agreement. Finally, the text of Article XIII:2(c) prohibited an import licensing distribution system only when that system "requires" the licensing to be utilized "from a particular country or source". This was not the case in the EEC system because any category of operator was permitted to import on the basis of his import license from any country of his choice. What could possibly be affected was the internal mix or composition of the individual operators entitled to import tariff quota bananas.

68. **Colombia, Costa Rica, Guatemala, Nicaragua and Venezuela** submitted that to ensure that a contracting party did not breach the prohibition against discrimination, Article XIII:2 provided the criteria to guarantee that the distribution approached the level that could have been expected in the absence of restrictions. The proper measurement in this case was the level that the complainants could have obtained in a market free of restrictions. By this measure, only the German market should be used to evaluate normal trade levels. However, the Regulation restricted even the levels of trade the complainants had reached under the import régimes applied by the EEC member states up to 30 June 1993. Specifically, while Latin American bananas were forced to share the tariff quota amongst themselves, traditional ACP bananas enjoyed both a country specific allocation of the quota and access to the tariff quota. This distribution did not remotely reflect a proportional allocation of the tariff quota.

69. The EEC believed that the above argument concerning the German market was irrelevant in this context, because the system previously applied by the EEC was in its view in conformity with the General Agreement and because the exports from all the complaining parties for the period 1989-1991 and for 1992 were on average, less than 1 million tons whereas the tariff quota was fixed at 2 million tons. The EEC was applying a global (unallocated) quota to all third, non-ACP countries as well as to non-traditional quantities of ACP bananas, in conformity with Article XIII:2(a). With regard to safeguards, the EEC informed the Panel that safeguard measures could be taken only against third country bananas, including against those of ACP countries, not against EEC bananas. As concerned the method used for the calculation of the operators' quota entitlements, the EEC explained that it was based on the average volume of their trade in the reference period which, for 1993, was the years 1989-1991, *i.e.* the EEC used the same method and the same reference period as for the calculation of the actual size of the tariff-quota. The calculation method did not violate Article XIII:2, first sentence, and sub-paragraphs (a) and (c) thereof, because (i) it did not amount to an allocation of the tariff-quota as such; (ii) it was an internal mechanism used only for the purpose of determining the operators' quota entitlements, otherwise leaving the operators entirely free to import from any source within the tariff quota; and (iii) in any case, it did not "require" that import licenses be utilized for the importation of the product concerned from a particular country or source.

70. **Colombia, Costa Rica, Guatemala, Nicaragua and Venezuela** submitted that past panels had confirmed and reinforced a contracting party's obligations under Article XIII to implement and administer any quota régime in a non-discriminatory fashion.<sup>61</sup> For example, in one case, a panel found that Norway acted inconsistently with Article XIII when it implemented global import quotas on various textile items, but reserved certain market shares for six countries. According to the panel, Hong Kong, which had "a substantial interest in supplying" the textile products but which had not received a reserved market share, had the right to expect the allocation of a share of the quotas in a non-discriminatory manner pursuant to Article XIII. Accordingly, the panel concluded that Norway must end its discriminatory quota practices.<sup>62</sup> This finding applied with equal force to the quota found in the Regulation, i.e. the Latin American banana exporting countries had a "substantial interest" in supplying bananas to the EEC.

71. The EEC replied that the panel report referred to above by the complainants<sup>63</sup> was irrelevant to the facts of this case, because the EEC had not "failed to allocate a share to [the complainants]" of the tariff-quota, since the new EEC régime on bananas was applying a global quota, without allocation of quota-shares to the supplying countries. The other panel reports referred to were also irrelevant for similar reasons.

72. **Colombia, Costa Rica, Guatemala, Nicaragua and Venezuela** submitted that although the EEC had not distributed the tariff quota into individual shares for particular contracting parties, neither had it opened the entire quota to all imports; instead, the EEC had used the allocations of licenses to fix effectively the source of supply of bananas. Once the EEC had decided to allocate access to the quota, rather than opening the quota globally, it was obligated under Article XIII to do so in a manner that reflected the share of the EEC banana trade that the contracting parties would have obtained under free market conditions. However, the EEC's distribution of the quota under the Regulation could not possibly satisfy this "proportionality" requirement since its allocation of quota shares was based on historic trade patterns that bore no relationship to free market conditions.<sup>64</sup>

73. The EEC was of the view that questions relating to the actual size of a tariff-quota fell outside the scope of Article XIII, if that quota was administered in a non-discriminatory fashion. As concerned the fact that the traditional ACP bananas were exempted from the tariff-quota, the EEC referred to its reply in paragraphs 0 and 0 above. In short, the preferential treatment granted to traditional ACP bananas was required by the Lomé IV Convention and justified under Article XXIV of the General Agreement. On the other hand, global tariff-quotas (whether allocated among supplying countries or not) were in conformity with Article XIII:1 and Article XIII:2(a). The right to impose such global tariff-quotas was not an issue that could be examined under Article XIII. This Article dealt only with the external effects of the administration of such quotas. Article XIII:1 (by virtue of Article XIII:5) required that tariff-quotas be applied to the importation of like products from all third countries. Moreover, Article XIII:2(a) permitted the imposition of global tariff-quotas. Therefore, nothing in Article XIII, paragraphs 1 and 2 prevented the EEC from applying the 2 million tons as a global quota both to non-traditional ACP and Latin American bananas. As regards the administration of the tariff-quota, the EEC system treated both Latin American and non-traditional ACP bananas the same way.

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<sup>61</sup>Report of the panel on Norway-Restrictions on Imports of Certain Textile Products, BISD 27S/119, adopted 18 June 1980; report of the panel on United States-Imports of Sugar from Nicaragua, BISD 31S/67, adopted 13 March 1984; report of the panel on EEC - Restrictions on Imports of Dessert Apples, BISD 36S/93, adopted 22 June 1989.

<sup>62</sup>Report of the panel on Norway-Restrictions on Imports of Certain Textile Products, BISD 27S/119, adopted 18 June 1980.

<sup>63</sup>*Idem*, paragraph 16.

<sup>64</sup>Report of the panel on Japan - Restrictions on Imports of Certain Agricultural Imports, BISD 35S/163, 226, 5.1.3.7, adopted on 22 March 1988.

74. The EEC added that it saw no discrimination in the licensing system against any source of bananas, ACP or Latin American alike, because the system, by design and effect, was in complete conformity with the General Agreement and the provisions of the Licensing Code. Moreover, for traditional ACP bananas there was no need to apply the operator categories, the activity and reduction coefficients, and the supply balance sheet factors because the quantities that could be imported as "traditional ACP bananas" were fixed in the Regulation for each ACP country concerned. This was not possible for Latin American bananas, because bananas from all third non-ACP countries were subject to the global tariff-quota. Because of the necessity to make sure that bananas from so many third-country sources did not exceed the tariff-quota, the above-mentioned provisions of the Regulation needed to be applied when issuing import licenses for such bananas. Licenses for such bananas were granted within a maximum of ten working days, and this was in conformity with the Licensing Code (see Article 2(2)(e) and Article 3).

75. **Colombia** responded that the Regulation's consistency with the Licensing Code was not at issue here. The point of inquiry was rather whether the EEC, in implementing the licensing scheme, discriminated between the licensing of traditional ACP imports and third country imports. Colombia considered that the EEC did indeed discriminate, as the licensing procedures were applied to the disadvantage of third country bananas.

76. **Colombia, Costa Rica, Guatemala, Nicaragua and Venezuela** submitted that if the Panel would find that the measures adopted by the EEC were not quantitative restrictions within the meaning of Article XI:1, paragraph 5 of Article XIII stated that "the provisions of this Article shall apply to any tariff quota instituted or maintained by any contracting party...". According to GATT doctrine and practice, tariff quotas must be applied in a non-discriminatory manner<sup>65</sup>, including in those cases where the product in question had not been the subject of a concession under Article II. Had the product also been bound, not only should the tariff quota be compatible with the most-favoured-nation principle, but it should also not exceed the tariff levels established in the schedule of concessions. In the case under consideration, the tariff quota established by the EEC for banana imports was not only contrary to the most-favoured-nation principle, but it also significantly exceeded the tariff level bound by the EEC for this product, thus infringing Article II.

77. As concerned tariff quotas, the **EEC** referred to its reply in paragraphs 0 and 0 above and added that the preferential treatment granted to traditional ACP bananas was required by the Lomé IV Convention, which was justified under Article XXIV of the General Agreement. On the other hand, global tariff-quotas (whether allocated among supplying countries or not) were in conformity with Article XIII:1 and Article XIII:2 (a). The right to impose such global tariff-quotas was not an issue that could be examined under Article XIII since it dealt only with the external effects from the administration of such quotas.

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<sup>65</sup>Jackson, J.: World Trade and Law of GATT, page 202; Rom, Michel, The Tariff Quota and its Treatment in GATT, Journal of World Trade Law, Volume 5, No. 2, March-April 1971; report of the panel on Norway-Restrictions on Imports of Certain Textile Products, BISD 27S/119, adopted on 18 June 1980; report of the panel on EEC-Restrictions on Imports of Dessert Apples, BISD 36S/93, adopted on 22 June 1989; report of the panel on Newsprint, BISD 31S/114, adopted on 20 November 1984.

### Article III - National Treatment on Internal Taxation and Regulation

78. **Colombia, Guatemala and Venezuela** were of the view that the new régime discriminated against Latin American bananas with respect to internal regulations. Specifically, the Regulation contravened the national treatment principle embodied in Article III. It was only through application of the national treatment principle that imported products gained "effective equality of opportunities" with respect to an importing country's internal regulations.<sup>66</sup> To deny imported products such national treatment, therefore, constituted a denial of "competitive opportunities no less favourable than those accorded to domestic products."<sup>67</sup> Because national treatment was so critical to an effective functioning of the General Agreement, past panels had construed the obligations of Article III, paragraphs 1 and 4, strictly, applying them to a multitude of circumstances.<sup>68</sup> Moreover, to ensure that the spirit as well as the letter of the principle was honoured and given effect, panels had interpreted the obligation's reach broadly to apply "not only [to] laws and regulations which directly govern the conditions of sale or purchase but also any laws or regulations which might adversely modify the conditions of competition between the domestic and imported products in the internal market."<sup>69</sup> Finally, a contracting party did not need to prove that a law actually resulted in less favourable treatment, only that it could have such discriminatory results.<sup>70</sup> Article 19 of the Regulation explicitly reserved 30 per cent of the tariff quota licenses for operators who marketed EEC and/or traditional ACP bananas. This reservation conferred a benefit on domestic production of bananas, and provided an incentive for the purchase and sale by operators of domestically produced bananas.

79. **Colombia** added that, in addition to strictly narrowing the permissible group of importers to agents established in the EEC, the Regulation modified the permissible group of operators entitled to licenses to include ripeners and secondary importers, resulting in these entities controlling entry to the EEC's internal market for a sizeable quantity of third country bananas, thus disrupting traditional trading links. This would adversely affect third country exporters' efforts to import and market their bananas on the EEC market. Similar problems were not faced by EEC bananas.

80. The **EEC** explained that the repartition of the tariff quota between EEC operators determined which group of EEC operators obtained, at least initially, access to the import quota. Therefore, the Regulation was a law which was concerned with what happened at the moment of importation. It was not relevant to what happened after the bananas had passed customs. It did not determine the sale or offering for sale once these bananas were on the EEC's internal market. Council Regulation (EEC)No 404/93 and Commission Regulation (EEC) No 1442/93 did not contain any explicit provision about the internal sale or offering for sale on the EEC market of the quantities imported under the tariff quota. But even if the broad interpretation of the term "affecting" adopted in the report of the panel on Italian Discrimination Against Imported Agricultural Machinery<sup>71</sup> was followed, these Regulations did not constitute a "law affecting the internal sale, purchase, distribution or use of bananas. The EEC held that there was competition between a precise amount of low-cost, low-duty Latin American bananas and non-traditional ACP bananas on the one hand, and a *de facto* limited quantity of EEC bananas, which was high-cost, but not subject to any duty. This competitive relationship was not affected by sharing out

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<sup>66</sup>Report of the panel on United States - Section 337 of the Tariff Act of 1930, BISD 36S/345, adopted on 7 November 1989.

<sup>67</sup>Report of the panel on Canadian Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies, DS17/R, adopted on 18 February 1992.

<sup>68</sup>*Idem.* Also, report of the panel on EEC - Payments and Subsidies to Processors and Producers of Oilseeds and Related Animal-Feed Proteins, BISD 37S/86, adopted 25 January 1990; report of the panel on United States-Section 337 of the Tariff Act of 1930, BISD 36S/345, adopted on 7 November 1989; report of the panel on Canada - Administration of the Foreign Investment Review Act, BISD 30S/140, 142, adopted on 7 February 1984; report of the panel on EEC - Measures on Animal Feed Protein, BISD 25S/49, adopted on 14 March 1978; report of the panel on Italian Discrimination Against Imported Agricultural Machinery, BISD 7S/60, adopted on 23 October 1958.

<sup>69</sup>Report of the panel on Italian Discrimination Against Imported Agricultural Machinery, BISD 7S/60, adopted on 23 October 1958.

<sup>70</sup>*E.g.*, report of the panel on United States - Section 337 of the Tariff Act of 1930, BISD 36S/345, adopted on 7 November 1989.

<sup>71</sup>BISD 7S/23.

the amount of the quota to EEC operators. There was no incentive not to sell the full quota. If the 2 million tons were fully sold, there would be no change in the competitive conditions caused by the tariff quota. The price relationships were also unlikely to change. If there was any competition for EEC bananas, in case operators would want to improve their share within the 30 per cent share of the tariff quota, the high cost of the EEC bananas would only further increase and that would make them more difficult to sell, compared to the lower cost bananas within the tariff quota. For these reasons, there was no modification of competitive conditions, beyond the modification already resulting from the existence of the tariff quota itself.

81. Moreover, **Colombia, Guatemala and Venezuela** were of the view that Article 19 of the Regulation established a complex tariff-quota licensing scheme (see paragraph 0 above). In short, to market imported bananas in the EEC within the quota set forth under the Regulation, a foreign banana producing country had to use an EEC-established operator.<sup>72</sup> By forcing third country bananas to be marketed for internal sale in the EEC through a defined category of EEC operators, the Regulation curtailed Latin American banana exporting countries' control over the internal pricing and delivery terms of their products. EEC suppliers, meanwhile, were free to market their bananas to any operator they wished to select, on whatever price and delivery terms that they deemed most advantageous. The direct consequence of the system was that no category (b) operator would use the licenses of his entitlement to buy Latin America fruit, unless and until banana purchases were first made from domestic and traditional ACP sources, because he would risk losing category (b) licenses for the following year since access would depend on the average quantities of bananas that each operator had sold in the preceding three years. This was precisely the type of discriminatory treatment barred by Article III.

82. The **EEC** replied that there was no provision of EEC law which limited the number of operators or prohibited operators established in the EEC to be linked with, or a subsidiary of, operators in the exporting countries. Moreover, Article III:4 did not protect in any way what the complainants called "their control" over pricing and delivery terms. There was no provision in the General Agreement which provided such protection to exporting countries. If the complainants referred to the so-called quota rents which often arose in systems of tariff quotas, again there was no provision in the General Agreement which entitled exporting countries to such rent.

83. **Colombia and Venezuela** submitted, furthermore, that under Article 19 of the Regulation, the EEC calculated the quota on the basis of the average quantities of bananas sold in the three most recent years for which figures were available. These calculations were used, in turn, to determine the allocation of import licenses to certain operators, including (under Article 19:1(b) of the Regulation) operators who marketed EEC bananas. Because the production and sale of EEC bananas had been unrestrained by the EEC to date, whereas imports from Latin American banana exporting countries had been subject over the years to restrictions on, and discriminatory practices toward, imports in half of the EEC member states, these calculations necessarily treated bananas from Latin America less favourably than EEC bananas, in contravention of Article III.

84. The **EEC** replied that these figures were only used to determine shares within the 66.5 per cent or 30 per cent allocation, not the quantities that could be imported under the tariff quota. All the traders were subjected to these restrictions and the figures were used to determine their relative position among one another, not to give a greater or smaller quota to third country bananas. Moreover, there was competition within the group of importers for two limited categories of resources: on the one hand EEC and traditional ACP bananas and on the other hand third country bananas and non-traditional ACP bananas.

85. **Colombia and Venezuela** argued that under Article 17 of the new Regulation, the EEC

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<sup>72</sup>Report of the panel on Italian Discrimination Against Imported Agricultural Machinery, BISD 7S/60, paragraph 12, adopted on 23 October 1958.

permitted imports of bananas solely pursuant to the submission of an import license, which was issued only subject to the provision of a security. The security was totally or partially forfeited if the transaction was not carried out, or only partially carried out, within the period specified. Such security and forfeiture provisions, which did not apply to domestically grown bananas, would adversely affect the sale, purchase and distribution of imported bananas; at a minimum, they would "adversely modify the conditions of competition between the domestic and imported products in the internal market."<sup>73</sup> As past panels had determined, such violations constituted a *prima facie* case of impairment or nullification of benefits which contracting parties were entitled to expect under the General Agreement, a presumption that was all but irrefutable in practice.<sup>74</sup>

86. The EEC submitted that the requirement to lodge a security was not contrary to any provision of the General Agreement or of the Licensing Code. None of these texts expressly prohibited recourse to securities in connection with import licenses. Moreover, security deposits were common practice among the contracting parties to ensure a proper functioning of licensing mechanisms. Indeed, a security deposit was only meant to ensure that the importer would actually carry out the operation for which he had applied for licenses and that the quantities for which licenses had been granted would in fact be imported. (See also reply under paragraph 0 below.)

87. As concerned the licensing requirement, the EEC said that licenses and attached requirements were border measures which did not fall within any of the categories of measures covered by Article III. The EEC added that the fact that the marketing of EEC bananas did not require a license was inherent in the existence of the tariff quota as such and did not have anything to do with discrimination between domestic and imported bananas when marketing both kinds on the internal EEC market. The price and delivery terms, moreover, were not distinct as between imported bananas and EEC bananas. Article 19 of Regulation 404/93 or Article 3 of Regulation 1442/93 did not create any such distinction, and there was no indication that the banana exporters could not freely negotiate about price and delivery terms with those who had access to the tariff quota.

### **Article VIII - Fees and Formalities Connected with Importation**

88. **Colombia, Guatemala, and Venezuela** claimed that the licensing provisions of the Regulation infringed Article VIII regarding import formalities. Article VIII:1(a) and Article VIII:4 of the General Agreement disallowed the use of licensing requirements as a means of providing indirect protection to domestic products or taxation of imports for fiscal purposes. This proscription had to be extended to include any licensing effect that could provide advantages to domestic fruit.<sup>75</sup> The licensing system restricted Latin American exporters' performance in the market to the benefit of domestic producers. Those provisions that artificially prevented the complainants from selling to the operators of their choice, would benefit the domestic producers because their fruit could trade freely in the market. Moreover, the import formalities of the licensing system set forth in the Regulation were incompatible with Article VIII:1(a).

89. Furthermore, under Article 17 of the Regulation, import licenses had to be accompanied by a security, which was forfeited if the transaction was not carried out pursuant to specified terms. The cost of this security was one more expense an importer had to account for in pricing imported bananas; as a result, the security requirement necessarily inflated the price of imported bananas from Latin American

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<sup>73</sup>Report of the panel on Italian Discrimination Against Imported Agricultural Machinery, BISD 7S/60, adopted on 23 October 1958.

<sup>74</sup>*E.g.*, report of the panel on United States - Taxes on Petroleum and Certain Imported Substances, BISD 34S/136, adopted on 17 June 1987.

<sup>75</sup>Report by the working party on Documentary Requirements for Imports, Consular Formalities, Valuation for Customs Purposes, Nationality of Imported Goods and Formalities Connected with Quantitative Restrictions, BISD 1S/100, paragraph 6, adopted on 7 November 1952.

banana exporting countries, thereby denying them their comparative advantage. The security requirement thus constituted both indirect protection to domestic bananas, which were not subject to any such requirement, and a taxation of imports for fiscal purposes.

90. The **EEC** submitted that the security requirements set forth in Article 17 of the Regulation did not violate any of the provisions of Article VIII, nor were they contrary to any provision of the General Agreement or of the Licensing Code. None of these texts expressly prohibited recourse to securities in connection with import licenses. The cost of securities could not be interpreted as providing an indirect protection to domestic production, nor could it be assimilated to a taxation for fiscal purposes. Indeed, a security deposit was only meant to ensure that the importer would actually carry out the operation for which he had applied for licenses and that the quantities for which licenses had been granted would in fact be imported. The security was released in total if the importation took place as scheduled. Furthermore, forfeiture of the security could not be considered to be a tax on imports for fiscal purposes as it was a penalty imposed on the importer for not having fulfilled his obligations as the beneficiary of the license. The fact that forfeiture of security deposits was not contrary to Article VIII of the General Agreement had been confirmed by the panel on EEC - Programme of Minimum Import prices, Licenses and Surety Deposits for Certain Processed Fruits and Vegetables, which found that: "such forfeiture could not logically be accepted as a charge 'in connection with importation' within the meaning of Article VIII:1(a), since no importation had occurred, but only as a penalty to the importer for not fulfilling its obligation to complete the importation within the seventy-five day time limit. The panel further considered that such a penalty should be considered as part of an enforcement mechanism and not as a fee or formality 'in connection with importation within the purview of Article VIII.'"<sup>76</sup>

91. **Colombia, Guatemala, and Venezuela** submitted that the overall licensing scheme established by the Regulation maximized the "incidence and complexity of import . . . formalities," and increased and complicated "import . . . documentation requirements," in violation of the express requirements of paragraph 1(c) of Article VIII of the General Agreement.

92. The **EEC** was of the view that Article VIII:1(c) did not impose a strict obligation to minimize the incidence and complexity of import and export formalities and to decrease and simplify import and export documentation requirements. It merely stated that the contracting parties "recognize the need" to minimize the incidence of such measures. Furthermore, the EEC system in no respect "maximizes" the incidence and complexity of import and export formalities. On the contrary, it had replaced a number of EEC member states' national import régimes and represented thus a significant simplification of import formalities in general. Finally, any apparent increase in the complexity of the import licensing system was only the result of the introduction of a single tariff quota for the EEC as a whole and of the market access obligations of the EEC vis-à-vis ACP countries.

#### **Article XVI - Subsidies**

93. **Colombia** submitted that the new EEC banana régime provided for apparently significant payments to EEC producers of bananas. Article XVI of the General Agreement obliged the EEC to discuss any such subsidy (and the possibility of limiting it) with adversely affected contracting parties where, as here, the subsidy caused or threatened serious prejudice to the interests of the contracting parties. Any subsidies to EEC producers of bananas would cause severe damage to the interests of Colombia and other Latin American exporting countries. Not having consulted with the Latin American banana exporting countries regarding such harmful subsidies, the EEC, consequently, had violated Article XVI.

94. The **EEC** considered that the aid provided to the EEC banana producers under the new régime

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<sup>76</sup>BISD 25S/68.

did not fall within the category of subsidies which were prohibited by the General Agreement or the Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement ("Subsidies Code").<sup>77</sup> Indeed, the assistance programmes referred to in Title III of the Regulation were not export subsidies, but rather domestic subsidies which were not prohibited by the General Agreement or the Subsidies Code. On the contrary, Article 11:1 of the Subsidies Code expressly recognized that these forms of subsidies "are widely used as important instruments for the promotion of social and economic policy objectives and [that signatories] do not intend to restrict the right of signatories to use such subsidies to achieve these and other important policy objectives which they consider desirable."

95. The recognition by the Subsidies Code that the subsidies available to the EEC producers of bananas were not incompatible with the General Agreement or the Subsidies Code, implied that the contracting party or the signatory which complained about these subsidies had to come with clear and positive evidence that its interests suffered serious prejudice as a result of the subsidization. Colombia had failed to provide such evidence.

96. Moreover, as far as the alleged violation of the procedural requirements of Article XVI:1 was concerned, the EEC submitted that it could not be considered in breach of its obligations under this provision of the General Agreement since it was up to the contracting party which considered that a subsidy caused or threatened to cause serious prejudice to its interests to request discussions with the contracting party allegedly granting the subsidy at issue.<sup>78</sup>

#### **Article XXIII - Nullification or Impairment**

97. **Colombia, Costa Rica, Guatemala, Nicaragua and Venezuela** considered that in the case under consideration, the restrictions applied by the EEC and the import licensing system for the administration of these restrictions, as well as the discriminatory tariff treatment established by the Regulation against banana imports from various Latin American countries, constituted a violation of the provisions of the General Agreement, in particular of Articles I, II, XI, XIII and Part IV of the General Agreement. Consequently, and pursuant to the provisions in paragraph 5 of the Annex to the Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance, there was a *prima facie* case of nullification and impairment of the benefits accruing to the Latin American countries, which it was up to the EEC to rebut. The benefits accruing from the General Agreement comprised not only those stemming from the Agreement at the time when a concession came into effect but also the future opportunities for trade that would result from the concession.

98. **Colombia** added that even if a panel were to find that the EEC's Regulation was not contrary to its obligations under the General Agreement, Colombia and the other Latin American banana exporting countries would still be entitled to relief under Article XXIII because the EEC's new banana régime would nullify and impair their benefits under the General Agreement.<sup>79</sup> Colombia and the other Latin American banana exporting countries had reasonably expected to increase their exports to the EEC market as a result of the EEC's 20 per cent *ad valorem* tariff binding in 1963. Yet, this legitimate expectation had been dashed, and the anticipated benefits nullified and impaired, by the many restrictions and discriminatory burdens the EEC had imposed on banana imports from Colombia and other Latin American banana exporting countries. The patchwork of national restrictions and discriminatory policies that various EEC members states had maintained until very recently against imports of bananas from Latin America had inflicted considerable economic injury on Colombia and other Latin American banana exporting countries. The Regulation which was designed to establish a

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<sup>77</sup> BISD 26S/56.

<sup>78</sup> Report of the working party on "Modifications to the General Agreement" BISD II/39, at page 44, paragraph 29(b), adopted on 1-2 September 1948.

<sup>79</sup> Report of the panel on United States - Restrictions on Imports of Sugar and Certain Sugar-Containing Products Applied under the Headnote to the Schedule of tariff Concessions, BISD 37S/228, adopted on 7 November 1990.

uniform banana policy, aggravated this injury, wreaking further damage on Colombia's banana industry and overall economy. Because the banana industry was so vital to the Colombian economy, access to markets within the EEC was crucial to the prospect of this industry and the welfare of the people of Colombia. Implementation of the Regulation would cause a drop in Colombian export earnings of an estimated US\$ 100 million per year, and the loss of an estimated 10,000 hectares of prime-quality banana crops. Colombia would also lose an estimated 21,000 jobs. Further, Colombia would experience a substantial increase in banana production costs as a result of an estimated 30 per cent decline in capacity utilization and export infrastructure.

99. **Costa Rica** stated that banana cultivation generated a third of agricultural added value. Fifty-three per cent of the total population was engaged in agricultural production. In certain areas of Costa Rica, 32 per cent of the population worked in the banana industry. It had been estimated that 41,739 workers were employed in the banana industry in 1992, indirectly generating some 83,500 jobs. Banana exports were the most important source of foreign exchange for the economy of Costa Rica, accounting for 25 per cent of national exports in recent years. The new EEC import régime for bananas would entail export losses for Costa Rica of some 352,000 metric tons, or US\$258 million in its first year of operation, representing more than 19 per cent of national banana production in 1993.

100. **Guatemala** noted that the banana industry was also central to Guatemala's overall economy, employing some 72,000 of Guatemala's 2.5 million labour force and generating over US\$100 million in export earnings alone. It had been expected that with free access to the entire EEC market, Guatemala's most lucrative export outlet for bananas, export earnings on bananas would have doubled over the next several years. That expectation disappeared on 1 July 1993 with the implementation of the EEC's discriminatory tariff policy, restrictive quota and licensing scheme. Guatemala had sustained real and immediate losses as a result of the new Regulation already in 1993. In anticipation of a liberalized EEC market, Guatemala had expanded its area devoted to banana production by 2,000 hectares. All of this area was intended to produce bananas for export to the EEC, where free market prices of about US\$10.70 per box were expected. Instead, because of a more restrictive EEC market that locked out this additional production, the extra 100,000 tons, or 5 million boxes, of bananas had to be diverted to the depressed United States market where prices were US\$4.50 per box or lower. The price differential would cause a loss of revenue this year alone estimated at US\$31.9 million. Future economic impairment as a result of the Regulation would be even greater.

101. In addition to violating the provisions of the General Agreement mentioned in paragraph 0 above, **Venezuela** was of the view that the new EEC banana régime nullified and impaired Venezuela's rights within the meaning of Article XXIII by granting subsidies for domestic production of bananas. By providing for compensation for losses incurred by producers of bananas in the EEC,<sup>80</sup> the new régime undermined the EEC's 20 per cent tariff binding on imported bananas. Venezuela, upon its entry into GATT in 1990, relied on the expectation of competitive conditions in trade with the EEC, including trade in bananas at or under the 20 per cent tariff binding. By affording subsidies pursuant to the EEC Regulation, the EEC had subjected Venezuelan trade in bananas to "an adverse change in competitive conditions"<sup>81</sup> that Venezuela could not reasonably have expected at the time it joined the GATT. Accordingly, the new régime's provision of a subsidy to banana producers in the EEC nullified and impaired Venezuela's rights under the General Agreement.

102. The **EEC** replied that, while it agreed in general with the concept of *prima facie* nullification or impairment, it disagreed with the extensive interpretation of this notion promoted by the complainants. In the EEC's opinion, it was not sufficient to claim the existence of a violation of a provision of the General Agreement to meet the conditions of a *prima facie* nullification or impairment. As the report of

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<sup>80</sup>Council Regulation (EEC) No. 404/93, Article 12.

<sup>81</sup>Report of the panel on EEC - Payments of Subsidies paid to processors and producers of oilseeds and related animal-feed proteins, BISD 37S/86, paragraph 150, adopted on 25 January 1990.

the panel on the Uruguayan Recourse to Article XXIII<sup>82</sup> put it, there must be "a clear infringement of the provisions of the General Agreement". It resulted from this that not only did the complaining party have the burden of proof that a violation existed, but it had also to provide sufficient evidence to meet the "clear infringement" standard mentioned above. The EEC considered that the complainants had failed to meet that requirement and that the evidence they brought forward was not convincing enough to establish the existence of a "clear infringement" of any of the provisions they claimed had been violated by the EEC. As a result, the EEC considered that no *prima facie* nullification or impairment could be determined to exist on the basis of the complaining parties' submissions.

103. Furthermore, a party bringing a complaint under Article XXIII:1(b) for non-violation nullification or impairment would be, pursuant to paragraph 5, *in fine* of the Agreed Description of the Customary Practice of the GATT in the Field of Dispute Settlement,<sup>83</sup> called upon to provide a detailed justification for its claim, in particular, it "would [...] normally be expected to explain in detail that benefits accruing to it under a tariff concession have been nullified or impaired".<sup>84</sup> In other words, GATT practice required that a party making a claim of non-violation nullification or impairment supported it with substantial information. While some of the complainants had come with certain data, the EEC had doubts as to whether these data were actually sufficient evidence or "detailed justification" capable of supporting a claim related to a tariff concession. Moreover, the EEC could not but notice that most of the figures submitted by the complainants did not correspond to the information available to it. Finally, the data provided by the complainants did not address the core of the matter which was trade effects and, in particular, the conditions of competition for trade. While the complainants attempted to address these issues in the "violation" parts of their submissions, they totally overlooked this essential aspect in their claims on non-violation. As a result, the EEC could not but assume that the claim of the complainants on non-violation was not founded. Furthermore, in its report on the Follow-up of the report of the panel on EEC - Payment and Subsidies paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins,<sup>85</sup> the reconvened panel considered that an appropriate way to eliminate the impairment of a tariff concession was to enter into a renegotiation of the tariff concession under Article XXVIII. Accordingly, the EEC while not acknowledging any violation of the provisions of the General Agreement, nor any nullification or impairment of benefits accruing to contracting parties, had informed the Panel that it had notified the Director-General of the GATT of its intention to apply the procedures of Article XXVIII.

104. The EEC argued that none of the complainants had established non-violation nullification or impairment of their benefits. Firstly, the tariff quota was fixed at 2 million tons whereas the complaining parties exported only half that tonnage to the EEC. Secondly, investments did not establish legitimate expectations since a non-violation case could not be claimed for future, potential damage.

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<sup>82</sup>BISD 11S/95, at paragraph 15.

<sup>83</sup>Annexed to the Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance, BISD 26S/210, adopted on 28 November 1979.

<sup>84</sup>Report of the panel on United States - Restrictions on Imports of Sugar and Certain Sugar-Containing Products Applied under the Headnote to the Schedule of tariff Concessions, BISD 37S/228, adopted on 7 November 1990.

<sup>85</sup>DS28/R, 31 March 1992.

#### IV. PARTICIPATING AND OTHER THIRD CONTRACTING PARTIES

105. **Brazil** believed that the EEC's "common organization of the market in bananas" was in breach of Article I for the less favourable, discriminatory treatment it extended to bananas from third exporting countries other than certain ACP countries. By providing for tariffs that were over the ordinary 20 per cent *ad valorem* bound tariff and by introducing quantitative restrictions in addition to the mentioned tariff, the EEC had modified the negotiated tariff rate bound under the General Agreement, thus violating Article II. Moreover, the new EEC banana régime denied national treatment to Latin American bananas since these were treated less favourably than EEC bananas. Due to the EEC's provisions for the administration of the quota's licensing scheme - which established that third country bananas were to be marketed for internal sales through a defined category of operators, thus limiting the free internal circulation of their product, the EEC violated Article III:4. Also, by using import licensing requirements and formalities in a way that restricted the free circulation of Latin American bananas to the benefit of the EEC's product, the EEC's banana régime violated Article VIII. Furthermore, by imposing quantitative restrictions on the imports of bananas, not encompassed in the exceptions foreseen in the General Agreement, the EEC violated Article XI as well. Moreover, through the discriminatory administration of the quota, the EEC violated Article XIII of the General Agreement, which established the "non-discriminatory administration of Quantitative Restrictions".

106. Although Brazil was not a substantial supplier to the EEC at present, Brazil held initial negotiating rights with the EEC for bananas, and it was affected by the EEC's new banana import régime, due to its adverse impact on the international trade flows of bananas. As a direct consequences of the increase in protection in the EEC banana market, the new system created trade diversion and destabilized other third countries' export markets. This trade diversion had already been felt by Brazilian exporters whose exports of bananas to traditional import markets of the region had been facing higher competition from other Latin American producers which, in turn, had been diverted from the EEC market. There had been, as a consequence, a decrease in the Brazilian trade balance and instability in the domestic sector, affecting not only banana producers but associated industries, such as, among others, those in the packaging and transportation sectors. Such negative effects fell mainly on producing regions, for example, "Vale do Ribeira", which accounted for 95 per cent of the Brazilian banana exports, and which was one of the poorest regions of the State of São Paulo.

107. **Cameroon, Côte d'Ivoire and Madagascar** (the "African banana producers") were of the view that since a working party had been set up to examine the Lomé IV Convention, the complainants were estopped from raising the issue of the consistency of the Lomé IV Convention in this Panel procedure. The present Panel should not, therefore, prejudge the working party's conclusions. The Regulation and the other subsequent EEC regulations relative to the common organization of the banana market had been adopted in order to implement the Lomé IV Convention, and in particular protocol No. 5 of the Convention. Article XXIV of the General Agreement provided that only the CONTRACTING PARTIES were empowered to review whether an agreement such as the Lomé IV Convention was compatible with the General Agreement.

108. Moreover, the African banana producers claimed that the preferential régime of the Yaoundé I and II and Lomé I, II, and III Conventions, granted for more than thirty years to exporters from ACP countries, fell within the scope of Article XX(h) of the General Agreement. These conventions had been duly notified to the GATT, which had examined them and had not objected to them at least until the Lomé III Convention. The African banana producers did not believe that the working parties' conclusions on Lomé I, II, and III, or on Yaoundé I and II constituted a disapproval within the meaning of Article XX(h) of the General Agreement, nor that it meant disapproval of any of the provisions of the Lomé IV Convention.

109. Furthermore, the complainants had no grounds to assert that the measures taken by virtue of the

EEC regulations in question were either an arbitrary or unjustified method of discrimination among countries where similar conditions prevailed, or were a disguised restriction on international commerce. The facts demonstrated the contrary, since the purpose of the regulations in question was to maintain and develop international commerce with the less developed countries referred to in particular by Article XXXVI of the General Agreement, and more specifically by paragraphs 1, 2, 4, 6 and 8 of that Article. The measures which the complainants qualified as discriminatory were conditions that conformed perfectly to the letter and spirit of the General Agreement.

110. The African banana producers were of the view that under Article I of the General Agreement, they had the right to be subject to the special measures criticized by the complainants. The lists in the Annexes to Article I justified the preferential treatment of bananas which benefited all the ACP countries, contracting parties of the General Agreement, and former colonies of Great Britain or former overseas territories of France. The EEC was vested with the authority of its member states and had inherited their international obligations concerning foreign trade. It had to comply with these obligations without extending their application to territories which did not benefit from the preferential treatment of Article I, paragraphs 2 and 4 of the General Agreement. That was what it did by combining Article 168 of the Lomé IV Convention with protocol No. 5 to that Convention, giving the traditional markets of the ACP states the benefit of maintaining their previous situation. The purpose and effect of this discrimination was to bring the unification of the banana market into conformity with Article I, paragraphs 2 and 4. Furthermore, Article I, paragraph 2 had to be read in the light of Articles XXIV and XXVI:5(c).

111. As concerned Article XXIV:1, it envisaged the situation of territories becoming independent. In its schedule of concessions, France had not given any concession for its territories which were later to become independent, and among which was the Côte d'Ivoire, Cameroon and Madagascar. Therefore, when the Côte d'Ivoire, Cameroon and Madagascar gained independence, like other ACP countries it became a contracting party without the obligations which would have been required for new applicants under Article XXXIII. In order to promote and encourage the movement of independence of former colonies, those countries, on becoming independent, were allowed to continue to benefit from advantages which had been attributed to them as dependent territories, while at the same time exonerating them from having to take on schedules of concessions. Thus, the advantages given by France to the Côte d'Ivoire, Cameroon and Madagascar, or more generally by European countries to ACP States, were in effect destined to help former dependent territories and were perfectly compatible with the General Agreement.

112. The African banana producers considered that Article II was limited by that of Articles I, XX and XXXVI of the General Agreement. The General Agreement did not create an imprescribable right to maintaining the tariff concession of 20 per cent. The objective of the General Agreement was to guarantee a procedure enabling a global equilibrium of the international commerce. The existence of Article XXVIII giving the contracting parties the option to modify or withdraw from a concession demonstrated that the consolidation did not create an absolute right. Furthermore, since certain practices of Latin American banana exporters could be considered dumping, the EEC would be justified in applying an anti-dumping levy or a compensatory levy in accordance with Article VI.

113. Article III concerning national treatment in matters of taxation and local regulation, the African banana producers claimed, did not appear to apply in this instance unless the complainants intended to assert that intra-community commercial operations, involving for example the commercialization of bananas from Martinique or Guadeloupe, were products of a territory of a contracting party imported onto the territory of some other contracting party. This argument was extraneous to the ACP - EEC relationship, and in any case did not justify the claim of violation of Article III.

114. The African banana producers noted that the EEC bananas were not subject to a license, since its commercialization did not legally constitute an importation. The ACP and Latin American bananas

were treated similarly to ACP countries as regarded access to the 2 million tons quota. The preferential régime applicable to "traditional" bananas was just as complex, since importers had to justify the provenance by a certificate or origin and verify country by country that the guaranteed quota was not exceeded. Also, the tariff quota could in no way be assimilated to a quantitative restriction in the sense of Article XI, as suggested by the complainants. The regulations in question did not create a prohibition to imports but a duty free exception on the one hand and a tariff rate of 100 ECUs per ton on the other for quantities within the tariff quota. Considering the importance in tonnage of the quota in franchise or at reduced levy, it was perfectly possible to make an equalization of the bananas which were included and those not included in the tariff quota, thus rendering the system easily workable, especially if the CIF prices were stabilized at a higher level than between 1990 and 1992. Moreover, the African banana producers believed that the EEC banana import régime was in conformity with Article XIII:2.

115. Finally, the African banana producers recalled that the Lomé IV Convention, and more particularly its Protocol no 5, met the fundamental objectives of the General Agreement which was to help the less favoured countries develop their economy and to improve the living conditions of the world population. Putting in question the preferences granted to ACP countries would be tantamount to refusing to apply the Lomé IV Convention and Protocol 5, and to violating the those fundamental objectives.

116. **Jamaica, St. Lucia, St. Vincent and the Grenadines, Dominica, Belize and Surinam**<sup>86</sup> (the "Caribbean banana producers") noted that many of the ACP banana producers and all of the Caribbean banana producers depended on bananas for the survival of much or most of their economy. Although diversification had been actively pursued, the scope for it was extremely limited and no alternative economic activity offered comparable employment at a regular income. Moreover, the periodic arrival of vessels able to transport such a sensitive crop quickly over great distances had enormous collateral benefits in economies dependent on the backhaul of such vessels for their imports of necessary foodstuffs and raw materials.

117. These countries were of the view that the tariff preference accorded by the EEC to ACP countries was justified and they subscribed to the legal arguments advanced by the EEC. In addition, they put forward the following arguments: the tariff preference from which the Caribbean banana producers benefitted in their principal export market, the United Kingdom, was justified and continued to be justified under Article I:2 of the General Agreement. Prior to the accession of the United Kingdom to the EEC, the preference was granted by the United Kingdom in its own right. After the United Kingdom acceded to the EEC, the EEC continued to grant tariff preferences on behalf of the United Kingdom, as a GATT contracting party and member state, by virtue of the rights that the United Kingdom enjoyed, and continued to enjoy, to grant preferences in respect of imports of bananas originating in the Caribbean ACP exporting countries under Articles I:2 and XXIV:9 of the General Agreement.

118. The granting of tariff preferences in favour of the Caribbean banana producers by other member states of the EEC in the context of the free-trade area constituted by successive Lomé Conventions was justified under Article XXIV of the General Agreement, either alone or in conjunction with Article XXXVI:8 of the General Agreement. Article XXIV also provided an additional justification for the maintenance of the tariff preference by the United Kingdom in favour of the Caribbean banana producers. The Lomé IV Convention contained the successor agreement to the various banana commodity arrangements that had existed previously, including the banana arrangements between the United Kingdom and the Caribbean banana producers. These pre-existing arrangements were incorporated by reference in the form of a special banana protocol, which appeared as Protocol 5 of the Lomé IV Convention. Protocol 5 subsumed the United Kingdom's long-standing arrangements with the Caribbean banana producers and other former British territories, as well as arrangements by other EEC

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<sup>86</sup>These countries are all contracting parties to the General Agreement.

countries in favour of their former dependencies, notably France in relation to West Africa, and Italy in relation to Somalia. The provisions of the new EEC régime were designed to assure continued access for traditional volumes of EEC and ACP fruit. In theory, the combined total of each ACP state's quota substantially exceeded past total ACP imports. However, these quotas were not transferable, even between individual islands of the Windward's Group.

119. Even assuming, for the sake of argument, that the preferences for imports of bananas from the Caribbean banana producers did not survive directly from Article I:2 and Article XXIV, they continued because of the implicit approval of Article XXVI:5(c). Since the Caribbean banana producers became contracting parties under Article XXVI, they owed no concessions in return for their accession. By virtue of their "no-ticket" admission, the Caribbean banana producers could therefore continue to receive *all* the benefits they had received as dependent territories, including established privileges of access to the markets of their former European colonizers.

120. The Caribbean banana producers considered that it was *ultra vires* for a panel to enquire into matters and make findings that were within the otherwise exclusive jurisdiction of the procedures under Article XXIV, without both a specific mandate from the Council to do so, and the parties to the free-trade area, including the ACP contracting parties, being made full parties to proceedings in which the obligations of all parties to the free-trade area under the General Agreement were at stake. The broader range of rights and obligations, as well as the major political ramifications that Article XXIV agreements involved, was the reason that matters relating to Article XXIV agreements were remitted for examination under separate procedures specifically established under the provisions of Article XXIV.

121. They submitted that, in any event, the Lomé IV Convention was a commodity agreement in relation to certain commodities, including bananas (Protocol 5), and, having been submitted to the CONTRACTING PARTIES and not disapproved by them, was entitled to the benefit of the exception provided for in Article XX(h) of the General Agreement. The criteria for invoking paragraph (h) were threefold and disjunctive: (i) that the agreement conformed to certain criteria; or (ii) that there was compliance with the ECOSOC criteria referred to in the *ad Article XX(h)*; or (iii) that regardless of any criteria, the agreement had been submitted to the CONTRACTING PARTIES and not disapproved by them. The first of these could not be satisfied because no such criteria had ever been submitted to the contracting parties. The second criterion was also impossible of fulfilment since the principles approved by the Economic and Social Council were, in the opinion of the Caribbean banana producers, no longer pertinent, because this resolution referred to the London draft of the ITO Charter, which never came into effect. Although it was true that the ECOSOC resolution recognized that the provisions of the London draft would be modified as negotiations progressed, the final draft provisions of the ITO Charter also never actually entered into force. Thus, the only way open to qualify under Article XX(h) was by satisfying a two-pronged test, i.e. a contracting party had to show that the agreement in question was a commodity agreement and that it had been submitted to the contracting parties and not been disapproved by them.

122. There was no doubt that the commodity-specific protocols of the Lomé IV Convention constituted intergovernmental commodity agreements in the sense of Article XX(h) of the General Agreement. Article XX(h) did not define "commodity," and since there were no agreed criteria for such agreements it was suggested that, as far as the General Agreement and actions of the contracting parties went, a "commodity agreement" was any agreement relating to an internationally-traded primary commodity. The commodity-specific protocols of the Lomé IV Convention certainly fit this bill. The second prong of this test had also been satisfied. Each Lomé Convention since 1974, had been submitted to the CONTRACTING PARTIES and, indeed, actually studied by a working party. No Lomé Convention had ever been disapproved by them. Since no specific procedures for submission under Article XX(h) had been promulgated by the CONTRACTING PARTIES, there was no reason why this submission to the CONTRACTING PARTIES and examination by working parties should not be regarded as fulfilling any procedural requirements. Therefore, it would appear that Protocol 5 was "... submitted to

the contracting parties and not disapproved by them. ..." as required by Article XX(h).

123. Even if the Panel found that the EEC's new banana import régime was not exempt from the obligations of the General Agreement, the Caribbean banana producers considered that it had to find that the preference in the scheme were not inconsistent with the General Agreement because the allocation of the tariff rate quota was in conformity with the EEC's obligations under Article XIII of the General Agreement as import licenses were issued automatically commensurate with a recent, representative period. The Caribbean banana producers recalled that the EEC's tariff rate quota distinguished between the bananas that were imported into the EEC within the general tariff-rate quota and those in excess of this quota. Since agreement among the EEC, the ACP banana producers and the Latin American producers regarding the allocation of shares in the quota had been impossible, the EEC had, in compliance with paragraph 2(d) of Article XIII, allotted shares in the tariff-rate quota to the Latin American exporters commensurate with the "proportions supplied by such contracting parties during a previous representative period..."<sup>87</sup>

124. The complainants suggested that the EEC did not follow Article XIII:2(d) to the letter because it allotted to traders in ACP and EEC bananas too high a share of the quota. The Caribbean banana producers considered that this claim was misplaced as the complainants' had used incorrect figures to calculate this proportion. Secondly, Article XIII:2(d) made explicit accommodation for any special factors affecting ACP trade in bananas. The special needs of the Caribbean banana producers were such a special factor since these countries would face economic disaster if they were unable to dispose of their major agricultural product in the EEC market. Quoting Article 3, paragraph (l) of the Licensing Code, the Caribbean banana producers were of the view that the present conditions in the EEC market for banana imports strongly indicated that the exports of the Latin American countries needed no special consideration in order to gain EEC market share, contrary to the Caribbean banana producers.

125. Furthermore, discrimination among developing countries as concerned the tariff preference in favour of ACP bananas was consistent with GATT practice. Some of the ACP banana producers were among the least developed countries in the world within the meaning of paragraphs 2(d) and 8 of the Tokyo Round decision of 28 November 1989, and the EEC, in providing a special benefit, had targeted developing countries with a series of special problems: they were poor island nations, only recently independent. Moreover, this type of discrimination was no different from the Generalized System of Preferences that were endorsed, approved, and extended in perpetuity by the results of the Tokyo Round of Multilateral Trade Negotiations.

126. Finally, the new EEC banana import régime did not nullify or impair any reasonable interest of the complaining contracting parties. The complainants had no legitimate expectation of permanence of the value of the 20 per cent tariff concession because they were not parties to the initial tariff negotiations at which the special conditions of the ACP banana trade were considered and accommodated. Nor was the competitive position of the complainants upset by the EEC's banana import régime.

127. **Tanzania** noted that its production of bananas was presently consumed domestically but that there existed a potential to develop production for exports. Tanzania was concerned that the deliberations of this Panel could have negative effects for those ACP countries that benefitted from a preferential trade régime with the EEC as a result of the Lomé IV Convention. Tanzania considered that these preferences were important for the development of the ACP countries and that they were fully justified under the General Agreement.

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<sup>87</sup> Article XIII:2(d).

## V. FINDINGS

128. The Panel noted that the issues in dispute arose essentially from the following facts, as described in greater detail in Part II of this report. Colombia, Costa Rica, Guatemala, Nicaragua and Venezuela export bananas to the EEC. In 1992, they supplied over one million tons, more than one-quarter of the EEC market. Until 1 July 1993, bananas from these countries imported into the EEC were subject to a 20 per cent *ad valorem* bound tariff rate, applied in all EEC member states except Germany. They also faced quantitative restrictions on imports imposed by several member states of the EEC, and preferential tariffs accorded to African, Caribbean and Pacific ("ACP") countries. Effective 1 July 1993, the EEC replaced the national systems with a common organization of the banana market. The EEC regulations, *inter alia*, abolished national quantitative restrictions on bananas and replaced the *ad valorem* duties on imports of bananas with specific duties.<sup>88</sup>

129. The new EEC regulations cover both the internal banana market and imports. With respect to the internal market, the regulations provide for the elaboration of quality and marketing standards, the establishment of producer organizations, compensation to producers for income loss and payments to producers for land set-aside. With respect to imports, the regulations establish a tariff quota supplemented by an import licensing scheme. The tariff quota and the import licensing scheme distinguish between bananas of different origins as follows:

Category	Source	Border measures
EEC:	Bananas produced within the EEC	No border measures
Traditional ACP:	Bananas imported from ACP countries within individual country quotas	Duty free
Non-traditional ACP:	Bananas imported from traditional ACP countries above individual country quotas or from non-traditional ACP countries	Duty free (within tariff quota) 750 ECUs per ton (outside tariff quota)
Third country:	Bananas imported from non-ACP third countries	100 ECUs per ton (within tariff quota) 850 ECUs per ton (outside tariff quota)

130. Imports of bananas within the tariff quota may only be made by "operators". An operator is a person who has been established in the EEC, has carried out defined commercial activities in the banana sector (purchasing, supplying or ripening), and has marketed a specified minimum quantity of bananas. The quantity of bananas within the tariff quota allocated to each operator is determined by the operator's activities in the previous three-year period, including the country of source of supply of the bananas, the quantity marketed, and type of marketing activity. Special provision is made for new operators.

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<sup>88</sup> Council Regulation (EEC) No 404/93 of 13 February 1993 on the Common Organization of the Market in Bananas. Subsequent regulations have completed and amended the new régime.

131. Apportioning of the tariff quota is determined, initially, on the basis of past sources of supply of the bananas marketed by the operators:

Category	Type	Proportion
Category (a):	Operators who have marketed third-country or non-traditional ACP bananas;	66.5%
Category (b):	Operators who have marketed EEC or traditional ACP bananas;	30%
Category (c):	Operators who have since 1992 started marketing third-country or non-traditional ACP bananas.	3.5%

The tariff quota is then apportioned within the operator categories on the basis of the average quantities of bananas sold by an operator in the three most recent years for which figures are available, and is weighted according to the marketing activities of the individual operators.

## Article II - Tariff Binding

132. The Panel noted that **Colombia, Costa Rica, Guatemala, Nicaragua and Venezuela** were of the view that the tariff rates applicable to bananas imported from their territories into the EEC were inconsistent with the EEC's tariff binding of 20 per cent *ad valorem* appearing in its Schedule. For bananas imported within the tariff quota, the new specific rate of 100 ECUs per ton was in their view equivalent to at least 23 percent *ad valorem* and thus in excess of the 20 per cent *ad valorem* rate. For bananas imported outside the tariff quota, the new specific rate of 850 ECUs per ton was equivalent to well above 160 per cent *ad valorem*. They noted that past panels had found that any change in the bound tariff structure or in the customs valuation method, even if the change did not increase the level of protection afforded by the tariff, had to meet the conditions of Article II. The EEC replied that, since it had notified its intention under Article XXVIII:5 to negotiate a modification of its binding on bananas, the issue of the equivalency of the new tariff structure was moot and should not be considered by the Panel. The EEC also argued that, in any event, a change from an *ad valorem* to a specific tariff basis increased the security and predictability of market access, by reducing the influence of currency fluctuations, cost structure and sale price of the product. Past panels had examined only changes from a specific to an *ad valorem* tariff basis and not, as here, from an *ad valorem* to a specific tariff basis. The EEC also disagreed with the complainants' calculations with respect to the equivalent *ad valorem* rates, noting that the new rate of 850 ECUs per ton was applied free of the quantitative restrictions which had previously been applied to bananas imported from the complainants, and that average imports of the bananas from the complainants in any case amounted to only one-half of the tariff quota.

133. The Panel considered first the preliminary argument of the EEC that the Panel should not examine the equivalency of the specific tariff with the bound *ad valorem* tariff in view of the notification by the EEC under Article XXVIII:5 that it wished to renegotiate its tariff binding on bananas. The Panel noted that its terms of reference directed it to examine, in the light of the relevant provisions of the General Agreement, the matter described by the complainants in document DS38/6. The new specific tariff rates for bananas were clearly part of the matter raised and, at the time of the Panel proceeding, continued to be applied to imports of bananas from the complaining parties. The Panel further observed the following: according to Article XXVIII:5, a notification of the intention to modify a tariff binding, by itself, does not change the legal status of that binding. Article XXVIII:1, to which Article XXVIII:5 refers, stipulates that the modification or withdrawal may occur only after negotiation with the other relevant contracting parties. The "Procedures for Negotiations under Article XXVIII" adopted by the CONTRACTING PARTIES provide that, in the case of negotiations under Article

XXVIII:4 or 5, a contracting party is free to give effect to agreed changes in its schedule only from the date on which the conclusion of all the negotiations have been notified to the Secretariat.<sup>89</sup> This procedure is in line with a statement, made during the negotiation of Article XXVIII, that this provision was intended to ensure that "consultation shall precede the withdrawal of the concession ... The action will not be taken first and consultation later."<sup>90</sup> The Panel concluded, therefore, that it was required to examine the consistency of the new specific tariffs for bananas with Article II, as requested by the complainants, notwithstanding the notification of the EEC under Article XXVIII:5.

134. The Panel noted that Article II required that each contracting party "accord to the commerce of the other contracting parties treatment no less favourable than that provided for in the appropriate Part of the appropriate Schedule annexed to this Agreement." The Panel then considered whether the introduction of a specific tariff for bananas in place of the *ad valorem* tariff provided for in its Schedule constituted "treatment no less favourable" in terms of Article II. The Panel observed that while the bound *ad valorem* tariff was related to the value of bananas, the new specific tariff was based on the weight of bananas. Any change in the value of bananas per ton therefore led to a change in the *ad valorem* equivalent of the specific tariff. Since the value of bananas was unpredictable, the *ad valorem* equivalent of the specific tariff could also not be foreseen. The Panel noted in this context that the *ad valorem* equivalent of the 850 ECUs per ton specific tariff on bananas presently exceeded by far 20 per cent *ad valorem*. As to the 100 ECUs per ton specific tariff, the Panel also noted that the EEC had neither argued nor submitted any evidence that this tariff could never exceed 20 per cent *ad valorem*; according to the complainants, the 100 ECUs per ton specific tariff had already exceeded the equivalent of the bound 20 per cent *ad valorem* tariff after 1 July 1993. The Panel consequently found that the new specific tariffs led to the levying of a duty on imports of bananas whose *ad valorem* equivalent was, either actually or potentially, higher than 20 per cent *ad valorem*.

135. The Panel considered that the **actual** levying of a duty in excess of the bound rate clearly constituted a treatment of imports of bananas less favourable than that provided for in the EEC's Schedule of Concessions. The Panel then proceeded to examine whether also the **mere possibility** that the specific tariff rate applied by the EEC might be higher than the corresponding bound *ad valorem* rate, rendered it inconsistent with Article II. The Panel recalled the importance of security and predictability in the application of tariffs bindings. It noted that previous panels and working parties had emphasized that tariff bindings justify reasonable expectations about market access and conditions of competition. The CONTRACTING PARTIES had consistently found that a change from a bound specific to an *ad valorem* rate was a modification of the concession. A working party examining a proposal by Turkey to modify its tariff structure from specific to *ad valorem* had stated:

"The obligations of contracting parties are established by the rates of duty appearing in the schedules and any change in the rate such as a change from a specific to an *ad valorem* duty could in some circumstances adversely affect the value of the concessions to other contracting parties. Consequently, any conversion of specific into *ad valorem* rates of duty can be made only under some procedure for the modification of concessions."<sup>91</sup>

The Panel noted that the working party did not only refer to a change from specific to *ad valorem* tariffs, but to "any change" that could in some circumstances adversely affect the value of the concessions. In a more recent panel report, the panel noted that "under long-standing GATT practice, even purely formal changes in the tariff schedule of a contracting party ... have been considered to require renegotiations."<sup>92</sup> Other panels and working parties had arrived at similar findings.<sup>93</sup> The Panel agreed with these

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<sup>89</sup>"Procedures for Negotiations under Article XXVIII", BISD 27S/26, paragraph 7, adopted 10 November 1980.

<sup>90</sup>EPCT/TAC/PV/14, page 13.

<sup>91</sup>Report of the working party on Transposition of Schedule XXXVII, BISD 3S/127, 128, paragraphs 3-4.

<sup>92</sup>Report of the panel on Newsprint, BISD 31S/131, paragraph 50, adopted 20 November 1984.

<sup>93</sup>Report of the working party on Conversion of Specific Duties in the Norwegian Schedule, BISD 7S/112, paragraph 3, adopted on 14

statements and findings and concluded that, in determining whether treatment accorded by a tariff measure was no less favourable than that provided for in the Schedule, it had to take into account not only the actual consequences of that measure for present imports but also its effects on possible future imports. This followed from the principle recognized by many previous panels that the provisions of the General Agreement serve not only to protect actual trade flows but also to create predictability for future trade.<sup>94</sup>

136. The Panel found therefore that the specific tariffs applied by the EEC on imports of bananas since 1 July 1993 accord treatment to imports of bananas less favourable than that provided for in the EEC's Schedule of Concessions and were, therefore, inconsistent with the EEC's obligations under Article II:1. The Panel could not agree with the argument presented by the EEC that this inconsistency with Article II could be justified by the fact that the EEC had removed the previously existing quantitative import restrictions on bananas. The Panel noted that the 20 per cent *ad valorem* tariff binding of the EEC was not made conditional upon the existence of these quantitative restrictions. Regardless of the legal status of these restrictions (which, in the still unadopted panel report on "EEC - Member States' Import Régimes for Bananas" (DS32/R), had been found to be inconsistent with Article XI:1 of the General Agreement), their removal could not justify the change from *ad valorem* to specific tariffs.

### Article XI - Tariff Quotas

137. The Panel noted that **Colombia, Costa Rica, Guatemala, Nicaragua and Venezuela** considered that the tariff quota imposed by the EEC on imports of bananas from third countries was inconsistent with Article XI:1 because (a) the tariff quota, (b) the high over-quota tariff rate, and (c) the non-automatic licenses within the tariff quota had to be assimilated to quantitative restrictions prohibited by that provision. The EEC replied that tariff quotas were not prohibited by the General Agreement, and that tariffs levied in accordance with them were not covered by Article XI, but were subject only to the conditions of Article II. The EEC further considered that the licensing scheme for imports of bananas did not reduce the flexibility of operators, nor did it create uncertainty in banana markets, and was not therefore inconsistent with Article XI.

138. The Panel first examined whether the establishment of a **tariff quota** on bananas was, as such, inconsistent with Article XI. It noted that the EEC measure permitted the import of a product under one tariff rate up to a specified amount, and any additional quantity of the product at a higher tariff rate. Apart from the import tariffs and import licenses, no further measures were applied to the importation of bananas. The Panel noted in this respect that the schedules of concessions of many contracting parties provided for tariff quotas and that the CONTRACTING PARTIES had never found tariff quotas, as such, to be "restrictions" within the meaning of Article XI:1. This accords with the distinction in Article XIII between "prohibition or restriction" (paragraph 1) and "any tariff quota", which is referred to specifically in paragraph 5. For these reasons, the Panel found that the EEC measures permitting the import of bananas under one tariff rate up to a specified amount, and any additional amount at a higher tariff rate, were, as such, not inconsistent with Article XI:1.

139. The Panel then examined whether the establishment by the EEC of a **high over-quota rate** was inconsistent with Article XI. The Panel noted in this respect that Article XI:1 distinguishes between different instruments of protection, namely between "prohibitions and restrictions" on the one hand and "duties, taxes or other charges" on the other. No reference is made in Article XI:1 to the commercial effect that the use of these instruments might have in a particular market situation. Previous panels had pointed out that, in determining whether a measure constitutes a quantitative restriction, the actual impact of the measure on trade flows at a given point in time is irrelevant. Thus, a recent panel had

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November 1958; report of the panel on Canada - Withdrawal of Tariff Concessions, BISD 25S/42, adopted on 17 May 1978.

<sup>94</sup>See references under note 95.

observed:

"The CONTRACTING PARTIES have consistently interpreted the basic provisions of the General Agreement on restrictive trade measures as provisions establishing conditions of competition. Thus they decided that an import quota constitutes an import restriction within the meaning of Article XI:1 whether or not it actually impeded imports."<sup>95</sup>

The Panel further noted that the CONTRACTING PARTIES had never taken the view that high tariff rates constituted quantitative restrictions in terms of Article XI:1 merely because of their adverse trade effects. The acceptance of the view of the complainants would make the legal status of a governmental measure under Article XI:1 dependent on factors governments do not fully control, namely the market impact of their measures, and would therefore render the scope of obligations under Article XI:1 highly unpredictable. Therefore, the Panel found that the mere fact that the level of the tariff may be such as to make imports of bananas subject to the tariff unprofitable, does not turn the tariff into a quantitative restriction within the meaning of Article XI:1.

140. The Panel then examined whether the **non-automatic licensing** transformed the tariff quota into a restriction inconsistent with Article XI:1, as claimed by the complainants. It noted that, whatever licensing régime might exist within the tariff quota, importers retained their right to import bananas outside the quota, unrestrained by quantitative restrictions in terms of Article XI, and subject only to the payment of the over-quota tariff. The Panel therefore found that the existence of non-automatic licensing did not change the nature of the tariff quota and was, as such, not inconsistent with Article XI:1.

### **Articles XIII - Measures on Importation Discriminating Between Sources**

141. The Panel noted that **Colombia, Costa Rica, Guatemala, Nicaragua and Venezuela** considered the allocation of the tariff quota licenses to be inconsistent with Article XIII. The **EEC** considered that, although the allocation of tariff quota licenses was made on the basis of the past marketing of bananas of the operator concerned, each license obtained could be used to purchase bananas from any source. Therefore, no discrimination among supplying countries occurred.

142. The Panel noted that the provisions of Article XIII are applicable to tariff quotas, by virtue of Article XIII:5. The basic rule is stated in Article XIII:1:

"No prohibition or restriction shall be applied by any contracting party on the importation of any product of the territory of any other contracting party ... unless the importation of the like product of all third countries ... is similarly prohibited or restricted."

The Panel noted that the scope of Article XIII:1 is confined to border measures "on the importation" of any product and does not apply to internal measures which do not restrict the importation of the product. This is confirmed by Article XIII:2 which, in specifying how sources of supply should be allocated, refers likewise to "import restrictions". The Panel also noted that Article XIII prohibits only discrimination "among supplying countries" in the allocation of quotas and in "the distribution of licenses among supplying countries" (Article XIII:3) but does not prescribe rules for the internal allocation of quota licenses to individual importers. The Panel then recalled that the EEC operators who have obtained a tariff quota license may use it for imports of bananas from any source. The Panel therefore found that the EEC's tariff quota for imports of bananas does not discriminate between sources

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<sup>95</sup>Report of the panel on European Economic Community - Payments and subsidies to processors and producers of oilseeds and related animal-feed proteins, BISD 37S/86, 130, paragraph 150, adopted on 25 January 1990, referring to the Panel on Japanese measures on imports of leather, BISD 31S/94, 112-113, paragraphs 47-48, 53, 55, adopted on 15/16 May 1984.

of supply in the sense of Article XIII.

### **Articles III and I - Internal Measures Discriminating Between Sources**

143. The Panel noted that **Colombia, Guatemala and Venezuela** were of the view that the EEC acted inconsistently with Article III:4 by reserving 30 per cent of the licenses under the tariff quota to operators who marketed EEC or traditional ACP bananas during a preceding period. This regulation gave operators an incentive to purchase EEC or traditional ACP bananas because, by doing so, they could obtain a larger share of the tariff quota licenses and, with them, a larger share of the quota rents accruing to the holders of such licenses. As a result, the conditions of competition between EEC and ACP bananas, on the one hand, and third-country and non-traditional ACP bananas, on the other, were distorted. The EEC was of the view that its method of allocating the import licenses did not adversely affect the competitive conditions for third-country bananas. Any competition for EEC or traditional ACP bananas among operators wishing to increase their share in the quota would simply drive up further the prices of bananas of these origins. The method of allocation could not prevent a full utilization of the tariff quota, and could not therefore modify the conditions of competition for imports of bananas under the tariff quota.

144. The Panel first examined the operation of the EEC import licensing system and noted the following. The quantity of bananas that an operator may import, pursuant to licenses granted under the tariff quota, depends on the origin of the bananas that the operator has marketed during the preceding three-year period.<sup>96</sup> In particular, 30 per cent of the tariff quota is apportioned among operators who, during the preceding period, have purchased bananas from domestic or traditional ACP sources. As a result, operators wishing to increase their future share of bananas benefiting from the tariff quota would be required to increase their current purchases of EEC or traditional ACP bananas.

145. The Panel noted that the General Agreement does not contain provisions specifically regulating the allocation of tariff quota licenses among importers and that contracting parties are, therefore, in principle free to choose the beneficiaries of the tariff quota. They could, for instance, allocate the licenses to enterprises on the basis of their previous trade shares. However, the absence of any provisions in the General Agreement specifically regulating the allocation of tariff quota licenses also meant that contracting parties, in allocating such licenses, had to fully observe the generally applicable provisions of the General Agreement, in particular those of Article III:4, which prescribes treatment of imported products no less favourable than that accorded to domestic products, and Article I:1, which requires most-favoured-nation treatment with respect to internal regulations.

146. The Panel then proceeded to examine the EEC licensing scheme in the light of the incentive provided under the regulations to buy bananas from **domestic sources**. The Panel noted that Article III:4 had been interpreted consistently by previous panels as establishing the obligation to accord imported products competitive opportunities no less favourable than those accorded to domestic products. A previous panel has stated:

"The words "treatment no less favourable" in paragraph 4 call for effective equality of opportunities for imported products in respect of the application of laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products."<sup>97</sup>

The Panel further noted that previous panels had found consistently that this obligation applies to any

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<sup>96</sup> Council Regulation (EEC) No 404/93, Article 19.

<sup>97</sup> Report of the panel on United States - Section 337 of the Tariff Act of 1930, BISD 36S/345, 386, paragraph 5.11, adopted on 17 June 1987.

requirement imposed by a contracting party, including requirements "which an enterprise voluntarily accepts to obtain an advantage from the government".<sup>98</sup> In the view of the Panel, a requirement to purchase a domestic product in order to obtain the right to import a product at a lower rate of duty under a tariff quota is therefore a requirement affecting the purchase of a product within the meaning of Article III:4. The Panel further noted that, in judging whether effective equality of opportunities for imported products under Article III:4 was accorded, the trade impact of the measure was not relevant. The CONTRACTING PARTIES determined in 1949 that the obligations of Article III:4 "were equally applicable whether imports from other contracting parties were substantial, small or non-existent",<sup>99</sup> and they have confirmed this view in subsequent cases.<sup>100</sup> Thus it was not relevant that, at present, the incentive under the EEC regulations to buy domestic or traditional ACP bananas may only result in raising their price, and not in reducing the exports of the third-country bananas, since these exports, because of the high over-quota tariff, were limited *de facto* to the amount allocated under the tariff quota. The discrimination of imported bananas under the licensing scheme could therefore not be justified by measures on the importation that currently prevented, *de facto*, bananas from entering into the internal market. The Panel therefore found that the preferred allocation of part of the tariff quota to importers who purchase EEC bananas was inconsistent with Article III:4.

147. The Panel then examined the EEC licensing scheme in the light of the incentive provided under the regulations to buy bananas of **ACP origin** in preference to other foreign origins. The Panel noted that Article I:1 obliges contracting parties, with respect to all matters referred to in Article III:4, to accord any advantage, granted to any product originating in any country, to the like product originating in the territories of all other contracting parties. As under Article III, the Panel considered that actual trade flows were not relevant to determine conformity with Article I:1. The Panel therefore found that the preferred allocation of licenses to operators who purchase bananas from ACP countries was inconsistent with the EEC's obligations under Article I:1.

148. The Panel noted that the EEC's licensing system, by reserving 66.5 per cent of the tariff quota to operators who had marketed third-country or non-traditional ACP bananas during a preceding period, included also incentives to continue importation of third-country bananas, even though these incentives may not have trade-distorting effects at present in view of the undisputed greater competitiveness of these third-country bananas. The Panel was of the view that, regardless of the trade effects, the apportioning of 66.5 per cent of the tariff quota to operators who had marketed third-country or non-traditional ACP bananas could not offset or legally justify the inconsistencies of the licensing system with Articles III:4 and I:1. The Panel agreed in this respect with a previous panel that had found that "an element of more favourable treatment would only be relevant if it would always accompany and offset an element of differential treatment causing less favourable treatment".<sup>101</sup>

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<sup>98</sup>Report of the panel on EEC - Regulation on Imports of Parts and Components, BISD 37S/132, 197, paragraph 5.21, adopted on 16 May 1990.

<sup>99</sup>Report of the working party on Brazilian Internal Taxes, BISD II/181, 185, paragraph 16, adopted on 30 June 1949.

<sup>100</sup>Report of the panel on United States - Taxes on petroleum and certain imported substances, BISD 34S/136, 158, paragraph 5.1.9, adopted on 17 June 1987; report of the panel on United States - Measures affecting alcoholic and malt beverages, DS23/R, paragraph 5.65, adopted on 19 June 1992,

<sup>101</sup>Report of the panel on United States Section 337 of the Tariff Act of 1930, BISD 36S/345, 388, paragraph 5.16, adopted on 7 November 1989.

### **Article VIII - Payment of a Security and Other Import Formalities**

149. The Panel noted the views of **Colombia, Guatemala and Venezuela** that the banana import licensing scheme infringed Article VIII:1(a) because it required the payment of a security that was forfeited if the transaction was not carried out pursuant to specified terms. The **EEC** replied that the security requirement was not inconsistent with Article VIII:1(a) since the requirement did not represent an indirect protection to domestic products, nor the taxation of imports for fiscal purposes, but only ensured that obligations assumed by an importer under a license were actually fulfilled. **Colombia, Guatemala and Venezuela** further stated that the overall licensing scheme infringed Article VIII:1(c) because it maximized the incidence and complexity of import formalities, and complicated import documentation requirements. The **EEC** replied that Article VIII:1(c) did not impose a strict obligation in this respect, requiring only that contracting parties "recognize the need" to minimize the complexity and incidence of import formalities and simplify import documentation requirements.

150. The Panel first examined whether the possibility of the forfeiture of the security as such was inconsistent with Article VIII:1(a). The Panel noted that a previous panel, in considering a similar scheme where a security payment for an import license was subject to forfeiture, had stated:

"The Panel considered that such a forfeiture could not logically be accepted as a charge 'in connection with importation' within the meaning of Article VIII:1(a), since no importation had occurred, but only as a penalty to the importer for not fulfilling his obligation to complete the importation within the seventy-five day time-limit. The Panel further considered that such a penalty should be considered as part of an enforcement mechanism and not as a fee or formality 'in connexion with importation' within the purview of Article VIII."<sup>102</sup>

The Panel agreed with this reasoning and found that the security deposit required by the EEC of operators wishing to import bananas was consistent with the terms of Article VIII:1(a). The Panel further found that it had not received sufficient evidence demonstrating that the security requirement gave rise to costs amounting to a charge prohibited by paragraph 1(a) of Article VIII.

151. The Panel then examined whether the banana import licensing procedures were consistent with Article VIII:1(c), in which contracting parties recognize the need to minimize the incidence and complexity of import formalities and to simplify import documentation requirements. The Panel noted that Article VIII:1(c) refers to import formalities and documentation requirements, not to the trade regulations which such formalities or requirements enforce. It further noted that the complaining parties had criticized the complexity of the EEC's banana import regulations but that they had not submitted any evidence substantiating that the EEC's import formalities and import documentation requirements, by themselves, were more complex than necessary to enforce these regulations. The Panel therefore found that the complaining parties had not demonstrated that the EEC had acted inconsistently with Article VIII:1(c).

### **Article XVI - Subsidies to Domestic Producers**

152. The Panel noted the view of **Colombia** that the EEC banana régime provided for significant payments to domestic banana producers, which would result in serious prejudice to the interests of Colombia and other Latin American banana producers being caused or threatened. Faced with this situation, the EEC had not met its obligations under Article XVI:1 to consult with Colombia and the other Latin American banana producers. The **EEC** replied that it had not violated any procedural

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<sup>102</sup>Report of the panel on EEC - Programme of minimum import prices, licenses and surety deposits for certain fruits and vegetables, BISD 25S/68, 96-97, paragraph 4.3, adopted on 18 October 1978.

requirement under Article XVI:1, since it was up to the contracting party which considered that a subsidy caused or threatened to cause serious prejudice to its interests to request discussions under Article XVI:1.

153. The Panel noted that Article XVI:1 establishes the obligation to discuss "upon request" the subsidy claimed to cause or threaten to cause serious prejudice. Since the complaining parties had not submitted any evidence that such a request had been made, the Panel found that they had not demonstrated that the EEC had acted inconsistently with Article XVI:1.

### **Article I - Preferential Tariff Treatment**

154. The Panel noted the arguments of **Colombia, Costa Rica, Guatemala, and Nicaragua** that the EEC regulations on imports of bananas were inconsistent with Article I. Whereas the duty on bananas imported from the complainants was 100 ECUs per ton within the tariff quota and 850 ECUs per ton outside it, the like product from ACP countries was more favourably treated: a fixed quantity was exempted from the tariff quota altogether and paid no duty; further quantities could enter duty-free inside the tariff quota; and any remainder entered under a duty of 750 ECUs per ton, 100 ECUs per ton less than that imposed on over-quota third-country bananas. The **EEC** did not argue that its differential tariff rates on bananas were consistent with Article I:1.

155. The Panel noted that Article I states:

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

The Panel recalled that duty-free tariffs and preferential customs duties were applied by the EEC to imports of bananas from ACP countries, and that this favourable treatment was not granted immediately or unconditionally to the like product originating in the territories of the complaining contracting parties. The Panel therefore found that the EEC's preferential tariff treatment of imports of bananas was inconsistent with Article I:1.

### **Article XXIV - Free Trade Areas**

156. The Panel proceeded to examine the claim of the **EEC** that its banana import measures, even if inconsistent with Article I, were justified under the provisions of Article XXIV relating to free trade areas. According to the EEC, free trade areas in terms of Article XXIV had been established between the EEC and the ACP countries by virtue of the Fourth ACP-EEC Convention, signed in Lomé on 15 December 1989 ("Lomé Convention"). In the view of the EEC, the Panel could, on the basis of the procedures of Article XXIII, only examine "specific measures", and not the overall consistency of the Lomé Convention with Article XXIV, because paragraph 7 of that Article provided for a special procedure for the examination of free trade areas. **Colombia, Costa Rica, Guatemala and Nicaragua** replied that the EEC measures were not justified under Article XXIV, since the Lomé Convention did not meet the conditions of a free trade area as set out in that Article. Furthermore, they claimed that it was within the mandate of the Panel to examine this issue, despite the initiation of a working party procedure.

157. The Panel first examined the argument of the EEC that Article XXIV:7 sets out special procedures for the examination of free trade areas by the CONTRACTING PARTIES, and that the overall consistency of such free trade areas with Article XXIV could therefore not be investigated by a panel

established under Article XXIII. The Panel began its examination by noting that the CONTRACTING PARTIES' decisions relating to the various Lomé Conventions had not explicitly decided on this issue. The notifications of the Lomé Conventions to the CONTRACTING PARTIES had not specifically referred to Article XXIV<sup>103</sup>. Likewise, the terms of reference of the working parties examining these Conventions merely referred to an examination in the light of the relevant GATT provisions without a specific reference to Article XXIV<sup>104</sup>. Also, the adoption of the reports of the working parties which had examined the Conventions did not constitute a decision that they fell within the framework of Article XXIV because none of these reports contained any agreed conclusions on this issue.<sup>105</sup> The Panel considered, therefore, that the decisions of the CONTRACTING PARTIES relating to the examination of the Lomé Conventions did not establish that the procedures of Article XXIV:7 necessarily applied to them.

158. The Panel observed that, whatever the precise relationship between the procedures under Articles XXIII and XXIV, the provisions of Article XXIV:7 empower the CONTRACTING PARTIES to make recommendations **only** on agreements establishing a customs union or free trade area, or interim agreements leading to such a union or area. These provisions thus do not apply to **any** agreement notified to the CONTRACTING PARTIES but only to the four specified types of agreements. The Panel therefore concluded that, notwithstanding the issue of whether the procedures of Article XXIV:7 supersede those of Article XXIII:2, it would first have to examine whether the Lomé Convention is an agreement of the type to which the procedures of Article XXIV:7 apply. The Panel could not accept that tariff preferences inconsistent with Article I:1 would, by notification of the preferential arrangement and invocation of Article XXIV against the objections of other contracting parties, escape any examination by a panel established under Article XXIII. If this view were endorsed, a mere communication of a contracting party invoking Article XXIV could deprive all other contracting parties of their procedural rights under Article XXIII:2, and therefore also of the effective protection of their substantive rights, in particular those under Article I:1. The Panel concluded therefore that a panel, faced with an invocation of Article XXIV, first had to examine whether or not this provision applied to the agreement in question.

159. The Panel then proceeded to examine whether the Lomé Convention was one of the types of agreement mentioned in Article XXIV. The Panel noted that, in the view of the EEC, the Lomé Convention established free trade areas in the sense of Article XXIV:8(b), which defines a free-trade area in the following terms:

"A free-trade area shall be understood to mean a group of two or more customs territories in which the duties and other restrictive regulations of commerce ... are eliminated on substantially all the trade between the constituent territories in products originating in such territories."

In the view of the Panel, the use of the plural in the phrases "between the constituent territories" and "originating in such territories" made it clear that only agreements providing for an obligation to liberalize the trade in products originating in **all** of the constituent territories could be considered to establish a free-trade area within the meaning of Article XXIV:8(b). The Panel noted in this respect that Article 25 of the Lomé Convention states that trade arrangements under it "shall be based on the principle of free access to the EEC market for products originating in the ACP States", but "shall not comprise any element of reciprocity for those States as regards free access".<sup>106</sup> The Convention

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<sup>103</sup> Cf. document L/7153.

<sup>104</sup> Cf. document L/7188/Rev.2.

<sup>105</sup> Report of the working parties on: ACP-EEC Convention of Lomé, BISD 23S/46, adopted on 15 July 1976; Second ACP-EEC Convention of Lomé, BISD 29S/119, adopted 31 March 1982; Third ACP-EEC Convention of Lomé, BISD 35S/321, adopted on 22 September 1988.

<sup>106</sup> See also Articles 168 and 174 of the Lomé Convention.

therefore did not provide for any liberalization of trade in products originating in the EEC. Although the reference in Article 174 to non-reciprocal obligations for the duration of the convention might indicate the possibility of a policy change after the expiration of this Lomé Convention, it did not establish an obligation to liberalize imports originating in the EEC. This lack of **any** obligation of the sixty-nine ACP countries to dismantle their trade barriers, and the acceptance of an obligation to remove trade barriers only on imports into the customs territory of the EEC, made the trade arrangements set out in the Convention substantially different from those of a free trade area, as defined in Article XXIV:8(b).

160. The Panel then proceeded to examine the argument of the EEC that the conditions set out in Article XXIV:8(b) had to be read in the light of Part IV of the General Agreement, in particular Article XXXVI:8 which states:

"The developed contracting parties do not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to the trade of less-developed contracting parties".

A Note to this provision adds:

"It is understood that the term "do not expect reciprocity" means, in accordance with the objectives set forth in this Article, that the less-developed contracting parties should not be expected, in the course of trade negotiations, to make contributions which are inconsistent with their individual development, financial and trade needs, taking into consideration past trade developments."

"This paragraph would apply in the event of action under Section A of Article XVIII, Article XXVIII, Article XXVIIIbis, ... Article XXXIII, or any other procedure under this Agreement."

The Panel noted that Article XXXVI:8 limits the right of developed contracting parties to demand reciprocity from developing contracting parties in "procedures under" the General Agreement. The Panel was thus faced with the following interpretative issue: could a limitation on the expectation of reciprocity in procedures under the General Agreement be understood to include procedures leading to the formation of a non-reciprocal free trade area between developed and developing countries?

161. The Panel observed that the Note to Article XXXVI:8 makes clear that this Article is applicable to procedures under specific provisions of the General Agreement - Articles XVIII:A, XXVIII, XXVIIIbis, and XXXIII. These procedures involve:

- the negotiation of tariff concessions leading to an accession pursuant to Article XXXIII;
- multilateral tariff negotiations pursuant to Article XXVIIIbis; and
- the renegotiation of tariff concessions with other contracting parties whose right to negotiate is based on a status (holder of initial negotiating rights, substantial interest, or principal supplying interest) accorded directly by the CONTRACTING PARTIES or through the provisions of the General Agreement (Articles XVIII:A and XXVIII).

In each case, the status of the participants in these procedures, and the procedures themselves, are regulated under the General Agreement. Moreover, the procedures cited in the Note to Article XXXVI:8 provide for, or imply, a right to demand reciprocal tariff reductions without, as in the case of Article XXIV:8(b), making reciprocal trade liberalization a mandatory requirement. The Panel then examined Article XXIV in this light. It observed that Article XXIV was not specifically mentioned in the Note to Article XXXVI:8 and that the participants in the negotiations of a free trade area in the sense

of Article XXIV, although involved in a process of tariff reduction, did not derive their negotiating status from the General Agreement, nor were they bound to follow procedures set out under the General Agreement for the conclusion of the agreement. The wording and underlying rationale of the Note to Article XXXVI:8 thus suggested to the Panel that Article XXXVI:8 and its Note were not intended to apply to negotiations outside the procedural framework of the General Agreement, such as negotiations of a free trade area.

162. The Panel further observed that this interpretation was consistent with the findings of a previous panel. That panel, in examining the allocation of quotas under Article XIII, had found that the provisions of Part IV cannot override obligations, in particular the obligation to accord most-favoured-nation treatment, owed under other parts of the General Agreement. That panel had stated:

"While noting that provision for some developing exporting countries of assured increase in access to Norway's textile and clothing markets might be consistent for those countries with the spirit and objectives of Part IV of the GATT, this cannot be cited as justification for actions which would be inconsistent with a country's obligations under Part II of the GATT."<sup>107</sup>

The Panel also noted that the drafting history of Part IV supported such an interpretation. The authorization of special preferences to developing countries had been suggested during the negotiations of Part IV, but had not been included in the final text.<sup>108</sup> The Panel noted that it was only much later, in 1971, that the CONTRACTING PARTIES had, through the waiver of the Generalized System of Preferences ("GSP"), permitted developed countries to accord non-reciprocal and non-discriminatory preferences to developing countries<sup>109</sup>, preferences now permitted under the Enabling Clause adopted in 1979.<sup>110</sup> Had non-reciprocal agreements between developed and developing contracting parties been considered justifiable under Article XXIV and Part IV, the decisions of the CONTRACTING PARTIES on the GSP and the Enabling Clause would have been largely unnecessary. Developed countries could simply have formed a "free-trade area" with selected developing countries by reducing barriers unilaterally on imports from these countries. The Panel found for these reasons that the provisions of Part IV of the General Agreement, in particular Article XXXVI:8, could not be interpreted as altering the rights and obligations of the contracting parties under Article XXIV. The Panel also noted the 1966 report of the working party which examined the Yaoundé Convention, in which the EEC representative is reported to have stated:

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<sup>107</sup> Report of the panel on Norway - Restrictions on imports of certain textile products, BISD 27S/119, page 125-6, paragraph 15, adopted on 18 June 1980.

<sup>108</sup> Report of the working party on Preferences, BISD 13S/100, submitted to the CONTRACTING PARTIES on 25 November 1964. Conclusion by Council on working party on Preferences, C/M/23 at page 6 (noting impossibility of agreeing on conclusion of clause on preferences).

<sup>109</sup> Generalized System of Preferences, Decision of 25 June 1971, L/3545.

<sup>110</sup> Decision of 28 November 1979 on "Differential and more favourable treatment, reciprocity and fuller participation of developing countries", L/4903.

"Part IV of the General Agreement, which did exist when the Convention entered into force, did not aim to modify the provisions of Article XXIV. The only test that the CONTRACTING PARTIES could apply to a free-trade area was whether it satisfied the requirements of Article XXIV."<sup>111</sup>

The Panel considered this as evidence of the understanding of contracting parties, shortly after the negotiations of Part IV, of the relationship of Part IV with Article XXIV. The Panel found therefore that the wording and underlying rationale of Article XXXVI:8 and its Note, and also its drafting history and subsequent interpretation in GATT practice, made clear that it was neither intended to modify Article XXIV:8(b) nor to justify preferences inconsistent with Article I:1 other than those specifically provided for in Article XXIV.

163. The Panel then proceeded to examine whether the Lomé Convention, even if Article XXIV:8 were to be read in conjunction with Part IV as suggested by the EEC, was the type of agreement which, under Article XXIV:5, could justify preferential tariffs on bananas accorded by the EEC to all ACP countries. The Panel observed that Article XXIV:5 covers the formation of free trade areas only "as between the territories of contracting parties", while the Lomé Convention included many non-contracting parties. The text of Article XXIV:5 makes it clear that a free-trade agreement with a country that is not a contracting party, absent a waiver from the CONTRACTING PARTIES, cannot justify infringements of the rights of third contracting parties to most-favoured-nation treatment pursuant to Article I. This clear wording is confirmed by the drafting history, which records that the procedures of Article XXIV:10 were included in the General Agreement to permit an approval by the CONTRACTING PARTIES of customs unions and free trade areas that include non-contracting parties. The reports on discussions at Havana of the corresponding paragraph of the Havana Charter note that:

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<sup>111</sup>Report of the working party on "EEC - Association Agreements with African and Malagasy States and Overseas Countries and Territories", BISD 14S/100, 106, paragraph 14, adopted on 4 April 1966.

"It was the understanding of the Sub-Committee that this new paragraph 6 will enable the Organization to approve the establishment of customs unions and free-trade areas which include non-Members."<sup>112</sup>

This implied, in the view of the Panel, that the Lomé Convention, even if it were to meet the requirements of a free trade area as defined in Article XXIV:8(b), could not justify, under Article XXIV:5, the preferential banana import tariffs which were extended in contravention of Article I:1 to ACP countries that were not contracting parties.

164. The Panel concluded from the considerations set out above that the Lomé Convention was not an agreement of the type covered by Article XXIV. This Article could therefore not justify the inconsistency with Article I of the tariff preferences for bananas accorded by the EEC to the ACP countries.

### **Article XX(h) - Commodity Agreements**

165. The Panel then examined the argument made by the ACP countries and endorsed by the EEC that the preferences on imports of bananas provided for in the Yaoundé and Lomé Conventions, granted for more than thirty years to exports from ACP countries, were justified under Article XX(h) as being undertaken in pursuance of an intergovernmental commodity agreement. **Guatemala** rejected this argument, stating that the Lomé Convention could not be considered to be a commodity agreement in the sense of Article XX(h), since it was not open to participation by all contracting parties, did not provide non-discriminatory treatment to all involved, and was not established under the authority of an international organization. Further, the Lomé Convention and its predecessor conventions had not been notified to the GATT as commodity agreements.

166. The Panel noted that Article XX(h) may be invoked to justify a measure otherwise inconsistent with the General Agreement if it is

"undertaken in pursuance of obligations under any intergovernmental commodity agreement which conforms to criteria submitted to the CONTRACTING PARTIES and not disapproved by them or which is itself so submitted and not so disapproved"

and if it meets the general requirements set out at the beginning of Article XX.

A Note to Article XX(h) further adds:

"The exception provided for in this sub-paragraph extends to any commodity agreement which conforms to the principles approved by the Economic and Social Council in its resolution 30 (IV) of 28 March 1947."

The Panel noted that Article XX(h) thus sets out three methods by which an intergovernmental commodity agreement can be brought within the exception in Article XX(h):

- either it conforms to criteria which have been submitted to the CONTRACTING PARTIES and not disapproved by them, or
- the agreement itself is submitted to and not disapproved by the CONTRACTING PARTIES, or

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<sup>112</sup>Havana Reports, page 52, paragraph 27.

- the agreement conforms to the principles approved by the ECOSOC Resolution 30(IV) of 28 March 1947.

The Panel noted that no criteria for commodity agreements had ever been submitted to the CONTRACTING PARTIES, nor had any commodity agreements themselves been "so submitted and so disapproved". The Panel considered that, in order to benefit from the exception in Article XX(h), such criteria or agreements had to be submitted to the CONTRACTING PARTIES with an explicit invocation of that provision. The Panel considered that this was a reasonable interpretation of Article XX(h), given the text of Article XX(h), which uses the terms "so submitted" and "so disapproved", and the fact that only the non-disapproval of the CONTRACTING PARTIES is required. The Panel noted that neither the Lomé Convention nor its predecessor agreements had been notified to the CONTRACTING PARTIES as commodity agreements covered by Article XX(h). Turning to the principles in the ECOSOC Resolution 30(IV), the Panel noted that this Resolution required, *inter alia*, that the negotiation of, and participation in, an international commodity agreement must be open to all interested countries and must avoid, as also stipulated in the requirements set out at the beginning of Article XX of the General Agreement, unjustifiable discrimination between countries. The Panel, noting the limited membership of the Lomé Convention and noting further that the EEC had never claimed the Lomé Convention to be a non-discriminatory commodity agreement open to all banana producer and consumer countries, found that the criteria of the ECOSOC Resolution 30(IV) had not been met. The Panel therefore concluded that Article XX(h) could not justify the inconsistency with Article I:1 of the EEC's banana preferences.

#### **Article XXIII - Nullification or Impairment**

167. The Panel noted the view of **Colombia, Costa Rica, Guatemala, Nicaragua and Venezuela** that the measures taken by the EEC affecting the importation of bananas from complaining countries - because of their inconsistency with the General Agreement - were a *prima facie* case of nullification or impairment of benefits under Article XXIII of the General Agreement. The EEC responded that a *prima facie* case must nonetheless be supported by evidence of "clear infringement" of the provisions of the General Agreement. The Panel recalled the provisions of paragraph 5 of the Annex to the Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance, which states that "there is normally a presumption that a breach of the rules has an adverse impact on other contracting parties, and in such cases, it is up to the contracting parties against whom the complaint has been brought to rebut the charge."<sup>113</sup> The Panel considered that the EEC had not rebutted the presumption that its violation of provisions of the General Agreement had nullified or impaired benefits of the complaining parties.

#### **Concluding Remarks by the Panel**

168. The Panel, throughout its proceedings, was well aware of the economic and social effects of the EEC measures on the ACP banana exporting countries, as well as on the Latin American banana exporting countries. However, it had to take into account that its terms of reference were to examine the EEC measures at issue exclusively in terms of their legal consistency with the General Agreement. The procedures of Article XXIII serve to ensure the settlement of disputes arising from the existing provisions of the General Agreement. The purpose of these procedures is not to modify the rights and obligations under the existing provisions in the light of social and economic considerations. The Panel wishes to point out, however, that the CONTRACTING PARTIES have at their disposal other procedures under the General Agreement, including Articles XXIV:10 and XXV:5, that are designed to allow CONTRACTING PARTIES to take into account, in the view of the Panel, economic and social

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<sup>113</sup>"Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance", BISD 26S/210, adopted on 28 November 1979.

considerations. The adoption of this report would not prevent the CONTRACTING PARTIES from taking action under any of these Articles. The Panel also wishes to emphasize that nothing in its report would prevent the parties to the Lomé Convention from achieving their treaty objectives, including the objective of promoting the production and commercialization of bananas from ACP countries through the use of policy instruments consistent with the General Agreement.

## VI. CONCLUSIONS

169. In the light of its findings set out above, the Panel **concluded** that:

- (a) the tariff quota on imports of bananas was not inconsistent with Articles XI and XIII;
- (b) the security requirements and other formalities connected with the importation of bananas were not inconsistent with Article VIII; and
- (c) the EEC had not acted inconsistently with its obligation under Article XVI:1 to discuss, upon request, the possibility of limiting the subsidization of bananas.

170. The Panel further **concluded** that:

- (a) the specific duties levied by the EEC on imports of bananas were inconsistent with Article II;
- (b) the preferential tariff rates on bananas accorded by the EEC to ACP countries were inconsistent with Article I and could neither be justified by Article XXIV nor by Article XX(h); and
- (c) the allocation of import licenses granting access to imports under the tariff quota was inconsistent with Article III and Article I and could neither be justified by Article XXIV nor by Article XX(h).

171. The Panel **recommends** that the CONTRACTING PARTIES request the EEC to bring its tariffs on bananas and the allocation of its tariff quota licenses into conformity with its obligations under the General Agreement.

**ANNEX**  
EEC SOURCES OF BANANAS - 1989

In Metric Tons

DESTINATION	BELGIUM- LUXEMBURG	DENMARK	GERMANY	GREECE	SPAIN	FRANCE	IRELAND	ITALY	NETHERLANDS	PORTUGAL	UNITED KINGDOM	TOTAL EEC
ORIGIN												
COSTA RICA	24,216	16,255	213,972	1,074		4,356	25,213	124,088	17,083	11,537	11,324	449,118
PANAMA	32,251	14,274	267,515	266		351	1,618	50,536	25,894	6,450	1,342	400,497
CANARY ISLANDS			249		340,783	72				240		341,344
COLOMBIA	47,308	4,863	129,378	612		3,007	10,752	50,663	52,196	11,390	21,136	331,305
ECUADOR	24,440	2,788	154,486	22		2,644	2,886	51,770	15,101	14,670	5,092	273,899
MARTINIQUE				35		197,907		131			353	198,426
HONDURAS	10,766	7,021	68,908	99			2,433	33,659	10,581	9,703	5,676	148,846
ST LUCIA				6,408				8,949			100,928	116,285
GADELOUPE						91,318						91,318
IVORY COAST			6			84,781		305	1		66	85,159
ST VINCENT & GRENADINES				2,221				2,056			63,319	67,596
GUATEMALA	6,650	344	18,670			3,590	872	23,122	3,621	1,476	3,482	61,827
SOMALIA				22,300				36,708	371	9		59,388
CAMEROON				21		54,306		226			1,518	56,071
DOMINICA		17		1,559				3,626	20		46,092	51,314
JAMAICA							99		19		39,101	39,219
SURINAME											29,945	29,945
NICARAGUA	10,295	4,074	10,410	4				36	1,497	2,580	141	29,037
BELIZE											26,580	26,580
PHILIPPINES	59		755	33		4,694	19	9,848	20	4,544	1	19,973
GRENADA								426	2		7,840	8,268
CAPE VERDE										2,734		2,734

DOMINICAN REPUBLIC	8		66	646					40		95	855
MADEIRA										37		37
OTHERS	257	150	523	466		70	223	74	289	60	485	2,597
WORLD*	156,250	49,786	864,938	35,766	340,783	447,096	44,115	396,223	126,735	65,430	364,516	2,891,638

\* Includes bananas from Canary Islands, Guadeloupe, Martinique and Madeira.

Note: Figures include fresh bananas and plantains.

Source: NIMEX 1989

EEC SOURCES OF BANANAS - 1990

In Metric Tons

DESTINATION	BELGIUM- LUXEMBURG	DENMARK	GERMANY	GREECE	SPAIN	FRANCE	IRELAND	ITALY	NETHERLANDS	PORTUGAL	UNITED KINGDOM	TOTAL EEC
ORIGIN												
COSTA RICA	31,504	20,120	343,844	4,907		5,770	2,549	105,134	18,469	4,845	11,378	548,520
PANAMA	39,919	11,579	351,282	4,595		793	1,912	81,855	33,297	1,448	827	527,507
COLOMBIA	70,652	3,709	210,535	3,254		3,775	2,862	44,785	22,420	29,365	10,553	401,910
ECUADOR	14,501	1,765	158,821	16,193		17,102	25,405	66,374	12,061	29,299	10,739	352,260
CANARY ISLANDS			543		345,935	47				5,071	6	351,602
MARTINIQUE	38		185			216,907			20		2,290	219,440
ST LUCIA				1,117		537		15,623			109,948	127,225
HONDURAS	6,779	6,278	63,471	1,357		1,531	2,029	20,524	4,464	3,628	13,419	123,480
IVORY COAST	45	17	109			94,306		132	361		260	95,230
ST VINCENT & GRENADINES			361	172				569	1		80,433	81,536
CAMEROON						74,891		107	1		2,629	77,628
GUADELOUPE			45			73,869		614	11		69	74,608
JAMAICA											63,181	63,181
SOMALIA				13,710				44,075				57,785
DOMINICA			13	326				5,824	26		46,227	52,416
NICARAGUA	5,416	2,055	31,602	17		1,007		207	1,732	4,841	723	47,600
SURINAME				9					4		27,692	27,705
BELIZE									9		24,030	24,039
GUATEMALA	2,873	290	1,512			1,225	218		1,149		2,103	9,370
GRENADA									15		8,174	8,189
PHILIPPINES			386			671		738		3,229		5,024
DOMINICAN REPUBLIC	22		1,050	286			562		1,748		161	3,829
UNITED STATES		1	1,125			2	207	2,337	5		1	3,678

CAPE VERDE										2,715		2,715
MADEIRA										38		38
OTHERS	1,321	92	664	15		26	71	2,512	507		313	5,521
WORLD*	173,070	45,906	1,165,548	45,958	345,935	492,459	35,815	391,410	96,300	84,479	415,156	3,292,036

\* Includes bananas from Canary Islands, Guadeloupe, Martinique

Note: Figures include fresh bananas and plantains.

EEC SOURCES OF BANANAS - 1991

In Metric Tons

DESTINATION	BELGIUM- LUXEMBURG	DENMARK	GERMANY	GREECE	SPAIN	FRANCE	IRELAND	ITALY	NETHERLANDS	PORTUGAL	UNITED KINGDOM	TOTAL EEC
ORIGIN												
ECUADOR	26,846	9,536	355,239	13,314			26,344	102,098	23,943	25,580	17,866	600,766
COSTA RICA	35,533	22,871	341,291	5,160		20	1,891	137,676	8,141	5,955	10,835	569,373
COLOMBIA	85,134	3,796	248,990	7,851		145	11,637	90,554	11,012	26,536	26,692	512,347
PANAMA	37,861	5,213	296,757	8,791			71	104,148	21,642	6,839	3,252	484,574
CANARY ISLANDS			637		338,768	15		2	1		27	339,450
MARTINIQUE			7			179,785		38			1,239	181,069
HONDURAS	10,816	4,041	64,955	972			280	14,212	2,052	28,233	12,835	138,396
IVORY COAST	146	86	160			115,396		40	214	73	310	116,425
GUADELOUPE		53	7			116,046					18	116,124
CAMEROON						89,070		23,050		227	3,494	115,841
ST LUCIA				114				17,438			85,099	102,651
JAMAICA	5						19	590			69,502	70,116
NICARAGUA	3,146	5,657	37,553	372			17	13,534	3,116	1,787	36	65,218
ST VINCENT & GRENADINES				6				2,090			60,967	63,063
DOMINICA				5			52	6,835	36		48,033	54,961
SURINAME									45		27,699	27,744
BELIZE	117							356			19,143	19,616
GUATEMALA	1,875	904	147				150		435		9,675	13,186
DOMINICAN REPUBLIC	652	2,658	1,200				1,542	648	1,635		1,963	10,298
GRENADA									5	1,407	6,774	8,186
SOMALIA				2,671				5,506				8,177
CAPE VERDE										3,011		3,011
UNITED STATES	404		1,196	44			291		19		11	1,965

MALAYSIA									5		1,419	1,424
KENYA	3		55					1,334	21		5	1,418
MADEIRA										40		40
OTHERS	1,316	39	1,040	223		14	221		310	19	552	3,734
WORLD*	203,854	54,854	1,349,234	39,523	338,768	500,491	42,515	520,148	72,632	99,707	407,446	3,629,172

Source: NIMEX 1991. \* Includes bananas from Canary Islands, Guadeloupe, Martinique and Madeira.

Note: Figures include fresh bananas and plantains.

### EEC SOURCES OF BANANAS - 1992

In Metric Tons

DESTINATION	BELGIUM- LUXEMBOUR G	DENMARK	GERMANY	GREECE	SPAIN	FRANCE	IRELAND	ITALY	NETHERLANDS	PORTUGAL	UNITED KINGDOM	TOTAL EEC
ORIGIN												
ECUADOR	35,903	10,927	433,762	15,384		2	26,473	105,955	16,707	22,231	9,717	677,061
COLOMBIA	83,242	9,603	270,619	3,016		1,149	15,355	74,623	14,324	26,002	20,694	518,627
PANAMA	96,177	6,093	280,572	13,309			129	75,187	943	6,179	121	478,710
COSTA RICA	49,132	16,212	253,560	7,628		1	3,903	74,953	6,418	13,992	36,711	462,510
CANARY ISLANDS			531		345,973	49					70	346,623
MARTINIQUE			32			197,088		771	21		138	198,050
HONDURAS	23,225	5,110	102,116	585			1,767	28,291	683	20,750	15,257	197,784
IVORY COAST	3,554	17	45	52		130,622		7,693	18		4,264	146,265
ST LUCIA				65				12,160			111,347	123,572
GUADELOUPE						115,163						115,163
CAMEROON	20		20			79,330		24,612		30	6,702	110,714
JAMAICA								51			74,774	74,825
ST VINCENT & GRENADINES	15			22				16,680			56,233	72,950
DOMINICA			29	57				10,943			44,658	55,687
DOMINICAN REPUBLIC	2,509	2,069	1,971				2,669	27,143	1,204		926	38,491
GUATEMALA	2,738	1,058	9,848	1,934			160	9,579	198	3,887	8,006	37,408

SURINAME									159		29,790	29,949
BELIZE	22							139	9		28,323	28,493
NICARAGUA	919	1,842	17,335	33				2,263	1,897	2,243		26,532
MEXICO	790	75	3,667			9		4,178	1,235		35	9,989
GRENADA									4		6,010	6,014
CAPE VERDE										1,876		1,876
MALAYSIA		5							3		1,579	1,587
JAPAN		38	5					864				907
UNITED STATES	438		18		19		227	39	20			761
ISRAEL			279						55			334
SOMALIA				181								181
OTHERS	165	53	305	17	121	97	171	21	108		342	1,400
WORLD*	298,849	53,102	1,374,714	42,283	346,113	523,510	50,854	476,145	44,006	97,190	455,697	3,762,463

\* Figures include bananas from Canary Islands, Guadeloupe and Martinique.

Note: Figures include fresh bananas and plantains

Source: NIMEX 1992