

**EUROPEAN COMMUNITIES - REGIME FOR THE
IMPORTATION, SALE AND DISTRIBUTION OF BANANAS
- RECOURSE TO ARTICLE 21.5 BY ECUADOR -**

REPORT OF THE PANEL

The report of the Panel on European Communities - Regime for the Importation, Sale and Distribution of Bananas - Recourse to Article 21.5 by Ecuador - is being circulated to all Members, pursuant to the DSU. The report is being circulated as an unrestricted document from 12 April 1999 pursuant to the Procedures for the Circulation and Derestriction of WTO Documents (WT/L/160/Rev.1). Members are reminded that in accordance with the DSU only parties to the dispute may appeal a panel report. An appeal shall be limited to issues of law covered in the Panel report and legal interpretations developed by the Panel. There shall be no *ex parte* communications with the Panel or Appellate Body concerning matters under consideration by the Panel or Appellate Body.

I. INTRODUCTION

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

1.2 On 13 November 1998, Ecuador requested the reactivation of the 17 September 1998 consultations (WT/DS27/30 and Add.1). Consultations were held between the European Communities and Ecuador on 23 November 1998. As these consultations did not result in a mutually satisfactory solution of the matter, Ecuador requested, on 18 December 1998, the DSB to reconvene the original panel in accordance with Article 21.5 of the DSU to examine the implementation of the DSB recommendations in the light of the General Agreement on Tariffs and Trade (GATT), the General Agreement on Trade in Services (GATS), and the Agreement on Import Licensing Procedures (WT/DS27/41).

1.3 The DSB, at its meeting on 12 January 1999, established a panel with the original panel members in accordance with Article 21.5 of the DSU. Brazil, Belize, Cameroon, Colombia, Costa Rica, Côte d'Ivoire, Dominica, Dominican Republic, Grenada, Haiti, Jamaica, Mauritius, Nicaragua, Saint Lucia, and Saint Vincent and the Grenadines reserved their third party rights to make a submission and to be heard by the Panel in accordance with Article 10 of the DSU.

(i) *Terms of reference*

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

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

(ii) *Panel composition*

1.5 The Panel was composed as follows:

Chairman: Mr. Stuart Harbinson

Members: Mr. Kym Anderson
Mr. Christian Häberli

1.6 The Panel submitted its report to the parties to the dispute on 6 April 1999.

II. FACTUAL ASPECTS

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

A. ACCESS QUANTITIES AND COUNTRY ALLOCATIONS

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

(i) *Traditional ACP imports*

2.3 Traditional ACP imports are defined as banana imports from twelve ACP countries¹ up to an annual aggregate limit of 857,700 tonnes.² As part of its implementation measures of the above-mentioned DSB recommendations, the EC has eliminated the country-specific allocations that previously existed for each of the twelve ACP countries. The aggregate import volume is not bound in the EC Schedule and there is no provision in the EC regulations for an increase in the level of the traditional ACP quantity.

(ii) *Third-country and non-traditional ACP imports*

2.4 The EC has a tariff quota commitment for banana imports of 2.2 million tonnes (net weight) bound in its Schedule. Regulation 1637 provides for additional tariff quota access of 353,000 tonnes per year.³ This latter quantity is not bound in the EC Schedule (autonomous tariff quota).

2.5 The aggregate tariff quota quantity of 2.553 million tonnes has been allocated to Colombia, Costa Rica, Ecuador, and Panama and an "others" category in the proportions set out in Table 1. According to Regulation 2362, the country-specific allocations are based on imports into the EC during the years 1994 to 1996.⁴ There are no specific provisions for reallocating unfilled portions of the country-specific allocations or the "others" category.⁵ The "others" category of the tariff quota is reserved for imports of third-country bananas as well as non-traditional ACP bananas.

¹ Belize, Cameroon, Cape Verde, Côte d'Ivoire, Dominica, Grenada, Jamaica, Madagascar, Somalia, St. Lucia, St. Vincent and the Grenadines, and Suriname, see Annex to Regulation 1637.

² Annex I to Regulation 2362.

³ Article 18.2 of Regulation 1637.

⁴ Paragraph (2) of Regulation 2362.

⁵ The provisions which allowed the reallocation of unfilled portions of the country-specific allocations have been repealed, see Article 31 of Regulation 2362.

Table 1 – EC Tariff Quota Allocations

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

Note: Calculation of shares done by Secretariat based on 2.553.0 million tonne tariff quota and the percentage shares according to Annex I to Regulation 2362.

2.6 Non-traditional imports from ACP countries cover any quantities supplied in excess of traditional quantities supplied by ACP countries (i.e. in excess of 857,700 tonnes) or any quantities supplied by ACP countries which are not traditional suppliers to the EC, such as the Dominican Republic. Non-traditional bananas may be imported duty-free under the "others" category of the tariff quota and are limited to 240,748 tonnes (9.43 per cent of the 2.553 million tonne tariff quota). The country-specific allocations for non-traditional ACP imports provided for in EC Regulation 478/95 as the result of the Banana Framework Agreement (BFA) (totalling 90,000 tonnes) have been eliminated.⁶

B. TARIFF TREATMENT

2.7 Table 2 shows the EC tariffs applicable to traditional ACP, non-traditional ACP as well as third-country banana imports. It also summarizes the key modifications of the banana import regime with respect to tariffs, country-specific allocations and volumes which the European Communities has undertaken as part of its implementation measures.

⁶ Article 31 of Regulation 2362.

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

Category of banana imports	Access volume	Source/definition	Tariffs applied	Modifications of the EC tariff quota regime under Regulations 1637 and 2362
Traditional ACP bananas	857,700 tonnes	Imports without country-specific quantitative limits from 12 traditional ACP countries.*	Duty-free	- elimination of country-specific allocations.
Non-traditional ACP bananas	2,553,000 tonnes	Imports of traditional ACP quantities above the 857,700 tonnes or any quantities supplied by ACP countries which are non-traditional suppliers.	Duty-free up to 240,748 tonnes. For additional imports the bound out-of-quota duty (currently 737 Euro per tonne minus 200 Euro per tonne) applies.	- elimination of country-specific allocations and "other" category totalling 90,000 tonnes. - increase in duty-free access opportunities from 90,000 tonnes to 240,748 tonnes under the "others" category of the 2.553 million tonnes tariff quota. - increase of the margin of preference for out-of-quota imports from 100 to 200 Euro per tonne.
Third-country bananas		Imports from any non-ACP source.	75 Euro per tonne up to 2.553 million tonnes. There are 4 country-specific allocations plus an "others" category. For additional imports the bound out-of-quota tariff applies (currently 737 Euro per tonne).	- modified country-specific allocations allocated to four Members and an "others" category - transferability of unfilled portions of country-specific allocations eliminated - increase in access opportunities by 90,000 tonnes to 2.553 million tonnes as the result of the elimination of country-specific allocations to non-traditional ACP suppliers.

*Belize, Cameroon, Cape Verde, Côte d'Ivoire, Dominica, Grenada, Jamaica, Madagascar, Somalia, St. Lucia, St. Vincent and the Grenadines, and Suriname.

C. ADMINISTRATIVE ASPECTS OF THE BANANA IMPORT REGIME

(i) Eligible operators

2.8 The tariff quota of 2.553 million tonnes and traditional ACP quantities (857,700 tonnes) are made available to two categories of operators – traditional operators and newcomers. Under the EC's amended banana import regime, the operator categories (A, B and C) and the activity functions (primary importer, secondary importer/customs clearer and ripener) have been abolished.

2.9 Under the amended regime, operators have access to the above quantities in the following proportions:⁷

traditional operators	92 per cent
newcomers	8 per cent.

⁷ Article 2.1 of Regulation 2362.

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

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

2.11 To qualify as a newcomer, an operator must be established in the European Communities at the time of registration and must have been engaged "independently and on his own account in the commercial activity of importing fresh fruit and vegetables falling within Chapters 7 and 8 of the Tariff and Statistical Nomenclature and the Common Customs Tariff, or products under Chapter 9 [coffee, tea, maté and spices] thereof if he has also imported products falling within Chapters 7 and 8 in one of the three years immediately preceding the year in respect of which registration is sought ...". The declared customs value of such imports during that three-year period must be at least Euro 400,000.¹⁰

2.12 For the purposes of registration, newcomer operators are to provide, *inter alia*, to the competent authority in one of the EC member States certified evidence of having imported the products referred to above (import licences used or customs documents, as appropriate) and of having complied with the above minimum import value requirement.¹¹ Applications for registration must be made by 1 July of each year in not more than one of the member States. Renewal of a newcomer's registration is subject to submission of proof that at least 50 per cent of the quantity allocated was imported on the newcomer's own account.¹²

(ii) *Determination of traditional operators' reference quantities and newcomer allocations*

2.13 For each traditional operator, import entitlements are established (i.e. the annual "reference quantity") on the basis of quantities of bananas "actually imported" during the reference period.¹³ The reference period for 1999 covers the years 1994-1996.¹⁴ Written applications for reference quantities have to be submitted in one of the member States by 1 July of each year.¹⁵ In their applications, operators have to provide data of the total volume of imports from origins covered by the tariff quota and of traditional ACP bananas during each year of the applicable reference period. Import volumes ("actual imports") are to be documented through both (i) copies of the import licences used either by the holder, or in the case of a transfer of the licence, by the transferee, and (ii) proof of payment of the customs duties. A traditional operator who furnishes proof of payment of customs duties, for the release into free circulation of a given quantity of bananas, without being the holder or the transferee holder of the relevant import licence, is considered to have actually imported the declared quantity provided that he has actually registered in a member State under Regulation (EEC) 1442/93 and/or fulfils the conditions of Regulation 2362 for registration as a traditional operator.¹⁶

⁸ Article 2.2 of Regulation 2362.

⁹ The minimum import quantity is 100 tonnes in any one year of the reference period, or 20 tonnes for bananas equal to or shorter than 10 cm. Article 3 of Regulation 2362.

¹⁰ Article 7 of Regulation 2362.

¹¹ Article 8 of Regulation 2362.

¹² *Idem*.

¹³ Article 4 of Regulation 2362.

¹⁴ For operators established in the new member States (Austria, Finland and Sweden) the corresponding reference period is 1994 and the first three quarters of 1995, see Article 5.4 of Regulation 2362.

¹⁵ Article 5 of Regulation 2362.

¹⁶ Article 5.3 of Regulation 2362.

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

(iii) *Import licensing procedures*

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

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

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

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

2.19 After the first round, the EC Commission publishes the origins and quantities for which new import licence applications can be made. For licence requests for origins that are subject to a reduction coefficient, operators may either renounce their licence requests or make new licence requests for the unfulfilled portion of their original licence request.²³ Import licences cannot be used to import from origins other than the origin indicated on the licence.²⁴

2.20 Unused import licences are, if requested, re-allocated to the same operator, whether a licence holder or transferee, for use in a subsequent quarter in the same year as the original licence. Such applications are not subject to the reduction coefficient that may apply in that quarter.²⁵

2.21 Import licences are transferable once:

- (a) between traditional operators;
- (b) from traditional operators to eligible newcomers;
- (c) between eligible newcomers.

¹⁷ Article 9 of Regulation 2362.

¹⁸ Article 10 of Regulation 2362.

¹⁹ Article 14 of Regulation 2362.

²⁰ Article 15 of Regulation 2362.

²¹ Article 17 of Regulation 2362.

²² For the applicable reduction coefficients in the first quarter of 1999, see Regulation (EC) No. 2806/98 and Regulation (EC) No.102/1999.

²³ Article 18 of Regulation 2362.

²⁴ Article 15.4 of Regulation 2362.

²⁵ Article 20 of Regulation 2362.

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

D. LOMÉ WAIVER

2.23 The Fourth Lomé Convention, signed on 15 December 1989 between the European Communities and 68 African, Caribbean and Pacific (ACP) developing countries contains a protocol concerning bananas, along with provisions applying to products more generally. Like its predecessors, the Fourth Lomé Convention was notified to GATT and considered by a working party.

2.24 In December 1994, the European Communities was granted a waiver by the CONTRACTING PARTIES from the EC's obligations under Article I:1 of GATT 1947 as concerns the Lomé Convention.²⁸ The waiver provides, in paragraph 1 of the decision, as follows:

"[T]he provisions of paragraph 1 of Article I of the General Agreement shall be waived, until 29 February 2000, to the extent necessary to permit the European Communities to provide preferential treatment for products originating in ACP States as required by the relevant provisions of the Fourth Lomé Convention, without being required to extend the same preferential treatment to like products of any other contracting party."²⁹

2.25 In October 1996, the Lomé waiver was extended until 29 February 2000 (in accordance with the procedures mentioned in paragraph 1 of the Understanding in respect of Waivers and those of Article IX of the WTO Agreement).³⁰

²⁶ Article 21.3 of Regulation 2362.

²⁷ Article 21 of Regulation 2362.

²⁸ GATT document L/7539 of 10 October 1994 and L/7539/Corr.1.

²⁹ Paragraph 1 of GATT document L/7604 of 19 December 1994.

³⁰ WT/L/186 of 18 October 1996.

III. PROCEDURAL ISSUES

3.1 The **European Communities** contested the original complainants' position that consultations were not required under Article 21.5 of the DSU, since that provision referred explicitly to "these dispute settlement procedures", i.e. the entirety of the DSU. Consultations were in fact held on 17 September 1998 with all the original complainants on the amendments to Regulation 404 as set out in Regulation 1637. Also, in a communication of 13 November 1998³¹, Ecuador requested the "reactivation" of the consultations, which had started on 17 September 1998. In this communication, Ecuador explicitly referred to Regulation 2362. The consultations were held on 23 November 1998 in the presence of Ecuador and Mexico as original complainants.

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

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

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

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

³¹ WT/DS27/30 of 16 November 1998.

³² Ecuador's first submission, paragraph 27.

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

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

[Parties' arguments in Sections IV and V deleted from this version]

VI. FINDINGS

6.1 This case arises out of a challenge by Ecuador of the WTO-consistency of measures taken by the European Communities to implement the recommendations and rulings of the Dispute Settlement Body ("DSB") in *European Communities – Regime for the Importation, Sale and Distribution of Bananas* (DS/27/R/ECU & DS/27/AB/R). In particular, Ecuador claims that Regulations 1637/98 and 2362/98 are inconsistent with the EC's obligations under Articles I and XIII of GATT 1994 and Articles II and XVII of GATS. Ecuador also invokes Article 19 of the Dispute Settlement Understanding ("DSU") and requests the Panel to suggest how the European Communities could implement any recommendations that the Panel might make. We first consider certain procedural issues and our terms of reference and then examine Ecuador's claims.

A. WORKING PROCEDURES AND TIMETABLE

6.2 On 15 January 1999, we met with the parties to establish our working procedures and a timetable for the panel proceeding. Given the short period of time available to complete a proceeding under Article 21.5 of the DSU, we did not include in the timetable an interim review period. Both parties requested that we reconsider the possibility of having an interim report. We ultimately concluded that the time necessary to draft the report would not allow us to issue an interim report and still meet the 90-day deadline of Article 21.5. Accordingly, we confirm our initial decision not to provide an interim report.

B. TERMS OF REFERENCE

6.3 The European Communities argues that the terms of reference of this Panel are limited by Article 21.5 of the DSU to the "matters" on which the DSB adopted its recommendations or rulings based on the original panel and Appellate Body reports in this case.¹⁷² In the EC's view, this Panel can only verify the consistency of measures taken to comply with those recommendations and not consider other claims raised by Ecuador.¹⁷³ In particular, the European Communities notes that it would be disadvantaged if new claims were allowed because the shorter period of time allowed for an Article 21.5 panel process (90 days compared to a normal panel timetable of at least six months) would affect its ability to defend its measures and because it would not be entitled to a new reasonable period of time to implement any new panel recommendations or rulings. It also argues that it would be inappropriate for the Panel to make recommendations on implementation of the sort requested by Ecuador.

6.4 In Ecuador's view, the limitation proposed by the European Communities is not found in the text of Article 21.5, which refers to disagreements as to the consistency with covered agreements of measures taken to comply with DSB recommendations and rulings. As to the shorter period of time, Ecuador notes that the European Communities has spent 15 months considering the implementation of the original recommendations and rulings and thus does not need as much time as might be necessary in a first-time challenge to an import regime. It also notes that it has waited a long time for the European Communities to comply with its obligations under the WTO Agreement. As to its request that the Panel make specific recommendations and suggestions, Ecuador argues that it has the right to make such a request under Article 19 of the DSU.

¹⁷² Colombia and Costa Rica make a similar argument as third parties.

¹⁷³ According to the European Communities, such claims include Ecuador's arguments concerning its share of the tariff quota (e.g. concerning the "representative period", "special factors" and the effect of the so-called BFA reallocation), its request that the Panel suggest that the European Communities implement a global tariff quota for bananas, and its GATS arguments in respect of "actual" importers and newcomers.

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

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

6.6 As recently explained by the Appellate Body:

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

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

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

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

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

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

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

¹⁷⁴ WT/DS27/44.

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

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

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

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

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

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

C. ARTICLE XIII OF GATT 1994

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

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

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

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

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

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

6.15 The Annex to Regulation 1637/98 provides for an aggregate quantity of 857,700 tonnes for traditional imports from ACP States. Under the revised EC regime, there are no longer any country-specific allocations to the 12 traditional ACP States (i.e. Belize, Cameroon, Cape Verde, Côte d'Ivoire, Dominica, Grenada, Jamaica, Madagascar, Somalia, St. Lucia, St. Vincent & the Grenadines, and Suriname).¹⁸⁰

6.16 The relevant provisions of Article XIII are the following:

"Non-discriminatory Administration of Quantitative Restrictions

1. No prohibition or restriction shall be applied by any Member on the importation of any product of the territory of any other Member or on the exportation of any product destined for the territory of any other Member, unless the importation of the like product of all third countries or the exportation of the like product to all third countries is similarly prohibited or restricted.

2. In applying import restrictions to any product, Members shall aim at a distribution of trade in such product approaching as closely as possible the shares which the various Members might be expected to obtain in the absence of such restrictions and to this end shall observe the following provisions:

...

(d) In cases in which a quota is allocated among supplying countries the Member applying the restrictions may seek agreement with respect to the allocation of shares in the quota with all other Members having a substantial interest in supplying the product concerned. In cases in which this method is not reasonably practicable, the Member concerned shall allot to Members having a substantial interest in supplying the product shares based upon the proportions, supplied by such Members during a previous representative period, of the total quantity or value of imports of the product, due account being taken of any special factors which may have affected or may be

¹⁷⁸ Annex I to Regulation 2362/98.

¹⁷⁹ Calculation of absolute shares based on the 2,553,000 tonne tariff quota and the shares of substantial suppliers according to Annex I to Regulation 2362/98.

¹⁸⁰ Annex to Regulation 1637/98 and Annex I to Regulation 2362/98.

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

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

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

6.17 In examining the revised EC banana regime and its consistency with Article XIII, we recall that in *Bananas III* the Appellate Body overruled the panel's interpretation of the scope of the Lomé waiver and held that the Lomé waiver does not cover inconsistencies with Article XIII. Accordingly, in considering Article XIII issues, we do not consider what is or is not required by the Lomé Convention. We address that issue in connection with Ecuador's claims under Article I of GATT.

1. The 857,700 tonnes reserved for traditional imports from ACP States

6.18 Ecuador alleges that the division of the revised EC import regime for bananas into (i) an MFN tariff quota of 2,553,000 tonnes, in combination with (ii) an amount of 857,700 tonnes reserved for traditional imports from ACP States at a zero-duty level fails to conform to the non-discrimination requirements of Article XIII and amounts to a continued application of "separate regimes" of the sort found to be inconsistent with Article XIII by the original panel and the Appellate Body in *Bananas III*.

6.19 The European Communities responds that a single import regime exists under Regulations 1637/98 and 2362/98. It is the EC's position that for purposes of Article XIII the quantity of 857,700 tonnes for traditional ACP imports is outside the MFN tariff quota of 2,553,000 tonnes and Ecuador should therefore have no interest in it. In the EC's view, the amount of 857,700 tonnes constitutes an upper limit for the zero-tariff preference for traditional ACP imports. It notes that the tariff preference is required by the Lomé Convention and is covered by the Lomé waiver as to any inconsistency with Article I:1 of GATT. In addition, the European Communities relies on the panel report on *EEC - Imports of Newsprint*¹⁸¹ in arguing that imports under preferential arrangements should not be counted against an MFN tariff quota. The European Communities also argues that its collective allocation of an amount of 857,700 tonnes for traditional imports from ACP States is effectively required by the Appellate Body report in *Bananas III*.

¹⁸¹ Panel report on *EEC - Imports of Newsprint*, adopted on 20 November 1984, BISD 31S/114, 130-133.

(a) The Applicability of Article XIII

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

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

6.22 As to the EC's suggestion that Ecuador has no interest in the collective allocation to traditional ACP suppliers, we note that the price and even the volume of Ecuador's exports could be affected by the price and volume of traditional ACP exports. In any event, under *Bananas III*, it is clear that Ecuador may bring this claim.¹⁸³

6.23 Accordingly, we find that the 857,700 tonne limit on traditional ACP imports is a tariff quota and therefore Article XIII applies to it.

(b) The Requirements of Article XIII and the 857,700 Tonne Tariff Quota for Traditional ACP Imports

6.24 Ecuador raises claims in respect of the 857,700 tonne tariff quota under both paragraphs 1 and 2 of Article XIII. We address these claims in that order. In assessing the 857,700 tonne tariff quota for traditional ACP exports in light of the requirements of Article XIII, we recall the Appellate Body's findings in *Bananas III* concerning "separate regimes":

"The issue here is not whether the European Communities is correct in stating that two separate regimes exist for bananas, but whether the existence of two, or more, separate EC import regimes is of any relevance for the application of the non-discrimination provisions of the GATT 1994 and the other Annex 1A agreements. The essence of the non-discrimination obligations is that like products should be treated equally, irrespective of their origin. As no participant disputes that all bananas are like products, the non-discrimination provisions apply to all imports of bananas, irrespective of whether and how a Member categorises or subdivides these imports for administrative or other reasons. If, by choosing a different legal basis for imposing import restrictions, or by applying different tariff rates, a Member could avoid the application of the non-discrimination provisions to the imports of like products from different Members, the object and purpose of the non-discrimination provisions would be defeated. It would be very easy for a Member to circumvent the non-discrimination provisions of the GATT 1994 and the other Annex 1A

¹⁸² *Ibid.*, paragraph 55.

¹⁸³ Panel reports on *Bananas III*, paragraphs 7.47-7.52; Appellate Body report on *Bananas III*, paragraphs 132-138.

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

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

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

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

(i) *Article XIII:1*

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

(ii) *Article XIII:2*

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

¹⁸⁴ Appellate Body report on *Bananas III*, paragraph 190.

¹⁸⁵ Appellate Body report on *Bananas III*, paragraph 187.

¹⁸⁶ The country-specific allocations for, e.g. Belize, Cameroon, Côte d'Ivoire and Jamaica seem to include allowances for investment made.

each and every non-substantial supplier) should be based upon the proportions supplied during a previous representative period. The European Communities explains that it chose the three-year period from 1994 to 1996 as the most recent three-year period for which reliable import data were available.

6.28 According to the information available to us, for traditional ACP supplier countries the average exports during the three-year period from 1994 to 1996 were collectively at a level of approximately 685,000 tonnes, which is only about 80 per cent of the 857,700 tonnes reserved for traditional ACP imports under the previous as well as under the revised regime. In contrast, the MFN tariff quota of 2.2 million tonnes (autonomously increased by 353,000 tonnes) has been virtually filled since its creation (over 95 per cent) and there have been some out-of-quota imports. Thus, the allocation of an 857,700 tonne tariff quota for traditional banana imports from ACP States is inconsistent with the requirements of Article XIII:2(d) because the EC regime clearly does not aim at a distribution of trade approaching as closely as possible the shares which various Members might be expected to obtain in the absence of restrictions.

6.29 In light of the foregoing, and in light of the Appellate Body findings that the Lomé waiver does not cover inconsistencies with Article XIII, we find that imports from different non-substantial supplier countries are not similarly restricted in the meaning of Article XIII:1 of GATT. Moreover, we find that the allocation of a collective tariff quota for traditional ACP States does not approach as closely as possible the share which these countries might be expected to obtain in the absence of the restrictions as required by the chapeau to Article XIII:2 of GATT. Therefore, we find that the reservation of the quantity of 857,700 tonnes for traditional ACP imports under the revised regime is inconsistent with paragraphs 1 and 2 of Article XIII of GATT.

(c) The Requirements of the Appellate Body report in *Bananas III*

6.30 The European Communities recalls that the panel and the Appellate Body held in *Bananas III* that it is required by the Lomé Convention to provide duty-free access to traditional exports from ACP suppliers in an amount of their pre-1991 best-ever exports (i.e. 857,700 tonnes) and that the Appellate Body held that it could not assign country-specific allocations to those suppliers inconsistently with Article XIII. It argues that in consequence the Appellate Body report in *Bananas III* requires it to provide a collective allocation of 857,700 tonnes to those suppliers.

6.31 We note, however, that the panel and Appellate Body reports made it clear that what was required by the Lomé Convention was not necessarily covered by the Lomé waiver. And, as the Appellate Body found in *Bananas III*, the European Communities is not authorized by the Lomé waiver to act inconsistently with its obligations under Article XIII. The Appellate Body also upheld the panel finding that the European Communities could not allocate country-specific shares to some non-substantial suppliers (e.g. traditional and non-traditional ACP countries and BFA signatories) unless country-specific allocations were also given to all non-substantial suppliers.

6.32 We stress that the foregoing analysis does not render the Lomé waiver meaningless (see paragraphs sections D.4 and F below). We have taken appropriate account of the EC's admonition that we should not interpret Article XIII so as to reduce the Lomé waiver or Article I to inutility. Nor have we added to or reduced the rights or obligations of Members contrary to Article 3.2 of the DSU.

2. Ecuador's Share of the MFN Tariff Quota

6.33 Article XIII:2(d) provides that if a Member decides to allocate a tariff quota it may seek agreement on the allocation of shares in the quota with those Members having a substantial interest in supplying the product concerned. In the absence of such an agreement, the Member:

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

6.34 Ecuador challenges the EC's allocation of the MFN tariff quota to it on the grounds that its share does not approximate the share that it might be expected to obtain in the absence of restrictions. It also argues that given the history of trade-distortive EC banana measures, it is far from clear that any country-share allocation system could be devised based on the idea of a representative period and special factors that would meet the requirements of Article XIII:2 (see paragraphs 6.47-6.48).

6.35 The European Communities notes that it based its calculation of country allocations under the MFN tariff quota of the revised regime on the three-year period from 1994 to 1996. In the EC's view, this was the most recent three-year period for which reliable data were available at the time.

(a) The Requirements of Article XIII

6.36 In considering Ecuador's claims regarding its tariff quota share under Article XIII, we recall our findings in *Bananas III*:

"The wording of Article XIII is clear. If quantitative restrictions are used (as an exception to the general ban on this use in Article XI), they are to be used in the least trade-distorting manner possible. In the terms of the general rule of the chapeau of Article XIII:2:

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

In this case we are concerned with tariff quotas, which are permitted under GATT rules, and not quantitative restrictions *per se*. However, Article XIII:5 makes it clear, and the parties agree, that Article XIII applies to the administration of tariff quotas. In light of the terms of Article XIII, it can be said that the object and purpose of Article XIII is to minimize the impact of a quota or tariff quota regime on trade flows by attempting to approximate under such measures the trade shares that would have occurred in the absence of the regime."¹⁸⁷

6.37 We also noted the following:

"[I]n order to bring its banana import regulations into line with Article XIII, the European Communities would have to take account of Article XIII:1 and XIII:2(d). In order to allocate country-specific tariff quota shares consistently with the requirements of Article XIII, the European Communities would have to base such shares on an appropriate previous representative period³⁷⁵ and any special factors would have to be applied on a non-discriminatory basis."

³⁷⁵In this regard, we note with approval the statement by the 1980 *Chilean Apples* panel:

¹⁸⁷ Panel reports on *Bananas III*, paragraph 7.68.

'[I]n keeping with normal GATT practice the Panel considered it appropriate to use as a 'representative period' a three-year period previous to 1979, the year in which the EC measures were in effect. Due to the existence of restrictions in 1976, the Panel held that that year could not be considered as representative, and that the year immediately preceding 1976 should be used instead. The Panel thus chose the years 1975, 1977, 1978 as a 'representative period.'

[Citation omitted.] In the report of the 'Panel on Poultry' issued on 21 November 1963, GATT Doc. L/2088, paragraph 10, the panel stated: '[T]he shares in the reference period of the various exporting countries in the Swiss market, which was free and competitive, afforded a fair guide as to the proportion of the increased German poultry consumption likely to be taken up by United States exports'. See also Panel report in 'Japan – Restrictions on Imports of Certain Agricultural Products, paragraph 5.1.3.7 [citation omitted]."

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

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

6.40 The panel on *Japan - Restrictions of Imports of Certain Agricultural Products*¹⁸⁹ addressed the question of the absence of a "previous representative period" in the context of Article XI:2(c). It noted that:

"... in the case before it the import restrictions maintained by Japan had been in place for decades and there was, therefore, no previous period free of restrictions in which the shares of imports and domestic supplies could reasonably be assumed to resemble those which would prevail today. ... The Panel realized that a strict application of this burden of proof rule had the consequence that Article XI:2(c) could in practice not be invoked in cases in which restrictions had been maintained for such a long time that the proportion between imports and domestic supplies that would prevail in the absence of restrictions could no longer be determined on the basis of a previous representative period. ... The Panel considered for these reasons that the burden of providing evidence that all requirements of Article XI:2(c)(i), including the proportionality requirement, had been met must remain fully with the contracting party invoking that provision."

¹⁸⁸ Panel report on *EEC - Restrictions on Imports of Apples from Chile*, adopted on 10 November 1980, BISD 27S/98, paragraph 4.8.

¹⁸⁹ Panel report on *Japan - Restrictions on Imports of Certain Agricultural Products*, adopted on 22 March 1988, BISD 35S/163, paragraph 5.1.3.7.

6.41 We note that Article XI:2(c), which stipulates that quotas must be such as not to reduce the total of imports relative to domestic production which might reasonably be expected to rule between the two in the absence of restrictions, is an exception from the prohibition of quantitative restriction in Article XI:1. Article XIII regulates the non-discriminatory administration of quantitative restrictions, including, where applied, the allocation of shares among Members. The determination of a previous representative period under Article XIII raises similar problems as under Article XI:2. Thus we deem the above considerations pertinent to the case before us. The effect of a lack of a representative period under Article XIII is much less far-reaching than the lack of such a period under Article XI:2(c). In the *Japan – Restrictions* case, the lack of a suitable previous representative period precluded the use of the Article XI:2(c) exception. Under Article XIII, the lack of a suitable previous representative period would only preclude allocation of a tariff quota unilaterally. It would not preclude the use of a global tariff quota nor of country-specific allocations by agreement.

(b) The Representative Period

6.42 With regard to the selection of a "previous representative period" for applying the tariff-quota regime for imports of bananas to the European Communities, we recall that prior to 1993, EC member States applied different national import regimes. Some member States applied import restrictions or prohibitions, while imports to other member States were subject to a tariff-only regime or could enter duty-free.¹⁹⁰ Thus, that period could not serve as a previous representative period (see paragraph 6.37).

6.43 With the introduction of the common market organization for bananas in mid-1993, we note traditional ACP supplier countries were guaranteed country-specific allocations at pre-1991 best-ever import levels, which were far beyond their actual trade performance in the recent past. As of 1995, the Banana Framework Agreement (BFA) allocated shares of the 2,200,000 tonne tariff quota established by Regulation 404/93 to the substantial suppliers Colombia and Costa Rica. Given the distortions in the EC market prior to the BFA, the shares assigned to Colombia and Costa Rica could not have been based on a previous representative period. Moreover, the BFA contained WTO-inconsistent rules concerning the export certificate requirements and re-allocations of unused portions of country-specific allocations exclusively among BFA signatories, which further aggravated such distortions. The shares of non-traditional ACP supplier countries were also distorted because of the country-specific allocations within the quantity of 90,000 tonnes that were reserved for non-traditional ACP suppliers.

6.44 It could be argued that within the "other" category of the 2,200,000 tonne tariff quota (autonomously enlarged by 353,000 tonnes as of 1995 for the EC-15), Ecuador, Panama and the non-substantial third-country suppliers without allocated shares were competing on a relatively undistorted basis during the period when the previous regime was in force (although less so after the BFA entered into force). However, given that, for purposes of applying the requirements of Article XIII, it does not matter whether imports from some supplier countries were relatively less distorted than others since distortions with respect to one (group of) supplier countries will have repercussions on the import performance of other substantial or non-substantial supplier countries within a single-product market.

6.45 Accordingly, in our view, the 1994-1996 period could not serve as a previous representative period because of the presence in the market of the foregoing distortions.

6.46 We also note that the world market excluding the European Communities is of limited value for purposes of calculating country shares based on a previous representative period because different

¹⁹⁰ For a description of the market, see panel report on *EEC – Member States' Import Regime for Bananas*, issued on 3 June 1993 (not adopted), GATT Doc. DS32/R, pages 3-7.

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

(c) Special Factors

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

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

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

6.49 The reliance by the European Communities on a previous unrepresentative period, and without adjustment for special factors, would suggest that Ecuador's country-specific tariff-quota share does not approach the share that it might be expected to obtain in the absence of restrictions, as required by the chapeau to Article XIII:2. This is confirmed by the significant growth over the past decade in Ecuador's share of the EC¹⁹³ and world¹⁹⁴ markets. This growth indicates that Ecuador's country-specific tariff-quota share is less than it should be under the rules of Article XIII:2.

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

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

¹⁹³ Annex II.

¹⁹⁴ Annex II.

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

D. ARTICLE I OF GATT 1994

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

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

1. The Lomé Waiver

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

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

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

2. The Requirements of the Lomé Convention

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

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

¹⁹⁵ WT/L/186.

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

Protocol 5 in turn provides:

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

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

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

"(1) Products originating in the ACP States shall be imported into the Community free of customs duties and charges having equivalent effect.

(2)(a) Products originating in the ACP States:

- listed in Annex II to the Treaty where they come under a common organization of the market within the meaning of Article 40 of the Treaty, or

- subject, on import into the Community, to specific rules introduced as a result of the implementation of the common agricultural policy,

shall be imported into the Community, notwithstanding the general arrangements applied in respect of third countries, in accordance with the following provisions:

(i) those products shall be imported free of customs duties for which Community provisions in force at the time of import do not provide, apart from customs duties, for the application of any measure relating to their import;

(ii) for products other than those referred to under (i), the Community shall take the necessary measures to ensure *more favourable treatment* than that granted to third countries benefitting from the most-favoured-nation clause for the same products."

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

6.58 Given the factual circumstances under the previous regime, the Appellate Body summarized the preferential treatment required by the relevant provisions of the Lomé Convention - in keeping with the limits of its terms of reference in the original dispute - as follows:

"Thus, of the relevant provisions of the measures at issue in this appeal, we conclude that the European Communities is *"required"* under the relevant provisions of the Lomé Convention to: provide duty-free access for all traditional ACP bananas;

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

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

3. Preferences for Traditional ACP Imports

6.60 Ecuador claims that (i) the preferential tariff of zero on 857,700 tonnes of traditional ACP imports exceeds the volume on which such a preference is required by the Lomé Convention and (ii) the collective allocation of that volume to 12 ACP States is not required by the Lomé Convention.

(a) The Level of 857,700 Tonnes and Pre-1991 Best-Ever Export Volumes

6.61 In considering Ecuador's challenge to the level of 857,700 tonnes, we recall the statement by the Appellate Body quoted above that the Lomé Convention requires the European Communities to "allocate tariff quota shares to the traditional ACP States that supplied bananas to the European Communities before 1991 in the amount of their pre-1991 best-ever export volumes". In reaching this conclusion it referred to the requirement of Protocol 5 that "no ACP State shall be placed as regards access to its traditional markets and its advantages on those markets, in a less favourable situation than in the past or at present". Thus, the question arises which quantities reflect the pre-1991 best-ever exports by traditional ACP suppliers, individually and collectively.

6.62 As defended by the European Communities before the original panel and the Appellate Body, the level of 857,700 tonnes included allocations to Belize, Cameroon, Cote d'Ivoire and Jamaica in excess of their pre-1991 best-ever exports to the European Communities. These allocations were defended by the European Communities on the grounds that they took account of investments made in those countries which would subsequently expand their export capacities. We recall that the Appellate Body concluded that, *inter alia*, the European Communities is *not "required"* under the relevant provisions of the Lomé Convention to allocate tariff quota shares to traditional ACP States in excess of their pre-1991 best-ever export volumes to reflect such investments.¹⁹⁷

6.63 In its submissions to this Panel, the European Communities argues that the total pre-1991 best-ever ACP exports to the European Communities in fact amounted to 952,939 tonnes. It states that the conclusion of the panel and Appellate Body reports that the Lomé Convention requires the European Communities to give duty-free treatment to pre-1991 best-ever ACP exports caused it to re-examine its calculation of the pre-1991 ACP banana export data. It appears that the increase in the total of pre-1991 best-ever exports is due mainly to the addition of an amount of approximately 100,000 tonnes to the totals of Jamaica and Somalia, based on 1965 exports. We note that at least some of the data on which the European Communities now bases its calculations of pre-1991 best-

¹⁹⁶ Appellate Body report on *Bananas III*, paragraph 178.

¹⁹⁷ Appellate Body report on *Bananas III*, paragraph 175.

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

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

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

(b) Collective Allocation to Traditional ACP States

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

6.67 In considering this claim, we note that the Appellate Body explicitly concluded that the European Communities is required under the Lomé Convention to "allocate tariff quota *shares* to the traditional ACP *States* that supplied bananas to the European Communities before 1991 in the amount of their pre-1991 best-ever export *volumes*".¹⁹⁸ (emphasis added). In our view, the Appellate Body's choice of the plural in this sentence indicates that the requirements of the Lomé Convention refer to country-specific pre-1991 best-ever volumes. To put it differently, Protocol 5 to the Lomé Convention does *not* "require" the European Communities to allow certain traditional ACP suppliers to exceed their individual pre-1991 best-ever import quantity within the "collective" allocation of 857,700 tonnes reserved for all traditional ACP suppliers under the revised regime.

6.68 In our view, it is evident that the existence of a "collective" reservation of 857,700 tonnes entails the possibility that individual - more competitive - traditional ACP suppliers will exceed their individual pre-1991 best-ever import quantities at the expense of other - less competitive - traditional ACP suppliers. Such *de facto* reallocation to the benefit of more competitive traditional ACP suppliers within the collective allocation for traditional ACP suppliers would mean that those suppliers would obtain a preferential tariff of zero for volumes beyond those required by Protocol 5 of the Lomé Convention. Absent any other applicable requirement of the Lomé Convention, those excess volumes would not be covered by the Lomé waiver and the preferential tariff thereon would therefore be inconsistent with Article I:1. In this regard, we note the similarity between this conclusion and the Appellate Body's conclusion that the European Communities was not required to allocate country-specific shares in respect of non-traditional ACP bananas.

6.69 Accordingly, we find that it is not reasonable for the European Communities to conclude that Protocol 5 of the Lomé Convention requires a collective allocation for traditional

¹⁹⁸ Appellate Body report on *Bananas III*, paragraph 178.

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

4. Preferential Tariffs for Non-Traditional ACP Banana Imports

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

E. GATS ISSUES

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

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

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

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

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

6.85 We note that the specific commitments bound by the European Communities in its GATS Schedule with respect to the service sectors²⁰² or sub-sectors at issue in the original case were categorized according to the Services Sectoral Classification List which refers to the more detailed Provisional CPC.

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

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

²⁰² Article XXVIII (e) of GATS: "'sector' of a service means,
(i) with reference to a specific commitment, one or more, or all, subsectors of that service, as specified in a Member's Schedule,
(ii) otherwise, the whole of that service sector, including all of its subsectors;"

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

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

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

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

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

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

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

2. Licence Allocation Procedures

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

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

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

(a) Articles II and XVII of GATS

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

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

Article XVII of GATS, its national treatment clause, provides:

"1. In the sectors inscribed in its Schedule, and subject to any conditions and qualifications set out therein, each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, *treatment no less favourable* than that it accords to its own like services and service suppliers.

2. A Member may meet the requirement of paragraph 1 by according to services and service suppliers of any other Member, either *formally identical treatment* or *formally different treatment* to that it accords to its own like services and service suppliers.

3. Formally identical or formally different treatment shall be considered to be less favourable if it *modifies the conditions of competition* in favour of services or service suppliers of the Member compared to like services or service suppliers of any other Member" (emphasis added, footnote omitted).

6.94 The adjudication of claims under the national treatment and MFN clauses usually presupposes a two-step examination. For purposes of Article XVII, it is necessary to examine (i) whether the domestic and foreign services or service suppliers at issue are "like" and (ii) whether services or service suppliers of the complainant's origin are treated less favourably than those of domestic origin. For purposes of Article II, it is necessary to examine (i) whether services or service suppliers originating in different foreign countries are "like" and (ii) whether services or service suppliers of the complainant's origin are subject to less favourable treatment than those of other Members' origin.

6.95 In this context, we recall that issues such as the origin of services and service suppliers and the "likeness" of services or service suppliers of the complainant's origin and of those of EC or other third-country origin, as the case may be, were resolved in the original case and need not be addressed

²⁰³ Ecuador refers in this regard to the reservation of 30 per cent of the licences required for in-quota imports of third-country and non-traditional ACP bananas to Category B operators, the reservation of 28 per cent of such import licences to ripeners under the activity function rules, and the allocation of hurricane licences exclusively to certain Category B operators.

²⁰⁴ We note that MFN exemptions as foreseen in Article II:2 of GATS and the Annex on Article II Exemptions were not relevant in the original dispute.

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

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

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

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

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

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

These findings were upheld by the Appellate Body.

(c) The Revised EC Licensing Regime

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

"[T]raditional operators' shall mean economic agents established in the European Community during the period for determining their reference quantity ... who have actually imported a minimum quantity of third-country and/or ACP-country bananas

²⁰⁵ Appellate Body report on *Bananas III*, paragraph 234.

²⁰⁶ Panel reports on *Bananas III*, paragraphs 7.341 and 7.353.

²⁰⁷ Panel reports on *Bananas III*, paragraph 7.368.

²⁰⁸ Panel reports on *Bananas III*, paragraph 7.393 (and paragraph 7.397).

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

6.98 Article 5 of Regulation 2362/98 provides:

"3. Actual import shall be attested by both of the following:

(a) by presenting *copies of the import licences used* either by the *holder* or, in the case of a transfer ... duly endorsed by the competent authorities, by the *transferee*, in order to release the relevant quantities for free circulation; and

(b) by presenting *proof of payment of the customs duties* due on the day on which customs import formalities were completed. The payment shall be made either *direct* to the competent authorities or via a *customs agent* or *representative*.

Operators furnishing *proof of payment of customs duties*, either direct to the competent authorities or via a customs agent or representative, for the release into free circulation of a given quantity of *bananas without being the holder or transferee holder of the relevant import licence ... shall be deemed to have actually imported the said quantity provided that they have been registered in a Member State under Regulation No. 1442/93* and/or that they fulfil the requirements of *this Regulation* for registration as a *traditional operator*. Customs agents or representatives may not call for the application of this subparagraph." (emphasis added).

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

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

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

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

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

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

²⁰⁹ Panel reports on *Bananas III*, paragraph 7.314.

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

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

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

6.103 As to the first element, we have already determined in the original dispute that the EC import licensing procedures for bananas are measures affecting trade in services.²¹² We also recall our discussion on the absence of MFN exemptions in the EC list of Article II exemptions which would be relevant to the claims before us.²¹³

6.104 We now have to ascertain, for purposes of Article XVII, whether, by applying its revised licensing regime, the European Communities accords less favourable treatment to Ecuadorian services and service suppliers than it accords to its own like service and service suppliers. For purposes of Article II, we also have to ascertain whether, under the revised regime, less favourable treatment is being accorded to Ecuadorian services and service suppliers than to services and service suppliers of other Members. In this context, we recall our consideration above (see paragraph 6.95) that we deem it appropriate to examine jointly whether the EC's revised regime accords less favourable treatment in the meanings of both Article II and XVII to services or service suppliers of Ecuador. The crucial issue in respect of these claims against the EC's revised licensing procedures is whether the allocation of licences based on the criterion of "*actual payment*" of customs duties by "*traditional operators*" under the revised regime prolongs the allocation of licences on the basis of those aspects of the previous licensing system which were found to be inconsistent with the GATS in *Bananas III*.

6.105 In framing this issue for consideration, we do not imply that the European Communities is under an obligation to remedy past discrimination. Article 3.7 of the DSU provides that "... the first objective of the dispute settlement is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements." This principle requires compliance *ex nunc* as of the expiry of the reasonable period of time for compliance with the recommendations and rulings adopted by the DSB. If we were to rule that the licence allocation to service suppliers of third-country origin were to be "corrected" for the years 1994 to 1996, we would create a retroactive effect of remedies *ex tunc*. However, in our view, what the EC is required to ensure is to terminate discriminatory patterns of licence allocation with *prospective* effect as of the beginning of the year 1999.

6.106 At the outset of our analysis, we note that Ecuador does not claim that the new EC regime is *de iure* discriminatory. The issue, as in *Bananas III*, is whether it is *de facto* discriminatory in a way that is inconsistent with Articles XVII and II of GATS. In this regard, we recall that, pursuant to Article XVII:2, a Member may ensure no less favourable treatment for foreign services or service suppliers by according formally identical treatment or formally different treatment to that it accords to its own like service suppliers. Moreover, according to Article XVII:3, formally identical treatment may, nevertheless be considered to be less favourable treatment if it adversely modifies conditions of

²¹⁰ Panel reports on *Bananas III*, paragraph 7.317.

²¹¹ Panel reports on *Bananas III*, paragraph 7.344.

²¹² Panel reports on *Bananas III*, paragraph 7.277 *et seq.*

²¹³ Panel reports on *Bananas III*, paragraph 7.298.

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

(e) The Parties' Arguments

(i) *Ecuador*

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

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

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

(ii) *European Communities*

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

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

²¹⁴ In calculating estimates for third-country service suppliers in their entirety, Ecuador submits that under the previous regime, Category A primary importers obtained 37.905 per cent of the reference quantities under the previous regime (i.e. 57 per cent of 66.5 per cent). With respect to customs clearers, Ecuador assumes that two-thirds of the customs clearers were of non-ACP third-country origin, whereas one-third was of EC/ACP origin. Accordingly, 6.65 per cent of customs clearance reference quantities (i.e. 10 per cent of 66.5 per cent) went to third-country operators. This results in an overall licence entitlement of 44.6 per cent of the quantities physically imported for non-ACP third-country operators under the previous regime.

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

6.112 First, there were investments by third-country operators in EC/ACP operators. The European Communities mention investments in *Compagnie Fruitière* and *CDB/Durand* by Dole and Chiquita, respectively, and concludes that reference quantities based on EC/ACP operations for major third-country operators doubled between 1993 and 1996.²¹⁶ The European Communities further point out that the original panel found that there was no *de iure* discrimination, based on an operator's origin, with respect to the access to the activity of ripening which entitled operators to licence allocations and thus to reap quota rents under the previous regime. However, the original panel had found that *de facto* less favourable conditions of competition existed for third-country suppliers of wholesale services because ripeners in the European Communities were predominantly EC owned or controlled²¹⁷ and thus licence allocations and quota rents accrued largely to service suppliers of EC origin. Before this Panel, the European Communities emphasizes that, based on 1994 to 1996 statistics, three out of the four biggest ripeners are now non-EC owned and that these alone represent around 20 per cent of the total ripening capacity of the European Communities.

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

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

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

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

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

²¹⁸ The EC accepts Ecuador's figures for primary importation and customs clearance, but recalculates Ecuador's figures concerning the distribution of reference quantities for ripening activities as follows. For purposes of breaking down ripening activities by third-country and EC/ACP origin, the ripening activities of both Category A and B operators were subdivided using a ratio of 78.5 per cent for EC/ACP operators and 21.5 per cent for non-ACP third-country operators. This results for Category A operators in 4 per cent for third-country operators and in 14.6 per cent for EC/ACP operators of the 18.6 per cent which represent the licence allocation for Category A ripening activities (i.e. 28 per cent of 66.5 per cent). For Category B operators this results in 1.8 per cent for third-country operators and in 6.6 per cent for EC/ACP operators of the 8.4 per cent which represent the licence allocation for Category B ripening activities (i.e. 28 per cent of 30 per cent). Consequently, in calculating the total share of reference quantities for non-ACP third-country wholesalers, the European Communities adds 4 per cent and 1.8 per cent for ripening activities effectuated by Category A and B operators of non-ACP third-country origin to Ecuador's estimate of 37.9 and 6.65 per cent so that the overall

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

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

(f) The Panel's Analysis of the Claim

6.116 In analyzing whether the new EC regime is *de facto* discriminatory, we will first consider the three general EC arguments set out in the preceding paragraph and thereafter evaluate the evidence presented by the parties on actual licence allocations and consider its relevance to Ecuador's claim. We will then consider the regime's structure and the extent to which it is based on or related to the previous regime found to be inconsistent with Articles XVII and II in *Bananas III*.

(i) General EC arguments

6.117 As to the EC argument that there are no grandfather rights in the GATS or guarantees of market shares, we agree, but note that this does not rule out the possibility that *de facto* less favourable conditions of competition may be found and prolonged in violation of GATS rules.

6.118 As to the EC's claimed right to choose "actual imports" as a basis for licence allocation, here again, we agree that the European Communities is not precluded from basing licence allocation on past usage. However, we note that the Import Licensing Agreement's provision that "consideration should be given" to full utilisation of licences does not rule out the possibility that the choice of how to assure that may be limited where *de facto* discrimination has been found in the past, and where reliance on licence usage may result in a prolongation of the results of a violation of GATS rules. The availability of the past performance allocation method, which is an option and not required by the Import Licensing Agreement, would not justify such a violation. In other words, even if Members are normally free to base licence allocation on past usage, that does not mean they are free to do so without regard to their GATS obligations. Moreover, we note that proof of payment of customs duties, directly or through a representative or customs agent, does not necessarily prove licence usage by a particular operator.

estimate for the share of licence entitlements of non-ACP third-country operators increases from Ecuador's estimate of 44.6 per cent to the EC's estimate of 50.35 per cent.

²¹⁹ Article 3.5(j) of the Agreement on Import Licensing Procedures provides that: "... consideration should be given as to whether licences issued to applicants in the past have been fully utilised during a recent representative period".

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

(ii) *Licence allocations under the revised regime*

6.120 In examining the evidence on licence allocations under the revised regime, we note that we based our original findings on the facts available at the time. Our findings explicitly foresaw that one of the effects of the previous regime would be to encourage service suppliers of non EC/ACP origin to invest in EC/ACP banana production and marketing and to acquire licences from EC/ACP service suppliers. Although these effects were anticipated, our findings were based on the fact that the previous EC regime modified the conditions of competition in violation of Articles XVII and II.²²⁰

6.121 As to Noboa, we note that the parties generally agree on the evidence concerning the level of Noboa's exports and licence allocations. The European Communities challenges Ecuador's arguments that its service suppliers had to enter into unfavourable contractual arrangements. It notes, for instance, that an example of such a contract cited by Ecuador was a proposed contract, not an actual one. We are not generally persuaded by this EC argument, however, as there is evidence of such arrangements even if the extent of their use is unclear. The licence allocation data for 1999 support Ecuador's claim that in general Noboa did not obtain licences for imports in a manner that would allow it to claim reference quantities under the revised regime for its export interest.

6.122 As to the evidence presented by the European Communities concerning the increase in licence allocations to non-EC suppliers as a result of their investments in ACP operators, we note that there is evidence from third parties that raises some questions as to whether at least one of these investments was sufficient to make these firms non-EC controlled for purposes of GATS.²²¹ According to Cameroon and Côte d'Ivoire, 60 per cent of Compagnie Fruitière, the principal exporter in each country, remains in the control of a French family. In this regard, we recall that, according to Article XXVIII(n) of GATS, a service supplier in the form of a legal person has the origin of a WTO Member if it is owned by more than 50 per cent by natural or juridical persons of that Member, or if it is controlled by those persons in the sense that they have the power to name the majority of directors. Moreover, in respect of investments in ripeners and licence transfers, we note that the EC's evidence was not comprehensive, which means that we are not in a position to ascertain the extent to which these factors have led to a change in licence allocations compared to the previous regime.

6.123 As to the EC argument that there were 1568 Category A and B operators registered under the previous regime, but that there are only 629 traditional operators under the revised regime, we note that the European Communities did not include information on ownership or control of these remaining traditional operators. Therefore, we are not in a position to ascertain whether the decline in the number of registered operators had an impact on the competitive conditions of non-ACP third-country service suppliers.

²²⁰ Panel reports on *Bananas III*, paragraphs 7.341, 7.353, 7.368, 7.393, 7.397.

²²¹ According to Article XXVIII(n) of GATS, a juridical person is:

- (i) 'owned' by persons of a Member if more than 50 per cent of the equity interest in it is beneficially owned by persons of that Member;
- (ii) 'controlled' by persons of a Member if such persons have the power to name a majority of its directors or otherwise to legally direct its actions.

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

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

6.126 Therefore, we conclude that the ACP/EC operators who continue to get licences on the basis of the revised regime, remain in a competitively advantaged position compared to non-EC operators and that advantage comes from the "carry on" effects of the GATS-inconsistent aspects of the previous regime. Even if such ACP/EC operators do deal in Latin American bananas and do not simply sell or lease their licences, they are able to compete on more favourable conditions in the market for distribution of bananas than their non-EC competitors because of the licence allocations that are derived from the previous discriminatory regime. In this way, the revised regime carries forward the *de facto* discrimination of the previous regime.

(iii) *The structure of the revised regime*

6.127 We also examine the structure of the revised regime because the Appellate Body has noted in the past, in *Japan - Alcoholic Beverages*²²², that a measure's "protective application can most often be discerned from the design, the architecture and the revealing structure of a measure". Although the dispute on *Japan - Alcoholic Beverages* concerned claims under the GATT, we believe that this approach may also give some guidance in analyzing whether there is *de facto* discrimination under the GATS.

6.128 In our examination of the structure of Regulation 2362/98, we start from the proposition that if, in its new licensing regime, the European Communities had simply provided that licences would be issued to those to whom licences had been issued in the 1994-1996 period when those aspects of the previous licence allocation procedures which were found to be WTO-inconsistent in the original dispute by the panel and the Appellate Body, were in force, we would find that such a revised regime did not remove the GATS inconsistencies of the old regime, even if technically different rules for licence allocation had been implemented. This would be so because the less favourable conditions of competition for Ecuadorian (and other) service suppliers would continue to exist. The revised regime

²²² Appellate Body report on *Japan - Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted on 1 November 1996, page 29.

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

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

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

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

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

6.131 In the latter case, the revised licensing regime facilitates the continuance of past patterns of licence allocation based on WTO-inconsistent elements of the previous allocation. In particular e.g. where former Category B operators and/or ripeners are able to prove licence usage and payment of customs duties for imports made with such licences during the 1994-1996 period, such operators are able to claim reference quantities for 1999 regardless of whether they imported in fact.

6.132 In conclusion of our examination of the structure of the revised regime, we note that licence allocations under the revised regime are based on licence usage (and payment of customs duties), which according to the cited Commission Document is likely to "fossilize" or "maintain the same pattern of" past licence allocations. We further note that the base period (1994-1996) is one in which the rules for licence allocation had been in certain aspects found to be WTO-inconsistent in *Bananas III*. On its face, the choice of the 1994-1996 reference period in combination with the licence usage/actual tariff payment criteria would seem likely to continue at least in part the less favourable conditions of competition for foreign service suppliers found under the previous licensing regime. Consequently, in our view, the EC's revised licence allocation system, which reflects licence usage during the 1994-1996 period, displays *de facto* discriminatory structure. While this is not in

²²³ Exhibit 15 to Ecuador's First Submission of the panel in the original dispute of 9 July 1996, referred to again in Ecuador's First Submission to the reconvened Panel of 2 February 1999.

²²⁴ Commission Working Document "Determination of Reference Quantities from 1995 Onwards" of 6 October 1993". The document further notes "... *Obviously the licence usage method can only be used for the years when the common market organization was in place*. Thus if it is decided to adopt this method there would be three years (1995-97) when both methods [i.e. licence usage and operator categories/activity functions] would have to be applied." (emphasis added).

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

(iv) *Overall evaluation*

6.133 In light of all these considerations, we conclude that Ecuador has established a presumption²²⁵ that the revised licence allocation system prolongs - at least in part - less favourable treatment in the meanings of Articles II and XVII for wholesale service suppliers of Ecuadorian origin. Ecuador has also shown that its service suppliers do not have opportunities to obtain access to import licences on terms equal to those enjoyed by service suppliers of EC/ACP origin under the revised regime and carried on from the previous regime. Accordingly, it was for the EC to adduce sufficient evidence to rebut this presumption. In light of our evaluation of the factual and legal arguments presented, we conclude that the European Communities has not succeeded in doing so. This result is consistent with our conclusion that the revised licence allocation system reflecting licence usage and payment of customs duties during the 1994-1996 period displays *de facto* discriminatory structure.

6.134 Accordingly, we find that under the revised regime Ecuador's suppliers of wholesale services are accorded *de facto* less favourable treatment than EC/ACP suppliers of those services in violation of Articles II and XVII of GATS.

(g) The "Single Pot" Licence Allocation

6.135 Regulation 1637/98 introduced a so-called "single pot" licence allocation system under which reference quantities claimed under the tariff quota of 2,553,000 tonnes are pooled with those claimed under the quantity of 857,700 tonnes reserved for traditional ACP imports. Thus, under the revised regime, a traditional operator may use its reference quantities based on past imports of traditional ACP bananas to apply for licences to import third-country bananas and *vice versa*.

6.136 Ecuador alleges that this "single pot" solution for calculating reference quantities aggravates the carry-on *de facto* discrimination from the previous regime and further erodes the licence allocations to Ecuadorian service suppliers. Specifically, Ecuador submits that less than 60 per cent of licence applications by Noboa and its subsidiaries granted in the quarterly licence allocation procedures due to oversubscription and the application of reduction coefficients with respect to Ecuador's country allocation. In Ecuador's view, these results are due to the "single pot" licence allocation under the revised regime.

6.137 The European Communities contends that, in compliance with the DSB rulings, it has abolished the different licensing procedures of the previous regime for traditional ACP imports, on the one hand, and for third-country and non-traditional ACP imports, on the other. It has introduced a single licensing regime for banana imports from all sources of supply and has created a "single pot" or "pool" for purposes of calculating reference quantities under the revised regime. The European Communities emphasizes that there cannot be a protection of "grandfather" rights as to licence entitlements, especially not in the transition from the previous to the revised regime.

6.138 We note the results of the quarterly two-round licence allocation procedures for the first and the second quarter of 1999. Due to the oversubscription of available licence quantities during the first

²²⁵ "... [T]he burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defense. If that party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption." Appellate Body report on *United States - Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, adopted on 23 May 1997, WT/DS33/AB/R, page 14.

round of the licence allocation procedures for the first quarter of 1999²²⁶, reduction coefficients of 0.5793, 0.6740 and 0.7080 were applied to applications for licences for imports from Colombia, Costa Rica and *Ecuador*, respectively. While licence quantities of 77,536.711 tonnes and 41,473.846 tonnes for imports from Panama and "other" (i.e. non-substantial third-country and non-traditional ACP supplier countries) were transferred to the second round, these quantities were exhausted in the second round, when reduction coefficients of 0.9701 and 0.7198 were applied to applications for licences allowing imports from Panama and "other", respectively.²²⁷ Licence quantities for 148,128.046 tonnes of traditional ACP imports were not applied for in the first round, and apparently also not exhausted in the second round. In the first round of the allocation procedure for the second quarter of 1999²²⁸, reduction coefficients of 0.5403, 0.6743 and 0.5934 were applied to applications for licences allowing imports from Colombia, Costa Rica and *Ecuador*, respectively. However, licence quantities for 120,626.234 tonnes and 7,934.461 tonnes of imports from Panama and from other third-country and non-traditional ACP sources, respectively, were transferred to the second round of the allocation procedure for the second quarter of 1999.

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

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

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

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

²²⁷ Regulation (EC) No. 102/99 of 15 January 1999, O.J. L 11/16 of 16 January 1999.

²²⁸ Regulation (EC) No. 608/99 of 19 March 1999, O.J. L 75/18 of 20 March 1999.

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

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

3. The Rules for "Newcomer" Licences

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

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

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

"...'*newcomers*' shall mean economic agents established in the European Community who, at the time of registration:

(a) have been *engaged independently and on their own account in the commercial activity of importing fresh fruit and vegetables* falling within chapters 7 and 8, of the Tariff and Statistical Nomenclature and the Common Customs Tariff, or products under Chapter 9 thereof if they have also imported products falling within Chapters 7 and 8 *in one of the three years immediately preceding the year in respect of which registration is sought*; and

(b) by virtue of this activity, have undertaken imports to a *declared customs value of ECU 400 000* or more during the period referred to in point (a)." (emphasis added).

6.146 We do not see how the enlargement of the licence quantity to 8 per cent of the tariff quotas and the traditional ACP quantities²²⁹ in itself could create less favourable conditions of competition for service suppliers of third-country origin.

6.147 In respect of the criteria for acquiring "newcomer" status, we note that the parties agree that Article 7 of Regulation 2362/98 does not contain conditions which discriminate *de iure* against service suppliers on the basis of their foreign as opposed to EC origin. However, we note that potential "newcomers" must have a certain degree of ongoing relationship to the European Communities because they need to be established within the European Communities and they must have been engaged in the commercial activity of importing fruits or vegetables in one of the three years immediately preceding the year for which registration as "newcomer" is sought. More importantly, service suppliers of other Members may prove expertise with respect to the commercial activity of importing fresh fruit and vegetables only through imports carried out to the European Communities but not through the same type of commercial activity of trading in fruits or vegetables with other countries. If it is indeed the level of experience that this criterion is designed to ensure, in our view, experience with trade in fruit or vegetables in or to other countries should equally be deemed sufficient to ensure a requisite level of expertise. If it is the commercial viability of the enterprise in question that is at issue, we believe that it should also be possible to establish that viability on the basis of commercial activity outside the European Communities.

6.148 Thus, while any potential service supplier originating in third countries is not *de iure* precluded from acquiring "newcomer" status, in our view, the criteria for demonstrating the requisite expertise in order to qualify as an importer of bananas as "newcomer" create in their overall impact less favourable conditions of competition for service suppliers of Ecuador or other Members than for like service suppliers of EC origin. In this respect, we recall the Appellate Body's statement in *Japan - Alcoholic Beverages*²³⁰ that a measure's "protective application can most often be discerned from the design, the architecture and the revealing structure of a measure".

6.149 In light of these considerations, we find that the criteria for acquiring "newcomer" status under the revised licensing procedures accord to Ecuador's service suppliers *de facto* less favourable conditions of competition in the meaning of Article XVII than to like EC service suppliers.

4. General observations

6.150 We wish to emphasize that our findings do not deprive any WTO Member of its right to choose WTO-consistent licence allocation methods based on, e.g. first-come, first-served, auctioning, or past trade performance. In principle, the WTO agreements leave Members a significant degree of discretion to choose the beneficiaries of licence allocations. We note that while, e.g. the Agreement on Import Licensing Procedures aims to ensure that licensing procedures do not constitute an additional restriction on trade in goods, the objectives of the GATS non-discrimination clauses are different. Articles XVII and II of GATS aim at ensuring that service suppliers of other Members are accorded conditions of competition no less favourable than those accorded to like service suppliers of national origin or of any other Member. However, the fact that the agreements under Annex 1A to the WTO Agreement and the GATS provide for different requirements, address different issues and pursue different objectives, does not imply that they are incompatible.

6.151 If a Member chooses an import regime which necessarily generates quota rents, such as a tariff quota, the requirement to ensure for service suppliers of other Members no less favourable

²²⁹ Article 2.1(b) of Regulation 2362/98.

²³⁰ Appellate Body report on *Japan - Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted on 1 November 1996, page 29.

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

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

6.153 In the present case, the supply of wholesale services is affected by conditions of access to available import licences.²³¹ If less favourable opportunities to obtain access to licence allocations adversely affect the conditions of competition for service suppliers of another Member, ensuring no less favourable treatment requires equal opportunities to obtain access to licence allocations. As discussed in detail above, under the revised regime service suppliers of Ecuadorian origin continue to be subject to less favourable conditions of competition for a number of reasons. In light of these considerations, we found that the revised licence allocation procedures accord less favourable treatment for Ecuador's service suppliers than for like service suppliers of EC/ACP origin. Thus we consider that EC licence allocation procedures should allow service suppliers of other Members equal competitive opportunities to expand their wholesale business as like EC/ACP suppliers of those services.

F. SUGGESTIONS ON IMPLEMENTATION

6.154 Ecuador requests this Panel to make specific suggestions to the European Communities on how it might implement our findings in this proceeding under Article 21.5 of the DSU. In this regard, we recall Article 19.1 of the DSU, which provides:

"Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement. In addition to its recommendations, the panel or Appellate Body *may suggest ways* in which the Member concerned *could implement* the recommendations." (Emphasis added, footnotes omitted.)

Panels have not often made suggestions pursuant to Article 19.1. While Members remain free to choose how they implement DSB recommendations and rulings, it seems appropriate, after one

²³¹ The Appellate Body notes that "obviously, a wholesaler must obtain the goods by some means in order to resell them. In this case, for example, it would be difficult to resell bananas in the European Communities if one could not buy them or import them in the first place." Appellate Body report on *Bananas III*, paragraph 226.

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

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

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

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

6.158 Third, the European Communities could maintain its current bound and autonomous MFN tariff quotas, either without allocating any country-specific shares or allocating such shares by agreement with all substantial suppliers consistently with the requirements of the chapeau to Article XIII:2. The MFN tariff quota could be combined with the extension of duty-free treatment (or preferential duties) to ACP imports. In respect of such duty-free treatment, the European Communities could consider with the ACP States whether the Lomé Convention can be read to "require" such treatment within the meaning of the Lomé waiver. We recall that some important preferences found by the original panel and Appellate Body reports to be required by the Lomé Convention cannot be implemented consistently with WTO rules (the most important being the quantitative protections foreseen in Protocol 5). If such a view of the Lomé Convention is challenged, a waiver covering such duty-free treatment could be sought. The MFN tariff quota could also be combined with a tariff quota for ACP imports, whether traditional or not, provided an appropriate waiver of Article XIII is obtained. We note that waivers for duty-free treatment for developing country exports have been granted on several occasions by Members.²³² In this context, some action may be required soon in respect of the Lomé waiver since it expires on 29 February 2000.

6.159 We make no specific suggestions in respect of licence allocation, but note that licences would not be needed at all in a tariff-only regime.

G. SUMMARY

6.160 **In respect of Article XIII of GATT, we find that the 857,700 tonne limit on traditional ACP imports is a tariff quota and therefore Article XIII applies to it. We further find that the reservation of the quantity of 857,700 tonnes for traditional ACP imports under the revised regime is inconsistent with paragraphs 1 and 2 of Article XIII of GATT. We also find that the country-specific allocations to Ecuador as well as to the other substantial suppliers are not consistent with the requirements of Article XIII:2.**

6.161 **In respect of Article I of GATT, we find that the level of 857,700 tonnes for duty-free traditional ACP imports can be considered to be required by the Lomé Convention because it appears to be based on pre-1991 best-ever exports and not on allowances for investments. However, we also find that it is not reasonable for the European Communities to conclude that**

²³² See WT/L/104 (United States – Caribbean Basin Economic Recovery Act); WT/L/183 (United States – Former Trust Territory of the Pacific Islands); WT/L/184 (United States – Andean Trade Preferences Act); WT/L/185 (Canada – CARICAN).

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

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

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

H. CONCLUDING REMARK

6.164 We recall that the fundamental principles of the WTO and WTO rules are designed to foster development, not impede it. As illustrated by our suggestions on implementation above, the WTO system is flexible enough to allow, through WTO-consistent trade and non-trade measures, appropriate policy responses in a wide variety of circumstances across countries, including countries that are heavily dependent on the production and commercialization of bananas.

VII. CONCLUSIONS

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

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