

***European Communities - Regime for the Importation,
Sale and Distribution of Bananas***

Complaint by Guatemala and Honduras

Report of the Panel

The report of the Panel on European Communities - Regime for the Importation, Sale and Distribution of Bananas is being circulated to all Members, pursuant to the DSU. The report is being circulated as an unrestricted document from 22 May 1997 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, and that there shall be no *ex parte* communications with the panel or Appellate Body concerning matters under consideration by the panel or Appellate Body.

Note by the Secretariat: This Panel Report shall be adopted by the Dispute Settlement Body (DSB) within 60 days after the date of its circulation unless a party to the dispute decides to appeal or the DSB decides by consensus not to adopt the report. If the Panel Report is appealed to the Appellate Body, it shall not be considered for adoption by the DSB until after the completion of the appeal. Information on the current status of the Panel Report is available from the WTO Secretariat.

The reports of each of the Complaining parties in the dispute have identical paragraph and footnote numbering. In the Findings section of each report, however, certain paragraph and footnote numbers are not used.

I. INTRODUCTION

I.1 On 5 February 1996, Ecuador, Guatemala, Honduras, Mexico and the United States acting jointly and severally, requested consultations with the European Communities ("the Community" or the "EC") pursuant to Article 4 of the Understanding on Rules and Procedures governing the Settlement of Disputes ("DSU"), Article XXIII of the General Agreement on Tariffs and Trade 1994 ("GATT"), Article 6 of the Agreement on Import Licensing Procedures (to the extent that it related to Article XXIII of GATT), Article XXIII of the General Agreement on Trade in Services, Article 19 of the Agreement on Agriculture (to the extent that it related to Article XXIII of GATT), and Article 8 of the Agreement on Trade-Related Investment Measures (to the extent that it related to Article XXIII of GATT) regarding the EC regime for the importation, sale and distribution of bananas established by Council Regulation (EEC) 404/93¹, and the subsequent EC legislation, regulations and administrative measures, including those reflecting the provisions of the Framework Agreement on Bananas, which implemented, supplemented and amended that regime (WT/DS27/1).

I.2 Consultations were held on 14 and 15 March 1996. As they did not result in a mutually satisfactory solution of the matter, Ecuador, Guatemala, Honduras, Mexico and the United States, in a communication dated 11 April 1996, requested the establishment of a panel to examine this matter in light of the GATT, the Agreement on Import Licensing Procedures, the Agreement on Agriculture, the General Agreement on Trade in Services ("GATS") and the Agreement on Trade-Related Investment Measures (WT/DS27/6).

I.3 The Dispute Settlement Body ("DSB"), at its meeting on 8 May 1996, established a panel with standard terms of reference in accordance with Article 6 of the DSU (WT/DS27/7). Belize, Canada, Cameroon, Colombia, Costa Rica, Côte d'Ivoire, Dominica, Dominican Republic, Ghana, Grenada, India, Jamaica, Japan, Nicaragua, the Philippines, Saint Vincent and the Grenadines, Saint Lucia, Senegal, Suriname, Thailand and Venezuela reserved their third party rights to make a submission and to be heard by the Panel in accordance with Article 10 of the DSU. Several of these countries also requested additional rights (see paragraph 7.4). Thailand subsequently renounced its third party rights.

Terms of reference

I.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, Guatemala, Honduras, Mexico and the United States in document WT/DS27/6, the matter referred to the DSB by Ecuador, Guatemala, Honduras, Mexico and the United States 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."

¹Official Journal of the European Communities No. L 47 of 25 February 1993, pp.1-11.

Panel composition

I.5 On 29 May 1996, the Director-General was requested by Ecuador, Guatemala, Honduras, Mexico and the United States to compose the Panel by virtue of paragraph 7 of Article 8 of the DSU.

I.6 On 7 June 1996 the Director-General announced the composition of the Panel as follows:

Chairman: Mr. Stuart Harbinson

Members: Mr. Kym Anderson
Mr. Christian Häberli

I.7 The Panel submitted its interim report to the parties to the dispute on 18 March 1997 and the final report on 29 April 1997.

II. PROCEDURAL ISSUES²

II.1 In this section, the parties' arguments are set out with respect to three procedural issues: (i) the adequacy of the consultations and the specificity of the request for panel establishment; (ii) the requirement of legal interest; and (iii) multiple panel reports. The organizational matter with respect to the participation of third parties in these proceedings and presence of private lawyers in meetings of the Panel is addressed in the "Findings" section of this report. Arguments presented by third parties on their participation in these proceedings are summarized in Section V.

(a) Adequacy of the consultations and specificity of the request for panel establishment

II.2 The EC noted that consultations on the EC banana regime were held in the autumn of 1995 between the EC, a number of banana producing countries, parties to the Lomé Convention, Guatemala, Honduras, Mexico and the United States. These consultations were inconclusive and were terminated when a new round of consultations started. After Ecuador had become a WTO Member on 26 January 1996, Ecuador as well as Guatemala, Honduras, Mexico and the United States requested consultations with the EC on its banana regime by letter dated 5 February 1996 and circulated to Members as document WT/DS27/1 on 12 February 1996. It contained, in the view of the EC, only the barest outline of the complaints against the EC banana regime. Bilateral consultations were held with each of the Complaining parties on 14 and 15 March 1996 in Geneva.

II.3 The EC, being of the view that consultations were intended not only to "give sympathetic consideration" to the considerations and the questions of the Complaining parties, but also to enable the responding party to obtain a clear view of the case held against it, prepared a large number of questions in an attempt to better understand the complaints of Ecuador, Guatemala, Honduras, Mexico and the United States. These questions were transmitted on 3 April 1996. In the meantime, the EC was preparing its answers to the numerous questions posed by the Complaining parties. On 11 April 1996, however, Ecuador, Guatemala, Honduras, Mexico and the United States submitted a request for the establishment of a panel to the Chairman of the DSB (WT/DS27/6). Under these circumstances, the EC, concluding that the Complaining parties were of the view that the consultation phase was over, decided not to submit its answers to these questions nor received any answers to its own questions.

II.4 The EC considered that, although the parties to the earlier consultations did exchange questions and answers in writing, these documents could not, in the opinion of the EC, be relied upon in the present procedure. During the consultations both sides agreed that the parties would re-exchange these questions and answers from the earlier consultation so as to include them in the record of the present consultations. This would also have enabled Ecuador to obtain this material since, as a non-participant in the earlier consultations, it had no access to it. Such re-exchange of questions and answers did not take place, however, and hence these questions and answers were not part of the consultation and did not form a basis for the present dispute settlement procedure.

II.5 In the opinion of the EC, the consultation stage preceding a possible panel procedure should serve to afford the possibility to come to a mutually satisfactory solution as foreseen in Article 4.3 of the DSU. The obligation to seek such a solution could not be fulfilled unless the individual claims, of which a matter or a problem brought to dispute settlement was composed, were set out in the consultation phase of the procedure.² The EC noted that the parties had exchanged a considerable number of questions and answers and that the oral consultations within two half-days could not possibly cover all questions and in reality were highly perfunctory, the largest part of the consultations being spent by the Complaining

²"United States - Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway", ADP/87 para. 335. Confirmed by the (unadopted) panel report on "Japan-Audiocassettes", ADP/136, para. 295 ff.

parties reading out identical statements. It was evident, therefore, in the view of the EC, that these consultations had not fulfilled their minimum function of affording a possibility for arriving at a mutually satisfactory solution and for a clear setting out of the different claims of which the dispute consisted.

II.6 In the view of the EC, the request for the establishment of a panel was intended to be the culmination of the preparatory stage of the dispute settlement procedure. This was not the case in this dispute. The request for the establishment of a panel was in several respects a step backward from the somewhat greater clarity provided during the consultations (a point illustrated by the EC with examples). The EC asserted that, in the case of several claims, it was not in a position to know whether the claims advanced during the consultations were maintained, altered, refined or dropped.

II.7 The EC noted that, after the request for a panel had been discussed for the second time by the DSB at its meeting on 8 May 1996, the DSB decided to establish the Panel under standard terms of reference (WT/DS27/7) which implied that the matter at issue was entirely defined in the document requesting the establishment of a panel (WT/DS27/6).

II.8 The EC claimed that this request was unacceptably vague in the light of Article 6.2 of the DSU and past practice from earlier panels. Article 6.2 of the DSU prescribed, *inter alia*, that the request for the establishment of a panel:

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

In the opinion of the EC, these two functions could be properly fulfilled only if the request for the establishment of a panel did not merely restate the matter at issue in its broadest terms, as did the request by the Complaining parties, but contained a list of concrete claims, i.e. brief statements which linked a specific measure (and not the whole banana regime) with the infringement of a specific rule or obligation under the WTO (and not just a whole list of provisions).

II.9 The request for the establishment of a panel thus clearly infringed, in the opinion of the EC, the terms of Article 6.2 of the DSU. It did not identify specific measures at issue - it merely cited "the regime". And it did not relate the specific measures to the alleged infringement of a specific obligation - it merely cited a list of Articles. It was therefore impossible to know which Article might be related to which specific measure and, thus, which claim was being made against the EC. The EC was of the view that the consultations in the present case had not been able to fulfil their function because the Complaining parties were not prepared to wait for a further exchange of questions and answers as agreed during the oral consultations on 14 and 15 March 1996. Hence the request was a nullity and, at the very least, the consultations should be restarted and lead to a proper request for a panel responding to the requirements of Article 6.2. The EC therefore requested the Panel to decide this issue prior to any examination of the substance of the case and prescribe any remedial action deemed necessary *in limine litis*. The EC argued that at the stage of the first submission procedural illegalities could still be "healed" without much damage. If, at the last stage of the proceeding before this Panel, or before the Appellate Body, the request for the establishment of a panel were ruled to be contrary to Article 6.2 of the DSU, in the view of the EC, the complications would be considerable.

II.10 The EC considered that it was time to impose discipline where it concerned the formulation of the request for the establishment of a panel. Although there were large variations in practice, such requests sometimes clearly fell below the minimum standard necessary to inform both the defending party and possibly interested third parties of the scope of the case. In the present case, Complaining parties had clearly not met the minimum requirements of Article 6.2 of the DSU and of the *Salmon*

*Panel.*³

II.11 The **Complaining parties** responded that the EC's claims were without basis in the DSU. Referring to the text of Article 4.2 of the DSU, the Complaining parties argued that the EC was obliged to accord the Complaining parties sympathetic consideration and afford adequate opportunity for consultation regarding representations made by the Complainants. This obligation was not reciprocal. Article 4.5 of the DSU stated that Members "should attempt" to obtain a satisfactory adjustment of the matter in consultations, but it referred to "attempt" and did not require that Members succeed in settling matters bilaterally. Article 4.7 of the DSU was unconditional in providing for the establishment of a panel upon request of the Complaining party or parties after the expiration of the 60-day consultation period.⁴

II.12 The Complaining parties considered that they had provided the EC with ample notice and explanation of their concerns during the consultation phase going beyond any DSU requirement by providing a detailed seven-page joint statement and a hundred questions detailing the many aspects of the EC banana regime about which they had concerns. The statement and the appended "Non-Exhaustive List of Questions" identified specific measures at issue and various legal bases for concern with a degree of specificity well beyond what was normally provided in any stage before the panel procedure. The EC's current insistence that the consultations had to permit the EC to identify each and every legal argument that would be presented in the panel proceeding was, in the view of the Complaining parties, without basis in the DSU. The banana regime in the EC had in any event been the subject of exhaustive and repeated consultations, negotiations, and GATT dispute settlement procedures even before 1991. There was nowhere in the WTO agreements any requirement that the consultations be a dress rehearsal for a panel proceeding.

II.13 With reference to the EC's arguments concerning the nullity of the request for establishment of a panel, the Complaining parties argued that Article 6.2 of the DSU required all panel requests to contain two elements. First, the request should "identify the specific measures at issue". Second, it should "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly". Contrary to the EC claim, the primary qualifying emphasis of this provision was, in the opinion of the Complaining parties, brevity, continuing the prior GATT emphasis on brevity enunciated in the Montreal Rules.⁵ Nowhere did Article 6.2 require a detailed exposition tying each specific measure to each provision of law to be claimed by the Complaining parties. This was what submissions to the panel had to do to enable the panel to perform the task of examining particular measures in the light of the covered agreements. The Complaining parties considered that their request of 11 April 1996 complied fully with the requirement of Article 6.2. The request identified the specific measures at issue by citation to the "basic" enabling regulation and all laws, regulations and administrative measures that implemented, supplemented or amended that regulation (which numbered in the hundreds), including specifically those reflecting the BFA. The request then provided a "brief summary of the legal basis of

³"US-Norway Salmon Panel" ("United States - Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway") ADP/87, paras. 335-336; see also the panel report on "Japan-Audiocassettes", ADP/136, para. 295 ff.

⁴The Complaining parties noted that even under earlier GATT practice, it was clear that it was not necessary for both parties to agree before a panel could be established; such a condition would mean that one party could indefinitely block the procedures simply by saying that bilateral consultations had not yet been terminated. See Statement of Legal Adviser to the Director-General in relation to Japan's attempt in 1986 to block establishment of a panel on Japan's taxes on alcoholic beverages, C/M/205 p.10, cited in WTO "Analytical Index" (1995 ed.), p.673.

⁵"Improvements to the GATT Dispute Settlement Rules and Procedures", Decision of 12 April 1989, BISD 36S/61, para. F(a) ("The request for a panel ... shall indicate whether consultations were held, and provide a brief summary of the factual and legal basis of the complaint sufficient to present the problem clearly.").

the complaint", with a listing of the specific agreements and particular Articles implicated by the regime. All of the claims made by the Complaining parties in this dispute were covered by this request. None of the claims related to aspects of the regime that were not identified as problems in the consultations.

II.14 The Complaining parties submitted several examples of panel requests filed since 1 January 1995 that in their view reflected a level of "specificity" comparable to the request in this dispute. If any requests for establishment of a panel filed since 1 January 1995 did provide more detail, it was, in the opinion of the Complaining parties, not detail compelled by Article 6.2. If some Members saw fit to provide a more detailed exposition of the problems than that contained in the Complaining parties' request, they were free to do so, but their providing such detail did not amount to "practice" under the DSU that would dictate how Article 6.2 should be interpreted. The arguments with respect to the panel report on *United States - Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway (Salmon Panel)*, adopted on 30 November 1992 (ADP/87), were misplaced in the view of the Complaining parties. To the extent the *Salmon Panel* declined to examine claims raised in that action, it did so for two reasons that were inapplicable in the current case. The first was that certain claims were outside the panel's terms of reference. The other was that various claims were not the subject of consultations and conciliation in accordance with Article 15.3 of the Agreement on Implementation of Article VI of GATT. Neither finding had any bearing on the claim that "a lack of specificity" in the request failed to meet the requirements of an entirely different agreement, the DSU.

II.15 The Complaining parties had requested the establishment of a panel at two meetings of the DSB: on 24 April and on 8 May 1996. At neither one of those meetings did the EC or any other Member complain that the request was too vague to "present the problem clearly". On these occasions, the EC representative mentioned numerous other issues, including its reservation of rights under Article 9.2 of the DSU, but did not request any further explanation of the request. The number of third parties participating in this proceeding further illustrated that other Members certainly understood the "problem" sufficiently to gauge their respective national interests in this proceeding.

II.16 The Complaining parties further argued that, as a legal matter, the EC was asking the Panel to take an action outside its terms of reference. The Panel was bound to complete its task of examining the EC measures in light of the covered agreements, as specified in those terms of reference. Those terms of reference did not permit the Panel to "dissolve itself": the DSU was not one of the agreements covered by the Panel's terms of reference. The EC argument that it needed an early decision on this issue to avoid "prejudice" was, in the Complaining parties' view, without basis. The EC had had more than adequate notice of the aspects of the regime that were of concern to the Complaining parties. If anything, the Complaining parties had only narrowed their focus since the consultations which amounted to a windfall, not prejudice, to the EC. The further contention that participating in the second meeting with the Panel and further proceedings constituted prejudice was equally misguided. Indeed, it misapprehended entirely the nature of dispute settlement proceedings under the DSU. Article 3.10 reflected the Members' understanding that:

"the use of dispute settlement procedures should not be intended or considered as contentious acts and that, if a dispute arises, all Members will engage in these procedures in good faith in an effort to resolve the dispute."

The DSU thus considered participation in dispute settlement proceedings an obligation of membership that improved trade relations, not a prejudicial process in itself. The remedy sought by the EC - additional time to defend itself - was only further proof of the opportunistic nature of this "procedural" claim. It was not likely that additional time would have changed the EC's presentation of its defence, as the first meeting of the Panel confirmed. The EC's claim of harm resulting from alleged lack of specificity should therefore be rejected.

II.17 The EC responded that the Complaining parties mischaracterized its position on this point. The EC's position was very simple: the request for the establishment did not satisfy the requirements of Article 6.2 of the DSU because of (i) lack of identification of specific measures at issue (i.e. the regime); and (ii) lack of a brief summary of the legal basis of the complaint sufficient to present the problem clearly (i.e. a list of Articles). Therefore, the request for the establishment of the Panel was null and void.

II.18 On 21 January 1996, the EC continued, Ecuador became a Member of the WTO; by 5 February 1996, the other Complaining parties had convinced Ecuador to join them and start new consultations which they requested on that day. Because of problems concerning the modalities of consultations and scheduling problems, these consultations took place only on 14-15 March 1996. Mutual promises were made to reply to long questionnaires, but before the process had run its course a request for a panel was filed. In the view of the EC, undue haste had resulted in the panel request being too brief a summary to present the problem clearly, in particular in a case where a new agreement, i.e. the GATS, was brought up for the first time in a panel procedure. As a separate identification was not made and the list of relevant Articles was so long, it was not even possible for the reader of the request to create his own link between the specific issues and the alleged infringement of a specific provision. This was at least possible in some earlier requests for establishment of panels which were at the border line of what could be deemed acceptable under Article 6.2 of the DSU.

II.19 The EC explained that in not mentioning the issue of the too summarized character of the request at the DSB meeting, the EC followed the by then well-established line that the respect for the basic procedural rules of the dispute settlement system was a task for the panels. Given that this was a well-established practice, raising the matter in the DSB and trying to prevent the DSB from establishing the panel for that reason would have been seen as a stalling tactic and onslaught on the "right to a panel" recently confirmed in the Marrakesh Agreement. Seen in this light, the argument advanced by the Complaining parties that the Panel, by ruling on Article 6.2, would be transgressing its terms of reference, was somewhat disturbing. This amounted to saying that the terms of reference prevailed over the DSU. If the Panel were not bound by what was in effect the constitution of the dispute settlement system and would not be held to apply the rules of the DSU, Members might just as well not have negotiated the DSU in the Uruguay Round. The Complaining parties had finally asserted that Article 6.2 should not be upheld because the EC had suffered no prejudice as a consequence. This position was misconceived in fact and in law. In fact, the EC had suffered a prejudice, i.e. the lack of minimal clarity handicapped the EC in the preparation of its defence, which was not unimportant given that the respondent normally had less time than the complaining Member to make its written submission. In law, procedural rules, and in particular the rule that the respondent must have a clear view of the case held against it, had a certain value in themselves. And that value should be defended by the Panel. As the "healing" measures suggested at the stage of the EC's first submission were no longer feasible at the stage of the rebuttal submissions, there was no alternative for the Panel but to draw the consequences of the serious defects inherent in this important document: nullity of this procedure.

II.20 In response to a question by the Panel, the EC analyzed, in light of Article 6.2 of the DSU, eight panel requests that were brought to the WTO (some of which with multiple Complaining parties). As a preliminary matter, the EC noted that it was puzzled as to how the WTO practice with respect to Article 6.2 could already have changed the interpretation to be given to this Article as it appeared from the (adopted) *Salmon Panel* report. Time had been too short and practice had been too inconsistent. In the view of the EC, several of the eight analyzed panel reports did not meet or barely met the requirements of Article 6.2 in the sense that there was a clear indication of the specific measure at issue, of the provision of the agreements allegedly infringed, and a link between the two. A considerable number of these requests, however, posed lesser problems in the light of Article 6.2 than the present panel request since they were concerned with one specific measure only or with a limited number of clearly defined measures which made it easier to link the measures to an alleged infringement if the number of

provisions cited in the panel request was limited. In the present case, however, there was a total lack of specificity in the description of the measures, on the one hand, and an extremely long and unspecified list of the allegedly infringed WTO provisions, on the other hand. According to the EC, this was clearly contrary to Article 6.2 and did not fulfil the function of properly giving notice to the EC of the case held against it.

(b) The requirement of legal interest

II.21 The EC argued that in any system of law, including international law⁶, a claimant must have a legal right or interest in the claim he was pursuing. The rationale behind this rule was that courts existed to decide cases and not to reply to abstract legal questions; the court system (in the WTO context, the panel system) should not be burdened needlessly by cases without legal or practical consequences. Likewise, the respondent should not be forced to bear the costs and inconvenience of conducting a panel case, when the complaining Member had no legal right, or no legal or material interest in the outcome of the case. The EC submitted that in the present case the United States had no legal right or no legal or material interest in the case that it had brought under the GATT and the other Agreements contained in Annex 1A to the WTO Agreement since none of the remedies it could obtain would be of any avail to it: compensation or retaliation would not be due, since the United States had only a token production of bananas and had not traded in bananas with the EC, not even with those geographical sectors which under the old regime had maintained virtually free access or only a low tariff. Furthermore, the EC considered that a declaratory judgement would be of no interest since there was no serious indication that banana production in the United States could make exports feasible within the foreseeable future. The EC referred to the Working party report on *Brazilian Internal Taxes* (first report) which had made it clear, in the view of the EC, that a country must at least have potentialities as an exporter in order to be able to file a claim against another Member.⁷ Moreover, under the GATT/WTO system the United States could not set itself up as private attorney-general and sue in the public interest and there were no indications that the GATT/WTO system accepted an *actio popularis* by all Members against any alleged infringement by any other Member. There were no indications so far in the GATT/WTO system that panels were willing to give declaratory rulings at the request of Members which had no legal right or interest in such a ruling, either in the form of a potential trading interest or in the form of a right to compensation or retaliation under Article XXIII of GATT (Article 22 of the DSU). The EC concluded that, on the issues raised under the GATT and other instruments of Annex 1A, the United States had no legal right or interest in obtaining a ruling from the Panel. Therefore, the EC requested that the Panel should decide, *in limine litis*, that it would not rule on the issues with respect to the United States.

II.22 It was obvious to the EC that the interest of companies, such as Chiquita and Dole Foods, was not the same as a legal interest of the United States in bringing a case under the GATT. The GATT was concerned with the treatment of products, not companies or their subsidiaries. In so far as the United States had a systemic interest in the case, where it professed to be concerned about the general law-abidingness of the EC, it advanced an interest as intervenor with a general interest in the interpretation of the GATT. If the Panel were to take position on the issue of the United States' legal interest in this matter, the United States might perhaps be admitted as intervenor, i.e. third party, in the GATT-related part of the case.

II.23 The **United States** responded that it had a significant commercial interest in seeing the EC comply with its GATT and other WTO obligations with respect to its banana regime. Two US fruit companies, Chiquita and Dole Foods, had played a major role over many decades in developing the

⁶See the South-West Africa cases, 1966 ICJ Reports, pp.4 *et seq.*

⁷BISD Vol. II/181, para. 16. According to the EC, the panel's interpretation of GATT Article III:2 that it made no difference "whether imports from other contracting parties were substantial, small or non-existent" should be read in this light.

European market for bananas. Although these bananas were mainly grown in Latin America, US companies were seriously affected by the manner in which the EC was distributing market share opportunities on a basis that was unrelated to past imports of third-country bananas or ability to import third-country bananas. The EC's measures had the effect of constraining US companies' import, delivery, and distribution flexibility and required them to expand substantial capital just to try to restore their former business. A regime violating GATT rules could be expected to adversely affect such major participants in the market. Both companies expressed concerns about the discrimination in the EC banana regime and sought an end to it.

II.24 The United States further argued that the EC was well aware of the interests and concerns of the United States since they had been explained to the EC by diplomatic efforts that had begun over five years ago and that had intensified after two GATT panel proceedings had only resulted in additional GATT violations by the EC. The United States had reiterated its concerns during efforts to more formally negotiate a solution to these problems with the EC Commission. The EC's arguments with respect to US banana production had no bearing on this proceeding. However, the United States did produce bananas in both the state of Hawaii and in Puerto Rico, which was within the US customs territory. The Hawaiian producers had expressed their concerns that the EC banana regime was lowering the price of bananas in the free market, adversely affecting their ability to continue to produce and potentially export bananas. The United States considered that it was not for the EC to decide which producers in the world had an interest or potential to export.

II.25 As far as legal rights or interests were concerned, the United States was a Member of the WTO and a founding contracting party of the GATT. Article XXIII of GATT, as amplified in the DSU, permitted the initiation of dispute settlement proceedings when any Member was concerned about the inconsistency of another Member's measures. In fact, dispute settlement proceedings could be instituted to consider measures that were not even alleged to be inconsistent with any WTO agreement. The "interest" that a Member had to have in order to initiate proceedings was self-defined: a Member could initiate procedures whenever (in its judgement) it considered that benefits accruing to it, directly or indirectly, under the GATT were being nullified or impaired or whenever it considered, in its own judgement, that the attainment of any objective of GATT was being impeded or impaired as a result of another Member's failure to carry out its GATT obligations. This was the multilateral procedure under which governments had agreed to address such disputes.

II.26 **Mexico** considered that the view expressed by the EC that Mexico did not have a substantial interest in participating in this Panel as a Complaining party since its banana exports to the EC were minimal or non-existent was incorrect both from the point of view of Mexico's rights under the GATT and from the point of view of its interest in the international banana trade. It had been clearly established that it was not necessary to prove the existence of adverse effects for a panel to confirm the inconsistency of a particular measure with the provisions of the GATT. Mexico had therefore refrained from providing a more detailed explanation of the impact of the EC's regime on its banana sector. In the view of Mexico, the consistency of a measure with WTO obligations should be examined in legal terms and not in terms of its impact on the economies of other Members. Any other approach would imply, wrongly, that certain Members had more rights than others or that the interpretation of the WTO's provisions varied according to the characteristics of the countries involved in a dispute.

II.27 In order to avoid any misconception as to Mexico's interest in the international banana trade and ultimately in the EC market, Mexico made, however, the following points: (i) Mexico was currently the eighth largest banana producer in the world; (ii) total exports from Mexico exceeded 250,000 tonnes in 1992 and 1993, and fell to just under 200,000 tonnes in 1994; (iii) bananas occupied the fourth place in Mexico's fruit production in terms of area under crop, and the second after oranges in terms of both production volume and value; (iv) bananas now occupied the first place in Mexico's fruit exports; (v) an estimated 50,000 persons were directly employed in banana production in the tropical areas of Mexico,

not to mention the persons indirectly employed in transport and marketing of bananas; (vi) the Soconusco region in the state of Chiapas was the most important banana exporting region of Mexico (it was well known that Chiapas was one of the poorest rural states in the country); (vii) bananas provided the only activity of the port Francisco I. Madero, the only port in Chiapas; and (viii) the international banana trade was of vital importance to the recovery of investment in the banana producing regions. With respect to services, Mexico argued that its legal interest in participating in the proceeding did not depend on the market share of its service suppliers, but that in any event, a major banana distribution company, Del Monte, remained in Mexican ownership.

II.28 The EC subsequently clarified its position regarding Mexico's legal interest in this dispute with the statement that, although Mexico had never exported bananas to the EC other than in symbolic quantities, the EC did not contest the legal interest of Mexico in this procedure under the GATT since it clearly was a potential exporter of bananas to the EC with a considerable capacity.

II.29 The **Complaining parties** considered that the manner in which the EC had continuously and increasingly defied the rules of the international trading system, affecting so many countries, impeded the objectives of the GATT, and of the WTO Agreement, to eliminate discrimination in international commerce.

II.30 With respect to this claim, the **United States** noted that with each GATT proceeding and each opportunity to reform its regime, the EC had only added new layers of discrimination against imports from third countries. In the view of the United States, this pattern was unprecedented in postwar international commerce.

II.31 The **Complaining parties** noted that the nature and scope of the Panel's inquiry was set by its terms of reference. All the Complaining parties' claims before the Panel fell within its terms of reference. Those terms did not provide authority to the Panel simply not to consider the Complaining parties claims. Moreover, the DSU had no *locus standi* limitation. The WTO agreements at issue in this dispute and the DSU set forth comprehensive, detailed rules and procedures governing WTO dispute settlement. Had the DSU drafters intended to institute a limitation of the sort being advanced by the EC, they would have done so. Instead, Article 3.7 of the DSU simply requested that:

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

The DSU in effect already recognized that recourse to dispute settlement under the WTO agreements was self-limiting in that a Member would not initiate and pursue a resource-intensive proceeding unless it considered itself adversely affected; it respected each Member's determination in that regard.

II.32 The Complaining parties considered that the findings that would result from this proceeding were necessary to bring about a positive solution to the dispute. It was accordingly clear that all five Complaining parties were fully within their legal rights to assert all claims being advanced in this action with respect to both goods and services, and to benefit from the Panel's findings. The Complaining parties were not standing in the place of others, in *actio popularis*, as the EC suggested. The Complaining parties were raising issues in their capacity as Members of the WTO, and sought EC compliance with specific disciplines which the EC had, in the WTO agreements, agreed to submit to dispute settlement proceedings for interpretation in accordance with the DSU.

II.33 Where the DSU addressed nullification and impairment, it did not address rights to engage in dispute settlement, nor did it limit the panel's consideration of the extent to which the measures at issue violated the agreements. Referring to Article 3.8 of the DSU, the Complaining parties argued that this provision defined nullification and impairment quite broadly, to cover any "adverse impact" on a

Member, presupposing a prior finding of an infringement. The kind of economic predictions that the EC would require to determine "trade potentiality" would, in the view of the Complaining parties, involve very difficult and speculative calculations of the type panels had wisely eschewed. From a global perspective, the EC approach would protect only current exporters or investors, at the expense of firms that might later invest in the country, or goods that might later be produced for export in the absence of trade or investment barriers. Such a rule could have a particularly adverse effect on developing countries. It was essential for emerging economies to guard future trade opportunities even before "potentialities" became apparent. Otherwise, opportunities to promote trade and development could be forever limited or foreclosed. Since one of the basic objectives of the GATT was to raise the standard of living and progressively develop the economies of all Members, particularly developing country Members,⁸ governments had to have the opportunity to seek dispute settlement proceedings as they saw fit in order to preserve their potential interests.

II.34 The Complaining parties submitted that as recently as 1993, in the panel report on *United States - Restrictions on Imports of Tuna (Tuna Panel)*,⁹ the EC had argued that any time a country produced a product, even if the application of another country's measure to its exports was only hypothetical, the potential effect on price in its market gave rise to a "legal interest". The EC had stated that it was challenging US trade sanctions that were not applicable to the EC on the basis that:

"It is clear that such sanctions can have an enormous impact on third countries, especially when fish and fish products normally exported to the United States have to be sold on other markets. It is primarily for that reason that the EC has an interest in seeking the condemnation [by the panel]."

The EC had later affirmed that its principal concern was with potential price depression in its own market resulting from global trade diversion. The EC also had gone so far as to say that even a tariff binding provided benefits to non-suppliers. At the first meeting with the panel in that dispute, the EC had acknowledged that the two measures it was challenging were "presently not applicable to the Community," but had admonished that:

"The GATT does not protect actual trade flows, but trading opportunities created by tariff bindings and other rules. Even though a contracting party is not a principal supplier at all (perhaps even a non-supplier), it profits from the tariff concessions concluded between principal suppliers."

The Complaining parties concluded that as a factual matter, by such a standard, the nullification and impairment issue would be conclusively resolved with respect to all the Complaining parties. With respect to goods, the United States produced more bananas than several of the EC's domestic and ACP supplying sources; with respect to services, all the Complaining parties had banana service suppliers within their own territories that were or would be affected by measures discriminating against foreign service suppliers in the EC. More to the point, however, the DSU and WTO agreements did not permit the EC or a panel to limit recourse to dispute settlement proceedings to only some Members whom the EC might consider to have "potential trade" or whatever other concepts the EC might wish to superimpose on the DSU on the basis of so-called "natural justice". Such an approach would fundamentally undercut the multilateral nature of these agreements.

II.35 The EC responded that it contested the legal (and material) interest of the United States in obtaining a panel ruling under the GATT. In turn, the United States had contested this but did so from

⁸GATT, Part IV, Article XXXVI:1(a).

⁹DS29/R, circulated 16 June 1994.

the angle of formal requirements of standing or admissibility. This was perhaps understandable since in the common law countries the distinction between absence of the formal requirements for standing and the lack of legal interest to sue was often not sharply made. Both were called "standing". However, in the opinion of the EC, its reference to the maxim "point d'intérêt, point d'action" should have made things clear to the United States. In any case, the EC failed to see how affirmations of the United States fulfilling the formal requirements to appear before the Panel could detract from the EC's demonstration that the United States could not possibly derive any legal or material benefit from its case under the GATT (no compensation, no retaliation, whilst a declaratory judgement was of no interest to the United States either).

II.36 The **EC** noted that according to official US statistics, the United States for many years has not, and does not now, export bananas. The EC further noted that it did not contest the accuracy of these official US statistics. The EC argued that the United States had claimed that, although the United States had no information that would contradict US export figures (which were nil), import statistics were more reliable and these showed that the United States had exported over 1,000 tonnes of bananas annually to the EC since 1990. In the view of the EC, this was a misrepresentation of the facts. It was well-known and accepted that the United States did not export bananas and that the relevant US statistics were correct. Furthermore, EC import statistics did not show the origin of bananas, but their provenance. This meant that a shipload of bananas from Costa Rica, for example, which first might have headed for a US port and subsequently been bound for the EC would be registered as of US provenance. Or, as another example, intra-EC trade showed significant banana imports into France from the Benelux countries. This clearly proved that import statistics registered the countries of provenance, not of origin (since the Benelux countries did not produce any bananas). The EC noted that the United States had also submitted FAO data on production and exports, according to which the United States had produced between 5,126 and 6,210 tonnes annually between 1990 and 1995, but had exported between 337,365 tonnes and 383,216 tonnes annually in the same period. In the view of the EC, this again demonstrated how misleading statistics relying on aggregate imports from the rest of the world might be. According to the EC, any trade from Puerto Rico was obviously with the US mainland and other US territories, such as the Virgin Islands. Since this was a situation that had existed for many years, the EC was of the view that the United States was not a potential entrant in the banana trade, could not possibly suffer any nullification or impairment, did not even have an interest in a declaratory judgement because it could not take advantage of the possible competitive opportunities and, hence, had no legal interest in a ruling under the GATT.

II.37 The **United States** submitted that it had no basis for contradicting FAO figures that showed exports of bananas from Puerto Rico, and that it did not possess the administrative ability to ascertain its export quantities with the same precision that it had with respect to imports.

II.38 The **EC** argued that the question of legal or material interest in this case was a serious matter and deserved a serious answer. This was best demonstrated by the United States reverting to the *Tuna Panel*. The EC's approach in the *Tuna Panel* proceeding was entirely consistent with the EC's present approach. The EC had argued in its second submission in the *Tuna Panel* case: "... potential entrants into a trade have a legitimate interest in a breach of GATT provisions". In the present case, the EC considered that the United States had demonstrated over many years, by not entering the trade in bananas, that it was not a potential entrant as referred to in the *Tuna Panel*.

II.39 The **United States** observed with respect to the *Tuna Panel* proceeding that the EC had challenged three US measures, the third of which had no potential effect on any EC exports, and that the EC had explained its "legal interest" in that particular measure solely on the basis of collateral price effects on products sold in its own market.

II.40 The **EC** argued further that the Complaining parties were hiding behind a formalistic approach

to nullification and impairment. In the view of the EC, it was logical to apply the rule of lack of legal interest, if one could already see at an early stage that nullification and impairment would not occur. It had demonstrated that there was no such interest, not even in terms of a declaratory judgement. Moreover, it was not necessary to engage in "difficult and speculative calculations" in order to see that the United States had no trade interest in the matter.

II.41 The EC argued that, even if the Panel were not to accept the Community's argument on the lack of a legal right or interest of the United States to pursue the case under the GATT, the United States had not suffered any nullification or impairment under Article XXIII of GATT. If in the present case an infringement of the GATT were to be found, it was, unlike in other cases, not difficult to rebut the presumption of nullification or impairment: the United States had never exported any bananas to the EC and it did not do so, not because it was blocked in any way by the Community's measures, but because it did not have the capacity to export and, through a combination of climatic and economic reasons, was unlikely to have such capacity in the near or medium term. Under these circumstances, the United States could not be considered to suffer nullification or impairment as a result of the Community's measures under the banana regime.

(c) **Multiple panel reports**

II.42 The EC argued that the present procedure was a procedure with multiple Complaining parties and hence the EC had the right to request that the Panel organize its examination and present its findings to the DSB in such a manner that the rights, which the EC would have enjoyed had separate panels examined the complaints, were in no way impaired. In particular, the EC had a right to a separate report on each complaint, if it so requested (Article 9.2 of the DSU). The EC made such a request at the DSB meeting of 8 May 1996. In the course of this proceeding, the EC had reiterated this request and had asked the Panel to prepare four separate reports, with the reports for Guatemala and Honduras being joined, since they had filed a joint submission.

II.43 Referring to the text of Article 9.2 of the DSU, the **Complaining parties** conceded that the DSU appeared to require the Panel to accede to the EC's request, if the EC insisted on separate panel reports - in spite of the administrative burden on the Panel and the Secretariat, and the potential waste of resources. If the EC continued to insist on separate reports, the Complaining parties would assume that, in keeping with a general policy favouring uniformity of results, the Panel's four different reports would make the same findings and conclusions with respect to the same claims. Past panels had accomplished this with ease.¹⁰ However, the Complaining parties believed that there were several reasons why the rights which the EC "would have enjoyed" in separate proceedings could be satisfied by a single report. As the Complaining parties' first submissions, their joint oral presentation of 10 September 1996, and the rebuttal submission made clear, with the exception of the tariff rates being challenged by Guatemala and Honduras, all the Complaining parties were challenging the same aspects of the EC banana regime. A single panel report could easily identify the separate claims,¹¹ if any, made by each country, since the claims all related to the same measures. Ecuador's separate legal claim under Article 4.2 of the

¹⁰See "Republic of Korea - Restrictions on Imports of Beef - Complaint by Australia", adopted 7 November 1989, BISD 36S/202; "Republic of Korea - Restrictions on Imports of Beef - Complaint by New Zealand", adopted 7 November 1989, BISD 36S/234; and "Republic of Korea - Restrictions on Imports of Beef - Complaint by the United States", adopted 7 November 1989, BISD 36S/268 (in which the findings were identical except where a unique claim was made by a complaining party). See also "EEC - Restrictions on Imports of Dessert Apples - Complaint by Chile", adopted 22 June 1989, BISD 36S/93 and "EEC - Restrictions on Imports of Apples - Complaint by the United States", adopted 22 June 1989, BISD 36S/135 (in which findings were largely identical except for arguments relating to Part IV and goods en route uniquely made by Chile).

¹¹See "United States - Taxes on Petroleum and Certain Imported Substances", adopted 17 June 1987, BISD 34S/136.

Agreement on Agriculture was based on the same aspects of the EC's regime as the claims made by the other Complaining parties. Such an approach would preserve any rights the EC would have had with separate reports. The different "legal situations" of any of the Complaining parties were, in the opinion of the Complaining parties, irrelevant to the Panel's ability to carry out its task: to examine the measures identified by the Complaining parties in light of the covered agreements.

II.44 The EC replied that the Complaining parties had deliberately followed a course during this procedure of effacing the differences between them. In their second submission they presented, in a single submission, the claims made by different Complaining parties as if they had been made by all. There was thus a constant threat of confusion about which of the Complaining parties claimed what. It was very important to recall that different Complaining parties had made different claims (especially with regard to services) and that they were in different legal situations (especially with respect to legal interest). The common second submission even seemed to take the position that in situations, where there had been a claim only by one Complaining party, such claim was extended to all. This should be firmly rejected. According to the EC: (i) Ecuador had made claims with respect to both goods and services. These claims were contested by the EC on their merits. Ecuador was the one country making a claim under Article 4.2 of the Agreement on Agriculture; (ii) Guatemala and Honduras had made no claims on services; their claims in the first submission related only to goods. The EC contested the claims with respect to goods on their merits. Guatemala was the only country making a claim under Article II of GATT; (iii) Mexico had made claims on goods and services, but its claims on services in the first submission were extremely limited and totally unsubstantiated. The EC contested the claims in both domains on their merits; (iv) the United States had made claims on trade in goods and on trade in services. The EC contested the claims on trade in goods for reasons of lack of legal interest on the part of the United States. The United States claims on services were contested on their merits.

II.45 The EC further argued that the Complaining parties were in very diverse legal positions as demonstrated in the foregoing paragraph. If there was one situation in which the right to separate reports in the case of multiple complaining parties had a function, it was in the present case, as it was far from clear that the Panel could reach the same findings and conclusions with respect to the same claims for all Complaining parties. It was of great importance for the EC that it be clearly established at the end of this procedure which of the Complaining parties had seen which claims accepted by the Panel and which not. In these circumstances, the EC considered it only logical to invoke what was its perfect right under Article 9.2 of the DSU.

II.46 The **Complaining parties** considered that the EC had misstated the nature of their claims. All five were making all the claims made in their joint presentations, both with respect to goods and services. While some had made one or two additional claims in the goods area, these were minimal.

III. FACTUAL ASPECTS

III.1 The complaint examined by the Panel relates to the EC's common market organization for bananas introduced on 1 July 1993.

(a) Banana production and trade

III.2 World production of bananas in 1995 is estimated at 54.5 million tonnes (FAO). The largest producer countries were India (9.5 million tonnes) and Brazil (5.7 million tonnes) followed by Ecuador (5.4 million tonnes), China (3.3 million tonnes) and the Philippines (3.2 million tonnes). Banana production of the Complaining parties, other than Ecuador, was as follows: Mexico 2.1 million tonnes, Honduras 0.8 million tonnes, Guatemala 0.5 million tonnes and the United States (including Puerto Rico) 54,500 tonnes.¹² In 1994 (the most recent year for which FAO data are available) the largest exporters were: Ecuador (2.35 million tonnes), Costa Rica (2 million tonnes), Colombia (1.7 million tonnes), the Philippines (1.2 million tonnes) and Panama (0.7 million tonnes). According to the same source, Honduras, Guatemala and the United States¹³ each exported 0.4 million tonnes and Mexico 0.2 million tonnes.

III.3 In 1994, the EC was the world's second largest importer of bananas, after the United States (3.7 million tonnes) and followed by Japan (0.9 million tonnes).¹⁴ According to data submitted by the EC, supplies of fresh bananas in the EC - 12 totalled approximately 3.5 million tonnes in 1994, 2.1 million tonnes of which originated in Latin American countries and 727,000 tonnes in African, Caribbean and Pacific (ACP) countries that are parties to the Lomé Convention. The leading suppliers of Latin American bananas to the EC were Costa Rica, Ecuador, Colombia, Panama and Honduras (in descending order).¹⁵ The leading suppliers of ACP bananas to the EC were Cameroon, Côte d'Ivoire, St. Lucia, the Dominican Republic, Jamaica, Belize and Dominica (in descending order). For many ACP countries, banana exports to the EC represent a very high proportion of their total banana exports (see the Attachment to this report). Domestic EC producers supplied, according to the EC, approximately 645,000 tonnes of the bananas consumed in the EC, with the producing areas being the Canary Islands, Martinique, Guadeloupe, Madeira, the Azores and the Algarve, and Crete and Lakonia. The conditions of production differ among all countries and so do the costs of production.

(b) The EC's common organization of the banana market

III.4 The common market organization for bananas, as established by Council Regulation (EEC) 404/93 ("Regulation 404/93"), replaced the various national banana import regimes previously in place in the EC's member States. Subsequent EC legislation, regulations and administrative measures implemented, supplemented and amended that regime.

III.5 Under the previous national import regimes, France, Greece, Italy, Portugal and the United Kingdom restricted imports of banana by means of various quantitative restrictions and licensing

¹²Source: FAO.

¹³In the case of the United States, the FAO export data are contested by the EC (see paragraph 0 above in section II - procedural issues). It would appear that according to US export figures there are no, or only negligible, quantities of bananas exported.

¹⁴Eurostat and FAO.

¹⁵EC import statistics for 1989-95 are contained in the Attachment to this report, although it should be noted that some of these data, which were submitted by the EC, are contested by the Complaining parties.

requirements. Spain maintained a de facto prohibition on imports of bananas.¹⁶ The French market was supplied principally from the overseas departments of Guadeloupe and Martinique, with additional preferential access granted to the ACP States of Côte d'Ivoire and Cameroon. The United Kingdom granted preferential access to bananas from the ACP States of Jamaica, the Windward Islands (Dominica, Grenada, St. Lucia and St. Vincent and the Grenadines), Belize and Suriname. Bananas from ACP countries were permitted duty-free into all EC member States. The Spanish market was almost exclusively supplied by domestic production from the Canary Islands. A major part of Portuguese supply came from Madeira, the Azores and the Algarve, with additional volumes being imported from Cape Verde and any remaining requirements being imported from third countries. The Greek market was in part supplied by bananas from domestic sources (Crete and Lakonia) and in part by third countries. Italy offered preferential access to bananas from Somalia. Belgium, Denmark, Germany, Luxembourg, Ireland and the Netherlands did not apply quantitative restrictions and, except for Germany, used a 20 per cent tariff as the sole border measure (paragraph 0 below refers). These countries almost exclusively imported bananas from Latin America. Germany had a special arrangement, set out in the banana protocol of the Treaty of Rome, permitting duty-free imports of third-country bananas reflecting the level of estimated consumption.

III.6 Regulation 404/93 consists of five separate titles. Titles I to III regulate the internal aspects of the common market organization. Title I provides that common quality and marketing standards for bananas are to be established in subsequent regulations. Title II contains rules concerning producers' organizations and "concentration mechanisms" to promote the establishment of organizations for the purposes of, *inter alia*, concentrating supply, regulating prices at the production stage, and improving EC production structures and quality. Title III establishes EC assistance for the domestic banana sector. Under this title, members of recognized EC producer organizations (and individual producers under certain circumstances) are eligible for compensation of any income loss resulting from the implementation of the EC banana regime, the maximum quantity for such compensation being fixed at 854,000 tonnes of bananas for the EC as a whole.

(i) Tariff treatment

III.7 Title IV, which regulates trade with third countries, establishes three categories of imports: (i) traditional imports from twelve ACP countries¹⁷; (ii) non-traditional imports from ACP countries which are defined as both any quantities in excess of traditional quantities supplied by traditional ACP countries and any quantities supplied by ACP countries which are not traditional suppliers of the EC; and (iii) imports from third (non-ACP) countries. The EC applies the following tariffs to these banana imports:

¹⁶See "Panel on EEC - Import Regime for Bananas", DS38/R (not adopted), paras. 17 *et seq.*

¹⁷Belize, Cape Verde, Côte d'Ivoire, Cameroon, Dominica, Grenada, Jamaica, Madagascar, Suriname, Somalia, St. Lucia, and St. Vincent and the Grenadines (Article 15.1 of Council Regulation (EEC) 404/93 (as amended) and the Annex thereto).

EC tariff treatment of banana imports		
Category of banana imports	Source/Definition	Tariffs applied
Traditional ACP bananas	Bananas within country-specific quantitative limits totalling 857,700 tonnes established for each of 12 ACP countries.	Duty-free.
Non-traditional ACP bananas	Either ACP imports above the traditional allocations for traditional ACP countries or any quantities supplied by ACP countries which are non-traditional suppliers.	Duty-free up to 90,000 tonnes, divided into country-specific allocations and an "other ACP countries" category; ECU 693 per tonne for out-of-quota shipments in 1996/97.
Third-country bananas	Imports from any non-ACP source.	ECU 75 per tonne up to 2.11 million tonnes as provided in the EC Schedule. An additional 353,000 tonnes were made available in 1995 and 1996. Country-specific allocations were made for countries party to the Framework Agreement on Bananas (BFA), plus an "others" category ¹⁸ ; ECU 793 per tonne for out-of-quota shipments in 1996/97.

(ii) Quantitative aspects, including country allocations

(1) Traditional ACP imports

III.8 Imports of bananas from the twelve traditional ACP countries enter duty-free up to the maximum quantity fixed for each ACP country (see table below which also includes allocations for non-traditional ACP countries).¹⁹ These allocations collectively amount to 857,700 tonnes. These quantities are not bound in the EC Schedule. There is no provision in the EC regulations for an increase in the level of traditional ACP allocations.

¹⁸The EC has opened additional tariff quota access under hurricane licences (para. 0 below refers).

¹⁹Article 15.1 of Council Regulation (EEC) 404/93 (as amended) and the Annex thereto.

Allocations for duty-free banana imports from ACP countries		
Country	Traditional quantities as set out in EC Regulation 404/93 (tonnes)	Non-traditional quantities as set out in EC Regulation 478/95 (tonnes)
Belize	40,000	15,000
Cameroon	155,000	7,500
Cape Verde	4,800	
Côte d'Ivoire	155,000	7,500
Dominica	71,000	
Dominican Republic		55,000
Grenada	14,000	
Jamaica	105,000	
Madagascar	5,900	
Somalia	60,000	
St. Lucia	127,000	
St. Vincent and the Grenadines	82,000	
Suriname	38,000	
"Other" ²⁰		5,000
Total	857,700	90,000

(2) Non-traditional ACP and third-country imports

III.9 Imports of non-traditional ACP bananas and bananas from third countries are subject to a tariff quota (also referred to by the EC as the "basic tariff quota") of, originally, 2 million tonnes (net weight). This tariff quota was increased to 2.1 million tonnes in 1994 and to 2.2 million tonnes as of 1 January 1995. These tariff quota quantities were bound in the EC Uruguay Round Schedule.²¹ The tariff quota can be adjusted on the basis of a "supply balance" to be derived from production and consumption forecasts prepared in advance of each year.²² In 1995 and 1996, a volume of 353,000 tonnes was added to the tariff quota as a result of "consumption and supply needs" resulting from the accession of three new EC member States, Austria, Finland and Sweden. This additional volume is not bound in the EC Schedule. In practice, however, the EC's tariff quota for non-traditional ACP and third-country banana imports was increased to 2.553 million tonnes.²³

²⁰E.g. Ghana and Kenya.

²¹Schedule LXXX - European Communities.

²²Article 16 of Council Regulation (EEC) 404/93 (as amended).

²³In addition, the EC issued hurricane licences, see para. 3.15 below.

III.10 Of the tariff quota referred to above, 90,000 tonnes are reserved for duty-free entries of non-traditional ACP bananas. This volume is bound in the EC Schedule as a result of the BFA. By regulation, the EC allocated this import volume largely among specific supplying countries (see table in paragraph 0 above).²⁴

III.11 Under the terms of the BFA, the EC allocated in its Schedule specific shares of the bound tariff quota of 2.1 million tonnes in 1994 and 2.2 million tonnes in 1995, respectively, as follows.²⁵

BFA allocations under the bound tariff quota for third-country and non-traditional ACP banana suppliers	
Country	Share
Costa Rica	23.40 %
Colombia	21.00 %
Nicaragua	3.00 %
Venezuela	2.00 %
Others	(1994) 46.32 % (1995) 46.51 %
Dominican Republic and other ACP countries concerning non-traditional quantities	90,000 tonnes

III.12 The BFA also provides that, "In case of *force majeure*, a country listed in paragraph 0 above, may, on the basis of an agreement notified in advance to the Commission, fulfil all or part of its quota with bananas originating in another country listed in paragraph 0 above. In this case, the deliveries from the two countries concerned shall be adjusted accordingly in the following year."²⁶

III.13 Furthermore, "If a banana exporting country with a country quota informs the Community that it will be unable to deliver the quantity allocated to it, the short-fall shall be reallocated by the Community in accordance with the same percentage shares indicated under paragraph 0 above (including 'others'). However, countries with country quotas may jointly request and the Commission shall agree to a different allocation amongst those countries."²⁷

III.14 The EC also undertook to allocate any increase in the EC tariff quota in proportion to the shares set out in paragraph 0, including to "others". However, according to the BFA, "... countries with country quotas may jointly request and the Commission shall agree to a different allocation amongst those countries."²⁸

²⁴Article 1 of Commission Regulation (EC) 478/95 (as amended) and Annex 1 thereto.

²⁵"Framework Agreement on Bananas", Annex to Part I, Section I-B (tariff quotas) in Schedule LXXX - European Communities.

²⁶Idem, para. 3.

²⁷Idem, para. 4.

²⁸Idem, para. 5.

(3) Hurricane licences

III.15 From November 1994 to May 1996, the EC issued 281,605 tonnes of supplemental "hurricane licences". Hurricane import volumes enter in addition to the 2.553 million tonne tariff quota and are subject to the third-country (non-ACP) in-quota tariff (ECU 75 per tonne). Hurricane licences may be used to import bananas from any source.²⁹

(iii) Licensing requirements

III.16 Imports of both traditional ACP and non-traditional ACP/third-country bananas are subject to licensing procedures.

III.17 According to Commission Regulation (EEC) 1442/93 ("Regulation 1442/93"), banana imports into the EC are managed on a quarterly basis. For each of the first three quarters in any year, "indicative quantities" are established based on past trade patterns, seasonal trends, and the supply and demand balance prevailing in the EC market. These indicative quantities determine the volumes of traditional ACP bananas and non-traditional ACP/third-country bananas, respectively, that are available for a given quarter for the purpose of issuing import licences.³⁰ The import volumes thus available are divided proportionally among origins in accordance with the allocations indicated in the tables in paragraphs 0 and 0 above.³¹ The licences available in the fourth quarter of any calendar year are determined by subtracting those issued in the first three quarters from the total quantity available for each origin. Import licence applications are to be lodged with the competent authority of a EC member State within a specified period of time for the purpose of obtaining a licence for the subsequent quarter.³² In the case of "unused" quantities covered by licences, there is a procedure for reallocation to the same operators in any subsequent quarter.³³

(1) Traditional ACP imports

III.18 Licence applications for imports of traditional ACP bananas must state the quantity and origin from which operators intend to source their bananas. Applications are also required to be accompanied by an ACP certificate of origin testifying to the status as traditional ACP bananas.³⁴ When licence applications exceed the indicative quantities of traditional bananas fixed for a particular country of origin, a single reduction coefficient is applied to all applications (a reduction coefficient serves to reduce importers' licence applications proportionally to the available volume).³⁵

III.19 Licences are issued by the competent member State authority no later than the 23rd day of the

²⁹See e.g. Commission Regulation (EC) 2791/94.

³⁰Article 16 of Council Regulation (EEC) 404/93 (as amended); Articles 9 and 14 Commission Regulation (EEC) 1442/93 (as amended).

³¹Article 14 Commission Regulation (EEC) 1442/93 (as amended); Article 1 of Commission Regulation (EC) 478/95 (as amended).

³²Commission Regulation (EEC) 1442/93 (as amended), Articles 9 and 14.

³³Idem, Articles 10 and 17.

³⁴Idem, Articles 14.4 and 15.

³⁵Idem, Article 16.2.

last month of the preceding quarter (where that day is not a working day, the licences are issued on the first subsequent working day). The validity of import licences expires on the seventh day following the end of the quarter in question.

(2) Non-traditional ACP and third-country imports

III.20 Import licences for third-country bananas and non-traditional ACP bananas are allocated on the basis of several cumulatively applicable procedures, including: (i) allocation of licences based on three operator categories; (ii) allocation of licences according to three activity functions; (iii) export certificate requirements for imports from Costa Rica, Colombia and Nicaragua; and (iv) a two-round quarterly procedure to administer licence applications.

III.21 *Operator categories:* Under the EC's operator category rules, import licences are distributed among three categories of operators based on quantities of bananas marketed during the latest three year period for which data are available (see table below).³⁶ As operators in Category C ("newcomers") do not have reference quantities based on past trade, their allocation is dependent on the volume of licence applications the newcomer portion of the tariff quota.³⁷ Category A and B licences are transferable (tradeable) among operators, including to operators in Category C. Category C licences are, however, not transferable to Categories A and B. Transferred licences are taken into account in establishing reference quantities.³⁸

Operator categories under the tariff quota for third-country/non-traditional ACP imports		
Operator category definition³⁹	Allocation of import licences allowing the importation of bananas at in-quota rates	Basis of determining operator entitlement
<i>Category A:</i> operators that have marketed third-country and/or non-traditional ACP bananas.	66.5%	Average quantities of third-country and/or non-traditional ACP bananas marketed in the three most recent years for which data are available.
<i>Category B:</i> operators that have marketed EC and/or traditional ACP bananas.	30%	Average quantities of traditional ACP and/or EC bananas marketed in the three most recent years for which data are available.
<i>Category C:</i> operators who started marketing bananas other than EC and/or traditional ACP bananas as from 1992 or thereafter ("newcomer category").	3.5%	Divided pro rata among applicants.

III.22 *Activity functions:* The operator Categories A and B are further subdivided into three types of qualifying entities ("activity functions"), as set forth in the table below. In order to qualify as

³⁶Article 19 of Council Regulation (EEC) 404/93 (as amended).

³⁷Commission Regulation (EEC) 1442/93 (as amended), Article 4.4 .

³⁸Idem, Article 13.

³⁹Article 19 of Council Regulation (EEC) 404/93 (as amended) and Article 2 of Commission Regulation (EEC) 1442/93 (as amended).

Category A and/or B operators, economic agents must have performed at least one of these activities in "marketing"⁴⁰ bananas during the rolling three-year reference period (i.e. the period determining their reference quantities; for 1993, the years 1989-91). In addition, operators must be established in the EC and have traded a minimum of 250 tonnes of bananas in any one year of the reference period.⁴¹

Activity function system under the tariff quota for third-country/non-traditional ACP imports		
Activity functions	Definitions⁴²	Weighting coefficients
Activity (a): "primary importer"	"the purchase of green third-country bananas and/or ACP bananas from the producers, or where applicable, the production, and their subsequent consignment to and sale of such products in the Community"	57 per cent
Activity (b): "secondary importer or customs clearer"	"as owners, the supply and release for free circulation of green bananas and sale with a view to their subsequent marketing in the Community; the risks of spoilage or loss of the product shall be equated with the risk taken on by the owner"	15 per cent
Activity (c): "ripeners"	"as owners, the ripening of green bananas and their marketing within the Community"	28 per cent

III.23 The weighting coefficient assigned to each type of activity function multiplied by the average quantity of bananas marketed by each operator of Categories A and B in the three most recent years, determines the individual operator's reference quantity.⁴³ According to Regulation 1442/93, the weighting coefficients are designed to reflect the level of commercial risk borne by operators for each of the activities in the marketing chain for bananas.⁴⁴

III.24 Operators are expected to identify the activity function or functions upon which they are making their claim of licence entitlement (operators may have performed more than one activity and thus obtain a weighting coefficient of up to one hundred per cent). The reference quantities are, after the application of a single provisional reduction coefficient for operator Categories A and B, respectively, used in calculating an individual operator's provisional annual entitlement to banana import licences.⁴⁵ These entitlements are normally determined a few months before the beginning of the applicable year, although they may be, and generally are, subject to changes throughout the year (including the application of a final reduction coefficient).⁴⁶ In practice, the total reference quantities established by the EC for each of

⁴⁰According to Article 15.5 of Council Regulation (EEC) 404/93 (as amended), "'market' and 'marketing' mean placing on the market, not including making the product available to the final consumer". Furthermore, Article 3.2 of Commission Regulation (EEC) 1442/93 (as amended) provides that "wholesalers and retailers shall not be considered operators solely by virtue of such activities" (i.e. the activities as set out in the table below) but does not define these terms.

⁴¹Commission Regulation (EEC) 1442/93 (as amended), Article 3.

⁴²Idem, Article 3.

⁴³Idem, Article 5.

⁴⁴Idem, Recitals.

⁴⁵Idem, Article 6.

⁴⁶E.g. Commission Regulation (EC) 2947/94.

the marketing years since the introduction of the common market organization for bananas have exceeded the volume of the tariff quota available for distribution amongst operators so that reduction coefficients were applied.

III.25 *Export certificates*: Pursuant to the BFA, supplying countries that have country allocations may deliver special export certificates for up to 70 per cent of their allocations. Colombia, Costa Rica and Nicaragua have chosen to issue such certificates. According to EC regulation, presentation of such certificates ("export licences") by Category A and Category C operators constitutes a prerequisite for the issuance, by the EC, of licences for the importation of bananas from these countries.⁴⁷

III.26 *Two-round quarterly licence applications*: Regulation 478/95 (as amended) establishes two rounds of import licence applications within each quarter. In the first round, A and B operators can request licences up to their quarterly entitlements. Category C operators may apply for their full annual entitlement in any given quarter. In their applications, companies must designate the source from which they plan to import and the desired volumes. Category A and C operators importing from BFA countries other than Venezuela must attach special export certificates. All licence applications are transmitted by the competent authorities of the EC member States to the EC Commission which, if the applications for any country of origin exceed the indicative quantity available for that origin (in any given quarter), applies a country-specific reduction coefficient which reduces such applications proportionally. "First round" licences are to be issued by the competent authorities by the 23rd day of the month preceding the relevant quarter (where that day is not a working day, the licences are issued on the first subsequent working day).

III.27 After the first round, the EC publishes the sources and quantities that were not exhausted (so far, mainly quantities from BFA countries and certain non-traditional ACP countries⁴⁸) for purposes of a second round allocation. Those operators whose initial licence applications are scaled back by a reduction coefficient have the option to participate in a second round of applications in respect of the difference between their original application and their allocation for one of the origins where the allocations are not exhausted.⁴⁹ After the EC publishes the first round reduction coefficients, by the 23rd day of the month prior to the beginning of the quarter, the operators have ten days to re-apply for the second round. On the basis of applications received, the EC Commission determines, if necessary, reduction coefficients and then publishes the quantities for which licences may be issued in the second round. In practice, publication of these quantities often occurred two weeks into the quarter for which the licences were issued.⁵⁰ Both "first" and "second" round licences are valid until the seventh day of the month following the end of the quarter.

(3) Hurricane licences

III.28 Hurricane licences are granted, on an ad hoc basis, to operators who "include or directly represent" a producer adversely affected by a tropical storm and are thus unable to supply the EC market.⁵¹ As noted above, hurricane licences may be used to import bananas from any source. Bananas imported with hurricane licences may be counted as reference quantities for future eligibility for Category B licences.

⁴⁷Article 3.2 of Commission Regulation (EC) 478/95 (as amended).

⁴⁸See e.g. Commission Regulations (EC) 704/95, 1387/95, 2234/95 (as amended) and 2913/95.

⁴⁹Article 4 of Commission Regulation (EC) 478/95 (as amended).

⁵⁰See Commission Regulations (EC) 2500/95, 45/96, 670/96, 1371/96, respectively.

⁵¹E.g. Article 2 of Commission Regulation (EC) 2791/94.

(c) **Trade policy developments concerning bananas**

(i) **Disputes relating to bananas under the GATT**

III.29 Elements of the present EC market organization for bananas were the subject of a complaint by Colombia, Costa Rica, Guatemala, Nicaragua and Venezuela in 1993. The panel which was established by the GATT CONTRACTING PARTIES to examine the matter submitted its report on 11 February 1994 (second *Banana* panel).⁵² Prior to the establishment of the common market organization for bananas on 1 July 1993, the banana regimes of individual EC member States were the subject of a complaint by the same countries mentioned above. The resulting GATT panel (first *Banana* panel) issued its report on 3 June 1993.⁵³ Neither panel report was adopted by the GATT CONTRACTING PARTIES.

(ii) **Framework Agreement on Bananas (BFA)**

III.30 In 1994, the EC negotiated the BFA with Colombia, Costa Rica, Venezuela and Nicaragua. As described above, the BFA contains provisions concerning the size of the basic tariff quota, the in-quota tariff (ECU 75 per tonne), country-specific allocations and transferability of those allocations, the 90,000 tonne allocation for non-traditional ACP bananas, and export certificates. The four Latin American parties to the BFA agreed not to pursue the adoption of the report of the second *Banana* panel. Guatemala, the fifth complaining contracting party to the second *Banana* panel, is not a party to the BFA. The BFA was incorporated into the EC's Uruguay Round Schedule in March 1994.⁵⁴ The BFA came into force on 1 January 1995⁵⁵ and its functioning is scheduled to be reviewed "before the end of the third year" with full consultations with Member Latin American suppliers. The BFA is applicable until 31 December 2002.⁵⁶

(iii) **Tariff changes**

III.31 From 1963, the EC had a consolidated tariff of 20 per cent ad valorem on bananas. Initial negotiating rights were held by Brazil. With the introduction of the common market organization for bananas on 1 July 1993, a tariff quota was established with an in-quota tariff of ECU 100 per tonne for third-country bananas and ECU 850 per tonne for out-of-quota imports. Out-of-quota imports of ACP bananas were subject to a tariff of ECU 750 per tonne. On 26 October 1993, the EC notified the CONTRACTING PARTIES of its intention to renegotiate the 1963 concession on bananas in accordance with the provisions of Article XXVIII:5 of GATT 1947. On 1 July 1995, the EC's Uruguay Round Schedule, including its tariff concession on bananas, became effective (see also paragraph 0 above).⁵⁷

⁵²Panel on "EEC - Import Regime for Bananas", DS38/R (not adopted).

⁵³Panel on "EEC - Member States' Import Regimes for Bananas", DS32/R (not adopted).

⁵⁴Schedule LXXX - European Communities.

⁵⁵Commission Regulation (EC) 3223/94 (as amended).

⁵⁶Para. 9 of the Annex "Framework Agreement on Bananas" in Schedule LXXX - European Communities.

⁵⁷In signing the Final Act, Guatemala submitted a letter stating that it was reserving "all GATT and WTO rights" relative to the EC's Schedule as regards bananas.

III.32 In accordance with the EC reduction commitments as a result of the Uruguay Round, the level of the bound tariff was reduced on 1 July 1995 to ECU 822 per tonne and on 1 July 1996 to ECU 793 per tonne. The final bound MFN rate at the end of the six-year implementation period of the Uruguay Round results will be ECU 680 per tonne. In accordance with the BFA entered into by the EC with Colombia, Costa Rica, Nicaragua and Venezuela, the MFN in-quota tariff rate was reduced and bound at ECU 75 per tonne from 1 July 1995 (though it was applied from 1 January 1995).

(iv) Lomé waiver

III.33 The Fourth Lomé Convention, signed on 15 December 1989 between the EC and 70 African, Caribbean and Pacific developing countries, many of which are Members of the WTO, contains a protocol concerning bananas, along with provisions applying to products more generally. Like its predecessors, the Fourth Lomé Convention was notified to the GATT and considered by a working party.

III.34 On 10 October 1994, the EC requested, together with the ACP contracting parties, a waiver from the EC's obligations under Article I:1 of GATT 1947.⁵⁸ The waiver was granted by the CONTRACTING PARTIES on 9 December 1994 and provides, in paragraph 1 of the waiver 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."⁵⁹

III.35 On 14 October 1996, the Lomé waiver as granted by decision of the GATT CONTRACTING PARTIES at its December 1994 session 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).⁶⁰

(v) Accession of Austria, Finland and Sweden to the EC

III.36 Following the accession of Austria, Finland and Sweden to the EC on 1 January 1995, the EC autonomously increased access under in-quota tariff conditions (ECU 75 per tonne) by 353,000 tonnes.⁶¹ The administration of these additional quantities is subject to the same procedures as the bound tariff quota, although they have not been bound in the EC Schedule.

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

⁵⁸GATT document L/7539 of 10 October 1994 and L/7539/Corr.1.

⁵⁹Para. 1 of GATT document L/7604 of 19 December 1994.

⁶⁰WT/L/186 of 18 October 1996.

⁶¹According to data submitted by the EC, this volume corresponds to the average yearly consumption of bananas in these three countries in the period 1991-93.

VI. INTERIM REVIEW

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

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

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

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

6.5 The Complaining parties also commented on the application of the Lomé waiver to Article XIII, on the one hand, and to the tariff treatment of non-traditional imports of ACP bananas, on the other. To the extent that we agreed with those comments, we made adjustments to paragraphs 7.104-7.110 and paragraphs 7.135 and 7.139. The EC also raised arguments concerning the interpretation of the coverage of the waiver. In response to the EC's comments, we revised paragraphs 7.197-7.199.

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

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

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

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

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

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

VII. FINDINGS

7.1 This case is an exceedingly complex one. There are six parties (one representing 15 member States) and 20 third parties, meaning that almost one-third of Members are involved in the case. In addition to claims under the General Agreement on Tariffs and Trade 1994, claims are made for the first time in dispute settlement under four other WTO agreements: The Agreement on Agriculture, the Agreement on Import Licensing Procedures, the Agreement on Trade-Related Investment Measures and the General Agreement on Trade in Services. The submissions by the Complainants³²⁷ and the EC totalled several thousand pages. Moreover, the unprecedented number and complexity of the claims and arguments has meant that the organization and presentation of our work has not been easy.

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

A. ORGANIZATIONAL ISSUES

7.3 In the course of these proceedings, we considered two issues related to the organization of our work. These concerned the extent of the participatory rights to be afforded third parties and the presence in Panel meetings of private lawyers representing third parties.

1. PARTICIPATION OF THIRD PARTIES

7.4 At the meeting of the Dispute Settlement Body on 8 May 1996, Belize, Cameroon, Colombia, Costa Rica, Côte d'Ivoire, Dominica, Dominican Republic, Ghana, Grenada, Jamaica, Nicaragua, Saint Vincent and the Grenadines, Saint Lucia, Senegal, Suriname and Venezuela requested to be allowed to participate more fully in the work of the Panel, i.e., these Members requested to be present at all meetings between the Panel and the parties to the dispute; to be able to present their point of view at each of these meetings; to receive copies of all submissions and other written material; and to be allowed to present written submissions both to the first and to the second meetings of the Panel. While the DSB took note of these statements, there was no consensus on such participation.³²⁸ Several of these countries later confirmed their requests in letters addressed to the Chairman of the DSB.

7.5 Subsequently, we considered the above requests. The rights of third parties are dealt with in Article 10 and Appendix 3 of the Dispute Settlement Understanding. Article 10 provides that third parties "shall have an opportunity to be heard by the panel and to make written submissions to the panel". It also provides that third parties are entitled to receive the submissions of the parties made to the first substantive panel meeting. Paragraph 6 of Appendix 3 specifies that third parties shall be invited "to present their views during a session of the first substantive meeting of the panel set aside for that purpose. All such third parties may be present during the entirety of this session". Under prior GATT practice, more expansive rights were granted to third parties in several disputes,

³²⁷Our use of the term Complainants in these Findings is explained in para. 7.0 *infra*. In respect of organizational and preliminary issues, it is used to refer to all five Complaining parties.

³²⁸WT/DSB/M/16, item 1, pp.1-5.

including the two prior disputes involving bananas and in the *Semiconductors* case.³²⁹ In those cases, however, the extension of such rights had been the subject of agreement between the parties at that time. No such agreement existed between the parties in the present dispute.

7.6 Having considered representations by the Complainants, the EC and third parties, we decided prior to our first substantive meeting with the parties that, in addition to the rights specifically provided for in the DSU, third parties in this dispute would be invited to observe the whole of the proceedings at that meeting and not just the one session thereof set aside for hearing third-party arguments.

7.7 At the first substantive meeting of the Panel, the EC requested that third parties be allowed to participate in future panel meetings as set out in paragraph 7.0 above. The Complainants expressed the view that third party rights were sufficiently safeguarded by the normal procedures as set out in Article 10 of the DSU. We consulted the parties on this issue, but they maintained their opposing viewpoints.

7.8 We thereafter ruled as follows:

"(a) The Panel has decided, after consultations with the parties in conformity with DSU Article 12.1, that members of governments of third parties will be permitted to observe the second substantive meeting of the Panel with the parties. The Panel envisages that the observers will have the opportunity also to make a brief statement at a suitable moment during the second meeting. The Panel does not expect them to submit additional written material beyond responses to the questions already posed during the first meeting.

(b) The Panel based its decision, *inter alia*, on the following considerations:

- (i) the economic effect of the disputed EC banana regime on certain third parties appeared to be very large;
- (ii) the economic benefits to certain third parties from the EC banana regime were claimed to derive from an international treaty between them and the EC;
- (iii) past practice in panel proceedings involving the banana regimes of the EC and its member States; and
- (iv) the parties to the dispute could not agree on the issue".

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

³²⁹Panel Report on "EEC - Import Regime for Bananas", issued on 11 February 1994 (not adopted), DS38/R, p.4, para. 8; Panel Report on "EEC - Member States' Import Regimes for Bananas", issued on 3 June 1993 (not adopted), DS32/R, p.2, para. 9; Panel Report on "Japan - Trade in Semiconductors", adopted on 4 May 1988, BISD 35S/116, 116-117, para. 5. See also Panel Report on "EEC - Tariff Treatment on Imports of Citrus Products from Certain Countries in the Mediterranean Region", issued on 7 February 1985 (not adopted), L/5776, p.2, para. 1.5; Interim Panel Report on "United Kingdom - Dollar Area Quotas", adopted on 30 July 1973, BISD 20S/230, 231, para. 3.

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

2. PRESENCE OF PRIVATE LAWYERS

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

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

- (a) It has been past practice in GATT and WTO dispute settlement proceedings not to admit private lawyers to panel meetings if any party objected to their presence and in this case the Complainants did so object.
- (b) In the working procedures of the Panel, which were adopted at the Panel's organizational meeting, we had expressed our expectation that only members of governments would be present at Panel meetings.
- (c) The presence of private lawyers in delegations of some third parties would be unfair to those parties and other third parties who had utilized the services of private lawyers in preparing their submissions, but who were not accompanied by those lawyers because they assumed that all participants at the meeting would comply with our expectations as expressed in the working procedures adopted by the Panel at its organizational meeting.
- (d) Given that private lawyers may not be subject to disciplinary rules such as those that applied to members of governments, their presence in Panel meetings could give rise to concerns about breaches of confidentiality.
- (e) There was a question in our minds whether the admission of private lawyers to Panel meetings, if it became a common practice, would be in the interest of smaller Members as it could entail disproportionately large financial burdens for them.
- (f) Moreover, we had concerns about whether the presence of private lawyers would change the intergovernmental character of WTO dispute settlement proceedings.

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

B. PRELIMINARY ISSUES

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

7.14 As the Appellate Body has made clear in its first two decisions, under Article 3.2 of the DSU the starting point for the interpretation of treaty provisions is the Vienna Convention on the Law of Treaties (the "Vienna Convention").³³⁰ Article 31 of the Vienna Convention provides in relevant part as follows:

"1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.

...

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

Article 32 of the Vienna Convention permits recourse to

"supplementary means of interpretation ... in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31 (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable".

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

"Except as otherwise provided under this Agreement or the Multilateral Trade

³³⁰Appellate Body Report on "Japan - Taxes on Alcoholic Beverages", adopted on 1 November 1996, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, AB-1996-2, pp.10-12; Appellate Body Report on "United States - Standards for Reformulated and Conventional Gasoline", adopted on 20 May 1996, WT/DS2/AB/R, AB-1996-1, pp.16-17.

Agreements, the WTO shall be guided by the decisions, procedures and customary practices followed by the CONTRACTING PARTIES to GATT 1947 and the bodies established in the framework of GATT 1947".

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

1. ADEQUACY OF THE CONSULTATIONS

7.17 Consultations under Article 4 of the DSU are normally required as the first step in the WTO dispute settlement process.³³¹ Article 4.2 of the DSU requires a Member "to accord sympathetic consideration to and afford adequate opportunity for consultation regarding any representations made by another Member ...". Article 4.5 of the DSU specifies that "[i]n the course of the consultations ... before resorting to further action under this Understanding, Members should attempt to obtain satisfactory adjustment of the matter". However, if consultations fail to settle a dispute within 60 days of the request for consultations, Article 4.7 of the DSU authorizes the complaining party to request the DSB to establish a panel.³³²

7.18 The EC argues that the consultations that were held in this matter between the Complainants and the EC did not fulfil their minimum function of affording a possibility for arriving at a mutually satisfactory solution and a clear setting out of the different claims of which a dispute consists. The Complainants argue that Article 4.5 of the DSU only requires that an "attempt" be made to resolve the matter. Since consultations were held on 14-15 March 1996, the Complainants argue that they complied with the DSU and were authorized to request the DSB to establish a panel when those consultations failed to produce a mutually agreed solution to the dispute. We note that the EC did not raise this issue in the DSB.³³³

7.19 Consultations play a critical role in the WTO dispute settlement process as they did under GATT. Experience under the DSU to date has shown that consultations frequently enable disputes between Members to be resolved without resort to the dispute settlement panel process.³³⁴ Since the DSU provides in Article 3.7 that "[a] solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred", disputing parties should consult in good faith and attempt to reach such a solution. Consultations are, however, a matter reserved for the parties. The DSB is not involved; no panel is involved; and the consultations are held in the absence of the Secretariat. In these circumstances, we are not in a position to evaluate the consultation process in order to determine if it functioned in a particular way. While a mutually agreed solution is to be preferred, in some cases it is not possible for parties to agree upon one. In those cases, it is our view that the function of a panel is only to ascertain that consultations, if required, were in fact held or, at least, requested.³³⁵

³³¹Under Article 8.10 of the Agreement on Textiles and Clothing, a matter may be taken to the DSB without prior consultations under the DSU.

³³²If there is a failure to consult, Article 4.3 of the DSU provides that a panel may be requested after 30 days.

³³³Minutes of DSB Meeting of 24 April 1996, WT/DSB/M/15, item 1, pp.1-2; Minutes of DSB Meeting of 8 May 1996, WT/DSB/M/16, item 1, pp.1-5.

³³⁴WT/DBS/8, p.17 (1996 Annual Report of the DSB).

³³⁵DSU, Article 4.3.

7.20 As to the EC argument that consultations must lead to an adequate explanation of the Complainants' case, we cannot agree. Consultations are the first step in the dispute settlement process. While one function of the consultations may be to clarify what the case is about, there is nothing in the DSU that provides that a complainant cannot request a panel unless its case is adequately explained in the consultations. The fulfilment of such a requirement would be difficult, if not impossible, for a complainant to demonstrate if a respondent chose to claim a lack of understanding of the case, a result which would undermine the automatic nature of panel establishment under the DSU. The only prerequisite for requesting a panel is that the consultations have "fail[ed] to settle a dispute within 60 days of receipt of the request for consultations ...".³³⁶ Ultimately, the function of providing notice to a respondent of a complainant's claims and arguments is served by the request for establishment of a panel and by the complainant's submissions to that panel.

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

2. SPECIFICITY OF THE REQUEST FOR PANEL ESTABLISHMENT

(a) Article 6.2 and the request for establishment of the Panel

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

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

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

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

"The European Communities maintains a regime for the importation, sale and distribution of bananas established by Regulation 404/93 (O.J. L 47 of 25 February 1993, p. 1), and subsequent EC legislation, regulations and administrative measures, including those reflecting the provisions of the Framework Agreement on bananas, which implement, supplement and amend that regime. The regime and related measures appear to be inconsistent with the obligations of the EC under, *inter alia*, the General Agreement on Tariffs and Trade 1994 ("GATT 1994"), the Agreement on Import Licensing Procedures, the Agreement on Agriculture, the General Agreement on Trade in Services ("GATS") and the Agreement on Trade-

³³⁶DSU, Article 4.7.

Related Investment Measures ("TRIMs Agreement").

[Description of consultations omitted]

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

- (1) Articles I, II, III, X, XI and XIII of the GATT 1994,
- (2) Articles 1 and 3 of the Agreement on Import Licensing Procedures,
- (3) the Agreement on Agriculture,
- (4) Articles II, XVI and XVII of the GATS, and
- (5) Article 2 of the TRIMs Agreement.

These measures also produce distortions which nullify or impair benefits accruing to Ecuador, Guatemala, Honduras, Mexico and the United States, directly or indirectly, under the cited Agreements; and these measures impede the objectives of the GATT 1994 and the other cited Agreements".³³⁷

(b) The arguments of the parties

7.24 The EC claims that the Complainants' request for the establishment of this Panel fails to comply with the requirements of Article 6.2 of the DSU. The EC notes that the request refers specifically to only one EC regulation and describes that regulation and related, but unspecified, measures as a "regime". The EC further notes that while the request refers to some specific agreements and provisions, it suggests that there might be other unspecified provisions and agreements that are relevant, and that it fails to explain which part of the EC regime is inconsistent with the requirements of which provision of which agreement. The EC argues that for these reasons the panel request is inadequate to serve as the basis for the terms of reference of the Panel and inadequate to give appropriate notice to the EC and potential third parties of which claims may be put forward by the Complainants. In support of its arguments, the EC cites two panel reports issued under the Tokyo Round Agreement on the Interpretation of Article VI (the "Tokyo Round Anti-Dumping Code"), one of which was adopted by the Committee on Anti-Dumping Practices and one of which was not.³³⁸

7.25 In response, the Complainants argue that their request refers to the basic EC regulation that establishes the EC rules on banana imports and that this reference is sufficient to identify the measures at issue. They argue, in addition, that Article 6.2 does not require a panel request to tie each part of a

³³⁷WT/DS27/6.

³³⁸Panel Report on "United States - Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway", adopted on 26 April 1994, ADP/87, p.99, paras. 333-335; Panel Report on "EC - Anti-Dumping Duties on Audiotapes in Cassettes Originating in Japan", issued on 28 April 1995, ADP/136, p.53, para. 295.

contested measure to a specific provision of a WTO agreement that it is inconsistent with, but rather that submissions to panels serve that purpose. The Complainants further argue that the Tokyo Round Anti-Dumping Code cases are irrelevant. Moreover, they note that the EC did not raise this issue at either DSB meeting at which the panel request was presented and cannot now claim that it was prejudiced by not knowing the claims of the Complainants. Finally, the Complainants argue that this Panel may not rule on this claim because it is outside the Panel's terms of reference.

(c) Analysis of the Article 6.2 claim

7.26 We examine first the argument by the Complainants that we have no authority to consider the EC claim. As noted above, panels under GATT 1947 and the Tokyo Round agreements considered similar claims.³³⁹ We see no reason to deviate from that practice. Because of the application of "reverse" consensus decision-making applicable in the case of panel establishment in the DSB, the DSB is not likely to be an effective body for resolving disputes over whether a request for the establishment of a panel meets the requirements of Article 6.2 of the DSU. Therefore, as a practical matter only the panel established on the basis of the request (and thereafter the Appellate Body) can perform that function. Moreover, the issue we are asked to resolve can be viewed in essence as a decision on the scope of our terms of reference, which is clearly a proper subject for consideration by a panel.³⁴⁰ We turn therefore to an analysis of the EC claim in light of the interpretative rule of the Vienna Convention and of Article XVI of the WTO Agreement. In this connection, we examine (i) the ordinary meaning of the terms of Article 6.2, (ii) the context of the terms of Article 6.2, (iii) the object and purpose of Article 6.2 and (iv) past practice under Article 6.2 and its predecessor.

(i) Ordinary meaning of treaty terms

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

7.28 As to the second requirement of Article 6.2, a complete elaboration of the complainant's legal argument is not required. Article 6.2 specifies only that the request must include a "summary" of the legal basis of the complaint and that the summary need only be "brief". However, Article 6.2 does require that summary to "present the *problem* clearly". In undertaking an analysis of whether the

³³⁹ Panel Report on "United States - Denial of Most-Favoured Nation Treatment as to Non-Rubber Footwear from Brazil", adopted on 19 June 1992, BISD 39S/128, pp.147-148, paras. 6.1-6.2. Panels under Tokyo Round agreements include: Panel Report on "European Communities - Imposition of Anti-Dumping Duties on Imports of Cotton Yarn from Brazil", adopted on 4 July 1995, ADP/137, pp.105-109, paras. 438-466; Panel Report on "United States - Countervailing Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway", adopted on 27 April 1994, SCM/153, pp.68-69, paras. 208-214; Panel Report on "United States - Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway", adopted on 26 April 1994, ADP/87, p.99, paras. 333-335; Panel Report on "United States - Anti-Dumping Duties on Imports of Gray Portland Cement and Cement Clinker from Mexico", issued on 7 September 1992, ADP/82, pp.49-50, para. 5.12.

³⁴⁰The Appellate Body has considered terms of reference issues. Appellate Body Report on "Brazil - Measures Affecting Desiccated Coconut", issued on 21 February 1997, WT/DS22/AB/R, AB-1996-4, p.22.

panel request in this case complies with the terms of Article 6.2 of the DSU, we find it useful to divide the request into three categories of specificity. First, in most cases, the request alleges that the EC banana regime is inconsistent with the requirements of a specific provision of a specific agreement. Second, in the case of the Agreement on Agriculture, the request simply alleges that the regime is inconsistent with that agreement. Third, the panel request indicates that the list of provisions specified in the request is not exclusive. We examine the compliance of the request with Article 6.2 in each of these three situations.

7.29 Where the panel request alleges that the banana regime is inconsistent with the requirements of a specific article of a specific agreement, we believe that the request is sufficiently specific to comply with the minimum standards established by the terms of Article 6.2 of the DSU. For example, the request claims that the regime is inconsistent with the requirements of six GATT provisions: Articles I, II, III, X, XI and XIII, as well as inconsistent with the requirements of specific provisions of the Agreement on Import Licensing Procedures, the Agreement on Trade-Related Investment Measures and the General Agreement on Trade in Services. Generally, each of these provisions is concerned with a distinct obligation. For example, Article I of GATT bans discrimination on the basis of origin in respect of certain specified matters. A fair reading of the panel request's reference to Article I would be that there is an allegation that the EC banana regime is inconsistent with the requirements of Article I because it contains elements that discriminate in favour of some countries to the detriment of Members. Such an allegation can be described as a "brief summary of the legal basis of the complaint", which arguably presents the "problem" clearly, i.e. there is discrimination on the basis of product origin which is inconsistent with the requirements of Article I. However, a panel request that does no more than identify a measure and specify the provision with which it is alleged to be inconsistent is, in our view, at the outer limits of what is acceptable under Article 6.2. Nonetheless, particularly in light of our analysis below of the object and purpose and of the context of Article 6.2 and of past GATT and WTO practice, we believe that this conclusion is the appropriate interpretation of the terms of Article 6.2. In this regard, we note that there is no explicit requirement in Article 6.2 to explain how the measure at issue is inconsistent with the requirements of a specific WTO provision and the EC concedes in its response to our questions that a simple listing of the provision and agreement alleged to have been violated may suffice for the purposes of Article 6.2.³⁴¹

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

³⁴¹In its response, the EC seems to accept that the following panel requests under the DSU meet the requirements of Article 6.2 even though they only list the WTO provisions that the challenged measures are alleged to be inconsistent with, without explaining why: Canada - Certain Measures Concerning Periodicals, Request for the Establishment of a Panel, 24 May 1996, WT/DS31/2; EC - Measures Concerning Meat and Meat Products (Hormones), Request for the Establishment of a Panel, WT/DS26/6; EC - Trade Description of Scallops, Request for the Establishment of a Panel by Chile, WT/DS14/5; EC - Trade Description of Scallops, Request for the Establishment of a Panel by Peru, WT/DS12/7; EC - Trade Description of Scallops, Request for the Establishment of a Panel by Canada, WT/DS7/7. We would note that at least one of the EC's three panel requests under the DSU has mentioned only the agreement and provisions alleged to have been violated, i.e., United States - Tariff Increases on Products from the EC, Request for the Establishment of a Panel by the EC, WT/DS39/2.

provisions or to unidentified "other" provisions are too vague to meet the standards of Article 6.2 of the DSU.

7.31 Thus, we preliminarily find that, given the ordinary meaning of the terms of Article 6.2 of the DSU, the panel request made by Complainants was generally sufficient to meet its requirements. We note, however, that since the invocation of the Agreement on Agriculture in the panel request did not indicate a specific provision thereof, we will not consider the claim raised by Ecuador in its first written submission under that Agreement. We will also not consider the claims raised by Ecuador, Guatemala and Honduras, and the United States in their first written submissions under Article 5 of the TRIMs Agreement since the panel request referred only to Article 2 of the TRIMs Agreement.³⁴² We now consider whether this preliminary finding is supported by the context and the object and purpose of Article 6.2. We also consider past practice under Article 6.2 and its predecessor.

(ii) Context

7.32 The terms of Article 6.2 of the DSU must be interpreted in light of their context in the WTO dispute settlement system. First and foremost, that system is designed to settle disputes.³⁴³ Article 3.2 of the DSU specifies that "[t]he dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. ...". Article 3.3 continues in the same vein (emphasis added):

"The *prompt* settlement of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members".

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

7.33 The problems presented by other interpretations of Article 6.2 are readily apparent in this case. While no one would contest that there is a real dispute between the Complainants and the EC over the EC's import regime for bananas, if we were to rule that the panel request did not meet the requirements of Article 6.2 of the DSU and that the Complainants' panel request was accordingly invalid, the resolution of this dispute would be delayed by at least 6 or 7 months. Yet, what purpose would that serve? Once the Complainants filed their first submission, there could be no doubt exactly what their claims were. To the extent that a respondent could legitimately claim surprise in what was contained in a complainant's submission, the efficient solution would be to grant the respondent several more weeks to file its initial submission, not to start the entire consultation/panel request process over. This is particularly true given that a reading of Article 6.2 of the DSU such as the EC

³⁴² Given that the request for consultations did list Article 5 of the TRIMs Agreement, the omission of that article in the panel request could be understood as a decision by the Complainants not to pursue this claim in the light of a more thorough legal assessment and/or the consultations.

³⁴³ Appellate Body Report on "United States - Measure Affecting Imports of Woven Wool Shirts and Blouses from India", issued on 25 April 1997, WT/DS33/AB/R, AB-1997-1, p.9.

proposes could result in some parts of the case being accepted, while others were relegated to a different proceeding, something completely contrary to the DSU's philosophy of resolving all related issues together, as expressed in Article 9 of the DSU.³⁴⁴ Moreover, such a reading could make it more difficult for Members, and particularly developing-country Members, to use the dispute settlement system, except by incurring the expense of private legal experts at the earliest stage of the proceedings.

7.34 Thus, a consideration of the context of the terms of Article 6.2 supports the preliminary finding reached in paragraph 7.0 above.

(iii) Object and purpose

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

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

7.37 Second, it appears that the panel request adequately informed the EC of the case against it. We reach this conclusion in light of the facts that the EC did not complain about the request's specificity until it filed its first submission, it did not ask for time beyond the normal periods indicated in the DSU to file its submission and it did not claim in its written submissions that its defence was prejudiced in any particular way by a lack of specificity in the panel request. The EC stated at the Panel's hearings, however, that it had been prejudiced in that the lack of minimal clarity handicapped the EC in the preparation of its defence. However, as pointed out by the Complainants, the EC's oral presentation at the first meeting of the Panel, its responses to our questions and its rebuttal submission essentially followed the line of argument made in its initial submissions, suggesting that it had sufficient time to develop its line of defence. In these circumstances, we believe that the object and purpose of Article 6.2 of the DSU was served by the Complainants' panel request, suggesting that such request was adequately specific under Article 6.2.

7.38 Third, it appears that the panel request adequately informed third parties of the case against the EC, as 20 third parties participated in this panel process.³⁴⁵

³⁴⁴Article 9 of the DSU provides that "1. Where more than one Member requests the establishment of a panel related to the same matter, a single panel may be established to examine these complaints taking into account the rights of all Members concerned. A single panel should be established to examine such complaints whenever feasible. ... 3. If more than one panel is established to examine the complaints related to the same matter, to the greatest extent possible the same persons shall serve as panelists on each of the separate panels and the timetable for the panel process in such disputes shall be harmonized".

³⁴⁵Belize, Cameroon, Canada, Colombia, Costa Rica, Côte d'Ivoire, Dominica, Dominican Republic, Ghana, Grenada, India, Jamaica, Japan, Nicaragua, Philippines, Saint Vincent and the Grenadines, Saint Lucia, Senegal, Suriname and Venezuela. Thailand indicated a third-party interest in the proceedings, but later withdrew.

7.39 Thus, a consideration of the object and purpose of Article 6.2 supports the preliminary finding reached in paragraph 7.0 above.

(iv) Past practice

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

"Adopted panel reports are an important part of the GATT *acquis*. They are often taken into account by subsequent panels. They create legitimate expectations among WTO Members, and, therefore should be taken into account where they are relevant to any dispute. However, they are not binding, except with respect to resolving the particular dispute between the parties to that dispute".³⁴⁶

There are two GATT/WTO cases that consider issues related to the one we face here. In 1992 a panel declined to consider claims based on GATT Articles X and XXIII(b)-(c) because they were not within its terms of reference, which it noted were defined by the request for the establishment of the panel.³⁴⁷

More recently, a WTO panel reached a similar result in respect of a claim that consultations had not been properly held under Article XXIII, rejecting the claim because a fair reading of the documents that were used to establish its terms of reference showed that the issue had not been raised in those documents.³⁴⁸ Although treated as a "terms of reference" issue in both cases, the results were in effect determined on the basis of the panel request. The terms of reference were found not to encompass the claim because the provision or issue had not been referred to in the panel request (and related documents in one case), which in both cases had served to establish the panels' terms of reference. Our reading of the terms of Article 6.2 of the DSU is not inconsistent with these past GATT/WTO panel decisions, nor with a recent Appellate Body decision affirming the above-mentioned WTO panel decision.³⁴⁹ In this connection, we note that the power of a panel to interpret its terms of reference is not negated by the requirement in Article 7.2 of the DSU that a panel address the "relevant" provisions of covered agreements cited by the parties.

7.41 With respect to practice of GATT contracting parties and Members in requesting panels, numerous examples may be found in the period from 1989³⁵⁰ to date of panel requests containing only

³⁴⁶Appellate Body Report on "Japan - Taxes on Alcoholic Beverages", adopted on 1 November 1996, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, AB-1996-2, p.14.

³⁴⁷Panel Report on "United States - Denial of Most-favoured-nation Treatment as to Non-rubber Footwear from Brazil", adopted on 19 June 1992, BISD 39S/128, 147-148, paras. 6.1-6.2.

³⁴⁸Panel Report on "Brazil - Measures Affecting Desiccated Coconut", issued on 17 October 1996, WT/DS22/R, pp.77-78, paras. 286-290.

³⁴⁹Appellate Body Report on "Brazil - Measures Affecting Desiccated Coconut", issued on 21 February 1997, WT/DS22/AB/R, AB-1996-4, p.22.

³⁵⁰In 1989, the GATT CONTRACTING PARTIES adopted Improvements to the GATT Dispute Settlement Rules and Procedures (BISD 36S/61), including the following language, which is quite similar to that contained in Article 6.2 of the DSU:

"F.(a) The request for a panel or a working party shall be made in writing. It shall indicate whether

an allegation that a measure is inconsistent with the requirements of a specific provision of a specific agreement, without a more detailed description of the problem.³⁵¹ Indeed, as noted above, the EC concedes as much in its response to our questions where it examines panel requests in eight WTO cases and finds that in most cases there is no specific explanation given as to how the contested measure is inconsistent with the requirements of the specified provisions of the specified agreements. To date, no GATT or WTO panel has found such requests to be inadequate, except in respect of the antidumping and countervailing duty claims discussed in the following paragraph. Thus, our reading of the terms of Article 6.2 of the DSU is consistent with the practice followed by GATT contracting parties and WTO Members in requesting panels under Article 6.2 and the similar language of its predecessor provision, which was adopted by the GATT CONTRACTING PARTIES in 1989.

7.42 It can be argued, however, that our reading of the terms of Article 6.2 may not be consistent with several panel decisions (adopted and unadopted) under the Tokyo Round Agreement on Implementation of Article VI (the "Tokyo Round Anti-Dumping Code").³⁵² We find these cases to be of limited relevance in the interpretation of the terms of Article 6.2 of the DSU. In the first place, the Tokyo Round Anti-Dumping Code had different rules for the initiation of panel procedures than were applicable in the case of GATT 1947 panels. More fundamentally, Article 15 of the Tokyo Round Anti-Dumping Code required a so-called conciliation procedure, involving the disputing parties and the Committee charged with supervising the operations of the Code, between the end of the consultation period and the filing of a request to establish a panel. The practice under this conciliation procedure involved the preparation of a detailed statement of issues by the complaining party, which was circulated to the members of the Committee so that they might attempt to solve the dispute through conciliation. Article 15.5 of the Tokyo Round Anti-Dumping Code referred to the conciliation process as involving a "detailed examination by the Committee". In order to make the conciliation process meaningful, it may have been appropriate to insist that all claims brought before a

(..continued)

consultations were held, and provide a brief summary of the factual and legal basis of the complaint sufficient to present the problem clearly".

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

³⁵¹See examples cited in note **Error! Bookmark not defined.** supra. See also EC - Measures Affecting Livestock and Meat (Hormones), Request for the Establishment of a Panel, WT/DS48/5; Brazil - Measures Affecting Desiccated Coconut, Request for the Establishment of a Panel, WT/DS22/2; European Communities - Duties on Imports of Grains, Request for the Establishment of a Panel, WT/DS13/2; Japan - Taxes on Alcoholic Beverages, Request for the Establishment of a Panel by the United States, WT/DS11/2; European Communities - Duties on Imports of Cereals, Request for the Establishment of a Panel, WT/DS9/2; United States - Standards for Reformulated and Conventional Gasoline, Request for the Establishment of a Panel, WT/DS4/2; United States - Measures Affecting the Importation and Internal Sale and Use of Tobacco, Recourse to Article XXIII:2 by Argentina, DS44/8; EEC - Restrictions on Imports of Apples, Communication from Chile, DS39/2 & DS41/2.

³⁵²Panel Report on "United States - Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway", adopted 26 April 1994, ADP/87, paras. 333-335; Panel Report on "European Communities - Imposition of Anti-Dumping Duties on Imports of Cotton Yarn from Brazil", ADP/137, adopted on 4 July 1995, paras. 438-466; Panel Report on "United States - Anti-Dumping Duties on Imports of Gray Portland Cement and Cement Clinker from Mexico", issued on 7 September 1992 (not adopted), ADP/82, para. 5.12; Panel Report on "EC - Anti-Dumping Duties on Audiotapes in Cassettes Originating in Japan", issued on 28 April 1995 (not adopted), ADP/136, para. 295. In addition, there was one case involving this issue under the Tokyo Round Agreement on Interpretation and Application of Articles VI, XVI and XXIII. Panel Report on "United States - Countervailing Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway", adopted 27 April 1994, SCM/153, paras. 208-214 (following the approach of the Salmon antidumping case cited above). A claim of noncompliance with Article 6.2 was made in the Panel Report on "Measures Affecting Desiccated Coconut", dated 17 October 1996, WT/DS22/R, para. 290, but the panel did not reach the Article 6.2 issue, except as noted above, by finding that the failure to allege that a measure was inconsistent with the requirements of a specific provision of GATT meant that a claim based on that provision was not within the panel's terms of reference, a result which we follow.

panel have been considered in the conciliation process. Such a conciliation requirement does not exist under the DSU and did not exist under GATT 1947 rules. There has never been a practice of preparing such a statement of claims. Moreover, the nature of antidumping cases is different from this case.

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

(v) Cure

7.44 Finally, we note that at the second substantive Panel meeting, we expressed the preliminary view that even if there was some uncertainty whether the panel request had met the requirements of Article 6.2, the first written submissions of the Complainants "cured" that uncertainty because their submissions were sufficiently detailed to present all the factual and legal issues clearly. We considered that at the time that the EC filed its first written submission to the Panel, it had complete knowledge of the Complainants' case through their submissions. In light of our analysis of the panel request and Article 6.2 as outlined above, we confirm our preliminary view.³⁵³

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

7.46 In light of the foregoing finding, since the invocation of the Agreement on Agriculture in the panel request did not indicate a specific provision thereof, we will not consider the claim raised by Ecuador in its first written submission under that Agreement. We will also not consider the claims raised by Ecuador, Guatemala and Honduras, and the United States in their first written submissions under Article 5 of the TRIMs Agreement since the panel request referred only to Article 2 of the TRIMs Agreement.³⁵⁴

³⁵³We exclude from this confirmation any suggestion that the panel request was sufficient to allow claims based on the Agreement on Agriculture and Article 5 of the TRIMs Agreement since as to those provisions, the panel request did not comply at all with the requirements of Article 6.2 and, accordingly, there was no uncertainty that could be cured.

³⁵⁴The panel request listed Article XI of GATT, but no claims under Article XI were pursued by the Complainants.

3. *REQUIREMENT OF LEGAL INTEREST*

7.47 The EC argues that the US claims concerning trade in goods should be rejected because US banana production is minimal, its banana exports are nil and that for climatic reasons this situation is not likely to change. As a result, the EC suggests that the United States has not suffered any nullification or impairment of WTO benefits in respect of trade in bananas as required by Article 3.3 and 3.7 of the DSU.³⁵⁵ Moreover, the EC argues that the United States would have no effective WTO remedy under Article 22 of the DSU. With no effective remedy and absent any notion of a declaratory judgment or advisory opinion in the WTO dispute settlement system, the EC claims that the United States cannot raise "goods" issues because it has "no legal right or interest" therein. The EC argues that there must be a requirement in the WTO dispute settlement system that a complaining party have such a "legal interest" because the absence of such a requirement would undermine the DSU by leading to litigation "by all against all". The EC also suggests that the interests of Members in any given case can be adequately protected through assertion of a third party interest in the case.

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

7.49 In examining this issue, we note that neither Article 3.3 nor 3.7 of the DSU nor any other provision of the DSU contain any explicit requirement that a Member must have a "legal interest" as a prerequisite for requesting a panel. The reference in Article XXIII of GATT to nullification or impairment (or the impeding of the attainment of any GATT objective) does not establish a procedural requirement. Moreover, Article 3.8 of the DSU provides that nullification or impairment is normally presumed if there is an infringement of the obligations of a WTO agreement.³⁵⁶

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

"the absence of imports from contracting parties ... would not necessarily be an indication that they had no interest in the exports of the product affected by the tax, since their potentialities as exporters, given national treatment, should be taken into account".³⁵⁷

³⁵⁵Article 3.3 of the DSU provides that the prompt settlement of disputes is essential "in situations where a Member considers that benefits accruing to it directly or indirectly under the covered agreements are being impaired". Article 3.7 of the DSU requires Members to exercise judgment as to whether invocation of the DSU would be "fruitful".

³⁵⁶See Panel Report on "United States - Taxes on Petroleum and Certain Imported Substances", adopted on 17 June 1987, BISD 34S/136, 158, para. 5.1.9.

³⁵⁷GATT/CP.3/42, adopted 30 June 1949, II/181, 185, para. 16.

This view was confirmed in the 1958 *Italian Agricultural Machinery* case, where the panel noted that Article III of GATT applied to "any laws or regulations which might adversely modify the conditions of competition between the domestic and imported products".³⁵⁸ The *Section 337* case notes that Article III is concerned with "effective equality of opportunities for imported products".³⁵⁹ These cases confirm that WTO rules are not concerned with actual trade, but rather with competitive opportunities. Generally, it would be difficult to conclude that a Member had no possibility of competing in respect of a product or service. The United States does produce bananas in Puerto Rico and Hawaii. Moreover, even if the United States did not have even a potential export interest, its internal market for bananas could be affected by the EC regime and that regime's effect on world supplies and prices. Indeed, with the increased interdependence of the global economy, which means that actions taken in one country are likely to have significant effects on trade and foreign direct investment flows in others, Members have a greater stake in enforcing WTO rules than in the past since any deviation from the negotiated balance of rights and obligations is more likely than ever to affect them, directly or indirectly. Since the United States is likely to be affected by the EC regime, it would have an interest in a determination of whether the EC regime is inconsistent with the requirements of WTO rules. Thus, in our view a Member's potential interest in trade in goods or services and its interest in a determination of rights and obligations under the WTO Agreement are each sufficient to establish a right to pursue a WTO dispute settlement proceeding. Moreover, we note that this result is consistent with decisions of international tribunals.³⁶⁰

7.51 As to the EC's suggestions that the absence of a legal interest test (defined to exclude the US "goods" claims in this case) would undermine the DSU because it would lead to litigation "by all against all" and that the interests of Members in any given case can be adequately protected through assertion of a third party rights in the case, we note that all Members have an interest in ensuring that other Members comply with their obligations. That interest is not completely served by the possible assertion of third party rights since there may be no occasion to assert such rights unless another Member initiates a DSU proceeding and since third party rights are more limited than the rights of parties. The likelihood of litigation by all against all seems unlikely, as Members are admonished by Article 3.7 of the DSU to exercise restraint in bringing cases and the cost of bringing cases is such,

³⁵⁸Panel Report on "Italian Discrimination Against Imported Agricultural Machinery", adopted 23 October 1958, 7S/60, 64, para.12.

³⁵⁹Panel Report on "United States - Section 337 of the Tariff Act of 1930", adopted on 7 November 1989, BISD 36S/345, 386-387, para. 5.11.

³⁶⁰The International Court of Justice has not defined the concept of legal interest in specific terms. However, a number of its cases would support finding a legal interest in this case. For example, in the *Wimbledon* case, the Permanent Court of International Justice found that a state could raise a claim with respect to the Kiel Canal even though its fleet did not want to use it, suggesting that a potential interest was sufficient for a legal interest. PCIJ (1923), Ser. A, no. 1, 20. In *Northern Cameroons (Preliminary Objections)*, the ICJ stated:

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

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

especially in a case like this one, that this admonition is likely to be followed. In our view, it is also unlikely that significant numbers of cases will be initiated by Members that have no immediate trade interest in their results.

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

4. NUMBER OF PANEL REPORTS

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

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

"1. Where more than one Member requests the establishment of a panel related to the same matter, a single panel may be established to examine these complaints taking into account the rights of all Members concerned. ...

2. The single panel shall organize its examination and present its findings to the DSB in such a manner that the rights the parties to the dispute would have enjoyed had separate panels examined the complaints are in no way impaired. If one of the parties to the dispute so requests, the panel shall submit separate reports on the dispute concerned. ...".

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

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

7.57 For purposes of determining whether a Complainant in this matter has made a claim, we have examined its first written submission, as we consider that document determines the claims made by a complaining party. To allow the assertion of additional claims after that point would be unfair to the respondent, as it would have little or no time to prepare a response to such claims. In this regard, we note that paragraph 12(c) of the Appendix 3 to the DSU on "Working Procedures" foresees the simultaneous submission of the written rebuttals by complaining and respondent parties, a procedure that was followed in this case. To allow claims to be presented in the rebuttal submissions would mean that the respondent would have an opportunity to rebut the claims only in its oral presentation during the second meeting. In our view, the failure to make a claim in the first written submission

cannot be remedied by later submissions or by incorporating the claims and arguments of other complainants.

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

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

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

C. SUBSTANTIVE ISSUES

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

7.62 Before doing so, we consider whether bananas from the EC, ACP countries, BFA countries and other third countries are "like" products for purposes of the claims made in respect of Articles I, III, X and XIII of GATT. The factors commonly used in GATT practice to determine likeness, such as, for example, customs classification, end-use, and the properties, nature and quality of the product, all support a finding that bananas from these various sources should be treated as like products.³⁶¹ Moreover, all parties and third parties to the dispute have proceeded in their legal reasoning on the assumption that all bananas are "like" products in spite of any differences in quality, size or taste that may exist.

³⁶¹For a general discussion of relevant factors for determining the likeness of products, see Panel Report on "Japan - Taxes on Alcoholic Beverages", adopted on 1 November 1996, WT/DS8/R, WT/DS10/R & WT/DS11/R, pp.111-114, paras. 6.20-6.23, as modified by, Appellate Body Report on "Japan - Taxes on Alcoholic Beverages", adopted on 1 November 1996, WT/DS8/AB/R, WT/DS10/AB/R & WT/DS11/AB/R, pp.19-21.

7.63 We find that bananas are "like" products, for purposes of Article I, III, X, and XIII of GATT, irrespective of whether they originate in the EC, in ACP countries, in BFA countries or in other third countries.

1. THE EC MARKET FOR BANANAS: ARTICLE XIII OF GATT

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

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

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

c. Third, imports of bananas in excess of the above-mentioned amounts were subject in 1995 to a tariff of 822 ECU per tonne (722 ECU for ACP bananas). The 822 ECU per tonne tariff will fall in equal instalments to 680 ECU per tonne on full implementation of the EC's Uruguay Round commitments.

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

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

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

(a) Article XIII

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

Article XIII

Non-discriminatory Administration of Quantitative Restrictions

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

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

...

(d) In cases in which a quota is allocated among supplying countries the Member applying the restrictions may seek agreement with respect to the allocation of shares in the quota with all other Members having a substantial interest in supplying the product concerned. In cases in which this method is not reasonably practicable, the Member concerned shall allot to Members having a substantial interest in supplying the product shares based upon the proportions, supplied by such Members during a previous representative period, of the total quantity or value of imports of the product, due account being taken of any special factors which may have affected or may be affecting the trade in the product. No conditions or formalities shall be imposed which would prevent any Member from utilizing fully the share of any such total quantity or value which has been allotted to it, subject to importation being made within any prescribed period to which the quota may relate.*³⁶²

...

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*³⁶³ 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

³⁶²Note Ad Article XIII, Paragraph 2(d), reads: "No mention was made of 'commercial considerations' as a rule for the allocation of quotas because it was considered that its application by governmental authorities might not always be practicable. Moreover, in cases where it is practicable, a Member could apply these considerations in the process of seeking agreement, consistently with the general rule laid down in the opening sentence of paragraph 2".

³⁶³Note Ad Article XIII, Paragraph 4, provides: "See note relating to 'special factors' in connection with the last subparagraph of paragraph 2 of Article XI". That note reads as follows: "The term 'special factors' includes changes in relative productive efficiency between domestic and foreign producers, or as between different foreign producers, but not changes artificially brought about by means not permitted under the Agreement".

having a substantial interest in supplying that product or upon the request of the [CONTRACTING PARTIES], consult promptly with the other Member or the [CONTRACTING PARTIES] regarding the need for an adjustment of the proportion determined or of the base period selected, or for the reappraisal of the special factors involved, or for the elimination of conditions, formalities or any other provisions established unilaterally relating to the allocation of an adequate quota or its unrestricted utilization.

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

7.68 The wording of Article XIII is clear. If quantitative restrictions are used (as an exception to the general ban on their use in Article XI), they are to be used in the least trade-distorting manner possible. In the terms of the general rule³⁶⁴ of the chapeau of Article XIII:2:

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

In this case, we are concerned with tariff quotas, which are permitted under GATT rules, and not quantitative restrictions *per se*. However, Article XIII:5 makes it clear, and the parties agree, that Article XIII applies to the administration of tariff quotas. In light of the terms of Article XIII, it can be said that the object and purpose of Article XIII:2 is to minimize the impact of a quota or tariff quota regime on trade flows by attempting to approximate under such measures the trade shares that would have occurred in the absence of the regime. In interpreting the terms of Article XIII, it is important to keep their context in mind. Article XIII is basically a provision relating to the administration of restrictions authorized as exceptions to one of the most basic GATT provisions—the general ban on quotas and other non-tariff restrictions contained in Article XI.

7.69 While previous panels have dealt with specific aspects of Article XIII, this is the first case in which a broad challenge to a quota or tariff quota system has been made. Therefore, we must in the first instance consider in general terms how the various subdivisions of Article XIII work together. Article XIII:1 establishes the basic principle that no import restriction shall be applied to one Member's products unless the importation of like products from other Members is similarly restricted. Thus, a Member may not limit the quantity of imports from some Members but not from others. But as indicated by the terms of Article XIII (and even its title, "Non-discriminatory Administration of Quantitative Restrictions"), the non-discrimination obligation extends further. The imported products at issue must be "similarly" restricted. A Member may not restrict imports from some Members using one means and restrict them from another Member using another means. The only directly relevant panel report dealt with this issue briefly, but confirms this interpretation of Article XIII:1. The report found an inconsistency with the requirements of Article XIII:1 where a GATT contracting party negotiated export restrictions on imports of products from some countries but imposed unilateral import restrictions on the like products from another country. The report also noted differences in

³⁶⁴At the 1955 Review Session, a working party considering amendments to Article XIII stated: "The Working Party ... agreed to recognize that the general rule contained in the introduction to paragraph 2 governed the various sub-paragraphs of that paragraph including those of sub-paragraph (d)". Working Party Report on "Quantitative Restrictions", adopted on 2, 4 and 5 March 1955, BISD 3S/170, 176, para. 24.

administration (import restrictions versus export restraint) and in transparency between the two measures.³⁶⁵

7.70 Article XIII's general requirement of non-discrimination is modified in one respect by Article XIII:2(d), which provides for the possibility to allocate tariff quota shares to supplying countries. Any such country specific allocation must, however, "aim at a distribution of trade ... approaching as closely as possible the shares which Members might be expected to obtain in the absence of such restrictions" (chapeau of Article XIII:2(d)).

7.71 Article XIII:2(d) further specifies the treatment that, in case of country-specific allocation of tariff quota shares, must be given to Members with "a substantial interest in supplying the product concerned". For those Members, the Member proposing to impose restrictions may seek agreement with them as provided in Article XIII:2(d), first sentence. If that is not reasonably practicable, then it must allot shares in the quota (or tariff quota) to them on the basis of the criteria specified in Article XIII:2(d), second sentence.

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

7.73 The question then is whether country-specific shares can also be allocated to Members that do not have a substantial interest in supplying the product and, if so, what the method of allocation would have to be. As to the first point, we note that the first sentence of Article XIII:2(d) refers to allocation of a quota "among supplying countries". This could be read to imply that an allocation may also be made to Members that do not have a substantial interest in supplying the product. If this interpretation is accepted, any such allocation must, however, meet the requirements of Article XIII:1 and the general rule in the chapeau to Article XIII:2(d). Therefore, if a Member wishes to allocate shares of a tariff quota to some suppliers without a substantial interest, then such shares must be allocated to all such suppliers. Otherwise, imports from Members would not be similarly restricted as required by Article XIII:1.³⁶⁶ As to the second point, in such a case it would be required to use the same method as was used to allocate the country-specific shares to the Members having a substantial interest in supplying the product, because otherwise the requirements of Article XIII:1 would also not be met.

7.74 The allocation of country-specific tariff quota shares to all supplying countries on the basis of the first method (agreement) may in practice be difficult since there will likely be demand for more than 100 per cent of the tariff quota and, furthermore, there would be no possibility to make provision

³⁶⁵ Panel Report on "EEC - Restrictions on Imports of Apples from Chile", adopted on 10 November 1980, BISD 27S/98, 114, 116, paras 4.11, 4.21. See also Panel Report on "EEC - Quantitative Restrictions Against Imports of Certain Products from Hong Kong", adopted 12 July 1983, BISD 30S/129, 139-140, para. 33.

³⁶⁶ See Panel Report on "EEC Restrictions on Imports of Apples from Chile", adopted on 10 November 1980, BISD 27S/98, 114, 116, paras. 4.11, 4.21.

for new suppliers. This would leave the second method as the only practical alternative—a result that, however, runs counter to the provision of Article XIII:2(d) to first seek agreement with all Members having a substantial interest in supplying the product concerned.

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

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

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

(i) Separate regimes

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

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

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

7.81 Past GATT and WTO practice suggests that Members have typically distinguished between tariff preferences and non-tariff preferences. For example, in the so-called Enabling Clause, preferential tariff treatment on a unilateral basis is authorized for developing countries in general terms in accordance with the Generalized System of Preferences, while non-tariff preferences are permitted only to the extent governed by instruments multilaterally negotiated under GATT/WTO auspices.³⁶⁷ As noted below (paragraph 7.0), most current waivers allowing preferential treatment

³⁶⁷Decision of the CONTRACTING PARTIES of 28 November 1979 on "Differential and More Favourable Treatment,

have been limited to preferential tariff treatment. The "separate regimes" argument of the EC blurs these distinctions and would result in a tariff preference providing preferential treatment in addition to a tariff advantage.

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

(..continued)

Reciprocity and Fuller Participation of Developing Countries", BISD 26S/203.

(ii) Members with a substantial interest

7.83 The following statistics supplied by the EC indicate the shares of suppliers to the EC banana market during the 1989-1991 period. We use 1989-1991 statistics because the EC claims that at the time it negotiated the BFA, 1992 statistics were not available. Although the Complainants contest this assertion, they have not convinced us that such statistics were in fact available.

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

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

The EC argues that only Colombia and Costa Rica had a "substantial interest in supplying the product" in the sense of Article XIII:2(d), in that they were the only GATT contracting parties at the time with market shares of more than 10 per cent and that, analogously to practice under Article XXVIII of GATT, a market share of 10 per cent could be considered as the threshold for a country to establish a substantial interest.³⁶⁸ The other major suppliers to the EC market-Ecuador and Panama-were not GATT contracting parties at the time. The remaining suppliers had relatively minor shares. The Complainants argue that the EC cannot claim compliance with Article XIII:2(d), first sentence, because there were GATT contracting parties with which the EC did not reach agreement and that they in some cases had more significant market shares of EC banana imports than some of the countries with which the EC did reach agreement in the BFA.

7.84 We do not find it necessary to set a precise import share for determination of whether a Member has a substantial interest in supplying a product. A determination of substantial interest might well vary somewhat based on the structure of the market.³⁶⁹

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

³⁶⁸Paragraph 7 to the Note Ad Article XXVIII:1 states that "[t]he expression 'substantial interest' is not capable of a precise definition ... It is, however, intended to be construed to cover only those Members which have ... a significant share in the market ...". It was indicated in 1985, however, that a 10 per cent rule has been applied generally. Analytical Index: Guide to GATT Law and Practice, 6th rev. ed. 1995, p.941, citing TAR/M/16, p.10.

³⁶⁹We note that in the case of Article XXVIII, the Uruguay Round Understanding on the Interpretation of Article XXVIII of the General Agreement on Tariffs and Trade 1994 provides that the Member which has the highest ratio of exports affected by the concession to its total exports shall be deemed to have principal supplying interest in the product at issue for purposes of negotiations under Article XXVIII. There is so far no similar understanding applicable to Article XIII.

7.86 Before turning to the consequences of the above finding, we must consider whether it would be possible for other Members to challenge an agreement reached under Article XIII:2(d), first sentence. The EC argues that since it negotiated an agreement with Colombia and Costa Rica in compliance with Article XIII:2(d), first sentence, the provisions of that agreement may not be challenged as not complying with other provisions of Article XIII. However, even though the EC did negotiate an agreement as foreseen in Article XIII:2(d), first sentence, it is necessary to keep in mind that the goal of any such agreement is provided in the general rule in the chapeau to Article XIII:2. We would not rule out the possibility that an agreement that does not generally achieve this goal may be open to challenge by Members who are not parties to the agreement, even if there is no requirement to include such Members in the negotiations because they do not have a substantial interest in supplying the product concerned. For example, in our view, it would be possible for other Members to challenge an agreement between the EC, Colombia and Costa Rica if it divided the bound tariff quota between only Colombia and Costa Rica. Support for allowing for the possibility of such a challenge is found in past GATT practice.³⁷⁰

7.87 In this case, however, we find it unnecessary to specify in detail under what circumstances an agreement reached pursuant to Article XIII:2(d) may be challenged. If our findings on the use of separate regimes (paragraph 7.0), on the shares assigned to Members without a substantial interest (paragraph 7.0) and the rights of new Members under Article XIII (paragraph 7.0), as well as those relating to the EC's licensing procedures, are adopted by the DSB, it will be necessary for the EC to reconsider its treatment of banana imports, including the allocation of tariff quota shares.

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

³⁷⁰For example, in a case involving Norwegian quotas on textiles products, the panel found that Norway had reached agreement on the limitation of textiles imports from six countries, but not Hong Kong. The panel found that the quantitative restrictions limiting Hong Kong exports were subject to Article XIII:2 and ruled that

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

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

(iii) Members without a substantial interest

7.89 As noted above (paragraph 7.0), Article XIII:1 would permit the EC to allocate a tariff quota share to all supplying Members without a substantial interest in the form of an "others" category, without specific shares. In this case, the EC allocated tariff quota shares by agreement and assignment to some Members (e.g., ACP countries (in respect of traditional and non-traditional exports), Nicaragua and Venezuela) without allocating such shares to other Members (e.g., Guatemala). Moreover, under the BFA, the BFA countries were given special rights in respect of reallocation of tariff quota shares³⁷¹ that were not given to other Members (e.g., Guatemala). For the reasons noted above (paragraphs 7.0 and 7.0), such differential treatment of like products from Members is inconsistent with the requirements of Article XIII:1.

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

(iv) New members

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

7.92 Thus, although the EC reached an agreement with all Members who had a substantial interest in supplying the product at one point in time, under the consultation provisions of Article XIII:4, the EC would have to consider the interests of a new Member who had a substantial interest in supplying the product if that new Member requested it to do so.³⁷² The provisions on consultations and adjustments in Article XIII:4 mean in any event that the BFA could not be invoked to justify a permanent allocation of tariff quota shares. Moreover, while new Members cannot challenge the EC's agreements with Colombia and Costa Rica in the BFA on the grounds that the EC failed to negotiate and reach agreement with them, they otherwise have the same rights as those Complainants who were

³⁷¹Under the BFA, there is a general provision that provides that if a country with a country-specific share of the tariff quota indicates to the EC that it will be unable to deliver the allocated quantity, the amount of the short-fall is to be allocated in accordance with the BFA allocations (including to the "others" category). The BFA also provides that countries with country-specific shares of the tariff quota may jointly request the EC to allocate the short-fall differently, in which case the EC is required to do so. As a result, according to the Complainants, in 1995 and 1996, all of the tariff quota share allocated to Nicaragua, and 70 and 30 per cent, respectively, of the share allocated to Venezuela, have been reallocated to Colombia.

³⁷²While the provisions of Article XIII:4 on consultations and adjustments seem to be primarily aimed at adjustments to quota shares allocated pursuant to Article XIII:2(d), second sentence, they also apply in the case where agreements were reached pursuant to Article XIII:2(d), first sentence, with Members having a substantial interest in supplying the product concerned. In addition, in so far as a new Member has a substantial interest in supplying that product, its share of the "others" category can be viewed, for purposes of Article XIII:4, as a provision established unilaterally relating to the allocation of an adequate quota.

GATT contracting parties at the time the BFA was negotiated to challenge its consistency with Article XIII. Generally speaking, all Members benefit from all WTO rights.

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

(v) Other arguments

7.94 In light of our findings in respect of Article XIII:1, we find it unnecessary to address the claims and arguments in respect of the interpretation of Article XIII:2(d), second sentence (e.g., the use of a "previous representative period" and "special factors") or in respect of the EC's enlargement to include Austria, Finland and Sweden.³⁷³ We would note, however, that in order to bring its banana import regulations into line with Article XIII, the EC would have to take account of Article XIII:1 and XIII:2(d). In order to allocate country-specific tariff quota shares consistently with the requirements of Article XIII, the EC would have to base such shares on an appropriate previous representative period³⁷⁴ and any special factors would have to be applied on a non-discriminatory basis (see paragraph 7.0).

³⁷³The Appellate Body has stated that "[a] panel need only address those claims which must be addressed in order to resolve the matter in issue in the dispute". Appellate Body Report on "United States - Measure Affecting Imports of Woven Wool Shirts and Blouses from India", issued on 25 April 1997, WT/DS33/AB/R, AB-1997-1, p.19.

³⁷⁴In this regard, we note with approval the statement by the 1980 *Chilean Apples* panel:

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

Panel Report on "EEC Restrictions on Imports of Dessert Apples - Complaint by Chile", adopted on 10 November 1980, BISD 27S/98, 113, para. 4.8. In the report of the "Panel on Poultry", issued on 21 November 1963, GATT Doc. L/2088, para. 10, the panel stated: "[T]he shares in the reference period of the various exporting countries in the Swiss market, which was free and competitive, afforded a fair guide as to the proportion of the increased German poultry consumption likely to be taken up by United States exports". See also Panel Report on "Japan - Restrictions on Imports of Certain Agricultural Products", adopted on 22 March 1988, BISD 35S/163, 226-227, para. 5.1.3.7.

(b) The allocation of tariff quota shares to ACP countries: The Lomé waiver

7.95 In light of the finding that the EC's allocation of country-specific tariff quota shares for bananas to the ACP countries for both traditional and non-traditional bananas is not consistent with the requirements of Article XIII (paragraph 7.0), we now consider whether that inconsistency is covered by the Lomé waiver. In this connection, we recall the findings of the second *Banana* panel report.³⁷⁵ It found that (i) the specific duties levied by the EC on imports of bananas were inconsistent with Article II, (ii) the preferential tariff rates for banana imports from ACP countries were inconsistent with the requirements of Article I and (iii) certain procedures regarding the allocation of licences were inconsistent with the requirements of Articles I and III. It also found that the then effective EC rules did not discriminate between sources of supply in the sense of Article XIII because the licences issued to import bananas could be used to import bananas from any source. After the issuance of the panel report, which was not adopted by the GATT CONTRACTING PARTIES, the EC and the ACP countries that were GATT contracting parties requested a waiver (although they were and still are of the opinion that such a waiver is not needed) of the EC's Article I:1 obligations in order to permit the EC to provide preferential treatment to the ACP countries as required by the Lomé Convention.³⁷⁶

7.96 Subsequently, the Lomé waiver was adopted by the GATT CONTRACTING PARTIES in December 1994 and was extended by the WTO General Council in October 1996.³⁷⁷ Under the operative paragraph of the Lomé waiver,

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

In order to determine whether the EC may allocate tariff quota shares to the ACP countries inconsistently with the requirements of Article XIII, we must determine whether those allocations are covered by the Lomé waiver. This determination involves resolving two interpretative issues. First, what preferential treatment in respect of bananas is "required" by the Lomé Convention? Second, does the Lomé waiver, which refers only to Article I:1 of GATT, encompass a waiver of Article XIII obligations as well?

³⁷⁵Panel Report on "EEC - Import Regime for Bananas", issued 11 February 1994 (not adopted), DS38/R, p.52, paras. 169-170.

³⁷⁶The EC's Uruguay Round Schedule substituted a specific tariff in place of its prior *ad valorem* tariff binding for bananas. The consistency of that substitution with GATT rules is examined in para. 7.0 *et seq.* of the Guatemala-Honduras report. In respect of the panel's finding that the EC regime was inconsistent with the requirements of Article III, the EC did not change the regime and we examine that issue in para. 7.0.

³⁷⁷EC - The Fourth ACP-EEC Convention of Lomé, Waiver Decision of 9 December 1994, L/7604, 19 December 1994; Extension of the Waiver, Decision of 14 October 1996, WT/L/186. Although the Lomé waiver was initially approved by the GATT CONTRACTING PARTIES until 29 February 2000, it was necessary for the WTO General Council to consider whether to extend it because under the Uruguay Round Understanding in Respect of Waivers of Obligations under the General Agreement on Tariffs and Trade 1994, all waivers in effect on the entry into force of the WTO Agreement expired two years thereafter (i.e., on 1 January 1997) unless extended.

(i) Preferential treatment required by the Lomé Convention

7.97 As a preliminary matter, the EC and the ACP countries argue that the Panel is not authorized to interpret the Lomé Convention. We accept that we are not directed in our terms of reference to interpret the Lomé Convention. We recall that we have found that the EC's allocation of tariff quota shares to ACP countries is inconsistent with the requirements of Article XIII (paragraph 7.0). However, in order to determine whether or not the EC's Article XIII obligations are waived, we must determine whether or not the Lomé waiver applies. That requires an interpretation of the Lomé waiver, which is a decision of the GATT CONTRACTING PARTIES, later extended by a WTO General Council decision. Since the waiver applies to action "necessary ... to provide preferential treatment ... *as required by the relevant provisions of the Fourth Lomé Convention*" (emphasis added), we must also determine what preferential treatment is required by the Lomé Convention.

7.98 The EC argues that the Panel must accept the EC and the ACP countries' interpretation of the Lomé Convention as valid since they are the parties to the Lomé Convention. We note that since the GATT CONTRACTING PARTIES incorporated a reference to the Lomé Convention into the Lomé waiver, the meaning of the Lomé Convention became a GATT/WTO issue, at least to that extent. Thus, we have no alternative but to examine the provisions of the Lomé Convention ourselves in so far as it is necessary to interpret the Lomé waiver. Moreover, we note that in their submissions to us, it appears that the EC and the ACP countries are not in accord on some aspects of what is required by the Lomé Convention.

7.99 We note that the Lomé Convention permits the EC to limit duty-free ACP country exports to the EC of products subject to common market organizations in the EC, i.e., many agricultural products. In respect of those products, Article 168(2)(a)(ii) of the Lomé Convention requires the EC to:

"take necessary measures to ensure more favourable treatment than that granted to third countries benefitting from the most-favoured-nation clause for the same products".

Moreover, in the case of bananas, Protocol 5 to the Lomé Convention places some restraints on the EC's right to limit imports of ACP bananas. It specifies in Article 1:

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

Since the Lomé Convention was signed in 1989 and was expected to enter into force in 1990, we believe that the words "at present" should be interpreted to refer to 1990. A Joint Declaration to Protocol 5 provides that "Article 1 of Protocol 5 does not prevent the Community from establishing common rules for bananas as long as no ACP State, traditional supplier to the Community, is placed as regards access to, and advantages in, the Community in a less favourable situation than in the past or at present". The fact that the EC has done so obviously makes the meaning of Protocol 5 more difficult to ascertain since what was a system of individual EC member State markets has been transformed into one EC-wide market.

7.100 In allocating country-specific shares of the banana tariff quota to traditional ACP banana

supplying countries, the EC set the shares at the level of each ACP country's "best-ever" exports to the EC, adjusted for certain other factors. The issue is whether it was required to do so by the Lomé Convention. The Complainants correctly point out that Protocol 5 does not guarantee that a certain level of banana exports will be achieved, and in response to questions of the Panel, the EC did not disagree. We recall that generally speaking, ACP countries formerly competed for the most part on either the French or UK markets and that on these markets they were protected by and large from import competition from other banana exporters. Given this degree of market access and advantage, the issue is how the EC could fulfil its obligations under Protocol 5 on an EC-wide market.

7.101 It appears that prior to Regulation 404/93 there were no set maximum levels for ACP exports to EC member State markets. While the ACP countries did not have specific quotas, they generally did enjoy protected access to one EC member State market (e.g., France, in the case of Cameroon and Côte d'Ivoire; Italy, in the case of Somalia; the UK, in the case of several Caribbean ACP countries).³⁷⁸ Access to these markets was essentially controlled by ad hoc decisions.³⁷⁹ We think that it can be reasonably contended that an EC-wide equivalent of the market access and advantages enjoyed by ACP countries in the past would be a country-specific tariff quota share, which may be assimilated to the past advantage of a protected EC member State market, set at their pre-1991 best-ever export levels. We note that since the pre-1991 best-ever export levels of the ACP countries occurred in different years for different countries (and in some cases, many years ago), there was no way for the EC to provide tariff quota shares covering such amounts consistently with the requirements of Article XIII:2, which requires shares to be based on a previous representative period, which has generally been interpreted to mean the most recent three years.³⁸⁰ If the EC had (i) provided only a non-country-specific share for ACP countries or (ii) set shares for ACP countries at a level lower than their pre-1991 best-ever levels, an ACP country with the ability to export at its pre-1991 best-ever level might have been effectively prevented from doing so either by lack of the protected market provided by a specific-country share allocation or by the volume limit of its share allocation. Thus, in order not to place an ACP country in a less favourable situation as regards access to and advantages on its traditional markets, which is the EC's obligation under the Lomé Convention, it was not unreasonable for the EC to conclude that the Lomé Convention requires the allocation of country-specific tariff quota shares to the ACP countries in an amount of their pre-1991 best-ever exports of bananas to the EC. We accept that interpretation for purposes of our analysis of this issue.

7.102 There is, however, nothing in Protocol 5 that suggests that the EC is required to apply other factors to increase the shares of ACP countries above their best-ever export levels prior to 1991. While the Lomé Convention contains various provisions concerning trade promotion and assistance to ACP countries, there are no specific provisions established in the Lomé Convention that can be said to require country-specific tariff quota shares in excess of past exports. Thus, in our view, the EC is not required by the Lomé Convention to assign tariff quota shares to ACP countries in excess of their pre-1991 best-ever exports to the EC.

7.103 Accordingly, we find that it was not unreasonable for the EC to conclude that the Lomé Convention requires the EC to allocate country-specific tariff quota shares to traditional ACP banana supplying countries in an amount of their pre-1991 best-ever exports to the EC.

³⁷⁸Panel Report on "EEC - Member States' Import Regime for Bananas", issued on 3 June 1993 (not adopted), DS32/R, p.3, para. 12.

³⁷⁹Idem, pp.4-5, 7, paras. 19-22, 37-38.

³⁸⁰See Panel Report on "EEC - Restrictions on Imports of Apples from Chile", adopted on 10 November 1980, BISD 27S/98, 113, para. 4.8.

However, we do find that the allocation of tariff quota shares to ACP countries in excess of their pre-1991 best-ever exports to the EC is not required by the Lomé Convention.

(ii) Application of the Lomé waiver to the EC's Article XIII obligations

7.104 The Lomé waiver, as quoted above, permits the EC to provide preferential treatment to ACP countries as required by the Lomé Convention. However, by its terms, the Lomé waiver only waives compliance with the provisions of Article I:1. Thus, the issue arises whether the EC's obligations under Article XIII are also waived in connection with preferential treatment required by the Lomé Convention. The Complainants argue that they are not and that such an interpretation would be unprecedented. Indeed, the EC has not argued that the Lomé waiver should be interpreted to waive its obligations under Article XIII. In its response to a question from the Panel, the EC stated that it did not claim and "has no need to suggest" that the Lomé waiver covers a violation of Article XIII. Rather the EC argued that (i) it has not acted inconsistently with the requirements of Article XIII and (ii) the Lomé waiver permits the preferential treatment required by the Lomé Convention. Since we have rejected the EC's argument that it has complied with Article XIII and have found that the EC's allocation of country-specific shares to ACP countries is inconsistent with Article XIII, we believe that it is appropriate to consider also whether this inconsistency is covered by the Lomé waiver. In this regard, we note that the EC has also argued that where aspects of a measure have been found to be covered by the waiver for purposes of Article I, they should not be found to violate another GATT provision imposing MFN-like obligations similar to those that have been waived (see paragraph 7.0).

7.105 In interpreting the scope of the Lomé waiver, we are mindful that the only GATT panel to interpret a waiver recalled that waivers are to be granted only in exceptional circumstances³⁸¹ and concluded that "their terms and conditions consequently have to be interpreted narrowly".³⁸² The waiver at issue in that case had no expiration date and permitted imposition of restrictions on a number of important agricultural products. A GATT working party on the waiver noted:

"Since the Decision [approving the waiver] refers to the provisions of Articles II and XI of the Agreement, it does not affect the obligations of the United States under any other provisions of the Agreement. In particular, as its obligations under Article XIII are not affected, the United States would acquire no right by virtue of this waiver to deviate from the rule of non-discrimination provided for in that Article".³⁸³

In light of this practice, we now consider the scope of the Lomé waiver, and, in particular, whether it waives the obligations of the EC under Article XIII in respect of the allocation of tariff quota shares based on the best-ever exports of bananas by the ACP countries to the EC.

7.106 We recall that Article 168(2)(a)(ii) of the Lomé Convention requires some preferential treatment for products from ACP sources. As we have found above, Protocol 5 to the Lomé

³⁸¹GATT, Article XXV:5; WTO, Article IX:3-4.

³⁸²Panel Report on "US - Restrictions on the Importation of Sugar and Sugar-Containing Products Applied Under the 1955 Waiver and Under the Headnote to the Schedule of Tariff Concessions", adopted on 7 November 1990, BISD 37S/228, 256-257, para. 5.9.

³⁸³Working Party Report on "Import Restrictions Imposed by the United States Under Section 22 of the United States Agricultural Adjustment Act", adopted on 5 March 1955, BISD 3S/141, 144, para. 10.

Convention expands this general obligation in respect of traditional ACP banana exports in that it is not unreasonable for the EC to interpret it to require the EC to provide access opportunities to the EC market for the ACP countries in a volume no greater than their pre-1991 best-ever exports to the EC. As explained above, this can be accomplished only by country-specific tariff quota shares and by tariff quota shares that are larger than would be allowed under Article XIII (assuming that the best-ever exports did not occur within a representative period). If the Lomé waiver is interpreted to waive only compliance with the obligations of Article I:1, the waiver would effectively limit preferential treatment to tariff preferences. In our view, in light of the 75 ECU per tonne rate applicable to the EC's bound tariff quota, tariff preferences alone would not allow the EC to provide market access opportunities and advantages required of it by the Lomé Convention. In other words, in order to give real effect to the Lomé waiver, it needs to cover Article XIII to the extent necessary to allow the EC to allocate country-specific tariff quota shares to the ACP countries in the amount of their pre-1991 best-ever banana exports to the EC. Otherwise, the EC could not practically fulfil its basic obligation under the Lomé Convention in respect of bananas, as we have found that it was not unreasonable for the EC to conclude that the Lomé Convention may be interpreted to require country-specific tariff quota shares at levels not compatible with Article XIII. Since it was the objective of the Lomé waiver to permit the EC to fulfil that basic obligation, logically we have no choice therefore but to interpret the waiver so that it accomplishes that objective. In fact, such an interpretation would be consistent with the terms of this particular waiver as it applies to preferential treatment generally and not, as is mostly the case with other currently effective waivers, only to preferential *tariff* treatment.³⁸⁴

7.107 Such an interpretation is also supported by the close relationship between Articles I and XIII:1, both of which prohibit discriminatory treatment. Article I requires MFN treatment in respect of "rules and formalities in connection with importation", a phrase that has been interpreted broadly in past GATT practice,³⁸⁵ such that it can appropriately be held to cover rules related to tariff quota allocations. Such rules are clearly rules applied in connection with importation. Indeed, they are critical to the determination of the amount of duty to be imposed. To describe the relationship somewhat differently, Article I establishes a general principle requiring non-discriminatory treatment in respect of, *inter alia*, rules and formalities in connection with importation. Article XIII:1 is an application of that principle in a specific situation, i.e., the administration of quantitative restrictions and tariff quotas. In that sense, the scope of Article XIII:1 is identical with that of Article I.

7.108 The foregoing considerations suggest that the Lomé waiver should be interpreted so as to waive compliance with the obligations of Article XIII, to the extent indicated above. We must consider, however, whether such a conclusion is consistent with past GATT practice that waivers are to be interpreted narrowly. Our interpretation of the Lomé waiver is narrow in the sense that the Lomé waiver itself has been qualified by the fact that it is applicable only to preferential treatment "required" by the Lomé Convention and does not extend to all preferential treatment that the EC might wish to give to the ACP countries. Thus, there is no danger of an overly broad interpretation of its scope. In our view, we only acknowledge what is implied in the decision to grant the waiver in the first place.

³⁸⁴There are three other waivers now in force for preferential treatment to groups of developing countries. These waivers cover Canadian preferences to Caribbean countries and US preferences to Caribbean countries and to Andean countries. In each of these three cases, the waiver is limited by its terms to preferential *tariff* treatment. CARIBCAN, WT/L/185; Caribbean Basin Economic Recovery Act, WT/L/104; Andean Trade Preference Act, WT/L/184. The waiver in respect of United States - Former Trust Territory of the Pacific Islands, WT/L/183, applies also to non-tariff preferential treatment.

³⁸⁵Panel Report on "United States - Denial of Most-favoured-nation Treatment as to Non-rubber Footwear from Brazil", adopted on 19 June 1992, BISD 39S/128, 150, para. 6.8 (Article I:1 applies to rules for revocation of countervailing duties).

7.109 In reaching this conclusion, however, we note our view that the scope of the Lomé waiver lacks precision. Future waiver negotiations will have to deal more precisely with the issues raised in this case in order to reduce differences in interpretation.

7.110 In light of these factors, to the extent that we have found that the EC has acted inconsistently with the requirements of Article XIII:1 (paragraph 7.0), we find that the Lomé waiver waives that inconsistency with Article XIII:1 to the extent necessary to permit the EC to allocate shares of its banana tariff quota to specific traditional ACP banana supplying countries in an amount not exceeding their pre-1991 best-ever exports to the EC.

(c) The allocation of tariff quota shares to BFA countries

7.111 In our general discussion above of Article XIII (paragraph 7.0), we found that the EC's allocation of shares in its tariff quota to the BFA countries not having a substantial interest in supplying bananas and in respect of non-traditional ACP bananas is inconsistent with the requirements of Article XIII. In this section, we consider whether any such inconsistency may be permitted because of (i) the inclusion of the banana tariff quota allocation to BFA countries and in respect of non-traditional ACP bananas in the EC's Schedule attached to the Marrakesh Protocol or (ii) the priority provision of the Agreement on Agriculture.

(i) Inclusion of the BFA tariff quota shares in the EC Schedule

7.112 The EC argues that even if the tariff quota share allocations to the BFA countries and in respect of non-traditional ACP bananas do not satisfy the requirements of Article XIII, they are consistent with GATT rules because of their inclusion in the EC's Schedule as a result of the Uruguay Round negotiations. The Complainants argue that a prior adopted GATT panel report (the so-called *Sugar Headnote* case)³⁸⁶ supports the conclusion that tariff bindings in schedules cannot justify inconsistencies with the requirements of generally applicable GATT rules. The EC responds that the Uruguay Round Schedules are of a different nature than past GATT tariff protocols, thereby undermining the legal reasoning underpinning the *Sugar Headnote* case, and that, in any event, the inclusion of the BFA tariff quota shares in its Schedule overrides Article XIII because of the priority provision of the Agreement on Agriculture.

7.113 The panel in the *Sugar Headnote* case found that qualifications on tariff bindings do not override other GATT provisions after an analysis of the wording of Article II, its object, purpose and context, and the drafting history of the provision. Although it made no mention of the Vienna Convention, it seems to have followed closely Articles 31 and 32 thereof.³⁸⁷ Its analysis was as follows:

5.1 ... The United States argues that the proviso "subject to the terms, conditions or qualifications set forth in that Schedule" in Article II:1(b) permits contracting parties to include qualifications relating to quantitative restrictions in their Schedule. The United States had made use of this possibility by reserving in its Schedule of Concessions the right to impose quota limitations on imports of sugar in certain

³⁸⁶Panel Report on "US - Restrictions on Imports of Sugar", adopted on 22 June 1989, BISD 36S/331, 341-343, paras. 5.2-5.7.

³⁸⁷These provisions of the Vienna Convention are quoted in para. 7.0 supra.

circumstances. Since the restrictions on the importation of sugar conformed to the qualifications set out in the Schedule of the United States, and the Schedules of Concessions were, according to Article II:7, an integral part of the General Agreement, the restrictions were consistent with the United States obligations under that Agreement. Australia argues that qualifications to concessions made in accordance with Article II:1(b) cannot justify measures contrary to other provisions of the General Agreement, in particular not quantitative restrictions inconsistent with Article XI:1. ...

5.2 The Panel first examined the issue in the light of the wording of Article II. It noted that in Article II:1(b), the words "subject to the ... qualifications set forth in that Schedule" are used in conjunction with the words "shall ... be exempt from ordinary customs duties in excess of those set forth in [the Schedule]". This suggests that Article II:1(b) permits contracting parties to qualify the obligation to exempt products from customs duties in excess of the levels specified in the Schedule, not however to qualify their obligations under other Articles of the General Agreement. The Panel further noted that the title of Article II is "Schedules of Concessions" and that the ordinary meaning of the word "to concede" is "to grant or yield". This also suggests in the view of the Panel that Article II permits contracting parties to incorporate into their Schedules acts yielding rights under the General Agreement but not acts diminishing obligations under that Agreement.

5.3 The Panel then examined the issue in the light of the purpose of the General Agreement. It noted that one of the basic functions of the General Agreement is, according to its Preamble, to provide a legal framework enabling contracting parties to enter into "reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade". Where the General Agreement mentions specific types of negotiations, it refers to negotiations aimed at the reduction of barriers to trade (Articles IV(d), XVII:3 and XXVIII bis). This supports in the view of the Panel the assumption that Article II gives contracting parties the possibility to incorporate into the legal framework of the General Agreement commitments additional to those already contained in the General Agreement and to qualify such additional commitments, not however to reduce their commitments under other provisions of that Agreement.

5.4 The Panel then examined the issue in the context of the provisions of the General Agreement related to Article II. It noted that negotiations on obstacles to trade created by the operation of state-trading enterprises may be conducted under Article XVII:3 and that a note to that provision provides that such negotiations

"may be directed towards the reduction of duties and other charges on imports and exports or towards the conclusion of any other mutually satisfactory arrangement consistent with the provisions of this Agreement (See paragraph 4 of Article II and the note to that paragraph)." (emphasis added).

The negotiations foreseen in Article XVII:3 are thus not to result in arrangements inconsistent with the General Agreement, in particular not quantitative restrictions made effective through state-trading that are not justified by an exception to Article XI:1. The Panel saw no reason why a different principle should apply to

quantitative restrictions made effective by other means.

5.5 The Panel then examined the issue in the light of the practice of the CONTRACTING PARTIES. The Panel noted that the CONTRACTING PARTIES adopted in 1955 the report of the Review Working Party on Other Barriers to Trade, which had concluded that:

"there was nothing to prevent contracting parties, when they negotiate for the binding or reduction of tariffs, from negotiating on matters, such as subsidies, which might affect the practical effects of tariff concessions, and from incorporating in the appropriate schedule annexed to the Agreement the results of such negotiations; provided that the results of such negotiations should not conflict with other provisions of the Agreement." (emphasis added) (BISD 3S/225).

Whether the proviso in this decision is regarded as a policy recommendation, as the United States argues, or as the confirmation of a legal requirement, as Australia claims, it does support, in the view of the Panel, the conclusion that the CONTRACTING PARTIES did not envisage that qualifications in Schedules established in accordance with Article II:1(b) could justify measures inconsistent with the other Articles of the General Agreement.

5.6 The Panel finally examined the issue in the light of the drafting history. It noted that the reference to "terms and qualifications" was included in a draft of the present Article II:1(b) during the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment. The original draft had referred only to "conditions". This amendment was proposed and adopted "in order to provide more generally for the sort of qualifications actually provided in the form of notes in the specimen Schedule. A number of these notes are, in effect, additional concessions rather than conditions governing the tariff bindings to which they relate" (E/PC/T/153 and E/PC/T/W/295). Schedule provisions qualifying obligations under the General Agreement were not included in the specimen Schedule nor was the possibility of such Schedule provisions mentioned by the drafters. The Panel therefore found that the drafting history did not support the interpretation advanced by the United States.

5.7 For the reasons stated in the preceding paragraphs, the Panel found that Article II:1(b) does not permit contracting parties to qualify their obligations under other provisions of the General Agreement and that the provisions in the United States GATT Schedule of Concessions can consequently not justify the maintenance of quantitative restrictions on the importation of certain sugars inconsistent with the application of Article XI:1".

7.114 We agree with the analysis of the *Sugar Headnote* panel report and note that Article II was not changed in any relevant way as a result of the Uruguay Round. Thus, based on the *Sugar Headnote* case, we conclude that the EC's inclusion of allocations inconsistent with the requirements of Article XIII in its Schedule does not prevent them from being challenged by other Members. We note in this regard that the Uruguay Round tariff schedules were prepared with full knowledge of the *Sugar Headnote* panel report, which was adopted by the GATT CONTRACTING PARTIES in the middle of the Round (June 1989). This is particularly significant in light of the Appellate Body's

statement that "[a]dopted panel reports are an important part of the GATT *acquis*. They are often taken into account by subsequent panels. They create legitimate expectations among Members, and, therefore should be taken into account where they are relevant to any dispute".³⁸⁸

7.115 The EC further argues that the principle of *pacta sunt servanda* supports its position that the BFA should override GATT rules. However, in our view, that principle applies as well to Article II, as interpreted by the *Sugar Headnote* case. We cannot accept that a conflict between Article II and the BFA should necessarily be resolved in the BFA's favour. It was to ensure consistency with the basic GATT rules that the *Sugar Headnote* panel reached the conclusions it did. As that panel stated (paragraph 5.2): "Article II permits contracting parties to incorporate into their Schedules acts yielding rights under the General Agreement but not acts diminishing obligations under that Agreement". That rule is a basic agreement of the Members that must be enforced.

7.116 The EC also notes that Article II:7 of GATT incorporates schedules into Part I of GATT, which contains Articles I and II, and argues that one provision of Part I such as Article II may not be given priority over another (i.e., the schedules). However, we are of the opinion that if there is a conflict between a schedule and GATT rules, it is necessary to resolve it, and that is what the *Sugar Headnote* panel did.³⁸⁹

7.117 Finally, the EC argues that the result in the *Sugar Headnote* case was necessary under GATT practice because tariff protocols, which added tariff commitments to schedules, were not accepted by all GATT contracting parties. It further argues that such a result is not necessary in the context of the WTO because all Members accepted all the results of the Uruguay Round. The *Sugar Headnote* panel's analysis was, in our view, a straightforward exercise in treaty interpretation under Vienna Convention principles. It made no mention that the result it reached was "necessary" under GATT practice. Moreover, the US measure at issue in the *Sugar Headnote* case first appeared in the Ancey and Torquay Protocols, both of which were signed by all GATT contracting parties at the time.³⁹⁰ Thus, these Protocols were in this respect similar to the schedules attached to the WTO Agreement.

7.118 Thus, we find that the inclusion of the BFA tariff quota shares in the EC's Schedule does

³⁸⁸Appellate Body Report on "Japan - Taxes on Alcoholic Beverages", adopted on 1 November 1996, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, AB-1996-2, p.15.

³⁸⁹The incorporation of schedules into Part I was done only because "it was intended that Part II [of GATT] would be immediately superseded by the [Havana] Charter provisions when the Charter entered into force". Analytical Index: Guide to GATT Law and Practice, 6th rev. ed. 1995, p.99.

³⁹⁰Contracting Parties to the General Agreement on Tariffs and Trade, Status of Legal Instruments, pp. xxi, 3--2.1-2.4, 3--3.1-3.4.

not permit the EC to act inconsistently with the requirements of Article XIII of GATT.

7.119 Since we have found that the inclusion of the BFA in the EC's Schedule does not permit the EC to act inconsistently with the requirements of Article XIII of GATT, we do not need to address Guatemala's argument that it reserved its rights in respect of the inclusion of the BFA tariff quotas in the EC's Schedule at the time it accepted the WTO Agreement. In respect of this argument, we would note, however, that Article XVI:5 of the WTO Agreement does not permit reservations.

(ii) Agreement on Agriculture

7.120 The EC argues that the provisions of the Agreement on Agriculture prevail over GATT rules such as Article XIII and that the inclusion by the EC of the BFA tariff quota shares in its tariff schedules means that they prevail over Article XIII, even if the *Sugar Headnote* case remains a valid interpretation of GATT rules.

7.121 In examining this argument, we note that the Agreement on Agriculture was intended to make agricultural products subject to strengthened and more operationally effective GATT rules. In the Preamble to the Agreement, Members recall:

"their long-term objective as agreed at the Mid-Term Review of the Uruguay Round 'is to establish a fair and market-oriented agricultural trading system and that a reform process should be initiated through the negotiation of commitments on support and protection and through the establishment of strengthened and more operationally effective GATT rules and disciplines'".

7.122 In some cases, the results of the agricultural negotiations were not consistent with the rules found in other WTO agreements. For example, Article 4.2 of the Agreement on Agriculture prohibits the use of certain measures that might otherwise be authorized by Article XI:2 of GATT; Article 5 of the Agreement on Agriculture permits the use of certain measures that might otherwise be questioned under Articles II and XIX of GATT and the Agreement on Safeguards. In order to establish priority for rules of the Agreement on Agriculture, Article 21.1 of that Agreement specifies:

"The provisions of GATT 1994 and of other Multilateral Trade Agreements in Annex 1A to the WTO Agreement shall apply subject to the provisions of this Agreement [i.e., the Agreement on Agriculture]".

It is clear from Article 21.1 that the provisions of the Agreement on Agriculture prevail over GATT and the other Annex 1A agreements. But there must be a provision of the Agreement on Agriculture that is relevant in order for this priority provision to apply. It is not the case that Article 21.1 of the Agreement on Agriculture means that no GATT/WTO rules apply to trade in agricultural products unless they are explicitly incorporated into the Agreement on Agriculture. We note that one of the purposes of the Agreement on Agriculture is to bring agriculture under regular GATT/WTO disciplines. It is against this background that we consider the EC's argument.

7.123 There is no provision of the Agreement on Agriculture that incorporates tariff bindings related to agricultural products into the Agreement on Agriculture. While the Annexes to the Agreement are incorporated into the Agreement by Article 21.2 thereof, tariff bindings are not. Indeed, under paragraph 1 of the Marrakesh Protocol, the Uruguay Round schedules attached to that protocol, which

include the agricultural tariff bindings, are explicitly made schedules to GATT.

7.124 An examination of the Agreement on Agriculture reveals that most of its provisions and annexes are concerned with domestic support and export subsidies and do not relate to market access concessions generally except for Articles 4 (market access) and 5 (special safeguard provisions) and Annex 5 (special treatment with respect to paragraph 2 of Article 4). Since we are not concerned here with special treatment or special safeguard measures, only Article 4 itself might be relevant. It reads as follows:

"1. Market access concessions contained in Schedules relate to bindings and reductions of tariffs, and to other market access commitments specified therein.

2. Members shall not maintain, resort to, or revert to any measures of the kind which have been required to be converted into ordinary customs duties [footnote omitted], except as otherwise provided for in Article 5 and Annex 5".

In our view, Article 4.1 is not a substantive provision, but is a statement of where market access commitments can be found. The definition of "market access concessions" (Article 1(g) of the Agreement on Agriculture) makes it clear that the Schedules annexed to Article II of GATT also contain the import quota commitments undertaken pursuant to Annex 5 of the Agreement on Agriculture (as well as an identification of the tariff lines which are eligible for the special safeguard provisions of Article 5 of the Agreement on Agriculture). If the Agreement on Agriculture would have allowed for country-specific allocations of tariff quotas there would have been a specific provision to this effect in deviation from Article XIII:2(d) as with the special treatment provisions of Annex 5. In contrast, Article 4.2 is a substantive provision in that it prohibits the use of certain non-tariff barriers, subject to certain qualifications. As a substantive provision, it prevails over such GATT provisions as Article XI:2(c).

7.125 Moreover, neither Article 4.1 nor 4.2 of the Agreement on Agriculture provides that agricultural tariff bindings have a special standing vis à vis other tariff bindings or that a market access commitment included therein is absolved from complying with other GATT rules. Indeed, we note that there are a number of provisions in the Agreement on Agriculture which simply refer to other agreements or decisions that are not incorporated into the Agreement on Agriculture. The reference in Article 14 to the Agreement on Sanitary and Phytosanitary Measures is one example; the reference to the Decision on Measures Covering the Possible Negative Effects of the Reform Programme on Least-Developed and Net Food-Importing Developing Countries in Article 16 is another example. These "cross-reference" provisions may be explained by the attempt of the framers of the Agreement on Agriculture to provide a complete overview of the Uruguay Round results in agriculture, since these matters are referred to generally in the preamble to the Agreement.

7.126 Finally, we note that, pursuant to Article 21 of the Agreement on Agriculture, GATT rules apply "subject to" the provisions of the Agreement on Agriculture, a wording that clearly suggests priority for the latter. But giving priority to Article 4.1 of the Agreement on Agriculture, which simply "relates" market access concessions to Members' goods schedules as attached to GATT by the Marrakesh Protocol, does not necessitate, or even suggest, a limitation on the application of Article XIII. The provisions are complementary, and do not clash. Thus, Article 21 of the Agreement on Agriculture is not relevant in this case.

7.127 Accordingly, we find that neither the negotiation of the BFA and its inclusion in the

EC's Schedule nor the Agreement on Agriculture permit the EC to act inconsistently with the requirements of Article XIII of GATT.

(d) Tariff quota share allocations and Article I:1

7.128 Guatemala and Honduras claim that the EC's tariff quota share allocations to the ACP and BFA countries and the reallocation rules of the BFA are inconsistent with the requirements of Article I:1 because they constitute "rules and formalities" in connection with importation and are applied on a non-MFN basis. The EC responds that these issues should be dealt with under Article XIII.

7.129 These matters may fall within the definition of "rules and formalities" as that term is used in Article I:1. In our view, however, it is more appropriate to consider these issues under Article XIII because that is the more specific provision. This is in accord with past GATT practice, where panels have resolved similar issues under Article XIII, without resort to Article I.³⁹¹

7.130 Accordingly, we make no finding on the compatibility of the EC's tariff quota share allocations and BFA reallocation rules with Article I:1.

2. TARIFF ISSUES

7.131 The Complainants have not challenged the tariff preferences accorded by the EC to traditional ACP bananas, i.e., bananas in traditional amounts from ACP countries that traditionally supplied the EC market. They have, however, claimed that the tariff preferences granted by the EC to non-traditional ACP bananas, i.e., bananas from ACP countries that have not traditionally supplied the EC market and bananas from historical suppliers in excess of their traditional supplies, are inconsistent with the requirements of Article I:1 of GATT. The tariff preference in the case of non-traditional ACP bananas imported under the relevant EC tariff quota share (90,000 tonnes) is 75 ECU per tonne (0 versus 75 ECU), while for over-quota bananas it is 100 ECU per tonne (in 1995: 822 ECU versus 722 ECU). The EC responds that to the extent that these tariff preferences are inconsistent with Article I:1, the inconsistency is permitted by the Lomé waiver.

7.132 Article I:1 provides in relevant part as follows:

"With respect to customs duties and charges of any kind imposed on or in connection with importation ..., any advantage, favour, privilege or immunity granted by any Member to any product originating in ... any other country shall be accorded immediately and unconditionally to the like product originating in ... the territories of all other Members".

³⁹¹Panel Report on "EEC Restrictions on Imports of Apples from Chile", adopted on 10 November 1980, BISD 27S/98, 112, para. 4.1, Panel Report on "EEC - Restrictions on Imports of Dessert Apples - Complaint by Chile", adopted on 22 June 1989, BISD 36S/93, 133, para. 12.28.

7.133 It is clear that the above-described tariff preferences for ACP bananas are inconsistent with Article I:1 since ACP and other bananas are like products and the lower tariffs on ACP-origin bananas are not provided unconditionally to bananas from other Members. The issue is whether the Lomé waiver covers the inconsistency. As noted above, the Lomé waiver provides:

"the provisions of paragraph 1 of Article I of the General Agreement shall be waived, until 29 February 2000, to the extent necessary to permit the European Communities to provide preferential treatment for products originating in ACP States as required by the relevant provisions of the Fourth Lomé Convention, without being required to extend the same preferential treatment to like products of any other contracting party".³⁹²

7.134 In this regard, we note that Article 168(2)(a)(ii) of the Lomé Convention provides that the EC:

"shall take the necessary measures to ensure more favourable treatment than that granted to third countries benefitting from the most-favoured-nation clause for the same products".

While Members in granting the Lomé waiver could have limited the extent to which the EC could provide preferential tariff treatment under Article I:1, they did not do so. Thus, even though waivers must be interpreted strictly,³⁹³ it seems to us that the preferential tariff for non-traditional ACP bananas is clearly a tariff preference of the sort that the Lomé waiver was designed to cover. In our view, in light of the requirement of Article 168(2)(a)(ii) of the Lomé Convention, the Lomé waiver permits the EC to grant tariff preferences to ACP countries on non-traditional bananas.

7.135 The Complainants argue, however, that the EC Court of Justice has ruled that Protocol 5 of the Lomé Convention supersedes Article 168(2)(a)(ii) with the result that the EC is not required to give non-traditional ACP bananas more favourable treatment pursuant to that provision. We do not agree with this characterization of the Court of Justice decision.³⁹⁴ In the part of the decision cited by the Complainants, the Court of Justice rejected the argument that the EC Council could not rely on Article 168(2)(a) in adopting the EC banana regime. Indeed, the Court states "the import of bananas from ACP States falls under Article 168(2)(a)(ii) of the Lomé Convention". The issue in the case was whether the Lomé Convention required that all ACP bananas had to be admitted duty-free, and the Court ruled that Protocol 5 did not require that. It did not rule that Article 168(2)(a)(ii), which generally requires some preferential treatment of ACP products, did not apply to bananas not covered by Protocol 5.

7.136 Accordingly, we find that to the extent that the EC's preferential tariff treatment of non-

³⁹²EC - The Fourth ACP-EEC Convention of Lomé, Waiver Decision of 9 December 1994, L/7604, 19 December 1994; Extension of the Waiver, Decision of 14 October 1996, WT/L/186.

³⁹³Panel Report on "US - Restrictions on the Importation of Sugar and Sugar-Containing Products Applied Under the 1955 Waiver and Under the Headnote to the Schedule of Tariff Concessions", adopted on 7 November 1990, BISD 37S/228, 256-257, para. 5.9.

³⁹⁴Germany v. Council, Case C-280/93, para. 101 (Judgment of 5 October 1994).

traditional ACP bananas is inconsistent with its obligations under Article I:1, those obligations have been waived by the Lomé waiver.

7.137 Guatemala challenges the EC tariffs as being inconsistent with the EC's pre-Uruguay Round tariff binding on bananas of 20 per cent ad valorem, which it asserts was not properly modified through negotiations under Article XXVIII of GATT 1947. Guatemala recalls that despite the EC's former tariff binding of 20 per cent ad valorem on bananas, in 1993, the EC established a tariff quota for bananas and implemented a duty on in-quota bananas of 100 ECU per tonne and on over-quota bananas of 850 ECU per tonne. It later notified the GATT Secretariat of its intention to renegotiate its pre-Uruguay Round tariff binding on bananas under Article XXVIII. The EC responds that its 20 per cent tariff binding was replaced by the inclusion of the new tariff binding in its Uruguay Round Schedule.

7.138 The second *Banana* panel report found that the new EC duties were inconsistent with the requirements of Article II.³⁹⁵ We agree with that finding. The issue for this Panel is whether that inconsistency was cured by the inclusion in the EC's Uruguay Round Schedule of a new binding in respect of bananas, which establishes an in-quota duty of 75 ECU per tonne and an over-quota duty of 850 ECU per tonne, falling to 680 ECU per tonne at the end of the implementation period for the Uruguay Round commitments.

7.139 The purpose of tariff schedules is to make it clear what tariff commitments Members have made and Article II requires Members to adhere to those commitments. In the Uruguay Round of Multilateral Trade Negotiations, all original Members participated and a complex new set of agreements and commitments was entered into, replacing GATT 1947 and various related side agreements. In this connection, many changes in tariff bindings were made, including certain tariff increases, and it was for all prospective members of the WTO to decide whether they would accept the new agreements, including the new bindings proposed by other participants. Under Article XVI:5 of the WTO Agreement, reservations are not permitted, except to the extent provided for in a WTO agreement; there is no such provision in GATT 1994. In this regard, we recognize the importance of not undermining the stability and predictability of tariff bindings. In light of the foregoing, in our view, the tariff rates specified in the EC's Uruguay Round Schedule are the valid EC tariff bindings in respect of bananas.

7.140 Furthermore, we note that there is a basic difference between this finding in respect of *tariff rates* and our finding in paragraph 7.0 in respect of the BFA tariff quota *allocations*. Under Article II of GATT, the purpose of the tariff schedules is to set clearly the tariff rate maxima that must be respected. As interpreted in the *Sugar Headnote* case, as discussed above, Article II of GATT does not allow Members to qualify their *non-tariff* obligations in their tariff schedules in a way that is inconsistent with WTO obligations.

7.141 We find that the tariff rates specified in the EC's Uruguay Round Schedule are the valid EC tariff bindings in respect of bananas.

³⁹⁵Panel Report on "EEC - Import Regime for Bananas", issued on 11 February 1994 (not adopted), DS38/R, pp.38-40, paras. 132-136.

3. *THE EC BANANA IMPORT LICENSING PROCEDURES*

7.142 We turn now to an examination of the EC's banana import licensing procedures.³⁹⁶ We give an overview of the claims of the Complainants and explain how we will organize our discussion of the numerous issues raised by those claims.

7.143 Altogether, the Complainants, jointly or severally, have raised more than 40 different claims against the EC licensing regime in general, or against specific elements thereof, under provisions of GATT, the Licensing Agreement and the TRIMs Agreement.³⁹⁷

7.144 We begin by considering three general issues: (i) whether the Licensing Agreement covers licences relating to tariff quotas; (ii) the relationship between claims under GATT 1994 and the Annex 1A Agreements in light of the General Interpretative Note to Annex 1A; and (iii) whether the EC licensing procedures should be analysed as one or two regimes.

(a) **General issues**

(i) **Scope of the Licensing Agreement**

7.145 The first general interpretative issue is whether the Licensing Agreement applies to tariff quotas. The Complainants argue that the administration of tariff quotas is subject to the disciplines embodied in the Licensing Agreement and have raised claims under Articles 1.2, 1.3, 3.2 and 3.5 of that Agreement. The EC takes the opposite view. It argues that the Licensing Agreement applies to "import restrictions". Since in its view tariff quotas do not constitute import restrictions, tariff quotas are not subject to the provisions of the Licensing Agreement. It also argues that import licences are tradeable and are not a "prior condition for importation" within the meaning of Article 1.1 of the Licensing Agreement since import licences are required only for the purpose of benefitting from the in-quota duty rate.

7.146 We therefore turn to an examination of the terms of the Licensing Agreement, interpreted in light of their context and of the object and purpose of the Agreement. Article 1.1 of the Licensing Agreement provides (footnote omitted):

³⁹⁶The EC common organization of the banana market, including the licensing regime and its administrative application, encompass more than 100 different regulations. The most important ones are: Council Regulation (EC) No. 404/93 of 13 February 1993 on the common organization of the market in bananas (O.J. L 47/1 of 25 February 1993); Commission Regulation (EEC) No. 1442/93 of 10 June 1993 laying down detailed rules for the application of the arrangements for importing bananas into the Community (O.J. L 142/6 of 12 June 1993); Council Regulation (EC) No. 3290/94 of 22 December 1994 on the adjustments and transitional arrangements required in the agricultural sector in order to implement the agreements concluded during the Uruguay Round of multilateral trade negotiations (O.J. L 349/105 of 31 December 1994); and Commission Regulation (EC) No. 478/95 on additional rules for the application of Council Regulation (EEC) No. 404/93 as regards the tariff quota arrangements for imports of bananas into the Community and amending Regulation (EEC) No. 1442/93 (O.J. L 49/13 of 4 March 1995).

³⁹⁷We recall that we decided not to consider claims under Article 5 of the TRIMs Agreement and under Article 4.2 of the Agreement on Agriculture because they were not or not adequately raised in the request for the establishment of the Panel. See para. 7.0 supra.

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

7.147 The terms of Article 1.1 do not explicitly include, or exclude, the administration of tariff quotas from the coverage of the Licensing Agreement. Its terms define "import licensing" as "administrative procedures used for the operation of import licensing regimes". However, footnote 1 to Article 1.1 further defines "administrative procedures" to include "those procedures referred to as 'licensing' as well as other similar administrative procedures". Accordingly, irrespective of whether the term "licensing" is used, in our opinion, administrative procedures are covered by the Licensing Agreement provided that they have a purpose similar to licensing. In other words, Article 1 of the Licensing Agreement, as further elaborated by footnote 1 thereto, clearly follows a functional approach. It embodies a comprehensive coverage of the Licensing Agreement, except as specifically limited.

7.148 Two limitations on the scope of the Licensing Agreement may be derived from the terms of Article 1.1. First, the notion of "import licensing" is limited to procedures "requiring the submission of an application or other documentation (other than that required for customs purposes) to the relevant administrative body". The licensing procedures used by the EC for the administration of the in-quota imports of bananas meet the terms of this limitation because they require the submission of an application, as well as other documentation.

7.149 Second, Article 1.1 limits "import licensing" to regimes requiring the "submission of an application or other documentation" as a "prior condition for importation into the customs territory of the importing Member". In our view, the requirement to present an import licence upon importation constitutes a "prior condition for importation", irrespective of whether that requirement applies to the administration of a quantitative restriction or a tariff quota. The mere possibility to import a particular product at a higher tariff rate outside a tariff quota without being subjected to the same or any licensing requirement does not alter the fact that the importation of a particular product within a tariff quota at a lower duty rate is made dependent upon the presentation of an import licence as a prior condition for importation at that lower rate.³⁹⁸

7.150 Thus, while Article 1.1 does not specifically include licences for tariff quotas within its scope, it does not exclude them. Indeed, the general definition of the scope of application in Article 1.1 of the Licensing Agreement is formulated in a comprehensive manner: import licensing procedures are mentioned without any reference to the underlying measure for whose administration they are employed. Moreover, procedures which are not in explicit terms labelled as "licensing" but pursue a similar purpose are included in the scope of the Licensing Agreement by virtue of footnote 1 to Article 1.1.³⁹⁹

³⁹⁸According to Article 18 of Regulation 1442/93, imports outside of the EC bound tariff quota are subject to automatic licensing.

³⁹⁹While it is true that the EC import licences for bananas are transferable and tradeable, it is also clear that a trader, regardless of whatever his classification might be with respect to operator categories and/or activity functions, at some point in time has to file an application for an import licence. That trader can use the licence he has obtained or sell it on the marketplace. Thus the trader who applies for a particular import licence is not necessarily the one who actually effectuates the importation of bananas. However, there is no requirement under Article 1.1 of the Licensing Agreement that the natural or legal person who files the application for a licence must also carry out the transaction of actually importing bananas. Moreover, in respect of

7.151 Article 3.1 of the Licensing Agreement also defines the coverage of the Agreement by providing that non-automatic licensing is covered by the Agreement as follows:

"The following provisions, in addition to those in paragraphs 1 through 11 of Article 1, shall apply to non-automatic import licensing procedures. Non-automatic import licensing procedures are defined as import licensing not falling within the definition contained in paragraph 1 of Article 2".

Article 2:1 of the Licensing Agreement, in turn, reads:

"Automatic import licensing is defined as import licensing where approval of the application is granted in all cases, and which is in accordance with the requirements of paragraph 2(a)".

Given that the approval of an application for an import licence is not, in the sense of Article 2.1 of the Licensing Agreement, granted by the relevant administrative bodies in all cases, the EC licensing procedures fall within the category of non-automatic import licensing.

7.152 Further indication of the scope of Article 3 of the Licensing Agreement can be derived from the wording of the first sentence of Article 3.2:

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

This raises the question whether the term "restriction" should be interpreted narrowly so as to encompass only quantitative restrictions, or whether it should be read to include also other measures such as tariff quotas.

7.153 In this context, Article 3.3 of the Licensing Agreement offers implicit guidance:

"In the case of licensing requirements for purposes other than the implementation of quantitative restrictions, Members shall publish sufficient information for other Members and traders to know the basis for granting and/or allocating licences".

The phrase "other than the implementation of quantitative restrictions" makes clear that the coverage of Article 3 of the Licensing Agreement is not limited to procedures used in the implementation of quantitative restrictions. On the contrary, the wording of Article 3.3 implies that the disciplines concerning non-automatic licensing also cover procedures used for the administration of other measures.

7.154 Moreover, the use of the term "restriction" in Article 3.2 is not a reason to give a narrow reading to the scope of the Licensing Agreement. Past GATT panel reports support giving the term

(..continued)
transferability and tradeability of licences, there is no difference between the administration of quantitative restrictions and of tariff quotas.

"restriction" an expansive interpretation.⁴⁰⁰ The introductory words of Article XI of GATT provide as follows:

"No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures ...".

Thus, tariffs and tariff quotas are restrictions as that term is used in Article XI, although "duties, taxes or other charges" are excepted from Article XI's requirements. A similar reading is appropriate in the case of the Licensing Agreement. Article 3.2 of the Licensing Agreement refers to "restrictions" and Article 3.3 of the Licensing Agreement applies to "licensing requirements for purposes other than the implementation of quantitative restrictions". Accordingly, we find that licensing procedures used for the implementation of measures other than quantitative restrictions, including tariff quotas, are subject to the disciplines of the Licensing Agreement.⁴⁰¹ We also note that our argument that tariff quotas are "restrictions" does not imply that they are not, in principle, legitimate trade measures under the agreements covered by the WTO in the same sense that tariffs are.

7.155 This finding is in accord with a consideration of the object and purpose and the context of the Licensing Agreement. The preamble to the Licensing Agreement makes it clear that the Licensing Agreement is to further the objectives of GATT. It is equally explicitly noted that the provisions of GATT apply to import licensing and then stated that Members desire that import licensing procedures not be used contrary to the principles and objectives of GATT. Since one of the principal GATT provisions dealing with import licensing is Article XIII, which by the explicit terms of Article XIII:5 applies to tariff quotas, it follows from the preamble to the Licensing Agreement that the Licensing Agreement should also apply to tariff quotas. There would not seem to be any reason to treat licensing procedures for quantitative restrictions differently from those for tariff quotas. The concerns raised in the preamble about the possible negative consequences of the inappropriate use of import licensing regimes would apply equally to both.

7.156 Accordingly, we find that the Licensing Agreement applies to licensing procedures for tariff quotas.

(ii) GATT 1994 and the Annex 1A Agreements

7.157 The Complainants have raised claims in respect of the EC's import licensing regime under GATT 1994, the Licensing Agreement and the TRIMs Agreement. Having found that the Licensing Agreement applies to tariff quotas, a further threshold question is whether both GATT 1994, as well as the Licensing Agreement and the TRIMs Agreement, apply to the EC's import licensing procedures. This requires us to consider the interrelationship of GATT 1994, on the one hand, and the Licensing Agreement and the TRIMs Agreement, on the other.

7.158 The General Interpretative Note to Annex 1A of the Agreement Establishing the WTO ("General Interpretative Note") reads:

⁴⁰⁰Panel Report on "Japan - Trade in Semiconductors", adopted on 4 May 1988, BISD 35S/116, 153, paras. 104-105; Panel Report on "EEC - Programme of Minimum Import Prices, Licences and Surety Deposits for Certain Processed Fruits and Vegetables", adopted on 18 October 1978, BISD 25S/68, 98-100, para. 4.9.

⁴⁰¹We note that past GATT/WTO practice in respect of this issue is not helpful in clarifying the meaning of the Licensing Agreement.

"In the event of conflict between a provision of the General Agreement on Tariffs and Trade 1994 and a provision of another agreement in Annex 1A to the Agreement Establishing the WTO ... , the provision of the other agreement shall prevail to the extent of the conflict".

Both the Licensing Agreement and the TRIMs Agreement are "agreement[s] in Annex 1A to the Agreement Establishing the WTO".

7.159 As a preliminary issue, it is necessary to define the notion of "conflict" laid down in the General Interpretative Note. In light of the wording, the context, the object and the purpose of this Note, we consider that it is designed to deal with (i) clashes between obligations contained in GATT 1994 and obligations contained in agreements listed in Annex 1A, where those obligations are mutually exclusive in the sense that a Member cannot comply with both obligations at the same time, and (ii) the situation where a rule in one agreement prohibits what a rule in another agreement explicitly permits.⁴⁰²

7.160 However, we are of the view that the concept of "conflict" as embodied in the General Interpretative Note does not relate to situations where rules contained in one of the Agreements listed in Annex 1A provide for different or complementary obligations in addition to those contained in GATT 1994. In such a case, the obligations arising from the former and GATT 1994 can both be complied with at the same time without the need to renounce explicit rights or authorizations. In this latter case, there is no reason to assume that a Member is not capable of, or not required to, meet the obligations of both GATT 1994 and the relevant Annex 1A Agreement.

7.161 Proceeding on this basis, we have to ascertain whether the provisions of the Licensing Agreement and the TRIMs Agreement, to the extent they are within the coverage of the terms of reference of this Panel, contain any conflicting obligations which are contrary to those stipulated by Articles I, III, X, or XIII of GATT 1994, in the sense that Members could not comply with the obligations resulting from both Agreements at the same time or that WTO Members are authorized to act in a manner that would be inconsistent with the requirements of GATT rules. Wherever the answer to this question is affirmative, the obligation or authorization contained in the Licensing or TRIMs Agreement would, in accordance with the General Interpretative Note, prevail over the provisions of the relevant article of GATT 1994. Where the answer is negative, both provisions would apply equally.

7.162 Based on our detailed examination of the provisions of the Licensing Agreement, Article 2 of

⁴⁰²For instance, Article XI:1 of GATT 1994 prohibits the imposition of quantitative restrictions, while Article XI:2 of GATT 1994 contains a rather limited catalogue of exceptions. Article 2 of the Agreement on Textiles and Clothing ("ATC") authorizes the imposition of quantitative restrictions in the textiles and clothing sector, subject to conditions specified in Article 2:1-21 of the ATC. In other words, Article XI:1 of GATT 1994 prohibits what Article 2 of the ATC permits in equally explicit terms. It is true that Members could theoretically comply with Article XI:1 of GATT, as well as with Article 2 of the ATC, simply by refraining from invoking the right to impose quantitative restrictions in the textiles sector because Article 2 of the ATC authorizes rather than mandates the imposition of quantitative restrictions. However, such an interpretation would render whole Articles or sections of Agreements covered by the WTO meaningless and run counter to the object and purpose of many agreements listed in Annex 1A which were negotiated with the intent to create rights and obligations which in parts differ substantially from those of the GATT 1994. Therefore, in the case described above, we consider that the General Interpretative Note stipulates that an obligation or authorization embodied in the ATC or any other of the agreements listed in Annex 1A prevails over the conflicting obligation provided for by GATT 1994.

the TRIMs Agreement as well as GATT 1994, we find that no conflicting, i.e. mutually exclusive, obligations arise from the provisions of the three Agreements that the parties to the dispute have put before us. Indeed, we note that the first substantive provision of the Licensing Agreement, Article 1.2, requires Members to conform to GATT rules applicable to import licensing.

7.163 In the light of the foregoing discussion, we find that the provisions of GATT 1994, the Licensing Agreement and Article 2 of the TRIMS Agreement all apply to the EC's import licensing procedures for bananas.

(iii) Separate regimes

7.164 The EC argues that for purposes of Article I:1 of GATT and other non-discrimination provisions the traditional ACP licensing procedures should not be compared with the third-country and non-traditional ACP licensing procedures because they are separate regimes. We note that licensing procedures applicable to all banana imports are embodied in the same Regulation 1442/93. Furthermore, administrative decisions applying the EC banana import procedures are not always contained in separate regulations depending on whether they relate to traditional ACP licensing or third-country and non-traditional ACP licensing procedures. This would also suggest that all EC licensing procedures for banana imports constitute a single regime.

7.165 Moreover, we have refuted the same argument in paragraph 7.0 *et seq.* above in the context of Article XIII's application to allocation of tariff quota shares. The object and purpose of Article I, Article X, Article XIII and similar non-discrimination provisions are to preclude the creation of different systems for imports from different Members, as explained in a 1968 Note by the GATT Director-General on Article X:3(a).⁴⁰³ [[Ecuador: [We discuss this Note in more detail in paragraph 7.228 *et seq.*, *infra*, but in our view, it is clear that the object and purpose of the non-discrimination provisions would be defeated if Members were permitted to create separate regimes for imports of like products based on origin.]] [[Guatemala-Honduras, Mexico: [We discuss this Note in more detail in paragraph 7.0 *et seq.*, *infra*, but in our view, it is clear that the object and purpose of the non-discrimination provisions would be defeated if Members were permitted to create separate regimes for imports of like products based on origin.]] [[United States: [We discuss this Note in more detail in paragraph 7.209 *et seq.*, *infra*, but in our view, it is clear that the object and purpose of the non-discrimination provisions would be defeated if Members were permitted to create separate regimes for imports of like products based on origin.]]

7.166 This is not to say that Members may not create import licensing regimes that vary in technical aspects. For example, the information required to establish origin for purposes of demonstrating an entitlement to a preferential tariff rate may differ from the information collected generally to establish origin. However, the measures for implementing a preferential tariff permitted under WTO rules should not in themselves create non-tariff preferences in addition to the tariff preference.

7.167 Accordingly, we find that the EC licensing procedures for traditional ACP bananas and third-country and non-traditional ACP bananas should be examined as one licensing regime.

⁴⁰³Note by the Director-General of 29 November 1968, L/3149.

(iv) Examination of the licensing claims

7.168 In light of the foregoing, we organize our examination of the EC's import licensing procedures for bananas as follows.⁴⁰⁴ In respect of each of the four principal components of the procedures to which the Complainants have objected - operator categories, activity functions, export certificates and hurricane licences, we first consider whether the EC's procedures are inconsistent with the general non-discrimination rules of Articles I and III of GATT. We then examine their consistency, where necessary, with Articles X:3 and XIII of GATT and the more specific provisions of the Licensing Agreement. We treat the claims under Article 2 of the TRIMs Agreement together with our consideration of the claims under Article III of GATT. We discuss the claims relating to operator categories in section (b), those relating to activity functions in section (c), those relating to export certificates in section (d) and those relating to hurricane licences in section (e). The remaining claims in respect of the EC licensing procedures are addressed in section (f).

(b) Operator categories

7.169 For purposes of the distribution of licences the EC established three types of "operators": operators who have during a preceding three-year period marketed third-country bananas and non-traditional ACP bananas are classified in Category A. Those who have marketed bananas from EC and traditional ACP sources during a preceding three-year period fall within Category B. Operators who have marketed third-country and non-traditional ACP bananas as well as traditional ACP and EC bananas qualify for both categories. New market entrants who start marketing third-country or non-traditional ACP bananas may qualify as Category C operators. Article 19 of EC Regulation 404/93 earmarks 66.5 per cent of the licences allowing imports of third-country and non-traditional ACP bananas at the lower tariff rates within the tariff quota for Category A operators. Another 30 per cent is allocated to Category B operators, while 3.5 per cent is reserved for the new market entrants of Category C. Subject to limitations, import licences for third-country and non-traditional ACP bananas are transferable and tradeable within and between operator categories.

7.170 The Complaining parties raise claims against the operator category rules under Articles I, III, X and XIII of GATT and Article 2 of the TRIMs Agreement, as well as claims under the Licensing Agreement. In the case of Guatemala and Honduras, we consider the claims they have raised under Article III of GATT, Article 2 of the TRIMs Agreement and Articles I and X of GATT.

(i) Article III:4 of GATT

7.171 The Complainants claim that the rules introducing operator categories, the eligibility criteria for Category B operators and the allocation to Category B operators of 30 per cent of the licences required for the importation of third-country and non-traditional ACP bananas at the lower duty rate within the bound tariff quota are inconsistent with Article III:4 of GATT because this licence allocation amounts to a requirement or incentive to purchase EC bananas in order to be eligible to import the bananas of Complainants' origin.

7.172 The EC responds that the licensing regime applied to third-country imports within the tariff quota does not force any trader to purchase any quantity of EC bananas, but provides a tool for

⁴⁰⁴In considering how to organize our findings, we note that Article 1.2 of the Licensing Agreement requires Members to conform to GATT rules applicable to import licensing procedures.

managing correctly the importation of third-country bananas according to the demand on the EC market. Likewise, the operator category rules and the allocation of 30 per cent of the licences required for imports from third-country sources form part of the EC's overall economic strategy and do not affect the volume of imports from third-country sources. Moreover, the EC reiterates that the licensing regime is applied at the border at the moment of importation, and not after the bananas have cleared customs and that, accordingly, all allegations concerning operator category rules under Article III are unfounded.

7.173 The relevant part of Article III:4 of GATT provides:

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

7.174 In addressing these claims concerning licensing procedures, we first examine the issue whether import licensing procedures are subject to the requirements of Article III. In this regard, we note that a GATT panel considered "... that the intention of the drafters of the Agreement was clearly to treat the imported products in the same way as the like domestic products once they had been cleared through customs. Otherwise indirect protection could be given."⁴⁰⁵ In view of this interpretation of Article III:4, the fact that imported products may be subject to the collection of tariffs or the imposition of a licensing requirement taken as such, whereas the marketing of domestic products is obviously not, cannot per se violate Article III:4 of GATT.

7.175 The next question that arises is whether the EC procedures and requirements for the allocation of import licences for foreign products to eligible operators are measures that are included in the notion of "all laws, regulations and requirements affecting their internal sale, offering for sale, purchase ..." in the meaning of Article III:4. In our view, the word "affecting" suggests a coverage of Article III:4, beyond legislation directly regulating or governing the sale of domestic and like imported products. We further have to take into account the context of Article III, i.e., the Interpretative Note Ad Article III which makes clear that the mere fact that an internal charge is collected or a regulation is enforced in the case of an imported product at the time or point of importation does not prevent it from being subject to the provisions of Article III.⁴⁰⁶ A GATT panel interpreted the Note as follows:

"The fact that Section 337 is used as a means for the enforcement of United States patent law at the border does not provide an escape from the applicability of Article III:4; the interpretative note to Article III states that any law, regulation or requirement affecting the internal sale of products that is enforced in the case of the imported product at the time or point of importation is nevertheless subject to the provisions of Article III. Nor could the applicability of Article III:4 be denied on the

⁴⁰⁵Panel Report on "Italian Discrimination against Imported Agricultural Machinery", adopted on 23 October 1958, BISD 7S/60, 63-64, para. 11.

⁴⁰⁶"... any law, regulation or requirement of the kind referred to in paragraph 1 which applies to an imported product and to the like domestic product and is ... enforced in the case of the imported product at the time or point of importation, is nevertheless to be regarded as ... law, regulation or requirement of the kind referred to in paragraph 1, and is accordingly subject to the provisions of Article III."

ground that most of the procedures in the case before the Panel are applied to *persons* rather than *products*, since the factor determining whether persons might be susceptible to Section 337 proceedings or federal district court procedures is the source of the challenged products, that is whether they are of United States origin or imported."⁴⁰⁷ (emphasis added)

This interpretation is in line with the interpretation of the term "affecting" in other past GATT panel reports.⁴⁰⁸

7.176 We further note that our interpretation is confirmed by the fact that the coverage of Articles I and III with respect to governmental measures is not necessarily mutually exclusive, as demonstrated by Article I:1's incorporation into the GATT most favoured nation clause of "all matters referred to in paragraphs 2 and 4 of Article III". To put it differently, under GATT internal matters may be within the purview of the MFN obligations and border measures may be within the purview of the national treatment clause.

7.177 In the light of the foregoing, we have to distinguish the mere requirement to present a licence upon importation of a product as such from the procedures applied by the EC in the context of the licence allocation which are internal laws, regulations and requirements affecting the internal sale of imported products. In the alternative, if the mere fact that the EC regulations on the introduction of the common market organization for bananas include or are related to a border measure such as a licensing requirement would mean that the Article III cannot apply, it would not be difficult to evade the GATT national treatment obligation. Such a result would run counter to the object and purpose of Article III, i.e., the obligation of Members to accord foreign products no less favourable treatment than like domestic products in the application of any measure affecting the internal sale of products, regardless of whether it applies internally or at the border.

7.178 In turning to the specific measures at issue, we note that operators address claims for reference quantities of bananas marketed during a preceding three-year period and applications for the allocation of quarterly licences to competent member State authorities. The administration of the licence allocation procedures is carried out in cooperation between these authorities and the European Commission within the EC territory. Consequently, although licences are a condition for the importation of bananas into the EC at in-quota tariff rates, we find that the administration of licence distribution procedures and the eligibility criteria for the allocation of licences to operators form part of the EC's internal legislation and are "laws, regulations and requirements affecting the internal sale, ... purchase, ... distribution" of imported bananas in the meaning of Article III:4. Therefore, the argument that licensing procedures are beyond the purview of the GATT national treatment clause cannot, in our view, be sustained in light of the wording, context, object or purpose of Article III or with the findings of past GATT panel reports.

7.179 Turning now to the basic Article III claim of Complainants in respect of operator categories, we first recall the findings of the panel on *EEC - Import Regime for Bananas*⁴⁰⁹ ("second *Banana*

⁴⁰⁷Panel Report on "US - Section 337 of the Tariff Act of 1930", adopted on 7 November 1989, BISD 36S/345, 385, para. 5.10.

⁴⁰⁸Panel Report on "Italian Discrimination against Imported Agricultural Machinery", adopted on 23 October 1958, BISD 7S/60, 63-64, para. 11; Panel Report on "EEC - on Imports of Parts and Components", adopted on 16 May 1990, BISD 37S/132, 197, paras. 5.20-5.21.

⁴⁰⁹Panel Report on "EEC - Import Regime for Bananas", issued on 11 February 1994 (not adopted), DS38/R.

panel"), which held with regard to operator categories:

"144. The Panel first examined the operation of the EEC import licensing system and noted the following. The quantity of bananas that an operator may import, pursuant to licences granted under the tariff quota, depends on the origin of the bananas that the operator has marketed during the preceding three-year period.⁴¹⁰ In particular, 30 per cent of the tariff quota is apportioned among operators who, during the preceding period, have purchased bananas from domestic or traditional ACP sources. As a result, operators wishing to increase their future share of bananas benefiting from the tariff quota would be required to increase their current purchases of EEC or traditional ACP bananas.

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

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

'The words 'treatment no less favourable' in paragraph 4 call for effective equality of opportunities for imported products in respect of the application of laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products.'⁴¹¹

The Panel further noted that previous panels had found consistently that this obligation applies to any requirement imposed by a contracting party, including requirements 'which an enterprise voluntarily accepts to obtain an advantage from the government'.⁴¹² In the view of the Panel, a requirement to purchase a domestic product in order to obtain the right to import a product at a lower rate of duty under a

⁴¹⁰Council Regulation (EEC) No. 404/93, Article 19 (original footnote).

⁴¹¹Report of the panel on "United States - Section 337 of the Tariff Act of 1930", BISD 36S/345, 386, para. 5.11, adopted on 17 June 1987 (original footnote).

⁴¹²Report of the panel on "EEC - Regulation on Imports of Parts and Components", BISD 37S/132, 197, paragraph 5.21, adopted on 16 May 1990 (original footnote).

tariff quota is therefore a requirement affecting the purchase of a product within the meaning of Article III:4. The Panel further noted that, in judging whether effective equality of opportunities for imported products under Article III:4 was accorded, the trade impact of the measure was not relevant. The CONTRACTING PARTIES determined in 1949 that the obligations of Article III:4 'were equally applicable whether imports from other contracting parties were substantial, small or non-existent',⁴¹³ and they have confirmed this view in subsequent cases.⁴¹⁴ Thus it was not relevant that, at present, the incentive under the EEC regulations to buy domestic or traditional ACP bananas may only result in raising their price, and not in reducing the exports of the third-country bananas, since these exports, because of the high over-quota tariff, were limited *de facto* to the amount allocated under the tariff quota. The discrimination of imported bananas under the licensing scheme could therefore not be justified by measures on the importation that currently prevented, *de facto*, bananas from entering into the internal market. The Panel therefore found that the preferred allocation of part of the tariff quota to importers who purchase EEC bananas was inconsistent with Article III:4.

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

148. The Panel noted that the EEC's licensing system, by reserving 66.5 per cent of the tariff quota to operators who had marketed third-country or non-traditional ACP bananas during a preceding period, included also incentives to continue importation of third-country bananas, even though these incentives may not have trade-distorting effects at present in view of the undisputed greater competitiveness of these third-country bananas. The Panel was of the view that, regardless of the trade effects, the apportioning of 66.5 per cent of the tariff quota to operators who had marketed third-country or non-traditional ACP bananas could not offset or legally justify the inconsistencies of the licensing system with Articles III:4 and I:1. The Panel agreed in this respect with a previous panel that had found that 'an element of more favourable treatment would only be relevant if it would always accompany and offset an element of differential treatment causing less favourable treatment'.⁴¹⁵

⁴¹³Report of the working party on Brazilian Internal Taxes, BISD II/181, 185, para. 16, adopted on 30 June 1949 (original footnote).

⁴¹⁴Report of the panel on "United States - Taxes on petroleum and certain imported substances", BISD 34S/136, 158, para. 5.1.9, adopted on 17 June 1987; Report of the panel on United States - Measures affecting alcoholic and malt beverages, DS23/R, para. 5.65, adopted on 19 June 1992 (original footnote).

⁴¹⁵Report of the panel on "United States Section 337 of the Tariff Act of 1930", BISD 36S/345, 388, para. 5.16, adopted on 7 November 1989 (original footnote).

7.180 While the second *Banana* panel report was not adopted by the GATT CONTRACTING PARTIES, the Appellate Body has stated in another context:

"[W]e agree with the panel's conclusion ... that unadopted panel reports 'have no legal status in the GATT or WTO system since they have not been endorsed through decisions by the CONTRACTING PARTIES to GATT or WTO Members'.⁴¹⁶ Likewise, we agree that 'a panel could nevertheless find useful guidance in the reasoning of an unadopted panel report that it considered to be relevant'.⁴¹⁷ ."⁴¹⁸

Neither the EC nor the Complainants have claimed that the rules concerning operator categories have significantly changed⁴¹⁹ since the second *Banana* panel report was issued on 11 February 1994 in a way that would affect the soundness of that panel's findings and conclusions with respect to Article III:4. Nor does the adoption of the Lomé waiver by the GATT CONTRACTING PARTIES and its extension by the WTO General Council, in our view, affect our examination of the allocation of licences to different operator categories in the light of Article III:4. Accordingly, we adopt the findings of the second *Banana* panel on Article III:4 of GATT in respect of operator categories as our own findings.

7.181 However, before finding whether the allocation to Category B operators of 30 per cent of the licences allowing the importation of third-country and non-traditional ACP bananas at in-quota tariff rates is inconsistent with Article III:4, we need to consider that Article III:1 is a "general principle that informs the rest of Article III", as the Appellate Body has recently stated.⁴²⁰ Since Article III:1 constitutes part of the context of Article III:4, it must be taken into account in our interpretation of the latter. Article III:1 articulates a general principle that internal measures should not be applied so as to afford protection to domestic production.⁴²¹ As noted by the Appellate Body, the protective application of a measure can most often be discerned from the design, the architecture, and the revealing structure of the measure.⁴²² We consider that the design, architecture and structure of the EC measure that provides for allocation to Category B operators of 30 per cent of the licences allowing the importation of third-country and non-traditional ACP bananas at in-quota tariff rates all indicate that the measure is also applied so as to afford protection to EC producers.

⁴¹⁶Panel Report on "Japan - Taxes on Alcoholic Beverages", adopted on 1 November 1996, WT/DS8/R, WT/DS10/R, WT/DS11/R, pp.106-107, para. 6.10 (original footnote).

⁴¹⁷Ibid.

⁴¹⁸Appellate Body Report on "Japan - Taxes on Alcoholic Beverages", adopted on 8 November 1996, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, AB-1996-2, pp.14-15.

⁴¹⁹While provisions such as Article 19 of Regulation 404/93 of 13 February 1993 and Articles 3 and 4 of Regulation 1442/93 of 12 June 1993 have been implemented and modified through subsequent EC legislation, these rules are still in essence in force in the EC legal order without having been affected by subsequent legislation.

⁴²⁰Appellate Body Report on "Japan - Taxes on Alcoholic Beverages", *op. cit.*, p.18. The Report states: "The purpose of Article III:1 is to establish this general principle as a guide to understanding and interpreting the specific obligations contained in Article III:2 and in the other paragraphs of Article III, while respecting, and not diminishing in any way, the meaning of words actually used in the texts of those other paragraphs".

⁴²¹Ibid., p.18.

⁴²²Ibid., p.29.

7.182 Thus, we find the allocation to Category B operators of 30 per cent of the licences allowing the importation of third-country and non-traditional ACP bananas at in-quota tariff rates is inconsistent with the requirements of Article III:4 of GATT.

(ii) Article 2 of the TRIMs Agreement

7.183 Proceeding on the assumption that the operator category rules are inconsistent with the requirements of Article III:4, the Complainants allege that the conditions for operator B eligibility and the 30 per cent tariff quota allocation for Category B operators are inconsistent with Article 2.1 of the TRIMs Agreement. The fact that the allocation of 30 per cent of the licences required for the importation of third-country bananas is contingent upon the marketing of EC (and traditional ACP) bananas amounts, in the view of the Complainants, to a purchasing requirement which falls within the first category of the Illustrative List in the Annex to the TRIMs Agreement of those trade-related investment measures which are inconsistent with Article III:4 of GATT.

7.184 In the EC's view, no breach of Article 2 of the TRIMs Agreement can be found because no breach of Article III:4 has occurred. In the alternative, the EC argues that rules establishing operator categories do not fall within the ambit of the TRIMs Agreement because there is no requirement to make an investment within a particular country; nor is there a requirement for purchase or use by an enterprise of products of domestic origin or from any domestic source in order to be allowed to make the investment.

7.185 In considering these arguments, we first examine the relationship of the TRIMs Agreement to the provisions of GATT. We note that with the exception of its transition provisions⁴²³ the TRIMs Agreement essentially interprets and clarifies the provisions of Article III (and also Article XI) where trade-related investment measures are concerned. Thus the TRIMs Agreement does not add to or subtract from those GATT obligations, although it clarifies that Article III:4 may cover investment-related matters.

7.186 We emphasize that in view of the importance of the TRIMs Agreement in the framework of the agreements covered by the WTO, we have examined the claims and legal arguments advanced by the parties under the TRIMs Agreement carefully. However, for the reasons stated in the previous paragraph, we do not consider it necessary to make a specific ruling under the TRIMs Agreement with respect to the eligibility criteria for the different categories of operators and the allocation of certain percentages of import licences based on operator categories. On the one hand, a finding that the measure in question would not be considered a trade-related investment measure for the purposes of the TRIMs Agreement would not affect our findings in respect of Article III:4 since the scope of that provision is not limited to TRIMs and, on the other hand, steps taken to bring EC licensing procedures into conformity with Article III:4 would also eliminate the alleged non-conformity with obligations under the TRIMs Agreement.

7.187 Therefore, we do not consider it necessary to make a specific ruling under the TRIMs Agreement with respect to the allocation to Category B operators of 30 per cent of the licences allowing the importation of third-country and non-traditional ACP bananas at in-quota tariff

⁴²³We have already dismissed the Complainants' claim under the transition provisions of Article 5 of the TRIMs Agreement because Article 5 was not listed in the request for the establishment of the Panel as required by Article 6.2 of the DSU, see para. 7.0.

rates.

(iii) Article I of GATT

7.188 The Complainants claim that (i) the conditions for operator B eligibility based on marketing of ACP bananas, (ii) the exemption of traditional ACP imports from operator category rules and (iii) the allocation of 30 per cent of the licences allowing imports of third-country bananas at in-quota tariff rates to Category B operators, are inconsistent with the requirements of Article I:1 of GATT. They argue: (a) that the comparatively less complex licensing procedures that apply to imports of bananas from traditional ACP sources are an "advantage" that the EC fails to accord to imports of third-country bananas, and (b) that these aspects of the EC licensing system provide an incentive or requirement to purchase bananas from traditional ACP sources over those originating in third countries. The EC responds that the existence of Category B licences *per se* does not create an incentive to purchase any particular product, but is designed to mitigate the effects of oligopolistic market structures and to stimulate competition between operators. Since licences allocated to particular operators are tradeable, the EC concludes that such licences do not constitute an impediment to imports from any specific source. In the alternative, the EC maintains that the Lomé waiver covers any inconsistency with the requirements of Article I:1 because Category B licences are required under the Lomé Convention in order to maintain existing advantages for traditional ACP bananas on the EC market.

7.189 Article I:1 provides as follows:

"With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed in the international transfer of payments for imports or exports and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, any advantage, favour, privilege or immunity granted by any Member to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other Members".

In our view, import licensing procedures, including the operator category rules, are "rules and formalities in connection with importation" in the meaning of Article I:1. A panel found, for example, that comparatively more favourable rules for revoking countervailing duties were an "advantage" for purposes of Article I:1 and that "making a regulatory advantage available to imports from some countries while not making it available to others" is inconsistent with Article I:1.⁴²⁴

7.190 In our view, the operator category and activity function rules contained in the licensing procedures for third-country and non-traditional ACP bananas require substantially more data to be submitted to show entitlement to a licence for third-country and non-traditional ACP bananas than is required by the procedures applicable to traditional ACP bananas. This is clearly demonstrated by comparing the data that needs to be maintained and submitted under the two systems.

⁴²⁴Panel Report on "US - Denial of MFN Treatment as to Non-Rubber Footwear from Brazil", adopted on 19 June 1992, BISD 39S/128, 150-151, paras. 6.8-6.11.

7.191 In respect of traditional ACP bananas, we note that, according to the EC,⁴²⁵ operators need only to obtain special certificates of origin from the issuing authority in the relevant ACP State for traditional ACP imports. In this regard, Article 14(4) of Regulation 1442/93 on "Detailed Rules Applicable to Imports of Traditional ACP Bananas" (as amended by Regulation 875/96) provides:

- "4. Import licence applications shall only be admissible where:
- (a) they are accompanied by the original of a certificate drawn up by the competent authorities of the ACP country concerned testifying to the origin of the bananas ...
 - (b) they contain
 - the words 'traditional ACP bananas - Regulation (EEC) No 404/93' ...
 - an indication of the country of origin ..."

7.192 In contrast, in respect of third-country and non-traditional ACP imports, operators need to apply for a reference quantity by sending details of banana volumes marketed during a preceding three-year period to the relevant competent authority. Article 19(2) of Regulation 404/93 on "Detailed Rules for the Application of the Tariff Quota Arrangements" provides in respect of imports of third-country and non-traditional ACP bananas that:

"On the basis of separate calculations for each of the categories of operators ... each operator shall obtain import licences on the basis of the average quantities of bananas that he has sold in the three most recent years for which figures are available. For the category of [A] operators ..., the quantities to be taken into consideration shall be the sales of third-country and/or non-traditional ACP bananas. In the case of category [B] operators ..., sales of traditional ACP and/or Community bananas shall be taken into consideration. ...".

Article 4 of Regulation 1442/93 provides:

"1. The competent authorities of the Member States shall draw up separate lists of operators in Category A and B and the quantities which each operators has marketed in each of the three years prior to that preceding the year for which the tariff quota is opened, broken down according to economic activity as described in Article 3(1).

Operators shall register themselves and shall establish quantities they have marketed by submitting individual written applications on their own initiative in a single Member State of their choice.

...

2. The operators concerned shall notify the competent authorities at the latest by ... each year thereafter of the overall quantities of bananas marketed in each of the years referred to in paragraph 1, breaking them down clearly:

- (a) according to origin, pursuant to the definition laid down in

⁴²⁵See the first item on the chart submitted by the EC which is reproduced at para. 4.274.

Article 15 of Regulation (EEC) No 404/93,⁴²⁶ as follows:

- of imports from non-ACP third countries and non-traditional imports from ACP States,
 - traditional imports from ACP States within the quantities set out in the Annex to Regulation (EEC) No. 404/93, specifying the quantities by State,
 - Community bananas, specifying the region of production;
- (b) according to the economic activity as described in Article 3(1).

3. The operators concerned shall make the supporting documents specified in Article 7 available to the authorities."

Article 7 of Regulation 1442/93 provides:

"At the request of the competent authorities of the Member States, the following documents may be submitted to establish the quantities marketed by each operator in Category A and B registered with them:

- the copy delivered to the importer of the Single Administrative Document (SAD) or, where applicable, his copy of the document for simplified declarations,
- a copy of the T2 declaration issued pursuant to ... for transactions effected during the reference period,
- original sales invoices or certified copies thereof,
- any relevant supporting documents such as national import documents issued and used before the entry into force of these arrangements,
- import licences issued pursuant to this Regulation and documents testifying to the marketing of bananas produced in the Community."

The information required to support claims in respect of activity functions (e.g., ripening) is not specified in this provision, but such information also must be maintained and submitted. We further note that the filing of data concerning the past volumes of traditional ACP and/or EC bananas marketed for purposes of the calculation of reference quantities for Category B operators relates to the eligibility of such operators for the allocation of licences allowing the importation of third-country and non-traditional ACP bananas at in-quota tariff rates. However, this filing of data on past banana volumes marketed is not a prerequisite for the importation of traditional ACP bananas, for the issuance of traditional ACP import licences, or for the marketing of EC bananas.

7.193 From the foregoing, in our view, it is clear that the procedural and administrative requirements for imports of third-country and non-traditional ACP bananas arising from the application of the operator category rules differ from, and go significantly beyond, those required in respect of traditional ACP bananas. Thus, we believe that the licensing procedures applied by the EC to traditional ACP banana imports, when compared to the licensing procedures imposed on third-

⁴²⁶Article 15 of Regulation 404/93 provides for definitions of, inter alia, "traditional imports from ACP States", "non-traditional imports from ACP States", "imports from non ACP-third countries", "Community bananas".

country and non-traditional ACP imports with its operator category rules, can be considered as an "advantage" which the EC does not accord to third-country and non-traditional ACP imports. The EC thereby acts inconsistently with the requirements of Article I:1.

7.194 In addition, Article I:1 obliges a Member to accord any advantage granted to any product originating in any country to the like product originating in the territories of all other Members, in respect of matters referred to in Article III:4. The matters referred to in Article III:4 are "laws, regulations and requirements affecting [the] internal sale, offering for sale, purchase, transportation, distribution and use [of a product]". In our view, the allocation to Category B operators of 30 per cent of the licences allowing for the importation within the tariff quota of third-country bananas means *ceteris paribus* that operators who in the future wish to maintain or increase their share of licences for the importation of third-country and non-traditional ACP bananas at in-quota tariff rates would be required to maintain or increase their current purchases and sales of traditional ACP (or EC) bananas in order to claim that they market traditional ACP (or EC) bananas for purposes of the operator category rules. Such a requirement to purchase and sell a product from one country (i.e., a source of traditional ACP imports) in order to obtain the right to import a product from any other country (i.e., a third country or a source of non-traditional ACP imports) at a lower rate of duty under a tariff quota is a requirement affecting the purchase of a product within the meaning of Articles III:4 and I:1. The allocation of licences allowing imports of third-country and non-traditional ACP bananas at in-quota tariff rates to operators who purchase and sell traditional ACP bananas is inconsistent with the EC's obligations under Article I:1 because it constitutes an advantage of the type covered by Article I that is accorded to traditional ACP bananas but which is not accorded to like products from all Members (i.e., non-traditional ACP and third-country bananas). We note that this result was also reached in the second *Banana* panel report as quoted above.⁴²⁷

7.195 Thus, we find that the application in general of operator category rules in respect of the importation of third-country and non-traditional ACP bananas at in-quota tariff rates, in the absence of the application of such rules to traditional ACP imports, and in particular the allocation to Category B operators of 30 per cent of the licences allowing the importation of third-country and non-traditional ACP bananas at in-quota tariff rates, are inconsistent with the requirements of Article I:1 of GATT.

(iv) Application of the Lomé waiver to the EC's Article I obligations

7.196 In light of the foregoing finding that the operator category rules contained in the EC's licensing procedures for bananas are inconsistent with the requirements of Article I:1, we must consider whether the EC's obligations in this respect have been waived by the Lomé waiver. We have already found that the Lomé waiver covers (i) tariff preferences that the EC currently affords to traditional and non-traditional ACP bananas, which would otherwise be inconsistent with its obligations under Article I:1 (paragraph 7.0) and (ii) to a limited extent, the banana tariff quota share allocations made by the EC to certain ACP countries, which would otherwise be inconsistent with its obligations under Article XIII (paragraph 7.0). As we noted in our discussion of this issue in the context of Article XIII, we must first determine whether the EC licensing procedures that we have found to be inconsistent with the requirements of Article I:1 are required by the Lomé Convention. If it is not, then the Lomé waiver is not applicable.

⁴²⁷Panel Report on "EEC - Import Regime for Bananas", issued on 11 February 1994 (not adopted), DS38/R, p.42ff, paras. 143-148, especially para. 147.

7.197 We recall that the operative paragraph of the Lomé waiver provides as follows:

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

For purposes of examining the issue of what is required by the Lomé Convention, we must examine the provisions of Article 168 and Protocol 5 of the Lomé Convention. In addition, we also consider whether the Lomé waiver should be interpreted to cover other provisions of the Lomé Convention that might be read to require such licensing procedures for ACP countries.

7.198 Article 168 of the Lomé Convention requires in general that ACP products be admitted duty-free to the EC. However, in the case of products, such as bananas, that are subject to specific rules as a result of the common agricultural policy, under Article 168(2)(a) they are to be (i) accorded duty-free treatment if there are no non-tariff measures applicable to their import or (ii) if (i) is not applicable (as is the case for bananas), given "more favourable treatment than that granted to third countries benefitting from the most-favoured-nation clause for the same products". The importation of traditional ACP bananas and non-traditional ACP bananas within the EC tariff quota is duty-free. Thus, for those imports, the basic requirement of Article 168, as expressed in its first paragraph, has been met, and we see no requirement in Article 168 that the EC must provide favourable treatment beyond such duty-free treatment. The Lomé waiver should not be interpreted to permit breaches of WTO rules that are not clearly required to satisfy the provisions of the Lomé Convention. This reading is confirmed by the terms of the waiver itself, which states in its fourth preambular paragraph: "Considering that the preferential treatment ... required by the Convention is designed ... not to raise undue barriers or to create undue difficulties for the trade of other contracting parties". In our view, the EC licensing procedures at issue do create undue difficulties for the trade of other Members. Accordingly, since Article 168 of the Lomé Convention does not specifically require these licensing procedures, it cannot be invoked as a justification for applying the Lomé waiver to such procedures.

7.199 Protocol 5 of the Lomé Convention provides:

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

Protocol 5 suggests that each ACP country must be protected as regards its traditional markets and advantages thereon, nothing in the Lomé Convention specifically requires a licensing system for third-country and non-traditional ACP banana imports, such as is provided by the application of the operator category-activity function system to third-country and non-traditional ACP imports. It is, however, necessary to consider whether these licensing procedures were one of the advantages, as that term is used in Protocol 5, formerly enjoyed by the ACP countries under member States' banana import regimes.

7.200 The first *Banana* panel report provided detailed information on the licensing systems that were applied in the EC member States prior to the implementation of its common market organization for bananas. Prior to the implementation of Regulation 404/93, ACP bananas were primarily

imported by France and the United Kingdom.⁴²⁸ The panel report described the French regime as follows:

"19. A banana import régime was first established in France by a Decree of 9 December 1931. This provided for the imposition of temporary quotas on imports of bananas from third countries. It was complemented by a law of 7 January 1932, on safeguard of production of bananas in colonies, protectorates or territories under French mandate. By Decree No. 60-460 of 16 May 1960, a special import régime was established for countries of the "zone franc" (i.e. former colonies). By an *arbitration* of the President of the Republic of 1962, the general supply of the French market was divided as follows: two thirds for national production (Guadeloupe, Martinique) and one third for imports from African suppliers (Cameroon, Côte d'Ivoire and Madagascar). Bananas from the Latin American countries were imported only to make up for any shortfall from the regions or countries mentioned above. When imported, the Latin American bananas were subject to the bound 20 per cent tariff and to licences.

20. In order to manage the banana market, an Interprofessional Committee for Bananas (Comité Interprofessionnel Bananier "CIB") was established on 5 December 1932. It was recognized as an agricultural interprofessional organization on 1 April 1989. The CIB brought together producers and importers, ripeners and distributors, including representatives of the African producers, as well as associated members (i.e., transporters). Since 1970, the GIEB (Groupement d'Intérêt Economique Bananier - Banana Economic Interest Group) has administered the existing quotas and import licences.

21. The CIB was responsible for assessing the demand for bananas on the French market on a yearly basis. A restricted Committee (*Conseil d'Administration*) of the CIB met every month to examine the quantities to buy the following month and to make a forecast for two months. In case of shortage of supply from one of the domestic or African sources, the CIB requested the GIEB to import from other third countries. In addition, the Ministry of Economics and Finance published notices to importers concerning the opening of quotas administered through licences. These licences were valid for a period of six months and were primarily designed to cover indirect imports made through other member States, as direct imports were made by the GIEB.

22. Import licences were granted to the GIEB by the government. The GIEB was exclusively responsible for purchasing and importing bananas directly from third countries. Imported quantities were then sold by the GIEB at the domestic market price. The "mark-up" was transferred to the Treasury. In addition to the national market organization, France was authorized, under the provisions of Article 115 of the Treaty of Rome, not to grant EEC treatment to bananas originating in certain third countries and put into free circulation in another EEC member State".⁴²⁹

⁴²⁸Panel Report on "EEC - Member States' Import Regimes for Bananas", issued on 3 June 1993 (not adopted), DS32/R, p.3, para. 12.

⁴²⁹Ibid., pp.4-5, paras. 19-22.

It described the regime of the United Kingdom as follows:

"37. The banana import régime dated back to the early 1930's when the United Kingdom introduced preferential duties on imports of British Empire bananas. Traditionally, and before it joined the EEC, the United Kingdom imported most of its bananas from the Windward Islands and Jamaica, formerly part of the British Empire. These countries were now regarded as ACP countries under the Lomé Convention. Imports of bananas from ACP countries entered in unrestricted quantities and duty free. Between 1940 and 1958, there was a total ban on imports of bananas from Latin American countries. Thereafter, imports from third countries, usually Latin American bananas, had been subject to a quota, since 1985 an annual quota, and a licensing system, as well as the common external tariff of 20 per cent. Licences were granted under Section 2 of "The Import of Goods (Control) Order" of 1954. There was a guaranteed minimum quantity for third country banana imports which, in 1992, amounted to 38,868 tons. Additional imports from third countries occurred when there was a short-fall of supplies. Upon its accession to the EEC, the United Kingdom was authorized, by the Commission of the EC, under Article 115 of the Treaty of Rome, to apply restrictions to imports, through other member States, of bananas from third countries, put into free circulation in the EEC.

38. At the beginning of every calendar year, the government authorities fixed the level of bananas that could be imported from all suppliers, according to the domestic needs determined by the Ministry of Agriculture, Fisheries and Food. On the basis of these parameters, monthly supply and demand conditions were established by the Banana Trade Advisory Committee (BTAC), set up in 1973 as a consultative committee for trade in bananas. Under the existing rules, the Department of Trade and Industry (DTI) was responsible for administering the import licensing system which controlled the quantity of banana imports from third country suppliers. The DTI issued public notices to importers. Since 1985, this took the form of an annual Notice to Importers, inviting applications for licences for the importation of bananas of non-preferential origin. Importers who fulfilled certain well-established criteria were eligible to obtain these licences. Once licences were allocated, for the annual basic import quota, management of further imports from third countries was done on a monthly basis. The BTAC met to consider updated forecasts of supply and demand. The DTI was then advised on the issue of further licences to cover shortfalls in supply and increases in demand".⁴³⁰

Based on the foregoing description of the UK and French procedures, it appears that when licences for banana imports were used, they were issued on a discretionary basis from time to time to established importers. Thus, prior to or as of 1990 (the reference period in the Lomé Convention for past or present advantages), neither the French nor the UK procedures appears to contain anything at all similar to the operator category-activity function system. Thus, in our view, licensing procedures of the kind presently applied were not an "advantage" that ACP countries formerly enjoyed in the EC or in individual member State markets.

7.201 In this connection, the EC argues that its licensing system is necessary to provide that the quantities for which access opportunities were given could actually be sold thereby guaranteeing traditional ACP bananas their existing advantages. We note that it appears that the ACP countries

⁴³⁰Ibid., p.7, paras. 37-38.

have enjoyed greater collective success on the EC market under Regulation 404/93 than in the years prior to 1993.⁴³¹ In any event, we believe that there are other methods consistent with WTO rules by which the EC could assist the ACP countries to compete on the EC market. As noted above, in our view, the Lomé waiver should not be interpreted to permit breaches of WTO rules that are not clearly required to satisfy the provisions of the Lomé Convention. This reading is, in our view, confirmed by the terms of the waiver itself, which states in its fourth preambular paragraph: "Considering that the preferential treatment ... required by the Convention is designed ... not to raise undue barriers or to create undue difficulties for the trade of other contracting parties". In our view, these licensing procedures do create undue difficulties for the trade of other Members. Since licensing procedures are not an advantage formerly enjoyed by ACP countries and they are not required to provide access to traditional markets, such procedures are not covered by the Lomé waiver.

7.202 There are other provisions of the Lomé Convention, such as Articles 15(a) and 167, that call for the promotion of trade between the EC and ACP countries. However, they are too general to impose specific requirements on the EC. Thus, we do not agree that those provisions can be read to require a particular licensing system such as the operator category-activity function system.

7.203 Finally, we note that a finding that the Lomé waiver does not apply to the EC's licensing procedures for banana imports is in accordance with past panel practice that waivers should be interpreted narrowly.⁴³²

7.204 Thus, we find that the Lomé waiver does not waive the EC's obligations under Article I:1 of GATT in respect of licensing procedures applied to third-country and non-traditional ACP imports, including those related to operator category rules.

(v) Article X:3(a) of GATT

7.205 The Complainants claim that the EC licensing procedures are inconsistent with the requirements of Article X:3 of GATT because they are not administered in a uniform, impartial and reasonable manner. The EC responds that Article X:3 only applies to internal measures and therefore is not applicable in this case. Alternatively, it argues that a system permitted under Article I by the Lomé waiver cannot be found to breach another GATT provision imposing MFN-like obligations similar to those waived. We note that we found in the preceding section that the EC licensing procedures were not permitted under Article I by the Lomé waiver.

7.206 Article X:3(a) provides:

"Each Member shall administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings of the kind described in paragraph 1 of this Article".

⁴³¹According to statistics submitted by the EC, the ACP countries' average share of the EC-12 market for imported bananas averaged 611,000 tonnes in the years 1989-1992, or 22.8 per cent. For 1993-1994, it averaged 737,000 tonnes, or 25.4 per cent. The Complainants suggest that the ACP share is understated in the EC statistics.

⁴³²Panel Report on "US - Restrictions on the Importation of Sugar and Sugar-Containing Products Applied Under the 1955 Waiver and Under the Headnote to the Schedule of Tariff Concessions", adopted on 7 November 1990, BISD 37S/228, 256-257, para. 5.9.

Article X:1 defines the coverage of Article X:3(a) as follows:

"Laws, regulations, judicial decisions and administrative rulings of general application, made effective by any Member, pertaining to the classification or the valuation of products for customs purposes, or to rates of duty, taxes or other charges, or to requirements, restrictions or prohibitions on imports or exports or on the transfer of payments therefor, or affecting their sale, distribution, transportation, insurance, warehousing, inspection, exhibition, processing, mixing or other use ...".

Given that this provision enumerates national legislation regarding border measures as well as internal measures, and customs tariffs as well as quantitative measures, the coverage of Article X could hardly be more comprehensive. Accordingly, internal laws regulating border measures constitute "... requirements ... on imports ..." in the meaning of Article X:1 and cannot be excluded from its scope.

7.207 Consequently, we find that the EC import licensing procedures are subject to the requirements of Article X of GATT.

7.208 More specifically, the Complainants claim that the rules establishing operator categories on the basis of the source of bananas marketed during a preceding three-year period are inconsistent with the requirements of Article X:3(a) because the EC applies them to imports of third-country and non-traditional ACP bananas but not to traditional ACP imports. According to the Complainants, these rules are inconsistent with the standards of "uniform, impartial and reasonable administration" of domestic laws, regulations, decisions and rulings and thus are inconsistent with the requirements of Article X:3(a). The EC maintains that the rules applying operator categories are administered in a uniform, impartial and reasonable manner among the third countries which are subject to that separate licensing regime and that the Complainants have failed to provide evidence to the contrary.

7.209 The Complainants support their argument by referring to a 1968 Note by the GATT Director-General, which stated that Article X:3(a)

"would not permit, in the treatment accorded to imported goods, discrimination based on country of origin, nor would they permit the application of one set of regulations and procedures with respect to some contracting parties and a different set with respect to the others".⁴³³

The EC responds that the 1968 Note cannot be considered as an authoritative interpretation of GATT rules because it was never endorsed by a formal decision of the CONTRACTING PARTIES.

7.210 We note that a prior panel in discussing the interpretation of Article X:3(a) found that its terms would be met if regulations were applied "in a substantially uniform manner, although there were some minor administrative variations, e.g. concerning the form in which licence applications could be made and the requirement of pro-forma invoices".⁴³⁴ In that case, the panel found that such

⁴³³Note by the GATT Director-General of 29 November 1968, L/3149.

⁴³⁴Panel Report on "EEC - Restrictions on Imports of Dessert Apples", Complaint by Chile, adopted on 22 June 1989, BISD 36S/93, 133, para.12.30. In the descriptive part of the *Chilean Apples* case, "concerning Article X:3, Chile argued that there were differences among the ten member States of the EEC as to the requirements they imposed on applications for licences for imports of dessert apples. It cited examples, such as a French requirement for licence applications to be accompanied by a pro

differences were minimal and did not in themselves establish a breach of Article X:3(a).

7.211 In our view, the Director-General's Note correctly describes the reach of Article X:3(a) and is consistent with the quoted panel decision. While minor "administrative variations" in the application of regulations may not be inconsistent with the requirements of Article X:3(a), as suggested by the above-mentioned panel report, two different sets of rules would be inconsistent with the requirements of Article X:3(a). In this case, we are confronted with a system for the importation of bananas into the EC with two different origin-based sets of import licensing procedures. These sets of licensing procedures differ significantly from one another, depending on whether imports of bananas are from traditional ACP sources or from third countries and non-traditional ACP sources, particularly with respect to the application of the rules on operator categories. The operator category (and activity function) rules contained in the licensing procedures for third-country and non-traditional ACP bananas (but not in the procedures applicable to traditional ACP bananas) mean that substantially more data must be maintained and submitted to show entitlement to a licence for third-country and non-traditional ACP bananas (see paragraphs 7.0 *et seq.*). These differences are not consistent with Article X:3(a)'s requirement of "uniform" administration.

7.212 As a result, we find that the application of operator category rules in respect of the importation of third-country and non-traditional ACP bananas at in-quota tariff rates, in the absence of the application of such rules to traditional ACP imports, is inconsistent with the requirements of Article X:3(a) of GATT.

(vi) Other claims

(..continued)

forma invoice, which effectively meant that licences could not be applied for until after ships had been loaded. Other examples cited by Chile included acceptance of telexed licence applications by some member states and not others; differing procedures for bank guarantees; and the refusal by one member state to accept a licence issued by another". *Idem* at p.116, para. 6.3.

7.213 In light of the foregoing findings on operator category rules and the allocation of certain percentages of import licences on the basis thereof, we do not consider it necessary to address the other claims raised by the Complaining parties against these EC measures.⁴³⁵ We further note that a finding that operator category rules are or are not inconsistent with the requirements of other provisions of GATT or the Licensing Agreement would not affect the findings we have made in respect of operator category rules.

(c) Activity functions

7.214 Activity function rules apply to Category A operators as well as to Category B operators. Article 3 of Regulation 1442/93 defines three categories of economic activities, i.e. (1) "primary" importers, (2) "secondary" importers and (3) ripeners. Fixed percentages of the licences required for the importation of bananas from third countries or non-traditional ACP sources at lower duty rates within the tariff quota are allocated on the basis of these "activity functions": Article 5 of Regulation 1442/93 provides for a weighting coefficient of 57 per cent for "primary" importers, 15 per cent for "secondary" importers, and 28 per cent for ripeners of bananas. The EC notes that "the Commission is guided by the principle whereby the licences must be granted to natural or legal persons who have undertaken the commercial risk of marketing bananas and by the necessity of avoiding disturbing normal trading relations between persons occupying different points in the marketing chain".⁴³⁶

7.215 The Complaining parties raise claims against the activity function rules under Articles I, III, X and XIII of GATT as well as claims under the Licensing Agreement. In the case of Guatemala and Honduras, we consider the claims they have raised under Articles III, I and X of GATT.

(i) Article III:4 of GATT

7.216 The Complainants claim that, while the reservation to ripeners of 28 per cent of the Category A and B import licences required for the importation of third-country bananas does not necessarily force operators to alter their trade and distribution pattern, the activity function rules provide nevertheless a strong incentive for operators to change the pattern of their economic activities with a view to maximizing their licence allocation. In the Complainants' view, the activity function rules require marketing through "middlemen"⁴³⁷ and are inconsistent with Article III:4 of GATT.

7.217 The EC explains that the licence distribution on the basis of "activity functions" is indispensable in order to avoid that certain operators in the supply chain would obtain extraordinary bargaining powers over their trading partners due to the commercial and financial power associated with the allocation of import licences for the tariff quota. The EC further submits that the Complainants failed to provide evidence as to how rules establishing activity functions could tilt competitive opportunities in favour of domestic products.

7.218 We note that the classification of companies according to the economic activities they perform applies to both Category A and B operators. Thus, for the application of the activity function

⁴³⁵See note 374 supra.

⁴³⁶Recital 15 of Council Regulation 404/93.

⁴³⁷Panel Report on "Canada - Administration of the Foreign Investment Review Act", adopted on 7 February 1984, BISD 30S/140, 160, para. 5.10.

rules, it does not matter whether economic actors have previously traded in third-country and non-traditional ACP bananas, on the one hand, or traditional ACP and EC bananas, on the other. Consequently, the rules establishing activity functions as such do not discriminate against bananas from third-country and non-traditional ACP sources. Unlike the case of the Category B operators, the right to import bananas at in-quota tariff rates is not tied to the purchase of domestic products. Thus, in respect of activity function rules, third-country and non-traditional ACP bananas are not treated less favourably than EC bananas in the terms of Article III:4.

7.219 Consequently, we find that the use of activity functions in connection with the allocation of licences allowing the importation of third-country and non-traditional ACP bananas at in-quota tariff rates is not inconsistent with the requirements of Article III:4 of GATT.

(ii) Article I:1 of GATT

7.220 The Complainants claim that activity function rules are inconsistent with the requirements of Article I:1 because import licences for bananas from third countries are issued to Category A and B operators according to the economic activities performed by them, while the licensing system applied to imports of traditional ACP bananas does not utilize activity functions as a criteria for issuing licences. The EC argues that it is necessary to issue licences on the basis of activity functions so that certain operators in the supply chain do not obtain extraordinary bargaining power due to the commercial and financial power associated with import licences and that the use of activity functions as a criteria for issuing licences has no direct impact on the imports of bananas from any source. In the EC's view, the absence of a licence allocation based on activity functions under the traditional ACP licensing procedures cannot be regarded as an "advantage" in the meaning of Article I and thus there is no inconsistency with the requirements of Article I. In the alternative, the EC takes the position that activity function rules are covered by the Lomé waiver.

7.221 In our view, import licensing procedures, including the activity function rules, are "rules and formalities in connection with importation" in the meaning of Article I:1. For example, a panel found that comparatively less favourable rules for revoking countervailing duties were an "advantage" for purposes of Article I:1 and that "making a regulatory advantage available to imports from some countries while not making it available to others" is inconsistent with Article I:1.⁴³⁸ As noted earlier (paragraphs 7.0 *et seq.*), in our view, the procedural and administrative requirements for imports of third-country and non-traditional ACP bananas arising from the application of the activity function rules differ from, and go significantly beyond, those required in respect of traditional ACP bananas. More specifically, the activity function rules contained in the licensing procedures for third-country and non-traditional ACP bananas (but not in the procedures applicable to traditional ACP bananas) mean that substantially more data must be maintained and submitted to show entitlement to a licence for third-country and non-traditional ACP bananas. In particular, in respect of past banana imports, Article 4(2) of Regulation 1442/93 requires a breakdown by origin, by category *and* activity function. Thus, we believe that the licensing procedures applied by the EC to traditional ACP banana imports, when compared to the licensing procedures imposed on third-country and non-traditional ACP imports with its activity function rules, can be considered as an "advantage" which the EC does not accord to third-country and non-traditional ACP imports..

7.222 We consider that imports of third-country and non-traditional ACP bananas are treated less

⁴³⁸Panel Report on "US - Denial of MFN Treatment as to Non-Rubber Footwear from Brazil", adopted on 19 June 1992, BISD 39S/128, 150-151, paras. 6.8-6.14.

favourably than traditional ACP imports since the latter are not subject to activity function rules. Finally, for the reasons given above, we reiterate our finding that the Lomé waiver does not waive the EC's obligations under Article I:1 in respect of licensing procedures (paragraph 7.0).

7.223 Accordingly, we find that the application of activity function rules in respect of the importation of third-country and non-traditional ACP bananas at in-quota tariff rates, in the absence of the application of such rules to traditional ACP imports, is inconsistent with the requirements of Article I:1 of GATT.

(iii) Article X:3(a) of GATT

7.224 The Complainants claim that the differences in the licensing procedures applied by the EC to traditional ACP imports and those applied to third-country and non-traditional ACP imports and in particular the rules establishing activity functions are inconsistent with the requirements of Article X:3 of GATT because they are not administered in a uniform, impartial and reasonable manner. The EC responds that Article X only applies to internal measures and therefore is not applicable in this case. Alternatively, it argues that a system permitted under Article I by the Lomé waiver cannot be found to breach another GATT provision imposing MFN-like obligations similar to those waived. The EC maintains that the activity function rules are administered in a uniform, impartial and reasonable manner among the third countries which are subject to that separate licensing regime and that the Complainants have failed to provide evidence to the contrary.

7.225 Article X:3(a) provides:

"Each Member shall administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings of the kind described in paragraph 1 of this Article".

Article X:1 defines the coverage of Article X:3(a) as follows:

"Laws, regulations, judicial decisions and administrative rulings of general application, made effective by any Member, pertaining to the classification or the valuation of products for customs purposes, or to rates of duty, taxes or other charges, or to requirements, restrictions or prohibitions on imports or exports or on the transfer of payments therefor, or affecting their sale, distribution, transportation, insurance, warehousing, inspection, exhibition, processing, mixing or other use ...".

Given that this provision enumerates national legislation regarding border measures as well as internal measures, and customs tariffs as well as quantitative measures, the coverage of Article X could hardly be more comprehensive. Accordingly, internal laws regulating border measures constitute "... requirements ... on imports ..." in the meaning of Article X:1 and cannot be excluded from its scope.

7.226 Consequently, we find that the EC import licensing procedures are subject to the requirements of Article X of GATT.

7.227 More specifically, the Complainants claim that the rules establishing activity functions are inconsistent with the requirements of Article X:3(a) because the EC applies them to imports of third-country and non-traditional ACP bananas but not to traditional ACP imports. According to the Complainants, these rules are inconsistent with the standards of "uniform, impartial and reasonable

administration" of domestic laws, regulations, decisions and rulings and thus are inconsistent with the requirements of Article X:3(a). The EC maintains that the rules applying activity functions are administered in a uniform, impartial and reasonable manner among the third countries which are subject to that separate licensing regime and that the Complainants have failed to provide evidence to the contrary.

7.228 The Complainants support their argument by referring to a 1968 Note by the GATT Director-General, which stated that Article X:3(a)

"would not permit, in the treatment accorded to imported goods, discrimination based on country of origin, nor would they permit the application of one set of regulations and procedures with respect to some contracting parties and a different set with respect to the others".⁴³⁹

The EC responds that the 1968 Note cannot be considered as an authoritative interpretation of GATT rules because it was never endorsed by a formal decision of the CONTRACTING PARTIES.

7.229 We note that a prior panel in discussing the interpretation of Article X:3(a) found that its terms would be met if regulations were applied "in a substantially uniform manner, although there were some minor administrative variations, e.g. concerning the form in which licence applications could be made and the requirement of pro-forma invoices".⁴⁴⁰ In that case, the panel found that such differences were minimal and did not in themselves establish a breach of Article X:3(a).

7.230 In our view, the Director-General's Note correctly describes the reach of Article X:3(a) and is consistent with the quoted panel decision. While minor "administrative variations" in the application of regulations may not be inconsistent with the requirements of Article X:3(a), as suggested by the above-mentioned panel report, two different sets of rules would be inconsistent with the requirements of Article X:3(a). In this case, we are confronted with a common regime for the importation of bananas into the EC with two different origin-based sets of import licensing procedures. These sets of licensing procedures differ from one another, depending on whether imports of bananas are from traditional ACP sources or from third countries and non-traditional ACP sources, including with respect to the application of activity function rules. As noted earlier, (paragraphs 7.0 *et seq.*, e.g., Article 4:2(b) of Regulation 1442/93), in our view, the procedural and administrative requirements for imports of third-country and non-traditional ACP bananas arising from the activity function rules differ from, and go significantly beyond, those required in respect of traditional ACP bananas. More specifically, the activity function rules contained in the licensing procedures for third-country and non-traditional ACP bananas (but not in the procedures applicable to traditional ACP bananas) mean that substantially more data must be maintained and submitted to show entitlement to a licence for third-country and non-traditional ACP bananas. These differences are not merely minor administrative variations in the application of regulations but are two different sets of rules which are

⁴³⁹Note by the GATT Director-General of 29 November 1968, L/3149.

⁴⁴⁰Panel Report on "EEC - Restrictions on Imports of Dessert Apples", Complaint by Chile, adopted on 22 June 1989, BISD 36S/93, 133, para. 12.30. In the descriptive part of the *Chilean Apples* case, "concerning Article X:3, Chile argued that there were differences among the ten member states of the EEC as to the requirements they imposed on applications for licences for imports of dessert apples. It cited examples, such as a French requirement for licence applications to be accompanied by a pro forma invoice, which effectively meant that licences could not be applied for until after ships had been loaded. Other examples cited by Chile included acceptance of telexed licence applications by some member states and not others; differing procedures for bank guarantees; and the refusal by one member state to accept a licence issued by another". *Idem* at p.116, para. 6.3.

inconsistent with the requirement of "uniform" administration as required by Article X:3(a).

7.231 As a result, we find that the application of activity function rules in respect of the importation of third-country and non-traditional ACP bananas at in-quota tariff rates, in the absence of the application of such rules to traditional ACP imports, is inconsistent with the requirements of Article X:3(a) of GATT.

(iv) Other claims

7.232 In light of the foregoing findings on activity function rules under Articles I and X, we do not consider it necessary to address the other claims raised by the Complaining parties against these EC measures.⁴⁴¹ We further note that a finding that activity function rules are or are not inconsistent with the requirements of other provisions of GATT or the Licensing Agreement would not affect the findings we have made in respect of activity function rules.

(d) BFA export certificates

7.233 As part of the EC import licensing procedures, Category A and C operators are required, for imports from Colombia, Costa Rica or Nicaragua, to present export certificates issued by these countries. Category B operators are exempted from this requirement.

The relevant part of Article 6 of the BFA provides that:

"... supplying countries with country quotas may deliver special export certificates for up to 70% of their quota, which, in turn, constitute a prerequisite for the issuance, by the Community, of certificates for the importation of bananas from said countries by "Category A" and "Category C" operators. ...".

The relevant part of Article 3.2 of EC Regulation 478/95 reads as follows:

"For goods originating in Colombia, Costa Rica or Nicaragua, the application for an import licence of category A or C ... shall also not be admissible unless it is accompanied by an export licence currently valid for a quantity at least equal to that of the goods, issued by the competent authorities listed in Annex II."⁴⁴²

In light of these provisions, we consider the claims raised the Complaining parties, who have alleged that the export certificate requirement is inconsistent with the requirements of Articles I:1, III:4 and X:3 of GATT and Articles 1.2, 1.3 and 3.2 of the Licensing Agreement. In the case of Guatemala and Honduras, we consider the claim they raised under Article I:1.

7.234 Initially, the EC argues that a consideration of export certificates is outside the Panel's terms

⁴⁴¹See note **Error! Bookmark not defined.** supra.

⁴⁴²Regulation 478/95 of 1 March 1995 on additional rules for the application of Council Regulation (EEC) No. 404/93 as regards the tariff quota arrangements for imports of bananas into the Community and amending Regulations (EEC) No. 1442/93, O.J. L 49/13 of 4 March 1995.

of reference because such certificates are not issued by the EC and therefore not part of the EC banana import regime. We agree that to the extent that the administration of export certificates is carried out by the authorities of Colombia, Costa Rica or Nicaragua, as appropriate,⁴⁴³ it is not within the terms of reference of this Panel. However, we cannot agree with the EC's argument that export certificates are completely outside the EC's sphere of competence and their legal examination thus entirely excluded from the mandate of this Panel. On the contrary, Article 3 of Regulation 478/95 states clearly that an application for an EC import licence is not admissible unless it is accompanied by an export certificate. Thus the requirement to match EC import licences with BFA export certificates and the exemption of Category B operators therefrom are part of the EC legal system and, accordingly, are within our terms of reference, to the extent they fall within the EC's responsibility.

(i) Article I:1 of GATT

7.235 The Complainants claim that the fact that the EC recognizes only export certificates issued by BFA signatories as prerequisites for importation, amounts to the conferral of a "privilege" (i.e., a commercial benefit) not enjoyed by other Members. This is alleged to be inconsistent with the requirements of Article I:1.

7.236 The EC responds that the Complainants have failed to prove that the export certificate requirement constitutes an "advantage" in the meaning of Article I:1 accorded to BFA signatories which is not conferred on other third countries. The EC concedes that the administration of the export certificates by BFA signatories can generate quota rents, but only among operators who are interested in marketing BFA bananas. However, the EC takes the position that the WTO agreements do not contain rules on the sharing and allocation of quota rents, e.g., by means of a licensing scheme. Therefore, in its view, any government is entitled to pursue its own policies in the distribution of quota rents provided that there is no discrimination between products originating in different Members.

7.237 The issue presented is whether the export certificate requirement constitutes an advantage in respect of rules and formalities in connection with importation accorded to BFA bananas that is not accorded to third-country bananas as required by Article I:1.

7.238 On its face, it would appear that there is discrimination against BFA bananas because they are subject to a requirement that is not imposed on other third-country bananas. However, closer analysis suggests that the export certificate requirement may in fact constitute a favour, advantage, privilege or immunity in the meaning of Article I. It is a commonplace, which no party to the dispute contests, that tariff quotas are likely to generate quota rents. The allocation of licences used in the administration of such tariff quotas can be viewed as a mechanism for the distribution of such rents. In fact, the parties do not contest that the export certificate requirement serves the purpose, or at least has the effect, of transferring part of the quota rent which would normally accrue to initial EC import licence holders to the suppliers who are initial holders of export certificates for bananas originating in the three BFA countries. The EC argues that the WTO agreements do not contain any rules governing the distribution of quota rents which are generated by trade measures, e.g., tariff quotas, whose imposition is legitimate under those agreements. We nevertheless have to ascertain whether the particular mechanisms implemented for the purposes of rent transfer directly or indirectly entail

⁴⁴³According to Annex II of Regulation 478/95, the bodies authorized to issue special export certificates are: for Colombia: Instituto Colombiano de Comercio Exterior; for Costa Rica: Corporación Bananera S.A.; and for Nicaragua: Ministerio de Economía y Desarrollo, Dirección de Comercio Exterior.

inconsistencies with the obligations Members have to respect under the WTO agreements.

7.239 The requirement to match EC import licences with BFA export certificates means that those BFA banana suppliers who are initial holders of export certificates enjoy a commercial advantage compared to banana suppliers from other third countries.⁴⁴⁴ We note that it is not possible to ascertain how many of the initial BFA export certificate holders are BFA banana producers or to what extent the tariff quota rent share that accrues to initial holders of BFA export certificates is passed on to the producers of BFA bananas in a way to create more favourable competitive opportunities for *bananas* of BFA origin. However, we also note that the possibility does exist to pass on tariff quota rent to BFA banana producers in such a way, whereas there is no such possibility in respect of non-BFA third-country banana producers. Thus, the EC's requirement affects the competitive relationship between *bananas* of non-BFA third-country origin and bananas of BFA origin. It is certainly true that Article I of GATT is concerned with the treatment of foreign *products* originating from different foreign sources rather than with the treatment of the suppliers of these products. In this respect, we note that the transfer of tariff quota rents which would normally accrue to initial holders of EC import licences to initial holders of BFA export certificates does occur when *bananas* originating in Colombia, Costa Rica and Nicaragua are, at some point, traded to the EC. Therefore, in our view, the requirement to match EC import licences with BFA export certificates and thus the commercial value of export certificates are linked to the *product* at issue as required under Article I. In practice, from the perspective of EC *importers* who are Category A or C operators, bananas of non-BFA third-country origin appear to be more profitable than bananas of BFA origin. This is confirmed by the fact that EC import licences for non-BFA third-country bananas and Category B licences for BFA bananas are typically oversubscribed in the first round of licence allocations, while Category A and C licences for BFA bananas are usually exhausted only in the second round of the quarterly licence allocation procedure. The EC argues that the fact that licences allowing the importation of non-BFA bananas at in-quota tariff rates are usually exhausted in the first round amounts to an advantage for bananas of Complainants' origin. While we do not endorse the EC's view, even if this were to constitute an advantage, we note "that Article I:1 does not permit balancing more favourable treatment under some procedure against a less favourable treatment under others".⁴⁴⁵

7.240 Indeed, one could argue that if the export certificate requirement is beneficial to BFA countries, non-BFA third countries could autonomously introduce a similar requirement in order to reap quota rent benefits. In this case, however, since the allocation of the "others" category of the BFA is not country-specific under the current EC regime, operators could switch to alternative sources within this category which are not subject to an export certificate requirement. Therefore, we consider that the requirement to match BFA export certificates with EC import licences in connection

⁴⁴⁴"Whereas the framework agreement provides that the signatory countries are authorized to issue export licences for seventy percent of their allocations, which licences are to be presented in order to obtain import licences of Category A and C for import into the Community, *in conditions which may improve the regularity and stability of commercial transactions* and guarantee the absence of any discriminatory treatment among operators" (emphasis added). Recital 8 of Regulation 478/95.

⁴⁴⁵"The Panel ... considered that Article I:1 does not permit balancing more favourable treatment under some procedure against a less favourable treatment under others. If such a balancing were accepted, it would entitle a contracting party to derogate from the most-favoured nation obligation in one case, in respect of one contracting party, on the ground that it accords more favourable treatment in some other case in respect of another contracting party. In the view of the Panel, such an interpretation of the most-favoured-nation obligation of Article I:1 would defeat the very purpose underlying the unconditionality of that obligation". Panel Report on "United States - Denial of Most-favoured-nation Treatment as to Non-rubber Footwear from Brazil", adopted on 19 June 1992, BISD 39S/128, 151, para. 6.10. Likewise, in the context of Article III a panel found that "an element of more favourable treatment would only be relevant if it would always accompany and offset an element of differential treatment causing less favourable treatment." Panel Report on "United States - Section 377 of the Tariff Act of 1930", adopted on 7 November 1989, BISD 36S/345, 388, para. 5.16.

with the country-specific allocation of tariff quota shares under the BFA is an advantage or privilege in the terms of Article I:1 in respect of rules and formalities in connection with importation. Since the EC accords this advantage to products originating in Colombia, Costa Rica and Nicaragua "while denying the same advantage to a like product originating in the territories of other [Members],"⁴⁴⁶ i.e., the Complainants' countries, the requirement to match EC import licences with BFA export certificates as provided for in Article 3 of Regulation 478/95 is inconsistent with Article I:1.

7.241 For these reasons, we find that the requirement to match EC import licences with BFA export certificates is inconsistent with the requirements of Article I:1 of GATT.

(ii) Other claims

7.242 In light of our finding that the requirement to match EC import licences with BFA export certificates is inconsistent with the requirements of Article I:1, one of the fundamental provisions of GATT, we consider it unnecessary to make specific rulings on the other claims raised by the Complaining parties with respect to the same EC measures, including the claim that the exemption of Category B operators from the matching requirement violates Article I also.⁴⁴⁷ A finding that these measures are or are not inconsistent with the requirements of Articles III and X of GATT and the Licensing Agreement would not affect our findings in respect of Article I. Moreover, steps taken by the EC to bring the measures into conformity with Article I should also eliminate the alleged non-conformity with these other obligations.

⁴⁴⁶Panel Report on "United States - Denial of Most-favoured-nation Treatment as to Non-rubber Footwear from Brazil", adopted on 19 June 1992, BISD 39S/128, 151, para. 6.11.

⁴⁴⁷See note 374 supra.

(e) **Hurricane licences**

7.243 Hurricane licences⁴⁴⁸ authorize operators who include or represent EC and ACP producers, or producer organizations "to import in compensation third-country bananas and non-traditional ACP bananas for the benefit of the operators who directly suffered damage as a result of the impossibility of the supplying the Community market with bananas originating in affected producer regions" because of the impact of tropical storms.⁴⁴⁹ In the aftermath of the hurricanes Debbie, Iris, Luis and Marilyn, 281,605 tonnes⁴⁵⁰ of third-country or non-traditional ACP imports were authorized between November 1994 and May 1996. The Complaining parties have raised claims under Article I, III and X of GATT and Articles 1.2, 1.3 and 3.5(h) of the Licensing Agreement. In the case of Guatemala and Honduras, we consider the claims they raised under Articles III and I of GATT and Article 1.3 of the Licensing Agreement.

(i) **Article III:4 of GATT**

7.244 The Complainants allege that the issuance of hurricane licences by the EC is inconsistent with the requirements of Article III:4 of GATT because EC producers are treated more favourably than third-country suppliers. The EC argues that the distribution of hurricane licences does not discriminate against bananas from third countries because hurricane licences are used for the importation of third-country or non-traditional ACP bananas.

7.245 We recall that it is the purpose of the national treatment clause to protect foreign *products* from being treated less favourably than like domestic products. Therefore, we have to examine whether the EC, by issuing hurricane licences, treats third-country bananas less favourably than domestic bananas.⁴⁵¹ We note that hurricane licences can be used to import third-country bananas or

⁴⁴⁸See, e.g., Commission Regulation (EC) No. 2791/94 of 16 November 1994 on the exceptional allocation of a quantity additional to the tariff quota for imports of bananas in 1994 as a result of tropical storm Debbie. Commission Regulation (EC) No. 510/95 of 7 March 1995 on the exceptional allocation of a quantity additional to the tariff quota for imports of bananas during the first quarter of 1995 as a result of tropical storm Debbie. Commission Regulation (EC) No. 1163/95 of 23 May 1995 on the exceptional allocation of a quantity additional to the tariff quota for imports of bananas during the second quarter of 1995 as a result of tropical storm Debbie. Commission Regulation (EC) No. 2358/95 of 6 October 1995 on the exceptional allocation of a quantity additional to the tariff quota for imports of bananas during the fourth quarter of 1995 as a result of tropical storms Iris, Luis and Marilyn. Commission Regulation (EC) No. 127/96 of 25 January 1996 on the exceptional allocation of a quantity additional to the tariff quota for imports of bananas during the first quarter of 1996 as a result of tropical storms Iris, Luis and Marilyn. Commission Regulation (EC) No. 822/96 of 3 May 1996 on the exceptional allocation of a quantity additional to the tariff quota for imports of bananas during the second quarter of 1996 as a result of tropical storms Iris, Luis and Marilyn.

⁴⁴⁹"Whereas ... these measures should be to the benefit of the operators who have directly suffered actual damage, without the possibility of compensation, and as a function of the extent of the damage." Recital 9 of Commission Regulation (EC) No. 510/95 of 7 March 1995 on the exceptional allocation of a quantity additional to the tariff quota for imports of bananas during the first quarter of 1995 as a result of tropical storm Debbie.

⁴⁵⁰Total quantities of authorized third-country and non-traditional ACP imports:

Regulation No. 2791/94 of 18 November 1994:	53,400 tonnes
Regulation No. 510/95 of 7 March 1995:	45,500 tonnes
Regulation No. 1163/95 of 23 May 1995:	19,465 tonnes
Regulation No. 2358/95 of 6 October 1995:	90,800 tonnes
Regulation No. 127/96 of 25 January 1996:	51,350 tonnes
Regulation No. 822/96 of 3 May 1996:	21,090 tonnes
Total:	281,605 tonnes

⁴⁵¹The exception of Article III:8(b) of GATT could be relevant where production aids to domestic production would accrue

non-traditional ACP bananas. Therefore, by issuing hurricane licences, the EC in effect authorizes imports of third-country (and non-traditional ACP) bananas at the lower duty rates in addition to the imports under the EC bound tariff quota.

7.246 In turning to the substance of this claim, we note that only operators including or directly representing EC (or traditional ACP) banana producers or producer organizations who have suffered damage caused by a tropical storm are eligible for the allocation of hurricane licences. We consider that it is not possible to ascertain to what extent such operators pass on the tariff quota rents linked to the hurricane licences to EC (or ACP) banana producers in a way to create more favourable competitive opportunities for *bananas* of EC (or traditional ACP) origin. However, we also note that it is the object and purpose of the EC hurricane licence regulations to pass on tariff quota rents to EC (or ACP) producers, whereas no such possibility exists in respect of third-country banana producers. Thus, competitive opportunities for *bananas* of Complainants' origin are less favourable than those that the EC provides to bananas of EC (or traditional ACP) origin, additional production of which may be encouraged in hurricane-prone regions because of the reduced risk of financial losses for such EC (or traditional ACP) banana producers in the event of a tropical storm.

7.247 Furthermore, since hurricane licences are issued only to operators who include or directly represent EC (or ACP) producers or producer organizations affected by a tropical storm,⁴⁵² Category A operators who have historically marketed third-country and non-traditional ACP bananas will not be allocated hurricane licences at all, irrespective of whether they include or represent third-country producers affected by a hurricane. Therefore, the fact that hurricane licences are issued only to operators who include or directly represent EC (or ACP) producers affected by a hurricane, although such licences might be used for the immediate importation of third-country (or non-traditional ACP) bananas, may provide an incentive for operators to market more EC (or traditional ACP) bananas grown in hurricane-prone areas than they otherwise would, in preference to third-country bananas, since the issuance of hurricane licences to eligible operators ensures that they can maintain, or do not lose, reference quantities for the purpose of establishing their entitlements to Category B licences in the future. Consequently, even if tariff quota rents linked to the hurricane licences are not fully passed on to producers by initial holders of hurricane licences who may only represent affected EC (or ACP) banana producers without being producers themselves, the greater incentive to market such EC (or traditional ACP) bananas arising from the fact that losses of such bananas caused by tropical storms can be expected to be compensated for through the allocation of hurricane licences, nevertheless, adversely affects conditions of competition for *bananas* of Complainants' origin in respect of which the risk of loss due to hurricanes cannot be expected to be reduced by the EC's hurricane licence allocations.

(..continued)

only to the producers, but not to processors of a domestic product. However, no such defense was raised in this case.

⁴⁵²1. The quantities referred to in Article 1(2) shall be allocated to the operators who:

- include or directly represent banana producers affected by tropical storm Debbie.
 - and who, during the last quarter of 1994, are unable to supply, on their own account, the Community market with bananas originating in the regions or countries referred to 1(2) on account of the damage caused by tropical storm Debbie.
2. The competent authorities in the Member States concerned shall determine the beneficiary operators who meet the requirements of paragraph 1 and shall make an allocation to each of them pursuant to this Regulation on the basis of:
- the quantities allocated to the producer regions or countries referred to in Article 1(2) and of
 - the damage sustained as a result of tropical storm Debbie.
3. The competent authorities shall assess the damage sustained on the basis of all supporting documents and information collected from the operators concerned." Article 2 of Commission Regulation No. 2791/94 of 16 November 1994 on the "exceptional allocation of a quantity additional to the tariff quota for imports of bananas in 1994 as a result of tropical storm Debbie.

7.248 In light of the foregoing, we now consider whether the above-described practice of issuing hurricane licences is inconsistent with the requirements of Article III:4. To establish an inconsistency with Article III:4, it would be sufficient for the Complainants to show that third-country bananas are treated less favourably than EC bananas in respect of a law, regulation or requirement affecting their internal sale, etc. We recall that we have agreed with the findings of the second *Banana* panel, which stated (paragraph 7.0): "A requirement to purchase a domestic product in order to obtain the right to import a product at a lower rate of duty under a tariff quota is therefore a requirement affecting the purchase of a product within the meaning of Article III:4". We note that this is the case in respect of the conditions attached to eligibility for hurricane licences. Since the practice of issuing hurricane licences may create an incentive for operators to purchase bananas of EC (and ACP) origin for marketing in the EC rather than bananas of third-country origin, this practice is an advantage accorded to bananas of EC origin that is not accorded to bananas of third-country origin. Thus, in terms of Article III:4, third-country bananas are treated less favourably than EC (and ACP) bananas in respect of a law, regulation or requirement affecting their internal sale.

7.249 However, before deciding whether the practice of issuing hurricane licences is inconsistent with Article III:4, we need to consider that Article III:1 is a general principle that informs the rest of Article III, as the Appellate Body has recently stated.⁴⁵³ Since Article III:1 constitutes part of the context of Article III:4, it must be taken into account in our interpretation of the latter. Article III:1 articulates a general principle that internal measures should not be applied so as to afford protection to domestic production.⁴⁵⁴ According to the Appellate Body, the protective application of a measure can most often be discerned from the design, the architecture, and the revealing structure of the measure.⁴⁵⁵ We consider that the design, architecture and structure of the EC practice of issuing hurricane licences all indicate that the measure is applied so as to afford protection to EC (and ACP) producers.

7.250 Thus, we find that the issuance of hurricane licences exclusively to EC producers and producer organizations or operators including or directly representing them is inconsistent with the requirements of Article III:4 of GATT.

⁴⁵³Appellate Body Report on "Japan - Taxes on Alcoholic Beverages", *op. cit.*, p.18. The Report states: "The purpose of Article III:1 is to establish this general principle as a guide to understanding and interpreting the specific obligations contained in Article III:2 and in the other paragraphs of Article III, while respecting, and not diminishing in any way, the meaning of words actually used in the texts of those other paragraphs".

⁴⁵⁴*Ibid.*, p.18.

⁴⁵⁵*Ibid.*, p.29.

(ii) Article I:1 of GATT

7.251 The Complainants claim that hurricane licences provide an "advantage" to ACP producers which is not unconditionally and immediately accorded to third-country producers as required by Article I:1 of GATT. The EC argues that the distribution of hurricane licences does not discriminate against bananas from third countries because hurricane licences are used for the importation of third-country or non-traditional ACP bananas. In the alternative, the EC submits that any inconsistency with Article I would be covered by the Lomé waiver.

7.252 We note that it is the purpose of the MFN clause to protect foreign *products* from being treated less favourably than like products of any other foreign origin. Therefore, we have to examine whether the EC, by issuing hurricane licences, accords bananas of Complainants' origin less favourable treatment than traditional ACP bananas. We share the view that hurricane licences are in general used to import third-country bananas or non-traditional ACP bananas. Therefore, by issuing hurricane licences, the EC in effect authorizes imports of third-country (and non-traditional ACP) bananas at the lower duty rates in addition to the imports under the EC bound tariff quota.

7.253 In turning to the substance of this claim, we note that only operators including or directly representing ACP (or EC) banana producers or producer organizations who have suffered damage caused by a tropical storm are eligible for the allocation of hurricane licences. We consider that it is not possible ascertain to what extent such operators pass on the tariff quota rents linked to the hurricane licences to ACP (or EC) banana producers in a way to create more favourable competitive opportunities for *bananas* of traditional ACP (or EC) origin. However, we also note that it is the object and purpose of the EC hurricane licence regulations to pass on tariff quota rents to ACP (and EC) producers, whereas no such possibility exists in respect of third-country banana producers. Thus, the EC modifies the competitive relationship between *bananas* of Complainants' origin and bananas of traditional ACP (or EC) origin, additional production of which is encouraged in hurricane-prone regions because of the reduced risk of financial losses for such traditional ACP (and EC) banana producers in the event of a tropical storm.

7.254 Furthermore, since hurricane licences are issued only to operators who include or directly represent ACP (or EC) producers or producer organizations affected by a tropical storm, Category A operators who have historically marketed third-country and non-traditional ACP bananas are unlikely to be allocated hurricane licences at all, irrespective of whether they include or represent third-country producers affected by a hurricane. Therefore, the fact that hurricane licences are issued only to operators who include or directly represent ACP (or EC) producers, although such licences might be used for the immediate importation of third-country (or non-traditional ACP) bananas, may provide an incentive for operators to market more traditional ACP (or EC) bananas grown in hurricane-prone areas than they otherwise would, in preference to third-country bananas, since the issuance of hurricane licences to eligible operators ensures that they can maintain, or do not lose, reference quantities for the purpose of establishing their entitlements to Category B licences in the future. Consequently, even if tariff quota rents linked to the hurricane licences are not fully passed on to producers by initial holders of hurricane licences who may only represent affected ACP (or EC) banana producers without being producers themselves, in a way to constitute an advantage for bananas of traditional ACP (or EC) origin grown in hurricane-prone regions, the greater incentive to market such traditional ACP (or EC) bananas arising from the fact that losses of such bananas caused by tropical storms can be expected to be compensated for through the allocation of hurricane licences, nevertheless, is an advantage that the EC does not accord to bananas of Complainants' origin in respect of which the risk of loss due to hurricanes cannot be expected to be reduced by the EC's hurricane licence allocations.

7.255 In light of the foregoing, we now consider whether the above-described practice of issuing hurricane licences is inconsistent with the requirements of Article I.1. To establish an inconsistency with Article I:1, it would be sufficient for the Complainants to show that bananas of ACP origin are accorded an advantage in respect of matters referred to in Article III:4 that is not accorded to bananas of third-country origin. We have already found that this is a matter referred to in Article III:4 (paragraph 7.0). Since the practice of issuing hurricane licences may create an incentive for EC operators to purchase bananas of ACP (and EC) origin for marketing in the EC rather than bananas of third-country origin, this practice is an advantage in terms of Article I:1 accorded to bananas of ACP origin that is not accorded to bananas of third-country origin.

7.256 Therefore, we find that the issuance of hurricane licences exclusively to traditional ACP producers and producer organizations or operators including or directly representing them is inconsistent with the requirements of Article I:1 of GATT.

(iii) Application of the Lomé waiver

7.257 The EC maintains that the practice of issuing hurricane licences to ACP countries derives from historic British and French schemes whose preservation is required by Protocol 5 of the Lomé Convention and covered by the Lomé waiver. The EC submits that under the UK scheme, "disaster licences" were issued to the affected operators to cover the volume lost, in proportion to the quantity of bananas that they would have supplied from traditional sources but for the disaster.⁴⁵⁶ Similar arrangements were in force in France beginning in 1962 which, according to the EC, in the event of specific climate disasters authorized imports from other sources by those operators who had been affected by the disasters.

7.258 We recall that the Lomé waiver provides that:

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

In this connection, we further recall that Protocol 5 of the Lomé Convention requires that in respect of banana exports to the EC market, "no ACP States shall be placed, as regards access to its *traditional* markets and *its advantages* on those markets, in a less favourable situation than in the past or at present" and the Joint Declaration to Protocol 5⁴⁵⁷ provides that "... no ACP State, *traditional* supplier to the Community, is placed as regards access to, and advantages in, the Community, in a less favourable situation than in the past or at present". Since the possibility of obtaining hurricane licences existed under the historic French and UK licensing schemes, hurricane licences can be viewed as advantages in the meaning of the Lomé Convention enjoyed by ACP States in the past in respect of their access to their traditional markets. As such, in terms of the Lomé waiver, the issuance of hurricane licences may be viewed as preferential treatment required by the Lomé Convention and thus is within the coverage of the Lomé waiver.

⁴⁵⁶According to the EC, the most recent example was the issue of disaster licences in 1989 following the destruction of the Jamaican banana crop caused by Hurricane Gilbert.

⁴⁵⁷Annex LXXIV - Joint declaration relating to Protocol 5 of the Fourth Lomé Convention.

7.259 Accordingly, we find that it was not unreasonable for the EC to conclude that the Lomé waiver waives its obligations under Article I:1 of GATT in respect of the issuance of hurricane licences to traditional ACP producers and producer organizations.

(iv) Article 1.3 of the Licensing Agreement

7.260 The Complainants claim that the issuance of hurricane licences by the EC exclusively to EC and ACP producers and producer organizations as well as operators who include or directly represent them is inconsistent with the requirements of Article 1.3 which requires the neutral application and the fair and equitable administration of import licensing procedures. The EC argues that no discrimination occurs in connection with the issuance of hurricane licences because the eligibility for hurricane licences is based on objective criteria.

7.261 Article 1.3 of the Licensing Agreement provides:

"The rules for import licensing procedures shall be neutral in application and administered in a fair and equitable manner".

To apply Article 1.3, we must interpret the terms "neutrality" in application, as well as "fairness" and "equity" in administration. In this regard, we recall our interpretation of Article X:3(a) of GATT (paragraph 7.0). Using the reasoning developed there, we interpret the phrase "neutrality in application" to preclude the imposition of one system of import licensing procedures in respect of a product originating in certain Members and a different system of import licensing procedures on the same product originating in other Members.⁴⁵⁸ In particular, we consider that the issuance of hurricane licences exclusively to ACP and EC producers and organizations or operators including or directly representing them in respect of bananas lost to hurricanes, but not to third-country producers and producer organizations or operators including or directly representing them, is inconsistent with the requirement of neutral application as contained in Article 1.3. In the light of the foregoing, we find it unnecessary to consider whether the EC hurricane licensing system meets Article 1.3's requirement of "fairness" and "equity".

7.262 The question then becomes whether the Lomé waiver applies so as to waive the EC's obligations under Article 1.3 in this regard. We note that the Lomé waiver was initially approved by the CONTRACTING PARTIES of GATT 1947, who had no power over the Tokyo Round Agreement on Import Licensing Procedures, which, at the time, was administered by a committee of signatories and contained no waiver provision. In the light of these considerations, the Lomé waiver from Article I of GATT cannot be read to waive the EC's obligations under Article 1.3 of the Licensing Agreement. We also note that the extension of the waiver by the General Council of the WTO has not altered that fact.

⁴⁵⁸We recall that we considered that minor "administrative variations" in the application of regulations may not be inconsistent with Article X:3(a) of GATT (para. 7.0). In our view, the same consideration applies in the context of Article 1.3 of the Licensing Agreement.

7.263 As a result, we find that the issuance of hurricane licences exclusively to ACP and EC producers and producer organizations or operators including or directly representing them is inconsistent with the requirements of Article 1.3 of the Licensing Agreement.

(v) Other claims

7.264 In light of our findings that the issuance of hurricane licences exclusively to EC and ACP producers and producer organizations or operators including or directly representing them is inconsistent with the requirements of Article III:4 of GATT and Article 1.3 of the Licensing Agreement, we consider it unnecessary to make specific rulings on the other claims raised by the Complaining parties with respect to the same EC measures.⁴⁵⁹ We further note that a finding that these measures are or are not inconsistent with the requirements of Article X:3(a) of GATT or Article 3:5(h) of the Licensing Agreement would not affect the findings we have made in respect of hurricane licences. Moreover, steps taken by the EC to bring the measures into conformity with the requirements of these articles should also eliminate the alleged non-conformity with Article X:3(a) of GATT and Article 3:5(h) of the Licensing Agreement.

(f) Other claims

(i) General

⁴⁵⁹See note **Error! Bookmark not defined.** supra.

7.265 In light of the findings we have made on operator categories, activity functions, export certificates and hurricane licences under Articles I, III and X of GATT and Article 1.3 of the Licensing Agreement, we do not consider it necessary to address the other claims raised by the Complaining parties against the EC licensing procedures.⁴⁶⁰ These claims are largely dependent on the existence of the operator category and activity function rules. For example, the alleged overfiling and unnecessary burdens and the alleged restrictive and distortive effects claimed to be inconsistent with the requirements of Article 3.2 of the Licensing Agreement and the alleged discouragement of tariff quota use claimed to be inconsistent with the requirements of Article 3.5(h) of the Licensing Agreement arise from the application of those rules. We further note that a finding that these EC measures are or are not inconsistent with the requirements of other provisions of GATT or the Licensing Agreement would not affect the findings we have made in respect of the EC licensing procedures.

7.266 We examine only the claim based on Article 1.2 of the Licensing Agreement, which we are required to do by Article 12.11 of the DSU since the claim relates to developing country Members.

(ii) Article 1.2 of the Licensing Agreement

7.267-7.273 [Used in the Ecuador and Mexico reports.]

4. THE EC BANANA IMPORT LICENSING PROCEDURES AND THE GATS

7.274-7.397 [Used in the Ecuador, Mexico and United States reports.]

5. NULLIFICATION OR IMPAIRMENT

⁴⁶⁰See note **Error! Bookmark not defined.** supra.

7.398 The measures taken by the EC affecting the importation of bananas from the Complainants, because of the infringement of obligations by the EC under a number of WTO agreements, are a *prima facie* case of nullification or impairment of benefits in the meaning of Article 3.8 of the DSU, which provides that "there is normally a presumption that a breach of the rules has an adverse impact on other Members parties to that covered agreement". To the extent that this presumption can be rebutted,⁴⁶¹ in our view the EC has not succeeded in rebutting the presumption that its breaches of GATT, GATS and Licensing Agreement rules have nullified or impaired benefits of the Complainants.

D. SUMMARY OF FINDINGS

7.399 The complexity of this case, and the unprecedented number of claims, arguments and Agreements involved, has resulted in a long report with an unprecedented number of findings. To assist the reader, the findings on the various procedural and substantive issues are repeated here. In summary we find that

1. PRELIMINARY ISSUES

- the EC's claim that the Complainants' case should be dismissed because the consultations held concerning this dispute did not perform their minimum function of affording a possibility for arriving at a mutually satisfactory solution and a clear setting out of the different claims of which a dispute consists shall be rejected (paragraph 7.0).

- the panel request made by the Complainants was sufficient to meet the requirements of Article 6.2 of the DSU to the extent that it alleged inconsistencies with the requirements of specific provisions of specific WTO agreements (paragraph 7.0).

- under the DSU the United States has a right to advance the claims that it has raised in this case (paragraph 7.0).

- the description of the Panel's proceedings, the factual aspects and the parties' arguments should be identical in the four reports. In the "Findings" section, however, the reports differ to the extent that the Complainants' initial written submissions to the Panel differ in respect of alleging inconsistencies with the requirements of specific provisions of specific agreements (paragraph 7.0).

2. THE EC MARKET FOR BANANAS: ARTICLE XIII OF GATT

- bananas are "like" products, for purposes of Article I, III, X and XIII of GATT, irrespective of whether they originate in the EC, in ACP countries, in BFA countries or in other third countries (paragraph 7.0).

- the EC has only one regime for banana imports for purposes of analysing whether its allocation of tariff quota shares is consistent with the requirements of Article XIII (paragraph 7.0).

- it was not unreasonable for the EC to conclude that at the time the BFA was negotiated Colombia and Costa Rica were the only contracting parties that had a substantial interest in supplying the EC banana

⁴⁶¹See Panel Report on "United States - Taxes on Petroleum and Certain Imported Substances", adopted on 17 June 1987, BISD 34S/136, 158, para. 5.1.9.

market in terms of Article XIII:2(d) (paragraph 7.0).

- it is not reasonable to conclude that at the time the BFA was negotiated Nicaragua and Venezuela had a substantial interest in supplying the EC banana market in the terms of Article XIII:2(d) (paragraph 7.0).

- the EC's allocation of tariff quota shares by agreement and by assignment to some Members not having a substantial interest in supplying bananas to the EC (including Nicaragua, Venezuela and certain ACP countries in respect of traditional and non-traditional exports) but not to other Members (such as Guatemala) and the tariff quota reallocation rules of the BFA, are inconsistent with the requirements of Article XIII:1 (paragraph 7.0).

- the failure of Ecuador's Protocol of Accession to address banana-related issues does not mean that Ecuador must accept the validity of the BFA as contained in the EC's Schedule or that it is precluded from invoking Article XIII:2 or XIII:4 (paragraph 7.0).

- it was not unreasonable for the EC to conclude that the Lomé Convention requires the EC to allocate country-specific tariff quota shares to traditional ACP banana supplying countries in an amount of their pre-1991 best-ever exports to the EC (paragraph 7.0).

- the allocation of tariff quota shares to ACP countries in excess of their pre-1991 best-ever exports to the EC is not required by the Lomé Convention (paragraph 7.0).

- to the extent that we have found that the EC has acted inconsistently with the requirements of Article XIII:1 (paragraph 7.0), we find that the Lomé waiver waives that inconsistency with Article XIII:1 to the extent necessary to permit the EC to allocate shares of its banana tariff quota to specific traditional ACP banana supplying countries in an amount not exceeding their pre-1991 best-ever exports to the EC (paragraph 7.0).

- the inclusion of the BFA tariff quota shares in the EC's Schedule does not permit the EC to act inconsistently with the requirements of Article XIII of GATT (paragraph 7.0).

- neither the negotiation of the BFA and its inclusion in the EC's Schedule nor the Agreement on Agriculture permit the EC to act inconsistently with the requirements of Article XIII of GATT (paragraph 7.0).

3. *TARIFF ISSUES*

- to the extent that the EC's preferential tariff treatment of non-traditional ACP bananas is inconsistent with its obligations under Article I:1, those obligations have been waived by the Lomé waiver (paragraph 7.0).

- the tariff rates specified in the EC's Uruguay Round Schedule are the valid EC tariff bindings in respect of bananas (paragraph 7.0).

4. THE EC BANANA IMPORT LICENSING PROCEDURES

- the Licensing Agreement applies to licensing procedures for tariff quotas (paragraph 7.0).
- the provisions of GATT 1994, the Licensing Agreement and Article 2 of the TRIMS Agreement all apply to the EC's import licensing procedures for bananas (paragraph 7.0).
- the EC licensing procedures for traditional ACP bananas and third-country and non-traditional ACP bananas should be examined as one licensing regime (paragraph 7.0).
- the allocation to Category B operators of 30 per cent of the licences allowing the importation of third-country and non-traditional ACP bananas at in-quota tariff rates is inconsistent with the requirements of Article III:4 of GATT (paragraph 7.0).
- the application in general of operator category rules in respect of the importation of third-country and non-traditional ACP bananas at in-quota tariff rates, in the absence of the application of such rules to traditional ACP imports, and in particular the allocation to Category B operators of 30 per cent of the licences allowing the importation of third-country and non-traditional ACP bananas at in-quota tariff rates, are inconsistent with the requirements of Article I:1 of GATT (paragraph 7.0).
- the Lomé waiver does not waive the EC's obligations under Article I:1 of GATT in respect of licensing procedures applied to third-country and non-traditional ACP imports, including those related to operator category rules (paragraph 7.0).
- the EC import licensing procedures are subject to the requirements of Article X of GATT (paragraphs 7.0, 7.0).
- the application of operator category rules in respect of the importation of third-country and non-traditional ACP bananas at in-quota tariff rates, in the absence of the application of such rules to traditional ACP imports, is inconsistent with the requirements of Article X:3(a) of GATT (paragraph 7.0).
- the use of activity functions in connection with the allocation of licences allowing the importation of third-country and non-traditional ACP bananas at in-quota tariff rates is not inconsistent with the requirements of Article III:4 of GATT (paragraph 7.0).
- the application of activity function rules in respect of the importation of third-country and non-traditional ACP bananas at in-quota tariff rates, in the absence of the application of such rules to traditional ACP imports, is inconsistent with the requirements of Article I:1 of GATT (paragraph 7.0).
- the application of activity function rules in respect of the importation of third-country and non-traditional ACP bananas at in-quota tariff rates, in the absence of the application of such rules to traditional ACP imports, is inconsistent with the requirements of Article X:3(a) of GATT (paragraph 7.0).
- the requirement to match EC import licences with BFA export certificates is inconsistent with the requirements of Article I:1 of GATT (paragraph 7.0).

- the issuance of hurricane licences exclusively to EC producers and producer organizations or operators including or directly representing them is inconsistent with the requirements of Article III:4 of GATT (paragraph 7.0).

- the issuance of hurricane licences exclusively to traditional ACP producers and producer organizations or operators including or directly representing them is inconsistent with the requirements of Article I:1 of GATT (paragraph 7.0).

- it was not unreasonable for the EC to conclude that the Lomé waiver waives its obligations under Article I:1 of GATT in respect of the issuance of hurricane licences to traditional ACP producers and producer organizations (paragraph 7.0).

- the issuance of hurricane licences exclusively to ACP and EC producers and producer organizations or operators including or directly representing them is inconsistent with the requirements of Article 1.3 of the Licensing Agreement (paragraph 7.0).

VIII. FINAL REMARKS

8.1 The procedures under the DSU serve to ensure the settlement of disputes among WTO Members in accordance with WTO obligations, not to add to or diminish these obligations. Accordingly, our terms of reference are to assist the DSB in reaching conclusions with regard to the legal consistency with WTO rules of the EC's common market organization for bananas.

8.2 Throughout our proceedings we were aware of the economic and social effects of the EC measures at issue in this case, particularly for the ACP and the Latin American banana exporting countries. In recognizing this, we decided to grant third parties participatory rights in our proceedings which were substantially broader than those normally afforded to them under the DSU.

8.3 From a substantive perspective, the fundamental principles of the WTO and WTO rules are designed to foster the development of countries, not impede it. Having heard the arguments of a large number of Members interested in this case and having worked through a complex set of claims under several WTO agreements, we conclude that the system is flexible enough to allow, through WTO-consistent trade and non-trade measures, appropriate policy responses in the wide variety of circumstances across countries, including countries that are currently heavily dependent on the production and commercialization of bananas.

IX. CONCLUSIONS

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

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