

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

**AWARD OF THE ARBITRATOR**

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## I. INTRODUCTION

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

## II. PROCEDURAL BACKGROUND

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

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

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

4. In a letter dated 4 August 2005, the Arbitrator observed that the fifth tiret of the Annex to the Doha Waiver contemplated that "in the absence of a mutually satisfactory solution, the same arbitrator will be asked to determine, within 30 days of the new arbitration request, whether the EC has rectified the matter". In the light of the possibility of a second arbitration, the Arbitrator outlined the procedure that it proposed to follow, were a second arbitration to be requested. This procedure included a tentative timetable for the parties' submissions, the hearing and the award. The letter also invited participation by the same African, Caribbean and Pacific ("ACP") countries that participated in the first arbitration (the "relevant ACP Members") on the same terms as in the first arbitration, including the possibility of presenting a collective written submission and a collective statement at the hearing.

5. The Arbitrator received a letter, dated 18 August 2005, from the relevant ACP Members requesting more extensive rights of participation in the second arbitration. Brazil, Colombia, Costa Rica, Ecuador, Guatemala, Honduras, Nicaragua, and Panama<sup>4</sup> (hereafter referred to as "the Interested Parties") objected to the ACP request in a letter dated 14 September 2005.

6. In a letter from the parties, dated 24 August 2005, the Arbitrator was informed that the European Communities had entered into consultations with the Interested Parties within ten days of the notification of the arbitration award to the General Council. It was also informed that the European Communities would "not be in a position before September to present the Interested Parties its proposal to "rectify the matter" or to propose a timetable for constructive consultations upon presentation of that proposal. Furthermore, the letter noted that the parties agreed "that in the absence of a mutually satisfactory solution, the second arbitration may be requested at any time in such a manner as would enable the Arbitrator to issue its award within 30 days after the request for a second arbitration, and "before the entry into force of the EC tariff-only regime for bananas on 1 January 2006".

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<sup>1</sup> WT/MIN(01)/15.

<sup>2</sup> *European Communities – The ACP-EC Partnership Agreement – Recourse to Arbitration Pursuant to the Decision of 14 November 2001, Award of the Arbitrator*, WT/L/616, dated 1 August 2005 (hereinafter "Award of the Arbitrator").

<sup>3</sup> Award of the Arbitrator, para. 94.

<sup>4</sup> Together with Venezuela hereafter referred to as "the Interested Parties"

7. On 13 September 2005, the European Communities notified the Interested Parties that it had revised its proposal to provide as from 1 January 2006 for an MFN tariff for bananas at €187 per metric ton and a tariff quota for ACP countries of 775,000 metric tons per year at zero duty.

8. On 16 September 2005, Costa Rica, Ecuador, Honduras, Nicaragua and Panama requested a preliminary ruling from the Arbitrator that the European Communities "is not entitled under the terms of the Waiver Annex to request the second arbitration." They further requested, in the alternative, a revision of the procedures and deadlines set out in the Arbitrator's letter of 4 August 2005. In a separate communication, Brazil, Colombia and Guatemala also requested a revision of the procedures and deadlines. The Arbitrator replied on 21 September 2005 that, in the light of the fact that no second arbitration had been requested at that date, any organizational matters or requests for preliminary rulings arising in the context of request for a second arbitration could be considered at an organizational meeting convened shortly after any such request.

9. In a communication dated 26 September 2005, the European Communities notified the Arbitrator that, after consultations with the Interested Parties, "there is currently no basis for even seeking a mutually satisfactory solution" within a timeframe that would allow for implementation of the new banana regime of the European Communities by 1 January 2006. It therefore requested the matter be referred back to the same arbitrator in accordance with the Annex to the Doha Waiver. In accordance with the procedures outlined by the Arbitrator in its letter of 4 August 2005, the European Communities also filed a written submission on the same day.

10. The Arbitrator held an organizational meeting with the parties on 28 September 2005. At that meeting, Costa Rica, Ecuador, Honduras, Nicaragua and Panama reiterated their request for a preliminary ruling regarding the validity of a request for arbitration by the European Communities. At the invitation of the Arbitrator, the European Communities filed a written response to the arguments made in the request for a preliminary ruling.

11. In a communication dated 29 September 2005, the Arbitrator informed the parties and the relevant ACP Members of its decisions with respect to the timetable for these proceedings and the request for a preliminary ruling presented by certain Interested Parties. In particular, it accorded some additional time to the Interested Parties and the relevant ACP Members for their submissions. The Arbitrator also indicated that it would address the request for a preliminary ruling in its final award.

12. The Interested Parties and the relevant ACP Members filed written submissions on 10 October 2005. The Arbitrator met with the parties and the relevant ACP Members on 19 October 2005. The parties and relevant ACP Members filed final written communications on 21 October 2005.

### **III. REQUEST FOR A PRELIMINARY RULING BY COSTA RICA, ECUADOR, HONDURAS, NICARAGUA AND PANAMA**

13. The Arbitrator begins by addressing the request by Costa Rica, Ecuador, Honduras, Nicaragua and Panama for a preliminary ruling "that the EC is not legally entitled to initiate the second arbitration".

14. Costa Rica, Ecuador, Honduras, Nicaragua and Panama argued that a request by the European Communities would be contrary to the procedures agreed in the Annex to the Doha Waiver. In particular, this group of Interested Parties argued that the structure of the second arbitration is intended to mirror that of the first round of proceedings. Under this process, the European Communities must make a proposal and consult with the Interested Parties. In the event that the Interested Parties are dissatisfied with the European Communities' proposal and no mutually satisfactory solution is found, the Interested Parties may then request arbitration. On this basis, these Members argued that the purpose of the second arbitration is to afford rights to the MFN suppliers and

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

15. Against that background, the Arbitrator notes that the appointment of the Arbitrator for purposes of the second arbitration is governed by the following sentence in the fifth tirit of the Annex to the Doha Waiver:

In the absence of a mutually satisfactory solution, the same arbitrator will be asked to determine, within 30 days of the new arbitration request, whether the EC has rectified the matter.

16. The Arbitrator observes that, on a plain reading of this text, there is no express limitation as to which of the parties may request, or "ask[]", it to fulfil the mandate of the second arbitration. This contrasts with the wording of the third tirit to the Annex, which expressly limits the right to request the initial arbitration to certain interested parties.

17. Costa Rica, Ecuador, Honduras, Nicaragua and Panama argue, in essence, that the context of the Annex requires that the conditions for requesting the first arbitration should also be applied to the request for the second arbitration. The Arbitrator acknowledges that interpreting the provisions of the Annex to the Doha Waiver in the light of their context is appropriate. However, this context may not override the explicit provisions being interpreted. As was emphasized in the first award, the explicit provisions of the Waiver Annex govern the mandate of the Arbitrator,<sup>5</sup> and indeed the manner in which the Arbitrator is appointed. The relevant explicit provision here, namely, the fifth tirit governing initiation of the second arbitration, suggests no limitation regarding which parties may request arbitration. If the drafters of the Annex had desired to limit the right to request the second arbitration to the Interested Parties alone, they could easily have adopted language similar to that used in the third tirit. The Arbitrator is not permitted to read into the text of the fifth tirit words that are not there.

18. That any of the parties may request recourse to a second arbitration is confirmed by the manner in which the precondition for such a request is phrased. That precondition is "the absence of a mutually satisfactory solution". The ordinary meaning of the term "mutually satisfactory" denotes that such a solution is one that is satisfactory to all parties affected. In its request for the second arbitration, the European Communities asserted that no mutually satisfactory solution was in existence at that time.<sup>6</sup> A "mutually satisfactory solution" would, necessarily, be a solution that was satisfactory to the European Communities. Thus the precondition for recourse to a second arbitration was clearly present.

19. For these reasons, the Arbitrator finds no grounds upon which to determine that the European Communities was not legally entitled to initiate the second arbitration. Accordingly, the Arbitrator declines to grant the preliminary ruling requested by Costa Rica, Ecuador, Honduras, Nicaragua and Panama.

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<sup>5</sup> Award of the Arbitrator, para.46.

<sup>6</sup> *Supra*, para. 9.

#### IV. MANDATE OF THE ARBITRATOR

##### A. THE MANDATE UNDER THE SECOND ARBITRATION (WHETHER THE EUROPEAN COMMUNITIES HAS "RECTIFIED THE MATTER")

20. Under the terms of the Annex to the Doha Waiver, the mandate of the Arbitrator in the first arbitration was to determine "whether the envisaged rebinding of the EC tariff on bananas would result in at least maintaining total market access for MFN banana suppliers, taking into account [all EC WTO market-access commitments relating to bananas]". In the context of that initial proceeding, the Arbitrator determined that its mandate involved three elements: first, the "envisaged rebinding of the EC tariff on bananas"; secondly, a benchmark against which that envisaged rebinding is to be assessed (namely, whether it "would result in at least maintaining total market access for MFN banana suppliers"); and thirdly, a direction to the Arbitrator to take into account all EC WTO market access commitments relating to bananas.<sup>7</sup>

21. Having analyzed the terms of its mandate, the Arbitrator found, in its first award, that it was required to determine "whether the proposed new EC tariff for bananas would preserve, at a minimum, the effective opportunities to enter the EC banana market afforded to MFN suppliers by the existing conditions of entry". The Arbitrator also found that the analysis must take into account not only bound commitments, but all other aspects of the import regime, as applied.<sup>8</sup>

22. In respect of a second arbitration, the Annex to the Doha Waiver provides that the Arbitrator would be asked to determine "whether the EC has rectified the matter". The European Communities has proposed to rectify the matter through a tariff on MFN imports of bananas of €187 per metric ton, for which it would modify its Schedule, and opening an autonomous tariff quota of 775,000 mt for imports originating in ACP countries with an in-quota duty of zero. The tariff quota would be administered on the basis of the historical system of license allocation, as under the current regime.<sup>9</sup>

23. The parties agree, and the Arbitrator finds, that its mandate in this matter is to determine whether the European Communities has "rectified the matter" in the light of the first award, such that the European Communities' new proposed rebinding would result in at least maintaining total market access for MFN suppliers, taking into account all of the European Communities' WTO market access commitments relating to bananas.<sup>10</sup> The Arbitrator determined in its first award that this mandate required "a determination as to whether the proposed new EC tariff for bananas would preserve, at a minimum, the effective opportunities to enter the European Communities' banana market afforded to MFN suppliers by the existing conditions of entry". This is also the pertinent benchmark for the Arbitrator's assessment in this proceeding. As in the initial proceedings, the analysis of the Arbitrator in the context of this second recourse to arbitration must factor in, not only bound commitments, but all other aspects of the European Communities' import regime for bananas, as applied.<sup>11</sup>

24. Although the parties did not differ on the interpretation of the benchmark to be applied to the Arbitrator's assessment in this proceeding, some of the Interested Parties considered that part of the European Communities' proposed rectification of the matter, namely the proposed application of a tariff quota on ACP imports, could not be taken into account in the assessment. The Arbitrator now

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<sup>7</sup> Award of the Arbitrator, para. 20.

<sup>8</sup> *Ibid.*, para. 37.

<sup>9</sup> See European Communities' submission, paras. 8 and 9.

<sup>10</sup> See submission by Colombia, Costa Rica, Ecuador and Guatemala submission, para. 1; submissions of Honduras, Nicaragua and Panama, para. 3; the issue was not specifically addressed in Brazil's submission, but it seems assumed that the revised European Communities' proposal should be assessed against the benchmark developed in the First Award. This view was also confirmed at the oral hearing in response to a question by the Arbitrator.

<sup>11</sup> Award of the Arbitrator, para. 37.

turns to the European Communities' proposed "rectification of the matter" and the relevance of the proposed tariff quota to its assessment in this proceeding.

**B. THE EUROPEAN COMMUNITIES' PROPOSED RECTIFICATION OF THE MATTER**

25. As noted above, the European Communities' proposed rectification of the matter includes two elements: a tariff on MFN imports of bananas of €187 per metric ton, for which it would modify its Schedule, and opening an annual tariff quota of 775,000 mt for imports originating in ACP countries, with an in-quota duty of zero.

26. It is not disputed that the first element constitutes an "envisaged rebinding" within the meaning of the Annex to the Doha Waiver. However, certain Interested Parties argued that the tariff quota component of the EC proposal could not be taken into account by the Arbitrator, because it was not an "envisaged rebinding" of the banana tariff. Honduras, Nicaragua and Panama, as well as Colombia, Costa Rica, Ecuador and Guatemala, also asked the Arbitrator to disregard the tariff quota from its analysis because it would be inconsistent with the European Communities' WTO obligations and with its commitment to apply a tariff-only regime as of 1 January 2006.<sup>12</sup> These arguments will be addressed in turn.

**1. Relationship between the proposed tariff quota and the "envisaged rebinding" of the European Communities' tariff on bananas**

27. Colombia, Costa Rica, Ecuador and Guatemala contended that, as was highlighted in the Arbitrator's analysis of its mandate in the first award, it was the European Communities' "envisaged rebinding" of its tariff on bananas that is to be the starting point of the analysis. In their view, the proposed tariff quota for ACP suppliers, which was not an envisaged rebinding, fell outside the scope of the Arbitrator's mandate and thus could not be considered by the Arbitrator.<sup>13</sup>

28. In its first award, the Arbitrator described the "envisaged rebinding" of the European Communities' tariff on bananas as the first element of its mandate and as the "starting point" for the analysis to be performed under the mandate.<sup>14</sup> For the purposes of this second arbitration, the Annex to the Doha Waiver does not specifically identify the different elements that should form the basis for the Arbitrator's analysis, beyond the indication that the Arbitrator should determine whether the European Communities has "rectified the matter". In particular, it does not specify in what form the European Communities might seek to rectify the matter.

29. The Arbitrator determined above – and the parties did not dispute – that its mandate for this arbitration should be understood with reference to the mandate in respect of the initial arbitration. The starting point of the Arbitrator's analysis should therefore be, as in the initial proceedings, the European Communities' "envisaged rebinding" of its tariff on bananas. Under the European Communities' proposed rectification of the matter, this "envisaged rebinding" would be at €187 per metric ton.<sup>15</sup> The European Communities did not suggest that the tariff quota would, in itself, be part of this envisaged rebinding, or otherwise be incorporated into its Schedule of commitments. Rather, it

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<sup>12</sup> Submissions by Nicaragua and Panama, paras. 234 and 235; submission by Honduras, paras. 235 and 236; and submission by Colombia, Costa Rica, Ecuador and Guatemala, paras. 43-57 and 73-75.

<sup>13</sup> Submission by Colombia, Costa Rica, Ecuador and Panama, paras. 58-67.

<sup>14</sup> Award of the Arbitrator, paras. 20 and 24.

<sup>15</sup> It might be argued that the expression "rectify the matter" could be read to imply that such rectification could incorporate more than an envisaged rebinding, if this were intended to "rectify the matter" following a determination that the initial proposed rebinding did not meet the requirements of the Annex of the Doha Waiver. However, we do not find it necessary to explore this issue further, in the light of our determination below that the tariff quota need not necessarily constitute an envisaged rebinding in order to be taken into account.

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

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

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

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

32. As noted above, Honduras, Nicaragua and Panama, as well as Colombia, Costa Rica, Ecuador and Guatemala, also asked the Arbitrator to disregard the tariff quota from its analysis because, in the absence of a waiver, it would be inconsistent with the European Communities' WTO obligations under the General Agreement on Tariffs and Trade 1994 (hereafter "GATT 1994") and with the European Communities' commitment to apply a tariff-only regime as of 1 January 2006.<sup>20</sup> Some of the Interested Parties argued that, aside from the proposed ACP tariff quota's inconsistency with the European Communities' WTO obligations, the granting of a GATT Article XIII waiver for the application of such a tariff quota was uncertain, and that the Arbitrator should therefore decline to consider the proposed tariff quota. The same Interested Parties also argued that the European Communities' proposed tariff quota could not be taken into account because it would not be consistent with the European Communities' commitment to apply a tariff-only regime for bananas as of 1 January 2006.

33. In respect of the potential WTO-inconsistency of the proposed tariff quota, it should first be noted that the European Communities indicated, as part of its proposed rectification of the matter, that the application of the tariff quota on ACP imports would be covered by the existing Doha Waiver in

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<sup>16</sup> Submission by the European Communities, paras. 8 to 10.

<sup>17</sup> Award of the Arbitrator, para. 65.

<sup>18</sup> *Ibid.*, para. 68.

<sup>19</sup> *Ibid.*, para. 31.

<sup>20</sup> Submissions by Nicaragua and Panama, paras. 234 and 235; submission by Honduras, paras. 235 and 236; and submission by Colombia, Costa Rica, Ecuador and Guatemala, paras. 43-57 and 73-75.



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

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

35. At the time of this award, the European Communities has requested an Article XIII waiver for the proposed tariff quota, pursuant to Article IX of the *WTO Agreement*. It is not possible, at this point in time, to predict whether or not such a waiver will, in due course, be granted by the WTO Membership. It is, as an abstract matter, possible that such a waiver might be granted, just as it is conceivable that it might not be granted. This is a matter that depends on collective action by the WTO Membership. However, this uncertainty is not an obstacle to the Arbitrator's consideration of the proposed rectification. There is no need to make any assumptions as to the likelihood of an Article XIII waiver being granted to the European Communities for its proposed tariff quota in order to consider whether, *if* it were to be applied as described, the European Communities' proposed rectification would result in at least maintaining total market access for MFN banana suppliers as required by the Annex to the Doha Waiver. The Arbitrator's determination in these proceedings is premised on the actual application by the European Communities of its proposed rectification of the matter. At the time of the Arbitrator's determination, even the application of the proposed revised tariff, independently of the tariff quota element, remains dependent on a rebinding of the European Communities' tariff on bananas in accordance with the procedures foreseen in Article XXVIII of GATT 1994.

36. Finally, as regards the European Communities' commitment to apply a tariff-only regime for bananas as of 1 January 2006, the Arbitrator notes that the parties disagree as to the interpretation of the notion of "tariff-only" regime, as contained in the Understandings concluded by the European Communities with the United States and Ecuador, and as referred to in the Doha Waiver. However, the Arbitrator does not find it necessary, for the purposes of its assessment of the proposed rectification, to determine this issue. As noted above, the European Communities' proposal to rectify the matter envisages that the tariff quota on ACP imports would be applied with a waiver, so that it would be specifically authorized by collective endorsement, through the appropriate procedures, of the WTO Membership.

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<sup>21</sup> The European Communities informed the Arbitrator, in the course of these proceedings, that it had formally presented such a request to the WTO. That request was circulated on 11 October 2005 in document G/C/W/529.

<sup>22</sup> Indeed, while some of the Interested Parties have disputed the WTO-consistency of the proposed tariff quota in the absence of a waiver, they do not appear to have questioned that the granting of an appropriate waiver by the WTO Membership, if obtained, would be such as to allow the imposition of a measure that may otherwise be incompatible with a Member's WTO obligations.

37. For these reasons, the Arbitrator is not persuaded that it is prevented from considering the proposed rebinding in the light of the proposed tariff quota on ACP banana imports. This threshold determination is entirely without prejudice to the question of whether this proposal would result in at least maintaining total market access for MFN suppliers as foreseen under the Doha Waiver. This will be addressed below.

### **3. Treatment of Beneficiaries of the "Everything But Arms" Initiative**

38. In its first award, the Arbitrator noted that duty-free access for least developed countries ("LDCs") to the European Communities market under the Everything But Arms ("EBA") Initiative might affect the competitive situation of MFN banana suppliers.<sup>23</sup> In this proceeding, the European Communities indicated that ACP suppliers who are also EBA beneficiaries would not be subjected to the proposed tariff quota. The European Communities considered that the EBA Initiative is independent of the trade regime being regulated through the currently applicable Doha Waiver regarding the EC-ACP Partnership Agreement and thus not relevant to this arbitration.

39. The Arbitrator agrees that the legal basis on which the EBA Initiative (i.e. preferential duty-free treatment for all LDC products except arms) is authorized within the WTO legal framework is distinct from the Doha Waiver. Moreover, no participant in this arbitration has suggested that the EBA is WTO-inconsistent. Nonetheless, as was described in the first award, EBA preferences could have an impact on the total market access for MFN suppliers. As the mandate of the Arbitrator is framed by reference to the market access of MFN suppliers, this issue is returned to later in this award.<sup>24</sup>

## **V. ASSESSMENT OF THE EUROPEAN COMMUNITIES' RECTIFICATION OF THE MATTER**

### **A. THE EUROPEAN COMMUNITIES' RECTIFICATION OF THE MATTER IN THE LIGHT OF THE ARBITRATOR'S FIRST AWARD**

40. Before assessing whether European Communities' proposed rectification of the matter "would result in at least maintaining total market access for MFN banana suppliers" within the meaning of the Doha waiver, this section describes how the European Communities, in revising its proposal, sought to take into account the findings of the Arbitrator in its first award.

41. In its initial proposal for a rebinding of its tariff on bananas, the European Communities had used the price gap methodology reflected in the attachment to Annex 5 of the Agreement on Agriculture because it "was devised precisely to measure the level of protection provided by different types of instruments affecting market access and to convert it into a tariff equivalent."<sup>25</sup> According to the European Communities, the "exercise envisaged in the Waiver Annex, namely the rebinding of the EC tariff on bananas, while at least maintaining total market access for MFN banana suppliers, is analogous to the type of exercise for which the price-gap methodology has been used."<sup>26</sup> In its first award, the Arbitrator noted that, using correct prices, this methodology would produce an estimate of the tariff equivalent that, all other things being equal, would confer the same level of protection to domestic producers as the border measures being replaced by the tariff equivalent.<sup>27</sup> Correctly

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<sup>23</sup> Award of the Arbitrator, para. 74.

<sup>24</sup> See *infra*, para. 115.

<sup>25</sup> Award of the Arbitrator, para. 51.

<sup>26</sup> *Ibid.*, para. 51.

<sup>27</sup> Award of the Arbitrator, para. 69.

applied, the price gap methodology would be broadly neutral in its effects on domestic producers and on total imports.<sup>28</sup>

42. The Arbitrator also found in its first award, however, that the standard price gap formula as applied by the European Communities in its initial calculation did not account for the potential impact of the increase in the margin of preferences enjoyed by ACP suppliers on actual market access opportunities for MFN suppliers.<sup>29</sup> It stated that:

examin[ing] the conditions of entry for MFN banana suppliers under the envisaged rebinding—and the opportunity that would be afforded by such conditions—without consideration of the impact of the rebinding on the preferential suppliers would amount to ignoring a key component of the market on which MFN (and preferential) suppliers compete.<sup>30</sup>

The Arbitrator also noted that the manner in which the European Communities may decide to preserve market access for ACP suppliers was, as such, beyond the scope of its mandate.<sup>31</sup>

43. As mentioned earlier, in its proposed rectification of the matter, the European Communities proposed, in addition to a rebinding of its tariff on bananas at €187 per metric ton, a tariff quota of 775,000 metric tons for ACP imports. In suggesting this combination of measures, the European Communities purports to respond to the Arbitrator's concern about the impact of the ACP supply response on the market access opportunities of MFN suppliers.<sup>32</sup>

44. The Arbitrator makes no determination as to whether the establishment of a tariff quota on preferential imports is the appropriate manner to address the impact of an increased MFN tariff rate on the conditions of competition between MFN and ACP preferential suppliers. The Arbitrator understands that the establishment of an ACP duty-free tariff quota is intended to allow existing conditions of competition between MFN and preferential ACP suppliers to be preserved. At this stage of its analysis, the Arbitrator takes no position as to whether the proposed MFN tariff accurately reflects the restrictiveness of the existing regime, or as to whether the tariff quota for ACP countries is set at a level such that the conditions of competition between MFN and preferential suppliers would be at least maintained.

45. The European Communities' price gap calculation in its initial proposal for a rebinding was based on the difference between internal and external prices of bananas during the *reference period* 2000-2002. The Interested Parties criticized this reference period as inappropriate.<sup>33</sup> The Arbitrator expressed a preference for using the most recent representative reference period because this "minimizes the need for *ad hoc* adjustments to be made to the data and corresponds as closely as possible to the trade regime as applied."<sup>34</sup> The European Communities responded to the Arbitrator's recommendation by calculating its proposed rectification on the basis of an updated reference period, namely, January 2002 to April 2004.

46. To calculate the *internal price* in its initial proposal, the European Communities had used price data collected by the Food and Agriculture Organization of the United Nations (the "FAO") and

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<sup>28</sup> Award of the Arbitrator, para. 69. While the Arbitrator recognized that simulation models might offer an alternative way for calculating tariff equivalents, it also highlighted their complexities regarding the choice of parameters and data. Award of the Arbitrator, paras. 78-79.

<sup>29</sup> Award of the Arbitrator, paras. 65-69.

<sup>30</sup> Award of the Arbitrator, para. 66.

<sup>31</sup> Award of the Arbitrator, para. 68.

<sup>32</sup> See Submission by the European Communities, para. 84.

<sup>33</sup> Award of the Arbitrator, paras. 80-81.

<sup>34</sup> Award of the Arbitrator, para. 83.

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

47. First, the internal price was derived from weekly price data from Sopisco News for the period January 2002 to April 2004. Secondly, since Sopisco News provides a range of the "actual prices" of bananas, the European Communities took the mid-point of that range. Thirdly, since Sopisco News published actual prices by bananas brands, the European Communities took the simple (weekly) average of the five major brands (Chiquita, Del Monte, Dole, Bonita and Fyffes) and the minor brands taken together. Fourthly, since Sopisco News does not contain "actual prices" for the years 2002 and 2003 for Chiquita bananas, the European Communities reconstructed "actual" prices for Chiquita bananas in 2003 by applying the ratio between the "actual" and "official" prices in 2004 to the "official" prices of Chiquita in 2003. For 2002, prices for Chiquita bananas were not taken into account and the average annual price was calculated on the basis of the prices for the other four major brands and the minor brands taken together.

48. On this basis, the European Communities calculated annual average prices of the Sopisco price data referred to as "EU" and "Non EU" (referred to as "E15" and "E10" as from the enlargement of the European Communities). These separate price series were taken by the European Communities to represent the EC-15, on the one hand, and the ten countries that acceded to the European Communities on 1 May 2004 (the "AC-10"), on the other hand. The annual price data were weighted using the respective annual import volumes into the EC-15 and AC-10, as reported by Eurostat, to arrive at the EC-25 internal prices for 2002 (€745 per metric ton), 2003 (€669 per metric ton) and January to April 2004 (€727 per metric ton).

49. For purposes of its initial price gap calculation, the European Communities had obtained the *external price* by using Eurostat data with respect to the volume and c.i.f. value of banana imports into the EC-25 from MFN suppliers.<sup>39</sup> With the exception of the question of the appropriate reference period, the calculation of the external prices based on Eurostat c.i.f. data was not in dispute;<sup>40</sup> nor did the Arbitrator find fault with the European Communities' reliance on Eurostat c.i.f. data in its initial price gap calculation. Nevertheless, in its revised price gap calculation, the European Communities decided that Eurostat c.i.f. data were inappropriate. The European Communities thus turned to alternative data for the external price. For the external price in its revised calculation, the European Communities took the average of the "Non EU" prices reported in Sopisco News for 2002 (€567 per metric ton), 2003 (€461 per metric ton), and January to April 2004 (€488 per metric ton).

50. The price gap was calculated by taking the annual difference between EC-25 prices (the internal price) and the corresponding "Non EU" prices (the external price). The price gap for the period January to April 2004 was adjusted by a factor of 1.35 in order take into account that prices

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<sup>35</sup> Award of the Arbitrator, para. 54.

<sup>36</sup> Award of the Arbitrator, para. 86.

<sup>37</sup> Award of the Arbitrator, para. 88.

<sup>38</sup> Submission by the European Communities, paras. 38ff.

<sup>39</sup> Exhibit EC-4.

<sup>40</sup> Award of the Arbitrator, paras. 53 and 84.

during that period tend to be higher than the annual average due to a lack of supplies of competing fruit.<sup>41</sup> The annual price gaps for 2002, 2003 and January to April 2004 (seasonally adjusted) were then averaged to result in the proposed tariff of €187 per metric ton.

51. In addition to the internal price used in the price gap calculation that resulted in the proposed tariff of €187 per metric ton, the European Communities provided a number of alternative estimates of the EC-25 internal price giving a range of internal prices between €58 per metric ton and €85 per metric ton. For the reference period 2002-2004<sup>42</sup>, the average internal price was estimated at €58 per metric ton, and when the major banana brands were weighted by the market shares assumed by European Communities, the resulting internal price was €85 per metric ton for the reference period 2002-April 2004.<sup>43</sup> For these alternative price estimates, the European Communities deducted discharge and handling costs of €44 per metric ton. These alternative estimates, however, were ultimately not retained by the European Communities as the basis for its proposed rectification of the matter.

#### B. THE EUROPEAN COMMUNITIES' PRICE GAP CALCULATION

52. As noted above,<sup>44</sup> the European Communities' proposal combining an increased MFN tariff and a duty-free tariff quota for ACP suppliers is intended to ensure that any increase in the margin of preference resulting from the increased MFN tariff will not affect the conditions of competition between MFN and ACP suppliers in a manner such that total market access for MFN suppliers would not be at least maintained. Under such an import regime, the standard price gap methodology can, in principle, be employed to calculate the tariff equivalent.

53. The Interested Parties challenged the adequacy of the European Communities' proposed tariff rate of €187 per metric ton tariff on the grounds that its price gap calculation was flawed in respect of *both* the internal price and the external price. In particular, the Interested Parties claimed that the European Communities *overestimated* the internal price of the EC-25 during the relevant reference period. They also submitted that EC *underestimated* the external price during that same period. At the same time, the European Communities considered that it made *conservative* estimates in respect of each of these variables. Accordingly, the Arbitrator considers that it is appropriate to consider both sides of the calculation performed by the European Communities to determine whether, overall, the resulting tariff equivalent would meet the requirement of "at least maintain[ing] total market access for MFN banana suppliers".<sup>45</sup>

#### 1. Internal price

54. As a preliminary matter, the Arbitrator notes that, according to the price gap guidelines set out in the Attachment to Annex 5 of the *Agreement on Agriculture*:

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<sup>41</sup> Submission by the European Communities, para. 58.

<sup>42</sup> The reference period covers the full year of 2004 rather than ending in April 2004, namely the reference period used by the EC in the calculation of the proposed tariff of €187 per metric ton.

<sup>43</sup> Submission by the European Communities, para. 48. According to the European Communities, its estimate of the internal price of €85 per metric ton would be lower, if the European Communities had applied a seasonal adjustment factor to account for the seasonally higher prices during the first four months of the year.

<sup>44</sup> See paragraphs 43 and 44 *supra*.

<sup>45</sup> This analysis is premised, *arguendo*, on the tariff quota for ACP suppliers being set at a level such that the conditions of competition between MFN and ACP banana suppliers would not be affected in a manner such that total market access for MFN suppliers would not be at least maintained. This is without prejudice to the question of whether the tariff quota actually proposed by the European Communities would in fact fulfil that condition.

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

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

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

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

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

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

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

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

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

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<sup>46</sup> The Arbitrator notes that parties have referred extensively to these guidelines in their arguments.

<sup>47</sup> Award of the Arbitrator, para. 92.

<sup>48</sup> Submissions by Nicaragua and Panama, paras. 77-78; submission by Honduras, paras. 78-79.

<sup>49</sup> Submission by Honduras, Nicaragua and Panama, para. 79.

<sup>50</sup> Submission by the European Communities, para. 29.

<sup>51</sup> Submission by the European Communities, paras. 31-33.

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

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

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

60. In this respect, the parties disagreed over the meaning of the expression "actual prices" in Sopisco News. Colombia, Costa Rica, Ecuador and Guatemala argued that these prices could not possibly represent actual selling prices, which were confidential between buyers and sellers, and might also not reflect terms and conditions, such as rebates, unknown to Sopisco News. In their view, Sopisco "actual" prices were in fact price quotes that did not reflect as accurately as possible the actual selling prices of bananas.<sup>53</sup> The European Communities argued that there was no alternative to Sopisco News price data for green bananas that is publicly available.<sup>54</sup> It emphasized that it had never claimed that these prices were necessarily actual market prices; nevertheless they were an accurate estimation of those prices.<sup>55</sup>

61. Sopisco News itself states: "The "Actual" prices are claims of the green market price range in the northern and southern European market for the week following negotiation of the cargoes. The information received from our sources includes what they claim is the selling price for their fruit if they are traders and what they believe is the level of what other traders are selling for."<sup>56</sup> The Arbitrator understands the Sopisco News data relied upon by the European Communities to be essentially predictions or estimates of "actual", as opposed to "official" prices, on the market the following week. In this regard, the Arbitrator considers it significant that these same Sopisco prices were relied upon by Brazil and Colombia, Costa Rica, Ecuador and Guatemala in their submissions during the course of the first arbitration to substantiate their claim that there is a difference between "official" and "actual" prices.

62. The Interested Parties proposed certain alternative sources of data, that would, in their view, more accurately reflect actual internal prices. Specifically, Colombia, Costa Rica, Ecuador, Guatemala and Panama argued that the European Communities should have relied on audited actual price data from the German Fruit Trade Association instead of Sopisco News. These Interested Parties provided the Arbitrator with an internal price of €703 per metric ton that appears to be based on audited data by the German Fruit Trade Association. This price was described as the verified and certified average price (f.o.t) for green MFN bananas in the northern European ports for sale in the EC-15 in 2002-2004.<sup>57</sup>

63. The European Communities, however, expressed strong reservations against the use of audited data on the grounds that it did not have access to the data to verify the results. The European

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<sup>52</sup> Oral Statement by the relevant ACP Members, page 3.

<sup>53</sup> Comments by Colombia, Costa Rica, Ecuador and Guatemala to the European Communities' replies to question 2 of the Arbitrator, para 14.

<sup>54</sup> Oral Statement by the European Communities, para. 13.

<sup>55</sup> Oral Statement by the European Communities' oral statement, para. 10.

<sup>56</sup> Exhibit II-15 of Colombia, Costa Rica, Ecuador and Guatemala.

<sup>57</sup> Submission by Nicaragua and Panama, para 115; submission by Honduras, para. 116.

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

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

65. In considering this issue, the Arbitrator is mindful of the challenges inherent in having access to exact and complete price information in respect of actual market prices. In particular, complete information in respect of actual prices is in the hands of the parties to individual transactions themselves. In these circumstances, as noted by the Arbitrator in its first award,<sup>61</sup> a certain degree of estimation or approximation may be required when calculating the internal price for purposes of a price gap calculation.

66. The Arbitrator notes the reservations of the European Communities with respect to the use of the "audited prices" presented by the Interested Parties. In particular, while this type of document may provide useful indications as to actual prices on the market, the Arbitrator acknowledges the European Communities' concern that it has no means of verifying the information. The Arbitrator also notes that the European Communities does not appear to have taken advantage of the suggestion made in the course of the proceedings by some of the Interested Parties to consult the books of certain companies.<sup>62</sup>

67. In respect of its calculations based on Sopisco News data, the European Communities submitted detailed calculations of the price gap leading to the proposed tariff equivalent of €187 per metric ton. The information provided by the European Communities includes the relevant original price data from Sopisco News, the European Communities' worksheets and step-by-step explanations of its calculations. None of the Interested Parties has challenged the European Communities' calculations on the grounds that they were non-transparent or could not be verified. It appears that the Interested Parties, on the basis of the information provided by the European Communities, were in a position to verify the price gap calculation leading to a tariff of €187 per metric ton, albeit with certain reservations by Honduras, Nicaragua and Panama.<sup>63</sup>

68. The Arbitrator also notes that, in the light of the evidence presented, the internal price derived by the European Communities from Sopisco News is not rendered implausible by the "audited internal price" presented by the Interested Parties.

69. The material thus far considered is not, in the view of the Arbitrator, a sufficient basis for dismissing Sopisco News data as a source of estimates of actual market prices for bananas.

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<sup>58</sup> Oral Statement by the European Communities, para. 14.

<sup>59</sup> Comments by Honduras, Nicaragua and Panama to the European Communities' replies to question 12 of the Arbitrator.

<sup>60</sup> Submission by the European Communities, para. 26.

<sup>61</sup> Award of the Arbitrator, para. 92.

<sup>62</sup> Statement by Colombia, Costa Rica, Ecuador and Guatemala at the hearing with the Arbitrator, 19 October 2005.

<sup>63</sup> Submissions by Honduras, Nicaragua and Panama, Table 5.



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

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

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

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

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

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

75. The second issue for the Arbitrator to consider is the objection raised by the Interested Parties with respect to the inclusion of Chiquita (one of the major brands) prices in the calculation of the internal price. Colombia, Costa Rica, Ecuador and Guatemala provided evidence that Chiquita brands were not discharged at the port of Hamburg in the period under consideration, that Chiquita did not disclose its actual prices, except to its customers, and that, in any event, Chiquita provided prices for yellow but not green bananas.<sup>67</sup> These Interested Parties also provided alternative calculations of the internal price, excluding prices for Chiquita bananas from the calculations, to show that the internal price could be lower than the price calculated by the European Communities by €26 and €21 per metric ton in 2003 and the first quarter of 2004, respectively.<sup>68</sup>

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<sup>64</sup> Submission by Honduras, para. 103; submissions by Nicaragua and Panama, para. 102.

<sup>65</sup> Written answer by the European Communities to question 3 by the Arbitrator.

<sup>66</sup> Exhibit by Colombia, Costa Rica, Ecuador and Guatemala II-15.

<sup>67</sup> A letter from Chiquita addressed to the Arbitration Counsel of Colombia, Costa Rica, Ecuador and Guatemala (Exhibit II-10 by Colombia, Costa Rica, Ecuador and Guatemala).

<sup>68</sup> Submissions by Honduras, Nicaragua and Panama, para. 163.

76. In response, the European Communities noted that Sopisco News reported "official" prices for Chiquita bananas throughout the reference period and "actual" prices in 2004. The European Communities argued that, although Chiquita bananas may have been unloaded in ports other than Hamburg, prices were published by Sopisco News to provide a full picture of the market. Without accounting for prices for Chiquita bananas – which held a market share of approximately 30 per cent for MFN bananas, according to the European Communities – the European Communities would not have been able to estimate a representative internal price for the European Communities.<sup>69</sup>

77. The Arbitrator notes that the European Communities included "actual" Chiquita prices for 2004 in its estimate of the internal EC-25 price, where such data were available from Sopisco News.<sup>70</sup> The Arbitrator considers it reasonable for the European Communities to have included original Sopisco price data of the Chiquita brand to ensure that its 2004 estimate was representative. As far as its EC-25 price estimate for 2003 is concerned, the European Communities employed reconstructed data rather than original data for Chiquita.<sup>71</sup> It appears that, on the one hand, this reconstructed price has resulted in an increase of the internal price (and hence an increase in the price gap) because Chiquita is a high-priced brand. On the other hand, inclusion of Chiquita arguably made the EC-25 price estimate for 2003 more representative. On balance, the Arbitrator considers that the European Communities' approach in the treatment of the price data for Chiquita bananas was not unreasonable.

78. Another issue raised by the Interested Parties was the European Communities' treatment of Sopisco price data for the other major banana brands (Dole, Del Monte, Bonita and Fyffes). Honduras, Nicaragua, and Panama argued that the European Communities used "statistically unsound methods" in deriving its banana brand estimates in the face of significant data gaps for these major brands in Sopisco News. In their view, by ignoring the data gaps and the seasonal behaviour of banana prices, the European Communities' calculation of simple averages of prices of the major banana brands was significantly distorted.<sup>72</sup> To demonstrate the impact of the data gaps on the European Communities' price gap calculation, Brazil made several adjustments to the original data from Sopisco News.<sup>73</sup> Although the Arbitrator finds Brazil's method of filling data gaps plausible, the results of Brazil's calculation (€169 per metric ton) are not directly comparable with the results of the European Communities' calculation (€187 per metric ton). The difference in the resulting price gap may, in part, be due to the fact that Brazil excluded data for Chiquita from its calculation and to the use of a different reference period.

79. The Arbitrator notes that the data gaps are inherent in the Sopisco News data itself and finds that the approach of the European Communities to the treatment of the data in respect of Dole, Del Monte, Bonita and Fyffes was not inappropriate in circumstances.

80. Overall, the Arbitrator does not consider that the European Communities' use of Sopisco News data to estimate the internal price of bananas on the EC market was inappropriate.

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<sup>69</sup> Answer by the European Communities to question 5 from the Arbitrator.

<sup>70</sup> The European Communities also included "actual" prices for Chiquita, where available, in the average "non EU" price in 2002-2004.

<sup>71</sup> See paragraph 47 *supra*.

<sup>72</sup> Submission by Honduras, para. 110; submissions of Nicaragua and Panama, para. 109.

<sup>73</sup> Submission by Brazil, para. 42. In the case of data gaps for the major brands (Dole, Del Monte, Bonita and Fyffes), Brazil filled the information gaps with the average of the other major brands in the relevant weeks. Amongst other adjustments to the data, Brazil excluded the data for Chiquita on the grounds that Chiquita did not discharge in Hamburg in the reference period. It also adjusted the weighting between the major and minor brands, and extended the reference period to December 2004 arguing that the European Communities was wrong in having excluded the months of May to December 2004 from its price gap calculation. The result of the European Communities' price gap calculation, as modified by Brazil, was €169 per metric ton.

## 2. External price

### (a) Introduction

81. In the first arbitration, the European Communities chose Eurostat c.i.f. prices as the basis for calculating the external price, a choice to which the Interested Parties did not object. The Arbitrator had noted that "the calculation of the external prices based on Eurostat data is not in dispute"<sup>74</sup> and did not direct the European Communities to revise its approach to this issue.

82. In the revised proposal that led to the proposed MFN tariff of €187 per metric ton, the European Communities used a different source of price information for the external price. The European Communities found that Eurostat data was "inappropriate in the sense of paragraph 2 of the Attachment to Annex 5 of the Agreement on Agriculture." The European Communities employed instead "Non EU" green banana prices from Sopisco News as the basis for calculating the external price.

83. The Interested Parties disagreed with the European Communities' characterization of Eurostat c.i.f. data as inappropriate and with the European Communities' use of Sopisco News "Non EU" prices as the new basis for calculating the external price.

84. The change in the source of the price data has a significant impact on the calculation of the external price. If one takes the reference period adopted by the European Communities, namely 2002 to April 2004, it means a reduction in the external price from €97 per metric ton (using Eurostat c.i.f. data) to €461 per metric ton (using Sopisco News "Non EU").

85. In view of the fact that the European Communities applied the price gap methodology for calculating a tariff equivalent for its current banana regime, and because the European Communities itself relied upon the price gap guidelines contained in the Agreement on Agriculture, the Arbitrator again considers that the price gap guidelines in the Attachment to Annex 5 of the *Agreement on Agriculture* provide guidance as to how such a price gap calculation should be performed. The Arbitrator observes that according to paragraph 2 of the Attachment, the external prices used in a price gap calculation shall in general be (1) "actual average c.i.f. unit values for the importing country", where average c.i.f. unit values "are not available or appropriate", the external prices shall be (2) "appropriate average c.i.f. unit values of a near country", or (3) "estimated from average f.o.b. unit values of (an) appropriate major exporter(s)" with certain adjustments.<sup>75</sup>

86. The Arbitrator will first examine the parties' arguments on whether or not Eurostat c.i.f. prices were *inappropriate* "actual average c.i.f. unit values for the importing country" during the reference period. The Arbitrator will then discuss the parties' arguments on whether the alternative external price used by the European Communities qualify as "appropriate average c.i.f. unit values of a near country".

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<sup>74</sup> Award of the Arbitrator, para. 53.

<sup>75</sup> Paragraph 2 of Attachment 5 to the *Agreement on Agriculture* provides:

External prices shall be, in general, actual average c.i.f. unit values for the importing country. Where average c.i.f. unit values are not available or appropriate, external prices shall be either:

- (a) appropriate average c.i.f. unit values of a near country; or
- (b) estimated from average f.o.b. unit values of (an) appropriate major exporter(s) adjusted by adding an estimate of insurance, freight and other relevant costs to the importing country.

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

(i) *The European Communities' arguments*

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

88. One problem related to the results that were obtained using the Eurostat c.i.f. data.<sup>76</sup> The European Communities began its price gap analysis by using data from Sopisco News to calculate the internal price and Eurostat data to calculate the external price. The resulting price gaps that the European Communities obtained with these data fell within a range of €53 per metric ton and €88 per metric ton. The European Communities stated that figures below €75 per metric ton were "clearly inappropriate". For the €88 per metric ton result, it stated that "the protective effect of the quota cannot be €13 per metric ton – a figure which cannot be considered realistic ...". The European Communities argued that price gaps that were close to or below the in-quota tariff of €75 per metric ton fell foul of the Arbitrator's finding in its award that a price gap of less than €75 per metric ton was "less than the current-in quota tariff rate, and does not appear to reflect any value for the existence of the tariff quota itself."<sup>77</sup>

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

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

(ii) *Arguments of the Interested Parties*

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

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

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

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

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

<sup>80</sup> Answers to Questions from the Arbitrator by the European Communities, para. 20.

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

92. Colombia, Costa Rica, Ecuador and Guatemala questioned the European Communities' justification for rejecting Eurostat data - that the price gap cannot be less than €75 per metric ton. In the European Communities' calculations, the price gap fell in a range between €3 per metric ton and €8 per metric ton. Honduras, Nicaragua and Panama pointed out that, because the applied level of protection for bananas in the AC-10 during the period of January 2002 to April 2004 was lower than in the EC-15, the trade-weighted tariff for bananas in the EC-25 was €6 per metric ton.<sup>82</sup> Hence, in their view the European Communities' reason for rejecting the results of these price gap calculations did not hold.

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

(iii) *Evaluation by the Arbitrator*

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

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

96. There were two main problems with Eurostat c.i.f. data identified by the European Communities to substantiate its claim that it is not "appropriate" in the sense of paragraph 2 of the Attachment to Annex 5. The first relates to the results of price gap calculations which were obtained

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<sup>81</sup> Submission by Honduras, Nicaragua and Panama, para. 155.

<sup>82</sup> Submission by Honduras, Nicaragua and Panama, par. 149.

<sup>83</sup> Responses by Colombia, Costa Rica, Ecuador and Guatemala at the oral hearing.

<sup>84</sup> Responses by Colombia, Costa Rica, Ecuador and Guatemala at the oral hearing.

<sup>85</sup> Award of the Arbitrator, para. 53.

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

97. The first problem identified by the European Communities concerns the *results* of price gap calculations made using the Eurostat data and Sopisco News prices. Although the Arbitrator agrees that comparisons of the results of various calculations may provide a useful "reality check", it is not of the view that the results of any particular comparison should be the starting point for the analysis of whether c.i.f. unit values for the importing country are "appropriate" or not. Rather, such an assessment should begin with the data *per se*. Thus, Paragraph 2 of the Attachment to Annex 5 envisages a test based on whether actual average c.i.f. unit values *themselves* are "appropriate" as "external prices", not of whether the *results* derived from price gap calculations based on c.i.f. unit values are "appropriate". Indeed, to do otherwise in the context of a price gap calculation would risk attributing to defects in the external price, problems that in fact occur within the internal price. If one arrives at an "unrealistic" or "inappropriate" price gap result, but one has not considered the quality of each of the data, one cannot discount the possibility that the problem lies with the internal price rather than the external price. The Arbitrator leaves these considerations to one side for a moment and turns instead to a consideration of the data *per se*.

98. Colombia, Costa Rica, Ecuador and Guatemala provided an extensive description of the manner in which statistics on the European Communities' trade with third countries are collected.<sup>86</sup> According to them, Eurostat data are collected systematically, subject to extensive controls, and objectively compiled by the statistics division of the European Commission, which obtains them from the national authorities of the EC Member States. These Interested Parties referred to the EC's *User Guide on the Statistics on the Trading of Goods*, which describes the kind of controls applied to trade statistics. These controls could be basic (e.g. ensuring documents have been fully completed); other checks are more sophisticated and assess the plausibility of the data; and still others involve mirror comparison of trade flows.

99. The European Communities argued that "the EC-15 CIF price is not consistent with any of the available data for comparable steps in the trading chain in neighbouring countries". It pointed out that, normally, "CIF prices of neighbouring countries will be more or less comparable", chose to look at the AC-10 countries, but found out that the Eurostat EC-15 c.i.f. price of €638 per metric ton was much higher than the Eurostat AC-10 c.i.f. price during the 2002-2004 period. The Arbitrator accepts the European Communities' conclusions regarding the c.i.f. prices in the AC-10, but notes that there are also other neighbouring countries, such as Norway and Switzerland, whose c.i.f. prices could have been used for the comparison instead of, or in combination with, the prices of AC-10 countries. Unlike the market of the European Communities, the markets for bananas in these countries are not fettered by tariff quotas and thus, by definition, contain no element of quota rent. Moreover, the consumers in these countries are, in terms of per capita income, more similar to the consumers of EC-15 countries than the populations of AC-10 countries. The c.i.f. prices for these markets during the period 2002-2004 are comparable, if not higher, than those calculated from Eurostat data for the EC-15.<sup>87</sup> Evidence from these neighbouring countries therefore does not support the conclusion reached by the European Communities that Eurostat c.i.f. prices are abnormally high and are therefore not "appropriate" for use in a price gap comparison.

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<sup>86</sup> Submission by Colombia, Costa Rica, Ecuador and Guatemala, paras. 137-149.

<sup>87</sup> Table 10 of the submissions of Honduras, Nicaragua and Panama show that, during the three-year period 2002-2004, the c.i.f. price of bananas in Norway averaged €790 per metric ton compared to the EC-15 average of €638 per metric ton. In para. 29 of their rebuttal of certain arguments raised by the European Communities in its oral statement, Colombia, Costa Rica, Ecuador and Guatemala submit weighted average prices of €781 per metric ton for Norway and of €51 per metric ton for Switzerland.

100. Moreover, there are other explanations for the prices of EC-15 countries and AC-10 prices not being similar although one would expect, as does the European Communities, price levels in neighbouring countries to be comparable. Colombia, Costa Rica, Ecuador and Guatemala noted that "quotas may cause exporters to change the mix of products they export. The result is that products with higher unit values are exported under quota regimes."<sup>88</sup> For this reason, "one cannot simply assume that unit values correspond to the same product when comparing quota and non-quota regimes. The product mix will include higher priced versions of the commodity in question in the quota regime" and, therefore, "one would expect higher unit values to the EC-15 countries."<sup>89</sup> According to Colombia, Costa Rica, Ecuador and Guatemala, the European Communities had imposed product standards for bananas that prohibited the sale of lower quality, and hence lower-priced, bananas.

101. Returning to the European Communities' arguments based on the *results* of the use of Eurostat c.i.f. data in a price gap calculation, the Arbitrator notes that the European Communities relies upon the Arbitrator's observation that a price gap of less than €75 per metric ton "is less than the current in-quota tariff rate, and does not appear to reflect any value for the existence of the tariff quota itself". In the European Communities' initial price gap calculations using Eurostat c.i.f. data, the price gap fell in a range between €3 per metric ton and €8 per metric ton. The European Communities considered these figures "unrealistic". In response, Honduras, Nicaragua and Panama have pointed out that, because the applied level of protection for bananas in the AC-10 during the period of January 2002 to April 2004 was lower than in the EC-15, the trade-weighted tariff for bananas in the EC-25, taken as a whole, was €66 per metric ton.<sup>90</sup>

102. The Arbitrator also notes that, in the calculations that led it to discard Eurostat data, the European Communities deducted discharge and handling costs of €14 per metric ton from the internal price. The European Communities has expressed the view that it "does not believe that it is required to deduct ... discharge and handling costs" from the internal price side of its calculation.<sup>91</sup> The Interested Parties have argued that a proper price gap calculation requires deduction of discharge and handling costs. In this respect, the Arbitrator notes that paragraph 4 of the Attachment to Annex 5 defines "internal prices" as "representative *wholesale* prices in the domestic market" and that prices in the domestic market for traded goods, especially at the wholesale level, would be expected to include discharge and handling costs.

103. In the light of the foregoing, the Arbitrator considers that reasonable alternative explanations exist for the problems that the European Communities had found with Eurostat data. The Arbitrator does not discount the possibility that some of the quota rents from the European Communities' banana regime may flow to the exporters. But as the European Communities itself made clear during the first arbitration procedure:

"[it] is not aware of any reliable information on quota rent divided between importers and exporters. Besides, the world banana market is over-supplied and an important quantity of bananas has difficulty in finding a market. In this situation, there are no reasons for the importer to transfer a part of the quota rent to the exporter."<sup>92</sup>

104. The Arbitrator finds it difficult to reconcile this stated position of the European Communities with its argument that the quota rents that flow to the exporters are so large that they make Eurostat

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<sup>88</sup> Rebuttal by Colombia, Costa Rica, Ecuador and Guatemala of certain arguments raised in the oral statement of the European Communities, para. 32.

<sup>89</sup> *Ibid.*

<sup>90</sup> Submission by Honduras, Nicaragua and Panama, par. 149.

<sup>91</sup> Reply of the European Communities to Written Question 20 from the Arbitrator.

<sup>92</sup> Replies of the European Communities to the Questions from the Arbitrators, para. 33.

c.i.f. data inappropriate for this price gap analysis. Thus, the Arbitrator is not convinced that the problems identified by the European Communities are significant enough to consider Eurostat c.i.f. "inappropriate" in the sense of paragraph 2 of the Attachment to Annex 5 of the Agreement on Agriculture.

105. It follows that the Arbitrator is not persuaded that the problems identified by the European Communities in respect of the Eurostat c.i.f. price were sufficient justification for departing from the "actual average c.i.f. unit values for the importing country" envisaged in paragraph 2 of the Attachment to Annex 5 as the basis for the external price. In addition, even assuming that there might have been valid reasons to discard the Eurostat data, for the reasons that follow, the Arbitrator is not convinced that the Sopisco "Non-EU" prices used by the European Communities as an alternative external price for purposes of its price gap calculation were appropriate in the circumstances.

(c) Alternative source of the external price

106. As noted above, the Attachment to Annex 5 of the *Agreement on Agriculture* provides for two possibilities for determining the external price, where c.i.f. data for the importing country itself is unavailable or inappropriate. These are: (a) appropriate average c.i.f. unit values of a near country; or (b) an estimate from average f.o.b. unit values of (an) appropriate major exporter(s) with certain adjustments. The European Communities explained that, with this framework in mind, after finding that Eurostat c.i.f. data was "inappropriate", it examined both of these alternative options. First, it took the c.i.f. prices of the AC-10 countries using Eurostat data. For the period, 2002-April 2004, this yielded an estimate of the external price of €439 per metric ton.<sup>93</sup> As an alternative to Eurostat c.i.f. data for the AC-10 countries, it took Sopisco News "Non EU" prices. For the period, 2002-April 2004, this yielded an estimate of the external price of €461 per metric ton.<sup>94</sup> The second alternative it considered was the f.o.b. prices for bananas reported by the Central Banks of Ecuador and Costa Rica. Adding estimates of spot freight rates from Sopisco News, it arrived at an estimate of the external price of €399 per metric ton. The European Communities chose the alternative that resulted in the lowest price gap result, namely, the highest estimate of the external price. On this ground, it chose to base its estimate of the external price on "Non-EU" banana prices published by Sopisco News.

107. The Interested Parties put forward a number of reasons why, in their view, Sopisco "Non EU" price was an inappropriate proxy of the external price of the European Communities. In particular, the Interested Parties emphasize that the acceding countries were markets that were unrepresentative and not comparable to the EC-15. There were differences in per capita incomes. The markets were emerging economies, with lower purchasing power compared to the EC-15. Banana exporters treated the markets in EC-15 and AC-10 countries differently. They were the last-resort markets for MFN bananas, where sales were often at marginal cost, and the prices earned were less than full market prices. In 2002-2004, bananas were in over-production, for which the AC-10 markets were chosen to dispose of that surplus. The impending accession of the AC-10 countries to the European Communities created artificial incentives to expand banana exports to the AC-10 markets at less than full market price. This could be justified because licenses for importing bananas would be distributed on the basis of "historical trade flows."<sup>95</sup>

108. The Arbitrator further notes that there remains some uncertainty regarding whether or not the Sopisco News "Non-EU" prices may be equated directly with AC-10 prices. Honduras, Nicaragua and Panama argued that, although the European Communities claims that the countries covered by "Non EU" were the AC-10, "neither [it] nor Sopisco News has anywhere substantiated that assumption".<sup>96</sup> In its response to the question by the Arbitrator on this issue, the European

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<sup>93</sup> Submission by the European Communities, para. 62.

<sup>94</sup> Submission by the European Communities, para 62.

<sup>95</sup> Submission by Honduras, Nicaragua and Panama, paras. 164-167.

<sup>96</sup> Submission by Honduras, Nicaragua and Panama, para. 163.



Communities referred to the fact that in week 20 of the year 2004, Sopisco News changed its designation of "Non EU" to "E10" and of "EU" to "E15".<sup>97</sup>

109. The Arbitrator finds that all these factors affect the appropriateness of using AC-10 prices as a proxy for the external price in the European Communities' price gap calculation.

110. The Arbitrator also notes that the Sopisco News "Non EU" is an *internal* price, as is evident from the data supporting the European Communities' calculations.<sup>98</sup> The price gap would therefore be established as the difference between two sets of internal prices. Effectively, what is being compared by the European Communities, is the level of protection from banana imports in the EC-25, on the one hand, with the level of protection in the AC-10, on the other hand. The Arbitrator recognizes that the use of internal price data from the "Non-EU" countries results in a lower price gap. However, the Arbitrator does not see how the Sopisco "Non EU" prices could serve as an "appropriate" proxy for the external price of the EC-25.

111. The Arbitrator considers that the use of Eurostat data for the purposes of the calculation of the external price may not have been free of problems in the context of European Communities' price gap calculation of its current banana import regime. However, the Arbitrator is not convinced, and has not been provided with sufficient evidence, that, effectively, a downward adjustment in the EC's external price that is in the magnitude of €136 per metric ton, was warranted.<sup>99</sup> The Arbitrator concludes that the European Communities underestimated the external price.

### 3. Reference Period

112. In its first award, the Arbitrator expressed the view "that it is important to reflect in the price gap calculation the existing banana regime of the European Communities. The use of the most recent representative reference period minimizes the need for ad hoc adjustments to be made to the data and corresponds as closely as possible to the trade regime as applied."<sup>100</sup>

113. In its revised proposal, the European Communities moved the reference period for its price gap calculation from 2000-2002 to the period 2002 to end-April 2004. It explained the reason for ending in April 2004, instead of taking the whole year 2004, as avoiding "a commingling of the trade regime of the EC-15 and the EC-25."<sup>101</sup> The Arbitrator is not persuaded that this is a sufficient explanation for not taking into account the whole year 2004. The calculations made by the European Communities of either the internal or external prices effectively commingle the regimes because an average is taken of the prices of the EC-15 and the AC 10 countries. In fact, commingling or blending will always be the consequence of taking an average (whether it be weighted or unweighted) of the EC-25. In this connection, Honduras, Nicaragua and Panama submitted that the European Communities chose to end its reference period in April 2004 because, if it had used Sopisco News prices for the full year of 2004, it would have found no external price from May 2004 onwards because the AC-10 countries had then become part of the European Communities.<sup>102</sup>

114. The Arbitrator notes that by using Eurostat c.i.f. data, one would be able to take the whole year of 2004 into account instead of just the first four months. And it appears that using the whole year would lead to a lower estimate of the external price. If one were to do so, the estimate of the external price would be €605 per metric ton instead of €597 per metric ton. These are additional

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<sup>97</sup> Answers to Questions by the European Communities, para. 13.

<sup>98</sup> Calculation 1 in Exhibit EC-39.

<sup>99</sup> See paragraph 82. Using the reference period, 2002 to April 2004, the external price using Eurostat c.i.f data is €597 per metric ton while the same calculation using Sopisco Non EU gives an external price of €461 per metric ton. This represents a difference of €136 per metric ton.

<sup>100</sup> Award of the Arbitrator, para. 83.

<sup>101</sup> Submission by the European Communities, para. 36.

<sup>102</sup> Submission by Honduras, Nicaragua and Panama, para. 92.

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

C. CONCLUSION REGARDING THE EUROPEAN COMMUNITIES' PRICE GAP CALCULATION

115. In the preceding sections, the Arbitrator considered all pertinent aspects of the European Communities' price gap calculation. In respect of the internal price, the Arbitrator examined the Interested Parties' general criticisms of the Sopisco News data<sup>103</sup>, including the availability of alternative price data.<sup>104</sup> The Arbitrator also addressed several specific issues in respect of this internal price data, including: whether Sopisco News prices reflect actual prices<sup>105</sup>; whether an adjustment should be made to the extent Sopisco prices are drawn from the Hamburg market<sup>106</sup>; the inclusion of Chiquita prices<sup>107</sup>; and banana brand estimates.<sup>108</sup> In respect of the external price, the Arbitrator addressed whether Eurostat c.i.f. data for the European Communities was not "appropriate" for the European Communities' price gap calculation<sup>109</sup>; and also considered the European Communities' alternative external price data.<sup>110</sup> The Arbitrator also addressed the reference period used by European Communities for its price gap calculation.<sup>111</sup>

116. Based on its consideration of all these factors, and bearing in mind the absence of perfect price data for bananas, the Arbitrator concludes that the European Communities' calculations did not reflect as accurately as possible the actual difference between internal and external prices, such that the results of the price gap calculation *overestimated* the level of the price gap. On this basis, the Arbitrator finds that the proposed tariff rebinding of €187 per metric ton would not result in at least maintaining total market access for MFN banana suppliers, regardless of whether or not a tariff quota of 775,000 mt is applied to banana imports of ACP origin and regardless of what supply response could be expected from EBA beneficiaries to the margin of preference resulting from the proposed tariff.

117. Because the Arbitrator's conclusion holds true regardless of the effect of the proposed tariff quota or EBA supply response, it is unnecessary for the Arbitrator to continue in its analysis to determine the manner in which these two additional factors would affect, or would not affect, the total market access of MFN suppliers. Accordingly, the Arbitrator makes no substantive findings in respect of either of these factors.

118. In reaching these conclusions, the Arbitrator emphasizes that it has considered the issues, and in particular the various price data, on the basis of the European Communities' proposal and the evidence that has been put before it. Although the Arbitrator is not satisfied that the European Communities has rectified the matter in accordance with the Annex to the Doha Waiver, it takes no view, and this award should not be taken to imply a view, as to the tariff level, or other elements, that would result in at least maintaining total market for MFN banana suppliers.

D. THE EUROPEAN COMMUNITIES' SIMULATION MODEL

119. The European Communities proposed a simulation model, which was intended to demonstrate that the proposed MFN tariff of €187 per metric ton and the tariff quota on ACP imports would maintain total market access for MFN banana suppliers. The simulation was not used to determine

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<sup>103</sup> *Supra*, paras. 57-70

<sup>104</sup> *Supra*, paras. 62-63

<sup>105</sup> *Supra*, paras. 59-68

<sup>106</sup> *Supra*, paras. 72-74

<sup>107</sup> *Supra*, paras. 75-77

<sup>108</sup> *Supra*, paras. 78-79

<sup>109</sup> *Supra*, paras. 87-105

<sup>110</sup> *Supra*, paras. 106-110

<sup>111</sup> *Supra*, paras. 112-114

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## **VI. DETERMINATION**

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

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<sup>118</sup> Answers to questions by the European Communities, para. 41.