WORLD TRADE ORGANIZATION

WT/DS27/AB/R
9 September 1997

(97-3593)

Appellate Body

EUROPEAN COMMUNITIES - REGIME FOR THE IMPORTATION, SALE AND DISTRIBUTION OF BANANAS

AB-1997-3

Report of the Appellate Body

WORLD TRADE ORGANIZATION
APPELLATE BODY

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

European Communities, *Appellant/Appellee*

Ecuador, Guatemala, Honduras, Mexico and the United States, *Appellants/Appellees*

Belize, Cameroon, Colombia, Costa Rica, Côte d'Ivoire, Dominica, Dominican Republic, Ghana, Grenada, Jamaica, Japan, Nicaragua, Saint Lucia, St. Vincent and the Grenadines, Senegal, Suriname and Venezuela, *Third Participants*

AB-1997-3

Present:

Bacchus, Presiding Member
Beeby, Member
El-Naggar, Member

I. Introduction

1. The European Communities and Ecuador, Guatemala, Honduras, Mexico and the United States (the "Complaining Parties") appeal from certain issues of law and legal interpretations in the Panel Reports, *European Communities - Regime for the Importation, Sale and Distribution of Bananas*[1] (the "Panel Reports"). The Panel was established on 8 May 1996 to consider a complaint by the Complaining Parties against the European Communities concerning the regime for the importation, sale and distribution of bananas established by Council Regulation (EEC) No. 404/93 of 13 February 1993 on the common organization of the market in bananas ("Regulation 404/93")[2], and subsequent EC legislation, regulations and administrative measures, including those reflecting the provisions of the Framework Agreement

[1]Complaint by Ecuador, WT/DS27/R/ECU; Complaint by Guatemala and Honduras, WT/DS27/R/GTM, WT/DS27/R/HND; Complaint by Mexico, WT/DS27/R/MEX; Complaint by the United States, WT/DS27/R/USA, 22 May 1997.

[2]Official Journal, No. L 47, 25 February 1993, p. 1.

on Bananas (the "BFA"), which implement, supplement and amend that regime. The relevant factual aspects of the EC common market organization for bananas are described fully at paragraphs 3.1 to 3.36 of the Panel Reports.[3]

2. The Panel issued four Panel Reports that were circulated to the Members of the World Trade Organization (the "WTO") on 22 May 1997. The Panel Reports contain the following conclusions:

With respect to Ecuador, in paragraph 9.1 of the Report, WT/DS27/R/ECU, the Panel concluded:

> … that for the reasons outlined in this Report aspects of the European Communities' import regime for bananas are inconsistent with its obligations under Articles I:1, III:4, X:3 and XIII:1 of GATT, Article 1.2 of the Licensing Agreement and Articles II and XVII of the GATS. These conclusions are also described briefly in the summary of findings.

With respect to Guatemala and Honduras, in paragraph 9.1 of the Reports, WT/DS27/R/GTM and WT/DS27/R/HND, the Panel concluded:

> … that for the reasons outlined in this Report aspects of the European Communities' import regime for bananas are inconsistent with its obligations under Articles I:1, III:4, X:3 and XIII:1 of GATT and Article 1.3 of the Licensing Agreement. These conclusions are also described briefly in the summary of findings.

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[3]The following terms are used throughout this Report:

> "ACP States" refers to the African, Caribbean and Pacific States which are parties to the Fourth ACP-EC Convention of Lomé (the "Lomé Convention"), signed in Lomé, 15 December 1989, as revised by the Agreement signed in Mauritius, 4 November 1995;
>
> "traditional ACP States" refers to the 12 ACP States, listed in the Annex to Regulation 404/93, which have traditionally exported bananas to the European Communities; these are Côte d'Ivoire, Cameroon, Suriname, Somalia, Jamaica, Saint Lucia, St. Vincent and the Grenadines, Dominica, Belize, Cape Verde, Grenada and Madagascar;
>
> "traditional ACP bananas" refers to the quantities of bananas, exported by the traditional ACP States, up to the quantities of bananas set out in the Annex to Regulation 404/93;
>
> "non-traditional ACP bananas" refers to the quantities of bananas exported by the traditional ACP States in excess of the quantities of bananas set out in the Annex to Regulation 404/93, and to the quantities of bananas exported by banana-producing ACP States other than traditional ACP States;
>
> "third-country bananas" refers to the quantities of bananas exported by non-ACP States to the European Communities.

With respect to Mexico, in paragraph 9.1 of the Report, WT/DS27/R/MEX, the Panel concluded:

> … that for the reasons outlined in this Report aspects of the European Communities' import regime for bananas are inconsistent with its obligations under Articles I:1, III:4, X:3 and XIII:1 of GATT, Articles 1.2 and 1.3 of the Licensing Agreement and Articles II and XVII of the GATS. These conclusions are also described briefly in the summary of findings.

With respect to the United States, in paragraph 9.1 of the Report, WT/DS27/R/USA, the Panel concluded:

> … that for the reasons outlined in this Report aspects of the European Communities' import regime for bananas are inconsistent with its obligations under Articles I:1, III:4, X:3 and XIII:1 of GATT, Article 1.3 of the Licensing Agreement and Articles II and XVII of the GATS. These conclusions are also described briefly in the summary of findings.

In each of the Panel Reports, the Panel made the following recommendation:

> … that the Dispute Settlement Body request the European Communities to bring its import regime for bananas into conformity with its obligations under GATT, the Licensing Agreement and the GATS.

3. On 11 June 1997, the European Communities notified the Dispute Settlement Body[4] (the "DSB") of its decision to appeal certain issues of law covered in the Panel Reports and certain legal interpretations developed by the Panel, pursuant to paragraph 4 of Article 16 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU"), and filed a Notice of Appeal with the Appellate Body pursuant to Rule 20 of the *Working Procedures for Appellate Review* (the "*Working Procedures*"). On 23 June 1997, the European Communities filed an appellant's submission pursuant to Rule 21 of the *Working Procedures*. On 26 June 1997, the Complaining Parties filed an appellant's submission pursuant to Rule 23(1) of the *Working Procedures*. In accordance with Rule 16(2) of the *Working Procedures*, and at the request of the Complaining Parties, the Appellate Body granted a two-day extension for the filing of appellees' and third participants' submissions. On 9 July 1997, the Complaining Parties filed an appellee's submission pursuant to Rule 22 of the *Working Procedures*, and the European Communities filed an appellee's submission pursuant to Rule 23(3) of the *Working*

[4]WT/DS27/9, 13 June 1997.

Procedures. Ecuador also filed a separate appellee's submission on that date. A joint third participants' submission was filed by Belize, Cameroon, Côte d'Ivoire, Dominica, Dominican Republic, Ghana, Grenada, Jamaica, Saint Lucia, St. Vincent and the Grenadines, Senegal and Suriname (the "ACP third participants") on 9 July 1997 pursuant to Rule 24 of the *Working Procedures*. That same day, Colombia, Nicaragua and Japan filed third participants' submissions and a joint third participants' submission was filed by Costa Rica and Venezuela.

A. *Procedural Matters*

4. On 10 July 1997, pursuant to Rule 16(2) of the *Working Procedures*, the Government of Jamaica asked the Appellate Body to postpone the dates of the oral hearing, set out in the working schedule for 21 and 22 July 1997, to 4 and 5 August 1997. This request was not granted as the Appellate Body was not persuaded that there were exceptional circumstances resulting in manifest unfairness to any participant or third participant that justified the postponement of the oral hearing in this appeal.

5. By letter of 9 July 1997, the Government of Saint Lucia submitted reasons justifying the participation of two specialist legal advisers, who are not full-time government employees of Saint Lucia, in the Appellate Body oral hearing. Saint Lucia argued that there are two separate issues concerning rights of representation in WTO dispute settlement proceedings. The first issue is whether a state may have its case presented before a panel or the Appellate Body by private lawyers. The second issue deals with the sovereign right of a state to decide who constitutes its official government representatives or delegation. On the second, and more fundamental issue, Saint Lucia submitted that as a matter of customary international law, no international organization has the right to interfere with a government's sovereign right to decide whom it may accredit as officials and members of its delegation. Furthermore, Saint Lucia noted that neither the DSU nor the *Working Procedures* deal with the issue of a sovereign state's entitlement to appoint its delegation or accredit persons as full and proper representatives of its government. Saint Lucia maintained that to do so would go beyond the powers of a panel, the Appellate Body or the WTO under customary international law. Saint Lucia also observed that there is no provision in the DSU or in the *Working Procedures* requiring governments to nominate only government employees as their counsel in WTO panel or Appellate Body proceedings.

6. The Governments of Canada and Jamaica supported the request by Saint Lucia. In a letter of 14 July 1997, Canada stated its concurrence with the proposition advanced by Saint Lucia that the composition of a WTO Member's delegation, in the absence of any rules to the contrary, is a matter internal to the Member itself. Canada argued that it is the Member's right to authorize those individuals

it considers necessary or appropriate to represent its interests. Canada maintained that it is not appropriate for a panel or the Appellate Body to verify the credentials of individuals that a Member has authorized to participate in its delegation. By letter of 14 July 1997, Jamaica also submitted that a government has the right to determine the composition of its own delegation within the context of international law and practice.

7. On 14 July 1997, the Complaining Parties filed a written submission opposing the request of Saint Lucia for permission to allow non-governmental employees to participate in the Appellate Body's oral hearing in this appeal. The Complaining Parties pointed out that the Panel ruled, in its first substantive meeting with the parties on 10 September 1996, that the private counsel seeking to represent Saint Lucia were not entitled to attend the Panel's meetings in this case. The Complaining Parties noted that "the Panel's ruling is not specifically appealed in this appeal".

8. With respect to Saint Lucia's request that its legal advisers be granted an opportunity to participate in the Appellate Body's oral hearing, the Complaining Parties argued that there is no basis for the WTO to change its established practice in this area, and that such a change would entail a fundamental change in the premises underlying the WTO dispute settlement system. The Complaining Parties maintained that the rules of international law governing diplomatic relations, particularly those codified in the *Vienna Convention on Diplomatic Relations*[5], do not support the proposition that a government can name whomever it wants as a member of its delegation to represent it in a foreign international body. The Complaining Parties also argued that the *Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character*[6] has never come into force and has not been ratified by any of the major host states, including Switzerland and the United States, and as such is not applicable to the WTO. The Complaining Parties argued that the law of diplomatic representation does not give states *carte blanche* as to whom they may appoint to their delegations. Furthermore, with respect to the practice of other international organizations and international tribunals, the Complaining Parties argued that where participation of outside counsel is permitted, it is done so in accordance with specific written rules which have been negotiated and agreed to by parties to that organization or treaty.

9. The Complaining Parties submitted that from the earliest years of the General Agreement on Tariffs and Trade (the "GATT"), presentations by governments in dispute settlement proceedings have

[5]Done at Vienna, 16 April 1961, 500 UNTS 95.

[6]Done at Vienna, 14 March 1975, AJIL 1975, p. 730.

been made exclusively by government lawyers or government trade experts. With respect to developing countries, the Complaining Parties argued that, unlike the practice before other international tribunals, under the provisions of Article 27.2 of the DSU, developing countries are entitled to legal assistance from the WTO Secretariat. The Complaining Parties also cited certain policy reasons in support of their position. WTO dispute settlement, they argued, is dispute settlement among governments, and it is for this reason that the DSU safeguards the privacy of the parties during recourse to dispute settlement procedures. Furthermore, the Complaining Parties asserted that if private lawyers were allowed to participate in panel meetings and Appellate Body oral hearings, a number of questions concerning lawyers' ethics, conflicts of interest, representation of multiple governments and confidentiality would need to be resolved.

10. On 15 July 1997, the Appellate Body notified the participants and third participants in this appeal of its ruling that the request by Saint Lucia would be allowed. The Appellate Body said the following:

> … we can find nothing in the *Marrakesh Agreement Establishing the World Trade Organization* (the "*WTO Agreement*"), the *DSU* or the *Working Procedures*, nor in customary international law or the prevailing practice of international tribunals, which prevents a WTO Member from determining the composition of its delegation in Appellate Body proceedings. Having carefully considered the request made by the government of Saint Lucia, and the responses dated 14 July 1997 received from Canada; Jamaica; Ecuador, Guatemala, Honduras, Mexico and the United States, we rule that it is for a WTO Member to decide who should represent it as members of its delegation in an oral hearing of the Appellate Body.

11. In providing additional reasons for our ruling in this Report, it is important to note first to what this ruling does and does not apply. A request was received from the Government of Saint Lucia to allow the participation of two legal counsel, who are not government employees of Saint Lucia, in the oral hearing of the Appellate Body in this appeal. This is not an appeal of the Panel's ruling concerning the participation of the same counsel in the panel meetings with the parties in this case. The Panel's ruling was not appealed by a party to the dispute[7], and thus that ruling is not before us in this appeal. Second, it is well-known that in WTO dispute settlement proceedings, many governments seek and obtain extensive assistance from private counsel, who are not employees of the governments

[7]Pursuant to Articles 16.4 and 17.4 of the DSU, only parties to a dispute, and not third parties, may appeal a panel report.

concerned, in advising on legal issues; preparing written submissions to panels as well as to the Appellate Body; preparing written responses to questions from panels and from other parties as well as from the Appellate Body; and other preparatory work relating to panel and Appellate Body proceedings. These practices are not at issue before us. The sole issue before us is whether Saint Lucia is entitled to be represented by counsel of its own choice in the Appellate Body's oral hearing.

12. We note that there are no provisions in the *Marrakesh Agreement Establishing the World Trade Organization* (the "*WTO Agreement*"), in the DSU or in the *Working Procedures* that specify who can represent a government in making its representations in an oral hearing of the Appellate Body. With respect to GATT practice, we can find no previous panel report which speaks specifically to this issue in the context of panel meetings with the parties. We also note that representation by counsel of a government's own choice may well be a matter of particular significance -- especially for developing-country Members -- to enable them to participate fully in dispute settlement proceedings. Moreover, given the Appellate Body's mandate to review only issues of law or legal interpretation in panel reports, it is particularly important that governments be represented by qualified counsel in Appellate Body proceedings.

B. *Oral Hearing*

13. The oral hearing was held on 21, 22 and 23 July 1997. In his opening statement, the Presiding Member of the Division reminded the participants and third participants that the purpose of the oral hearing was to clarify and distil the legal issues raised in this appeal. The participants and third participants presented oral arguments, were questioned by the Members of the Division hearing this appeal, and made concluding statements. The third participants participated fully in all aspects of the oral hearing.

II. Arguments of the Participants

A. *European Communities - Appellant*

14. The European Communities appeals from certain of the Panel's legal findings and conclusions as well as from certain legal interpretations developed by the Panel.

1. Preliminary Issues

(a) Right of the United States to Advance Claims under the GATT 1994

15. The European Communities argues that the Panel infringed Article 3.2 of the DSU by finding that the United States has a right to advance claims under the GATT 1994. The European Communities asserts that, as a general principle, in any system of law, including international law, a claimant must normally have a legal right or interest in the claim it is pursuing. The European Communities refers to judgments of the Permanent Court of International Justice (the "PCIJ") and the International Court of Justice (the "ICJ") as support for its argument that the concept of *actio popularis* "is not known to international law as it stands at present".[8]

16. According to the European Communities, treaty law is a "method of contracting out of general international law". Therefore, the *WTO Agreement* must contain a rejection of the requirement of a legal interest or an acceptance of the notion of *actio popularis* in order to conclude that the WTO dispute settlement system sets aside the requirement of a legal interest. The absence of such an express rule in the DSU or in the other covered agreements indicates that general international law must be applied. The European Communities maintains that the reasoning advanced by the Panel that all parties to a treaty have an interest in its observance is a general observation which is true for all treaties. The European Communities submits that this has not been accepted by the ICJ as a valid proposition under general international law granting all parties to a multilateral treaty *locus standi* in all cases.

17. The European Communities also argues that the provisions of Article 10.2 of the DSU, allowing a WTO Member that has "a substantial interest in the matter before a panel" to participate as a third party, suggest *a fortiori* that a party to a dispute must show a legal interest. The European Communities asserts that the United States has no actual or potential trade interest justifying its claim, since its banana production is minimal, it has never exported bananas, and this situation is unlikely to change due to climatic and economic conditions in the United States. In the view of the European Communities, the Panel fails to explain how the United States has a potential trade interest in bananas, and production alone does not suffice for a potential trade interest. The European Communities also contends that

[8]The European Communities refers to the *South West Africa Cases* (Second Phase), ICJ Reports 1966, p. 47; the *Case Concerning the Barcelona Traction, Light, and Power Company, Limited* (Second Phase), ICJ Reports 1970, p. 32; and the *Mavrommatis Palestine Concessions Case*, PCIJ (1925), Series A, No. 2, p. 12.

the United States has no right protected by WTO law to shield its own internal market from the indirect effects of the EC banana regime.

(b) Specificity of the Request for Establishment of the Panel

18. The European Communities argues that Article 6.2 of the DSU requires that a "specific measure" be identified, which implies that the mere identification of the legislation or regulations at issue is not sufficient, especially if they are broad and extensive and if only specific aspects of them are being attacked. The European Communities asserts that "specific measures at issue" should be given a substantive meaning and not a formalistic interpretation. The European Communities submits further that the request for establishment of a panel must at the very least make a link between the specific measure concerned and the article of the specific agreement allegedly infringed thereby in order to give both the defending party and prospective third parties a clear idea of what the alleged infringements are.

2. Interpretation of the *Agreement on Agriculture*

19. In the view of the European Communities, the Panel erred in interpreting Article 4.1 of the *Agreement on Agriculture*. The European Communities submits that the Preamble of the *Agreement on Agriculture* indicates that Members were aware of the uniqueness and the specificity of the negotiations concerning agricultural products in the Uruguay Round as compared to tariff negotiations in other areas. Two elements of this specificity are especially important in the context of these proceedings. First, the transition from a highly restrictive system, largely based on non-tariff barriers, to more open market access for agricultural products had to be progressive. Second, the process of reform initiated by the *Agreement on Agriculture* was aimed at achieving binding commitments in three areas: market access, domestic support and export competition. The fundamental achievement of this reform process was the obligation to remove non-tariff barriers and to convert them into tariff equivalents, including tariff quotas. The European Communities contends that the Panel's failure to take into account both the context and the negotiating history of the *Agreement on Agriculture*, in particular as evidenced by the *Modalities* document[9], contributed to the Panel's erroneous interpretation of Article 4.1.

[9] *Modalities for the Establishment of Specific Binding Commitments Under the Reform Programme*, MTN.GNG/MA/W/24, 20 December 1993.

20. The European Communities argues that Article 4.1 is a substantive provision. Read in conjunction with Article 1(g), it defines the market access commitments regarding agricultural products contained in the Schedules as "commitments undertaken pursuant to the *Agreement on Agriculture*". In support of its argument, the European Communities also refers to the Panel's interpretation of Article 21.1 of the *Agreement on Agriculture*. In the view of the European Communities, Article 21.1 confirms the "agricultural specificity" in its clearest form and demonstrates that the rules of the *Agreement on Agriculture*, including the Schedules specifically referred to in Article 4.1, supersede the provisions of the GATT 1994 and the other Annex 1A agreements, where appropriate. The European Communities submits that pursuant to Article 21.1 of the *Agreement on Agriculture*, Article XIII:2(d) of the GATT 1994 is applicable to market access commitments, subject to the provision of Article 4.1 of the *Agreement on Agriculture* allowing the inclusion in those commitments of "other market access commitments as specified" in the Schedule. The European Communities does not contest that the Members' Schedules are formally annexed to the GATT 1994. However, in applying the rule of priority in the implementation of the WTO rules relating to agricultural products, as set out in Article 21.1 of the *Agreement on Agriculture*, the provisions of the GATT 1994 shall be applied with regard to the parts of the Schedules concerning the agricultural products "subject to the provisions" of the *Agreement on Agriculture*, and in particular, Article 4.1. The market access commitments contained in the part of each Member's Schedule relating to agricultural products shall therefore be those resulting from the "bindings and reductions of tariffs, and *other* market access commitments *as specified therein*".

21. The European Communities submits further that the fact that a number of Members have used tariff quotas, with country-specific allocations and an "others" category for making current access commitments, is a clear indication that the practice of allocating tariff quotas in this manner was considered acceptable under the *Agreement on Agriculture*. The European Communities asserts that the Panel's conclusion that this practice is contrary to Article XIII of the GATT 1994, and is not protected by Article 21.1 of the *Agreement on Agriculture*, will destroy a large part of the results of the Uruguay Round negotiations on agriculture relating to tariffication.

3. Interpretation of Article XIII of the GATT 1994

22. The European Communities disagrees with several aspects of the Panel's conclusions on Article XIII of the GATT 1994. The European Communities argues that while Article XIII:2(d) does not explicitly permit allocations on the basis of agreement with some Members not having a substantial

interest, it does not forbid that possibility. The only unequivocal obligation flowing from Article XIII, with respect to Members not having a substantial interest, is to ensure that any Member is entitled to have access to at least a share of the tariff rate quota that approaches, as closely as possible, the share it would expect to receive in the absence of that tariff rate quota. The European Communities submits that an agreement on the allocation of the tariff quota shares with as many supplying countries as possible cannot be against the object and purpose of Article XIII. Furthermore, the terms of Article XIII:2(d) do not exclude the combined use of agreements and unilateral allocations for substantial suppliers. What is important, for the allocation to be in conformity with Article XIII, is that any Member not able to reach an agreement with the importing Member should not be penalized in its access to the tariff rate quota. The European Communities refers to the panel report in *Norway - Restrictions on Imports of Certain Textile Products*[10] ("*Norway - Imports of Textile Products*"), arguing that if the combined use of allocation methods is allowed for Members having a substantial interest, it is also allowed for Members not having a substantial interest. More specifically, with respect to Guatemala, the European Communities maintains that Guatemala cannot be considered as having been harmed in its trade interests in bananas in any way by the decision of the European Communities to include it in the "others" category, which amounts to 49 per cent of the tariff rate quota. In addition, the European Communities asserts that the tariff quota reallocation rules for the BFA are not inconsistent with Article XIII.

4. Separate Regimes

23. The European Communities argues that there are, in fact, two separate EC import regimes for bananas: one preferential regime for traditional ACP bananas and one *erga omnes* regime for all other imported bananas. The European Communities contends further that the non-discrimination obligations of Articles I:1, X:3(a) and XIII of the GATT 1994 and Article 1.3 of the *Agreement on Import Licensing Procedures* (the "*Licensing Agreement*"), only apply *within* each of these two regimes.

24. The European Communities takes the view that in the context of the tariff negotiations in the Uruguay Round, the issue of specified quantities of traditional ACP bananas under the preferential treatment provided for by the Lomé Convention was never raised nor discussed, let alone negotiated or included in the EC GATT Schedule LXXX. Legally, this implies that, under the preferential treatment of the Lomé Convention, the specified quantities of imports of traditional ACP bananas are not part

[10]Adopted 18 June 1980, BISD 27S/119, paras. 15-16.

of the bound commitments of the *erga omnes* regime and that the obligations of the European Communities *vis-à-vis* Members that are parties to the Lomé Convention have their source in the Convention itself and not in the GATT 1994. Furthermore, the allocation by the European Communities of the tariff quota in the EC Schedule is not only separate from, but also irrelevant to, the allocation of ACP preferential quantities, and a licence for the importation of bananas at the in-quota reduced rate could never be used to import bananas from any traditional ACP State. Therefore, the European Communities submits that the Panel's conclusion that there is a single licensing regime is simply refusing to see what happens in the real world.

25. In support of this "separate regimes" argument, the European Communities refers to the *Panel on Newsprint*.[11] The European Communities claims that the situations in that panel report and in this case are identical, in particular, the relationship between an *erga omnes* tariff rate quota and preferential treatment under a preferential agreement. The European Communities admits that there is a partial (and rather formalistic) difference between the present case and the *Panel on Newsprint* case in that the preferential regime in the latter case was justified under Article XXIV of the GATT 1947. The European Communities argues that this does not affect the relevance of the *Panel on Newsprint* case, because the preferential nature of the Lomé Convention has not been contested and the European Communities continues to believe that the Lomé Convention is justified under Article XXIV. The European Communities is concerned that the Panel's findings would oblige the European Communities to include traditional ACP bananas in the current tariff quota for non-traditional ACP and third-country bananas, i.e. to increase or modify the concessions made by the European Communities in the context of the Uruguay Round. This would affect the balance of rights and obligations resulting from the Uruguay Round negotiations on agriculture.

26. The European Communities submits that the Panel ignored the "objective legal situation" that the common organization of the market in bananas has three separate elements: an internal one, a general external one and a preferential one. The European Communities asserts that the plain language of the GATT 1994 indicates that Article XIII applies to the non-discriminatory administration of quantitative restrictions and tariff quotas. The European Communities contends that it has only one tariff quota concerning bananas -- the tariff quota of 2.2 million tonnes set out in the EC Schedule -- and that the preferential quantities of traditional ACP bananas are not included in this tariff quota.

[11]Adopted 20 November 1984, BISD 31S/114, para. 55.

5. Interpretation of the Lomé Convention and Scope and Coverage of the Lomé Waiver

27. The European Communities submits that the Panel endorsed a different interpretation of the Lomé Convention and of the Lomé Waiver[12] from the one commonly accepted by the parties to that Convention.

28. The European Communities argues that the decision taken by the EC Council in its meeting of 14 to 17 December 1992 reflects a clear common understanding that "… the Lomé commitments will be met by allowing tariff-free imports from each ACP State up to a traditional level reflecting its highest sendings (best ever) in any one year up to and including 1990. In cases where it can be shown that investment had already been committed to a programme of expanding production, a higher figure may be set for that ACP State". The reasons for this decision were in Protocol 5 on Bananas to the Lomé Convention ("Protocol 5") and in the obvious need not to waste EC public money and trade opportunities that the EC's financial intervention was trying to establish. The best-ever shipments to the European Communities, by definition, are a statistical measure of past trade, but they in no way reflect an element of the present. The European Communities argues that the Panel's interpretation is tantamount to reducing the words "at present" in Article 1 of Protocol 5 to redundancy. Article 1 of Protocol 5 took into account a dynamic factual situation.

29. The European Communities disagrees with the Panel's conclusion that the current licensing system is not "an advantage" that the ACP countries enjoyed in the European Communities prior to the introduction of the banana regime. Before 1993, the licensing system operated by the United Kingdom and France applied only to imports from third countries, but not to traditional ACP imports. Such an advantage, by virtue of Protocol 5, needed to be carried over into the licensing arrangements for the "new" EC banana regime. The European Communities argues further that Article 167 of the Lomé Convention states that the object of the Convention is to promote trade between the ACP States and the European Communities, and that the Lomé Convention highlights the importance of improving conditions for market access for the ACP States. Article 167 clearly goes beyond a mere tariff preference insofar as it also provides for the securing of "effective additional advantages". The effectiveness of the advantages is a key element thereof. According to the European Communities, Protocol 5 requires the continuation of the advantages enjoyed by traditional ACP States. Tariff preferences alone have

[12]The Fourth ACP-EEC Convention of Lomé, Decision of the CONTRACTING PARTIES of 9 December 1994, L/7604, 19 December 1994 (the "Lomé Waiver"); and EC - The Fourth ACP-EC Convention of Lomé, Extension of Waiver, Decision of the WTO General Council of 14 October 1996, WT/L/186, 18 October 1996.

been shown to be insufficient to ensure this. Without the combined tariff preferences and the import licensing system, ACP bananas would not be competitive in the EC market, and the European Communities would therefore not be able to fulfil its obligations under the Lomé Convention.

6. *Licensing Agreement*

30. In the view of the European Communities, the Panel erred in law in interpreting the *Licensing Agreement*, in particular, Articles 1.2 and 1.3, as applicable to tariff quotas. According to the European Communities, the Panel failed to distinguish appropriately "import quotas", which are quantitative restrictions, from "tariff quotas", which do not limit imports but rather regulate access to a reduced tariff rate. The European Communities asserts that Article 1.1 of the *Licensing Agreement* defines an import licence as "… an application or other documentation … to the relevant administrative body as a prior condition for importation into the customs territory of the importing Member". The European Communities argues that the EC tariff quota licence is *not* a prior condition for importation. It is necessary to gain access at a reduced rate, but not to import bananas. The European Communities submits that Article 1.1 of the *Licensing Agreement* covers licences which are prior conditions "for importation", not "for importation at a lower duty rate".

7. Articles I:1 and X:3(a) of the GATT 1994 and Article 1.3 of the *Licensing Agreement*

31. With respect to the "neutrality" obligation in Article 1.3 of the *Licensing Agreement*, the European Communities submits that the letter, the context and the negotiating history, and even the Panel's own interpretation of the relationship between Article X of the GATT 1994 and Article 1.3 of the *Licensing Agreement*, plead against the use of Article 1.3 of the *Licensing Agreement* as a legal tool to compare the requirements of different licensing systems. The European Communities concludes that the use of Article 1.3 of the *Licensing Agreement* in this way would duplicate Article I:1 of the GATT 1994.

32. In addition, the European Communities submits that Article X of the GATT 1994 is designed to ensure the transparency and the impartiality of public authorities charged with the administration of the relevant national legislation regarding trade. The *raison d'être* of Article X is to ensure that administrative actions are as neutral as possible. According to the European Communities, the Panel distorted the interpretation of this provision in such a way that Article X is now equivalent to a repetition of the most-favoured-nation ("MFN") provision in Article I:1 of the GATT 1994. The European

Communities maintains that the Panel erred in finding that the requirements of uniformity, impartiality and reasonableness in Article X:3(a) do not refer to the administration of the laws, regulations, decisions and rulings, but to the laws, regulations, decisions and rulings themselves. With respect to the interpretation of Article 1.3 of the *Licensing Agreement*, the European Communities agrees with the Panel that a perfect parallel can be made between Article X:3(a) of the GATT 1994 and Article 1.3 of the *Licensing Agreement*. However, Article 1.3 of the *Licensing Agreement* is *lex specialis* for the administration of import licensing procedures, while Article X:3(a) of the GATT 1994 is *lex generalis* for the administration of all "laws, regulations, decisions and rulings …". As a result of the Panel Reports, the European Communities queries whether it is possible to find a breach of Article X:3(a) of the GATT 1994 without also finding an infringement of Article 1.3 of the *Licensing Agreement*.

8. Interpretation of Article III:4 of the GATT 1994

33. The European Communities asserts that the Panel erred in finding that the licensing regime is an internal measure subject to Article III:4 of the GATT 1994, and not a border measure, and that the Panel misunderstood the notion of internal measures in the GATT 1994. The European Communities refers to the panel report in *Italian Discrimination Against Imported Agricultural Machinery*[13] ("*Italian Agricultural Machinery*") and argues that the word "all" in that report, when referring to measures that modify conditions of competition between domestic and imported products in domestic markets, is concerned with internal measures. The European Communities asserts that the panel report in *Italian Agricultural Machinery* stands for the proposition that Article III applies only to measures applied to imported products "once they have cleared through customs".[14]

34. The European Communities argues that a licence is a document which is a prior condition for applying the reduced duty-rate bound under the EC tariff quota to imported bananas. This all happens before the bananas have cleared customs. According to the European Communities, the existence of the licence is justified by operations whose very nature is that of a border operation concerning the duty-rate applicable to that product. The European Communities asserts that the Panel confuses the notion of border measures and the notion of adjustment at the border of an internal measure, the latter being the subject of *Ad* Article III of the GATT 1994.

[13]Adopted 23 October 1958, BISD 7S/60.

[14]*Ibid.*, para. 11.

35. In the case of the EC licensing system, it is obvious that domestic bananas are not subject to an import licence since they do not cross the border, do not clear customs, do not pay duty and are not included in any tariff quota. Therefore, the very application to an import licence of the notion of border adjustment in *Ad* Article III is legally wrong. The European Communities refers to the panel report in *United States - Section 337 of the Tariff Act of 1930*[15] ("*United States - Section 337*") in support of its interpretation. The European Communities submits further that most of the licensing procedures are applied to persons rather than products. The European Communities refers to the panel report in *United States - Restrictions on Imports of Tuna*[16] ("*United States - Imports of Tuna (1991)*") in support of its argument that Article III cannot be used to compare treatment between persons but only between products.

36. As to the effect of hurricane licences, the European Communities asserts that a simple side-effect resulting from the implementation of a measure pursuing a general internal policy, which has or might have an effect on the conditions of competition, should not be considered to infringe Article III:4 of the GATT 1994 unless clear evidence is provided that this general policy measure was designed to afford protection to domestic products. The European Communities asserts that hurricane licences are distributed only in the event of a proven catastrophe and are limited to the quantities lost due to the devastation caused by a hurricane. Therefore, these licences are clearly a means of intervention to support the income of those domestic producers that are harmed by the hurricane. The European Communities points out that operators can benefit from hurricane licences in two ways: they can use them to import bananas from third countries, or they can sell the licences. Hurricane licences by themselves do not affect the internal sale or offering for sale of domestic bananas to the detriment of imported bananas. The only effect they have is an occasional increase in the EC tariff quota. Finally, the European Communities asks whether WTO Members are not allowed to remedy the consequences of natural disasters within their own territories in order to prevent their producers from being eliminated.

9. Interpretation of Article I:1 of the GATT 1994

37. The European Communities contends that the Panel erred in law in interpreting Article I:1 of the GATT 1994. With respect to the activity function rules, the European Communities argues that discrimination occurs in treating identical situations differently, or in treating different situations in the same way. The Panel's findings would amount to compelling the European Communities to

[15]Adopted 7 November 1989, BISD 36S/345.

[16]Unadopted, BISD 39S/155, p. 195.

treat different situations concerning operators, in the same way, and by doing so, create additional burdens for some that would not be appropriate for the situation in which they are operating. In the view of the European Communities, nothing in Article I:1 of the GATT 1994 forbids a Member to treat different situations on their merits.

38. The European Communities submits that tariff quota licences have a considerable monetary value and confer significant advantages to the holders. The same factual reality does not exist with regard to traditional ACP bananas. It is "simply nonsensical" to find that a violation of Article I:1 of the GATT 1994 was committed solely on the grounds that the activity function rules are not used in the traditional ACP licensing system. The European Communities maintains that the activity function rules were established for reasons relating to EC domestic competition policy, and that competition policy considerations fall entirely outside the ambit of the *WTO Agreement* as it is currently drafted.

39. With respect to export certificates, the European Communities asserts that the possibility of passing quota rents to banana producers "does exist" in any situation where a licensing system exists together with limited access to a quantitative restriction or a tariff quota. In the view of the European Communities, it would be wrong to affirm that a distinction could be drawn between quota rents resulting from an export certificate, and quota rents arising from the existence of an import licence. The European Communities argues that there is no advantage for Colombian, Costa Rican and Nicaraguan bananas deriving from the requirement of export certificates. The distribution of quota rents, provided that licences are tradeable, confers no particular advantage, nor has any effect on, the importation of Ecuadorian, Guatemalan, Honduran and Mexican bananas into the European Communities as compared with the access of BFA bananas to the EC market.

10. Measures Affecting Trade in Services

40. The European Communities submits that the Panel erred in law by finding that there is no legal basis for an *a priori* exclusion of measures within the EC banana import licensing regime from the scope of the *General Agreement on Trade in Services* (the "GATS"). The European Communities argues that as a result of the Panel's interpretation of the scope of the GATS, there is a "total overlap" between the GATT 1994 and the other Annex 1A agreements of the *WTO Agreement*, on the one hand, and the GATS on the other hand. Any measure can fall under both the Annex 1A agreements and the GATS simultaneously. The European Communities maintains that there is no indication that the Panel examines, under the GATS, a different aspect or part of the EC licence allocation rules from that examined under the GATT 1994 or the *Licensing Agreement*. Therefore, exactly the same measures

are scrutinized under the GATT 1994 and under the GATS. In the view of the European Communities, this is contrary to Articles I and XXVIII of the GATS. Furthermore, this interpretation is contrary to Article 3.2 of the DSU.

41. The European Communities asserts that the Panel's broad interpretation of the term "affecting" is not supported by the text of Article XXVIII(c) of the GATS. If the category of "measures in respect of … the purchase, payment or use of a service" in Article XXVIII(c) is part of the category of "measures affecting trade in services", then the term "in respect of" describes the same relationship as the term "affecting", namely that between measures and trade in services. The European Communities maintains that for an important category of these measures, "in respect of" means the same as "affecting". The European Communities argues that the words "for the supply of a service" in Article XXVIII(c)(iii) indicate that the measures must relate to a natural or legal person in its quality of a service supplier, or in its activity of supplying a service. In the view of the European Communities, the Panel's interpretation neglects the combined implication of Articles I and XXVIII(c)(iii) of the GATS, i.e. that the measures complained of must bear on the supply of a service. As a consequence, the measures at issue are measures in respect of importation of goods and measures relating to the supply of services with respect to these goods.

42. The European Communities also asserts that the Panel's interpretation is not supported by the preparatory work for the GATS. The European Communities argues that there is no indication that the broad interpretation given to the term "affecting" in a Note by the Secretariat[17], which is referred to by the Panel in support of its interpretation, was shared by the negotiators of the GATS. In addition, introducing into a general article on the scope of the GATS a very specific meaning of the word "affecting", derived from previous panel reports interpreting Article III of the GATT 1947, would be taking things out of context. The European Communities also argues that the Panel's view that the drafters of the GATS wanted to widen the scope of the GATS by using the term "supply of a service" instead of the narrower term "delivery of a service" is in no way conclusive, because it would still need to be shown that the measures concerned were taken in respect of the "production, distribution, marketing, sale and delivery of a service" within the definition of "supply of a service" in Article XXVIII(b) of the GATS. In the view of the European Communities, the Panel's interpretation is not supported by the context of the relevant GATS provisions. The European Communities argues that the preamble of the GATS as well as other important provisions, such as Articles VI:4 and XVI of

[17]*Definitions in the Draft General Agreement on Trade in Services*, Note by the Secretariat, MTN.GNS/W/139, 15 October 1991.

the GATS, give no indication that the GATS is concerned with the indirect effects on trade in services of measures relating to trade in goods.

43. Furthermore, the European Communities argues that the negotiators of the GATS wanted to create an instrument of limited coverage that would be distinct *ratione materiae* from the GATT 1994, and that the simultaneous application of the GATT 1994 and the GATS leads to a clear conflict between the rights of one Member under one agreement and the rights of another Member under the other agreement. In the view of the European Communities, measures targeted at trade in a certain good, such as the imposition of an anti-dumping duty, a selective safeguard measure or a prohibitive tariff, could have repercussions on service suppliers, in particular, distribution services, and could be condemned under the GATS. This would, in turn, impede the Member's right to take measures under the GATT 1994. As a further example of probable conflicts between the GATT 1994 and the GATS, the European Communities mentions discriminatory measures in favour of goods taken in a customs union pursuant to Article XXIV of the GATT 1994. These may have negative repercussions on services supplied from non-Member countries. It is quite likely that those repercussions would not be covered by the restrictions inscribed in the Services Schedules of the Members of the customs union. The European Communities asserts that a similar problem might arise with waivers granted under Article XXV of the GATT 1994 that allow discrimination in respect of trade in goods in relation to which certain services could be provided. This would run counter to Article II of the GATS, and the Lomé Waiver would become useless unless the respective services come within an Article II exemption.

44. The European Communities argues further that conflicts may occur where Members have, in accordance with Article XVI of the GATS, introduced restrictions into their Schedules that limit their commitments under Article XVII. When scheduling initial commitments under Article XVII, Members were told that there was no need to make provision in their Schedules for measures which were not direct limitations on services trade as such, but rather were restrictions on trade in goods. The European Communities argues that this interpretation would have scheduled limitations on trade in goods had there been a generally-shared awareness that such measures were deemed to be covered not just by the GATT 1994, but also by the GATS. The European Communities contends that this interpretation would amount to upsetting the results of the negotiations on scheduling under the GATS, if precisely those Members that had been the most liberal in their services scheduling, in particular in the sector of distribution services, would suffer negative consequences on their rights in trade in goods. The European Communities also maintains that the absence of rules of conflict and of a hierarchical relationship between the GATT 1994 and the GATS indicates that an overlap was not seen

by the negotiators to exist between the GATS and the GATT 1994, because these agreements were believed by the negotiators to cover different domains and to apply to different kinds of measures.

45. Moreover, the European Communities argues that the Panel's view that, in the absence of an overlap between the GATS and the GATT 1994, the value of Members' obligations would be undermined by the possibility of circumvention, is not supported by the object and purpose of the two agreements. The European Communities asserts that the only example of the so-called frustration of the object and purpose that the Panel can suggest is in the transport area, which clearly falls under Article III:4 of the GATT 1994. The European Communities asserts that apart from Article V, Article III:4 is probably the only article of the GATT 1994 that explicitly submits certain services measures to GATT disciplines. Article III:4 applies only to a limited number of services and applies only to the extent that measures relating to those services directly affect the competitive relationship between imported and domestic goods.

46. The European Communities argues that as a practical result of the Panel's conclusion that no measures are excluded *a priori* from the scope of the GATS, the Panel does not demonstrate that the impugned measures actually affect the supply of services, within the meaning of Article XXVIII(b), in one of the four modes of service supply. Under the EC's view of the term "affecting", the Panel does not explain how rules dividing up entitlements to parts of the tariff quota for bananas among importers constitute measures in respect of the production, distribution, marketing or sale and delivery of wholesale trade services by service suppliers present in the EC's territory. The European Communities asserts that the Panel's findings on activity functions, export certificates and hurricane licences are also characterized by the same lack of reasoning.

11. Scope of Article II of the GATS

47. The European Communities submits that the Panel's finding in paragraph 7.304 of the Panel Reports "that the obligation contained in Article II:1 of the GATS to extend 'treatment no less favourable' should be interpreted *in casu* to require providing no less favourable conditions of competition" is in contradiction with the customary rules of interpretation of public international law. The European Communities asserts that paragraphs 2 and 3 of Article XVII of the GATS reflect the interpretation of the terms "treatment no less favourable" given to Article III:4 of the GATT 1994 in the panel report,

United States - Section 337.[18] This interpretation, which is contentious, cannot be equated with the ordinary meaning of the term "treatment no less favourable" in a wholly different article of the GATS.

48. In the view of the European Communities, the GATS negotiators found it necessary in the case of Article XVII to include concepts from previous GATT panel reports to clarify that the standard of "no less favourable treatment" was one of substantive discrimination based on modification of competitive conditions. The European Communities submits that such clarification was expressly omitted from the MFN clause in Article II:1 of the GATS, despite the fact that it was drafted on the same "treatment no less favourable" basis as Article XVII of the GATS. Therefore, Article II:1 of the GATS does not encompass the idea of substantive discrimination or the even further-reaching notion of modification of competitive conditions. The European Communities also asserts that the concept of "no less favourable treatment" is not limited to Article III of the GATT 1994. There are a number of MFN-type clauses in the GATT 1994 which use the same wording, for example, Article V, paragraphs 5 and 6 and Article IX:1. There is, therefore, no reason to conclude that since the wording of Article III:4 was used, this automatically carries a standard of substantive discrimination, including "modification of competitive conditions".

49. The European Communities maintains that it is only logical that the obligations under Article XVII of the GATS should be more onerous than those under Article II, because Members have made commitments and specifically opened up certain sectors, which is not the case with Article II of the GATS. According to the European Communities, it is unlikely that Members, many of whom originally viewed the GATS MFN clause as a conditional MFN provision during the Uruguay Round, could have, in the end, agreed to an MFN clause that also includes the principle of equality of competitive conditions without explicitly saying so.

50. Moreover, the European Communities submits that legislators may have a good knowledge of the competitive conditions prevailing between service suppliers of that Member and those not of that Member, but there is usually a lack of knowledge relating to the competitive conditions prevailing among services and service suppliers of various third countries. Therefore, the European Communities contends that it may be feasible for the legislators of Members to ensure formally equal treatment between third-country services and service suppliers, but it is virtually impossible to be sure that they are also ensuring equal competitive conditions.

[18]Adopted 7 November 1989, BISD 36S/345.

51. Finally, the European Communities argues that the formulation of the Panel's finding in paragraph 7.304 of the Panel Report, in particular, the use of the term *in casu* might be interpreted to mean that the standard of equality of competitive conditions in Article II of the GATS applies only when, as in this case, full commitments have been made in a sector, while the formal MFN standard would apply for sectors without commitments. This would turn Article II into a half-conditional MFN clause and would contradict the result of the negotiations which was to have no conditions attached to the MFN clause.

12. Effective Date of GATS Obligations

52. The European Communities submits that the Panel erred in its interpretation of what constitutes "a situation" within the meaning of general international law as codified in Article 28 of the *Vienna Convention on the Law of Treaties* (the "*Vienna Convention*").[19] The European Communities maintains that the "situation" is the alleged *de facto* discrimination against and between foreign suppliers which must be proven to exist at the moment the obligations of the treaty -- in this case the GATS -- apply to the Members allegedly having caused the discrimination, and that such discrimination cannot lawfully be established on the basis of the factual situation existing before the entry into force of the treaty. The European Communities argues that the Panel failed to demonstrate that there was *de facto* discrimination after the entry into force of the GATS on 1 January 1995, as the Panel relied entirely on the Complaining Parties' data on the ownership and control of companies relating to 1992 and on the Complaining Parties' estimates on market shares of companies which were based on the situation existing before June 1993.

13. Burden of Proof

53. According to the European Communities, the Panel misapplied the standard of burden of proof affirmed by the Appellate Body in *United States - Measure Affecting Imports of Woven Wool Shirts and Blouses from India*[20] ("*United States - Shirts and Blouses from India*"). According to that standard, a complaining party must adduce "evidence sufficient to raise a presumption that what is claimed is true" in order to prove its claim.[21] In the view of the European Communities, this burden of proof should be satisfied, at the latest, at the first meeting of a panel.

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[19]Done at Vienna, 23 May 1969, 1155 UNTS 331; 8 International Legal Materials, p. 679.

[20]WT/DS33/AB/R, adopted 23 May 1997.

[21]*Ibid.*, p. 14.

54. The European Communities maintains, first, that the Panel misapplied this standard of burden of proof in deciding which companies are a "juridical person of another Member" and are "owned", "controlled" by or "affiliated" with a juridical person of another Member within the meaning of Articles XXVIII(m) and (n) of the GATS. The absolute minimum for any claim under the third mode of service supply is showing that these conditions are fulfilled. The European Communities argues that the Panel, in fact, relied exclusively on the list of alleged "banana wholesaling companies established in the European Communities that were owned or controlled by the Complainants' service suppliers, 1992" and that this list as such gave no clear indications about ownership or control. In this respect, the European Communities contends that, in particular, there are doubts that Del Monte was owned by Mexican persons at the time the complaint was brought and that, for this reason, it is impossible to argue that the Complaining Parties had satisfied the requirement of proving their claim in respect of companies from Mexico.

55. Second, the European Communities asserts that the burden of proof has not been discharged with respect to the distribution of the market for wholesale services for bananas between Category A and Category B Operators. The European Communities contends that the Panel's conclusion is based on alleged market shares for imports and production, and that it is not clear how the distribution of market shares in the services market can be based completely on shares in the import and production markets, unless one assumes that service providers supply services only in respect of their own bananas and that there is no independent market for services in bananas in general. Finally, the European Communities maintains that, with respect to hurricane licences, the Panel posited an unproved identity of the class of Category B operators and of the class of "operators who include or represent EC producers" as well as the group of "operators who include or represent ACP producers".

14. Definition of Wholesale Trade Services

56. The European Communities submits that the Panel erred in applying the concept of wholesale trade services in the Provisional Central Product Classification (the "CPC Classification").[22] The European Communities argues that importation is not mentioned as one of the subordinate services of wholesale trade services, and that, although the list of subordinate services is only illustrative, reselling of merchandise is the core activity of wholesalers, whereas importation involves only buying and not selling. The licensing regime is an import licensing system and, therefore, does not touch the service providers of the Complaining Parties in their wholesale service activities, but only in their import

[22]Provisional Central Product Classification, United Nations' Statistical Papers, Series M, No. 77, 1991.

activities, that is, in their activities in the goods sector. The European Communities maintains that, with respect to the allegedly discriminatory effect of operator categories, the Panel failed to demonstrate that there are unequal conditions of competition between service suppliers, and not between importers, who, although they may be also service suppliers, are not, in the latter capacity, affected by the licensing system. The European Communities submits further that the Panel erred in law by determining that integrated companies are service suppliers under the GATS, because normally only their products, and not their services, appear on the market, and thus the GATS does not apply.

15. Alleged Discrimination Under Articles II and XVII of the GATS

(a) Operator Category Rules

57. The European Communities argues, in the alternative, that the EC licensing system for bananas is not discriminatory under Articles II and XVII of the GATS. Therefore, the Panel erred in law by condemning the operator category rules under Articles II and XVII of the GATS. The European Communities contends that, in the final analysis, the operator category rules are condemned principally because of statistical evidence on market shares. The European Communities refers to the panel report in *United States - Taxes on Automobiles*[23] where the panel looked at the statistical evidence, and beyond the dominant presence of imported goods in the sector of the market affected by the measure, in order to determine whether the measure had the "aim and effect" of affording protection to domestic production. The European Communities contends that the various aspects of the licensing system pursue legitimate policies and are not inherently discriminatory in effect or design. The European Communities asserts, therefore, that the Panel should have looked beyond the fact that, because of reasons related to the historical development of the banana distribution sector, service suppliers of the Complaining Parties are concentrated in one segment of the market, and EC and ACP suppliers in another segment.

58. The European Communities contends that the legitimate aim of the operator category rules, as recognized by the European Court of Justice (the "ECJ"), is to establish a machinery for dividing the tariff quota among the different categories of traders concerned, to encourage operators dealing in EC and traditional ACP bananas to obtain supplies of third-country bananas and to encourage importers of third-country bananas to distribute EC and ACP bananas. This corresponds with the EC's objectives of integrating the various national markets and of harmonizing the differing situations of banana traders in the various Member States. The European Communities maintains that to achieve "mutual

[23]DS31/R, 11 October 1994, unadopted.

interpenetration" of the markets of the various Member States, a system of transferability of licences was used. The operator category rules served the purpose of distributing the quota rents among operators in the market. The fact that service suppliers of the Complaining Parties may have been over-represented in one category in particular (Category A), and may have significant but not overwhelming representation in another category (Category B) is, in itself, no basis for arguing that the operator category rules afford protection to EC (or ACP) service suppliers. Furthermore, in terms of conditions of competition, operator category rules do not have the effect of affording protection to service suppliers of domestic- or ACP-origin as they leave a commercial choice to the operators.

(b) Activity Function Rules

59. The European Communities maintains that EC activity function rules aim to correct the position of all ripeners *vis-à-vis* all suppliers of bananas and seek to maintain the ripeners' bargaining power in relation to their commercial partners as it was before the creation of the tariff quota. The effect of activity function rules is highly dependent on the commercial choices of operators. Operators who supplied wholesale services primarily for bananas that were brought under the tariff quota can avoid, or reduce, the extent to which they are subject to activity function rules by extending their services to include EC and ACP bananas. The European Communities further submits that primary importers can resort to "licence pooling" or having bananas ripened under contract.

(c) Hurricane Licences

60. The European Communities asserts that hurricane licences are intended to compensate those who suffer directly from damage caused by tropical storms. The European Communities argues that the fact that compensation benefits those persons who have the nationality of the country where the disaster took place, does not necessarily signify that such measures are discriminatory and modify the conditions of competition under Article XVII of the GATS. There is no infringement of Article II of the GATS, as there is no formal, or hidden *de facto*, distinction as to operators. There is no indication in the hurricane licence rules that operators that are not ACP-owned or -controlled cannot own or represent ACP producers on the same basis as ACP or EC-owned or -controlled operators.

16. Nullification or Impairment

61. The European Communities argues that the Panel erred in paragraph 7.398 of the Panel Report in its application of the standard of rebuttal under Article 3.8 of the DSU in concluding that the European

Communities had not succeeded in rebutting the presumption that there was nullification or impairment with respect to all of the Complaining Parties. The EC's argument related only to the United States, and was that the United States lacked a legal right or interest with respect to the GATT 1994. This is one of the exceptional cases where the presumption of nullification or impairment in Article 3.8 of the DSU could be rebutted, because of the absence of any trade damage to the United States, due to its lack of exports of bananas. The European Communities submits that the United States has never exported bananas to the European Communities or anywhere else in the world. Demonstrating a lack of any trade damage is a recognized way in the GATT of rebutting the presumption of nullification or impairment. As the Panel failed to rule on the issue of United States' export statistics, it is not capable of deciding that the European Communities has not succeeded in rebutting the presumption of nullification and impairment. The European Communities contends that this is a clear failure by the Panel to objectively assess the matter before it, as required under Article 11 of the DSU. Moreover, the Panel erred in law in its application of the standard of rebuttal under Article 3.8 of the DSU by assuming that the EC's rebuttal was based on mere quantitative elements when it was based on the United States' proven incapacity to grasp competitive opportunities in the banana export market. Thus, the Panel rendered meaningless the possibility of rebutting the presumption under Article 3.8 of the DSU. The European Communities also submits that the Panel infringed Article 9 of the DSU by not ruling separately on the position of the United States. The rights which the European Communities would have enjoyed if separate panels had been established have been impaired under Article 9 of the DSU.

B. *Ecuador, Guatemala, Honduras, Mexico and the United States - Appellees*

1. Trade in Goods

(a) Country Allocations

62. The Complaining Parties submit that the Panel correctly found the "two regimes" argument of the European Communities to be irrelevant for WTO purposes. The Complaining Parties argue that nothing in the text of Article XIII of the GATT 1994 suggests that the obligations concerning "restrictions" and "shares" of trade or imports can be avoided by creating legal formalities, such as "separate regimes", for administrative or other reasons. The Complaining Parties argue further that the insistence by the European Communities that it has "only one tariff quota concerning bananas" is neither legally relevant nor factually correct. Article XIII of the GATT 1994 clearly does not distinguish between quota allocations reflected in a Schedule and those that are not. In the view of

the Complaining Parties, the panel report in *Norway - Imports of Textile Products*[24] confirms that creating separate regimes for certain developing countries does not permit a Member to avoid its Article XIII obligations. The Complaining Parties also argue that the *Panel on Newsprint*[25] does not support the "separate regimes" argument because the justification of the preferential treatment under Article XXIV of the GATT 1994 was crucial in the *Panel on Newsprint* case, and no such justification exists in this case. In response to the EC's concern about the modification of its obligations, the Complaining Parties argue that the Panel has not modified the EC's obligations under its Schedule but has insisted that these obligations be observed for the benefit of all concerned. Therefore, the Panel correctly concluded that all of the EC's country-specific allocations must be considered together in determining consistency with Article XIII of the GATT 1994.

63. The Complaining Parties submit that the Panel correctly concluded that EC allocations to non-substantial suppliers are inconsistent with Article XIII of the GATT 1994. They argue that the text of Article XIII:2(d) of the GATT 1994, in particular the word "all", amply supports the Panel's conclusion that the combined use of agreements and unilateral allocations for the allocation among Members having a substantial interest is inconsistent with Article XIII:2(d). In support of their argument, the Complaining Parties refer to the panel report in *Norway - Imports of Textile Products*[26] and to the drafting history of the GATT 1947.[27] The Complaining Parties argue that if Article XIII of the GATT 1994 does not allow the combined use of agreements and unilateral allocations for the allocation among Members having a substantial interest, it also does not allow the combined use for the allocation among Members without a substantial interest. Concerning the EC's argument as to allocations to Members without a substantial interest, the Complaining Parties argue that Article XIII of the GATT 1994 is unambiguous in requiring that the administration of quantitative restrictions and country-specific allocations must be non-discriminatory and reflective of recent trade patterns. The European Communities persists, against both the text and the object and purpose of Article XIII, in defending the arbitrary assignments of shares based on agreements with suppliers regardless of their level of trade. Additionally, the Complaining Parties assert that Article XIII:2(d) recognizes that it may indeed not always be practicable to reach agreement with all suppliers, but it is precisely for such situations that Article XIII:2(d) provides for the possibility of assigning country-specific allocations based on historical

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[24]Adopted 18 June 1980, BISD 27S/119, paras. 15, 16 and 18.

[25]Adopted 20 November 1984, BISD 31S/114.

[26]Adopted 18 June 1980, BISD 27S/119, paras. 15-16.

[27]*Report of the First Session of the London Preparatory Committee of the United Nations Conference on Trade and Employment*, UN Document EPCT/33, October 1946, p. 14, referred to in the Complaining Parties' appellee's submission, para. 36.

shares. However, the EC's insistence that Members cannot be considered as "having been harmed" by their inclusion in the "others" category ignores basic economic realities and the underlying tenets of Article XIII. Country-specific allocations are recognized in Article XIII:2 as an advantage for which specific rules are required to carry out the general principle in Article XIII:1 of non-discrimination. The Complaining Parties assert further that a Member may reallocate unused amounts of a quota or tariff quota among other supplying Members, but Article XIII:2 of the GATT 1994 does not permit this to be done in a discriminatory manner.

64. The Complaining Parties submit that the Panel correctly found that Article 21.1 of the *Agreement on Agriculture* is not a defence to the inconsistencies with Article XIII of the GATT 1994 found with respect to the EC's country-specific allocations. The Panel properly dismissed the EC's contention that Article 4.1 of the *Agreement on Agriculture* effectively incorporates GATT-inconsistent provisions of the Schedules into the *Agreement on Agriculture* and thereby legitimizes them. The ordinary meaning of Article 4.1 of the *Agreement on Agriculture* does not permit it to be read as a substantive provision. The Complaining Parties argue that, had the drafters wished to incorporate the Schedules by reference into the *Agreement on Agriculture*, they could have done so explicitly. No provision of the *Agreement on Agriculture* clashes with Article XIII of the GATT 1994. Accordingly, Article 21.1 of the *Agreement on Agriculture* is not relevant, and Article XIII of the GATT 1994 applies to the EC tariff quota allocations. The Panel's findings are fully supported by the object and purpose of the *Agreement on Agriculture*, which is to make agricultural products subject to strengthened and more operationally-effective GATT rules. Finally, the Complaining Parties assert that the fact that the "current access" tariff quotas of many WTO Members include country-specific allocations does not support the EC's argument. The related allegation by the European Communities that other countries have disregarded Article XIII of the GATT 1994 is factually unsupported. However, even if true, it cannot serve to contradict the ordinary meaning of the relevant terms of the *Agreement on Agriculture* nor to endorse the EC violations.

(b) *Licensing Agreement*

65. The Complaining Parties submit that the Panel correctly found that the *Licensing Agreement* applies to licensing procedures for tariff quotas. In their view, the European Communities cannot factually dispute that import licences are required as a prior condition for importing in-quota bananas. Moreover, this in-quota quantity comprises the sum total of third-country and non-traditional ACP bananas entering the EC market. According to the Complaining Parties, the context of Article 1.1 of the *Licensing Agreement*, as well as Articles 3.2, 3.3 and the Preamble of the *Licensing Agreement*,

and prior GATT practice on the notion of "restriction", confirm that the *Licensing Agreement* also applies to licensing procedures for tariff quotas. The Complaining Parties also argue that a major achievement of the Uruguay Round agriculture negotiations was the large-scale conversion of non-tariff barriers to tariff quotas. They maintain that making tariff quotas an exception to the disciplines of the *Licensing Agreement* would directly contradict the trend towards transparency and predictability.

66. Finally, the Complaining Parties contend that the Panel properly concluded that the issuance of hurricane licences exclusively to ACP and EC producers and producer organizations, or operators including or directly representing them, but not to third-country producers and producer organizations or operators including or directly representing them, was inconsistent with the requirement of "neutrality in application" contained in Article 1.3 of the *Licensing Agreement*.

(c) Article III of the GATT 1994

67. The Complaining Parties submit that the Panel correctly found that the distribution of Category B licences conditioned on purchases of EC bananas is inconsistent with Article III:4 of the GATT 1994. According to the Complaining Parties, the text of Article III:4 indicates coverage beyond legislation directly regulating or governing the sale of domestic and like imported products. In support of this argument, the Complaining Parties refer to the panel report in *Italian Agricultural Machinery*[28] and to the Interpretative Note *Ad* Article III of the GATT 1994. Referring to the panel report in *United States - Section 337*, the Complaining Parties argue that the dispositive issue under Article III:4 is whether a discriminatory advantage is affecting the sale or purchase of the domestic product.[29] In response to the EC's argument relating to the panel reports in *United States - Imports of Tuna (1991)* and *United States - Section 337*, the Complaining Parties assert that these panel reports show that Article III does apply to all measures affecting trade in goods. The Complaining Parties insist that the object of Article III is to ensure that Members accord foreign products no less favourable treatment than like domestic products in the application of any measure affecting the internal sale of products, regardless of whether it applies internally or at the border. The Complaining Parties further assert that the European Communities cannot claim that imported products are treated under the Category B rules in the same way as domestic products, once they have cleared customs. In support of this argument, they refer to the statement of the panel in *Italian Agricultural Machinery* that any measure that "modif[ies] the conditions of competition between the domestic and imported products on the internal market", including

[28]Adopted 23 October 1958, BISD 7S/60, para. 11.

[29]Adopted 7 November 1989, BISD 36S/345, para. 5.10.

one that encourages domestic purchases of national goods, violates Article III:1 of the GATT 1994.[30] Referring to the Appellate Body's previous ruling that Article III:1 is a general principle that informs the rest of Article III[31], the Complaining Parties argue that given Category B's explicit incentive to purchase EC bananas, the "design and architecture" of the measure to afford protection to EC producers is clear.

(d) Article I:1 of the GATT 1994

68. The Complaining Parties submit that the Panel correctly found the activity function rules to be inconsistent with Article I:1 of the GATT 1994. In contrast to the activity function rules, the simpler procedures applicable to ACP bananas constitute a clear regulatory "advantage" in violation of Article I:1 of the GATT 1994. In support of their argument, the Complaining Parties refer to the panel report in *United States - Denial of Most-Favoured-Nation Treatment as to Non-Rubber Footwear from Brazil*[32] ("*United States - Non-Rubber Footwear*"). None of the rationales invoked by the European Communities in justification for the activity function rules -- such as that ACP imports are "inherently less profitable" and that different "situations concerning operators" require a different allocation of quota rents -- legitimizes regulations which discriminate explicitly among like products on the basis of their origin.[33] The Complaining Parties add that Article I:1 of the GATT 1994 applies to any "rules or formalities", and that the EC's argument that measures intended to implement competition policies are somehow "outside of the WTO" is "confused and groundless".

69. According to the Complaining Parties, the European Communities themselves recognized the commercial value of the export certificates in the European Commission *Report on the EC Banana Regime*, in which the European Commission indicated that export certificates helped the BFA countries "share in the economic benefits of the tariff quota".[34] The Complaining Parties argue that export certificates accord holders in BFA countries preferential bargaining leverage to extract a share of the quota rent for their fruit exported to the European Communities, and hence give BFA countries a

[30]Adopted 23 October 1958, BISD 7S/60, para. 12.

[31]Appellate Body Report, *Japan - Taxes on Alcoholic Beverages* ("*Japan - Alcoholic Beverages*"), WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, p. 18.

[32]Adopted 19 June 1992, BISD 39S/128, paras. 6.8-6.17.

[33]*Ibid.*, para. 6.11.

[34]Commission of the European Communities, *Report on the EC Banana Regime*, VI/5671/94, July 1994, p. 12, contained in the Complaining Parties' first submission to the Panel.

competitive advantage over other Latin American suppliers. This "possibility" (i.e. privilege) was requested by the BFA countries.

(e) Article X of the GATT 1994

70. The Complaining Parties submit that the Panel correctly found that the licensing procedures applicable to Latin American bananas differ from, and go significantly beyond, those required in respect of traditional ACP bananas in violation of Article X:3(a) of the GATT 1994. Because everything from border measures to internal measures falls within the language of Article X:1 of the GATT 1994, and because the import licensing procedures of the European Communities constitute internal laws regulating border measures, the Complaining Parties conclude that the procedures at issue fall well within the scope of Article X:1 of the GATT 1994. The language of Article X:3(a) prohibits the application of two significantly different, origin-based sets of licensing procedures. The Complaining Parties argue that the Panel rested its findings on a review of the different EC procedures, not on the operator category and activity function rules themselves. The Panel's analysis specifically reviewed the licensing procedures at issue and not the enabling laws as such. Furthermore, there is no support in the WTO for the proposition that Article I and Article X of the GATT 1994 cannot overlap. The fact that the EC discriminatory import procedures are inconsistent with the uniformity requirement of Article X:3(a) does not mean that the licensing rules themselves cannot represent "rules and formalities" that have not been accorded immediately and unconditionally to like products of all origins in violation of Article I of the GATT 1994. The Panel correctly found that the EC practices violated both Articles I and X of the GATT 1994. In response to the EC's argument that Article 1.3 of the *Licensing Agreement* is *lex specialis*, and that the Panel must therefore make concurrent findings under both Article X:3(a) of the GATT 1994 as *lex generalis* and Article 1.3 of the *Licensing Agreement*, the Complaining Parties submit that it is only in the event of conflict between the GATT 1994 and a provision of another Annex 1A agreement (such as the *Licensing Agreement*), that the provision of the latter agreement prevails.

(f) Hurricane Licences

71. Furthermore, the Complaining Parties assert that the Panel correctly found that hurricane licences created an incentive to purchase EC bananas in violation of Article III:4 of the GATT 1994. Operators that purchase EC bananas can expect in the event of a hurricane to be compensated for both their lost volume in the form of extra "hurricane licences" and with respect to their reference quantities for purposes of future licensing entitlement. Therefore, operators are being encouraged, by way of hurricane licences, to purchase EC bananas instead of "Latin American bananas" in violation of Article III:4

of the GATT 1994. According to the Complaining Parties, irrespective of the impact hurricane licences may have had on the tariff quota, the incentive such licences create to purchase EC bananas is a clear, discriminatory modification of conditions of competition in violation of Article III:4 of the GATT 1994. Finally, the Complaining Parties assert that WTO Members are entitled to afford "occasional protection against the effects of natural disasters", but they may not do so through discriminatory measures that encourage the purchase of EC bananas.

72. The Complaining Parties assert that the Panel properly concluded that there is nothing in Protocol 5 that suggests that the European Communities is required to apply other factors to increase the shares of ACP countries above their best-ever export levels before 1991. They argue further that the plain language of Article 1 of Protocol 5 makes clear that it means past and present ACP "access to its traditional markets and its advantages on those markets," and not pending or contemplated ACP investments in production that may or may not materialize at some future time in the form of trade in the EC market. The Complaining Parties contend that operator category rules were not formerly enjoyed by ACP countries, and are not required to provide access to traditional markets, and that there are other methods consistent with WTO rules by which the European Communities could assist the ACP countries in competing in the EC market. During the Panel proceedings, the European Communities declined to put forward any facts relating to the "past" "situation" concerning import licence systems. The Complaining Parties argue that even if this "factual" issue is reviewable, the EC's belated assertion that licences for third-country banana imports "were a permanent market management system" is inconsistent with statements made during the Panel proceedings.

2. *General Agreement on Trade in Services*

(a) Threshold Legal Issues

73. With respect to all issues concerning the GATS raised in this appeal, the Complaining Parties argue that the Panel was correct. The Complaining Parties ask the Appellate Body to affirm the Panel's findings on the GATS.

74. The Complaining Parties submit that the ordinary meaning of the GATS, in its context, establishes that it has a broad scope and that the Panel correctly concluded that the GATS applies to all measures affecting the marketplace for services, including services measures that also relate to goods. The ordinary meaning of the term "affecting" is "having an effect on" or "having an impact on". The Complaining Parties contend that the negotiators of the GATS clarified the inclusive nature of the terms "trade in

services" and "supply of a service" by adding the illustration found in Article XXVIII(c) of the GATS and, that this, together with the ordinary meaning of the term "affecting", makes plain that the scope of the GATS is "as sweeping as possible". The Complaining Parties argue that the European Communities is incorrect in claiming that "affecting" and "in respect of" are used in parallel in Article XXVIII(c) of the GATS. What follows the phrase "affecting" is "trade in services" and, by contrast, what follows the phrase "in respect of" is not "trade in services". The Panel was, therefore, correct in rejecting the EC's argument.

75. The Complaining Parties also maintain that this broad ordinary meaning is confirmed by the broad interpretation of Article III of the GATT by previous panels. The Complaining Parties maintain that the drafters of the GATS were generally familiar with such basic GATT concepts[35], and that this includes the Note by the GATT Secretariat issued to the GATS negotiators.[36] A Secretariat Note of this sort, issued generally to all delegations participating in the negotiations, is a legitimate part of the preparatory work of the GATS for the purpose of confirming the ordinary meaning of the text -- in this case, its broad scope.

76. The Complaining Parties submit that the Panel properly found that the mutual exclusivity of the GATT 1994 and the GATS would be fundamentally at odds with the object and purpose of both agreements. In support of this argument, the Complaining Parties set out a number of "goods measures" that do not directly regulate a service *per se*, but place foreign-owned firms at a distinct competitive disadvantage.[37] The acceptance of the argument of the European Communities that measures regulating goods are excluded from the GATS disciplines would seriously erode service commitments made in the goods distribution sector -- both wholesaling and retailing. The Complaining Parties maintain that the entire sector is devoted to the distribution of goods and that measures affecting this sector will, by definition, have a direct or indirect connection with goods. In support of their argument as to the possibility of "overlaps" between the GATT 1994 and the GATS, the Complaining Parties refer also to the Appellate Body Report in *Canada - Certain Measures Concerning Periodicals* ("*Canada - Periodicals*").[38]

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[35]The Complaining Parties refer in particular to the panel report, *Italian Agricultural Machinery*, adopted 23 October 1958, BISD 7S/60.

[36]*Definitions in the Draft General Agreement on Trade in Services*, Note by the Secretariat, MTN.GNS/W/139, 15 October 1991, para. 12.

[37]Complaining Parties' appellee's submission, para. 193.

[38]WT/DS31/AB/R, adopted 30 July 1997.

77. In response to the arguments of the European Communities concerning anti-dumping duties and preferential treatment of goods under free trade agreements, the Complaining Parties submit that the relevance of these arguments is not clear as the GATS violations in this case were not based on the fact that the European Communities provided greater market access to EC and ACP bananas than to "Latin American bananas". In reply to the argument by the European Communities on the GATT exceptions and waivers, the Complaining Parties submit that the Panel properly described this issue not as a fundamental issue of overlap between the GATT 1994 and the GATS, but rather as an issue of the "appropriate drafting of waivers". With respect to the EC's argument concerning scheduling, the Complaining Parties maintain that, had the negotiators understood that all goods-related measures were automatically exempted from the GATS, they would not have extended the GATS to include entire sectors -- such as distribution and freight transportation -- devoted entirely to the sale and movement of such goods. Finally, in response to the argument by the European Communities on the absence of any provision in the WTO agreements to resolve conflicts between the GATT 1994 and the GATS, the Complaining Parties submit that the framers of the GATS did not adopt a rule of exclusivity, and thus some sort of "unspoken hierarchy", because they did not perceive any "overlap" to have any significant consequences.

78. The Complaining Parties submit that the Panel correctly concluded that Article II of the GATS applies to instances of *de facto* discrimination. The Complaining Parties argue that the phrase "treatment no less favourable" in Article II of the GATS is unqualified and therefore not limited to measures embodying *de jure* discrimination, but rather by its terms applies to *all* less favourable treatment, whether or not the fact that it is less favourable is apparent from the face of the measure. The Complaining Parties agree also with the Panel that Article III of the GATT 1994 is an important context for the interpretation of Article II of the GATS, and that the prior interpretation of the phrase "treatment no less favourable" in Article III:4 by GATT panels confirms the broad plain meaning of the same phrase as used in Article II of the GATS. Article II:2 of the GATS and the Annex on Article II Exemptions, which set out elaborate listing and review procedures for MFN exemptions, provide additional relevant context. The Complaining Parties observe that it is difficult to imagine why the negotiators would provide such procedures if Members were at liberty to adopt discriminatory measures in any event, escaping coverage of Article II unless the discrimination is "formal" in design. The Complaining Parties also support the Panel's reasoning in that the additional paragraphs 2 and 3 in Article XVII of the GATS neither add to, nor subtract from, the "treatment no less favourable" standard. The Complaining Parties agree with the Panel in that the narrow "formal" interpretation of the MFN standard in Article II:1

of the GATS would be incompatible with its non-discrimination objective and purpose. The negotiating history of the MFN clause in the GATS confirms that the "treatment no less favourable" standard was intended to require effective equality of opportunities and that the GATS negotiators were made fully aware that it had been interpreted in that way by the panel report in *United States - Section 337*.[39] In support of this argument, the Complaining Parties refer to a Note by the GATT Secretariat reviewing various non-discrimination concepts in the context of offering possible MFN options for the Group of Negotiations on Services.[40]

(b) Application of GATS to the EC Licensing System

79. The Complaining Parties submit that the Panel correctly concluded that the EC licensing rules affected trade in wholesale trade services. In response to the EC's argument relating to the coverage of the definition of wholesale trade services, the Complaining Parties argue that, in fact, buying directly affects selling, and that if a wholesaler cannot buy bananas, he cannot sell them. The Complaining Parties submit that the EC's argument on integrated companies is irrelevant since the Complaining Parties demonstrated that their main distribution companies distributed bananas they had purchased from independent Latin American growers, in addition to bananas they grew themselves. In so far as trade in wholesale services for bananas was affected through import licences, the banana regime effectively regulated the access of banana wholesalers to the most important item they needed to provide wholesale trade services -- namely, bananas.

80. The Complaining Parties contend that the Panel properly concluded that operator category rules, activity function rules and hurricane licences modify competitive conditions in favour of EC and ACP wholesale distribution firms in comparison to like third-country firms and are, therefore, inconsistent with both Articles II and XVII of the GATS. The Complaining Parties do not agree with the EC's "aims and effects" argument. The Complaining Parties note that the European Communities did not take this position before the Panel, that the European Communities does not indicate what in the text of the GATS calls for such an inquiry, and that the Appellate Body has found previously that the proper inquiry in applying the national treatment principle of Article III:1 of the GATT 1994 is not a measure's "aim and effect" but rather an examination of "… the underlying criteria used in a particular … measure,

[39]Adopted 7 November 1989, BISD 36S/345, para. 5.11.

[40]*Most-Favoured-Nation Treatment and Non-Discrimination Under The General Agreement on Tariffs and Trade*, Note by the Secretariat, MTN.GNS/W/103, 12 June 1990.

its structure, and its overall application to ascertain whether it is applied in a way that affords protection to domestic products".[41]

81. In response to the argument by the European Communities that the aim of operator categories is to encourage "interpenetration" of markets, the Complaining Parties contend that this statement ignores the one-way transfer to EC and ACP firms of an entitlement to a portion of the business that had historically been in the hands of the Complaining Parties' distributors. The Complaining Parties further submit that the market integration claim by the European Communities is legally irrelevant under Articles II and XVII of the GATS and that Article V of the GATS governing market integration does not relieve the European Communities from either its national treatment or its MFN obligation *vis-à-vis* ACP and third-country service suppliers. The Complaining Parties refer to the EC's argument that operator categories were motivated largely by the legitimate need to promote competition by distributing quota rents "in a way which was not skewed by the existing market situation".[42] According to the Complaining Parties, this is just another way of saying that the European Communities wished to re-arrange the "existing market situation" by moving business and resources from one group of service suppliers to another. The Complaining Parties also argue that the European Communities did not justify operator categories on the basis of competition policy concerns in any of the relevant directives establishing the measure. In response to the EC's argument that operator categories do not have an inherently discriminatory effect, the Complaining Parties argue that this is an inappropriate effort by the European Communities to place factual issues before the Appellate Body. In their view, operator categories are "inherently" discriminatory despite the EC's argument that all suppliers are on an equal footing to compete for access to supplies of the EC and ACP bananas. Unlike the wholesalers of the Complaining Parties, those of the European Communities and the ACP States are not required to initiate new business relationships in new regions in order to win back their traditional business.

82. With respect to the real design and operation of activity function allocations, the Complaining Parties submit that, since the Panel's assessment was in large part a factual inquiry, the Appellate Body should not interfere lightly with it. In response to the EC argument on the prevention of concentration of economic bargaining power in the hands of the large multinational companies, the Complaining Parties argue that this confirms the Panel's analysis that the allocation to ripeners was in fact *designed*

[41]Appellate Body Report, *Japan - Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, p. 29.

[42]EC's appellant's submission, para. 311.

to tilt the competitive environment against the Complaining Parties' firms. Furthermore, the Complaining Parties reject the argument by the European Communities that there were various opportunities available to avoid actual loss of market share, as such options involve substantial cost merely to regain former business. As a result, Complaining Parties' firms have a competitive disadvantage over EC firms which have not been required to make purchases or investments in order to retain their traditional banana business.

83. With respect to the allocation of hurricane licences, the Complaining Parties do not question the legitimacy of providing relief in the case of natural disasters, but rather the mechanism the European Communities has chosen to provide disaster relief. The Panel correctly found that this mechanism, in fact, increases the already large and discriminatory 30 per cent share of the tariff quota given predominantly to firms from the European Communities and the ACP States. However, the mechanism for hurricane licences places firms of the Complaining Parties' origin at a competitive disadvantage *vis-à-vis* EC and ACP operators from whom they package the licences.

84. In response to the EC's argument with respect to Article 28 of the *Vienna Convention*, the Complaining Parties argue that the Panel correctly characterized the measure at issue as continuing measures which were, in some cases, enacted before the entry into force of the GATS, but which did not cease to exist after that date. In its commentary on the final draft of the *Vienna Convention*, the International Law Commission recognized that such measures fall outside the scope of Article 28 of the *Vienna Convention*.[43] Concerning market shares, the Complaining Parties argue that the Panel necessarily had to base its analysis on trade data pertaining to a period several years earlier than the entry into force of the GATS, as the EC regime awards import rights based on *historical trade*.

85. With respect to the issue of the burden of proof, the Complaining Parties argue that, to the extent the Appellate Body can consider the claims raised by the European Communities to constitute an issue of law within its mandate under Article 17.6 of the DSU, the European Communities does not show how the Panel's rendering of its factual findings constitutes a legal error that the Appellate Body should reverse. The Complaining Parties observe that the Appellate Body in *United States - Shirts and Blouses from India*[44] declined to define a uniform set of facts needed to create the presumption of a violation, let alone the quantum of support needed to establish any particular fact given in the

[43]The Complaining Parties refer to the *Yearbook of the International Law Commission*, Vol. II (1966), p. 212.

[44]WT/DS33/AB/R, adopted 23 May 1997.

case. The Complaining Parties argue as well that the Panel based its evidentiary finding on a methodical, issue-by-issue examination of the evidence presented on the record, accurately described the information in the record and explained how, on the key facts, the European Communities had not rebutted the information submitted by the Complaining Parties. The Panel correctly concluded that Del Monte was Mexican-owned and that the relevance to the Panel's conclusion of a suggested alteration of Del Monte's status during the Panel's proceeding was not clear. The Complaining Parties further submit that there is no specific test required by the GATS concerning the ownership of ongoing companies.

86. The Complaining Parties argue that, with respect to ownership and control of service suppliers established in the European Communities, the Complaining Parties submitted to the Panel an array of corroborative information[45] which the Panel properly determined to be credible and sufficient. The Complaining Parties argue that the European Communities had not even asserted any point that contradicted the Complaining Parties' facts. The Complaining Parties maintain that the Panel correctly based its finding concerning market shares on the import and production markets, as it is this activity that generates entitlements to import licences as "primary importers". With respect to hurricane licences, the Complaining Parties assert that the European Communities should not be allowed to re-open this issue on appeal, as it never sought to dispute the identification of Category B operators (both of EC and ACP origin) as recipients of hurricane licences by the Complaining Parties during the Panel proceeding.

3. Procedural Issues

(a) Request for Establishment of a Panel

87. The Complaining Parties submit that the Panel correctly found that the request for the establishment of a panel satisfied the requirements of Article 6.2 of the DSU. In response to the EC's arguments on specificity and the necessity of showing an explicit link between each measure and the article allegedly infringed, the Complaining Parties point out that there is no agreed WTO definition of the terms "specific measures at issue" and that, under the practice of the GATT 1947 CONTRACTING PARTIES, most requests for the establishment of a panel contained no explanation of how certain measures are inconsistent with the requirements of the specific agreements. The Complaining Parties also submit that the Panel correctly determined that the request was sufficiently precise to fulfil the

[45]The Complaining Parties refer to Exhibit E of their joint rebuttal submission.

three identified purposes of a panel request[46] by enabling the Panel to understand without difficulty which claims it was required to examine, by adequately informing the European Communities of the case against it, and by adequately informing third parties of the case against the European Communities.

(b) Right of the United States to Advance Claims under the GATT 1994

88. The Complaining Parties argue that the Panel correctly found that the United States has a right to advance "goods claims" in this dispute. The Complaining Parties submit that the European Communities appears to use the term "legal interest" as a "short-hand reference" for its arguments regarding United States' export interests in bananas and seems to stipulate an additional requirement that a complaining party must plead and prove nullification or impairment as a precondition for raising a claim. The Complaining Parties contend that neither Article XXIII of the GATT 1994 nor Articles 3.3 or 3.7 of the DSU contain any explicit requirement that a Member must have a "legal interest" in order to request a panel and that other provisions in the DSU, such as Article 3.8, confirm the absence of such a prerequisite. In addition, the "substantial interest" standard in Article 10.2 of the DSU on third-party participation is irrelevant because the rights of third-party participation and its purpose are fundamentally different from those of the parties to the dispute.

89. Moreover, the Complaining Parties contend that the European Communities was fundamentally mistaken in suggesting that "general" international law, requiring a legal interest to bring a claim, is operative in this case. The Complaining Parties observe that Article 3.2 of the DSU encompasses only customary rules of *interpretation* of public international law. Therefore, consistently with Article XVI:1 of the *WTO Agreement*, the Panel found that, in the absence of an explicit legal interest requirement in the *WTO Agreement*, GATT practice was relevant. As the Complaining Parties see it, in GATT practice, a wide variety of interests is permitted to support a claim.[47] The Panel noted that the United States does produce bananas in Hawaii and Puerto Rico, and that, even if the United States did not have a potential export interest, its internal market for bananas could be affected by the EC regime because of the potential effect on world prices. In the view of the Complaining Parties, the EC's arguments on the issue of the United States' trade interests contradict the EC's own past position in

[46]The Complaining Parties refer to the Appellate Body Report, *Brazil - Measures Affecting Desiccated Coconut* ("*Brazil - Desiccated Coconut*"), WT/DS22/AB/R, adopted 20 March 1997, p. 22, and argue that the discussion in that Report is equally relevant to requests for panels with standard terms of reference under Article 7.1 of the DSU.

[47]The Complaining Parties refer to the Report by the Working Party on *Brazilian Internal Taxes*, adopted 30 June 1949, BISD II/181, para. 16.

United States - Restrictions on Imports of Tuna.[48] The European Communities claimed in that case that any time a country produces a product, even if the application of another country's measure is only hypothetical, the potential effect on price in its market gives rise to a "legal interest".

90. The Complaining Parties submit further that the jurisdictional clause of Article XXIII of the GATT 1994 specifically applies to all WTO Members, and that Article 3.2 of the DSU specifically states that the WTO dispute settlement system "serves to preserve the rights and obligations of Members under the covered agreements".

(c) Nullification or Impairment

91. The Complaining Parties submit that the Panel correctly found that the numerous violations by the European Communities of the GATT 1994, the *Licensing Agreement* and the GATS have nullified or impaired benefits the United States is entitled to derive from those agreements. The Panel properly identified several areas in which benefits to the United States would be nullified or impaired by noting that the United States produces bananas in Puerto Rico and Hawaii and by finding that the violation by the European Communities of the WTO agreements could adversely affect the United States' internal market. The Complaining Parties also argue that the Panel justifiably cited the reasoning in *United States - Taxes on Petroleum and Certain Imported Substances*[49] ("*United States - Superfund*") in support of its finding that the European Communities had failed to rebut the presumption of nullification or impairment.

92. The Complaining Parties submit that the Panel noted a WTO Member's "interest in a determination of rights and obligations under the WTO Agreement". The Complaining Parties maintain that Article 3.7 of the DSU makes clear that it is for the complaining Member to decide whether to pursue dispute settlement and, if necessary thereafter, whether to pursue rights to suspend concessions. More precision of the level of nullification or impairment becomes necessary only in the case where concessions are suspended under Article 22.4 of the DSU, because that provision requires that the level of suspension of concessions shall be equivalent to the level of nullification or impairment. According to the Complaining Parties, in the absence of a mutually-agreed solution, the first objective of dispute settlement is to secure the withdrawal of the inconsistent measure. This objective is not

[48]DS29/R, 16 June 1994, unadopted.

[49]Adopted 17 June 1987, BISD 34S/136, para. 5.1.9.

linked to the level of nullification or impairment, but to whether the measure at issue is inconsistent with WTO obligations.

C. *Ecuador, Guatemala, Honduras, Mexico and the United States - Appellants*

93. The Complaining Parties generally agree with the Panel's findings but consider that there are three conclusions that stand out in the Panel Reports as being unsupported by the relevant legal texts and customary principles of treaty interpretation, and are thus manifestly erroneous findings of law.

1. Scope of the Lomé Waiver

94. The Complaining Parties argue that the "ordinary meaning" of the Lomé Waiver, read in its context and in the light of its purpose, is clear, not ambiguous or obscure. The Lomé Waiver clearly and specifically waives Article I:1 of the GATT 1994 and no other provision of the *WTO Agreement*. According to the Complaining Parties, the Panel's overall approach in interpreting the Lomé Waiver was fundamentally flawed in two ways: first, it ignored the ordinary meaning of the text, and this is only allowed when the ordinary meaning would lead to a result that is "manifestly absurd or unreasonable"; and second, the Panel focused its analysis on speculation about the objective of the Lomé Waiver and the intentions of the parties seeking the Lomé Waiver, rather than on the text. The Complaining Parties contend that under the *Vienna Convention*, a treaty's object and purpose are to be considered in determining the meaning of the terms of the treaty but not as an independent basis for interpretation.

95. Furthermore, the Complaining Parties argue that in deciding that the Lomé Waiver applies to violations of Article XIII of the GATT 1994, the Panel disregarded the EC's express denial that the Lomé Waiver covers violations of Article XIII of the GATT 1994 in favour of what it infers to have been the EC's intentions in seeking the Waiver. However, the "object" of a treaty is that of all the parties, not the presumed intentions that might be attributed to only some of those parties. The Complaining Parties also assert that the rules governing the administration of quantitative restrictions in Article XIII are not analogous or "close" to the MFN provision of Article I of the GATT 1994. Instead, the specific rules in Article XIII are in fact an outgrowth of Article XI of the GATT 1994. The Complaining Parties argue that therefore, the Panel's reliance on "a general principle requiring non-discriminatory treatment" shared by Articles I and XIII of the GATT 1994 is "misguided". The Lomé Waiver does not state that the "principles" of Article I:1 are waived; it states that the "provisions"

of that article are waived. A waiver analysis based on loose analogies among various non-discrimination/MFN-like obligations would extend a waiver from Article I well beyond Article XIII of the GATT 1994. MFN-like disciplines could also include Article V:5 on transit of goods, Article IX:1 on marks of origin and Article XVII:1 on state trading. The Complaining Parties maintain that GATT practice shows two things: that the non-discriminatory disciplines in Article XIII are distinct[50]; and that in 50 years the CONTRACTING PARTIES granted only *one* waiver in respect of Article XIII of the GATT 1994.[51] Consequently, the Complaining Parties conclude that the negotiating history and circumstances of the Lomé Waiver's adoption provide no support for disregarding the plain meaning of the text of the Waiver.

2. Measures "required" by the Lomé Convention

96. The Complaining Parties contend that the trade in bananas is exclusively regulated by Article 183 of the Lomé Convention and by Protocol 5. The Complaining Parties argue that Article 168(2)(a)(ii) of the Lomé Convention only applies to products listed in Annex XL, and this list does not include bananas. The Complaining Parties maintain furthermore that Annex XXXIX confirms the limited scope of Article 168(2)(a)(ii) of the Lomé Convention. They also argued that the "more favourable" treatment provided for by Article 168(2)(a)(ii) has been separately and specifically negotiated between the parties on a product-by-product basis. This did not happen for bananas. If Annex XL does not provide a specific arrangement for a particular product, then there is no trade requirement for that product other than for the European Communities to consult with the ACP States on providing additional preferential access. The Complaining Parties assert that Article 183 and Protocol 5 deal with both traditional and non-traditional ACP bananas. They argue that the text of these provisions shows in several ways that they contain the entirety of the EC's undertakings concerning all bananas from all ACP countries. In the view of the Complaining Parties, the ECJ Judgments in *Federal Republic of Germany v. Council of the European Union* ("*Germany v. Council*"), and in *Administrazione delle Finanze delle Stato v. Chiquita* ("*Chiquita Italia*")[52] support the proposition that Protocol 5 is *lex specialis*, not only in respect of trade in traditional ACP bananas, but also in relation to all bananas. Therefore, the ordinary meaning

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[50]In support of their argument the Complaining Parties refer to the Working Party on *Import Restrictions Imposed by the United States Under Section 22 of the United States Agricultural Adjustment Act* ("*United States - Section 22*"), adopted 5 March 1955, BISD 3S/141, p. 144; and to the *Waiver on the Caribbean Basin Economic Recovery Act*, Decision of 15 February 1985, BISD 31S/20, p. 22.

[51]*Waiver Granted in Connection with the European Coal and Steel Community*, Decision of 10 November 1952, BISD 1S/17, para. 3.

[52]Case C-280/93, *Germany v. Council*, Judgment of the Court of 5 October 1994, ECR 1994, p. I-4973; and Case C-469/93, *Chiquita Italia*, Judgment of the Court of 12 December 1995, ECR 1995, p. I-4533.

in the context of the relevant provisions of the Lomé Convention, confirmed by the application of the *lex specialis* principles of interpretation, shows that the Lomé Convention's only "trade instruments" on bananas are those set forth in Protocol 5, and that Protocol 5 contains no requirements with respect to non-traditional bananas.

97. The Complaining Parties also maintain that, if Article 168(2) of the Lomé Convention is read to require preferences for ACP bananas in addition to those set out in Protocol 5, it renders useless the strict limitations on preferential treatment of Protocol 5 for traditional ACP States. The Complaining Parties agree that during the first 18 years of the Lomé Convention (1975-1992), the trade provisions of Article 168(1) and 169(1) were not considered by the parties to be applicable to bananas. Therefore, it was incorrect of the Panel to conclude that Article 168(2) has become applicable since that time. In support of these arguments, the Complaining Parties refer to EC and ACP official statements reflecting a recognition that Protocol 5 alone governs the treatment of banana imports and that the Lomé Convention does not require preferential treatment for non-traditional ACP bananas.

3. GATS Claims of Guatemala, Honduras and Mexico

98. The Complaining Parties submit that the claims excluded were fully within the Panel's terms of reference under Article 7.1 of the DSU, as set out in the joint request for the establishment of a Panel in document WT/DS27/6. There is no provision analogous to Article 7 of the DSU for first written submissions and therefore, the Panel has impermissibly imposed an additional obligation on the Complaining Parties, contrary to the DSU, by requiring that all claims are spelled out in a complaining party's first written submission. The Complaining Parties note further that since the claims were within the Panel's terms of reference, there was no issue of unfair surprise to the detriment of the European Communities in the light of the simultaneous filing of rebuttal submissions pursuant to Article 12(c) of the *Working Procedures* in Appendix 3 to the DSU.

4. Scope of the Appeal

99. In an additional submission[53], Ecuador submits that the findings of the Panel in paragraph 7.93 of the Panel Reports concerning Ecuador's right to invoke Article XIII:2 or XIII:4 of the GATT 1994 are not addressed in the Notice of Appeal and that there was no argumentation on this issue in the EC's appellant's submission, except for in its "conclusions" section. Ecuador contends that the European

[53]Under Article 22(1) of the *Working Procedures.*

Communities did not comply with the requirements in Rule 20(2)(d) of the *Working Procedures* and, as a result, did not conform with its "due process objectives" as set out by the Appellate Body in its Report in *Brazil - Measures Affecting Desiccated Coconut*.[54] Therefore, Ecuador asks the Appellate Body to exclude this issue from the appeal.

D. *European Communities - Appellee*

1. Lomé Waiver -- Traditional ACP Bananas

100. The European Communities agrees with the Panel that Article I of the GATT 1994 is a "general principle requiring non-discriminatory treatment". The European Communities maintains, however, that Article XIII cannot be assumed to be a "subset" of Article I:1 of the GATT 1994, and submits that the Complaining Parties do not contest this.[55] There are separate GATT 1994 and other WTO provisions, such as Article X and XIII of the GATT 1994 and 1.3 of the *Licensing Agreement* which, even though they are MFN or non-discrimination obligations, have their own *raison d'être* and scope and cannot be regarded as mere duplications of each other. The European Communities contends that the circumstances surrounding the negotiation of the Lomé Waiver clearly show that those involved in the negotiations must have been aware and must have recognized that there were, in fact, two different import regimes for bananas. The European Communities never explicitly requested a waiver for Article XIII of the GATT 1994 for the simple reason that there was no reason, logical or legal, for doing so. The European Communities was convinced that the provisions of Article XIII refer primarily to the allocation of a particular quantitative restriction or tariff rate quota and not to a generic non-discrimination principle. In such a situation, the question of whether the Lomé Waiver needed to contain an exemption not only from Article I, but also from Article XIII of the GATT 1994, never entered into consideration. Therefore, the Panel's finding that both regimes constitute one regime to which Article XIII should be applied across the board is fundamentally at odds with the circumstances under which the Lomé Waiver was negotiated.

101. Finally, the European Communities observes that the Panel was correct in seeing a link between Articles I:1 and XIII:1 of the GATT 1994. Otherwise, the specific language of the Lomé Waiver referring to "preferential treatment", and not merely to "preferential tariff treatment", would be deprived

[54]WT/DS22/AB/R, adopted 20 March 1997.

[55]The European Communities, in its oral presentation to the Appellate Body at the oral hearing, refers to the Complaining Parties' appellant's submission, para. 40.

of any meaning. The European Communities submits that the principle of strict interpretation of exceptions to the GATT 1994 should be applied to the text of the Lomé Waiver, but not to the text or the content of the Lomé Convention, as the latter is not *per se* an exception to the GATT 1994 or the other WTO agreements. The Lomé Convention is an autonomous international agreement which does not stand in a hierarchical relationship with the GATT 1994, and in respect to which a panel or the Appellate Body is not authorized to give a restrictive interpretation. In the view of the European Communities, insofar as WTO "quasi-judicial organs" need to understand the Lomé Convention in order to understand the Lomé Waiver, such organs should exercise judicial restraint and, in principle, defer to the interpretations of the parties to the Lomé Convention.

2. Lomé Waiver -- Preferential Treatment of Non-Traditional Bananas

102. The European Communities submits that the discretion existing under Article 168(2)of the Lomé Convention, limiting its tariff obligations to provide a preferential margin on the MFN duty applied to third-country importation, is unlimited *vis-à-vis* its ACP partners. The European Communities argues that it must take into account the objectives of Article 168 and apply that Article in good faith by securing an effective additional advantage to the ACP-originated bananas when compared to the *erga omnes* tariff treatment.

103. With respect to the arguments of the Complaining Parties about what is "required" under the Lomé Waiver, the European Communities asserts that before 1 July 1993, Article 168(1) of the Lomé Convention applied to ACP bananas and that ACP bananas could therefore be imported duty-free. Since 1 July 1993, Article 168(2)(a)(ii) has applied to ACP bananas and ACP bananas thus enjoy "a preference" compared to the MFN-duty rate for third-country bananas. The European Communities argues that Annex XL of the Lomé Convention spells out the "intention" of the European Communities with respect to "certain" agricultural products covered by Article 168(2)(a)(ii). Therefore, Annex XL merely serves the purpose of clarifying the future tariff treatment for the listed products. That list is by no means exhaustive. The European Communities submits further that Protocol 5 provides for preferential treatment over and above the basic tariff preferential treatment. In the view of the European Communities, Article 168(2)(a)(ii) is not applicable to traditional bananas as these are subject to Protocol 5 which provides for more preferential treatment. However, Article 168(2)(a)(ii) remains applicable to non-traditional ACP bananas. In response to the reference by the Complaining Parties to the ECJ's judgments in *Germany v. Council* and in *Chiquita Italia*, the European Communities contends that those judgments do not support the proposition that Protocol 5 is *lex specialis*, not only in respect of the trade in traditional ACP bananas, but also in relation to all bananas.

104. Finally, the European Communities maintains that, in the light of the circumstances surrounding the discussions leading up to the granting of the Lomé Waiver, the partners of the European Communities in these discussions must have been perfectly aware that the treatment of the non-traditional ACP bananas was considered to be part and parcel of the preferential treatment granted by the Lomé Convention.

3. GATS Claims of Guatemala, Honduras and Mexico

105. The European Communities submits that the Panel acted lawfully when it excluded the GATS claims raised by the United States on behalf of Guatemala, Honduras and Mexico. The European Communities asserts that if claims are dropped at the stage of the first submission, the complaining party has voluntarily narrowed the scope or the number of claims originally contained in the request for the establishment of a panel. Once the defendant has relied on the dropping of a claim in the first submission, the complaining party is estopped from bringing it up again. Referring to the Appellate Body's ruling in *United States - Shirts and Blouses from India*[56] that for reasons of judicial economy a panel need not decide every claim contained in the terms of reference if it can decide the case without doing so, the European Communities submits further that *a fortiori* a panel must have the power to omit claims from consideration because they have voluntarily been dropped from the first submission. A panel is the master of its own procedure; its procedural rulings can only be quashed if they are contrary to the fundamental principle of proper procedure or to the provisions of the *WTO Agreement*. Lastly, the European Communities argues that a panel ruling on claims not properly advanced in the first written submission would have been contrary to Article 9.2 of the DSU requiring a panel to "organize its examination … in such a way that the rights which the parties to the dispute would have enjoyed had separate panels examined the complaints are in no way impaired".

III. Arguments of the Third Participants

A. *Belize, Cameroon, Côte d'Ivoire, Dominica, Dominican Republic, Ghana, Grenada, Jamaica, Saint Lucia, St. Vincent and the Grenadines, Senegal and Suriname*

106. Belize, Cameroon, Côte d'Ivoire, Dominica, Dominican Republic, Ghana, Grenada, Jamaica, Saint Lucia, St. Vincent and the Grenadines, Senegal and Suriname disagree with certain of the legal

[56]WT/DS33/AB/R, adopted 23 May 1997, p. 18.

findings and conclusions of the Panel and request the Appellate Body to take into consideration some issues of principal concern to the ACP third participants. However, the ACP third participants also endorse all the positions advanced by the European Communities in this appeal.

107. The ACP third participants assert that the Panel erred in law in finding that the Complaining Parties' request for the establishment of a panel was sufficient to meet the requirements of Article 6.2 of the DSU. The ACP third participants maintain that the panel request by the Complaining Parties contains only "bare allegations of inconsistencies" and does not provide, as required by Article 6.2 of the DSU, the summary of a legal basis for the allegations. They submit that this breach severely prejudiced the ACP third participants. They argue further that the ordinary meaning of Article 6.2, the context and its object and purpose did not justify the Panel's decision. In particular, the ACP third participants assert that it is not the Panel's function to cure errors in the submissions of the Complaining Parties to the disadvantage and prejudice of third parties or respondents. With respect to the function of Article 6.2 of the DSU, the ACP third participants contend that the Panel misunderstood the purpose that a third party has in "participating" in the panel proceedings, which is to make submissions to the Panel to protect vital national interests. Article 6.2 plays a fundamental role in enabling third parties to prepare their submissions to the panel adequately. In addition, the ACP third participants argue that the Panel erred in law by not recognizing that a legal interest test is a principle of international law, and that it is implicit in Article XXIII:1 of the GATT 1994 as well as in Articles 3.7, 4.11 and 10.2 of the DSU. It would be clearly against the intention of the drafters of the *WTO Agreement* to permit a Member to be a complaining party if that Member has a lesser interest than that required to join consultations or participate as a third party. Finally, the ACP third participants contend that a legal interest test is a practical necessity in order to avoid a proliferation of cases initiated by Members with no immediate trade interest in the results of the disputes.

108. In the view of the ACP third participants, the Panel precluded them from properly representing their interests and thereby tainted the entire proceeding. The ACP third participants assert that the right to observe at the first and second substantive meetings of the Panel with the parties did not permit full and adequate representation of their interests. Previous GATT practice recognizes that parties with interests such as those of the ACP third participants should be given full participatory rights; this practice is also supported by Articles 2, 3.2, 10.1, 11, 12.2, and 13.1 of the DSU. They add that the Panel's decision of 10 September 1996, prohibiting the participation of private counsel serving

on the delegation of Saint Lucia in panel meetings, violated the general principle of international law that sovereign states are free to choose the representation of their choice.[57]

109. The ACP third participants submit that the Panel erred in law in its interpretation of the scope and coverage of the Lomé Waiver and the entitlements of ACP States in respect of both traditional and non-traditional quantities of bananas under the Lomé Convention. With respect to the interpretation of the EC's obligations under Article I of the GATT 1994, the ACP third participants take the view that the purpose of the Lomé Waiver was not properly considered by the Panel. In particular, the Panel did not acknowledge the fact that the sole purpose of obtaining the Waiver was to deal with the findings of the panel report in *EEC - Import Regime for Bananas*.[58] The ACP third participants argue that the Panel added the word "clearly" to the text of the Waiver which was not contained there and that it improperly interpreted the phrase "as required". In addition, the Panel erred in interpreting recitals to the Lomé Waiver as conditions and in its finding that a waiver must be interpreted narrowly. The ACP third participants contend that the drafters of the GATT envisaged that the conditions under which waivers are granted might be interpreted narrowly, but that once a waiver is granted, and in view of the fact that this is only done in cases of an exceptional nature involving hardship, there is no ground to interpret narrowly actions permissible under international agreements protected by a waiver. The ACP third participants submit that the Panel misinterpreted the panel report in *United States - Restrictions on the Importation of Sugar and Sugar-Containing Products Applied Under the 1955 Waiver and Under the Headnote to the Schedule of Tariff Concessions* ("*United States - Sugar Waiver*").[59]

110. The ACP third participants also argue that the Panel erred in limiting the preference required to be granted to traditional ACP States under Protocol 5 and Article 168 of the Lomé Convention. In this respect, the ACP third participants submit: first, Protocol 5 should not be read in isolation; and second, before 1990, there were no quantitative limitations on ACP exports to traditional markets. Moreover, in the view of the ACP third participants, the Panel erred in its interpretation of the EC's obligations under Article 168 of the Lomé Convention and Protocol 5 in relation to non-traditional ACP bananas. The Panel even failed to consider the application of Article 168(2)(d) to such quantities.

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[57]In support of their argument, the ACP third participants refer to the *Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character*, done at Vienna, 14 March 1975, AJIL 1975, p. 730, as well as to the practice before other international adjudicatory bodies: See pp. 20 and 22 of the ACP third participants' submission and the Annex thereof.

[58]DS38/R, unadopted.

[59]Adopted 7 November 1990, BISD 37S/228.

In addition, prior to the introduction of Regulation 404/93, non-traditional ACP bananas benefited from more than the simple customs duties exemption. The benefits afforded to those suppliers in respect of quantities prior to 1995 must be protected within the new banana regime. The ACP third participants argue that Article 168(2)(a)(ii) of the Lomé Convention includes an obligation on the European Communities to adopt measures in relation to the importation of ACP agricultural products that give them a benefit over third-country agricultural products and ensure more favourable treatment, for which the level of preference is not specified. They assert that the Panel incorrectly assumed that Article 168 of the Lomé Convention only obliges the European Communities to provide tariff-free treatment. When read in conjunction with Articles 10 and 167 of the Lomé Convention, it is apparent that these provisions impose on the European Communities a form of "standstill" provision, stipulating that after the introduction of the banana regime, those benefits which had accrued previously to traditional ACP bananas must be maintained, not necessarily in form but in substance. The ACP third participants conclude that the provisions of Article 168 of the Lomé Convention confer on ACP agricultural products protection similar to that specifically provided for or reiterated in Protocol 5 for bananas. The interpretation by the European Communities of its obligations under the Lomé Convention cannot be considered very generous, but for the Complaining Parties to argue that there are no obligations in respect of non-traditional ACP bananas is to completely ignore the text of the Lomé Convention.

111. The ACP third participants assert that the scope of the Lomé Waiver must be interpreted as extending to EC licensing procedures, because those procedures are an integral part of the importation regime and are therefore saved by the Lomé Waiver from inconsistency with Article I:1 of the GATT 1994 as "rules and formalities in connection with importation". The ACP third participants argue that the EC licensing regime was necessary to give effect to the EC's obligations under the Lomé Convention. This holds true, in particular, under a correct interpretation of the obligations of the European Communities (other than in Article 168 of the Lomé Convention and Protocol 5) under Articles 10, 135 and 167 of the Lomé Convention. The ACP third participants contend that the Panel incorrectly determined that these commitments are of no legal effect. Additionally, the Panel erred in law and fact in finding that the EC licensing regime did not follow in *form* the previous national regimes, since, in the view of the ACP third participants, the licensing regime, as regards operator categories and activity function rules, is substantially similar to the previous historic arrangements. Also, the Panel was incorrect in its finding regarding the *substance* of the previous national regimes and their relations to the EC regime. The ACP third participants argue that in particular under the United Kingdom system, ACP producers were given substantial protection and, in effect, had a guaranteed outlet for their supplies in both the United Kingdom and the French markets. The ACP third participants conclude that it is

clear that a system which granted preferences in a superficial manner, but which, under the new factual circumstances of a single market, would make the demise of the ACP banana industry inevitable, would not meet the EC's obligations under Protocol 5.

112. The ACP third participants argue that the licensing regime is necessary because, in its absence, marketers of ACP bananas would have to compete with those of third-country bananas. ACP bananas will be unable to compete with third-country bananas because of the higher production and shipping costs of ACP bananas, and because of the risks caused by the "oligopolistic" structure of the market. The ACP third participants insist that when the Lomé Waiver is construed in the light of its object, purpose and context, it becomes clear that it saves from inconsistency any measure that is reasonably necessary to implement the EC's obligations to the ACP States under the Lomé Convention. The ACP third participants argue that the Panel erred in finding that the licensing procedures applied by the European Communities to traditional ACP imports, when compared to the procedures applied to imports of third-country and non-traditional bananas, can be considered an "advantage". According to the ACP third participants, the Panel was wrong to suggest that the "superficial differences" between ACP import rules and third-country import rules are of the same order as the very substantive disadvantage at issue in the *United States - Non-Rubber Footwear* case.[60] Additionally, in the view of the ACP third participants, the Panel erred both in its proper role in interpreting the Lomé Convention, and in its interpretation of the Lomé Convention.

113. Finally, the ACP third participants submit that the Panel misinterpreted the scope and application of the GATS. The ACP third participants contend that the Panel's interpretation of the term "affecting" in Article I:1 of the GATS ignored the fact that the GATS covers only the "production" of a service, i.e. trade in services as such. The ACP third participants add that the GATS was negotiated after the GATT 1994 in order to provide protection supplementary to that provided by the GATT 1994 and to address trade in the area of services not covered by the GATT 1994. Concerning the term, "wholesale trade services", the ACP third participants argue that this relates to reselling and involves a purchase and a subsequent sale. Vertically-integrated companies do not "resell". The ACP third participants assert that the scope of Article II:1 of the GATS does not extend to the modification of conditions of competition. In the view of the ACP third participants, the measures relating to operator categories, BFA export certificate requirements and hurricane licences were necessary to carry out the EC's obligations under the Lomé Convention.

[60]Adopted 19 June 1992, BISD 39S/128.

B. *Colombia*

114. Colombia's submission concerns three issues of law and legal interpretations addressed in the appeal of the European Communities. First, Colombia submits that the Panel erred in law in finding that the Complaining Parties' request for the establishment of a panel identified the specific measure at issue and presented the problem clearly within the meaning of Article 6.2 of the DSU. The almost complete listing of all the basic obligations under an agreement as submitted by the Complaining Parties does not provide any information on the legal basis of a complaint; it merely informs the reader that an inconsistency with the agreement is being claimed. Furthermore, in Colombia's view, the failure to observe the requirements of Article 6.2 of the DSU cannot be "cured" by clarifying the measure at issue and the legal basis of the complaint in the first submission to the panel. One of the most important functions of the requirements in Article 6.2 of the DSU is to enable other Members to decide whether to participate as third parties in the proceedings. This right cannot be exercised without sufficient information. In the event that such participation is not sought because the legal issues raised by the complaining party are insufficiently clear, a WTO Member who is a potential third party cannot subsequently exercise its right in the light of information contained in the first submission, since these are not made available to non-participants. In Colombia's view, for Members that decide not to participate in the proceedings because the request for the establishment of a panel was insufficiently clear, the subsequent clarification in the first submission can therefore not be described as a "cure" or an "efficient solution".

115. Second, Colombia contends that the Panel erred in law in finding that neither the inclusion of the tariff quota shares in the EC Schedule, nor the *Agreement on Agriculture*, permit the European Communities to act inconsistently with the requirements of Article XIII of the GATT 1994. Colombia submits that the review of the tariff quotas scheduled by the European Communities and the United States, which entail commitments negotiated with more than fifty other participants in the Uruguay Round, shows that few, if any, of these quota allocation commitments presently conform to the requirements set out in Article XIII of the GATT 1994. Therefore, in Colombia's view, it can be safely assumed that all quota allocation commitments made pursuant to the *Agreement on Agriculture* are actually or potentially inconsistent with Article XIII of the GATT 1994. Colombia submits that not only were quota allocations made irrespective of Article XIII, but also that Members have incorporated into their GATT 1994 Schedules tariff rates on agricultural products inconsistent with Article II:1(b) of the GATT 1994. In this respect, Colombia asserts that the Panel correctly found that "the tariff rates specified in the EC Uruguay Round Schedule are valid EC tariff bindings with respect to bananas", but that the Panel erred in its conclusion that the results of the Uruguay Round

override the results of previous tariff negotiations. Colombia contends that the Panel's interpretation does not take into consideration the requirements of the procedures under Article XXVIII of the GATT 1994 and makes redundant paragraph 7 of the *Marrakesh Protocol to the General Agreement on Tariffs and Trade 1994* (the "*Marrakesh Protocol*"). Colombia concludes that in the event of conflict between the GATT 1994 provisions and the *Agreement on Agriculture*, the applicable provision that guides market access concessions undertaken pursuant to the *Agreement on Agriculture* is Article 4.1 and not the GATT 1994. Colombia asserts that the Panel failed to recognize that, in Articles 1(g), 4.1 and 21 of the *Agreement on Agriculture*, the drafters of the *WTO Agreement* had given a clear expression of their intention that the results of the tariffication exercise should override the results of earlier negotiations. By basing itself on general principles of law, the Panel concluded that the legal consequences which the drafters intended to achieve only in the field of agriculture applied to all previous concessions, including those for industrial products.

116. Colombia further contends that, by interpreting Article 4.1 of the *Agreement on Agriculture* as "a statement of where market access commitments can be found", the Panel deprives not only this provision but also all the country allocation commitments made by or in favour of a majority of WTO Members of any legal relevance. In this event, Article 4.1 would have the mere function of a "signpost" indicating the "way to the schedules". Colombia asserts that the *Agreement on Agriculture* regulates the relationship between it and the scheduled commitments differently from the GATT 1994. While the GATT 1994 is a framework agreement for the incorporation of tariff bindings, the *Agreement on Agriculture* and the scheduled commitments negotiated under it constitute *together* the result of a negotiation on the first stage of agricultural reform. Colombia adds that the market access commitments made under the *Agreement on Agriculture* constitute, in large part, settlements of disputes on the interpretation and application of the provisions of the GATT 1947 that had arisen prior to the Uruguay Round and during the Uruguay Round negotiations. The provisions related to the BFA in the EC market access commitments are not designed to circumvent GATT 1994 provisions, but to settle past disputes on the EC banana regime and to forestall new ones. Finally, Colombia asserts that, by sanctioning the increase in tariff bindings, but not the quota allocations negotiated in conjunction with the tariff bindings, the Panel creates an imbalance in the outcome of the Uruguay Round negotiations on agriculture.

117. Third, Colombia questions whether in the present case the transfer of a quota rent from an importer to an exporter is an "advantage granted to a product" within the meaning of Article I of the GATT 1994. Colombia contends that the Panel correctly recognized that Article I of the GATT 1994 is concerned with the treatment of foreign *products* originating from different foreign sources rather

than with the treatment of the suppliers of these products, but that it fails to observe this distinction it has established. Colombia asserts that under the Panel's line of reasoning, financial advantages that might be passed on to producers are equated with competitive advantages accorded to the product, and the important legal distinction between advantages accorded to producers and those accorded to products is lost. Within the framework of a trade agreement such as the GATT 1994, different treatment of producers cannot be equated with different treatment of the products they produce. Therefore, in Colombia's view, the Panel incorrectly concluded that the quota rents generated from trade in bananas means that the EC licensing procedures constitute an "advantage granted to a product" within the meaning of Article I of the GATT 1994, as this can only be an advantage that changes the conditions faced by the product in the market of the importing Member. The mere transfer of quota rents from importers to exporters of other countries does not alter the conditions that the product sold by the exporters faces in the restricted market. Additionally, Colombia contends that it is not clear why the Panel referred to the panel report in *United States - Non-Rubber Footwear*[61]; the European Communities did not argue that there were two trade effects, one compensating the other, but only one possible trade effect relevant under Article I of the GATT 1994 that favoured the Complaining Parties. Colombia contends that the Panel dismissed an important point in an unreasoned manner and thereby failed to demonstrate how the competitive conditions for a product are improved when quota rents are transferred from importers to exporters under a regime which does not encourage an increase in exports of that product.

C. *Costa Rica and Venezuela*

118. Costa Rica and Venezuela submit joint legal arguments with respect to the relationship between Articles 4.1 and 21.1 of the *Agreement on Agriculture* and Article XIII of the GATT 1994. They argue that the tariff bindings and tariff quota allocations resulting from the Uruguay Round negotiations on agriculture are in large part inconsistent with Articles II and XIII of the GATT 1994. These inconsistencies are justified only if there is a provision in the *WTO Agreement* according to which tariff bindings and other market access concessions made pursuant to the *Agreement on Agriculture* override the obligations under Articles II and XIII of the GATT 1994. In Costa Rica's and Venezuela's view, Articles 4.1 and 21.1 of the *Agreement on Agriculture* are the legal expression of the intent of the drafters to give legal effect to all market access concessions incorporated in the Schedules of Concessions. Costa Rica and Venezuela contend that the Panel erred in law when it found that the rise in bound tariffs resulting from the tariffication exercise could be justified on the basis of general principles

[61]Adopted 19 June 1992, BISD 39S/128.

governing the application of successive treaties. Such an interpretation would ignore the legal meaning of Article XXVIII of the GATT 1994 and of paragraph 7 of the *Marrakesh Protocol*. In the view of Costa Rica and Venezuela, the Panel therefore erred in finding that GATT-inconsistent quota allocation commitments made pursuant to the *Agreement on Agriculture* could not be justified under the *Agreement on Agriculture*.

119. Furthermore, with respect to the question of whether Article 4.1 of the *Agreement on Agriculture* is a substantive provision, Costa Rica and Venezuela argue that there is no other example in the whole of the *WTO Agreement* of a provision whose sole function is to inform the reader of the location of another provision. Costa Rica and Venezuela contend that the *Agreement on Agriculture* regulates the relationship between it and the scheduled commitments differently from the GATT 1994. While the GATT 1994 is a framework agreement for the incorporation of tariff bindings, the *Agreement on Agriculture*, and the scheduled commitments negotiated under it, constitute *together* the result of a negotiation on the first stage of agricultural reform. Additionally, Costa Rica and Venezuela submit that the market access commitments made under the *Agreement on Agriculture* constitute, in large part, settlements of disputes on the interpretation and application of the provisions of the GATT 1947 that had arisen prior to the Uruguay Round and during the Uruguay Round negotiations. It would not be justified to dismiss the quota allocation commitments as "illegitimate deals" between individual participants in the Uruguay Round negotiations designed to discriminate against other participants. These allocations were legitimate reactions of the negotiators to the legal uncertainty to which an application of the criteria set out in Article XIII of the GATT 1994 gives rise in a situation in which a highly restrictive import regime is transformed into a tariff-based regime.

120. In addition, Costa Rica and Venezuela are concerned that, by sanctioning the rise in the tariff bindings, but not the quota allocations negotiated in conjunction with the tariff bindings, the Panel creates an imbalance in the outcome of the negotiations on agriculture. Costa Rica and Venezuela add that they fully support the EC's view on the issue whether Article XIII:2(d) of the GATT 1994 prohibits an allocation of quotas by an agreement that includes countries which do not have a substantial supplying interest.

121. Costa Rica and Venezuela question whether in the present case the transfer of a quota rent from an importer to an exporter is an "advantage granted to a product" within the meaning of Article I of the GATT 1994. Costa Rica and Venezuela contend that the Panel correctly recognized that Article I of the GATT 1994 is concerned with the treatment of foreign *products* originating from different

foreign sources rather than with the treatment of the suppliers of these products, but that it fails to observe this distinction it has itself established. Costa Rica and Venezuela submit that, under the Panel's line of reasoning, financial advantages that might be passed on to producers are equated with competitive advantages accorded to the products, and the important legal distinction between advantages accorded to producers and those accorded to products is lost. Within the framework of a trade agreement such as the GATT 1994, different treatment of producers cannot be equated with different treatment of the products they produce. Therefore, Costa Rica and Venezuela take the position that the Panel incorrectly concluded that the quota rents generated by trade in bananas mean that they constitute an "advantage granted to a product" within the meaning of Article I of the GATT 1994, as this can only be an advantage that changes the conditions in the market. The mere transfer of a quota rent from importers to exporters of other countries does not alter the conditions that the product sold by the exporters faces in the quota-restricted market. Additionally, Costa Rica and Venezuela assert that it is not clear why the Panel referred to the panel report in *United States - Non-Rubber Footwear*[62], since the European Communities did not argue that there were two trade effects, one compensating the other, but only one possible trade effect relevant under Article I of the GATT 1994 that favoured the Complaining Parties. Costa Rica and Venezuela argue that the Panel dismissed an important point in an unreasoned manner and thereby failed to demonstrate how the competitive conditions for a product are improved when quota rents are transferred from importers to exporters under a regime which does not encourage an increase in exports of that product.

122. Costa Rica and Venezuela invite the Appellate Body to consider the broad implications that an acceptance of the Panel's interpretation of Article I of the GATT 1994 would entail. Most WTO Members that allocate tariff quotas among supplying countries do so by allocating a share to named countries constituting the main suppliers and a residual share to "other countries". The producers of the named countries can easily obtain the financial benefits associated with a quota regime by forming an export cartel or asking their government to channel exports through a single agency in accordance with Articles XVII and XX(d) of the GATT 1994; the "other countries" would need to cooperate with one another to secure that financial benefit, which is inherently more difficult. In spite of the different impact on producers from different countries, this method of allocating trade shares among countries has never been challenged in the history of the GATT. If Article I of the GATT 1994 were interpreted to oblige Members to afford not only equal trade opportunities for products but also equal opportunities to obtain the rents arising from the administration of quotas, a quota allocation mechanism used by

[62]Adopted 19 June 1992, BISD 39S/128.

practically all WTO Members, including the Complaining Parties, would be subject to challenge under the GATT 1994.

D. *Nicaragua*

123. Nicaragua fully supports the views expressed by Colombia, Costa Rica and Venezuela in their submissions to the Appellate Body. The views set out in these submissions should therefore be treated by the Appellate Body as representing the position of Nicaragua. Nicaragua in particular shares their view that the *Agreement on Agriculture*, and consequently the market accession commitments made pursuant to that Agreement, take precedence over the provisions of Article XIII of the GATT 1994.

124. With respect to the Panel's reasoning on Article XIII:1 that "the imports from all other countries must be similarly restricted", Nicaragua contends that the Panel draws from this principle the incorrect conclusion that any difference in the method of allocation, whether it can affect the distribution of trade or not, is inconsistent with Article XIII of the GATT 1994. Nicaragua submits that the text of Article XIII:1 clearly regulates the importation of products, not the granting of advantages to exporters or producers, whereas the sole objective of paragraph 2 of Article XIII is to prevent distortions in the distribution of trade arising from the administration of quotas. In this context, the terms "similarly restricted" can only be interpreted to refer to measures imposed in connection with importation that are capable of altering the distribution of trade. Therefore, the terms cannot be interpreted to mean "restricted with similar means", but rather should be interpreted to mean "with similar restrictive effect". Nicaragua also contends that the quota allocation in the case at issue does not accord a trade advantage, since the only consequence of the allocation is that the quota rent is no longer enjoyed by the importer but by the exporter of the exporting country. The resulting financial advantage cannot be used to increase the level of exports because that level is fixed by the quota. It therefore does not alter the competitive condition in favour of that product. In the view of Nicaragua, the mere allocation of a quota share to a particular Member does not distribute trade shares in favour of that Member and can therefore not by itself constitute discriminatory treatment of products inconsistent with Article XIII of the GATT 1994. Nicaragua admits that differences in the means of imposing restrictions can lead to discrimination even when they do not change the distribution of trade shares. However, this is a matter specifically covered by Article I of the GATT 1994 and the *Licensing Agreement*. The Panel's interpretation of the terms of Article XIII of the GATT 1994 as entailing a total prohibition of any distinction in the means of restriction, including distinctions that do not affect the distribution of trade shares, goes beyond the terms and objectives of Article XIII and the GATT 1994 in general.

125. In addition, Nicaragua contends that the Panel did not correctly determine the issue whether a Member's supplying interest is substantial within the meaning of Article XIII of the GATT 1994. Nicaragua asserts that a Member's interest in supplying a product may be substantial because its exports of the product represent a substantial proportion of total imports of the quota-allocating Member or because its exports of the product represent a substantial proportion of its own total exports. In fact, the words "interest in supplying" suggest that the determination should be made by examining the pattern of trade from the perspective of the interest of the supplying country, which in turn suggests that the proportion of exports of the product in its total exports is the relevant proportion. With respect to the Panel's argumentation on Article XXVIII of the GATT 1994, Nicaragua asserts first that there is no rule that "substantial supplying interest" can only be determined on the basis of the import share from which an exception can only be created by agreement, and, second that the function of the terms as used in Articles XIII and XXVIII is not identical. Nicaragua submits that, given the different objectives of the two provisions, the definition adopted by Members under Article XIII of the GATT 1994 can justifiably differ from that adopted under Article XXVIII of the GATT 1994.

E. *Japan*

126. In its submission, Japan presents arguments concerning the issue of specificity of the request for the establishment of a panel under Article 6.2 of the DSU. In Japan's view, the "Panel's interpretations on this issue are highly erroneous" and, if accepted by the Appellate Body, will have serious implications for the future operation of the dispute settlement mechanism.

127. Japan submits that the request for the establishment of a panel does not fulfil the two requirements of Article 6.2 of the DSU: the identification of the "specific measure at issue" and the provision of a "brief summary of the legal basis of the complaint". Japan considers that the mere identification of the basic regulation and a simple listing of the provisions which are allegedly violated are not enough. At least the linkage "between the specific measure … concerned and the Article allegedly infringed thereby" must be provided to meet the requirements under Article 6.2 of the DSU. In the view of Japan, undue emphasis on the promptness of the settlement, without taking account of the respondent's burden, may invite abuse of the dispute settlement system and could cause serious damage to its proper operation. The DSU must be interpreted so as to serve the fair settlement of disputes. Japan argues that the Panel's argument that the Complaining Parties "cured" uncertainty with their first submission should not be accepted. Japan asserts: first, the lack of specificity in the request for the establishment of a panel requires extensive additional work on the respondent's side for the preparation of its defence,

which could be avoided if the request for the establishment of a panel is sufficiently specific; second, the Panel's proposed remedy puts too much emphasis on the interests of the Complaining Parties; and third, the first submission does not replace the request for the establishment of a panel with respect to the notice function which is required under Article 6.2 of the DSU. Finally, Japan argues that the Panel's reasoning has no legal basis in the text of the DSU.

128. Japan agrees with the Complaining Parties that the first written submission does not determine the claims made by a complaining party, and that such a finding has no basis in the text of the DSU. However, in the view of Japan, if the Complaining Parties failed to include in their first submission certain claims which are identified in their request for the establishment of a panel, those Complaining Parties should be deemed to have withdrawn such claims. In addition, Japan does not disagree with the Complaining Parties on the progressive nature of a panel proceeding, and it considers that the parties to the dispute should be permitted to make any legal and factual arguments responding to the panel's questions or other parties' arguments throughout the proceeding. However, the complaining party's legal claims must be within the terms of reference of the panel. Finally, Japan considers that, in this case, the Panel incorrectly found that the panel request adequately informed the European Communities of the case against it. Japan contends that the Panel's analysis does not take due account of the burden upon the respondent to respond to the case against it.

IV. Issues Raised in this Appeal

129. The appellant, the European Communities, raises the following issues in this appeal:

(a) Whether the United States had a right to bring claims under the GATT 1994;

(b) Whether the request for the establishment of the panel made by the Complaining Parties in WT/DS27/6 meets the requirements of Article 6.2 of the DSU;

(c) Whether the market access concessions made by the European Communities under the *Agreement on Agriculture* prevail, as a result of Articles 4.1 and 21.1 of the *Agreement on Agriculture*, over the obligations of the European Communities under Article XIII of the GATT 1994;

(d) Whether the EC's allocation of tariff quota shares, whether by agreement or by assignment, to some, but not to other, Members not having a substantial interest in supplying bananas to the European Communities, is consistent with Article XIII:1 of the GATT 1994; and whether the tariff quota reallocation rules of the BFA are consistent with the requirements of Article XIII:1 of the GATT 1994;

(e) Whether the European Communities is "required" under the relevant provisions of the Lomé Convention to allocate tariff quota shares to traditional ACP States in excess of their pre-1991 best-ever export volumes, and to maintain the EC import licensing procedures that are applied to imports of third-country and non-traditional ACP bananas;

(f) Whether the existence of two separate EC regimes for the importation of bananas is legally relevant to the application of the non-discrimination provisions of the GATT 1994 and the other Annex 1A agreements of the *WTO Agreement*;

(g) Whether the provisions of the *Licensing Agreement* apply to licensing procedures for tariff quotas; and whether Article 1.3 of the *Licensing Agreement* precludes the imposition of different import licensing systems on like products when imported from different Members;

(h) Whether Article X:3(a) of the GATT 1994 precludes the imposition of different import licensing systems on like products when imported from different Members; and whether both Article 1.3 of the *Licensing Agreement* and Article X:3(a) of the GATT 1994 apply to import licensing procedures;

(i) Whether the application of the EC activity function rules to imports of third-country and non-traditional ACP bananas, in the absence of the application of such rules to imports of traditional ACP bananas, is consistent with Article I:1 of the GATT 1994; and whether the EC export certificate requirement for the importation of BFA bananas is consistent with the requirements of Article I:1 of the GATT 1994;

(j) Whether the EC import licensing procedures are within the scope of Article III:4 of the GATT 1994; and, if so, whether the EC practice with respect to hurricane licences is consistent with the requirements of Article III:4 of the GATT 1994;

(k) Whether the GATS applies to the EC import licensing procedures, or whether the GATT 1994 and the GATS are mutually exclusive agreements;

(l) Whether "operators" under the relevant EC regulations are service suppliers within the meaning of Article I:2(c) of the GATS that are engaged in the supply of "wholesale trade services"; and whether vertically-integrated companies, which include such operators, are service suppliers;

(m) Whether the requirement of Article II:1 of the GATS to extend "treatment no less favourable" should be interpreted as including *de facto*, as well as *de jure*, discrimination;

(n) Whether the Panel erred by giving retroactive effect to Articles II and XVII of the GATS, contrary to the principle stated in Article 28 of the *Vienna Convention*;

(o) Whether the Panel misapplied the standard of burden of proof, set out in the Appellate Body Report in *United States - Shirts and Blouses from India*[63]: in deciding which companies are a "juridical person of another Member" and are "owned" by, "controlled" by or "affiliated" with persons of another Member within the meaning of paragraphs (m) and (n) of Article XXVIII of the GATS; in deciding the market shares of the companies engaged in wholesale trade in bananas within the European Communities; and in its conclusions concerning the category of "operators who include or directly represent EC or ACP producers" that have suffered damage from hurricanes;

(p) Whether the Panel erred in finding that the allocation to Category B operators of 30 per cent of the licences allowing the importation of third-country and non-traditional ACP bananas at in-quota tariff rates is inconsistent with the requirements of Articles II and XVII of the GATS;

(q) Whether the Panel erred in finding that the allocation to ripeners of 28 per cent of the Category A and B licences allowing the importation of third-country and non-traditional

[63]WT/DS33/AB/R, adopted 23 May 1997.

ACP bananas at in-quota tariff rates is inconsistent with the requirements of Article XVII of the GATS;

(r) Whether the Panel erred in finding that the allocation of hurricane licences exclusively to operators who include or directly represent EC or ACP producers of bananas is inconsistent with the requirements of Articles II and XVII of the GATS;

(s) Whether the Panel erred in concluding that the European Communities has not succeeded in rebutting the presumption that its breaches of the GATT 1994, the GATS and the *Licensing Agreement* have nullified or impaired benefits of the Complaining Parties.

130. The Complaining Parties, as appellants, raise the following issues in this appeal:

(a) Whether the Lomé Waiver granted to the European Communities for "the provisions of paragraph 1 of Article I of the General Agreement" applies also to breaches of Article XIII of the GATT 1994 with respect to the EC's country-specific allocations for traditional ACP States;

(b) Whether the European Communities is "required" under the relevant provisions of the Lomé Convention to provide duty-free access for 90,000 tonnes of non-traditional ACP bananas and a margin of tariff preference in the amount of 100 ECU/tonne for all other non-traditional ACP bananas;

(c) Whether the Panel erred in excluding from the scope of this case certain claims relating to Article XVII of the GATS made by Mexico and all the GATS claims made by Guatemala and Honduras because those complaining parties did not address such claims in their first written submissions to the Panel;

(d) Ecuador raises the question whether the Panel's finding at paragraph 7.93 of the Panel Reports concerning Ecuador's right to invoke Articles XIII:2 or XIII:4 of the GATT 1994 is properly within the scope of this appeal.

131. We will address these issues in turn, and we will deal simultaneously with the issues that have been raised by both the European Communities and the Complaining Parties.

A. *Preliminary Issues*

1. Right of the United States to Bring Claims under the GATT 1994

132. We agree with the Panel that "neither Article 3.3 nor 3.7 of the DSU nor any other provision of the DSU contain any explicit requirement that a Member must have a 'legal interest' as a prerequisite for requesting a panel".[64] We do not accept that the need for a "legal interest" is implied in the DSU or in any other provision of the *WTO Agreement*. It is true that under Article 4.11 of the DSU, a Member wishing to join in multiple consultations must have "a substantial trade interest", and that under Article 10.2 of the DSU, a third party must have "a substantial interest" in the matter before a panel. But neither of these provisions in the DSU, nor anything else in the *WTO Agreement*, provides a basis for asserting that parties to the dispute have to meet any similar standard. Yet, we do not believe that this is dispositive of whether, in this case, the United States has "standing"[65] to bring claims under the GATT 1994.

133. The participants in this appeal have referred to certain judgments of the International Court of Justice and the Permanent Court of International Justice relating to whether there is a requirement, in international law, of a legal interest to bring a case.[66] We do not read any of these judgments as establishing a general rule that in all international litigation, a complaining party must have a "legal interest" in order to bring a case. Nor do these judgments deny the need to consider the question of standing under the dispute settlement provisions of any multilateral treaty, by referring to the terms of that treaty.

134. This leads us to examine Article XXIII of the GATT 1994, which is the dispute settlement provision for disputes brought pursuant to the GATT 1994, most other Annex 1A agreements and the

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[64]Panel Reports, para. 7.49.

[65]Standing, or *locus standi*, is generally understood to mean the right to bring an action in a dispute. See B. Garner, *A Dictionary of Modern Legal Usage* (Oxford University Press, 1987), p. 347; L.B. Curzon, *A Dictionary of Law*, 4th ed. (Pitman Publishing, 1993), p. 232. Article 1.1 of the DSU states that: "The rules and procedures of this Understanding shall apply to *disputes brought pursuant to the consultation and dispute settlement provisions* of the agreements listed in Appendix 1 to this Understanding …". (emphasis added)

[66]The EC's appellant's submission in paras. 9-10 refers to the ICJ and PCIJ Judgments in: the *South West Africa Cases*, (Second Phase), ICJ Reports 1966, p. 4; the *Case Concerning the Barcelona Traction, Light and Power Company, Limited* (Second Phase), ICJ Reports 1970, p. 4; the *Mavrommatis Palestine Concessions Case*, PCIJ (1925) Series A, No. 2, p. 1; the *S.S. "Wimbledon"* case, PCIJ (1923) Series A, No. 1, p.1; and the *Case Concerning the Northern Cameroons*, ICJ Reports 1963, p. 4. The Complaining Parties' appellee's submission, in para. 364, also refers to the ICJ Judgment in the *South West Africa Cases*.

Agreement on Trade Related Aspects of Intellectual Property Rights ("*TRIPs*").[67] The chapeau of Article XXIII:1 of the GATT 1994 provides:

> If any Member should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded …

Of special importance for determining the issue of standing, in our view, are the words "[i]f any Member should consider …".[68] This provision in Article XXIII is consistent with Article 3.7 of the DSU, which states:

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

135. Accordingly, we believe that a Member has broad discretion in deciding whether to bring a case against another Member under the DSU. The language of Article XXIII:1 of the GATT 1994 and of Article 3.7 of the DSU suggests, furthermore, that a Member is expected to be largely self-regulating in deciding whether any such action would be "fruitful".

136. We are satisfied that the United States was justified in bringing its claims under the GATT 1994 in this case. The United States is a producer of bananas, and a potential export interest by the United States cannot be excluded. The internal market of the United States for bananas could be affected by the EC banana regime, in particular, by the effects of that regime on world supplies and world prices of bananas. We also agree with the Panel's statement that:

> … with the increased interdependence of the global economy, … Members have a greater stake in enforcing WTO rules than in the past since any deviation from the negotiated balance of rights and obligations is more likely than ever to affect them, directly or indirectly.[69]

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[67]Article XXIII of the GATT 1994 is referred to as the dispute settlement provision in most other Annex 1A agreements (*Agreement on Agriculture, Agreement on the Application of Sanitary and Phytosanitary Measures, Agreement on Textiles and Clothing, Agreement on Technical Barriers to Trade, Agreement on Trade-Related Investment Measures, Agreement on Preshipment Inspection, Agreement on Rules of Origin, Licensing Agreement, Agreement on Subsidies and Countervailing Measures, Agreement on Safeguards*) and in *TRIPs*.

[68]We note that Articles XXIII:1 and XXIII:3 of the GATS use similar opening phrases: "If any Member should consider …" and "If any Member considers …".

[69]Panel Reports, para. 7.50.

137. We note, too, that there is no challenge here to the standing of the United States under the GATS, and that the claims under the GATS and the GATT 1994 relating to the EC import licensing regime are inextricably interwoven in this case.

138. Taken together, these reasons are sufficient justification for the United States to have brought its claims against the EC banana import regime under the GATT 1994. This does not mean, though, that one or more of the factors we have noted in this case would necessarily be dispositive in another case. We therefore uphold the Panel's conclusion that the United States had standing to bring claims under the GATT 1994.

2. Request for Establishment of the Panel

139. Article 6.2 of the DSU requires that a request for the establishment of a panel:

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

140. We agree with the Panel that the request in this case, WT/DS27/6, dated 12 April 1996, which refers to "a regime for the importation, sale and distribution of bananas established by Regulation 404/93 (O.J. L 47 of 25 February 1993, p. 1), and subsequent EC legislation, regulations and administrative measures, including those reflecting the provisions of the Framework Agreement on bananas, which implement, supplement and amend that regime", contains sufficient identification of the specific measures at issue to fulfil the requirements of Article 6.2 of the DSU.

141. With respect to whether the panel request provides, as required, a "brief summary of the legal basis of the complaint sufficient to present the problem clearly"[70], we agree with the Panel's conclusion that "the request is sufficiently specific to comply with the *minimum standards* established by the terms of Article 6.2 of the DSU"[71] (emphasis added). We accept the Panel's view that it was sufficient for the Complaining Parties to list the provisions of the specific agreements alleged to have been violated without setting out detailed arguments as to which specific aspects of the measures at issue relate to which specific provisions of those agreements. In our view, there is a significant difference between the *claims* identified in the request for the establishment of a panel, which establish the panel's terms

[70]DSU, Article 6.2.

[71]Panel Reports, para. 7.29.

of reference under Article 7 of the DSU, and the *arguments* supporting those claims, which are set out and progressively clarified in the first written submissions, the rebuttal submissions and the first and second panel meetings with the parties.

142. We recognize that a panel request will usually be approved automatically at the DSB meeting following the meeting at which the request first appears on the DSB's agenda.[72] As a panel request is normally not subjected to detailed scrutiny by the DSB, it is incumbent upon a panel to examine the request for the establishment of the panel very carefully to ensure its compliance with both the letter and the spirit of Article 6.2 of the DSU. It is important that a panel request be sufficiently precise for two reasons: first, it often forms the basis for the terms of reference of the panel pursuant to Article 7 of the DSU; and, second, it informs the defending party and the third parties of the legal basis of the complaint.

143. We do not agree with the Panel that "even if there was some uncertainty whether the panel request had met the requirements of Article 6.2, the first written submissions of the Complainants 'cured' that uncertainty because their submissions were sufficiently detailed to present all the factual and legal issues clearly".[73] Article 6.2 of the DSU requires that the *claims*, but not the *arguments*, must all be specified sufficiently in the request for the establishment of a panel in order to allow the defending party and any third parties to know the legal basis of the complaint. If a *claim* is not specified in the request for the establishment of a panel, then a faulty request cannot be subsequently "cured" by a complaining party's argumentation in its first written submission to the panel or in any other submission or statement made later in the panel proceeding.

144. We note, in passing, that this kind of issue could be decided early in panel proceedings, without causing prejudice or unfairness to any party or third party, if panels had detailed, standard working procedures that allowed, *inter alia*, for preliminary rulings.

3. GATS Claims by Guatemala, Honduras and Mexico

145. We do not agree with the Panel's decisions to exclude certain claims under Article XVII of the GATS made by Mexico[74] and all of the GATS claims made by Guatemala and Honduras[75] from

[72]DSU, Article 6.1.

[73]Panel Reports, para. 7.44.

[74]Panel Report, WT/DS27/R/MEX, paras. 7.309-7.311.

the scope of this case. There is no requirement in the DSU or in GATT practice for arguments on all claims relating to the matter referred to the DSB to be set out in a complaining party's first written submission to the panel. It is the panel's terms of reference, governed by Article 7 of the DSU, which set out the claims of the complaining parties relating to the matter referred to the DSB.

146. In this dispute, the Complaining Parties filed a joint request for the establishment of the Panel in WT/DS27/6, dated 12 April 1996, and the parties to the dispute agreed that the Panel would have standard terms of reference pursuant to Article 7.1 of the DSU. The Panel's terms of reference in this dispute, therefore, must be determined by an examination of the joint request for the establishment of a panel in WT/DS27/6, which includes claims that the EC measures are inconsistent with, *inter alia*, Articles II, XVI and XVII of the GATS. The Complaining Parties filed their request for the establishment for a panel jointly, but they filed their first written submissions to the Panel separately.[76] Any omissions in the arguments contained in the first written submissions of Mexico or of Guatemala and Honduras were rectified in their joint representations with the other Complaining Parties made at the first meeting of the parties with the Panel, as well as in their joint written rebuttal submission and in their joint representations made at the second meeting of the parties with the Panel. Specific arguments on all relevant GATS claims were made by the five Complaining Parties jointly in their oral statements at the first and second meetings with the Panel and in their written rebuttal submission.

147. For these reasons, we reverse the conclusions of the Panel that certain claims under Article XVII of the GATS made by Mexico[77] and all of the GATS claims made by Guatemala and Honduras[78] are not to be included within the scope of this case. We do not agree with the Panel's statement that a "failure to make a claim in the first written submission cannot be remedied by later submissions or by incorporating the claims and arguments of other complainants".[79] Pursuant to Articles 6.2 and 7.1 of the DSU, the terms of reference of the Panel in this case were established in the request for the establishment of the panel, WT/DS27/6, in which the claims specified under the GATS were made by all five Complaining Parties jointly.

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[75]Panel Reports, paras. 7.57-7.58.

[76]Guatemala and Honduras submitted a first written submission jointly.

[77]Panel Report, WT/DS27/R/MEX, paras. 7.309-7.311.

[78]Panel Reports, para. 7.58.

[79]*Ibid.*, para. 7.57.

4. Ecuador's Right to Invoke Article XIII of the GATT 1994

148. Ecuador argues, in its submission of 9 July 1997, that the European Communities did not properly set out any allegation of error concerning paragraph 7.93 of the Panel Reports in the Notice of Appeal, nor did the European Communities include in its appellant's submission any statement of the grounds for such an appeal, any specific allegations of errors in the issues of law covered in the Panel Reports, or any legal arguments in support of an appeal of that finding. In the appellant's submission of the European Communities, there was merely a summary reference to paragraph 7.93 of the Panel Reports in Part IV, paragraph 352, of the Conclusions. Ecuador argues that this omission, on the part of the European Communities, does not meet the requirements of Rule 20(2)(d) or Rule 21(2) of the *Working Procedures*.

149. The Panel's finding on this issue reads as follows:

> … we find that the failure of Ecuador's Protocol of Accession to address banana-related issues does not mean that Ecuador must accept the validity of the BFA as contained in the EC's Schedule or that it is precluded from invoking Article XIII:2 or XIII:4.[80]

150. Paragraphs (c) and (d) of the Notice of Appeal read as follows:

> (c) The Panel erred in law in its interpretation of the Agreement on Agriculture and, in particular, of Articles 4.1 and 21.1 of that Agreement and their relation to the GATT, in particular its Article XIII.
>
> (d) In the alternative: the Panel erred in its interpretation of Article XIII of GATT, in particular paragraph 2(d) (both in relation to the allocation of country shares in the Tariff Rate Quota (TRQ)) for bananas and to the tariff quota reallocation rules of the Banana Framework Agreement (BFA).

151. Rule 20(2)(d) of the *Working Procedures* provides that a notice of appeal shall include:

> … a brief statement of the nature of the appeal, *including the allegations of errors* … (emphasis added)

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[80]Panel Reports, para. 7.93.

Rule 21(2)(b)(i) of the *Working Procedures* requires that an appellant's submission shall set out:

> … a precise statement of the grounds for the appeal, including the *specific allegations of errors* in the issues of law covered in the panel report … *and the legal arguments in support thereof* … (emphasis added)

152. In our view, the claims of error by the European Communities set out in paragraphs (c) and (d) of the Notice of Appeal do not cover the Panel's finding in paragraph 7.93 of the Panel Reports. The finding in that paragraph explicitly deals with Ecuador's right to invoke Article XIII:2 or XIII:4 of the GATT 1994, given that Ecuador acceded to the WTO *after* the *WTO Agreement* entered into force and *after* the tariff quota for the BFA countries had been negotiated and inscribed in the EC Schedule to the GATT 1994. There is no specific mention of this Panel finding in either the Notice of Appeal or in the main arguments of the appellant's submission by the European Communities. Therefore, Ecuador had no notice that the European Communities was appealing this finding. For these reasons, we conclude that the Panel's finding in paragraph 7.93 of the Panel Reports should be excluded from the scope of this appeal.

B. *Multilateral Agreements on Trade in Goods*

1. *Agreement on Agriculture*

153. The European Communities raises the question whether the market access concessions for agricultural products made by the European Communities pursuant to the *Agreement on Agriculture* prevail over Article XIII of the GATT 1994. The European Communities maintains that this result necessarily follows from the meaning and intent of Articles 4.1 and 21.1 of the *Agreement on Agriculture*. Accordingly, the European Communities contends that it is permitted with respect to such market access concessions to act inconsistently with the requirements of Article XIII of the GATT 1994. The Panel concluded that the *Agreement on Agriculture* does not permit the European Communities to act inconsistently with the requirements of Article XIII of the GATT 1994.

154. The market access concessions for agricultural products that were made in the Uruguay Round of multilateral trade negotiations are set out in Members' Schedules annexed to the *Marrakesh Protocol*, and are an integral part of the GATT 1994. By the terms of the *Marrakesh Protocol*, the Schedules

are "Schedules to the GATT 1994", and Article II:7 of the GATT 1994 provides that "Schedules annexed to this Agreement are hereby made an integral part of Part I of this Agreement". With respect to concessions contained in the Schedules annexed to the GATT 1947, the panel in *United States - Restrictions on Importation of Sugar* ("*United States - Sugar Headnote*") found that:

> … Article II permits contracting parties to incorporate into their Schedules acts yielding rights under the General Agreement but not acts diminishing obligations under that Agreement.[81]

This principle is equally valid for the market access concessions and commitments for agricultural products contained in the Schedules annexed to the GATT 1994. The ordinary meaning of the term "concessions" suggests that a Member may yield rights and grant benefits, but it cannot diminish its obligations.[82] This interpretation is confirmed by paragraph 3 of the *Marrakesh Protocol*, which provides:

> The implementation of the concessions and commitments contained in the schedules annexed to this Protocol shall, upon request, be subject to multilateral examination by the Members. This would be *without prejudice to the rights and obligations of Members under Agreements in Annex 1A of the WTO Agreement*. (emphasis added)

155. The question remains whether the provisions of the *Agreement on Agriculture* allow market access concessions on agricultural products to deviate from Article XIII of the GATT 1994. The preamble of the *Agreement on Agriculture* states that it establishes "a basis for initiating a process of reform of trade in agriculture" and that this reform process "should be initiated through the negotiation of commitments on support and protection and through the establishment of strengthened and more operationally effective GATT rules and disciplines". The relationship between the provisions of the GATT 1994 and of the *Agreement on Agriculture* is set out in Article 21.1 of the *Agreement on Agriculture*:

> The provisions of GATT 1994 and of other Multilateral Trade Agreements in Annex 1A to the WTO Agreement shall apply subject to the provisions of this Agreement.

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[81]Adopted 22 June 1989, BISD 36S/331, para. 5.2.

[82]*Ibid*.

Therefore, the provisions of the GATT 1994, including Article XIII, apply to market access commitments concerning agricultural products, except to the extent that the *Agreement on Agriculture* contains specific provisions dealing specifically with the same matter.

156. Article 4.1 of the *Agreement on Agriculture* provides as follows:

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

In our view, Article 4.1 does more than merely indicate where market access concessions and commitments for agricultural products are to be found. Article 4.1 acknowledges that significant, new market access concessions, in the form of new bindings and reductions of tariffs as well as other market access commitments (i.e. those made as a result of the tariffication process), were made as a result of the Uruguay Round negotiations on agriculture and included in Members' GATT 1994 Schedules. These concessions are fundamental to the agricultural reform process that is a fundamental objective of the *Agreement on Agriculture*.

157. That said, we do not see anything in Article 4.1 to suggest that market access concessions and commitments made as a result of the Uruguay Round negotiations on agriculture can be inconsistent with the provisions of Article XIII of the GATT 1994. There is nothing in Articles 4.1 or 4.2, or in any other article of the *Agreement on Agriculture*, that deals specifically with the allocation of tariff quotas on agricultural products. If the negotiators had intended to permit Members to act inconsistently with Article XIII of the GATT 1994, they would have said so explicitly. The *Agreement on Agriculture* contains several specific provisions dealing with the relationship between articles of the *Agreement on Agriculture* and the GATT 1994. For example, Article 5 of the *Agreement on Agriculture* allows Members to impose special safeguards measures that would otherwise be inconsistent with Article XIX of the GATT 1994 and with the *Agreement on Safeguards*. In addition, Article 13 of the *Agreement on Agriculture* provides that, during the implementation period for that agreement, Members may not bring dispute settlement actions under either Article XVI of the GATT 1994 or Part III of the *Agreement on Subsidies and Countervailing Measures* for domestic support measures or export subsidy measures that conform fully with the provisions of the *Agreement on Agriculture*. With these examples in mind, we believe it is significant that Article 13 of the *Agreement on Agriculture* does not, by its terms, prevent

dispute settlement actions relating to the consistency of market access concessions for agricultural products with Article XIII of the GATT 1994. As we have noted, the negotiators of the *Agreement on Agriculture* did not hesitate to specify such limitations elsewhere in that agreement; had they intended to do so with respect to Article XIII of the GATT 1994, they could, and presumably would, have done so. We note further that the *Agreement on Agriculture* makes no reference to the *Modalities* document[83] or to any "common understanding" among the negotiators of the *Agreement on Agriculture* that the market access commitments for agricultural products would not be subject to Article XIII of the GATT 1994.

158. For these reasons, we agree with the Panel's conclusion that the *Agreement on Agriculture* does not permit the European Communities to act inconsistently with the requirements of Article XIII of the GATT 1994.

2. Article XIII of the GATT 1994

159. The European Communities raises two legal issues relating to the interpretation of Article XIII of the GATT 1994. The first is whether the allocation by the European Communities of tariff quota shares, by agreement and by assignment, to some Members not having a substantial interest in supplying bananas to the European Communities (including Nicaragua, Venezuela, and certain ACP countries in respect of traditional and non-traditional exports), but not to other such Members (including Guatemala), is consistent with Article XIII:1. The second is whether the tariff quota reallocation rules of the BFA are consistent with the requirements of Article XIII:1 of the GATT 1994.

160. Article XIII of the GATT 1994 requires the non-discriminatory administration of quantitative restrictions. As provided in paragraph 5, Article XIII also applies to tariff quotas. Article XIII:1 sets out a basic principle of non-discrimination in the administration of both quantitative restrictions and tariff quotas. Article XIII:1 stipulates that the importation or exportation of a product of a Member can only be prohibited or restricted if:

> … the importation of the like product of all third countries or the exportation of the like product to all third countries is similarly prohibited or restricted.

[83] *Modalities for the Establishment of Specific Binding Commitments Under the Reform Programme*, MTN.GNG/MA/W/24, 20 December 1993.

161. In administering quantitative import restrictions or tariff quotas, Members must also observe the rules in Article XIII:2. The chapeau of Article XIII:2 provides that Members shall:

> … aim at a distribution of trade in such product approaching as closely as possible the shares which the various Members might be expected to obtain in the absence of such restrictions …

Article XIII:2(d) provides specific rules for the allocation of tariff quotas among supplying countries, but these rules pertain only to the allocation of tariff quota shares to Members "having a substantial interest in supplying the product concerned". Article XIII:2(d) does not provide any specific rules for the allocation of tariff quota shares to Members not having a substantial interest. Nevertheless, allocation to Members not having a substantial interest must be subject to the basic principle of non-discrimination. When this principle of non-discrimination is applied to the allocation of tariff quota shares to Members not having a substantial interest, it is clear that a Member cannot, whether by agreement or by assignment, allocate tariff quota shares to some Members not having a substantial interest while not allocating shares to other Members who likewise do not have a substantial interest. To do so is clearly inconsistent with the requirement in Article XIII:1 that a Member cannot restrict the importation of any product from another Member unless the importation of the like product from all third countries is "similarly" restricted.

162. Therefore, on the first issue raised by the European Communities, we conclude that the Panel found correctly that the allocation of tariff quota shares, whether by agreement or by assignment, to some, but not to other, Members not having a substantial interest in supplying bananas to the European Communities is inconsistent with the requirements of Article XIII:1 of the GATT 1994.

163. The second issue relates to the consistency of the tariff quota reallocation rules of the BFA with Article XIII:1 of the GATT 1994. Pursuant to these reallocation rules, a portion of a tariff quota share not used by the BFA country to which that share is allocated may, at the joint request of the BFA countries, be reallocated to the other BFA countries. These reallocation rules allow the exclusion of banana-supplying countries, other than BFA countries, from sharing in the unused portions of a tariff quota share. Thus, imports from BFA countries and imports from other Members are not "similarly" restricted. We conclude, therefore, that the Panel found correctly that the tariff quota reallocation rules of the BFA are inconsistent with the requirements of Article XIII:1 of the GATT 1994. Moreover, the reallocation of unused portions of a tariff quota share exclusively to other BFA

countries, and not to other non-BFA banana-supplying Members, does not result in an allocation of tariff quota shares which approaches "as closely as possible the shares which the various Members might be expected to obtain in the absence of the restrictions". Therefore, the tariff quota reallocation rules of the BFA are also inconsistent with the chapeau of Article XIII:2 of the GATT 1994.

3. The Scope of the Lomé Waiver

164. On 9 December 1994, at the request of the European Communities and of the 49 ACP States that were also GATT contracting parties, the CONTRACTING PARTIES granted the European Communities a waiver from certain of its obligations under the GATT 1947 with respect to the Lomé Convention.[84] The operative paragraph of this Decision of the CONTRACTING PARTIES reads as follows:

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

This is the Lomé Waiver. The WTO General Council, acting pursuant to paragraphs 3 and 4 of Article IX of the *WTO Agreement* and the provisions of the *Understanding in Respect of Waivers of Obligations under the General Agreement on Tariffs and Trade 1994*, decided on 14 October 1996 to extend this waiver until 29 February 2000.[85]

165. The appeals by the European Communities and the Complaining Parties raise two distinct legal issues relating to the scope of the Lomé Waiver. The first issue is whether the European Communities is "required" under the relevant provisions of the Lomé Convention to do what it has done in the measures at issue in this appeal, that is, to provide duty-free access for all traditional ACP bananas; to provide duty-free access for 90,000 tonnes of non-traditional ACP bananas; to provide a margin of tariff preference in the amount of 100 ECU/tonne for all other non-traditional ACP bananas; to

[84]The Fourth ACP-EEC Convention of Lomé, Decision of the CONTRACTING PARTIES of 9 December 1994, L/7604, 19 December 1994.

[85]EC - The Fourth ACP-EC Convention of Lomé, Extension of Waiver, Decision of the WTO General Council of 14 October 1996, WT/L/186, 18 October 1996.

allocate tariff quota shares to the traditional ACP States that supplied bananas to the European Communities before 1991 in the amount of their pre-1991 best-ever export volumes; to allocate tariff quota shares to some traditional ACP States in excess of their pre-1991 best-ever export volumes to the European Communities; to allocate tariff quota shares to ACP States exporting non-traditional ACP bananas; and to maintain the import licensing procedures that are applied by this measure to imports of third-country and non-traditional ACP bananas.

166. The second issue is whether the Lomé Waiver, which specifically covers violations of Article I:1 of the GATT 1994, also covers violations of Article XIII with respect to the EC's country-specific tariff quota allocations for traditional ACP States. We will address these two issues in turn.

(a) What is "required" by the Lomé Convention?

167. The European Communities asserts that the Panel should not have conducted an objective examination of the requirements of the Lomé Convention, but instead should have deferred to the "common" EC and ACP views on the appropriate interpretation of the Lomé Convention. This assertion is without merit. The Panel was correct in stating:

> We note that since the GATT CONTRACTING PARTIES incorporated a reference to the Lomé Convention into the Lomé waiver, the meaning of the Lomé Convention became a GATT/WTO issue, at least to that extent. Thus, we have no alternative but to examine the provisions of the Lomé Convention ourselves in so far as it is necessary to interpret the Lomé waiver.[86]

We, too, have no alternative.

168. From the operative paragraph of the Lomé Waiver, it is clear that what is waived is compliance with only "the provisions of paragraph 1 of Article I of the General Agreement", and it is clear also that compliance with those provisions is only waived "to the extent necessary" to permit the European Communities to provide the "preferential treatment" that is "required" by the relevant provisions of the Lomé Convention. It is equally clear that the use of the term "required" is not accidental. Originally, the European Communities and the ACP States that were contracting parties to the GATT 1947 requested a waiver that would have allowed the European Communities to grant preferential

[86]Panel Reports, para. 7.98.

treatment as "foreseen" under the relevant provisions of the Lomé Convention.[87] However, the term "foreseen" was not accepted by the CONTRACTING PARTIES, and was replaced in the text of the waiver by the more stringent term "required".[88] We do not agree with the European Communities that this is a distinction without a difference.[89]

169. To determine what is "required" by the Lomé Convention, we must look first at the text of that Convention and identify the provisions of it that are relevant to trade in bananas. Article 183 of Chapter 2, entitled "Special undertakings on rum and bananas", which is part of the general title on "Trade Cooperation", and Protocol 5 on Bananas are clearly provisions that specifically concern trade in bananas. Article 183 reads as follows:

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

Article 183 does not in itself clarify what is "required" with respect to trade in ACP bananas. Article 183 does, however, refer to Protocol 5, which is an integral part of the Lomé Convention.[90] Article 1 of Protocol 5 stipulates:

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

The requirements in Protocol 5 clearly apply to "traditional markets" for traditional ACP bananas, and to nothing more.

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[87]ACP Countries - European Communities, Fourth Lomé Convention, Request for a Waiver, L/7539, 10 October 1994.

[88]CONTRACTING PARTIES, Fiftieth Session, Summary Record of the First Meeting, 8 December 1994, SR. 50/1, 8 February 1995, p. 13.

[89]Preferential treatment that is authorized or called for in the Lomé Convention, or reflected in its objectives, may well be preferential treatment "foreseen" under the Lomé Convention, but it is not necessarily preferential treatment "required" or made mandatory by the Lomé Convention. Provisions of the Lomé Convention, such as Article 15(a); Article 24, second indent; Article 135; and Article 167 authorize or call for preferential treatment of ACP products. These provisions elaborate one of the central objectives of the Lomé Convention -- to promote the expansion of trade and the economic development of the ACP States. These provisions may "foresee", but do not "require", any preferential treatment.

[90]Pursuant to Article 368 of the Lomé Convention, protocols annexed to the Convention form an integral part thereof.

170. In addition, the Lomé Convention contains Article 168(2)(a)(ii), which is also relevant to trade in ACP bananas. Article 168(2)(a)(ii), which is found in the chapter on the "General trade arrangements" of the Lomé Convention, reads in relevant part as follows:

> … the Community shall take the necessary measures to ensure *more favourable treatment* than that granted to third countries benefiting from the most-favoured-nation clause for the same products. (emphasis added)

These "products" include bananas. Article 168(2)(a)(ii) applies to *all* ACP agricultural products that come under a common organization of the market and that are subject to import restrictions. Nothing in Article 168(2)(a)(ii) indicates that bananas are to be excluded from the scope of this provision, either because the import arrangement for bananas is dealt with elsewhere, or because bananas are not included in the non-exhaustive list of preferential arrangements under Article 168(2)(a)(ii) that is contained in Annex XL of the Lomé Convention. Therefore, under Article 168(2)(a)(ii), the European Communities is required to "take the necessary measures to ensure more favourable treatment than that granted to third countries benefiting from the most-favoured-nation clause" for *all* ACP bananas. This requirement in Article 168(2)(a)(ii) in no way conflicts with Article 1 of Protocol 5, which requires additional preferential treatment for *traditional* ACP bananas over and above the preferential treatment for *all* ACP bananas that is required by Article 168(2)(a)(ii).[91]

171. These are the requirements that the Lomé Convention imposes on the European Communities for trade in ACP bananas. The admittedly difficult legislative task facing the European Communities was to translate these requirements into appropriate regulations while also transforming the previously varied, national banana markets of its Member States into a single Community-wide market for bananas. It is not our task to do this for the European Communities. Our task is to determine whether the particular regulatory means that the European Communities has chosen to employ, and that are at issue in this appeal, are in fact means that are "required" by the Lomé Convention. In our view, to be "required", each of the relevant provisions of the measures at issue in this appeal must be reasonably necessary to give effect to the relevant obligations imposed on the European Communities by the Lomé Convention. We shall examine them in turn.

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[91]This interpretation of the relationship between Article 168 and Protocol 5 is confirmed by the ECJ in paragraph 101 of its Judgment of 5 October 1994, *Germany v. Council*, Case C-280/93, ECR 1994, p. I-4973. The Court stated that "… the import of bananas from ACP States falls under Article 168(2)(a)(ii) of the Lomé Convention …", and that Article 1 of Protocol 5 also applies to traditional ACP bananas.

172. The European Communities grants duty-free access to all traditional ACP bananas. It will be recalled that Protocol 5 specifies that "no ACP State shall be placed, as regards *access* to its *traditional* markets and its *advantages* on those markets, in a less favourable situation than in the past or present" (emphasis added). With respect to *traditional* ACP bananas, this mandate of Protocol 5 is reinforced by the additional obligations imposed on the European Communities by Article 168(2)(a)(ii), which, as we have said, applies to *all* ACP bananas. Before the creation of a single Community-wide market for bananas through the enactment of Regulation 404/93, duty-free "access" for their banana exports was indisputably one of the "advantages" enjoyed by the ACP States. Therefore, in our view, the duty-free access afforded by the European Communities to all traditional ACP bananas is "required".

173. In addition, the European Communities grants duty-free access to 90,000 tonnes of non-traditional ACP bananas and a margin of tariff preference in the amount of 100 ECU/tonne to all other non-traditional ACP bananas. The out-of-quota tariff rate for non-traditional ACP bananas is 693 ECU/tonne; the out-of-quota tariff rate for third-country bananas is 793 ECU/tonne.[92] Protocol 5 does not apply here; Protocol 5 does not apply to non-traditional ACP bananas. However, the obligation imposed on the European Communities by Article 168(2)(a)(ii) to "take the necessary measures to ensure more favourable treatment" for *all* ACP bananas "than that granted to third countries benefiting from the most-favoured-nation clause for the same product" does apply. The tariff rates applied to imports of bananas from third countries benefitting from MFN treatment are an in-quota tariff rate of 75 ECU/tonne and, as already noted above, an out-of-quota tariff rate of 793 ECU/tonne. Both the duty-free access afforded to the 90,000 tonnes of non-traditional ACP bananas, imported in-quota, and the margin of tariff preference in the amount of 100 ECU/tonne afforded to all other non-traditional ACP bananas by the European Communities are clearly "more favourable treatment" than that afforded by the European Communities to bananas from third countries benefitting from MFN treatment. Therefore, the remaining issue under Article 168(2)(a)(ii) is whether the particular measures chosen by the European Communities to fulfil the obligations in that Article to provide "more favourable treatment" to non-traditional ACP bananas are also in fact "necessary" measures, as specified in that Article. In our view, they are. Article 168(2)(a)(ii) does not say that only *one* kind of measure is "necessary". Likewise, that Article does not say *what* kind of measure is "necessary". Conceivably, the European Communities might have chosen some other "more favourable treatment" in the form of a tariff preference for non-traditional ACP bananas. But it seems to us that this particular measure can, in the overall context of the transition from individual national markets to a single Community-wide market for bananas, be deemed to be "necessary". Therefore, in our view, both the duty-free access granted by the European Communities

[92]Out-of-quota tariff rates for shipments in 1996-97. See Panel Reports, para. 3.7.

to the 90,000 tonnes of non-traditional ACP bananas and the margin of tariff preference in the amount of 100 ECU/tonne granted to all other non-traditional ACP bananas are "required" by the Lomé Convention.

174. The European Communities also allocates tariff quota shares to the traditional ACP States that supplied bananas to the European Communities before 1991 in the amount of their pre-1991 best-ever export volumes. With respect to these allocations, it will be recalled that Article 1 of Protocol 5 obliges the European Communities to ensure that "[i]n respect of its banana exports to the Community markets, no ACP State shall be placed as regards access to its traditional markets and its advantages on those markets, in a less favourable situation than in the past or at present". We note here that the European Court of Justice has ruled in its Judgment of 5 October 1994 in *Germany v. Council* that pursuant to Article 1 of Protocol 5:

> … the Community is obliged to permit the access, free of customs duty, *only* of the quantities of bananas actually imported 'at zero duty' in the best year *before 1991* from each ACP State which is a traditional supplier.[93] (emphasis added)

Thus, the pivotal date is 1991. To be sure, the European Communities might have used another basis for determining the tariff quota shares allotted to the traditional ACP States that supplied bananas to the European Communities before 1991. For example, the European Communities might have chosen to use a fixed reference period of 10, or perhaps 20, years. The European Communities might also have chosen an average export volume rather than the best-ever export volumes that was in fact chosen. However, some standard was clearly needed. The standard chosen by the European Communities does have a legitimate basis in the history of the banana trade of the European Communities with the traditional ACP States. Therefore, we are persuaded that the allocation of tariff quota shares for traditional ACP bananas chosen by the European Communities is "required".

175. The European Communities also allocates tariff quota shares to some traditional ACP States *in excess of* their pre-1991 best-ever export volumes so as to reflect potential increases in trade in the future as a result of investments made in banana production in those ACP States.[94] In our view, tariff

[93]Case C-280/93, ECR 1994, p. I-4973, para. 101.

[94]Neither the Lomé Convention's provisions on trade development (Articles 135-138), nor its provisions on development finance cooperation (Articles 220-327), can be interpreted as *requiring* that elements other than the best-ever levels (e.g. investment decisions) are to be taken into account in the determination of the extent of the preferential treatment.

quota shares *in excess of* the pre-1991 best-ever export volumes, which are designed to reflect potential increases in trade *in the future*, are not reasonably necessary to guarantee that these traditional ACP States are not placed, as regards market access and market advantages, in a less favourable situation than *at any time before 1991*. These traditional ACP States could not have enjoyed any pre-1991 market access or advantages with respect to future quantities of bananas. This would be different only if, before 1991, these ACP States had a guarantee in any of their traditional markets that they would be able to export quantities of bananas that might in the future result from investments they made. There was, however, no such guarantee. Finally, it is clear that any future increases in trade as a result of investments are highly speculative. For these reasons, we conclude that the allocation of tariff quota shares in excess of pre-1991 best-ever export volumes to reflect investments is not "required" by the Lomé Convention.

176. The European Communities also allocates country-specific tariff quota shares to ACP States exporting non-traditional ACP bananas. It will be recalled that the more expansive requirement of Article 1 of Protocol 5 does not apply to non-traditional ACP bananas. Only the more limited requirement of Article 168(2)(a)(ii), to take "necessary measures to ensure more favourable treatment" to certain ACP agricultural products, including bananas, applies to non-traditional ACP bananas. However, in our view, this obligation to afford "more favourable treatment" to non-traditional ACP bananas could be met without allocating tariff quota shares. Therefore, the allocation of tariff quota shares to ACP States exporting non-traditional ACP bananas is not "required".

177. The final relevant provisions of the measures at issue that must be addressed are the import licensing procedures that are applied to third-country and non-traditional ACP bananas. We have concluded that certain tariff preferences for ACP bananas are "required" by the Lomé Convention. We have also concluded that the tariff quota allocations to traditional ACP States in the amount of their pre-1991 best-ever export volumes is "required". It may be that, in order to do all that is "required" by the Lomé Convention, the European Communities should do something more. Conceivably, this could be some form of import licensing arrangement. However, the issue before us is not whether some hypothetical licensing arrangement that might be enacted by the European Communities is "required" by the Lomé Convention. The issue before us is whether the specific provisions of these import licensing procedures that have in fact been enacted by the European Communities, and are at issue in this appeal, are "required". The import licensing procedures at issue here create advantages for favoured EC operators that market traditional ACP bananas, by providing those operators with

quota rents that, even the European Communities acknowledges, amount to "cross-subsidization".[95] We see nothing in any of the relevant provisions of the Lomé Convention that can in any way be construed to "require" such "cross-subsidization". Therefore, in our view, these import licensing procedures are not "required".

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

(b) What is covered by the Lomé Waiver?

179. Having determined what is "required" by the Lomé Convention, we must next determine what is covered by the Lomé Waiver.

180. Specifically, we must determine whether the Lomé Waiver applies not only to breaches of Article I:1 of the GATT 1994, but also to breaches of Article XIII of the GATT 1994, with respect to the EC's country-specific tariff quota allocations for traditional ACP States.

181. The operative paragraph of the Lomé Waiver reads in relevant part:

> Subject to the terms and conditions set out hereunder, the provisions of *paragraph 1 of Article I* of the General Agreement shall be waived, until 29 February 2000, to the extent necessary to permit the European Communities to provide preferential treatment for products originating

[95]Commission of the European Communities, *Report on the Operation of the Banana Regime*, 11 October 1995, SEC (95) 1565 final, p. 18. See also Commission of the European Communities, *Impact of Cross-subsidization within the Banana Regime*, Note for Information, Ecuador's first submission to the Panel, Exhibit 11.

> in ACP States as required by the relevant provisions of the Fourth Lomé Convention, …[96] (emphasis added)

182. The Panel, nevertheless, concluded that the Lomé Waiver should be interpreted so as to waive not only compliance with the obligations of Article I:1, but also compliance with the obligations of Article XIII of the GATT 1994. The Panel based its conclusion on the need to give "real effect"[97] to the Lomé Waiver and on the "close relationship"[98] between Articles I and XIII:1.

183. We disagree with the Panel's conclusion. The wording of the Lomé Waiver is clear and unambiguous. By its precise terms, it waives only "the provisions of paragraph 1 of Article I of the *General Agreement* … to the extent necessary" to do what is "required" by the relevant provisions of the Lomé Convention. The Lomé Waiver does not refer to, or mention in any way, any other provision of the GATT 1994 or of any other covered agreement. Neither the circumstances surrounding the negotiation of the Lomé Waiver, nor the need to interpret it so as to permit it to achieve its objectives, allow us to disregard the clear and plain wording of the Lomé Waiver by extending its scope to include a waiver from the obligations under Article XIII. Moreover, although Articles I and XIII of the GATT 1994 are both non-discrimination provisions, their relationship is not such that a waiver from the obligations under Article I implies a waiver from the obligations under Article XIII.

184. The Panel's interpretation of the Lomé Waiver as including a waiver from the GATT 1994 obligations relating to the allocation of tariff quotas is difficult to reconcile with the limited GATT practice in the interpretation of waivers, the strict disciplines to which waivers are subjected under the *WTO Agreement*, the history of the negotiations of this particular waiver and the limited GATT practice relating to granting waivers from the obligations of Article XIII.

185. There is little previous GATT practice on the interpretation of waivers. In the panel report in *United States - Sugar Waiver*, the panel stated:

> The Panel took into account in its examination that waivers are granted according to Article XXV:5 only in "exceptional circumstances", that they waive obligations under the basic rules of the General Agreement

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[96]The Fourth ACP-EEC Convention of Lomé, Decision of the CONTRACTING PARTIES of 9 December 1994, L/7604, 19 December 1994.

[97]Panel Reports, para. 7.106.

[98]*Ibid.*, para. 7.107.

> and that their terms and conditions consequently have to be interpreted narrowly.[99]

Although the *WTO Agreement* does not provide any specific rules on the interpretation of waivers, Article IX of the *WTO Agreement* and the *Understanding in Respect of Waivers of Obligations under the General Agreement on Tariffs and Trade 1994*, which provide requirements for granting and renewing waivers, stress the exceptional nature of waivers and subject waivers to strict disciplines. Thus, waivers should be interpreted with great care.

186. With regard to the history of the negotiations of the Lomé Waiver, we have already noted that the CONTRACTING PARTIES limited the scope of the waiver by replacing "preferential treatment *foreseen* by the Lomé Convention" with "preferential treatment *required* by the Lomé Convention" (emphasis added). This change clearly suggests that the CONTRACTING PARTIES wanted to restrict the scope of the Lomé Waiver.

187. Finally, we note that between 1948 and 1994, the CONTRACTING PARTIES granted only one waiver of Article XIII of the GATT 1947.[100] In view of the truly exceptional nature of waivers from the non-discrimination obligations under Article XIII, it is all the more difficult to accept the proposition that a waiver that does not explicitly refer to Article XIII would nevertheless waive the obligations of that Article. If the CONTRACTING PARTIES had intended to waive the obligations of the European Communities under Article XIII in the Lomé Waiver, they would have said so explicitly.

188. Thus, we conclude that the Panel erred in finding that "the Lomé waiver waives [the] inconsistency with Article XIII:1 to the extent necessary to permit the EC to allocate shares of its banana tariff quota to specific traditional ACP banana supplying countries in an amount not exceeding their pre-1991 best-ever exports to the EC".[101]

4. The "Separate Regimes" Argument

189. It has been argued by the European Communities that there are two separate EC import regimes for bananas, the preferential regime for traditional ACP bananas and the *erga omnes* regime for all

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[99]Adopted 7 November 1990, BISD 37S/228, para. 5.9.

[100]*Waiver Granted in Connection with the European Coal and Steel Community*, Decision of 10 November 1952, BISD 1S/17, para. 3.

[101]Panel Reports, para. 7.110.

other imports of bananas. Submissions made by the European Communities raise the question whether this is of any relevance for the application of the non-discrimination provisions of the GATT 1994 and the other Annex 1A agreements. The European Communities argues, in particular, that the non-discrimination obligations of Articles I:1, X:3(a) and XIII of the GATT 1994 and Article 1.3 of the *Licensing Agreement*, apply only *within* each of these separate regimes. The Panel found that the European Communities has only one import regime for purposes of applying the non-discrimination provisions of the GATT 1994 and Article 1.3 of the *Licensing Agreement*.

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

191. Non-discrimination obligations apply to all imports of like products, except when these obligations are specifically waived or are otherwise not applicable as a result of the operation of specific provisions of the GATT 1994, such as Article XXIV.[102] In the present case, the non-discrimination obligations of the GATT 1994, specifically Articles I:1 and XIII[103], apply fully to all imported bananas irrespective of their origin, except to the extent that these obligations are waived by the Lomé Waiver. We, therefore, uphold the findings of the Panel[104] that the non-discrimination provisions of the GATT 1994, specifically, Articles I:1 and XIII, apply to the relevant EC regulations, irrespective if there is one or more "separate regimes" for the importation of bananas.

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[102]*Panel on Newsprint*, adopted 20 November 1984, BISD 31S/114.

[103]We do not agree with the Panel's findings that Article X:3(a) of the GATT 1994 and Article 1.3 of the *Licensing Agreement* preclude the imposition of different import licensing systems on like products when imported from different Members. See our **Findings and Conclusions**, paras. (l) and (m).

[104]Panel Reports, paras. 7.82 and 7.167.

5. *Licensing Agreement*

192. The appeal by the European Communities raises two legal issues relating to the interpretation and application of the *Licensing Agreement*. The first is whether the *Licensing Agreement* applies to import licensing procedures for tariff quotas. The second is whether the requirement of "neutrality in application" in Article 1.3 of the *Licensing Agreement* precludes the imposition of different import licensing systems on like products when imported from different Members.

193. With respect to the first issue, "import licensing" is defined in Article 1.1 of the *Licensing Agreement* as follows:

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

Although the precise terms of Article 1.1 do not say explicitly that licensing procedures for tariff quotas are within the scope of the *Licensing Agreement*, a careful reading of that provision leads inescapably to that conclusion. The EC import licensing procedures require "the submission of an application" for import licences as "a prior condition for importation" of a product at the lower, in-quota tariff rate.[105] The fact that the importation of that product is possible at a high out-of-quota tariff rate without a licence does not alter the fact that a licence is required for importation at the lower in-quota tariff rate.[106]

194. We note that Article 3.2 of the *Licensing Agreement* provides that:

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

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[105]See Commission Regulation (EEC) No. 1442/93 of 10 June 1993 laying down detailed rules for the application of the arrangements for importing bananas into the Community, which explicitly requires operators to submit licence applications. Official Journal No. L 142, 12 June 1993, p. 6.

[106]In this case, the out-of-quota tariff rate on bananas is prohibitively high and, therefore, importation of bananas without a licence is in fact only a theoretical possibility. See B. Borrell, *EU Bananarama III*, The World Bank, Policy Research Working Paper 1386, December 1994, p. 16.

We note also that Article 3.3 of the *Licensing Agreement* reads:

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

We see no reason to exclude import licensing procedures for the administration of tariff quotas from the scope of the *Licensing Agreement* on the basis of the use of the term "restriction" in Article 3.2. We agree with the Panel that, in the light of the language of Article 3.3 of the *Licensing Agreement* and the introductory words of Article XI of the GATT 1994[107], the term "restriction" as used in Article 3.2 should not be interpreted to encompass only quantitative restrictions, but should be read also to include tariff quotas.[108]

195. For these reasons, we agree with the Panel that import licensing procedures for tariff quotas are within the scope of the *Licensing Agreement*.

196. With respect to the second issue, the Panel found that Article 1.3 of the *Licensing Agreement* "preclude[s] the imposition of one system of import licensing procedures in respect of a product originating in certain Members and a different system of import licensing procedures on the same product originating in other Members".[109]

197. Article 1.3 of the *Licensing Agreement* reads as follows:

> The rules for import licensing procedures shall be *neutral in application* and *administered* in a fair and equitable manner. (emphasis added)

By its very terms, Article 1.3 of the *Licensing Agreement* clearly applies to the *application* and *administration* of import licensing procedures, and requires that this application and administration be "neutral … fair and equitable". Article 1.3 of the *Licensing Agreement* does not require the import licensing *rules*, as such, to be neutral, fair and equitable. Furthermore, the context of Article 1.3 -- including the preamble, Article 1.1 and, in particular, Article 1.2 of the *Licensing Agreement* -- supports

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[107]The introductory words of Article XI of the GATT 1994 read as follows: "No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures …".

[108]Panel Reports, para. 7.154.

[109]Panel Reports, WT/DS27/R/GTM, WT/DS27/R/HND, WT/DS27/R/MEX and WT/DS27/R/USA, para. 7.261.

the conclusion that Article 1.3 does not apply to import licensing *rules*. Article 1.2 provides, in relevant part, as follows:

> Members shall ensure that the administrative procedures used to implement import licensing régimes are in conformity with the relevant provisions of GATT 1994 … as interpreted by this Agreement, …

As a matter of fact, none of the provisions of the *Licensing Agreement* concerns import licensing *rules*, *per se*. As is made clear by the title of the *Licensing Agreement*, it concerns import licensing *procedures*. The preamble of the *Licensing Agreement* indicates clearly that this agreement relates to import licensing procedures and their administration, not to import licensing rules. Article 1.1 of the *Licensing Agreement* defines its scope as the *administrative procedures* used for the operation of import licensing regimes.

198. We conclude, therefore, that the Panel erred in finding that Article 1.3 of the *Licensing Agreement* precludes the imposition of different import licensing systems on like products when imported from different Members.

6. Article X:3(a) of the GATT 1994

199. The European Communities raises two legal issues relating to the application and interpretation of Article X:3(a) of the GATT 1994. The first issue is whether the requirements of uniformity, impartiality and reasonableness set out in Article X:3(a) preclude the imposition of different import licensing systems on like products imported from different Members. The second issue is whether both Article X:3(a) of the GATT 1994 and Article 1.3 of the *Licensing Agreement* apply to the EC import licensing procedures.

200. On the first issue, the Panel found that the application of operator category rules and activity function rules "in respect of the importation of third-country and non-traditional ACP bananas at in-quota tariff rates, in the absence of the application of such rules to traditional ACP imports, is inconsistent with the requirements of Article X:3(a) of GATT".[110] In coming to this conclusion, the Panel relied on a 1968 Note by the GATT Director-General, which asserted that Article X:3(a) precludes the application of one set of regulations and procedures to some contracting parties and a different set to

[110]Panel Reports, para. 7.212, with regard to operator category rules; and WT/DS27/R/ECU, WT/DS27/R/GTM, WT/DS27/R/HND and WT/DS27/R/MEX, para. 7.231, with regard to activity function rules.

others.[111] However, the European Communities correctly pointed out during the Panel proceedings that the 1968 Note cannot be considered as an authoritative interpretation of GATT rules because it was never endorsed by a formal decision of the CONTRACTING PARTIES.

Article X:3(a) of the GATT 1994 provides:

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

The text of Article X:3(a) clearly indicates that the requirements of "uniformity, impartiality and reasonableness" do not apply to the laws, regulations, decisions and rulings *themselves*, but rather to the *administration* of those laws, regulations, decisions and rulings. The context of Article X:3(a) within Article X, which is entitled "Publication and Administration of Trade Regulations", and a reading of the other paragraphs of Article X, make it clear that Article X applies to the *administration* of laws, regulations, decisions and rulings. To the extent that the laws, regulations, decisions and rulings themselves are discriminatory, they can be examined for their consistency with the relevant provisions of the GATT 1994.

201. We conclude, therefore, that the Panel erred in finding that Article X:3(a) of the GATT 1994 precludes the imposition of one system of import licensing procedures on a product originating in certain Members and a different system on the same product originating in other Members.

202. With respect to the second issue, the Panel found that the relevant provisions of the GATT 1994 *and* the *Licensing Agreement* apply to the EC import licensing procedures for bananas[112], and then proceeded to examine the consistency of the import licensing procedures with Article X:3(a) of the GATT 1994. Having found that the operator category rules and the activity function rules were inconsistent with Article X:3(a) of the GATT 1994, the Panel, referring to the ruling of the Appellate Body in *United States - Shirts and Blouses from India*[113], concluded that it was not necessary to address whether the EC import licensing procedures were also inconsistent with the *Licensing Agreement*.[114]

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[111]See *Agreement on Implementation of Article VI*, Note by the GATT Director-General of 29 November 1968, L/3149.

[112]Panel Reports, para. 7.163.

[113]WT/DS33/AB/R, adopted 23 May 1997, p. 19. The Appellate Body stated that "[a] panel need only address those claims which must be addressed in order to resolve the matter in issue in the dispute".

[114]Panel Reports, paras. 7.213 and 7.232.

203. Article X:3(a) of the GATT 1994 applies to all "laws, regulations, decisions and rulings of the kind described in paragraph 1" of Article X, which includes those, *inter alia*, "pertaining to … requirements, restrictions or prohibitions on imports …". The EC import licensing procedures are clearly regulations pertaining to requirements on imports and, therefore, are within the scope of Article X:3(a) of the GATT 1994. As we have concluded, the *Licensing Agreement* also applies to the EC import licensing procedures. We agree, therefore, with the Panel that *both* the *Licensing Agreement* and the relevant provisions of the GATT 1994, in particular, Article X:3(a), apply to the EC import licensing procedures. In comparing the language of Article 1.3 of the *Licensing Agreement* and of Article X:3(a) of the GATT 1994, we note that there are distinctions between these two articles. The former provides that "the rules for import licensing procedures shall be neutral in application and administered in a fair and equitable manner". The latter provides that each Member shall "administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions or rulings of the kind described in paragraph 1 of [Article X]".

We attach no significance to the difference in the phrases "neutral in application and administered in a fair and equitable manner" in Article 1.3 of the *Licensing Agreement* and "administer in a uniform, impartial and reasonable manner" in Article X:3(a) of the GATT 1994. In our view, the two phrases are, for all practical purposes, interchangeable. We agree, therefore, with the Panel's interpretation that the provisions of Article X:3(a) of the GATT 1994 and Article 1.3 of the *Licensing Agreement* have identical coverage.[115]

204. Although Article X:3(a) of the GATT 1994 and Article 1.3 of the *Licensing Agreement* both apply, the Panel, in our view, should have applied the *Licensing Agreement* first, since this agreement deals specifically, and in detail, with the administration of import licensing procedures. If the Panel had done so, then there would have been no need for it to address the alleged inconsistency with Article X:3(a) of the GATT 1994.

7. Article I:1 of the GATT 1994

205. The appeal by the European Communities raises two legal issues relating to the interpretation of Article I:1 of the GATT 1994. The first issue is whether the activity function rules of the EC import licensing procedures are consistent with Article I:1 of the GATT 1994, in the absence of the application of such rules to imports of traditional ACP bananas. The second issue is whether the EC requirement

[115]Panel Reports, WT/DS27/R/GTM, WT/DS27/R/HND, WT/DS27/R/MEX, WT/DS27/R/USA, para. 7.261.

to match import licences with export certificates for bananas exported from BFA countries is consistent with the requirements of Article I:1 of the GATT 1994.

206. On the first issue, the Panel found that the procedural and administrative requirements of the activity function rules for importing third-country and non-traditional ACP bananas differ from, and go significantly beyond, those required for importing traditional ACP bananas. This is a factual finding. Also, a broad definition has been given to the term "advantage" in Article I:1 of the GATT 1994 by the panel in *United States - Non-Rubber Footwear*.[116] It may well be that there are considerations of EC competition policy at the basis of the activity function rules. This, however, does not legitimize the activity function rules to the extent that these rules discriminate among like products originating from different Members. For these reasons, we agree with the Panel that the activity function rules are an "advantage" granted to bananas imported from traditional ACP States, and not to bananas imported from other Members, within the meaning of Article I:1. Therefore, we uphold the Panel's finding that the activity function rules are inconsistent with Article I:1 of the GATT 1994.

207. On the second issue, the Panel found that the EC export certificate requirement is inconsistent with the requirements of Article I:1 of the GATT 1994. The EC export certificate requirement accords BFA banana suppliers, which are initial holders of export certificates, preferential bargaining leverage to extract a share of the quota rents for their fruit exported to the European Communities, and gives them a competitive advantage over other Latin American suppliers.[117] The EC export certificate requirement thus provides an advantage to some Members (i.e. the BFA countries) that is not given to other Members. Therefore, we agree with the Panel that the export certificate requirement is inconsistent with Article I:1 of the GATT 1994.

8. Article III of the GATT 1994

208. The appeal of the European Communities raises two legal issues with respect to the application and interpretation of Article III of the GATT 1994. The first issue is whether the EC procedures and requirements for the distribution of licences for importing bananas among eligible "operators" within the European Communities are measures within the scope of Article III:4 of the GATT 1994. The second issue is whether the issuance of hurricane licences exclusively to EC producers and producer

[116]Adopted 19 June 1992, BISD 39S/128, para. 6.9.

[117]The European Communities recognized the commercial value of the export certificates in the Commission's *Report on the EC Banana Regime*, VI/5671/94, July 1994, p. 12, in which it indicated that export certificates helped the BFA countries "share in the economic benefits of the tariff quota".

organizations, or to operators including or directly representing them, is inconsistent with Article III:4 of the GATT 1994.

209. On the first issue, the Panel found that, although licences are a condition for the importation of bananas into the European Communities at in-quota tariff rates:

> … the administration of licence distribution procedures and the eligibility criteria for the allocation of licences to operators form part of the EC's internal legislation and are "laws, regulations and requirements affecting the internal sale, …" of imported bananas in the meaning of Article III:4.[118]

210. Article III:4 of the GATT 1994 provides in relevant part:

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

211. At issue in this appeal is not whether *any* import licensing requirement, as such, is within the scope of Article III:4, but whether the EC procedures and requirements for the *distribution* of import licences for imported bananas among eligible operators *within* the European Communities are within the scope of this provision. The EC licensing procedures and requirements include the operator category rules, under which 30 per cent of the import licences for third-country and non-traditional ACP bananas are allocated to operators that market EC or traditional ACP bananas, and the activity function rules, under which Category A and B licences are distributed among operators on the basis of their economic activities as importers, customs clearers or ripeners. These rules go far beyond the mere import licence requirements needed to administer the tariff quota for third-country and non-traditional ACP bananas or Lomé Convention requirements for the importation of bananas. These rules are intended, among other things, to cross-subsidize distributors of EC (and ACP) bananas and to ensure that EC banana ripeners obtain a share of the quota rents.[119] As such, these rules affect "the internal sale, offering

[118]Panel Reports, para. 7.178.

[119]EC's appellant's submission, para. 325 and the EC's oral statement, para. 70. See also Commission of the European Communities, *Report on the Operation of the Banana Regime*, 11 October 1995, SEC (95) 1565 final, p. 18; and Commission of the European Communities, *Impact of Cross-subsidization within the Banana Regime*, Note for Information, Ecuador's first submission to the Panel, Exhibit 11.

for sale, purchase, …" within the meaning of Article III:4, and therefore fall within the scope of this provision. Therefore, we agree with the conclusion of the Panel on this point.

212. On the second issue, the Panel found that the EC practice with respect to hurricane licences may create an incentive for operators to purchase bananas of EC origin for marketing in the European Communities, and that this practice is an advantage accorded to bananas of EC-origin that is not accorded to bananas of third-country origin. The Panel concluded, therefore, that the issuance of hurricane licences exclusively to EC producers and producer organizations, or operators including or directly representing them, is inconsistent with the requirements of Article III:4 of the GATT 1994.

213. Hurricane licences allow for additional imports of third-country (and non-traditional ACP) bananas at the lower in-quota tariff rate. Although their issuance results in increased exports from those countries, we note that hurricane licences are issued exclusively to EC producers and producer organizations, or to operators including or directly representing them. We also note that, as a result of the EC practice relating to hurricane licences, these producers, producer organizations or operators can expect, in the event of a hurricane, to be compensated for their losses in the form of "quota rents" generated by hurricane licences. Thus, the practice of issuing hurricane licences constitutes an incentive for operators to market EC bananas to the exclusion of third-country and non-traditional ACP bananas. This practice therefore affects the competitive conditions in the market in favour of EC bananas. We do not dispute the right of WTO Members to mitigate or remedy the consequences of natural disasters. However, Members should do so in a manner consistent with their obligations under the GATT 1994 and the other covered agreements.

214. For these reasons, we agree with the Panel that the EC practice of issuing hurricane licences is inconsistent with Article III:4 of the GATT 1994.

215. We note that, in coming to this conclusion, the Panel found:

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

> measure. We consider that the design, architecture and structure of the EC practice of issuing hurricane licences all indicate that the measure is applied so as to afford protection to EC (and ACP) producers.[120]

216. The Panel has misinterpreted what we said in the Appellate Body Report in *Japan - Alcoholic Beverages*.[121] We were dealing in that case with allegations of inconsistencies with Article III:2, first and second sentences, of the GATT 1994. It is true that at page 18 of that Report, we stated that "Article III:1 articulates a general principle" which "informs the rest of Article III". However, we also said in that Report that Article III:1 "informs the first sentence and the second sentence of Article III:2 in different ways".[122] With respect to Article III:2, first sentence, we noted that it does not refer specifically to Article III:1. We stated:

> This omission must have some meaning. We believe the meaning is simply that the presence of a protective application need not be established separately from the specific requirements that are included in the first sentence in order to show that a tax measure is inconsistent with the general principle set out in the first sentence.[123]

With respect to Article III:2, second sentence, we found:

> Unlike that of Article III:2, first sentence, the language of Article III:2, second sentence, specifically invokes Article III:1. The significance of this distinction lies in the fact that whereas Article III:1 acts implicitly in addressing the two issues that must be considered in applying the first sentence, it acts explicitly as an entirely separate issue that must be addressed along with two other issues that are raised in applying the second sentence.[124]

The same reasoning must be applied to the interpretation of Article III:4. Article III:4 does *not* specifically refer to Article III:1. Therefore, a determination of whether there has been a violation of Article III:4 does *not* require a separate consideration of whether a measure "afford[s] protection to domestic production".

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[120]See paragraph 7.249 of the Panel Reports (footnotes deleted). See also a similar finding in paragraph 7.181 relating to the operator category rules.

[121]WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996.

[122]*Ibid.*, p. 18.

[123]*Ibid.*

[124]*Ibid.*, p. 24.

C. *General Agreement on Trade in Services*

1. Application of the GATS

217. There are two issues to consider in this context. The first is whether the GATS applies to the EC import licensing procedures. The second is whether the GATS overlaps with the GATT 1994, or whether the two agreements are mutually exclusive. With respect to the first issue, the Panel found that:

> … no measures are excluded *a priori* from the scope of the GATS as defined by its provisions. The scope of the GATS encompasses any measure of a Member to the extent it affects the supply of a service regardless of whether such measure directly governs the supply of a service or whether it regulates other matters but nevertheless affects trade in services.[125]

For these reasons, the Panel concluded:

> We therefore find that there is no legal basis for an *a priori* exclusion of measures within the EC banana import licensing regime from the scope of the GATS.[126]

218. The European Communities argues that the GATS does not apply to the EC import licensing procedures because they are not measures "affecting trade in services" within the meaning of Article I:1 of the GATS. In the view of the European Communities, Regulation 404/93 and the other related regulations deal with the importation, sale and distribution of bananas. As such, the European Communities asserts, these measures are subject to the GATT 1994, and not to the GATS.

219. In contrast, the Complaining Parties argue that the scope of the GATS, by its terms, is sufficiently broad to encompass Regulation 404/93 and the other related regulations as measures affecting the competitive relations between domestic and foreign services and service suppliers. This conclusion, they argue, is not affected by the fact that the same measures are also subject to scrutiny under the GATT 1994, as the two agreements are not mutually exclusive.

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[125]Panel Reports, WT/DS27/R/ECU, WT/DS27/R/MEX and WT/DS27/R/USA, para. 7.285.

[126]*Ibid.*, para. 7.286.

220. In addressing this issue, we note that Article I:1 of the GATS provides that "[t]his Agreement applies to measures by Members affecting trade in services". In our view, the use of the term "affecting" reflects the intent of the drafters to give a broad reach to the GATS. The ordinary meaning of the word "affecting" implies a measure that has "an effect on", which indicates a broad scope of application. This interpretation is further reinforced by the conclusions of previous panels that the term "affecting" in the context of Article III of the GATT is wider in scope than such terms as "regulating" or "governing".[127] We also note that Article I:3(b) of the GATS provides that "'services' includes *any service* in *any sector* except services supplied in the exercise of governmental authority" (emphasis added), and that Article XXVIII(b) of the GATS provides that the "'supply of a service' includes the production, distribution, marketing, sale and delivery of a service". There is nothing at all in these provisions to suggest a limited scope of application for the GATS. We also agree that Article XXVIII(c) of the GATS does not narrow "the meaning of the term 'affecting' to 'in respect of'".[128] For these reasons, we uphold the Panel's finding that there is no legal basis for an *a priori* exclusion of measures within the EC banana import licensing regime from the scope of the GATS.

221. The second issue is whether the GATS and the GATT 1994 are mutually exclusive agreements. The GATS was not intended to deal with the same subject matter as the GATT 1994. The GATS was intended to deal with a subject matter not covered by the GATT 1994, that is, with trade in services. Thus, the GATS applies to the supply of services. It provides, *inter alia*, for both MFN treatment and national treatment for services and service suppliers. Given the respective scope of application of the two agreements, they may or may not overlap, depending on the nature of the measures at issue. Certain measures could be found to fall exclusively within the scope of the GATT 1994, when they affect trade in goods as goods. Certain measures could be found to fall exclusively within the scope of the GATS, when they affect the supply of services as services. There is yet a third category of measures that could be found to fall within the scope of both the GATT 1994 and the GATS. These are measures that involve a service relating to a particular good or a service supplied in conjunction with a particular good. In all such cases in this third category, the measure in question could be scrutinized under both the GATT 1994 and the GATS. However, while the same measure could be scrutinized under both agreements, the specific aspects of that measure examined under each agreement could be different. Under the GATT 1994, the focus is on how the measure affects the goods involved. Under the GATS, the focus is on how the measure affects the supply of the service or the service

[127]Panel Reports, WT/DS27/R/ECU, WT/DS27/R/MEX and WT/DS27/R/USA, para. 7.281. See, for example, the panel report in *Italian Agricultural Machinery*, adopted 23 October 1958, BISD 7S/60, para. 12.

[128]Panel Reports, WT/DS27/R/ECU, WT/DS27/R/MEX and WT/DS27/R/USA, para. 7.280.

suppliers involved. Whether a certain measure affecting the supply of a service related to a particular good is scrutinized under the GATT 1994 or the GATS, or both, is a matter that can only be determined on a case-by-case basis. This was also our conclusion in the Appellate Body Report in *Canada - Periodicals.*[129]

222. For these reasons, we agree with the Panel that the EC banana import licensing procedures are subject to both the GATT 1994 and the GATS, and that the GATT 1994 and the GATS may overlap in application to a particular measure.

2. Whether Operators are Service Suppliers Engaged in Wholesale Trade Services

223. The European Communities raises two issues concerning the definition of wholesale trade services and the application of that definition. Both these issues relate to the Panel's finding that:

> … operators in the meaning of Article 19 of Regulation 404/93 and operators performing the activities defined in Article 5 of Regulation 1442/93 are service suppliers in the meaning of Article I:2(c) of GATS provided that they are owned or controlled by natural persons or juridical persons of other Members and supply wholesale services. When operators provide wholesale services with respect to bananas which they have imported or acquired for marketing, cleared in customs or ripened, they are actual wholesale service suppliers. Where operators form part of vertically integrated companies, they have the capability and opportunity to enter the wholesale service market. They could at any time decide to re-sell bananas which they have imported or acquired from EC producers, or cleared in customs, or ripened instead of further transferring or processing bananas within an integrated company. Since Article XVII of GATS is concerned with conditions of competition, it is appropriate for us to consider these vertically integrated companies as service suppliers for the purposes of analysing the claims made in this case.[130]

224. First, the European Communities questions whether the operators within the meaning of the relevant EC regulations are, in fact, service suppliers in the sense of the GATS, in that what they actually do is buy and import bananas. The European Communities argues that "when buying or importing, a wholesale trade services supplier is a buyer or importer and not covered by the GATS at all, because

[129]Appellate Body Report, WT/DS31/AB/R, adopted 30 July 1997, p. 19.

[130]Panel Reports, WT/DS27/R/ECU, WT/DS27/R/MEX and WT/DS27/R/USA, para. 7.320 (footnotes deleted).

he is not providing any reselling services".[131] The European Communities also challenges the Panel's conclusion that "integrated companies", which may provide some of their services in-house in the production or distribution chain, are service suppliers within the meaning of the GATS.

225. On the first of these two issues, we agree with the Panel that the operators as defined under the relevant regulations of the European Communities are, indeed, suppliers of "wholesale trade services" within the definition set out in the Headnote to Section 6 of the CPC.[132] We note further that the European Communities has made a full commitment for wholesale trade services (CPC 622), with no conditions or qualifications, in its Schedule of Specific Commitments under the GATS.[133] Although these operators, as defined in the relevant EC regulations, are engaged in some activities that are not strictly within the definition of "distributive trade services" in the Headnote to Section 6 of the CPC, there is no question that they are also engaged in other activities involving the wholesale distribution of bananas that are within that definition.

226. The Headnote to Section 6 of the CPC defines "distributive trade services" in relevant part as follows:

> … the *principal services* rendered by wholesalers and retailers may be characterized as *reselling merchandise, accompanied by a variety of related, subordinated services* … (emphasis added)

We note that the CPC Headnote characterizes the "*principal* services" rendered by wholesalers as "reselling merchandise". This means that "reselling merchandise" is not necessarily the *only* service provided by wholesalers. The CPC Headnote also refers to "a variety of related, subordinated services" that may accompany the "principal service" of "reselling merchandise". It is difficult to conceive how a wholesaler could engage in the "principal service" of "reselling" a product if it could not also purchase or, in some cases, import the product. Obviously, a wholesaler must obtain the goods by some means in order to resell them.[134] In this case, for example, it would be difficult to resell bananas in the European Communities if one could not buy them or import them in the first place.

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[131]EC's appellant's submission, para. 293.

[132]Provisional Central Product Classification, United Nations Statistical Papers, Series M, No. 77, 1991, p. 189.

[133]European Communities and their Member States' Schedule of Specific Commitments, GATS/SC/31, 15 April 1994, p. 52.

[134]After all, as the European Communities has pointed out, "goods cannot walk" or be resold by themselves (EC's appellant's submission, para. 236).

227. The second issue relates to "integrated companies". In our view, even if a company is vertically-integrated, and even if it performs other functions related to the production, importation, distribution and processing of a product, to the extent that it is also engaged in providing "wholesale trade services" and is therefore affected in that capacity by a particular measure of a Member in its supply of those "wholesale trade services", that company is a service supplier within the scope of the GATS.

228. For these reasons, we uphold the Panel's findings on both these issues.[135]

3. Article II of the GATS

229. The European Communities appeals the Panel's finding:

> … that the obligation contained in Article II:1 of GATS to extend "treatment no less favourable" should be interpreted *in casu* to require providing no less favourable conditions of competition.[136]

The critical issue here is whether Article II:1 of the GATS applies only to *de jure*, or formal, discrimination or whether it applies also to *de facto* discrimination.

230. The Panel's approach to this question was to interpret the words "treatment no less favourable" in Article II:1 of the GATS by reference to paragraphs 2 and 3 of Article XVII of the GATS. The Panel said:

> … we note that the standard of "no less favourable treatment" in paragraph 1 of Article XVII is meant to provide for no less favourable conditions of competition regardless of whether that is achieved through the application of formally identical or formally different measures. Paragraphs 2 and 3 of Article XVII serve the purpose of codifying this interpretation, and in our view, do not impose new obligations on Members additional to those contained in paragraph 1. In essence, the "treatment no less favourable" standard of Article XVII:1 is clarified and reinforced in the language of paragraphs 2 and 3. The absence of similar language in Article II is not, in our view, a justification for giving a different ordinary meaning in terms of Article 31(1) of the Vienna Convention to the words "treatment no less favourable", which are identical in both Articles II:1 and XVII:1.[137]

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[135]Panel Reports, WT/DS27/R/ECU, WT/DS27/R/MEX and WT/DS27/R/USA, para. 7.320.

[136]*Ibid.*, para. 7.304.

[137]*Ibid.*, para. 7.301.

231. We find the Panel's reasoning on this issue to be less than fully satisfactory. The Panel interpreted Article II of the GATS in the light of panel reports interpreting the national treatment obligation of Article III of the GATT. The Panel also referred to Article XVII of the GATS, which is also a national treatment obligation. But Article II of the GATS relates to MFN treatment, not to national treatment. Therefore, provisions elsewhere in the GATS relating to national treatment obligations, and previous GATT practice relating to the interpretation of the national treatment obligation of Article III of the GATT 1994 are not necessarily relevant to the interpretation of Article II of the GATS. The Panel would have been on safer ground had it compared the MFN obligation in Article II of the GATS with the MFN and MFN-type obligations in the GATT 1994.[138]

232. Articles I and II of the GATT 1994 have been applied, in past practice, to measures involving *de facto* discrimination.[139] We refer, in particular, to the panel report in *European Economic Community - Imports of Beef from Canada*[140], which examined the consistency of EEC regulations implementing a levy-free tariff quota for high quality grain-fed beef with Article I of the GATT 1947. Those regulations made suspension of the import levy for such beef conditional on production of a certificate of authenticity. The only certifying agency authorized to produce a certificate of authenticity was a United States agency. The panel, therefore, found that the EEC regulations were inconsistent with the MFN principle in Article I of the GATT 1947 as they had the effect of denying access to the EEC market to exports of products of any origin other than that of the United States.

233. The GATS negotiators chose to use different language in Article II and Article XVII of the GATS in expressing the obligation to provide "treatment no less favourable". The question naturally arises: if the GATS negotiators intended that "treatment no less favourable" should have exactly the same meaning in Articles II and XVII of the GATS, why did they not repeat paragraphs 2 and 3 of Article XVII in Article II? But that is not the question here. The question here is the meaning of "treatment no less favourable" with respect to the MFN obligation in Article II of the GATS. There is more than one way of writing a *de facto* non-discrimination provision. Article XVII of the GATS is merely one of many provisions in the *WTO Agreement* that require the obligation of providing "treatment no less favourable". The possibility that the two Articles may not have exactly the same

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[138]In addition to Article I (the fundamental MFN provision of the GATT), Articles III:7, IV(b), V:2 and V:5, IX:1 and XIII:1 are also MFN-type obligations in the GATT 1994.

[139]See *European Economic Community - Imports of Beef from Canada*, adopted 10 March 1981, BISD 28S/92; *Spain - Tariff Treatment of Unroasted Coffee*, adopted 11 June 1981, BISD 28S/102; and *Japan - Tariff on Imports of Spruce-Pine-Fir (SPF) Dimension Lumber*, adopted 19 July 1989, BISD 36S/167.

[140]Adopted 10 March 1981, BISD 28S/92, paras. 4.2-4.3.

meaning does *not* imply that the intention of the drafters of the GATS was that a *de jure*, or formal, standard should apply in Article II of the GATS. If that were the intention, why does Article II not say as much? The obligation imposed by Article II is unqualified. The ordinary meaning of this provision does not exclude *de facto* discrimination. Moreover, if Article II was not applicable to *de facto* discrimination, it would not be difficult -- and, indeed, it would be a good deal easier in the case of trade in services, than in the case of trade in goods -- to devise discriminatory measures aimed at circumventing the basic purpose of that Article.

234. For these reasons, we conclude that "treatment no less favourable" in Article II:1 of the GATS should be interpreted to include *de facto*, as well as *de jure*, discrimination. We should make it clear that we do not limit our conclusion to this case. We have some difficulty in understanding why the Panel stated that its interpretation of Article II of the GATS applied "*in casu*".[141]

4. Effective Date of the GATS Obligations

235. The European Communities also raises the question whether the Panel erred in giving retroactive effect to Articles II and XVII of the GATS, contrary to the principle stated in Article 28 of the *Vienna Convention*. Article 28 states the general principle of international law that "[u]nless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to … any situation which ceased to exist before the date of entry into force of the treaty …". The Panel stated in its finding on this issue that:

> … the scope of our legal examination includes only actions which the EC took or continued to take, or measures that remained in force or continued to be applied by the EC, and thus did not cease to exist after the entry into force of the GATS. Likewise, any finding of consistency or inconsistency with the requirements of Articles II and XVII of GATS would be made with respect to the period after the entry into force of the GATS.[142]

The Panel stated, further, in a footnote to this finding, that "the EC measures at issue may be considered as continuing measures, which in some cases were enacted before the entry into force of the GATS but which did *not* cease to exist after that date (the opposite of the situation envisaged in Article 28)".[143]

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[141]Panel Reports, WT/DS27/R/ECU, WT/DS27/R/MEX and WT/DS27/R/USA, para. 7.304.

[142]*Ibid.*, para. 7.308 (footnotes deleted).

[143]*Ibid.*, footnote 486.

236. The European Communities argues that the continuing situation at issue here is not the continued existence of Regulation 404/93 and other related regulations, but is, instead, the alleged discrimination against and among foreign service suppliers. The European Communities maintains that *de facto* discrimination is a fact at a particular point in time, and does not necessarily continue for as long as a law remains in force. The European Communities argues that the Panel based its finding with respect to *de facto* discrimination on data related to 1992, that is, before the entry into force of the GATS on 1 January 1995. In the view of the European Communities, there is no basis for the assumption that this factual data relating to 1992, even if correct, continued to exist after the entry into force of the GATS. In the absence of evidence to the contrary, the European Communities argues, it should be concluded that the *de facto* discrimination in 1992 was a situation which ceased to exist before the entry into force of the GATS. Consequently, the European Communities contends that the non-retroactivity principle in Article 28 of the *Vienna Convention* applies in this case, and that this invalidates the Panel's conclusion of inconsistency of the EC import licensing regime with Articles II and XVII of the GATS.

237. It is, however, evident from the terms of its finding that the Panel concluded, as a matter of fact, that the *de facto* discrimination did continue to exist after the entry into force of the GATS.[144] This factual finding is beyond review by the Appellate Body. Thus, we do not reverse or modify the Panel's conclusion in paragraph 7.308 of the Panel Reports.

5. Burden of Proof

238. The European Communities argues that the Panel has not followed the ruling by the Appellate Body in *United States - Shirts and Blouses from India*[145], as it relates to the burden of proof, in deciding the following issues:

> which companies are a "juridical person of another Member" within the meaning of Article XXVIII(m) of the GATS and are "owned", "controlled" by or "affiliated" with such a juridical person of another Member within the meaning of Article XXVIII(n) of the GATS and are providing wholesale trade services through commercial presence within the European Communities;

[144]Panel Reports, WT/DS27/R/ECU, WT/DS27/R/MEX and WT/DS27/R/USA, para. 7.308.

[145]Appellate Body Report, WT/DS33/AB/R, adopted 23 May 1997.

the market shares of the respective companies engaged in wholesale trade in bananas within the European Communities; and

the category of "operators" that include or directly represent EC (or ACP) producers who have suffered damage from hurricanes.

239. In our view, the conclusions by the Panel on whether Del Monte is a Mexican company[146], the ownership and control of companies established in the European Communities that provide wholesale trade services in bananas[147], the market shares of suppliers of Complaining Parties' origin as compared with suppliers of EC (or ACP) origin[148], and the nationality of the majority of operators that "include or directly represent" EC (or ACP) producers[149], are all factual conclusions. Therefore, we decline to rule on these arguments made by the European Communities.

6. Whether the EC Licensing Procedures are Discriminatory Under Articles II and XVII of the GATS

240. The European Communities argues that the EC licensing system for bananas is not discriminatory under Articles II and XVII of the GATS, because the various aspects of the system, including the operator category rules, the activity function rules and the special hurricane licence rules, "pursue entirely legitimate policies" and "are not inherently discriminatory in design or effect".[150]

241. We see no specific authority either in Article II or in Article XVII of the GATS for the proposition that the "aims and effects" of a measure are in any way relevant in determining whether that measure is inconsistent with those provisions. In the GATT context, the "aims and effects" theory had its origins in the principle of Article III:1 that internal taxes or charges or other regulations "should not be applied to imported or domestic products so as to afford protection to domestic production". There is no comparable provision in the GATS. Furthermore, in our Report in *Japan - Alcoholic*

[146]Panel Reports, WT/DS27/R/ECU, WT/DS27/R/MEX, WT/DS27/R/USA, para. 7.330.

[147]*Ibid.*, para. 7.331.

[148]*Ibid.*, paras. 7.333-7.334.

[149]Panel Reports, WT/DS27/R/ECU and WT/DS27/R/USA, para. 7.392.

[150]EC's appellant's submission, para. 301.

Beverages[151], the Appellate Body rejected the "aims and effects" theory with respect to Article III:2 of the GATT 1994. The European Communities cites an unadopted panel report dealing with Article III of the GATT 1947, *United States - Taxes on Automobiles*[152], as authority for its proposition, despite our recent ruling.

(a) Operator Category Rules

242. The European Communities argues that the aim of the operator category system, in view of the objective of integrating the various national markets, and of the differing situations of banana traders in the various Member States, was not discriminatory but rather was to establish machinery for dividing the tariff quota among the different categories of traders concerned. In the view of the European Communities, the operator category system also serves the purpose of distributing quota rents among the various operators in the market. The European Communities emphasizes, furthermore, that the principle of transferability of licences is used in order to develop market structures without disrupting existing commercial links. The effect of the operator category rules, the European Communities argues, is to leave a commercial choice in the hands of the operators.

243. We do not agree with the European Communities that the aims and effects of the operator category system are relevant in determining whether or not that system modifies the conditions of competition between service suppliers of EC origin and service suppliers of third-country origin. Based on the evidence before it[153], the Panel concluded "that most of the suppliers of Complainants' origin are classified in Category A for the vast majority of their past marketing of bananas, and that most of the suppliers of EC (or ACP) origin are classified in Category B for the vast majority of their past marketing of bananas".[154] We see no reason to go behind these factual conclusions of the Panel.

244. We concur, therefore, with the Panel's conclusion that "the allocation to Category B operators of 30 per cent of the licences allowing for the importation of third-country and non-traditional ACP

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[151]Appellate Body Report, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996.

[152]DS31/R, 11 October 1994, unadopted.

[153]We note that the European Communities contests the Panel's findings in paras. 7.331, 7.333 and 7.334 of the Panel Reports, WT/DS27/R/ECU, WT/DS27/R/MEX, WT/DS27/R/USA, concerning the relative market shares of suppliers of EC (or ACP) origin as compared with suppliers of Complaining Parties' origin. We also note that the Panel indicated that it relied on evidence supplied by the Complaining Parties, and that the European Communities failed to present information that would cast doubt on the evidence presented by the Complaining Parties (see Panel Reports, WT/DS27/R/ECU, WT/DS27/R/MEX, WT/DS27/R/USA, paras. 7.331 and 7.333).

[154]Panel Reports, WT/DS27/R/ECU, WT/DS27/R/MEX, WT/DS27/R/USA, para. 7.334 (footnotes deleted).

bananas at in-quota tariff rates creates less favourable conditions of competition for like service suppliers of Complainants' origin and is therefore inconsistent with the requirement of Article XVII of GATS".[155] We also concur with the Panel's conclusion that the allocation to Category B operators of 30 per cent of the licences for importing third-country and non-traditional ACP bananas at in-quota tariff rates is inconsistent with the requirements of Article II of the GATS.[156]

(b) Activity Function Rules

245. The European Communities maintains that the aim of the activity function rules is to protect the banana ripeners against the concentration of economic bargaining power in the hands of the primary importers as a result of the tariff quota. The European Communities contends that the policy objective is to correct the position of all ripeners *vis-à-vis* all suppliers of bananas, without distinction as to nationality. Furthermore, the European Communities asserts, the effect of the activity function rules depends on the commercial choices made by operators. Operators that previously supplied wholesale trade services to bananas brought under the tariff quota can avoid or reduce the extent to which they are subject to the activity function rules by extending their services to the EC market segment. These operators may also resort to licence pooling within independent ripeners, or they may retain ownership of the bananas they import and have them ripened under contract. Thus, in the view of the European Communities, there are many options open to primary importers, and the activity function rules do not have the effect of providing less favourable conditions of competition.

246. As indicated earlier, we do not accept the argument by the European Communities that the aims or effects of the activity function rules are relevant in determining whether they provide less favourable conditions of competition to services and service suppliers of foreign origin. In this respect, we note the Panel's factual conclusions that:

> … even the EC statistics suggest that 74 to 80 per cent of ripeners are EC controlled. Thus, we conclude that the vast majority of the ripening capacity in the EC is owned or controlled by natural or juridical persons of the EC and that most of the bananas produced in or imported to the EC are ripened in EC owned or controlled ripening facilities.[157]

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[155]Panel Reports, WT/DS27/R/ECU, WT/DS27/R/MEX, WT/DS27/R/USA, para. 7.341.

[156]*Ibid.*, para. 7.353.

[157]Panel Reports, WT/DS27/R/ECU and WT/DS27/R/USA, para. 7.362 (footnotes deleted).

We also note the Panel's factual finding that "most of the service suppliers of Complainants' origin will usually be able to claim reference quantities only for primary importation, and possibly for customs clearance, but not for the performance of ripening activities".[158] Given these factual findings, we see no reason to reverse the Panel's legal conclusion that the allocation to ripeners of a certain proportion of the Category A and B licences allowing the importation of third-country and non-traditional ACP bananas at in-quota tariff rates creates less favourable conditions of competition for like service suppliers of Complainants' origin, and is therefore inconsistent with the requirements of Article XVII of GATS.[159]

(c) Hurricane Licences

247. The European Communities asserts that the purpose of the hurricane licences is to compensate those that suffer damage caused by tropical storms. With respect to Article XVII of the GATS, the European Communities maintains that the hurricane licence provisions do not modify competitive conditions between EC operators and operators of Complaining Parties' origin. With respect to Article II of the GATS, the European Communities argues that there is no *de facto* discrimination since there is no indication in the hurricane licence rules that operators that are not ACP-owned or -controlled cannot own or represent ACP producers on the same basis as ACP or EC-owned or -controlled operators.

248. Once again, we do not accept the argument by the European Communities that the aims and effects of a measure are relevant in determining its consistency with Articles II or XVII of the GATS. We note that under the EC hurricane licence rules, only operators who include or directly represent EC or ACP producers or producer organizations affected by a tropical storm are eligible for allocation of hurricane licences.[160] The Panel made a conclusion of fact that "the vast majority of operators who 'include or directly represent' EC or ACP producers are service suppliers of EC (or ACP) origin".[161] Given this factual finding, we do not reverse the Panel's conclusions in paragraphs 7.393 and 7.397 of the Panel Reports.

[158]Panel Reports, WT/DS27/R/ECU and WT/DS27/R/USA, para. 7.362 (footnotes deleted).

[159]*Ibid.*, para. 7.368.

[160]*Ibid.*, para. 7.392.

[161]*Ibid.*

D. *Nullification or Impairment*

249. The Panel concluded that:

> … the infringement of obligations by the EC under a number of WTO agreements, are a *prima facie* case of nullification or impairment of benefits in the meaning of Article 3.8 of the DSU, which provides that "there is normally a presumption that a breach of the rules has an adverse impact on other Members parties to that covered agreement". To the extent that this presumption can be rebutted, in our view the EC has not succeeded in rebutting the presumption that its breaches of GATT, GATS and Licensing Agreement rules have nullified or impaired benefits of the Complainants.[162]

The European Communities has appealed this conclusion.

250. We observe, first of all, that the European Communities attempts to rebut the presumption of nullification or impairment with respect to the Panel's findings of violations of the GATT 1994 on the basis that the United States has never exported a single banana to the European Community, and therefore, could not possibly suffer any trade damage. The attempted rebuttal by the European Communities applies only to one complainant, the United States, and to only one agreement, the GATT 1994. In our view, the Panel erred in extending the scope of the presumption in Article 3.8 of the DSU to claims made under the GATS as well as to claims made by the Complaining Parties other than the United States.

251. We note that Article 12.7 of the DSU provides in part that:

> … the report of a panel shall set out the findings of fact, the applicability of relevant provisions and *the basic rationale behind any findings and recommendations* that it makes. (emphasis added)

In paragraph 7.398 of the Reports, the Panel has provided no more by way of a "basic rationale" than a reference in a footnote to a previous panel report.[163] That said, we note that the two issues of nullification or impairment and of the standing of the United States are closely related. Indeed, the

[162]Panel Reports, para. 7.398.

[163]*Ibid.*, footnote 523.

European Communities argues these two issues in the alternative. In the part of the Panel Reports dealing with standing[164], two points are made that the Panel may well have had in mind in reaching its conclusions on nullification or impairment. One is that the United States is a producer of bananas and that a potential export interest by the United States cannot be excluded; the other is that the internal market of the United States for bananas could be affected by the EC bananas regime and by its effects on world supplies and world prices of bananas. These are matters that we have already decided are relevant to the question of the standing of the United States under the GATT 1994. They are equally relevant to the question whether the European Communities has rebutted the presumption of nullification or impairment.

252. So, too, is the panel report in *United States - Superfund*, to which the Panel referred.[165] In that case, the panel examined whether measures with "only an insignificant effect on the volume of exports do nullify or impair benefits under Article III:2 …". The panel concluded (and in so doing, confirmed the views of previous panels) that:

> Article III:2, first sentence, cannot be interpreted to protect expectations on export volumes; it protects expectations on the competitive relationship between imported and domestic products. A change in the competitive relationship contrary to that provision must consequently be regarded *ipso facto* as a nullification or impairment of benefits accruing under the General Agreement. A demonstration that a measure inconsistent with Article III:2, first sentence, has no or insignificant effects would therefore in the view of the Panel not be a sufficient demonstration that the benefits accruing under that provision had not been nullified or impaired even if such a rebuttal were in principle permitted.[166]

253. The panel in *United States - Superfund* subsequently decided "not to examine the submissions of the parties on the trade effects of the tax differential"[167] on the basis of the legal grounds it had enunciated. The reasoning in *United States - Superfund* applies equally in this case.

254. For these reasons, we can find no legal basis on which to reverse the conclusions of the Panel in paragraph 7.398 of the Panel Reports.

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[164]Panel Reports, paras. 7.47-7.52.

[165]*Ibid.*, footnote 523.

[166]Adopted on 17 June 1987, BISD 34S/136, para. 5.1.9.

[167]*Ibid.*, para. 5.1.10.

V. Findings and Conclusions

255. For the reasons set out in this Report, the Appellate Body:

(a) upholds the Panel's conclusion that the United States had standing to bring claims under the GATT 1994 in this case;

(b) upholds the Panel's conclusion that the request for the establishment of the panel in this case was consistent with Article 6.2 of the DSU., with the modification that a faulty request cannot be "cured" by the first written submission of a complaining party;

(c) reverses the Panel's conclusions that certain of the claims under Article XVII of the GATS made by Mexico and all the claims made under the GATS by Guatemala and Honduras are not to be included within the scope of this case;

(d) upholds the Panel's conclusion that the *Agreement on Agriculture* does not permit the European Communities to act inconsistently with the requirements of Article XIII of the GATT 1994;

(e) upholds the Panel's finding that the allocation of tariff quota shares, whether by agreement or by assignment, to some, but not to other, Members not having a substantial interest in supplying bananas to the European Communities is inconsistent with Article XIII:1 of the GATT 1994;

(f) upholds the Panel's finding that the tariff quota reallocation rules of the BFA are inconsistent with Article XIII:1 of the GATT 1994, and modifies the Panel's finding by concluding that the BFA tariff quota reallocation rules are also inconsistent with the chapeau of Article XIII:2 of the GATT 1994;

(g) concludes that the European Communities is "required" under the relevant provisions of the Lomé Convention to: provide duty-free access for traditional ACP bananas, provide duty-free access for 90,000 tonnes of non-traditional ACP bananas, provide a margin of tariff preference in the amount of 100 ECU/tonne for all other non-traditional ACP bananas, and allocate tariff quota shares to the traditional ACP States in the amount of their pre-1991 best-ever export volumes;

(h) concludes that the European Communities is *not* "required" under the relevant provisions of the Lomé Convention to: allocate tariff quota shares to traditional ACP States in excess of their pre-1991 best-ever export volumes, allocate tariff quota shares to ACP States exporting non-traditional ACP bananas, or maintain the EC import licensing procedures that are applied to third-country and non-traditional ACP bananas;

(i) and therefore, based on the conclusions in (g) and (h), upholds the findings of the Panel that the European Communities is "required" under the relevant provisions of the Lomé Convention to provide preferential tariff treatment for non-traditional ACP bananas, is not "required" to allocate tariff quota shares to traditional ACP States in excess of their pre-1991 best-ever export volumes, and is not "required" to maintain the EC import licensing procedures that are applied to third-country and non-traditional ACP bananas;

(j) reverses the finding of the Panel that the Lomé Waiver waives any inconsistency with Article XIII:1 of the GATT 1994 to the extent necessary to permit the European Communities to allocate tariff quota shares to traditional ACP States;

(k) upholds the Panel's findings that the non-discrimination provisions of the GATT 1994, specifically, Articles I:1 and XIII, apply to the relevant EC regulations, irrespective of whether there are one or more "separate regimes" for the importation of bananas;

(l) upholds the Panel's finding that licensing procedures for tariff quotas are within the scope of the *Licensing Agreement*, and reverses the Panel's finding that Article 1.3 of the *Licensing Agreement* precludes the imposition of different import licensing systems on like products when imported from different Members;

(m) reverses the Panel's finding that Article X:3(a) of the GATT 1994 precludes the imposition of different import licensing systems on like products when imported from different Members; and upholds the Panel's finding that both Article 1.3 of the *Licensing Agreement* and Article X:3(a) of the GATT 1994 apply to the EC import licensing procedures, with the modification that the Panel should have applied the provisions of the *Licensing Agreement* first, as it is the more specific and detailed agreement;

(n) upholds the Panel's conclusions that the EC activity function rules and the BFA export certificate requirement are inconsistent with Article I:1 of the GATT 1994;

(o) upholds the Panel's findings that Article III:4 of the GATT 1994 applies to the EC import licensing procedures, and that the EC practice with respect to hurricane licences is inconsistent with Article III:4 of the GATT 1994;

(p) upholds the Panel's conclusions that there is no legal basis for an *a priori* exclusion of measures within the EC import licensing regime from the scope of the GATS and that the GATT 1994 and the GATS may overlap in application to a measure;

(q) upholds the Panel's findings that "operators" as defined in the relevant EC regulations are service suppliers within the meaning of Article I:2(c) of the GATS that are engaged in providing "wholesale trade services" and that, where such operators form part of vertically-integrated companies, such companies are service suppliers for the purposes of this case;

(r) upholds the Panel's conclusion that Article II:1 of the GATS should be interpreted to include *de facto*, as well as *de jure*, discrimination;

(s) upholds the Panel's conclusion that the scope of its legal examination of the application of Articles II and XVII of the GATS includes only actions that the European Communities took, or continued to take, or measures that remained in force or continued to be applied by the European Communities, and thus did not cease to exist after the entry into force of the GATS;

(t) upholds the Panel's findings relating to: which companies are owned or controlled by, or are affiliated with, persons of Complaining Parties' origin, and are providing wholesale trade services in bananas through commercial presence within the European Communities; the respective market shares of service suppliers of Complaining Parties' origin as compared with service suppliers of EC (or ACP) origin; and the nationality of the majority of operators that "include or directly represent" EC (or ACP) producers that have suffered damage from hurricanes;

(u) upholds the Panel's conclusions that the allocation to Category B operators of 30 per cent of the licences allowing the importation of third-country and non-traditional ACP bananas at in-quota tariff rates is inconsistent with Articles II and XVII of the GATS;

(v) upholds the Panel's conclusions that the allocation to ripeners of a certain portion of the Category A and B licences allowing the importation of third-country and non-traditional ACP bananas at in-quota tariff rates is inconsistent with Article XVII of the GATS;

(w) upholds the Panel's conclusions that the EC practice with respect to hurricane licences is inconsistent with Articles II and XVII of the GATS; and

(x) upholds the Panel's finding that the European Communities has not succeeded in rebutting the presumption that its breaches of the GATT 1994 have nullified or impaired the benefits of the United States, with the modification that this finding should be limited to the United States and to the EC's obligations under the GATT 1994.

256. The foregoing legal findings and conclusions uphold, modify or reverse the findings and conclusions of the Panel in Parts VII and IX of the Panel Reports, but leave intact the findings and conclusions of the Panel that were not the subject of this appeal.

257. The Appellate Body *recommends* that the Dispute Settlement Body request the European Communities to bring the measures found in this Report and in the Panel Reports, as modified by this Report, to be inconsistent with the GATT 1994 and the GATS into conformity with the obligations of the European Communities under those agreements.

Signed in the original at Geneva this 22nd day of August 1997 by:

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James Bacchus

Presiding Member

_____ _____

Christopher Beeby

Member

Said El-Naggar

Member