ANNEX A

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ANNEX A-1

REQUEST FOR THE ESTABLISHMENT OF A PANEL

WORLD TRADE ORGANIZATION

WT/DS27/80
26 February 2007

(07-0829)

Original: English

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

Recourse to Article 21.5 of the DSU by Ecuador

Request for the Establishment of a Panel

The following communication, dated 23 February 2007, from the delegation of Ecuador to the Chairman of the Dispute Settlement Body, is circulated pursuant to Article 21.5 of the DSU.

Upon the instructions of my authorities, I hereby convey the request of the Government of Ecuador for the establishment of a panel under Article 21.5 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU") with respect to *European Communities – Regime for the Importation, Sale, and Distribution of Bananas* (DS27).

Background

On 25 September 1997, the Dispute Settlement Body ("DSB") adopted the Panel and Appellate Body Reports of *European Communities – Regime for the Importation, Sale and Distribution of Bananas* ("*Bananas III*")[1]. The Panel Report, as modified by the Appellate Body and adopted by the DSB, found the tariff, tariff-rate quota, and licensing measures of the European Communities (EC) to be in violation, *inter alia*, of GATT Articles I, III, and XIII, and GATS Articles II and XVII, and recommended that the EC be requested to bring its banana regime into conformity with EC's obligations under the WTO.[2]

Among the EC measures found not to comply with the EC's obligations were the EC's tariff-rate quota regimes on banana imports, which excluded bananas of Ecuadorian (and other) origin completely from the most favorable tariff-rate quota, and which allocated shares of quotas in a way incompatible with the requirements of Article XIII, paragraph 2.

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[1] Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/R, adopted 25 September 1997, modified by the Appellate Body Report, WT/DS27/AB/R.

[2] Panel Report, *Bananas III*, para. 9.1; Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted 25 September 1997, para. 255.

The measures also included measures for granting and allocating licenses for the importation, distribution and other banana-related activities. Those measures were found to infringe EC obligations under Article I of the GATT, and Article II and XVII of the GATS, because the EC measures discriminated against bananas, services and service suppliers of some WTO members relative to the treatment that the EC accorded to the bananas, services and service suppliers of the EC and of other WTO members.

On 1 January 1999, in accordance with earlier EC announcements, the EC put into effect a revised regime pertaining to bananas. The EC claimed that its modified regime brought the EC into conformity with the EC's WTO obligations. On 18 December 1998, Ecuador requested the DSB to establish a panel, with the same composition as previously, under Article 21.5 of the DSU to examine the conformity of the measures taken by the EC with the EC's obligations under certain WTO rules. On 14 January 1999, the United States sought authority under Article 22.6 of the DSU to suspend concession against the EC for its failure to conform with the rulings and recommendations of the DSB.

The Article 21.5 Panel found that the EC's modified regime violated GATT Articles I and XIII, and GATS Articles II and XVII. [3] In particular, the Article 21.5 panel found that:

> The EC's 857,700 mt tariff quota disfavored Ecuadorian bananas in violation of GATT Article XIII:1, and failed to represent a distribution of trade that would have prevailed in the absence of restrictions in violation of GATT Article XIII:2.
>
> The EC's quota-licensing treatment accorded more favorable treatment to EC and ACP services and service suppliers than to services and service suppliers of Ecuador and other countries, in breach of GATS Articles II and XVII.[4]
>
> The EC's allocation of the tariff-rate quota for MFN suppliers did not conform with GATT Article XIII:2 in that it was based on an unrepresentative period and did not accord Ecuador (or other substantial suppliers) shares consistent with the requirements of Article XIII:2.
>
> The EC's duty-free treatment for ACP countries was not covered by the EC's then existing Article I waiver insofar as it allowed duty free entry over the required minimum, and the EC was to that extent in violation of GATT Article I.[5]

As in *Bananas III*, the Article 21.5 Panel recommended that the DSB request the EC to bring its regime for bananas into conformity with its obligations under the GATT 1994 and the GATS.[6] These rulings and recommendations were adopted by the DSB.

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[3] Panel Report, *European Communities – Regime for the Importation, Sale, and Distribution of Bananas – Recourse to Article 21.5 of the DSU by Ecuador*, WT/DS27/RW/ECU, adopted 6 May 1999 (hereafter "*Bananas – DSU Article 21.5 (Ecuador)*"), para. 7.1; The Arbitrators decision came to a similar conclusion. Decision by the Arbitrators, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Arbitration by the European Communities Under Article 22.6 of the DSU*, WT/DS27/ARB, 9 April 1999 (hereafter "*Bananas – DSU Article 22.6 (US)*"), paras. 5.33, 5.80.

[4] *Bananas – DSU Article 21.5 (Ecuador)*, paras. 6.160, 6.163; *Bananas – DSU Article 22.6 (US)*, paras. 5.96, 5.97.

[5] *Id*., para. 6.161.

[6] *Id*., para. 7.2.

In April 2001, the EC reached two "Understandings on Bananas," one with the United States[7] and the other with Ecuador.[8] On 2 July 2001, the EC notified the Understandings to the WTO, characterizing both as covering "the implementation by the EC of the conclusions and recommendations adopted by the DSB in the dispute 'Regime for the Importation, Sale and Distribution of Bananas.'"[9] Ecuador (as well as the United States) communicated to the DSB that the Understandings were not a mutually satisfactory settlement under Article 3.6 of the DSU, but rather constituted agreement on a phased series of steps, including a "transitory" regime that would require the EC to take various steps supported by the collective action of the WTO membership, until the EC implemented the final definitive Tariff Only regime.[10] The United States made a similar communication.

The Understandings required that the EC implement a tariff-only regime effective 1 January 2006, and that it takes interim or "transitory" measures in the meantime. Essentially, the EC would adjust its measures in two initial "phases", in a way that would ease the trade problems for Ecuador and others, even though these initial phases did not involve full conformity with the EC's obligations. The Understandings required that Ecuador and the United States "lift their reserves concerning the waiver of Article I of the GATT" for the EC's preferential tariffs for ACP products and "actively work towards promoting the acceptance of an EC request for a waiver of Article XIII of the GATT 1994" for the ACP tariff quota on bananas so as to allow for a temporary period preferences inconsistent with Articles I and XIII of the GATT.[11] These provisions were intended to and did help the EC to obtain waivers from its WTO obligations sufficient to temporarily and conditionally permit measures that would otherwise violate Articles I and XIII of the GATT but which were provided for in the measures to be taken in Phase I and Phase II. At the end of Phase II, the EC was to establish a Tariff Only system that would not require further waivers to conform with EC obligations.

Pursuant to these provisions, suitable GATT Article I and GATT Article XIII waiver conditions applicable to bananas were negotiated and the waivers were granted at the Doha Ministerial in November 2001. The final stage of the Understandings required the EC to introduce "a 'Tariff-Only regime for imports of bananas' no later than 1 January 2006. The waiver of Article I would allow the EC to maintain tariff preferences for two years after 1 January 2006, provided that a suitable MFN duty on bananas had been established by January 1 2006 in accordance with the conditions of the waiver and the provisions of Article XXVIII of the GATT and other WTO obligations."[12] The waiver of Article XIII expired on 31 December 2005, because at that point no more tariff-rate quotas were supposed to be employed.

The Article I Waiver included an annex on bananas requiring that the EC's tariff-only regime "result in at least maintaining total market access for MFN banana suppliers," taking into account "all EC WTO market-access commitments relating to bananas."[13] In the event of disagreement over

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[7] *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Understanding on Bananas between the European Communities and the United States*, WT/DS27/59, 2 July 2001 ("EC-US Understanding").

[8] *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Understanding on Bananas between the European Communities and Ecuador*, WT/DS27/60, 9 July 2001 ("EC-Ecuador Understanding").

[9] Notification of Mutually Agreed Solution, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/58, 2 July 2001.

[10] WT/DS27/60, 3 July 2001.

[11] EC-US Understanding, para. E; EC-Ecuador Understanding, para. F.

[12] *See* Award of the Arbitrator, *European Communities – The ACP-EC Partnership Agreement – Recourse to Arbitration Pursuant to the Decision of 14 November 2001*, WT/L/616, 1 August 2005, paras. 1 and 2.

[13] *European Communities – The ACP-EC Partnership Agreement*, WT/MIN(01)/15, 14 November 2001, Annex, tiret 4.

whether the proposed regime met the conditions of the Annex, the Annex provided for arbitration in accordance with the terms of the Annex. If the EC were found by the Arbitrator twice to have failed to satisfy the terms of the Annex standard for the tariff-only regime, the waiver of Article I expired with respect to bananas.

In 2005, the EC twice proposed a final MFN rate of duty, which Ecuador and other countries challenged under the Annex dispute settlement procedures as not meeting the standard of the Article I waiver. In each arbitration, the arbitrators found that the EC's banana proposals failed the standard of the Annex. As a result the Waiver of GATT Article I with respect to the EC's imports of bananas terminated for the EC on 1 January 2006.[14]

As of 31 December 2005, the EC's waiver of GATT Article XIII for its ACP banana quota of 750,000 mt also expired.[15]

<u>The Measures of the EC that are subject to this Challenge</u>

The challenged EC measures are contained in EC Council Regulation No. 1964/2005 ("Regulation 1964")[16] and its associated implementing regulations, including the EC's autonomous tariff provisions. These measures include:

- A tariff-rate quota, with a current volume of 775,000 mt, exclusively reserved for bananas of ACP origin. ACP bananas within the quota enter duty-free, quantities above the TRQ paying a current duty of 176 €/mt. The 775,000 mt ACP tariff quota volume is subject to import licenses and allocation. Ecuador does not get any share of this tariff rate quota or related measures, let alone receive the share required under Article XIII.

- An EC tariff, currently at 176 €/mt to EC imports of bananas, that applies to all bananas of Ecuadorian origin and to all other bananas except those benefiting from access to the zero-duty TRQ.

These measures are not justified under the Understandings or any agreed settlement, and are not covered by any waiver of EC obligations.

Ecuador considers that the EC measures are inconsistent with the following obligations of the WTO Agreements:

- Article I of the GATT 1994, in that the EC applies different and more favorable duties to bananas originating in ACP countries than the EC applies to bananas originating in Ecuador and most or all other WTO members.

- Article II of the GATT in that the EC applies a tariff (currently 176€ /mt) on import of bananas originating in Ecuador (and other WTO member countries) that is above the EC bound rate of duty under Article II, which is 75€/mt.

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[14] Award of the Arbitrator, *European Communities – The ACP-EC Partnership Agreement – Recourse to Arbitration Pursuant to the Decision of 14 November 2001*, WT/L/616, 1 August 2005, para. 94; Award of the Arbitrator, *European Communities – The ACP-EC Partnership Agreement – Second Recourse to Arbitration Pursuant to the Decision of 14 November 2001*, WT/L/625, 27 October 2005, para. 127.

[15] *European Communities – Transitional Regime for the EC Autonomous Tariff Rate Quotas on Imports of Bananas*, WT/MIN(01)/16, 14 November 2001, para. 1.

[16] Council of the European Union, *Council Regulation (EC) No. 1964/2005 of 29 November 2005 on the tariff rate for bananas*, OJL 316/1, 2 December 2005.

- Article XIII:1 and 2 of the GATT, in that the EC continues to provide a tariff rate quota system reserved exclusively for bananas of ACP origin, while Ecuador is denied any share of the preferential quota, let alone the share to which it is entitled under Article XIII.

REQUEST FOR THE ESTABLISHMENT OF A PANEL

On 28 November 2006, Ecuador requested consultations on the foregoing matter under DSU Article 4 and Article XXII of the GATT.[17] Consultations were held on 14 December 2006, but failed to resolve the disagreement between the parties.

As there continues to be a disagreement between Ecuador and the EC over the WTO-consistency of the EC banana measures taken to comply with *Bananas III* and *Bananas-DSU Article 21.5 (Ecuador)* and subsequent related rulings, Ecuador respectfully requests that this matter be referred to a Panel, if possible the original panel, in accordance with Article 21.5 of the DSU.

Ecuador further asks pursuant to DSU Article 6.1, fn. 5, that a special meeting of the DSB be convened within 15 days for the purpose of considering Ecuador's request for the establishment of a panel.

[17] *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 of the DSU by Ecuador*, WT/DS27/65/Rev.1, 29 November 2006.

ANNEX A-2

WORKING PROCEDURES FOR THE PANEL
DATED 29 JUNE 2007

1. In its proceedings the Panel shall follow the relevant provisions of the Dispute Settlement Understanding (DSU). In addition, the following Working Procedures shall apply.

2. The Panel will provide the Parties[1] and Third Parties[2] with a timetable for its proceedings. The timetable may be modified by the Panel as appropriate, after having consulted the Parties.

3. The Panel shall meet in closed session. The Parties, and interested Third Parties, shall be present at the meetings only when invited by the Panel to appear before it.

4. The deliberations of the Panel and the documents submitted to it shall be kept confidential. Nothing in the DSU, nor in these Working Procedures, precludes a Party or a Third Party from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted by another Member to the Panel which that Member has designated as confidential. As provided in Article 18.2 of the DSU, where a Party submits a confidential version of its written submissions to the Panel, it shall also, upon request of the other Party, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public. Non-confidential summaries shall be normally submitted no later than one week after the written submission is presented to the Panel, unless a different deadline is granted by the Panel upon a showing of good cause.

5. Before the substantive meeting of the Panel with the Parties, and in accordance with the timetable approved by the Panel, the Parties shall transmit to the Panel written submissions and subsequently written rebuttals in which they present the facts of the case, their arguments and their counter-arguments, respectively. Third Parties may transmit to the Panel written submissions after the rebuttals of the Parties have been submitted, and in accordance with the timetable approved by the Panel.

6. All Third Parties shall be invited in writing to present their views during the substantive meeting of the Panel with the Parties and the Third Parties. Third Parties may be present during the entirety of that meeting.

7. At its substantive meeting with the Parties, the Panel shall ask Ecuador to present its case first. Subsequently, and still at the same meeting, the European Communities will be asked to present its arguments. At the same meeting, Third Parties will be asked to present their views thereafter. Parties will then be allowed an opportunity for final statements, with Ecuador presenting its statement first.

8. The Panel may at any time put questions to the Parties and to the Third Parties and ask them for explanations either in the course of the substantive meeting or afterwards in writing. Replies to questions shall be submitted in writing by the dates specified by the Panel after consultation with the Parties. In addition, the Parties shall be permitted to ask questions to each other and to Third Parties.

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[1] Throughout this document, the term "Party" refers to either Ecuador or European Communities, as appropriate. The term "Parties" refers to both Ecuador and European Communities.

[2] Throughout the document, the term "Third Parties" refers to Belize, Brazil, Cameroon, Colombia, Côte d'Ivoire, Dominica, the Dominican Republic, Ghana, Jamaica, Japan, Madagascar, Nicaragua, Panama, St. Lucia, St. Vincent & the Grenadines, Suriname and the United States.

Third Parties may ask oral questions to the Parties during the course of the substantive meeting, but Parties are under no obligation to respond to those questions.

9. Each Party shall make available to the Panel and to the other Party a written version of its oral statements, preferably at the end of the meeting with the Panel, and in any event no later than the working day following the presentation. Any Third Party that wishes to present its views shall similarly make available to the Panel and to the Parties and other Third Parties a written version of its oral statements, preferably at the end of the meeting with the Panel, and in any event no later than the working day following the presentation. Parties and Third Parties shall provide the Panel and other participants at the respective session with a provisional written version of their oral statements before these statements are made.

10. In the interests of full transparency, oral presentations shall be made in the presence of the Parties. Moreover, each Party's written submissions, including replies to questions put by the Panel, shall be made available to the other Party. Third Parties shall receive copies of the Parties' first written submissions and rebuttals as well as copies of the questions posed by the Panel to the Parties and to the other Third Parties and copies of Parties' and Third Parties' responses to such questions. Parties shall submit all factual evidence to the Panel as early as possible and no later than during the substantive meeting, except with respect to evidence necessary for the answering of questions. Exceptions will be granted by the Panel upon a showing of good cause. In such cases, the other Party shall be accorded a period of time for commenting, as appropriate.

11. Within seven (7) calendar days following the submission of a written submission or presentation of an oral statement to the Panel, the Parties should provide the Panel with an executive summary of the submission or statement. These executive summaries will be used by the Panel only for the purpose of drafting a concise factual and arguments section of the Panel Report so as to facilitate timely translation and circulation of the Panel report to the Members. They shall not serve in any way as a substitute for the submissions of the parties. Each summary to be provided by each Party shall not exceed ten (10) pages in length. Third Parties are invited to also submit an executive summary seven (7) calendar days after delivering their written submission or oral statement. Third Parties' executive summaries shall not exceed three (3) pages in length. The Panel may, in light of further developments, allow the Parties and Third Parties to submit longer summaries.

12. To facilitate the maintenance of the record of the dispute, and to maximize the clarity of submissions, in particular the references to exhibits submitted by Parties, Parties shall sequentially number their exhibits throughout the course of the dispute. For example, exhibits submitted by Ecuador should be numbered ECU-1, ECU-2, etc. If the last exhibit in connection with the first submission was numbered ECU-5, the first exhibit of the next submission thus should be numbered ECU-6. Exhibits submitted by the European Communities should be numbered EC-1, EC-2, etc.

13. The Parties and Third Parties to this proceeding have the right to determine the composition of their own delegations. Delegations may include as representatives of the government concerned, private counsel and advisers. The Parties and Third Parties shall have responsibility for all members of their delegation and shall ensure that all members of their delegation, as well as any other advisers consulted by a Party or Third Party, act in accordance with the rules of the DSU and the Working Procedures of this Panel, particularly in regard to the confidentiality of the proceedings. Parties shall provide a list of the participants of their delegation to the Secretary of the Panel and to each other no later than 5.00 pm, local Geneva time, the working day before any meeting with the Panel.

14. The Panel reserves the right to earmark its communications to enable the identification of possible breaches of confidentiality, especially the Panel's interim report and its final report before the latter's circulation to all Members.

15. Any request for a preliminary ruling (including rulings on jurisdictional issues) to be made by the Panel shall be submitted no later than in a Party's first written submission. If Ecuador requests any such ruling, the European Communities shall submit its response to such a request in its first written submission. If the European Communities requests any such ruling, Ecuador shall submit its response to such a request in its rebuttal submission. Exceptions to this procedure will be granted upon a showing of good cause. The Panel shall inform the Parties promptly of any preliminary rulings it might make in the course of the proceedings. In addition, the Panel may also choose to inform third parties of such preliminary rulings, if it deems it relevant.

16. The following procedures regarding service of documents shall apply:

(a) Each Party shall serve its submissions directly on the other Party. Each Party shall, in addition, serve its first written submission, rebuttals, and its responses to the questions by the Panel and by the other Party on Third Parties. Each Third Party shall serve its submissions on the Parties and other Third Parties. Each Party and Third Party shall confirm in writing, at the time it provides the submission to the Secretariat, that copies have been served as required.

(b) The Parties and Third Parties shall provide their written submissions to the Panel, through the Secretariat, by 5.00 p.m., local Geneva time, on the deadlines established by the Panel.

(c) Parties and Third Parties shall provide the Secretariat with written copies of their oral statements on the first working day following the date of the presentation.

(d) The Parties and Third Parties shall provide the Secretariat with two (2) paper copies of all their submissions as well as an "electronic" copy on a CD-ROM, diskette or as an e-mail attachment, in a format compatible with the Secretariat's software. Paper copies shall be delivered to the Dispute Settlement Registrar, ***** (Room 2150). Electronic copies should be sent by e-mail to ***** at Dsregistry@wto.org; ***** at *****@wto.org; ***** at *****@wto.org; -***** at *****@wto.org; and ***** at *****@wto.org.

(e) The Panel will provide Parties with an electronic version of the descriptive sections of its draft report, the interim report and the final report, as well as of other documents, as appropriate. When the Panel transmits to the Parties or Third Parties both paper and electronic versions of a document, the paper version shall constitute the official version for the purposes of the record of the dispute.

17. These Working Procedures may be modified by the Panel as appropriate, after having consulted the Parties.

ANNEX A-3

REVISED WORKING PROCEDURES FOR THE PANEL DATED 23 AUGUST 2007

1. In its proceedings the Panel shall follow the relevant provisions of the Dispute Settlement Understanding (DSU). In addition, the following Working Procedures shall apply.

2. The Panel will provide the Parties[1] and Third Parties[2] with a timetable for its proceedings. The timetable may be modified by the Panel as appropriate, after having consulted the Parties.

3. The Panel shall meet in closed session. The Parties, and interested Third Parties, shall be present at the meetings only when invited by the Panel to appear before it.

4. The deliberations of the Panel and the documents submitted to it shall be kept confidential. Nothing in the DSU, nor in these Working Procedures, precludes a Party or a Third Party from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted by another Member to the Panel which that Member has designated as confidential. As provided in Article 18.2 of the DSU, where a Party submits a confidential version of its written submissions to the Panel, it shall also, upon request of the other Party, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public. Non-confidential summaries shall be normally submitted no later than one week after the written submission is presented to the Panel, unless a different deadline is granted by the Panel upon a showing of good cause.

5. Before the substantive meeting of the Panel with the Parties, and in accordance with the timetable approved by the Panel, the Parties shall transmit to the Panel written submissions and subsequently written rebuttals in which they present the facts of the case, their arguments and their counter-arguments, respectively. Third Parties may transmit to the Panel written submissions after the rebuttals of the Parties have been submitted, and in accordance with the timetable approved by the Panel.

6. All Third Parties shall be invited in writing to present their views during the substantive meeting of the Panel with the Parties and the Third Parties. Third Parties may be present during the entirety of that meeting.

7. At its substantive meeting with the Parties, the Panel shall ask Ecuador to present its case first. Subsequently, and still at the same meeting, the European Communities will be asked to present its arguments. At the same meeting, Third Parties will be asked to present their views thereafter. Parties will then be allowed an opportunity for final statements, with Ecuador presenting its statement first.

8. The Panel may decide to hold meetings with the Parties jointly with the Panel in the case of *European Communities – Regime for the Importation, Sale and Distribution of Bananas (Recourse to Article 21.5 of the DSU by the United States)*. In that case, the order in which Members will be asked to make their statements will be decided by the Panel.

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[1] Throughout this document, the term "Party" refers to either Ecuador or European Communities, as appropriate. The term "Parties" refers to both Ecuador and European Communities.

[2] Throughout the document, the term "Third Parties" refers to Belize, Brazil, Cameroon, Colombia, Côte d'Ivoire, Dominica, the Dominican Republic, Ghana, Jamaica, Japan, Madagascar, Nicaragua, Panama, St. Lucia, St. Vincent & the Grenadines, Suriname and the United States.

9. The Panel may at any time put questions to the Parties and to the Third Parties and ask them for explanations either in the course of the substantive meeting or afterwards in writing. Replies to questions shall be submitted in writing by the dates specified by the Panel after consultation with the Parties. In addition, the Parties shall be permitted to ask questions to each other and to Third Parties. Third Parties may ask oral questions to the Parties during the course of the substantive meeting, but Parties are under no obligation to respond to those questions.

10. Each Party shall make available to the Panel and to the other Party a written version of its oral statements, preferably at the end of the meeting with the Panel, and in any event no later than the working day following the presentation. Any Third Party that wishes to present its views shall similarly make available to the Panel and to the Parties and other Third Parties a written version of its oral statements, preferably at the end of the meeting with the Panel, and in any event no later than the working day following the presentation. Parties and Third Parties shall provide the Panel and other participants at the respective session with a provisional written version of their oral statements before these statements are made.

11. In the interests of full transparency, oral presentations shall be made in the presence of the Parties. Moreover, each Party's written submissions, including replies to questions put by the Panel, shall be made available to the other Party. Third Parties shall receive copies of the Parties' first written submissions and rebuttals as well as copies of the questions posed by the Panel to the Parties and to the other Third Parties and copies of Parties' and Third Parties' responses to such questions. Parties shall submit all factual evidence to the Panel as early as possible and no later than during the substantive meeting, except with respect to evidence necessary for the answering of questions. Exceptions will be granted by the Panel upon a showing of good cause. In such cases, the other Party shall be accorded a period of time for commenting, as appropriate.

12. Within seven (7) calendar days following the submission of a written submission or presentation of an oral statement to the Panel, the Parties should provide the Panel with an executive summary of the submission or statement. These executive summaries will be used by the Panel only for the purpose of drafting a concise factual and arguments section of the Panel Report so as to facilitate timely translation and circulation of the Panel report to the Members. They shall not serve in any way as a substitute for the submissions of the parties. Each summary to be provided by each Party shall not exceed ten (10) pages in length. Third Parties are invited to also submit an executive summary seven (7) calendar days after delivering their written submission or oral statement. Third Parties' executive summaries shall not exceed three (3) pages in length. The Panel may, in light of further developments, allow the Parties and Third Parties to submit longer summaries.

13. To facilitate the maintenance of the record of the dispute, and to maximize the clarity of submissions, in particular the references to exhibits submitted by Parties, Parties shall sequentially number their exhibits throughout the course of the dispute. For example, exhibits submitted by Ecuador should be numbered ECU-1, ECU-2, etc. If the last exhibit in connection with the first submission was numbered ECU-5, the first exhibit of the next submission thus should be numbered ECU-6. Exhibits submitted by the European Communities should be numbered EC-1, EC-2, etc.

14. The Parties and Third Parties to this proceeding have the right to determine the composition of their own delegations. Delegations may include as representatives of the government concerned, private counsel and advisers. The Parties and Third Parties shall have responsibility for all members of their delegation and shall ensure that all members of their delegation, as well as any other advisers consulted by a Party or Third Party, act in accordance with the rules of the DSU and the Working Procedures of this Panel, particularly in regard to the confidentiality of the proceedings. Parties shall provide a list of the participants of their delegation to the Secretary of the Panel and to each other no later than 5.00 pm, local Geneva time, the working day before any meeting with the Panel.

15. The Panel reserves the right to earmark its communications to enable the identification of possible breaches of confidentiality, especially the Panel's interim report and its final report before the latter's circulation to all Members.

16. Any request for a preliminary ruling (including rulings on jurisdictional issues) to be made by the Panel shall be submitted no later than in a Party's first written submission. If Ecuador requests any such ruling, the European Communities shall submit its response to such a request in its first written submission. If the European Communities requests any such ruling, Ecuador shall submit its response to such a request in its rebuttal submission. Exceptions to this procedure will be granted upon a showing of good cause. The Panel shall inform the Parties promptly of any preliminary rulings it might make in the course of the proceedings. In addition, the Panel may also choose to inform third parties of such preliminary rulings, if it deems it relevant.

17. The following procedures regarding service of documents shall apply:

(a) Each Party shall serve its submissions directly on the other Party. Each Party shall, in addition, serve its first written submission, rebuttals, and its responses to the questions by the Panel and by the other Party on Third Parties. Each Third Party shall serve its submissions on the Parties and other Third Parties. Each Party and Third Party shall confirm in writing, at the time it provides the submission to the Secretariat, that copies have been served as required.

(b) In the light of the particular circumstances of this case, the Panel may decide to copy, as appropriate, the complainant in the case of *European Communities – Regime for the Importation, Sale and Distribution of Bananas (Recourse to Article 21.5 of the DSU by the United States*) on communications directed to the Parties.

(c) The Parties and Third Parties shall provide their written submissions to the Panel, through the Secretariat, by 5.00 p.m., local Geneva time, on the deadlines established by the Panel.

(d) Parties and Third Parties shall provide the Secretariat with written copies of their oral statements on the first working day following the date of the presentation.

(e) The Parties and Third Parties shall provide the Secretariat with two (2) paper copies of all their submissions as well as an "electronic" copy on a CD-ROM, diskette or as an e-mail attachment, in a format compatible with the Secretariat's software. Paper copies shall be delivered to the Dispute Settlement Registrar, ***** (Room 2150). Electronic copies should be sent by e-mail to ***** at DSregistry@wto.org; ***** at *****@wto.org; ***** at *****@wto.org; ***** at ***** @wto.org; and ***** at *****@wto.org.

(f) The Panel will provide Parties with an electronic version of the descriptive sections of its draft report, the interim report and the final report, as well as of other documents, as appropriate. When the Panel transmits to the Parties or Third Parties both paper and electronic versions of a document, the paper version shall constitute the official version for the purposes of the record of the dispute.

18. These Working Procedures may be modified by the Panel as appropriate, after having consulted the Parties.

ANNEX B

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ANNEX B-1

NOTIFICATION OF A MUTUALLY AGREED SOLUTION

WORLD TRADE ORGANIZATION

WT/DS27/58
2 July 2001

(01-3276)

Original: English

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

Notification of Mutually Agreed Solution

The following communication, dated 22 June 2001, from the Permanent Delegation of the European Commission to the Chairman of the Dispute Settlement Body, is circulated pursuant to Article 3.6 of the DSU.

The European Communities (EC) wish to notify the Dispute Settlement Body (DSB) that they have reached, with the United States of America and Ecuador, a mutually satisfactory solution within the meaning of Article 3.6 of the DSU regarding the implementation by the EC of the conclusions and recommendations adopted by the DSB in the dispute "Regime for the importation, sale and distribution of bananas" (WT/DS27).

Please find attached the text of the Understandings reached between the EC and the United States and between the EC and Ecuador, respectively on 11 April 2001 and 30 April 2001, which constitute a mutually agreed solution to the bananas dispute.

I would be grateful if you could circulate a copy of this letter with its enclosures to the WTO Members.

Enclosure 1: Understanding on Bananas between the EC and the United States of 11 April 2001

A. The European Commission and the United States have identified the means by which the long-standing dispute over the EC's banana import regime can be resolved.

B. In accordance with Article 16(1) of Regulation No. (EC) 404/93 (as amended by Regulation No. (EC) 216/2001), the European Communities (EC) will introduce a Tariff Only regime for imports of bananas no later than 1 January 2006.

C. In the interim, the EC will implement an import regime on the basis of historical licensing as follows :

1. Effective 1 July 2001, the EC will implement an import regime on the basis of historical licensing as set out in Annex 1.

2. Effective as soon as possible thereafter, subject to Council and European Parliament approval and to adoption of the Article XIII waiver referred to in paragraph E, the EC will implement an import regime on the basis of historical licensing as set out in Annex 2. The Commission will seek to obtain the implementation of such an import regime as soon as possible.

D. With respect to the United States' imposition of increased duties applied to certain EC products as of 19 April 1999 covering trade in an amount of US$191.4 million per year (the "increased duties"):

1. Upon implementation of the import regime described in paragraph C(1), the United States will provisionally suspend its imposition of the increased duties.

2. Upon implementation of the import regime described in paragraph C(2), the United States will terminate its imposition of the increased duties.

3. The United States may reimpose the increased duties if the import regime described in paragraph C(2) does not enter into force by 1 January 2002.

E. The United States will lift its reserve concerning the waiver of Article I of the GATT 1994 that the EC has requested for preferential access to the EC of goods originating in ACP states signatory to the Cotonou Agreement; and will actively work towards promoting the acceptance of an EC request for a waiver of Article XIII of the GATT 1994 needed for the management of quota C under the import regime described in paragraph C(2) until 31 December 2005.

F. The EC and the United States have informed Ecuador and will cooperate in seeking the agreement of all parties.

Annex I

Phase I

1. A bound tariff-rate quota (TRQ) designated as quota "A" will be set at 2,200,000 tonnes. An autonomous TRQ designated as quota "B" will be set at 353,000 tonnes. These TRQs will be managed as one, with the total quota being 2,553,000 tonnes. There is no expectation of allocation of shares of either of these TRQs among country suppliers, and the Commission will not seek to convene a meeting to that effect of the principal supplying countries except upon the joint request of all such countries. The tariff applied to bananas imported in the "A" and "B" quotas shall not exceed 75 euro/tonne.

2. A TRQ designated as quota "C" will be set at 850,000 tonnes.

3. Import licenses for 83% of the "A" and "B" TRQs will be distributed to "traditional" operators based on each qualified "traditional" operator's 1994-96 average annual final reference volume ("reference volume") for the "A/B" quotas. Qualified "traditional" operators will be identified on the basis of the distribution of licenses that occurred under Regulation 404, Article 19.1(a) and Regulation 1442, Article 3.1(a) for "Category A subfunction (a)". Importers will not need to produce new evidence.

4. Licenses for TRQ "C" are intended to be distributed broadly in accordance with the principles to be utilized in managing of licenses for TRQ's "A" and "B" and on the basis of imports of ACP-origin bananas. The European Commission and the United States will consult again within 4 weeks with a view to finalizing the licensing principles for TRQ "C".

5. Within each TRQ, licenses may be used to import bananas from any source. Licenses to import bananas into TRQ "C" cannot be used to import bananas into TRQs "A" or "B", and vice versa.

6. A "non-traditional" operator category will be created with respect to 17% of the quantity of the "A and B" TRQs. Non-traditional operators cannot become traditional operators in subsequent periods. Management of non-traditional imports will be done by simultaneous examination.

7. The licensing regime will be administered in good faith and on a non-discriminatory basis.

8. The Commission will provide the United States as soon as possible the verified statistics confirming the implementation of this phase, taking into account the protection of business confidential information.

Annex II

Phase II

1. During Phase II, the provisions applying to Phase I will continue, except as provided in this Annex.

2. In Phase II, TRQ "B" will be 453,000 tonnes (an increase of 100,000 tonnes). The total for the "A" and "B" TRQs will be 2,653,000 tonnes.

3. The TRQ "C" will be 750,000 tonnes and will be reserved for bananas of ACP origin.

4. The share of import licenses to "traditional" operators for the "A" and "B" TRQs will be allocated in accordance with the procedure in Annex I. Import licenses will be distributed based on each qualified "traditional" operator's 1994-96 reference volume through 31 December 2003. Thereafter, the share of import licenses to "traditional" operators for the "A" and "B" TRQs will be allocated based only on usage of licenses issued under Phase II of this Understanding, through credible documentation.

5. The Commission will provide the United States as soon as possible the verified statistics confirming the implementation of this phase, taking into account the protection of business confidential information.

Enclosure 2: Understanding on Bananas between the EC and Ecuador of 30 April 2001

A. The European Commission and Ecuador have identified the means by which the long-standing dispute over the EC's banana import regime can be resolved.

B. In accordance with Article 16(1) of Regulation No. (EC) 404/93 (as amended by Regulation No. (EC) 216/2001), the European Communities (EC) will introduce a Tariff Only regime for imports of bananas no later than 1 January 2006. GATT Art XXVIII negotiations shall be initiated in good time to that effect, recognizing Ecuador as the principal supplier in these negotiations.

C. In the interim, the EC will implement an import regime on the basis of historical licensing as follows :

1. Effective 1 July 2001, the EC will implement an import regime on the basis of historical licensing as set out in Annex 1.

2. Effective as soon as possible thereafter, subject to Council and European Parliament approval and to adoption of the Article XIII waiver referred to in paragraph F, the EC will implement an import regime on the basis of historical licensing as set out in Annex 2. The Commission will seek to obtain the implementation of such an import regime as soon as possible.

D. Ecuador takes note that the European Commission will examine the trade in organic bananas and report accordingly by 31 December 2004.

E. Upon implementation of the import regime described in paragraph C, Ecuador's right to suspend concessions or other obligations of a level not exceeding US$201.6 million per year vis-à-vis the EC will be terminated.

F. Ecuador will lift its reserve concerning the waiver of Article I of the GATT 1994 that the EC has requested for preferential access to the EC of goods originating in ACP states signatory to the Cotonou Agreement; and will actively work towards promoting the acceptance of an EC request for a waiver of Article XIII of the GATT 1994 needed for the management of quota C under the import regime described in paragraph C(2) until 31 December 2005.

G. The EC and Ecuador consider that this Understanding constitutes a mutually agreed solution to the banana dispute.

Annex I

Phase I

1. A bound tariff-rate quota (TRQ) designated as quota "A" will be set at 2,200,000 tonnes. An autonomous TRQ designated as quota "B" will be set at 353,000 tonnes. These TRQs will be managed as one, with the total quota being 2,553,000 tonnes. There is no expectation of allocation of shares of either of these TRQs among country suppliers, and the Commission will not seek to convene a meeting to that effect of the principal supplying countries except upon the joint request of all such countries. The tariff applied to bananas imported in the "A" and "B" quotas shall not exceed 75 euro/tonne.

2. A TRQ designated as quota "C" will be set at 850,000 tonnes.

3. Import licenses for 83% of the "A" and "B" TRQs will be distributed to "traditional" operators based on each qualified "traditional" operator's 1994-96 average final reference volume ("reference volume") for the "A/B" quotas. Qualified "traditional" operators will be identified on the basis of the distribution of licenses that occurred under Regulation 404, Article 19.1(a) and Regulation 1442, Article 3.1(a) for "Category A subfunction (a)". Importers will not need to produce new evidence.

4. Licenses for TRQ "C" are intended to be distributed broadly in accordance with the principles to be utilized in managing of licenses for TRQ's "A" and "B" and on the basis of imports of ACP-origin bananas.

5. Within each TRQ, licenses may be used to import bananas from any source. Licenses to import bananas into TRQ "C" cannot be used to import bananas into TRQs "A" and "B", and vice versa.

6. A "non-traditional" operator category will be created with respect to 17% of the quantity of the "A and B" TRQs. Non-traditional operators cannot become traditional operators in subsequent periods.

7. Management of non-traditional operators will be done by simultaneous examination, respecting the following conditions:

   (a) the activity period to consider for registration shall be 2 years;

   (b) the minimum annual customs value of imports into the EU to qualify shall be 1.2 million € ;

   (c) traditional importers in Quota C may only qualify as non-traditional importers in Quota A/B when they prove that they imported bananas from third countries other than ACP in the relevant period;

   (d) in application for licenses, the maximum requested quantities for each non-traditional operator shall be not higher than 12.5% of the quantity reserved for non-traditional operators;

   (e) a security of 150€/t shall be required;

(f) a non-traditional operator shall be required to be responsible for shipping bananas to the EU;

(g) simultaneous examination shall be conducted in a pro-rata basis;

(h) dissuasive penalties shall apply in the event that a traditional operator be found to be controlling a non-traditional operator within the same Quota;

(i) transmissibility of licenses between non-traditional operators will be permitted.

8. The licensing regime will be administered in good faith and on a non-discriminatory basis.

Annex II

Phase II

1. During Phase II, the provisions applying to Phase I will continue, except as provided in this Annex.

2. In Phase II, TRQ "B" will be 453,000 tonnes (an increase of 100,000 tonnes). The total for the "A" and "B" TRQs will be 2,653,000 tonnes.

3. The TRQ "C" will be 750,000 tonnes and will be reserved for bananas of ACP origin.

4. The share of import licenses to "traditional" operators for the "A" and "B" TRQs will be allocated in accordance with the procedure in Annex I. Import licenses will be distributed based on each qualified "traditional" operator's 1994-96 reference volume through 31 December 2003. Thereafter, the share of import licenses to "traditional" operators for the "A" and "B" TRQs will be allocated based only on usage of licenses issued under Phase II of this Understanding, through credible documentation.

5. The Commission will provide regularly the verified statistics on the importation of bananas from Ecuador.

ANNEX B-2

COMMUNICATION FROM THE UNITED STATES

WORLD TRADE ORGANIZATION

WT/DS27/59
G/C/W/270
2 July 2001
(01-3275)

Original: English

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

Communication from the United States

The following communication, dated 26 June 2001, from the Permanent Mission of the United States to the Chairman of the Dispute Settlement Body, is circulated at the request of that delegation.

For the information of all Members, please find attached the text of the Understanding reached between the European Communities (EC) and the United States on 11 April 2001.

We have received and reviewed the EC's separate notification of 22 June 2001, to the Dispute Settlement Body (DSB) of our Understanding on bananas. As we have explained to the EC during bilateral discussions last week and indicated at meetings of the DSB, the Understanding identifies the means by which the long-standing dispute over the EC's banana import regime can be resolved, but, as is obvious from its own text, it does not in itself constitute a mutually agreed solution pursuant to Article 3.6 of the DSU. In addition, in view of the steps yet to be taken by all parties, it would also be premature to take this item off the DSB agenda.

The United States very much looks forward to the prospect of a resolution to this long-standing dispute, and we will of course continue to be pleased to consult with the Commission and other interested parties as the EC proceeds with implementing its regulations in accordance with the Understanding.

Understanding on Bananas

A. The European Commission and the United States have identified the means by which the long-standing dispute over the EC's banana import regime can be resolved.

B. In accordance with Article 16(1) of Regulation No. (EC) 404/93 (as amended by Regulation No. (EC) 216/2001), the European Communities (EC) will introduce a Tariff Only regime for imports of bananas no later than 1 January 2006.

C. In the interim, the EC will implement an import regime on the basis of historical licensing as follows :

1. Effective 1 July 2001, the EC will implement an import regime on the basis of historical licensing as set out in Annex 1.

2. Effective as soon as possible thereafter, subject to Council and European Parliament approval and to adoption of the Article XIII waiver referred to in paragraph E, the EC will implement an import regime on the basis of historical licensing as set out in Annex 2. The Commission will seek to obtain the implementation of such an import regime as soon as possible.

D. With respect to the United States' imposition of increased duties applied to certain EC products as of 19 April 1999 covering trade in an amount of US$191.4 million per year (the "increased duties"):

1. Upon implementation of the import regime described in paragraph C(1), the United States will provisionally suspend its imposition of the increased duties.

2. Upon implementation of the import regime described in paragraph C(2), the United States will terminate its imposition of the increased duties.

3. The United States may reimpose the increased duties if the import regime described in paragraph C(2) does not enter into force by 1 January 2002.

E. The United States will lift its reserve concerning the waiver of Article I of the GATT 1994 that the EC has requested for preferential access to the EC of goods originating in ACP states signatory to the Cotonou Agreement; and will actively work towards promoting the acceptance of an EC request for a waiver of Article XIII of the GATT 1994 needed for the management of quota C under the import regime described in paragraph C(2) until 31 December 2005.

F. The EC and the United States have informed Ecuador and will cooperate in seeking the agreement of all parties.

Annex I

Phase I

1. A bound tariff-rate quota (TRQ) designated as quota "A" will be set at 2,200,000 tonnes. An autonomous TRQ designated as quota "B" will be set at 353,000 tonnes. These TRQs will be managed as one, with the total quota being 2,553,000 tonnes. There is no expectation of allocation of shares of either of these TRQs among country suppliers, and the Commission will not seek to convene a meeting to that effect of the principal supplying countries except upon the joint request of all such countries. The tariff applied to bananas imported in the "A" and "B" quotas shall not exceed 75 euro/tonne.

2. A TRQ designated as quota "C" will be set at 850,000 tonnes.

3. Import licenses for 83% of the "A" and "B" TRQs will be distributed to "traditional" operators based on each qualified "traditional" operator's 1994-96 average annual final reference volume ("reference volume") for the "A/B" quotas. Qualified "traditional" operators will be identified on the basis of the distribution of licenses that occurred under Regulation 404, Article 19.1(a) and Regulation 1442, Article 3.1(a) for "Category A subfunction (a)". Importers will not need to produce new evidence.

4. Licenses for TRQ "C" are intended to be distributed broadly in accordance with the principles to be utilized in managing of licenses for TRQ's "A" and "B" and on the basis of imports of ACP-origin bananas. The European Commission and the United States will consult again within 4 weeks with a view to finalizing the licensing principles for TRQ "C".

5. Within each TRQ, licenses may be used to import bananas from any source. Licenses to import bananas into TRQ "C" cannot be used to import bananas into TRQs "A" or "B", and vice versa.

6. A "non-traditional" operator category will be created with respect to 17% of the quantity of the "A and B" TRQs. Non-traditional operators cannot become traditional operators in subsequent periods. Management of non-traditional imports will be done by simultaneous examination.

7. The licensing regime will be administered in good faith and on a non-discriminatory basis.

8. The Commission will provide the United States as soon as possible the verified statistics confirming the implementation of this phase, taking into account the protection of business confidential information.

Annex II

Phase II

1. During Phase II, the provisions applying to Phase I will continue, except as provided in this Annex.

2. In Phase II, TRQ "B" will be 453,000 tonnes (an increase of 100,000 tonnes). The total for the "A" and "B" TRQs will be 2,653,000 tonnes.

3. The TRQ "C" will be 750,000 tonnes and will be reserved for bananas of ACP origin.

4. The share of import licenses to "traditional" operators for the "A" and "B" TRQs will be allocated in accordance with the procedure in Annex I. Import licenses will be distributed based on each qualified "traditional" operator's 1994-96 reference volume through 31 December 2003. Thereafter, the share of import licenses to "traditional" operators for the "A" and "B" TRQs will be allocated based only on usage of licenses issued under Phase II of this Understanding, through credible documentation.

5. The Commission will provide the United States as soon as possible the verified statistics confirming the implementation of this phase, taking into account the protection of business confidential information.

ANNEX B-3

**UNDERSTANDING ON BANANAS
BETWEEN ECUADOR AND THE EC**

WORLD TRADE ORGANIZATION

WT/DS27/60
G/C/W/274
9 July 2001
(01-3398)

Original: English

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

Understanding on Bananas between Ecuador and the EC

The following communication, dated 3 July 2001, from the Permanent Mission of Ecuador to the Chairman of the Dispute Settlement Body, is circulated at the request of that delegation.

For the information of all WTO members, please find attached the text of the Understanding on Bananas reached by Ecuador and the European Communities on 30 April 2001.

After a careful analysis on how best to present this Understanding to the membership of the Organization, having reviewed the separate notification made unilaterally by the EC on 22 June 2001 (WT/DS27/58), and bearing in mind the subsequent discussions maintained with the EC after the Understanding was reached, Ecuador considers it necessary to put forward the following comments for the Members' consideration.

1. The Understanding identifies means by which a long-standing dispute can be resolved. However, the Understanding also comprises of the execution of two phases and requires the implementation of several key features, which demands the collective action of the WTO membership. As Ecuador has expressed during the last two meetings of the DSB, it will remain vigilant that these phases and elements be fully implemented and executed.

2. Once the EC has amended its banana import regime - which was found to be WTO inconsistent by the original panel that reviewed the case as a result of Ecuador's recourse to Article 21.5 of the DSU (WT/DS27/RW/ECU) - Ecuador notes that the Understanding reached with the EC refers to the current banana import regime in force as of 1 July 2001 as one of a transitory nature since, beginning at the latest on 1 January 2006, a new and definitive Tariff Only regime will be in force.

3. Since the new EC banana import regime which is currently in force still requires that several steps be taken in the context of the DSB and other WTO bodies, it would be premature to take

this item off the DSB agenda which considers this issue at every regular meeting pursuant to Article 21.6 of the DSU.

In light of the above and although Ecuador sees the Understanding as an agreed solution which can contribute to an overall, definite and universally accepted solution, it must be made clear that the provisions of Article 3.6 of the DSU are not applicable in this case.

We request that you please circulate a copy of this letter with its attachment to all WTO Members and request that the Secretariat provide a copy of these documents to the Council of Trade in Goods.

Understanding on Bananas

A. The European Commission and Ecuador have identified the means by which the long-standing dispute over the EC's banana import regime can be resolved.

B. In accordance with Article 16(1) of Regulation No. (EC) 404\93 (as amended by Regulation No. (EC) 216\2001), the European Communities (EC) will introduce a Tariff Only regime for imports of bananas no later than 1 January 2006. GATT Art XXVIII negotiations shall be initiated in good time to that effect, recognizing Ecuador as the principal supplier in these negotiations.

C. In the interim, the EC will implement an import regime on the basis of historical licensing as follows :

1. Effective 1 July 2001, the EC will implement an import regime on the basis of historical licensing as set out in Annex 1.

2. Effective as soon as possible thereafter, subject to Council and European Parliament approval and to adoption of the Article XIII waiver referred to in paragraph F, the EC will implement an import regime on the basis of historical licensing as set out in Annex 2. The Commission will seek to obtain the implementation of such an import regime as soon as possible.

D. Ecuador takes note that the European Commission will examine the trade in organic bananas and report accordingly by 31 December 2004.

E. Upon implementation of the import regime described in paragraph C, Ecuador's right to suspend concessions or other obligations of a level not exceeding US$201.6 million per year vis-à-vis the EC will be terminated.

F. Ecuador will lift its reserve concerning the waiver of Article I of the GATT 1994 that the EC has requested for preferential access to the EC of goods originating in ACP States signatory to the Cotonou Agreement; and will actively work towards promoting the acceptance of an EC request for a waiver of Article XIII of the GATT 1994 needed for the management of quota C under the import regime described in paragraph C(2) until 31 December 2005.

G. The EC and Ecuador consider that this Understanding constitutes a mutually agreed solution to the banana dispute.

Annex I

Phase I

1. A bound tariff-rate quota (TRQ) designated as quota "A" will be set at 2,200,000 tonnes. An autonomous TRQ designated as quota "B" will be set at 353,000 tonnes. These TRQs will be managed as one, with the total quota being 2,553,000 tonnes. There is no expectation of allocation of shares of either of these TRQs among country suppliers, and the Commission will not seek to convene a meeting to that effect of the principal supplying countries except upon the joint request of all such countries. The tariff applied to bananas imported in the "A" and "B" quotas shall not exceed 75 euro/tonne.

2. A TRQ designated as quota “C” will be set at 850,000 tonnes.

3. Import licenses for 83% of the "A" and "B" TRQs will be distributed to "traditional" operators based on each qualified "traditional" operator’s 1994-96 average final reference volume ("reference volume") for the “A/B” quotas. Qualified “traditional” operators will be identified on the basis of the distribution of licenses that occurred under Regulation 404, Article 19.1(a) and Regulation 1442, Article 3.1(a) for “Category A subfunction (a)”. Importers will not need to produce new evidence.

4. Licenses for TRQ “C” are intended to be distributed broadly in accordance with the principles to be utilized in managing of licenses for TRQs "A" and "B" and on the basis of imports of ACP-origin bananas.

5. Within each TRQ, licenses may be used to import bananas from any source. Licenses to import bananas into TRQ "C" cannot be used to import bananas into TRQs "A" and "B", and vice versa.

6. A "non-traditional" operator category will be created with respect to 17% of the quantity of the “A and B” TRQs. Non-traditional operators cannot become traditional operators in subsequent periods.

7. Management of non-traditional operators will be done by simultaneous examination, respecting the following conditions:

(a) the activity period to consider for registration shall be 2 years;

(b) the minimum annual customs value of imports into the EU to qualify shall be 1.2 million € ;

(c) traditional importers in Quota C may only qualify as non-traditional importers in Quota A/B when they prove that they imported bananas from third countries other than ACP in the relevant period;

(d) in application for licenses, the maximum requested quantities for each non-traditional operator shall be not higher than 12.5% of the quantity reserved for non-traditional operators;

(e) a security of 150€/t shall be required;

(f) a non-traditional operator shall be required to be responsible for shipping bananas to the EU;

(g) simultaneous examination shall be conducted in a pro-rata basis;

(h) dissuasive penalties shall apply in the event that a traditional operator be found to be controlling a non-traditional operator within the same Quota;

(i) transmissibility of licenses between non-traditional operators will be permitted.

8. The licensing regime will be administered in good faith and on a non-discriminatory basis.

Annex II

Phase II

1. During Phase II, the provisions applying to Phase I will continue, except as provided in this Annex.

2. In Phase II, TRQ "B" will be 453,000 tonnes (an increase of 100,000 tonnes). The total for the "A" and "B" TRQs will be 2,653,000 tonnes.

3. The TRQ "C" will be 750,000 tonnes and will be reserved for bananas of ACP origin.

4. The share of import licenses to "traditional" operators for the "A" and "B" TRQs will be allocated in accordance with the procedure in Annex I. Import licenses will be distributed based on each qualified "traditional" operator's 1994-96 reference volume through December 31, 2003. Thereafter, the share of import licenses to "traditional" operators for the "A" and "B" TRQs will be allocated based only on usage of licenses issued under Phase II of this Understanding, through credible documentation.

5. The Commission will provide regularly the verified statistics on the importation of bananas from Ecuador.

ANNEX B-4

THE ACP-EC PARTNERSHIP AGREEMENT
DECISION OF 14 NOVEMBER 2001

WORLD TRADE ORGANIZATION

WT/MIN(01)/15
14 November 2001

(01-5786)

MINISTERIAL CONFERENCE
Fourth Session
Doha, 9 - 14 November 2001

EUROPEAN COMMUNITIES – THE ACP-EC PARTNERSHIP AGREEMENT

Decision of 14 November 2001

The Ministerial Conference,

Having regard to paragraphs 1 and 3 of Article IX of the Marrakech Agreement Establishing the World Trade Organisation (the "WTO Agreement"), the Guiding Principles to be followed in considering applications for waivers adopted on 1 November 1956 (BISD 5S/25), the Understanding in Respect to Waivers of Obligations under the General Agreement on Tariffs and Trade 1994, paragraph 3 of Article IX of the WTO Agreement, and Decision-Making Procedures under Articles IX and XII of the WTO Agreement agreed by the General Council (WT/L/93);

Taking note of the request of the European Communities (EC) and of the Governments of the ACP States which are also WTO members (hereinafter also the "Parties to the Agreement") for a waiver from the obligations of the European Communities under paragraph 1 of Article I of the General Agreement with respect to the granting of preferential tariff treatment for products originating in ACP States as required by Article 36.3, Annex V and its Protocols of the ACP-EC Partnership Agreement (hereinafter also referred to as "the Agreement")[1];

Considering that, in the field of trade, the provisions of the ACP-EC Partnership Agreement requires preferential tariff treatment by the EC of exports of products originating in the ACP States;

Considering that the Agreement is aimed at improving the standard of living and economic development of the ACP States, including the least developed among them;

Considering also that the preferential tariff treatment for products originating in ACP States as required by Article 36.3, Annex V and its Protocols of the Agreement is designed to promote the expansion of trade and economic development of beneficiaries in a manner consistent with the

[1] As contained in documents G/C/W/187, G/C/W/204, G/C/W/254 and G/C/W/269).

objectives of the WTO and with the trade, financial and development needs of the beneficiaries and not to raise undue barriers or to create undue difficulties for the trade of other members;

Considering that the Agreement establishes a preparatory period extending until 31 December 2007, by the end of which new trading arrangements shall be concluded between the Parties to the Agreement;

Considering that the trade provisions of the Agreement have been applied since 1 March 2000 on the basis of transitional measures adopted by the ACP-EC joint institutions;

Noting the assurances given by the Parties to the Agreement that they will, upon request, promptly enter into consultations with any interested member with respect to any difficulty or matter that may arise as a result of the implementation of the preferential tariff treatment for products originating in ACP States as required by Article 36.3, Annex V and its Protocols of the Agreement;

Noting that the tariff applied to bananas imported in the "A" and "B" quotas shall not exceed 75 €/tonne until the entry into force of the new EC tariff-only regime.

Noting that the implementation of the preferential tariff treatment for bananas may be affected as a result of GATT Article XXVIII negotiations;

Noting the assurances from the Parties to the Agreement that any re-binding of the EC tariff on bananas under the relevant GATT Article XXVIII procedures should result in at least maintaining total market access for MFN banana suppliers and their willingness to accept a multilateral control on the implementation of this commitment.

Considering that, in light of the foregoing, the exceptional circumstances justifying a waiver from paragraph 1 of Article I of the General Agreement exist;

Decides as follows:

1. Subject to the terms and conditions set out hereunder, Article I, paragraph 1 of the General Agreement shall be waived, until 31 December 2007, to the extent necessary to permit the European Communities to provide preferential tariff treatment for products originating in ACP States as required by Article 36.3, Annex V and its Protocols of the ACP-EC Partnership Agreement,[2] without being required to extend the same preferential treatment to like products of any other member.

2. The Parties to the Agreement shall promptly notify the General Council of any changes in the preferential tariff treatment to products originating in ACP States as required by the relevant provisions of the Agreement covered by this waiver.

3. The Parties to the Agreement will, upon request, promptly enter into consultations with any interested member with respect to any difficulty or matter that may arise as a result of the implementation of the preferential tariff treatment for products originating in ACP States as required by Article 36.3, Annex V and its Protocols of the Agreement; where a member considers that any benefit accruing to it under the General Agreement may be or is being impaired unduly as a result of such implementation, such consultations shall examine the possibility of action for a satisfactory adjustment of the matter.

[2] Any reference to the Partnership Agreement in this Decision shall also include the period during which the trade provisions of this Agreement are applied on the basis of transitional measures adopted by the ACP-EC joint institutions.

3bis With respect to bananas, the additional provisions in the Annex shall apply.

4. Any member which considers that the preferential tariff treatment for products originating in ACP States as required by Article 36.3, Annex V and its Protocols of the Agreement is being applied inconsistently with this waiver or that any benefit accruing to it under the General Agreement may be or is being impaired unduly as a result of the implementation of the preferential tariff treatment for products originating in ACP States as required by Article 36.3, Annex V and its Protocols of the Agreement and that consultations have proved unsatisfactory, may bring the matter before the General Council**,** which will examine it promptly and will formulate any recommendations that they judge appropriate.

5. The Parties to the Agreement will submit to the General Council an annual report on the implementation of the preferential tariff treatment for products originating in ACP States as required by Article 36.3, Annex V and its Protocols of the Agreement.

6. This waiver shall not preclude the right of affected members to have recourse to Articles XXII and XXIII of the General Agreement.

ANNEX

The waiver would apply for ACP products under the Cotonou Agreement until 31 December 2007. In the case of bananas, the waiver will also apply until 31 December 2007, subject to the following, which is without prejudice to rights and obligations under Article XXVIII.

- The parties to the Cotonou Agreement will initiate consultations with Members exporting to the EU on a MFN basis (interested parties) early enough to finalize the process of consultations under the procedures hereby established at least three months before the entry into force of the new EC tariff only regime.

- No later than 10 days after the conclusion of Article XXVIII negotiations, interested parties will be informed of the EC intentions concerning the rebinding of the EC tariff on bananas. In the course of such consultations, the EC will provide information on the methodology used for such rebinding. In this regard, all EC WTO market-access commitments relating to bananas should be taken into account.

- Within 60 days of such an announcement, any such interested party may request arbitration.

- The arbitrator shall be appointed within 10 days, following the request subject to agreement between the two parties, failing which the arbitrator shall be appointed by the Director-General of the WTO, following consultations with the parties, within 30 days of the arbitration request. The mandate of the arbitrator shall be to determine, within 90 days of his appointment, whether the envisaged rebinding of the EC tariff on bananas would result in at least maintaining total market access for MFN banana suppliers, taking into account the above-mentioned EC commitments.

- If the arbitrator determines that the rebinding would not result in at least maintaining total market access for MFN suppliers, the EC shall rectify the matter. Within 10 days of the notification of the arbitration award to the General Council, the EC will enter into consultations with those interested parties that requested the arbitration. In the absence of a mutually satisfactory solution, the same arbitrator will be asked to determine, within 30 days of the new arbitration request, whether the EC has rectified the matter. The second arbitration award will be notified to the General Council. If the EC has failed to rectify the matter, this waiver shall cease to apply to bananas upon entry into force of the new EC tariff regime. The Article XXVIII negotiations and the arbitration procedures shall be concluded before the entry into force of the new EC tariff only regime on 1 January 2006.

ANNEX B-5

TRANSITIONAL REGIME FOR THE EC AUTONOMOUS TARIFF RATE QUOTAS ON IMPORTS OF BANANAS DECISION OF 14 NOVEMBER 2001

WORLD TRADE ORGANIZATION

WT/MIN(01)/16
14 November 2001

(01-5787)

MINISTERIAL CONFERENCE
Fourth Session
Doha, 9 – 14 November 2001

EUROPEAN COMMUNITIES – TRANSITIONAL REGIME FOR THE EC AUTONOMOUS TARIFF RATE QUOTAS ON IMPORTS OF BANANAS

Decision of 14 November 2001

The Ministerial Conference,

Having regard to the Guiding Principles to be followed in considering applications for waivers adopted on 1 November 1956, the Understanding in Respect of Waivers of Obligations under the General Agreement on Tariffs and Trade 1994, and paragraphs 3 and 4 of Article IX of the Marrakesh Agreement Establishing the World Trade Organization (hereinafter "WTO Agreement");

Taking note of the request of the European Communities for a waiver from its obligations under paragraphs 1 and 2 of Article XIII of the GATT 1994 with respect to bananas;

Taking note of the understandings reached by the EC, Ecuador and the United States that identify the means by which the longstanding dispute over the EC's banana regime can be resolved, in particular their provision for a temporary global quota allocation for ACP banana supplying countries under specified conditions;

Taking into account the exceptional circumstances surrounding the resolution of the bananas dispute and the interests of many WTO Members in the EC banana regime;

Recognizing the need to afford sufficient protection to the ACP banana supplying countries, including the most vulnerable, during a limited transition period, to enable them to prepare for a tariff-only regime;

Noting assurances given by the EC that it will, upon request, promptly enter into consultations with any interested member with respect to any difficulty or matter that may arise as a result of the implementation of the tariff rate quota for bananas originating in ACP States;

Considering that, in light of the foregoing, the exceptional circumstances justifying a waiver from paragraphs 1 and 2 of Article XIII of the GATT 1994 with respect to bananas exist;

Decides as follows:

1. With respect to the EC's imports of bananas, as of 1 January 2002, and until 31 December 2005, paragraphs 1 and 2 of Article XIII of the GATT 1994 are waived with respect to the EC's separate tariff quota of 750,000 tonnes for bananas of ACP origin.

2. The EC will, upon request, promptly enter into consultations with any interested member with respect to any difficulty or matter that may arise as a result of the implementation of the separate tariff rate quota for bananas originating in ACP States covered by this waiver; where a Member considers that any benefit accruing to it under the GATT 1994 may be or is being impaired unduly as a result of such implementation, such consultations shall examine the possibility of action for a satisfactory adjustment of the matter.

3. Any Member which considers that the separate tariff rate quota for bananas originating in ACP States covered by this waiver is being applied inconsistently with this waiver or that any benefit accruing to it under the GATT 1994 may be or is being impaired unduly as a result of the implementation of the separate tariff rate quota for bananas originating in ACP States covered by this waiver and that consultations have proved unsatisfactory, may bring the matter before the General Council, which will examine it promptly and will formulate any recommendations that they judge appropriate.

4. This waiver shall not preclude the right of affected members to have recourse to Articles XXII and XXIII of the GATT 1994.

ANNEX C

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ANNEX C-1

**ARTICLE XXIV.6 NEGOTIATIONS
ENLARGEMENT OF THE EUROPEAN UNION
COMMUNICATION FROM THE EUROPEAN COMMUNITIES**

WORLD TRADE ORGANIZATION

No. _____

G/SECRET/20
30 January 2004

(04-0350)

Original: English

ARTICLE XXIV:6 NEGOTIATIONS

Enlargement of the European Union

Communication from the European Communities

The following communication, dated 19 January 2004, is being circulated at the request of the Delegation of the European Communities.

Notification
by the European Communities to
the World Trade Organization and its Members
concerning decisions to enter into a customs union, resulting from the

Enlargement of the European Union

by the accession of

The Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic;

Pursuant to the Understanding on the Interpretation of Article XXIV GATT 1994, paragraph 4, incorporating the Guidelines adopted on 10 November 1980 (BISD 27S/26-28), paragraph 1 (the "Guidelines").

Following, *inter alia*, the decision of 14 April 2003 of the Council of the European Union on the admission to the European Union of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and pending the finalisation of ratification procedures, the European Communities have the honour to notify the WTO and its Members that these states have decided to become members of the European Union on

1 May 2004. The Treaty of Accession is published in the *Official Journal of the European Union* L 236 of 23 September 2003. A version subject to a legal disclaimer is published at: http://europa.eu.int/comm/enlargement/negotiations/treaty_of_accession_2003/index.htm.

Accordingly, the European Communities hereby notifies, within the framework of procedures laid down in Article XXIV GATT 1994, and in particular paragraph 6 thereof, the withdrawal on 1 May 2004 of the commitments in Schedule XCII Czech Republic, Schedule CXLIV Republic of Estonia, Schedule CVII Republic of Cyprus, Schedule CXLIII Republic of Latvia, Schedule CL Republic of Lithuania, Schedule LXXI Republic of Hungary, Schedule CXVII Republic of Malta, Schedule LXV Republic of Poland, Schedule XCVI Republic of Slovenia, Schedule XCIII Slovak Republic and Schedule CXL[1] of the European Communities of 15.

The European Communities is ready to enter into Article XXIV and XXVIII GATT 1994 procedures including tariff negotiations or consultations to address compensatory adjustments provided for under Article XXIV.6 GATT 1994.

The data[2] necessary for the purposes of applying Article XXIV.6 GATT 1994, as provided for in the Guidelines, paragraph 2, first and second sentences, is included in the Annex of this notification. In accordance with the Guidelines, paragraph 2, third sentence, and paragraph 3, any proposed modifications or compensatory adjustments will be circulated and communicated separately.

The EC intends to communicate further data in the near future to members having negotiation rights.

Pending the completion of the Article XXIV and XXVIII GATT 1994 procedures and the creation of a new schedule valid for the European Communities of 25, the commitments in the European Communities Schedule CXL will be fully respected. The new members of the European Union intend to align their Schedules with those of the European Communities on 1 May 2004.

Pursuant to the Guidelines, paragraph 1, the European Communities transmits this notification to the Secretariat, and requests the Secretariat to distribute this notification to all other Members in a secret document.

The above-mentioned data are available in **electronic form only** on the WTO Members' Homepage (http://members.wto.org), go to WTO Resources, then Market Access Schedules on Goods (login), and then to Other. Download the zipped database and open using MS Access, choose your country to print the applicable data.

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[1] This schedule is a total of the tariff and other commitments of the European Communities of 15 circulated under cover of WTO document G/L/65/Rev.1 of 19 March 1996. It has subsequently been modified by G/MA/TAR/RS/16 of 2 April 1997 (certified WT/Let/156), G/MA/TAR/RS/30 of 13 May 1997 (certified WT/Let/178), G/L/65/Rev.1/Add.2 of 21 October 1997, G/MA/TAR/RS/47 of 10 February 1998 (certified WT/Let/261), G/L/65/Rev.1/Add.2/Corr.1 of 10 February 1998, G/L/65/Rev.1/Add.3 of 23 November 1998, G/L/65/Rev.1/Add.4 of 1 July 1999, and G/L/65/Rev.1/Add.5 of 22 February 2000.

[2] Please see the bottom of the page for more information on how to obtain the data. The data are available in English only.

ANNEX C-2

**ARTICLE XXIV.6 NEGOTIATIONS
ENLARGEMENT OF THE EUROPEAN UNION
COMMUNICATION FROM THE EUROPEAN COMMUNITIES**

WORLD TRADE ORGANIZATION

No. _____

G/SECRET/26
28 September 2006

(06-4638)

Original: English

ARTICLE XXIV:6 NEGOTIATIONS

Enlargement of the European Union

Communication from the European Communities

The following communication, dated 27 September 2006, has been received from the delegation of the European Communities.

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Notification
by the European Communities to
the World Trade Organization and its Members
concerning decisions to enter into a customs union, resulting from the

Enlargement of the European Union

by the accession of

the Republic of Bulgaria and Romania;

Pursuant to the Understanding on the Interpretation of Article XXIV GATT 1994, paragraph 4, incorporating the Guidelines adopted on 10 November 1980 (BISD 27S/26-28), paragraph 1 (the "Guidelines").

Following, *inter alia*, the decision of 25 April 2005 of the Council of the European Union on the admission to the European Union of the Republic of Bulgaria and Romania and pending the finalisation of ratification procedures, leading to the entry into force of the Treaty of Accession, the European Communities have the honour to notify the WTO and its Members that these states have

decided to become members of the European Union on 1 January 2007. The Treaty of Accession is published in the *Official Journal of the European Union* L 157 of 21 June 2005.[1]

Accordingly, the European Communities hereby notifies, within the framework of procedures laid down in Article XXIV GATT 1994, and in particular paragraph 6 thereof, the modification of the Schedule of the European Communities in order to cover these new members of the European Union.

The new members of the European Union will be subject to the Schedules of the European Communities on 1 January 2007. Consequently, the commitments in Schedule CXXXIX of the Republic of Bulgaria and Schedule LXIX of Romania are withdrawn on 1 January 2007.

The data necessary for the purposes of applying Article XXIV.6 GATT 1994, as provided for in the Guidelines, paragraph 2, first and second sentences, is included in the Annex of this notification.[2] In accordance with the Guidelines, paragraph 2, third sentence, and paragraph 3, any proposed modifications or compensatory adjustments will be circulated and communicated separately.

The European Communities is ready to enter into Article XXIV and XXVIII GATT 1994 procedures including tariff negotiations or consultations to address compensatory adjustments provided for under Article XXIV.6 GATT 1994.

The European Communities requests the Secretariat to inscribe an item concerning these notifications on the agenda of the next Council meeting, subject to the rules on inclusion of items on the agenda, so that the Council may take any appropriate actions in this respect.

Pursuant to the Guidelines, paragraph 1, the European Communities transmits this notification to the Secretariat, and requests the Secretariat to distribute this notification to all other Members in a secret document.

Annex: Data for applying Article XXIV.6[2].

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[1] http://eur-lex.europa.eu/JOHtml.do?uri=OJ:L:2005:157:SOM:EN:HTML
[2] The data are available in electronic format and in English only.

ANNEX D

RESPONSES BY THE PARTIES AND THIRD PARTIES TO QUESTIONS POSED BY THE PANEL AFTER THE SUBSTANTIVE MEETING OF THE PANEL

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ANNEX D-1

RESPONSES BY ECUADOR TO QUESTIONS POSED BY THE PANEL

QUESTIONS ADDRESSED TO PARTIES

1. (Both Parties) In paragraph 39 of its third party submission, Colombia concludes that "the tariff level that would result in at least maintaining the conditions of competition between *MFN bananas and ACP bananas* is the difference between the price gap for MFN bananas (€97/tonne) and the price gap for ACP bananas (€86/tonne), or €11/tonne." Can the Parties provide a reasoned answer as to whether they agree with the argument raised by Colombia.

First, Ecuador maintains its position that the EC's Article I waiver for bananas lapsed on 1 January 2006 with the implementation of Regulation 1964, eliminating the legal relevance of the waiver's access standard (the "envisaged rebinding ... would result in at least maintaining total market access for MFN banana suppliers ...") to which the Arbitrator applied its price-gap analysis. Ecuador notes that Colombia's third party submission and oral statement support the view that the waiver has lapsed.

Second, as a factual matter, Ecuador agrees with Colombia's statement in paragraph 39 of its third party submission that "the tariff level that would result in at least maintaining the conditions of competition between *MFN bananas and ACP bananas* is the difference between the price gap for MFN bananas (€97/tonne) and the price gap for ACP bananas (€86/tonne), or €11/tonne."

As Colombia rightly mentioned, the Arbitrator, while agreeing with the use of the price gap as an appropriate methodology for the measurement of the level of protection accorded to domestic or EC growers from foreign competitors, also made it clear that the manner in which the EC had applied it "[did] not take into account how the competitive relationship may change between imports from different sources, i.e. MFN and preferential banana suppliers. …"[1]

Ecuador agrees that to determine the competitive relationship between MFN bananas and ACP bananas using the price gap methodology, it is necessary to (i) determine the level of protection accorded to EC ban *vis-à-vis* anas *vis-à-vis* MFN bananas (ii) determine the level of protection accorded to EC bananas *vis-à-vis* ACP bananas, and (iii) determine the competitive relationship between MFN bananas and ACP bananas by comparing the results of the calculations under (i) and (ii). The result of that comparison is the maximum margin of preference between ACP bananas and MFN bananas that would result in at least maintaining conditions of competition between ACP bananas and MFN bananas.

Following this methodology through, Colombia correctly carried out the relevant calculations in the light of the undisputed facts contained in the arbitrations' records – and which were either endorsed by the Arbitrator or submitted by the EC itself. First, Colombia determined in the light of the relevant reference period, the relevant internal price submitted by the EC and the relevant external price, that the tariff level for MFN bananas *vis-à-vis* EC bananas was €97/tonne.[2] Second, Colombia did an analogous calculation to determine the tariff level that would maintain the conditions of competition between ACP bananas and EC bananas, and found that such a tariff was €86/tonne.[3]

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[1] Colombia's third party submission, para. 37. First Arbitration Award, *European Communities – The ACP-EC Partnership Agreement, Recourse to Arbitration pursuant to the Decision of 14 November 2001*, WT/L/616, 1 August 2005, para. 69.

[2] Colombia's third party submission, para. 36.

[3] *Id*., para. 38.

The last step of Colombia's calculation was the comparison of (i) the tariff level that would result in at least maintaining the conditions of competition between MFN bananas and EC bananas with (ii) that that would result in at least maintaining the conditions of competition between ACP bananas and EC bananas ACP bananas.[4] The result is the tariff difference of €11/tonne. Ecuador also submits that to comply with the Article I Waiver's mandate, to envisage a tariff rebinding that would result in at least maintaining total market access for MFN banana suppliers, the appropriate MFN tariff could not accord to ACP bananas a preference higher than €11/tonne. Accordingly, by establishing an unbound tariff of €176/tonne, even if the EC had an additional opportunity to "rectify the matter", it has failed to comply with such an standard.

2. (Both Parties) How has the EC been applying the MFN tariff of €176/mt to individual imports? What volume and share of its imports have been subject to that tariff?

It is not contested that the EC applies its €176/mt tariff to all bananas of MFN origin, and to ACP origin bananas in excess of the 775,000 mt ACP duty-free tariff quota. In 2006, the volume of imports subject to the €176/mt tariff was 3,473,521 mt (of which 116,190 mt, or 3%, were ACP over-quota imports). The volume subject to that rate constituted 82% of total EC-25 banana imports, according to the EC's data.[5]

3. (Both Parties) In paragraph 15 of its first written submission, Ecuador states that, subsequent to adopting Council Regulation No. 1964/2005, "the EC has issued implementing regulations ancillary to [such regulation]." Can Parties identify all ancillary or implementing regulations associated with Council Regulation No. 1964/2005 adopted by the EC since November 2005, if any.

The implementing regulations associated with Council Regulation No. 1964/2005 and adopted by the EC since November 2005 include:

- Commission Regulation (EC) No. 2014/2005, OJ L 324/3, 10 December 2005;
- Commission Regulation (EC) No. 2015/2005, OJ L 324/5, 10 December 2005;
- Council Regulation (EC) No. 2149/2005, OJ L 342/19, 24 December 2005;
- Commission Regulation (EC) No. 219/2006, OJ L 38/22, 9 February 2006;
- Commission Regulation (EC) No. 325/2006, OJ L 54/8, 24 February 2006;
- Commission Regulation (EC) No. 566/2006, OJ L 99/6, 7 April 2006;
- Commission Regulation (EC) No. 966/2006, OJ L 176/21, 30 June 2006;
- Commission Regulation (EC) No. 1261/2006, OJ L 230/3, 24 August 2006;
- Commission Regulation (EC) No. 1789/2006, OJ L 339/3, 6 December 2006;
- Commission Regulation (EC) No. 34/2007, OJ L 10/9, 17 January 2007; and
- Commission Regulation (EC) No. 47/2007, OJ L 14/4, 20 January 2007.

4. (Both Parties) Is the import regime for bananas contained in EC Council Regulation No. 1964/2005, to be considered "the new EC tariff regime", in the sense that the term is used in the Doha Waiver? What is the exact date of entry into force of "the new EC tariff regime"? Has the EC Council Regulation No. 1964/2005 been modified in any way since its entry into force?

Yes. It is the new tariff regime introduced on 1 January 2006. The Council Regulation has not been modified, but additional regulations were issued as described in response to question 4.

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[4] *Id*., para. 39.

[5] *See* Exhibit ECU-6. Year-to-date 2007 import data, which appear to run only through June 2007, are distorted by the effects of storm-related damage in Africa.

5. (Both Parties) Ecuador has advanced claims against the preferences granted by the EC to ACP bananas under both Articles I and XIII of the GATT 1994. Do Parties see any particular order in which these two claims should be considered in this dispute? Does Ecuador consider its claim under Article XIII of the GATT 1994 a subsidiary or secondary claim to its claim under Article I? If the preferences granted by the EC to ACP bananas are inconsistent with either Article I or Article XIII of the GATT 1994, on what grounds would Ecuador argue that additional findings regarding the same preferences under the other provision, i.e. Article XIII or Article I of the GATT, respectively, would also be necessary to resolve the matter at issue?

In paragraph 37 of their joint third party submission, Belize, Cameroon, Côte d'Ivoire, Dominica, the Dominican Republic, Ghana, Jamaica, Madagascar, Saint Lucia, Saint Vincent and the Grenadines, and Suriname state that: Ecuador does not believe that it matters what order the Panel considers the claims under Article I and Article XIII. Ecuador does not consider the claim under Article XIII to be subsidiary or secondary to Ecuador's claim under Article I.

If the panel deals first with Article XIII, a finding that the EC measures violate Article XIII would not preclude the EC from granting tariff preferences so long as there was no tariff quota from which Ecuador was excluded or in which Ecuador was not given a fair allocation. If the Panel ruled in favour of Ecuador under Article I, that would resolve some of the dispute, but leave open the question of the ability to use tariff quotas in contexts where tariff discrimination is allowed without the requirement for a waiver, for example in the case of free trade areas. Further, if the Panel finds in favour of the EC under Article I, that still would leave an issue what degree of preference is allowed by the Doha Waiver and whether, as the EC contends, it can use tariff quotas in its system notwithstanding the absence of a waiver of Article XIII.

Regardless, in Ecuador's view, the history of the banana dispute has demonstrated repeatedly that anything not specifically and directly found to violate WTO rules (and some things that are) is likely to emerge in the next EC banana regime, justified as not having been excluded by the Panel. Finally, the Panel's rulings on both Articles are likely to be important to the effort to reach at last a durable solution, consistent with WTO rules.

6. (Both Parties) In paragraph 37 of their joint third party submission, Belize, Cameroon, Côte d'Ivoire, Dominica, the Dominican Republic, Ghana, Jamaica, Madagascar, Saint Lucia, Saint Vincent and the Grenadines, and Suriname state that:

> **"pursuant to the Understanding [on Bananas reached between the EC and Ecuador on 30 April 2001], the banana dispute was taken off the agenda of the DSB in accordance with Article 21.6 of the DSU. Indeed, at the DSB meeting held on 1 February 2002 [footnote omitted], the representative of the EC noted that the EC had implemented the second phase of the Understanding on Bananas which would be applicable until the time the EC's banana import regime became a tariff-only regime i.e. at the latest by 1 January 2006, and that the EC considered that this matter should therefore be withdrawn from the DSB agenda. Ecuador agreed by stating that it '*also considered that this item should no longer appear on the agenda of future DSB meeting*.'"**

Can Parties confirm that the issue of the implementation of the rulings and recommendations of the DSB in the *EC – Bananas III* dispute was withdrawn from the DSB's agenda with the consent of both the EC and Ecuador, in accordance with Article 21.6 of the DSU.

Yes. Ecuador agreed to the withdrawal of the item from the DSB agenda, subject to an explicit reservation of rights to bring a complaint under Article 21.5, as reflected in the following excerpt from the minutes of the DSB meeting. There was no objection to this reservation of rights. It can also be seen that Ecuador was clear that the Understanding involved staged obligations over several additional years, and that Ecuador was reserving Article 21.5 rights precisely because of concern that the terms might not be followed in subsequent years. As the minutes of that meeting summarized (WT/DSB/M/119):

> During the dispute settlement process, Ecuador had demonstrated patience and flexibility and had, in this spirit, signed a bilateral Understanding on Bananas with the EC on 30 April 2001. This Understanding constituted a sound basis for the EC to implement a transitional banana import regime so that by 1 January 2006, at the latest, a WTO-compatible tariff-only regime would be put into place. The transitional regime contained various phases, stages and elements to be implemented. One element was to obtain waivers from Articles I and XIII of the GATT 1994. However, the decision to grant these waivers included new stages which would have to be carried out in order to ensure a proper transition to a tariff-only banana import regime, as from 1 January 2006. Accordingly, insofar as the EC continued to implement the DSB's recommendations by meeting its commitments, Ecuador wished to reserve its rights under Article 21 of the DSU. Therefore if there was any disagreement concerning the measures applied by the EC, the matter could be referred to the original Panel pursuant to Article 21.5 of the DSU. Ecuador, like other countries, also considered that this item should no longer appear on the agenda of future DSB meetings.

There was no objection to this reservation, and similar reservations were expressed by others.

7. (Both Parties) In paragraph 4 of its statement during the substantive meeting with the Panel, Brazil argues that "Article 3.7 of the DSU should be interpreted in its integrality, with due account of all the provisions contained therein, that is to say the preference for negotiated solutions and the conformity with WTO agreements. Those two elements permit us to conclude that compliance with the covered agreements has precedence over negotiated solutions and that parties to an agreed solution are not authorized by such instrument to circumvent their obligations under the multilateral trading rules." Can the Parties provide a reasoned answer as to whether they agree with this statement.

Ecuador agrees with Brazil. While the DSU encourages mutually agreed solutions, that encouragement is subject to the requirement that all solutions must be consistent with the covered agreements.

8. (Both Parties) If the Panel was to examine whether the current EC regime for bananas results "in at least maintaining total market access for MFN banana suppliers", what should be the appropriate criteria to consider? Would the relevant criteria be the same that were considered by the Arbitrator in its Awards of August 2005 and October 2005?

Ecuador notes that the Panel has changed the standard provided in the Doha Waiver from one in which the Arbitrator was charged with determining whether a proposed rebinding "would result" in meeting the standard of "maintaining total market access for MFN banana suppliers" to one in which the "EC Regime … results" in meeting that standard. Therefore, unlike the standard of the waiver, the Panel is asking not for a forward looking projection, but whether in the present tense the Regime, whether or not viewed as a proposed rebinding, is resulting in "at least maintaining total market access for MFN banana suppliers"

Even if the test is considered to be, at any given moment, whether market access is being maintained, Ecuador agrees with the Arbitrator that "market access" cannot be equated with current trade levels or current market shares. Ecuador believes that market access should continue to be measured according to competitive opportunities afforded by the EC's trade measures, compared to the opportunities provided by the measures in existence just prior to 1 January 2006. This means that the tariff only duty would have to provide conditions of competition no less favourable for MFN suppliers than were afforded by the 3.113 million mt tariff quota at €75/mt preference and the zero duty tariff quota for ACP bananas at a quantity of 750,000 mt.

9. (Both Parties) In paragraph 38 of its statement during the substantive meeting with the Panel, Ecuador argues that "[i]t will be recalled that the waiver in any event expires 1 January 2008, but the MFN duty continues, and will be the margin of preference for any preferences that the EC grants inconsistent with WTO rules into the future, past 2007. It will be recalled that the EC had made plain its intent to use not only the 'Everything but Arms' initiative but also WTO-conforming free trade agreements to carry on with preferences past 2007. Further, even if the EC were to grant no future preferences, the duty will restrict future banana imports." Can Ecuador elaborate on these arguments, and can the EC provide a reasoned answer as to whether it agrees.

First, with apologies, the first sentence of the quotation should have said "consistent" rather than "inconsistent" with WTO rules. The point of the sentence was not to assume that the EC would continue to grant preferences in a manner inconsistent with WTO rules. Second, as the next sentence quoted in the question makes clear, there are ways consistent with WTO rules for the EC to continue preferences. A major concern of Ecuador was and is that a high bound rate of duty on bananas would be established, resulting in vastly diminished market access for Ecuadorian bananas if the EC negotiated free trade agreements that conformed with WTO rules, especially with the more efficient of the banana-producing ACP countries. Ecuador and other MFN suppliers in 2001 were willing to allow the EC to continue otherwise illegal preferences under the cover of a waiver for an extended period, provided that by 1 January 2006 the EC would establish a bound MFN duty that would still allow MFN suppliers to at least maintain access, without the use of tariff quotas, even assuming that the EC continued to grant tariff preferences for ACP countries, first under cover of the Doha Waiver (assuming its conditions were met) and then under whatever WTO-consistent means that the EC and ACP countries might arrive at by 1 January 2008. Even if the EC did not continue such preferences, the MFN duty rate would protect EC domestic banana production and would burden banana exports to the EC.

Unfortunately, and to the detriment of Ecuador, the EC failed to comply with the waiver and proceeded unilaterally with the measures that are before the Panel today.

10. (Both Parties) In paragraph 71 of its first written submission, the EC argues that the phrase "the new EC tariff regime" can only refer to the tariff regime that was presented to the Arbitrator and on which the Arbitrator made a pronouncement in its Award. Can Ecuador provide a reasoned answer as to whether it agrees with this statement. Would the EC consider its argument valid even if it was established that the TRQ to which the Banana Framework Agreement (BFA) relates has not expired at the end of 2002? Does the EC refer to the applied system and not the rebinding?

As Ecuador stated in paragraphs 28-30 of Ecuador's second submission, the EC's interpretation of the waiver is wrong. The waiver does not refer to the "tariff regime presented to the Arbitrator", nor would it make any sense to interpret the phrase that was used, "the new EC tariff regime" to mean the regime that the Arbitrator had just found to fail to meet the test of the waiver. It would be absurd to think that WTO members created a waiver giving the EC two opportunities to satisfy on a timely basis either the interested parties or a neutral Arbitrator, but then allowed the EC to keep the benefit if the

waiver for a further two years by the simple expediency of installing any tariff regime that the EC might choose, so long as it was not identical to the one just found unacceptable by both the interested parties and the Arbitrator.

11. (Both Parties) In paragraph 23 of its first written submission, the EC argues that "on 1 January 2006, the European Communities introduced a tariff only system and the Cotonou Preference took the form of a tariff quota for certain volumes of bananas coming from Cotonou beneficiary developing countries". Can the EC provide a reasoned answer as to how can an MFN tariff combined with a tariff-rate quota for ACP countries qualify as a "tariff-only system". Can Ecuador provide a reasoned answer as to whether it agrees with the EC's statement in paragraph 23 and, if not, what would qualify, in its view, as a "tariff-only system".

Insofar as Ecuador is aware, there is no legal definition of a "tariff only" system. Ecuador considers that the ordinary meaning of "tariff only" is a system has no quotas or tariff quotas. The context of the Doha Waiver reinforces this conclusion, because the "tariff only" system is to be something different from that which preceded it, which was a system with tariffs and tariff quotas. Therefore, any preference that is granted is not quantitatively limited, unless, at a minimum, access to that tariff quota is done in compliance with Article XIII, i.e. without excluding or granting an inadequate share to MFN suppliers such as Ecuador.

The fact that the WTO members granted a waiver of Article XIII only through 31 December 2006 reinforces Ecuador's view, because (1) despite the EC's efforts to deny the plain rulings of the Appellate Body and the Article 21.5 panel, it is obvious that all tariff quotas must comply with Article XIII, which does not allow exclusion of MFN suppliers; and (2) it is impossible to think that WTO members would grant a waiver of Article I to the EC if it included a reliance on a second waiver of Article XIII that had not been granted. The Appellate Body in *Bananas III* made clear that a waiver of Article XIII cannot be implied from a waiver of Article I.

12. (Both Parties) In paragraph 26 of its first written submission, Ecuador argues that "[t]he burden is on the EC if it wishes to claim that it still has a valid waiver with respect to bananas, and that this waiver covers the EC measures at issue. [E]ven if the burden were on Ecuador …" Could the Parties develop their legal arguments as to which of them should bear the burden of proving that the Doha Waiver is still valid and whether it covers the EC measure at issue.

Ecuador has proven the violation of Article I. The EC has the burden, if it wishes, to argue that the waiver relieves the EC from the obligation, and that the EC has satisfied the conditions of the waiver. Numerous prior WTO dispute settlement decisions have established that the invocation of any exception to a WTO obligation is the assertion of an affirmative defense, resulting in the burden of proof being placed on the party claiming that exception.[6] In *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries* the Appellate Body explained that:

[6] Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted 23 May 1997 ("*US-Wool Shirts and Blouses (AB)*"), pp. 15-16 and nn.21 and 22 (citing GATT Panel Report, *Canada – Administration of the Foreign Investment Review Act*, BISD 30S/140, adopted 7 February 1984, para. 5.20 (wherein it was found that since Article XX(d) is an exception to GATT, it is up to Canada, as the party invoking the exception, to demonstrate that its measures comply with that exception)); Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R,WT/DS169/AB/R, adopted 10 January 2001, para. 39 (wherein it was found that the party invoking an exception to the General Agreement bears the burden of proof to "demonstrate a *prima facie* case that the measure in question falls within one of the exceptions"); Appellate Body Report, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/AB/R, adopted 20 April 2004 ("*EC – Tariff Preferences (AB)*"), paras. 104-118 (wherein it was found that the EC, as

> the burden of proof for an "exception" falls on ... the party "assert[ing] the affirmative of a particular ... defence." From this allocation of the **burden of proof, it is normally for the respondent, first, to *raise* the defence and, second, to *prove* that the challenged measure meets the requirements of the defence provision**.[7]

Here, Ecuador has demonstrated that the EC's differential treatment of ACP and MFN bananas violates Article I:1 on its face, a proposition which the EC does not and cannot deny. In response, the EC claims that the Doha Waiver remains in force and covers its Article I:1 violation.[8] As the party invoking this defense or exception to compliance with Article I:1, the EC bears the burden of demonstrating that its WTO-inconsistent measure meets every condition of the exception. The EC has failed to do so, and indeed, though it was not Ecudors's burden, Ecuador has proved the contrary.

13. (Both Parties) In paragraph 43 of their respective third party submissions, Nicaragua and Panama argue that the Latin American suppliers insisted on inserting, into the *Bananas Annex* of the Doha Waiver, the sentence "If the EC has failed to rectify the matter, this waiver shall cease to apply to bananas upon entry into force of the new EC tariff regime", which did not appear in the original EC draft. Nicaragua and Panama argue further that the insertion of such sentence is an "explicit penalty for EC unilateralism following two arbitration losses", without which the waiver would not have been approved. Can the Parties provide a reasoned answer as to whether they agree with this statement.

Ecuador agrees that the waiver for bananas expired when the EC introduced its unilateral "tariff only" system on 1 January 2006, without the agreement of Ecuador and other interested parties, and having twice failed to satisfy the standard of the waiver as determined by the Arbitrator. The conditions of the waiver established by the WTO members cannot be disregarded.

14. (Both Parties) Under the fifth tiret of the *Bananas Annex* of the Doha Waiver, can Parties identify the specific conditions listed therein and explain how many of those would have to be fulfilled for the waiver to cease to apply to bananas?

Under Tiret 5, the waiver would cease to apply unless each of the following conditions were met:
First, the EC would have to have proposed a rebinding that:

- the Arbitrator approved meeting the standard of the fourth tiret; or failing that,
- the EC rectified the matter in a mutually satisfactory solution, following consultations with interested parties, or failing a mutual satisfactory solution,
- the Arbitrator in a second arbitration determined that that EC has rectified the matter.

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the Member invoking the Enabling Clause as a defense to GATT Article I discrimination, had the burden of establishing the facts necessary to establish the consistency of its measures under the Enabling Clause); Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, adopted 20 April 2005 ("*US-Gambling (AB)*"), paras. 6.77-6.83; Appellate Body Report, *United States – Subsidies on Upland Cotton*, WT/DS267/AB/R, adopted 21 March 2005, para. 644 (quoting *US – Wool Shirts and Blouses(AB)*, p. 14). The Appellate Body found it important to reiterate this rule of general applicability, even though the case before it was to be decided under a "special rule for proof of export subsidies that applies in certain disputes under Articles 3, 8, 9, and 10 of the Agreement on Agriculture."

[7] *EC – Tariff Preferences (AB)*, para. 104 (emphasis added) (quoting *US – Wool Shirts and Blouses (AB)*, p. 14).

[8] *See* EC first written submission, paras. 67-77; EC second written submission, paras. 36-43.

Second, the Arbitration awards must have been issued and the Article XVIII negotiations have been completed prior to the entry into force of the EC's tariff only regime on 1 January 2006.

Neither of these conditions was fulfilled. The EC did not satisfy the Arbitrator with either its initial envisaged rebinding or its proposed rectification, nor did it reach agreement with interested parties. Article XXVII negotiations were likewise not concluded, in large part because of the EC failure to propose a rebinding meeting the waiver criteria.

Under the fifth tiret of the waiver, the conditions that would have to be fulfilled for the waiver to lapse are (i) the Second award of the Arbitrator (following the EC's failure in the first award and the failure to reach agreement) must determine that the EC "has failed to rectify the matter" and (ii) the EC's "new tariff regime" must enter into force. Both conditions have occurred.

15. (Both Parties) On what grounds does the EC argue that the phrase "suitable waiver" in paragraph 6.158 of the report of the first *EC – Bananas III* compliance Panel should be interpreted to mean a waiver from only Article I of the GATT 1994? On what grounds does Ecuador argue that the same term should be interpreted as referring to a waiver to both Articles I and XIII of the GATT 1994?

Ecuador considers that the "suitable waiver" in paragraph 6.158 includes both a waiver of Article I and Article XIII for the reasons explained in paragraphs 40-44 of Ecuador's second submission.

The pertinent suggestions of the first Article 21.5 Panel were as follows:

> 6.156 First, the European Communities could choose to implement a tariff-only system for bananas, without a tariff quota. This could include a tariff preference (at zero or another preferential rate) for ACP bananas. If so, a waiver for the tariff preference may be necessary unless the need for a waiver is obviated, for example, by the creation of a free-trade area consistent with Article XXIV of GATT. This option would avoid the need to seek agreement on tariff quota shares.
>
> 6.157 Second, the European Communities could choose to implement a tariff-only system for bananas, with a tariff quota for ACP bananas covered by a suitable waiver.
>
> 6.158 Third, the European Communities could maintain its current bound and autonomous MFN tariff quotas, either without allocating any country-specific shares or allocating such shares by agreement with all substantial suppliers consistently with the requirements of the chapeau to Article XIII:2. The MFN tariff quota could be combined with the extension of duty-free treatment (or preferential duties) to ACP imports. In respect of such duty-free treatment, the European Communities could consider with the ACP States whether the Lomé Convention can be read to "require" such treatment within the meaning of the Lomé waiver. We recall that some important preferences found by the original panel and Appellate Body reports to be required by the Lomé Convention cannot be implemented consistently with WTO rules (the most important being the quantitative protections foreseen in Protocol 5). If such a view of the Lomé Convention is challenged, a waiver covering such duty-free treatment could be sought. *The MFN tariff quota could also be combined with a tariff quota for ACP imports, whether traditional or not, provided an appropriate waiver of Article XIII is obtained.* We note that waivers for duty-free treatment for

> developing country exports have been granted on several occasions by Members.[9] In this context, some action may be required soon in respect of the Lomé waiver since it expires on 29 February 2000. [Emphasis added]

It is difficult to see how even the EC could construe these paragraphs other than to show that the Panel considered that a tariff quota restricted to ACP exports would always require a waiver of Article XIII. Paragraph 6.156 shows that the panel considered that a tariff only system with a preference for just ACP bananas but no tariff quota would require a waiver of Article I, unless the preferences were done within some legal exception, such as a free trade agreement. Paragraph 6.157 then provides that the EC in effect could modify its system to include a tariff quota for ACP bananas, covered by a suitable waiver. Paragraph 6.158 starts by saying that the EC could maintain its tariff quotas if they were opened and either not allocated or allocated in accordance with Article XIII. The highlighted portion of paragraph 6.158 makes explicit on its face, especially in light of the foregoing, that a waiver of Article XIII is required for a tariff quota preference limited to ACP countries.

The Panel never suggested that the EC did not need a waiver in a system that had a tariff quota in which only ACP countries could participate in the zero duty quota. It is also most unlikely that the Article 21.5 Panel would make such a suggestion, which also would have contradicted the original findings of *Bananas III*, and have violated Article XIII.

16. (Both Parties) In paragraph 96 of its first written submission, the EC states that "the text of GATT Article XIII, paragraph 1 makes clear that a Member can successfully claim that another Member's measures violate the provisions of GATT Article XIII, only if its can show that... the allegedly offending Member imposes a prohibition or restriction on products originating from the complaining Member and, in principle, there is a nullification and impairment of a benefit accruing to the complaining Member". Can the EC elaborate its arguments in support of each of these propositions, i.e. that in order to make a successful claim under Article XIII:1 of the GATT 1994, the complaining Member must show: (a) that the challenged measure must be a prohibition or restriction *on products originating from the complaining Member*; and, (b) that there is a *nullification and impairment of a benefit* accruing to the complaining Member. Can Ecuador provide a reasoned answer as to whether it agrees with the arguments raised by the EC.

Ecuador disagrees with the EC's interpretation.

Article XIII.1 provides that "no prohibition or restriction shall be applied" on a product of one WTO member unless "importation of like product of all third countries is similarly prohibited or restricted." As previously noted, the restriction of a tariff quota is created by the imposition of a higher duty on over quota imports than is applied to in-quota imports.

The EC's tariff quota applies a €176/mt duty on all bananas of MFN origin. ACP bananas are not similarly restricted, because they benefit from access to the duty-free quota, from which bananas of Ecuadorian origin are totally excluded. As was noted in *Bananas III*:

> Article XIII:1 establishes the basic principle that no import restriction shall be applied to one Member's products unless the importation of like products from other Members is similarly restricted. Thus, *a Member may not limit the quantity of imports from some Members but not from others ... . A Member may not restrict*

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

> *imports from some Members using one means and restrict them from another using another means.*[10]

There is likewise no requirement that Ecuador demonstrate the level of nullification or impairment caused by the EC's discriminatory tariff quota as a prerequisite to challenging that measure in dispute settlement.

Article 3.7 of the DSU specifies three possible resolutions to a WTO dispute: a mutually agreed solution consistent with the covered agreements; a withdrawal of the WTO-inconsistent measures; or, if all else fails, suspension of concessions. Neither a mutually agreed solution nor the withdrawal of inconsistent measures hinges on the level of nullification or impairment suffered by the complaining Member. Only the third scenario, the suspension of concessions under DSU Article 22, requires a determination regarding the level of nullification or impairment suffered by the complaining party.[11]

In any event, even if nullification or impairment had to be demonstrated, Ecuador has established that the EC has nullified or impaired Ecuador's interests. In particular, the EC has denied Ecuador (and other MFN suppliers) participation in the zero-duty quota as required by Article XIII.

17. (Both Parties) In paragraph 60 of its second written submission, the EC argued that "[i]n effect, Ecuador is saying that the discrimination constitutes the 'restriction' [within the context of Article XIII:2 of the GATT 1994]. Having created this 'restriction' it then compares it with that on ACP products and comes, *not surprisingly*, to the conclusion that there is discrimination, which it assumes falls within paragraph 2 [of Article XIII]". (Emphasis added) Can Ecuador provide a reasoned answer as to whether it agrees with this statement. Do the words "not surprisingly" in the EC statement mean that, provided that the existence of the restriction mentioned by the EC can be proven, the EC accepts that there would be a violation of Article XIII:2?

Ecuador does not agree. The restriction in the EC's system, as in any tariff quota, is the higher duty applied to over-quota imports – those not benefiting from the lower or zero duty applied to imports within the tariff quota. If the over-quota duty were not considered a restriction, then Article XIII:5 would be a nullity, as the obligations of Article XIII are framed in terms of restrictions. Banana of ACP origin are restricted less than bananas of Ecuadorian origin because the former can be entered duty free within the tariff quota, while Ecuadorian bananas all are restricted by the high duty.

18. (Both Parties) In paragraph 51 of its statement during the substantive meeting with the Panel, Ecuador argues that its "exports are restricted by the high duty compared to those who participate in the zero duty quota. The only difference between a straight quota and a tariff quota in this regard is that exclusion from a straight quota means no access, while exclusion from a tariff quota means access restricted by the higher duty that applies to imports not benefiting from the tariff quota, which may be prohibitive in effect." In paragraph 52 of the same statement, Ecuador adds that "[i]t is true that unlimited preferences for ACP bananas would be worse than the tariff quota only for ACP countries, but exclusion from the tariff quota is more restrictive of Ecuador and other members than if they were allowed to participate in the zero duty tariff quota as they are entitled under Article XIII." Can the EC provide a reasoned

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[10] Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Complaints by Ecuador, Guatemala and Honduras, Mexico, and the United States*, WT/DS27/R, adopted 25 September 1997, as modified by Appellate Body Report, WT/DS27/AB/R ("*Bananas III (Panel)*"), para. 7.69 (emphasis added).

[11] *See* Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"), Article 22.4.

answer as to whether it agrees with this statement. Can Ecuador clarify whether it is arguing that any high duty would qualify as a "restriction" under Article XIII of the GATT 1994. If yes, why? Can Ecuador also clarify on what grounds, and according to what criteria, would a tariff be considered to be "prohibitive in effect". In Ecuador's view, does the restriction result from the in-quota tariff or the out-of-quota tariff?

Ecuador is not arguing that every high duty necessarily qualifies as a restriction under Article XIII. Article XIII:5 provides that the provisions of Article XIII apply to any tariff quota. A tariff quota means a quota below which a lower duty applies than to over quota imports of the like product. As noted, in a tariff quota, the restrictive element is the higher duty on over- quota imports. Ecuador does not consider that the concept of a tariff quota is limited to those tariff quotas whose over-quota duty rate is so high as to be de facto prohibitive . That may be the most dramatic form of a tariff quota, but in fact, if a higher duty is applied above a certain quantity than below that quantity, it is a tariff quota even if – unlike the EC measures at issue --the difference is slight and the over-quota duty is not so high as to create a major commercial problem.

The restriction in the EC's system is the over-quota duty that restricts all bananas not allowed to participate in the zero duty quota.

19. (Both Parties) In paragraph 57 of its statement during the substantive meeting with the Panel, Ecuador argues that "[i]t is a fact that the restriction in a tariff quota is achieved by means of a tariff – the higher duty applied to products imported outside the quota than inside the quota. That is not a problem because Article XIII specifically applies to any tariff quota, and, unlike Article XI the reference to restrictions in Article XIII does not exclude taxes, duties or other charges." Can Ecuador elaborate on this argument, and the EC provide a reasoned answer as to whether it agrees with Ecuador's arguments in this context.

Article XI begins "No prohibitions or restrictions other than duties, taxes or other charges…" This makes plain that the drafters thought that prohibitions or restrictions included duties, taxes or other charges (otherwise there would be no need to exclude them), but wanted to exclude them from Article XI. By contrast, no such exclusion was provided in Article XIII, which also uses the term "restrictions" (but without the exclusion) and indeed the drafters explicitly said that the *provisions* of Article XIII apply to "any tariff quota." Article XIII:5 would be a nullity if a tariff is not regarded as a restriction for purposes of Article XIII as applied to tariff quotas.

20. (Both Parties) If, under Article II of the GATT 1994, the EC was bound to a €75/mt tariff rate in-quota duty for 2.2 million metric tons of bananas, in addition to the zero-duty TRQ of 775,000 metric tons for ACP bananas, should such a finding affect the manner in which the Panel conducts its analysis under Article XIII?

In Ecuador's opinion, the EC plainly was and is bound by the a €75/mt tariff rate in-quota duty for 2.2 million metric tons of bananas, but it makes no difference whether the EC has one or multiple tariff quotas; Article XIII applies if there is one tariff quota or more than one tariff quota. The EC has never been able to explain in terms of Article XIII what difference it would make whether the EC had one or more tariff quotas.

21. (Both Parties) In paragraph 19 of its opening statement during the substantive meeting with the Panel, the EC argues that "[t]he complainants attempt to draw some analogy with the regimes analysed by this Panel in 1997 and 1999. This is not correct. Following the abolition of the tariff-quota-based system in 2006, the current regime is so different to those of the 1990s that no analogy can be drawn." Can the EC elaborate on this argument, and Ecuador provide a reasoned answer as to whether it agrees with the same.

Ecuador reserves the right to comment on the EC's answer, but Ecuador notes that the current system, like those examined in the late 1990 has a tariff quota with the zero duty in quota rate reserved for ACP origin bananas..

22. (Both Parties) In paragraph 10 of its statement during the substantive meeting with the Panel, Brazil argues that "the EC abruptly jumps to the flawed conclusion that because the Member has chosen to implement a suggestion by the panel such Member would always be in compliance with its obligations under the covered agreements." In paragraph 11 of the same statement, Brazil adds that "[i]n no provision does the DSU grant Members certainty as to the 'lawfulness' of a measure taken to comply just because such measure is intended to implement a suggestion made by a panel. To the contrary, Article 21.5 sets forth the Members' right to resort to a panel where there is disagreement as to the consistency with covered agreements of the measures taken to comply." Can the Parties provide a reasoned answer as to whether they agree with Brazil's argument.

Ecuador agrees with Brazil. The EC is wrong to contend in this dispute that the EC's current illegal regime was suggested by the Panel. However, if a Panel did suggested measures that a Party thought were inconsistent with WTO rules, there is nothing in the DSU that would bar a challenge to such measures.

23. (Both Parties) The Understanding on Bananas signed by the EC with Ecuador and the US seems to include references, in both Phases I and II, to a bound tariff-rate quota, designated as "quota 'A'", of 2.2 million metric tons with an in-quota tariff rate not exceeding €75/mt, that would possibly extend beyond the end of 2002. Can Parties provide a reasoned answer as to whether they agree with this reading of the Understanding. Can the EC explain how this can be reconciled with its argument that the TRQ expired at the end of 2002, considering that the EC has been arguing for the binding nature of the Understanding on Bananas and that it would constitute a mutually agreed solution?

Ecuador considers that, regardless of the Understanding, the EC tariff was and remains bound (subject to adjustment in Article XXIV:6 negotiations that have yet to be concluded to account for the enlargement of the EC and the extension of the preference regime). The understanding in this sense was not a new commitment but a confirmation.

24. (Both Parties) Irrespective of their differences in the interpretation of the Framework Agreement on Bananas (BFA), can the Parties identify the document that constitutes the legally binding schedules of the European Communities for bananas at the date of the establishment of this Panel on 20 March 2007, indicating its WTO document symbol if any, and specify any changes to that document that might have taken place in regard to bananas.

Schedule CXL is contained in documents G/L/65/Rev.1 and G/L/65/Rev.1/Add.3, and also should be taken into account documents G/SECRET/20; G/SECRET/22; G/SECRET/26.

25. (Both Parties) Paragraph 9 of the Framework Agreement on Bananas (BFA) annexed to the EC Schedules provides that "[t]his *agreement* shall apply until 31 December 2002" (Emphasis added). Could it be concluded from this language that only the Framework Agreement on Bananas annexed to the EC Schedules expired on 31 December 2002, but not Section I B of the EC Schedules, where the tariff rate quota (TRQ) is also indicated? Please provide a reasoned response.

Yes. This interpretation is not only possible, but is compelled by the record. Ecuador's position is explained in paragraphs 53-60 of Ecuador's second submission and in paragraphs 59 to 67 of Ecuador's oral statement**,** and in response to question 45.

26. (Both Parties) Should the expressions "agreed system" used in paragraph 8 of the Framework Agreement on Bananas (BFA) annexed to the EC Schedules, "the agreement" used in paragraph 9, and "this agreement" used in paragraphs 9, 10 and 11, be considered to be equivalent?

The term "the agreement" must be presumed to mean the same thing each time it is used, but the use of the term "agreed system" in the context of paragraph 8 is not especially clear, but could refer to those aspects that refer to the operation of the TRQ system. The Agreement has provisions such as the commitment of parties not to seek adoption of the report and the commitments to consult which are not terms and conditions of a WTO schedule of concession and would not fit within the concept of a tariff quota system.

27. (Both Parties) Should paragraph 9 of the Framework Agreement on Bananas (BFA) be interpreted as a stand-alone provision or by taking into account other parts and sections of the EC's Schedule, as well as the intentions of the parties in all subsequent procedures?

Ecuador thinks that the ordinary meaning of the language establishes that the concession did not terminate upon termination of the BFA, but it is always proper to look at context, object and purpose and where there is ambiguity, other interpretive aids.

28. (Both Parties) In paragraph 69 of its statement during the substantive meeting with the Panel, Ecuador argues that "[t]ariff quota concessions can be withdrawn, but the withdrawing member must follow Article XXVIII procedures which the Doha Waiver required and the European Communities failed to do." Can Ecuador clarify in what specific way the EC has "failed" to follow Article XXVIII procedures and what would be the legal consequences of such failure. Can the EC provide a reasoned answer as to whether it agrees with Ecuador's assertion that it has failed to follow Article XXVIII procedures.

Article XXVIII establishes a process by which a WTO member can withdraw a concession. This process involves announcing an intention to withdraw, and negotiating with principal and substantial suppliers and a host of procedural requirements. Substantively, if agreement is not reached on compensation, the withdrawing party ultimately may proceed, interested party but principal and substantial suppliers than have retaliation rights. In the case of bananas, the objective of "at least maintaining" should have resulted in a duty rate for bananas that would not have involved compensation or retaliation in other products, at least in the main. But Article XXVIII does allow any member simply to start applying a duty in violation of is bindings without following procedural and substantive requirements.

QUESTIONS ADDRESSED TO ECUADOR

29. (Ecuador) Can Ecuador expand on the factual information provided in Chart 1 of its first written submission by providing annual data (and their sources) for each year from 1999 (where "EC" refers from 1999 to 2003 to EC15 and from 2004 to 2006 to EC25, but, if possible, also show separately EC15 from 2004 to 2006; and for the first half of 2007 for EC27) for the following:

(a) Volume, FOB value and average unit value (in Euros/mt and USD/mt) of banana exports from Ecuador to the EC, and to the rest of the world;

VOLUME OF EXPORTS FROM ECUADOR BY COUNTRY OF DESTINATION
1999 to First Semester 2007
(thousand metric tonnes)

YEARS	(1) TOTAL EXPORTS (C=A+B)	(2) EXPORTS TO THE EC (A)	EXPORTS TO OTHER MARKETS (B)
1999 (UE-15)	3,782.58	695.00	3,087.58
2000 (UE-15)	3,993.38	674.00	3,319.38
2001 (UE-15)	3,752.97	705.00	3,047.97
2002 (UE-15)	3,875.92	829.00	3,046.92
2003 (UE-15)	4,212.36	800.00	3,412.36
2004 (UE-25)	4,370.43	993.00	3,377.43
2005 (UE-25)	4,331.30	1,059.00	3,272.30
2006 (UE-25)	4,402.39	1,026.00	3,376.39
2007 (*) (UE-27)	2,423.36	635.45	1,787.91

Sources: ***(1)*** *Asociación de Exportadores de Banano del Ecuador (AEBE / Declaración en Aduanas (bills of ladings)*
(2) *Eurostat.*
(*) *First Semester.*

VOLUME OF EXPORTS FROM ECUADOR TO THE EC
2004 – 2006
(thousand metric tonnes)

YEARS	(1) TOTAL EXPORTS C=A+B	(2) EXPORTS TO THE EC 15 (A)	(2) EXPORTS TO THE EC 10 (B)
2004	992,502.00	797,045.00	195,457.00
2005	1,059,269.00	885,975.00	173,294.00
2006	1,026,447.00	960,897.00	65,550.00

Sources: ***(1)*** *Asociación de Exportadores de Banano del Ecuador (AEBE)/ Declaración en Aduanas (bills of ladings).*
(2) *Eurostat.*

FOB VALUE OF ECUADORIAN EXPORTS
1999 to First Semester 2007

	thousands USD			AVERAGE EXCHANGE RATE 1USD=1€ (1)	thousands EUROS		
	TOTAL (C=A+B)	EC (A)	OTHER MARKETS (B)		TOTAL (D=E+F)	EC (E)	OTHER MARKETS (F)
1999	811,363.41	149,077.50	662,285.91	0.9875	801,221.37	147,214.03	654,007.34
2000	902,703.55	152,357.70	750,345.85	1.0667	962,913.88	162,519.96	800,393.92
2001	928,860.08	174,487.50	754,372.58	1.1226	1,042,738.32	195,879.67	846,858.65
2002	965,685.47	206,545.35	759,140.12	0.9541	921,360.51	197,064.92	724,295.59
2003	1,088,895.06	206,800.00	882,095.06	0.8007	871,878.27	165,584.76	706,293.51
2004	1,067,259.01	242,490.60	824,768.41	0.7337	783,047.93	177,915.35	605,132.58
2005	1,079,143.40	263,849.85	815,293.55	0.8450	911,876.17	222,953.12	688,923.05
2006	1,159,809.65	270,299.70	889,509.95	0.7607	882,267.20	205,616.98	676,650.22
2007 (*)	641,241.97	167,758.80	473,483.17	0.7426 (**)	476,186.29	124,577.68	351,608.60

(1) Sources: AEBE
(*)First Semester
(**) Exchange rate June 2007

FOB VALUE OF EXPORTS FROM ECUADOR TO THE EC
2004 – 2006

		Thousand USD			Thousand euros	
Year	**TOTAL (C=A+B)**	**EC-15 (A)**	**EC-10 (B)**	**TOTAL (D=E+F)**	**EC-15 (E)**	**EC-10 (F)**
2004	242,490.60	194,637.17	47,853.43	177,915.35	142,805.29	35,110.06
2005	263,849.85	220,739.43	43,110.42	222,953.12	186,524.81	36,428.31
2006	270,299.70	209,980.19	60,319.51	205,616.98	159,731.93	45,885.05

Source: AEBE / Banco Central del Ecuador / Eurostat

FOB VALUE/ mt OF EXPORTS (1)
1999 – First Semester 2007
In USD/€

YEARS	USD	EUROS
1999	214.50	211.82
2000	226.05	241.13
2001	247.50	277.84
2002	249.15	237.71
2003	258.50	206.98
2004	244.20	179.17
2005	249.15	210.53
2006	263.45	200.41
2007 (*)	264.00	196.05

(*) *First Semester*
(1) *FOB Value established by Inter-ministerial Agreements Ministeriode Agricultura and Ministerio de Comercio Exterior.*
Source: AEBE / Banco Central del Ecuador.

(b) Share (percentage) of banana exports from Ecuador going to the EC, in volume and value terms;

ECUADOR'S SHARE IN TOTAL IMPORTS BY THE EC 15
thousand metric tonnes and percentage

YEAR	TOTAL IMPORTS BY EC-15	IMPORTS FROM ECUADOR	SHARE (%)
2004	3,403.39	797.04	23.42%
2005	3,322.87	885.97	26.66%
2006	4,085.82	960.89	23.51%

Source: Eurostat

ECUADOR'S SHARE IN TOTAL IMPORTS BY THE EC 10
thousand metric tonnes and percentage

YEAR	TOTAL IMPORTS BY EC-10	IMPORTS FROM ECUADOR	SHARE (%)
2004	455.61	195.45	42.90%
2005	400.13	173.29	43.31%
2006	109.89	65.55	59.41%

Source: Eurostat

SHARE AND ANNUAL VARIATION OF SALES TO THE EC VIS A VIS
TOTAL EXPORTS BY ECUADOR
1999 -2006
thousand FOB USD and percentage

YEARS	TOTAL (USD)	TOTAL EC (USD)	SHARE (%)	ANNUAL VARIATION (%)
1999	811,363.41	149,077.50	18.37%	
2000	902,703.55	152,357.70	16.88%	2.20%
2001	928,860.08	174,487.50	18.79%	14.52%
2002	965,685.47	206,545.35	21.39%	18.37%
2003	1,088,895.06	206,800.00	18.99%	0.12%
2004	1,067,259.01	242,490.60	22.72%	17.26%
2005	1,079,143.40	263,849.85	24.45%	8.81%
2006	1,159,809.65	270,299.70	23.31%	2.44%

Source: AEBE / Banco Central del Ecuador

SHARE AND ANNUAL VARIATION OF SALES TO THE EC 15
VIS A VIS TOTAL EXPORTS
2004-2006
thousand FOB USD and percentage

YEAR	TOTAL USD	TOTAL EC 15 (USD)	SHARE (%)	ANNUAL VARIATION (%)
2004	1,067,259.01	194,638.39	18.24%	
2005	1,079,143.40	213,266.17	19.76%	9.57%
2006	1,159,809.65	253,148.31	21.83%	18.70%

Source: AEBE / Banco Central del Ecuador

SHARE AND ANNUAL VARIATION OF SALES TO THE EC 10
VIS A VIS TOTAL EXPORTS
2004-2006
thousand FOB USD and percentage

YEAR	TOTAL USD	TOTAL EC-10 (USD)	SHARE (%)	ANNUAL VARIATION (%)
2004	1,067,259.01	47,728.89	4.47%	
2005	1,079,143.40	43,175.20	4.00%	-9.54%
2006	1,159,809.65	17,269.15	1.49%	-60.00%

Source: AEBE /Banco Central del Ecuador

(c) Share (percentage) of total volume of banana exports by Ecuador going to the EC divided by the EC's share of global banana imports; and

SHARE (PERCENTAGE) OF BANANA EXPORTS FROM ECUADOR
1999 – 2006
thousand metric tonnes

YEARS	TOTAL IMPORTS EC (1000 MT)	IMPORTS FROM ECUADOR (1000 MT)	SHARE (%)
1999	3,201.00	695.00	21.71
2000	3,288.00	674.00	20.50
2001	3,205.00	705.00	22.00
2002	3,282.00	829.00	25.26
2003	3,366.00	800.00	23.77
2004	3,859.00	993.00	25.73
2005	3,723.00	1,059.00	28.44
2006	4,196.00	1,026.00	24.45

Source: Eurostat

SHARE (PERCENTAGE) OF BANANA EXPORTS FROM ECUADOR IN EC IMPORTS
2004 – 2006
thousand metric tonnes

YEARS	TOTAL IMPORTS EC (1000 MT)	IMPORTS EC-15	SHARE (%)	IMPORTS EC-10	SHARE (%)
2004	3,859.00	797.04	20.65%	195.45	5.06%
2005	3,723.00	885.97	23.80%	173.29	4.65%
2006	4,196.00	960.89	22.90%	65.55	1.56%

Source*: Eurostat*

Imports by the EC are calculated including imports from the dollar zone and ACP countries. It does not include imports from the EC's outer and peripheric regions (Canaries, Martinique, Guadaloupe, Madeira, Cyrus and Greece).

(d) Amount of duties paid to the EC for the importation of bananas from Ecuador for each of the years specified above.

Amount of duties paid to the EC
1999 to First Semester 2007
thousand mt and thousand euros

YEARS	VOLUME IMPORTED BY THE EC FROM ECUADOR	DUTIES PAID (EUROS)
1999	695.00	52,125
2000	674.00	50,550
2001	705.00	52,875
2002	829.00	62,175
2003	800.00	60,000
2004	993.00	74,475
2005	1,059.00	79,425
2006	1,026.00	180,576
2007 (*)	635.45	111,839

(*) *First Semester*
Source: *Eurostat / AEBE*

Amount of duties paid to the EC
2004 – 2006
thousand euros

YEARS	DUTIES PAID EC-15 (EUROS)	DUTIES PAID EC-10 (EUROS)
2004	59,778.38	14,696.63
2005	66,448.13	12,976.88
2006	169,117.87	11,458.13

Source: Eurostat / AEBE

30. (Ecuador) Chart II in Exhibit ECU-3 refers to "Imports of Bananas by the EU–27" for the years 2005-2007. In regard to this chart, could Ecuador:

(a) Explain how it calculated the figures for 2005-2006, i.e. before the enlargement of the EU to 27 member States;

EUROSTAT data has been taking into account, which corresponds to imports made by the EC (updated May 2007).

(b) Clarify whether the figures for 2007 are estimates and, if so, explain the calculations involved; and,

Statistical data in Exhibit ECU-3 are provisional. Figures from 2007 correspond to the first quarter and the average that appears in column No 5 corresponds to the first quarter of years 2005 and 2006.

Data starting in column No 7 refers to the market share of each of the supplying countries within the total imports by the EC in 2007. By dividing Ecuador's imports from January to March 2007 (339.328 tonnes) to total de imports made from the dollar zone and ACP countries (1.189.756 tonnes), the result of 28.5% is obtained.

(c) State whether the figures for 2007 need any rectification, in the light of any relevant subsequent events since the submission of Ecuador's first written submission.

As it was already said, data for 2007 are provisional. Below is attached data for the first semester 2007 taken from Eurostat, which are also provisional but show a broader picture.

VOLUME OF IMPORTS OF BANANAS FROM ECUADOR
COMPARATIVE CHART FIRST SEMESTER 2006-2007
thousand metric tonnes/percentage

COUNTRY	2006 VOLUME	ECUADOR'S SHARE IN THE EC MARKET	2007 VOLUME	ECUADOR'S SHARE IN THE EC MARKET	COMPARATIVE VARIATION SEMESTERS 2007/2006
Ecuador	720,270	32.05%	635,459	26.50%	-11.77%

Source*: Eurostat*

31. (Ecuador) In paragraph 46 of its first written submission, the EC mentions that "although the group of MFN countries (to which Ecuador belongs) has seen a spectacular increase in the volumes exported into the European Communities since 1 January 2006, Ecuador has experienced a slight reduction in its own exports: its 2006 volumes were approximately 3.6% below its 2005 volumes." In paragraph 7 of its opening statement during the substantive meeting with the Panel, the EC goes on to argue that "[t]he group of MFN banana suppliers had never exported so many bananas into the European Communities as it did in 2006." Can Ecuador provide a reasoned answer as to whether it agrees with these statements. If so, what are the reasons to explain the decrease in EC imports of bananas from Ecuador, accompanied by an apparent increase in the EC imports of other MFN bananas?

Ecuador believes that the assertion of the EC that other MFN countries, except Ecuador have experienced a "spectacular increase of exports to the EC" since January 2006 is not true. First, traditional MFN exporters, which are the largest exporters to the EU, generally experienced an increase which in the best of cases bordered 10% compared with 2005, and this in no way constitutes a spectacular growth, as stated by the EC. It could be argued that an important exception was Costa Rica, whose exports grew 32% approximately in 2006 compared to 2005. However, 2005 is not an adequate benchmark for that country, because in 2005 Costa Rican exports fell almost 26% to 623,687 mt due to climate problems. Therefore, what happened in 2006 (824,590 mt of exports) was only a recovery of Costa Rica's normal export volumes, which even so did not reach 2004 levels (842,629 mt).

In second place, although other less bigger MFN exporters like Brazil and Peru recorded a significant increase in exports in 2006, at the same time, other countries like Venezuela, Mexico and Honduras suffered a similarly important loss in their sales to the EC.

In third place, Ecuador believes that it is essential to consider the issue within the framework of a broader analysis that allows visualizing the evolution of MFN, ACP and Ecuadorian exports to the

EC 15 and the EC 10 (EC 25), from 1999 to 2006. In this broad framework it can be seen that MFN exports between 1999 and 2006 for the EC25 in general remained stable and recorded a slight increase in 2006, contrary to the declaration of the EC (3,208,943 mt in 1999 compared to 3,293,638 mt in 2006). In turn, Ecuadorian exports during the same period generally remained stable and recorded a fall in 2006 (1,074,407 mt in 1999 compared to 1,027,209 mt in 2006). On the contrary, it is notorious that ACP exports registered a sustained increase in the same period of 688,217 mt in 1999 to 891,190 mt. The growth of ACP is steeper in 2006 after the increase of the tariff protection received from the EC against MFN suppliers, as a result of the tariff increase from €75/mt to €176/mt. See attached comparative table for more details at Exhibit ECU-9

This proves that there is no "spectacular growth of MFN exports to the EC since 2006". The assertion of the EC that MFN suppliers had never exported so many bananas to the EC as in 2006 is also untrue. APC imports into the EC-25 in 2006 were 30% higher than their constructed EC-25 import level in 1999. It is the ACP banana suppliers, not the MFN suppliers, that have seen a "spectacular increase" in banana shipments to the EC.

On the other hand, Ecuador stresses that the fall of its exports in 2006 is a direct consequence of the introduction of the MFN tariff of €176/mt by the EC. Indeed, the increase of approximately 2.34 times in the MFN tariff (from €75/t to €176/t) generated negative economic impacts on MFN suppliers, the real and full dimension of which will only be appreciated in the medium term. It not only made Ecuadorian and MFN exports more expensive, there are other measures that should be analysed:

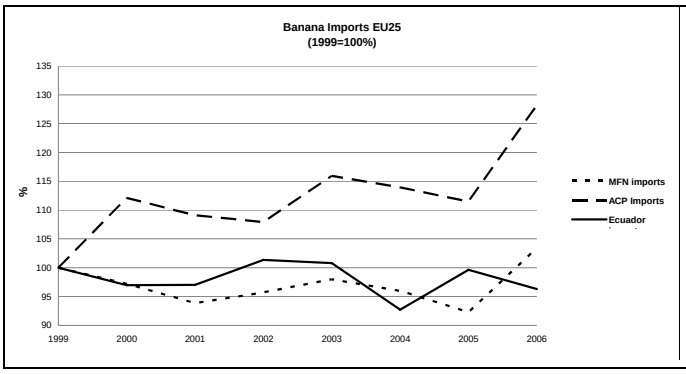
The EC reduced by more than half the ACP out of quota tariff from €380/t to €176/t, it increased to more than double the MFN tariff -from €75/t to €176/t , it established an exclusive ACP 0 tariff quota, which went from 750,000 mt to 775.000 mt. These measures caused a substantial improvement in the conditions of competition and a significant increase in preferences for ACP suppliers against MFN suppliers.

The findings of the Arbitrator regarding this issue fully coincide with the above statements: "In this case, the tariff equivalent proposed by the EC would result in an increase of the margin of preference currently enjoyed by ACP suppliers thanks to the €75/t tariff applied to imports within quota, to place it at €230/t, which **would significantly increase the margin of preference they enjoy against MFN banana suppliers prior to the rebinding**. In view that the use of the price gap methodology means that the rebinding will have impartial effects on *total* imports, **any advantage achieved by preferential supplies in the EC market as a result of this added advantage would happen at the expense of MFN banana suppliers**.[12]

Therefore, we can state that there is a huge increase in the margin of preference of ACP bananas produced as a direct consequence of the introduction of the €176/t discriminatory MFN tariff.

ACP countries currently also benefit from a reduction of their out of quota tariff from €380/t to €176/t (a 2.2 times reduction). This reduction gives ACP suppliers huge incentives to cross subsidized over quota ACP exports (profitable in quota sales lead to profitable cross subsidized over quota sales).

[12] WT/L/616, 1 August 2005, European Communities - ACP-EC Association Agreement Recourse to Arbitration pursuant to the Decision of 14 November 2001, Arbitral award, paragraph 69.



Banana Imports into the EU25 (tons)			
	MFN imports	ACP Imports	Ecuador imports
1999	3,208,943	688,217	1,074,407
2000	3,118,517	771,502	1,041,713
2001	3,014,628	748,216	1,042,540
2002	3,070,810	739,530	1,087,452
2003	3,140,260	798,801	1,081,666
2004	3,077,783	782,962	993,825
2005	2,963,764	763,672	1,062,735
2006	3,293,638	891,190	1,027,209

Source: Eurostat – Extracted Sept 26, 2007 (EU15 CN8 level/EU 10 '99-'03 HS4 level, '04-'06 CN8 level)

32. (Ecuador) In paragraph 50 of its first written submission, the EC argues that:

"there is ample evidence that Ecuador's banana industry is facing a number of difficulties that have nothing to do with the new import regime of the European Communities. These difficulties include:

(i) Adverse climatic conditions negatively affecting the 2006 production: the drought at the end of 2005 was followed by heavy rain at the beginning of 2006.

(ii) According to Aprobanec, the Association of banana growers in Quevedo, Ecuador's banana production was significantly damaged by the eruption of the volcano Tungurahua on 16 August 2006. The volcano caused significant damage to approximately 35% of the banana plantations in the Los Rios province, which produces about 30% of all Ecuadorian bananas.

(iii) Ecuador introduced certain administrative measures that encouraged traders operating in the European Communities' market to source bananas from other countries. For example, a letter sent by the Association of German Fruit Importers to Mr. Rizzo, Minister of Agriculture in Ecuador on 15 August 2006, expresses the discontent of the German traders with an Ecuadorian decree providing that the fruit should be inspected only at the plantation and not at the port. This administrative measure incited German traders to source bananas from other MFN countries, neighbouring Ecuador. Another administrative measure with a similar effect on European traders was adopted in August 2006: it imposed a minimum price of $3.25 per box and obliged exporters to pay producers via the Central Bank." (Footnotes omitted)

Can Ecuador provide a reasoned answer as to whether it agrees with these assertions.

(i) These assertions are wrong because total Ecuadorian banana exports to all destinations increased from 4,331,300 mt in 2005 to 4,402,390 in 2006 (an increase of 71,090 mt). However, exports to the EC fell from 1,059,000 in 2005 to 1,026,000 in 2006. This clearly shows that in 2006 Ecuadorian exports continued growing and that there was a diversion of trade originally directed to the EC market to other destinations as a direct consequence of the increase of the MFN tariff from €75/t to €176/t. The notable increase of ACP protection and margin of preference in 2006 means that these countries sharply increased their exports to the

Community market, in detriment of some MFN suppliers and particularly Ecuador, which had to sell to other markets.

(ii) According to official reports of the Ministry of Agriculture and Livestock of Ecuador, the effects of the two eruptions were approximately 108,000 mt of bananas that the country failed to export. If the eruptions had not taken place, the increase in the total volume of Ecuadorian exports to all destinations in 2006 (which reached an additional 71,090 mt compared to 2005) would have been even greater.

(iii) The administrative measures mentioned by the EC, as has been demonstrated, never affected the growth of total Ecuadorian exports in 2006. The price of USD 3.25 per box of bananas is a referential price that should have been paid by Ecuadorian exporters to all destinations and not only to the EC, and as we have seen exports to all destinations rather grew in 2006 in spite of these problems, unlike exports to the EC as a direct consequence of the increase of the tariff to €176/t.

33. (Ecuador) Please provide information on whether Ecuador's banana exports to the EC benefit from any preferential systems and, if yes, please describe those systems, indicating the relevant dates, and focusing your response on the period 1999 to 2007.

Ecuador's banana exports to the EC never benefited from any preferential systems granted by the European Communities. This includes the period 1999 to 2007.

34. (Ecuador) How did the actual conditions for the export of bananas change following the various enlargements of the EC in the period 1999 and 2007?

In 1995, when Austria, Finland, and Sweden joined the EC, the EC "autonomously" enlarged its MFN tariff quota by 353,000 mt, thereby increasing its MFN tariff-quota volume to 2.553 million mt.[13] The EC has yet to alter its schedule of concessions to reflect this accession or otherwise provide Article XXIV:6 compensation to the MFN suppliers.

The enlargement of the EC to 25 members also meant for Ecuador and MFN suppliers (mostly in Latin America) a huge loss in access levels, because before the enlargement the region exported from 560,000 to 570,000 mt of bananas per annum to the 10 countries that joined the EC (according to EUROSTAT figures) and once they became members of the EC25, the EC arbitrarily established an enlargement quota of only 460,000 mt per annum as compensation for Latin America.

More than 58.2% of this tonnage corresponded to Ecuador, and the rest to other Latin American countries. The presence of ACP bananas in this market was negligible.

This means that the EC drastically reduced previous exports by Latin American countries in 110,000 mt, inflicting losses estimated in millions of dollars which the EC has failed to compensate.

The enlargement of the EU also meant a significant improvement of ACP preferences, because ACP countries went from having very small marginal exports to the EC prior to May 1, 2004 (according to EUROSTAT figures), to having access to a quota of 460,000 mt with 0 tariff, while Latin American was reduced in approximately 110.000 mt in exports and had to pay €75/t, while before the enlargement it benefited in general from a free market, because most countries used an applied tariff equivalent to 0 to bananas.

[13] *See* Council Regulation (EC) No. 1637/98, OJ L 210/28, 28 July 1998, Article 1.

On the other hand, also according to EUROSTAT figures, Ecuador had average annual exports to the EC10 of 314,713 mt during the period 2000-2002. These exports fell to 195,450 mt in 2004, 173,290 mt in 2005 and 65,550 in 2006, when the 176 €/t tariff entered into force.

In consequence, the enlargement of the EC with the accession of 10 new members meant huge losses in terms of volumes and net revenues for Ecuador, which have not been compensated, as explained below.

Correcting for the errors in the EC calculations, Ecuador arrived at a figure of €374,442,049.30 as the compensation due arising from the modification of the schedules of the EC-10 countries. The following chart presents the results of these two corrections to the EC's calculations:

08030019 Bananas, fresh (excl. Plantains

Summary by acceding country

Countries	Volumes (tonnes)[1]	Value (€)[4]	Duties with NMS rate (€)	Bound duty rate NMS	Duties with EU15 rate	Bond duty rate EU15 rate	Credits/ Debits
Cyprus	945.50	666,707.80	1,137,211.37	30% + 570 C£	642,936.67	680€/t	494,274.70
Czech Republic	122486.4146	58,296,676.28	0.00	0.00	83,290,761.93	680€/t	-83,290,761.93
Estonia	13,374.43	6,481,863.16	1,296,372.63	0.20	9,094,610.36	680€/t	-7.798,237.73
Hungary[2]	75,607.96	24,626,015.00	4,925,203.00	0.20	51,413,412.80	680€/t	-46,488,209.80
Lithuania	24,168.09	10,917,025.12	545,851.26	0.05	16,434,302.76	680€/t	-15,888,451.51
Latvia	20,391.43	9682751.578	4,841,375.79	0.50	13,866,175.66	680€/t	-9,024,799.87
Malta	7,512.40	3,233,909.43	29,092,352.76	40% + 1500 Ln	5,108,429.85	680€/t	23,983,922.92
Poland[3]	256,956.53	111,829,147.00	57,032,864.97	0.51	174,730,439.24	680€/t	-171,743,858.63
Slovenia	37,177.48	16,831,546.80	336,630.94	0.02	25,280,683.34	680€/t	-24,944,052.40
Slovakia	58,443.93	26,287,659.54	0.00	0.00	39,741,875.05	680€/t	-39,741,875.05
Total	617,064.16		99,207,862.72	1.48	419,603,627.67		-374,442,049.30

[1] Except for Hungary and Poland, these figures are the future trade prospects calculated in accordance with para. 6 of the Understanding on the Interpretation of Article XXVIII of the GATT 1994

[2] Hungary has a TRQ of 17 079 + (in-quota rate same as out-of-quota rate)

[3] Poland has a TRQ of 33 000 + (in-quota rate – 20%)

[4] For Hungary and Poland, the figures represent the total value; for the others, they represent the value of the future trade prospects on the basis of the unit value during the representative period.

In this regard, the information that the EC has provided indicates that for the period 2000-2002, Ecuador's share in the total value of imports into the EC-10 was 58.2%. Assuming that Ecuador's share in such imports during the period 2001-2003 remained at the same level, the total compensation due to Ecuador would be 58.2% of €374,442,049.30 per annum, or €217,925,273 per annum.

It is easily deduced that the compensation owed by the EC to Ecuador for its enlargement as a consequence of the accession of 10 new members is by no means compensated with the introduction of the €176/t tariff, applicable since 1 January 2006 to the 10 countries that joined the EC, as the European Communities would have us believe.

In January 2007, when Romania and Bulgaria acceded to the EC prior to accession, Romania imported 143,000 mt of Latin American bananas, subject to a tariff of 16%;[14] Bulgaria imported 55,000 mt in 2005, subject to a tariff of 11.2%.[15] Following accession, both countries became subject to an "autonomous" €176/mt tariff. No scheduling changes or compensation adjustments have been made.

35. (Ecuador) In paragraph 6 of its oral statement during the substantive meeting with the Panel, Ecuador mentions that "[l]ast year, the European Communities' tariff on bananas required the payment of additional tariffs for Ecuador in the order of €103 million more than the previous year as a result of the European Communities' unilateral 'tariff only' scheme." For clarification, can Ecuador describe the methodology for this calculation, and provide the amounts paid from 1999 to 2006. Can Ecuador also clarify whether it is arguing that €103 million is the additional amount paid in 2006 as compared to the duties paid during the prior year (2005) before the EC banana regime of 1 January 2006 entered into force.

The additional tariffs for Ecuador amounting to 103 million Euros were derived by taking the difference between total duties actually paid by Ecuador in 2006 under the current €176/mt rate and the duties Ecuador would have paid that same year had the rate been €75/mt (as it was from 1995 to 2005). The methodology for this calculation is as follows: [Total duties paid by Ecuador to the EC in 2006] – [Total volume of EC imports of bananas from Ecuador in 2006 (in mt) x €75/mt]. The actual calculation is as follows: €180,788,696 – [1,027,209 mt x €75/mt] = €180,788,696 – €77,040,675 = €103,748,021.

Based on 1999-2006 trade data total duties paid to the EC for imports of bananas from Ecuador between 1999 and 2006 were:

- 1999 – €52,259,175;
- 2000 – €51,816,960;
- 2001 – €52,880,355;
- 2002 – €62,059,943;
- 2003 – € 59,974,208;
- 2004 – €70,847,381;
- 2005 – €79,705,148; and
- 2006 – €180,788,696

36. (Ecuador) In paragraph 10 of its closing statement during the substantive meeting with the Panel, the EC argues that "[t]he fundamental GATT distinction between tariff and non-tariff measures is an important element of this case. Tariff measures are subject to Articles I and II, and non-tariff measures are governed by Articles XI and XIII. The European Communities is unaware of any instance in which a single measure has been found to be in breach of both Article I and Article XIII." Can Ecuador provide a reasoned answer as to whether it agrees with this statement.

[14] U.N. Comtrade Database: Romania banana imports 2002-2005, Exhibit ECU-10.
[15] U.N. Comtrade Database: Bulgaria banana imports 2002-2005, Exhibit ECU-10.

The compliance panel in *Bananas III (Article 21.5 – Ecuador)* concluded the ACP tariff-quotas were being maintained in breach of both Article I and Article XIII of the GATT.[16]

In any event, As previously noted, there is no provision of the WTO that prevents a single measure from violating more than one provision of the WTO and there is no reason to try to imply such a rule. The EC has no textual or contextual basis for arguing that a tariff quota may not simultaneously violate Article I and Article XIII.

37. (Ecuador) Can Ecuador confirm that it signed an *Understanding on Bananas* with the EC on 30 April 2001, the text of which is reproduced in documents WT/DS27/58 and WT/DS27/60. If so, did the legal and factual assumptions based upon which Ecuador signed such understanding on 30 April 2001 change by June 2001 when the Understanding was notified to the DSB?

Ecuador signed the Understanding on Bananas with the EC on 30 April 2001. Ecuador was, and is, quite certain regarding what it agreed to under the Understanding – a transitional regime comprised of several phased steps to be taken by the EC to ultimately bring about a resolution to the dispute, not an immediate end to the dispute. Both the text of the Understanding and Ecuador's communication confirm this interpretation.

What changed, from Ecuador's point of view, and what prompted Ecuador's July 2001 communication to the DSB, was the EC's portrayal of the Understanding to the DSB in June 2001 – as a mutually satisfactory solution within the meaning of DSU Article 3.6 and an end to the *Bananas* dispute.[17] Ecuador did not, and to this day does not, share the EC's interpretation.

Immediately after the EC's communication, Ecuador clarified that the Understanding identified a "*means* by which a long-standing dispute *can* be resolved,"[18] comprised of "the execution of two phases" and "the implementation of several key features, which demands the collective action of the WTO membership." Ecuador viewed the EC's approach to the Understanding (as a mutually agreed solution within the meaning of Article 3.6) as denying the transitional nature of the Understanding.

Ecuador's concerns have been borne out by the EC's actions since 2001. The EC failed to satisfy the terms of the Understanding, the waiver Annex, as well as its obligations under the covered agreements.

38. (Ecuador) Paragraph G of the Banana Understanding provides that "[t]he EC and Ecuador consider that this Understanding constitutes a mutually agreed solution to the banana dispute." Why did Ecuador then state in its notification of the Understanding to the DSB (document WT/DS27/60) that "although Ecuador sees the Understanding as an agreed solution which can contribute to an overall, definite and universally accepted solution, it must be made clear that the provisions of Article 3.6 of the DSU are not applicable in this case"? Please provide a reasoned response.

Ecuador, especially because of the EC purported notification, came to realize that the EC might try to use the Understanding as means to restrict WTO control and Ecuador's rights under WTO dispute settlement rights. Ecuador wished to make clear to the EC and WTO members generally, despite

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[16] *See EC – Bananas III (Article 21.5 – Ecuador)*, paras. 6.160 and 6.161.

[17] *See* Notification of Mutually Agreed Solution, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/58, 2 July 2001.

[18] *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Understanding on Bananas between the European Communities and Ecuador*, WT/DS27/60, 9 July 2001("Ecuador Communication"),quoting EC-Ecuador Understanding, paragraph A.

Ecuador's commitment to and hope for the Understanding, it was not a mutually satisfactory solution in the sense of Article 2 of the DSU.

39. (Ecuador) In paragraph 15 of its second written submission, the EC argues that Ecuador "accepted the legality of the Understanding [on Bananas reached between the EC and Ecuador on 30 April 2001], by initially complying with its provisions." The Panel notes Ecuador's assertion in paragraph 26 of its opening statement that "the Understanding plainly requires a waiver of Article I (for which Ecuador *agreed* to lift its reserve) and a waiver of Article XIII, which Ecuador *committed* to promote to permit the EC tariff quota for ACP countries until 1 January 2006. *Ecuador did its part regarding the waivers* ..." (Emphasis added). In the light of this assertion, does Ecuador consider that it has at least partly complied with the Understanding? If not, why not? If yes, what are Ecuador's views on the point made by the EC, in paragraph 62 of the EC's first second written submission, that Ecuador's partial compliance proves the "binding nature" of the Understanding? What implications does the eventual binding nature of the Understanding have, in Ecuador's view, for the potential status of the Understanding as a mutually agreed solution?

Ecuador complied with its obligations under the Understanding, which proves none of the illogical propositions that the EC seeks to derive from Ecuador's compliance.

Compliance with the terms of the bilateral Understanding does not remotely mean that Ecuador cannot complain under the WTO about measures that the EC never would have applied if the EC had complied with the bilateral Understanding. This EC argument turns international law and good faith on its head, once again. The intention of the parties that the Understanding result in a durable mutually satisfactory solution does not make the Understanding such a mutually satisfactory solution, as Ecuador has previously explained.

40. (Ecuador) In paragraph 4 of its statement during the substantive meeting with the Panel, Suriname argues that "[i]n this case there can be no doubt that a *mutually agreed* solution exists. Therefore, there cannot be any *disagreement* in the sense of Article 21.5 of the DSU." Provided that a mutually agreed solution exists, can Ecuador provide a reasoned answer as to whether it agrees with Suriname's conclusion in regard to Article 21.5 of the DSU.

Ecuador disagrees. There is no provision of the DSU that precludes bringing a complaint under Article 21.5 simply on the basis that the challenged measure complied or was alleged to comply with an agreement alleged to constitute a mutually agreed solution. The DSU encourages mutually agreed solutions, but carefully does not provide anywhere that a mutually agreed solution precludes or limits the right to bring dispute settlement proceedings. The DSU drafters were wise not to provide that a mutually agreed solution limits any DSU rights, for any such limitation would be a disincentive for parties to try to negotiate solutions. This is graphically illustrated in this dispute, where the EC is attempting to avoid scrutiny of it flagrant violations of the WTO on grounds that the Understanding constituted a sub silencio waiver of Ecuador's WTO rights. The DSU authorizes and requires Panels to determine compliance with covered agreements. The DSU does not authorize a Panel to forego or limit its responsibilities because the defending party in the dispute alleges that the complaining party waived its WTO rights in a bilateral agreement. Despite their protests, the EC and ACP countries are urging the Panel out of expediency in this dispute to fabricate rules regarding mutually agreed solutions that would make dispute parties, especially complaining parties, reluctant ever to enter into a mutually agreed solution, since that would cost them their WTO rights. The WTO Agreements do not provide such a rule, and it would be bad policy and bad law to try to contrive one.

41. (Ecuador) In paragraph 14 of its second written submission, the EC states that the term "1 January 2006" in the phrase "[to further actions that, by 1 January 2006 would enable the] system [to] operate fairly without any waiver at all", used by Ecuador in paragraph 11 of its

own second written submission, is "probably a typographical error and should be replaced by 1 January 2008". Does Ecuador agree? If not, why not?

Ecuador agrees and apologizes for the inadvertent error.

42. (Ecuador) Is Ecuador arguing that any non-reciprocal preferential quota can be WTO-consistent only if covered by an Article XIII waiver? Alternatively, could other provisions in WTO agreements, such as the Enabling Clause or Article XXIV of the GATT 1994, also excuse such non-reciprocal preferential quotas from inconsistency with WTO obligations, in the absence of an Article XIII waiver?

Ecuador is arguing that any tariff quota must conform with Article XIII, unless it is covered by a waiver or by some other exception. Ecuador has not done a survey of all possible exceptions, and the EC has not argued that its tariff quotas benefit from a waiver or other exception.

With regard to the possible exceptions mentioned in the question – the Enabling Clause and GATTT Article XXIV – Ecuador does not consider that the Enabling Clause provides an exception, since it is expressly an exception only to GATT Article I:1.[19] As noted by the Appellate Body in *EC – Tariff Preferences*, the Enabling Clause "excepts Members from complying with the obligation contained in Article I:1 for the purpose of providing differential and more favourable treatment to developing countries ... ."[20] It does not permit a Member to derogate from the provisions of other GATT Articles, including Article XIII.

For Free Trade Areas and Customs Unions that meet the strict criteria of Article XXIV, that Article creates an exception that could justify some kinds of exceptions from the obligations of Article XIII. As the Appellate Body found in *Turkey – Textiles*, a GATT-inconsistent quantitative measure n would only be justified under Article XXIV if: (i) the FTA met the "substantially all trade" coverage test of Article XXIV:8(b); (ii) the FTA met the requirements of XXIV:5(b) that duties and regulations not be higher upon the formation of the FTA than prior to it; and (iii) the GATT-inconsistent measure was *necessary* for the formation of the FTA.[21]

Assuming that no higher barriers were imposed on third countries, and that the substantially all trade test were met, it is self-evident that exempting products of free trade area partners from duties, quotas and tariff quotas contributes to meeting the test of eliminating duties and other regulations of commerce on substantially all products of the free trade area. Indeed, failure to include such an exemption, or limiting such exemption through devices such as capping the preferences is a negative point though not necessarily fatal, since the requirement is not "all trade", but rather "substantially all trade" must be free from duties or other restrictions. Whether the third test is met– the necessity of taking the measure inconsistent with the WTO obligation in order to form the free trade area – will depend on the nature of the measures.

43. (Ecuador) If the tariff rate quota of €75/mt for 2.2 million metric tons expired at the end of 2002, what would be the arguments of Ecuador to demonstrate a violation of Article II:1(a) and (b) of the GATT 1994? In particular, would in such a case Ecuador accept that the EC's bound level of duty is merely an MFN duty of 680€/mt? If not, why not?

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[19] Paragraph 1 of the Enabling Clause provides that '[notwithstanding the provisions of Article I of the General Agreement, contracting parties may accord differential and more favourable treatment to developing countries." Paragraph 2 identifies the four types of measures that can be exempted from a finding of inconsistency with Article I:1 under the Enabling Clause. *EC – Tariff Preferences (AB)*", para. 112.

[20] *EC – Tariff Preferences (AB)*, para. 90.

[21] Appellate Body Report, *Turkey – Restrictions on Imports of Textiles and Clothing Products*, WT/DS34/AB/R, adopted 19 November 1999 ("*Turkey – Textiles (AB)"*), para. 58.

If the DSB found that the EC's €75/mt for 2.2 million metric tons concession expired at the end of 2002, the EC's only bound commitment would be the €680/mt duty. Neither Ecuador nor any other WTO member could then claim that a duty of €176/mt – or any duty up to €680/mt – breaches Article II:1(a) and (b).

44. (Ecuador) What are the specific EC obligations under Article II of the GATT 1994 that Ecuador argues are being infringed by the EC duty of €176/mt applied to bananas originating in Ecuador and other MFN countries?

Article II:1(a) and (b).

45. (Ecuador) In what way should paragraph 9 of the Framework Agreement on Bananas (BFA) be interpreted, if not to establish an expiration of a 2.2 mt tariff rate quota (TRQ)? In other words, what exactly has expired, under the terms of paragraph 9, on 31 December 2002?

The BFA expired on that date. The tariff quota concession did not expire, because the EC made that concession independently in its schedule. Since none of provisions of the BFA were WTO-consistent terms and conditions, their legitimacy and validity were only as commitments among the parties to the BFA, and thus they must be considered to have expired on 31 December 2002, if they even had any effectiveness among BFA parties by that point. Other provisions that plainly were not terms, conditions or qualifications of the concession, such as the commitment not to pursue adoption of the panel report or the commitment to consult in 2001, were not WTO terms conditions or qualifications on a concession, could not have been enforced in WTO dispute settlement proceedings, and would have expired with the BFA.

46. (Ecuador) In paragraph 93 of its second written submission, the EC argues that:

> **"Ecuador's second written submission goes on to assert in paragraphs 69 and 70 that 'eliminating the volume restraint element of a tariff quota does not authorize ignoring the tariff binding'. In other words, Ecuador seems to imply that once a tariff quota is granted in a WTO Member's schedules, the tariff part somehow becomes obligatory and perpetual, while the quota part may be freely eliminated. This assertion is not supported by any provision of WTO law and Ecuador's second written submission does not even attempt to offer any explanation as to its legal basis. Moreover, accepting that the 'tariff element' and the 'quota element' of a tariff quota are completely separable and each has a 'life of its own' leads to unreasonable results. For example, Ecuador should explain why the rule that it proposes should not be the other way round, i.e. that the 'tariff element' of a tariff quota may be freely amended, while the 'quota element' should be treated as obligatory and perpetual."**

Can Ecuador provide a reasoned answer as to whether it agrees with the EC's arguments.

The EC's concessions are the in-quota concession of €75/mt for 2.2 million mt; and the over-quota concession of €680/mt, subject. These concessions are subject to such adjustments as may be agreed in Article XXIV:6 negotiations to account for accessions of countries (who had more favourable bindings on bananas than those of the EC) since the concession was granted, but the need for such adjustment is not disputed in this proceeding, and therefore Ecuador and other parties continue to refer to the €75/mt for 2.2 million mt; concession, without prejudice to the obligation for adjustments.

Ecuador does not argue that the EC is bound to provide a €75/mt duty for an unlimited quantity of bananas. However, the EC cannot eliminate the €75/mt for 2.2 million mt obligation by asserting that

it wishes to eliminate the "quota element" of that concession (i.e. the 2.2 million mt) and, having eliminated that element, then automatically it no longer has any obligation with respect to the €75/mt duty. It is true that just eliminating the quantitative limit of 2.2 million mt would not breach the EC's binding and indeed would grant more favourable treatment than required by the binding, which is always welcome, but not required by Article II. What the EC cannot do is avoid its duty obligation by the simple expedient of eliminating the quota element and announcing that that step eliminates any tariff obligation. If there were such a right, all WTO members could eliminate all their low duty and zero duty tariff quota concessions by the same expedient.

47. (Ecuador) In paragraph 3 of its statement during the substantive meeting with the Panel, Saint Lucia argues that "[i]n 2005 WTO Ministers in Hong Kong accepted the tariffication proposal in which the TRQ was replaced by a single tariff of €176 per tonne. Indeed, the Ecuadorian delegation was a leading campaigner for this change and Minister Støre of Norway was charged with monitoring trade flows that would indicate if the change had in fact disadvantaged MFN suppliers." In paragraph 11 of its third party statement Saint Lucia adds that "Ecuador argues that ... the European Communities was allowed only one shot at 'rectifying the matter'. I trust that [the Panel] will reject this narrow and self-serving reading of the waiver – a reading that even Ecuador did not share when it agreed to join the monitoring group that kept under review the actual effects on import volumes of the tariff of €176 per tonne." Can Ecuador provide a reasoned answer as to whether it agrees with the arguments raised by Saint Lucia. Can Ecuador also provide evidence to support the factual assertions made by Saint Lucia, regarding the acceptance by WTO Ministers in Hong Kong of the tariffication proposal in which the TRQ was replaced by a single tariff of €176 per tonne.

Ecuador does not agree. To the contrary, a large number of Latin American nations, including Ecuador, Honduras, Panama, Colombia, and Nicaragua, made statements at the Ministerial Conference decrying the EC's adoption of the €176/mt tariff.[22] Ecuador agreed to participate in Minister Støre's monitoring procedures with the hope that it would produce a speedy negotiated solution. At the same time, Ecuador expressly reserved its rights to use all the legal instruments at its disposal in the WTO to safeguard its rights.[23]

QUESTIONS ADDRESSED TO PARTIES AND THIRD PARTIES

86. (Both Parties, Belize, Cameroon, Côte d'Ivoire, Dominica, the Dominican Republic, Ghana, Jamaica, Madagascar, Saint Lucia, Saint Vincent and the Grenadines, and Suriname) In paragraph 31 of its statement during the substantive meeting with the Panel, Cameroon argues that "[c]'est un fait reconnu que les producteurs de bananes ACP sont moins compétitifs que les producteurs NPF. Comparés à ces derniers, les producteurs ACP produisent à un coût plus élevé. Pour des raisons historiques et géographiques, ils ne disposent pas des mêmes économies d'échelle que les producteurs NPF. Dès lors, les producteurs ACP ne peuvent les concurrencer que sur les marches où ils bénéficient d'un accès préférentiel." Can Cameroon provide evidence for its assertions. Can Belize, Côte d'Ivoire, Dominica, the Dominican Republic, Ghana, Jamaica, Madagascar, Saint Lucia, Saint Vincent and the Grenadines, and Suriname confirm that they agree with these specific assertions made by Cameroon. Can Cameroon, as well as Belize, Côte d'Ivoire, Dominica, the Dominican Republic, Ghana, Jamaica, Madagascar, Saint Lucia, Saint Vincent and the Grenadines, and Suriname specify the relevance of this argument, if any, in the context of its eventual analysis of Article XIII of the

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[22] *See* Ministerial Conference, Sixth Session, *Summary Record of the Fourth Meeting Held in Hong Kong Convention and Exhibition Centre, Hong Kong, China on Wednesday, 14 December 2005, at 8 p.m*, WT/MIN(05)/SR/4, 24 February 2006, agenda item 2(b), attached as Exhibit ECU-11.

[23] *See* Hong Kong Statement of Ecuador and Dispute Settlement Body, *Minutes of Meeting Held in the Centre William Rappard on 17 February 2006*, WT/DSB/M/205, 31 March 2006, para. 61. Exhibit ECU-11.

GATT 1994, in particular as regards the chapeau of Article XIII:2. Can the Parties provide a reasoned answer as to whether they agree with these assertions, and specify, in their view, how the same should be taken into account in the context of an eventual analysis of Article XIII of the GATT 1994, in particular as regards the chapeau of Article XIII:2.

Ecuador has no comment on the relative efficiency of these countries. However, Article XIII:2 does not permit a restricting Member to use allocations of restrictions to make up for relative economic inefficiency of one or more supplying Members. To the contrary the goal of Article XII is to achieve the same distribution of any restrictions as would likely prevail in the absence of the restriction.

87. (Both Parties and Brazil) In paragraph 17 of its statement during the substantive meeting with the Panel, Brazil argues that "a Member is not exempted from discharging its burden of proof as regards the compliance of the new measures with the DSB recommendations and rulings even if such measures are <u>intended</u> to implement a suggestion by the panel." Can Brazil elaborate on this argument, and the Parties provide a reasoned answer as to whether they agree with Brazil's argument.

Ecuador understood Brazil's statement to agree with Ecuador's position that nothing in the DSU immunizes a measure from challenge in an Article 21.5 proceeding simply on the basis that the defending party argues or even ultimately proves that the measure conforms with a panel suggestion. Ecuador may have further comments, depending on the responses to this question.

88. (Both Parties and Colombia) In paragraph 16 of its third party submission, Colombia argues that "[a]n applied tariff of €176/tonne does not constitute a 'rebinding' [under the Doha Waiver]." Can Colombia elaborate on this argument, and the Parties provide a reasoned answer as to whether they agree with it.

Ecuador understood Colombia to explain that the €176/tonne duty that the EC applies to bananas (except those benefiting from the zero duty quota) is not in fact bound. The EC does not dispute that this duty is not bound.

89. (Both Parties and Côte d'Ivoire) In paragraph 21 of its oral statement during the substantive meeting with the Panel, Côte d'Ivoire argues that "moins d'une année suffit pour produire et exporter des bananas". Can Côte d'Ivoire provide evidence for its argument. Can the Parties comment on the argument made by Côte d'Ivoire, and explain how rapidly banana production and exports can be expanded, and how much time is necessary for suppliers to fully respond to a change in market conditions, such as a change in the EC's import regime for bananas.

The Côte d'Ivoire underestimates the timetable for completing any new banana project of a meaningful scale. A new banana project is not simply about how long it takes a banana plant, once in the ground, to produce bananas. When suppliers establish these new plantations to respond to improved conditions of entry, a great many preparatory steps must be taken, including, among others:

- identifying the land;
- conducting soil surveys;
- evaluating farm-to-port operations, as well as port operations;
- addressing any government policy or regulatory issues;

- developing infrastructure, including digging drainage, installing irrigation, and installing roadways;
- contracting for meristems, 1,800 of which are needed for each hectare and often are difficult to source in significant magnitudes;
- planting the new fields; and
- cultivating export-quality production.

The lead-time required for these steps is typically two to three years, if not more. Thus, while *short-term* responses to a change in market conditions occur primarily from more intensive production of existing plantations, a longer period of time is needed to launch new plantations and bring them to peak production. willingness on the part of investors to make this investment depends in part on perception of the stability of market conditions.

90. (Both Parties, Nicaragua and Panama) In paragraph 108 of their respective third party submissions, Nicaragua and Panama argue that "[t]he EC's €75/mt concession – *which from 1995 to 2005 covered all bound in-quota Latin American imports and informed the rate applicable to all other Latin American bananas entering the EC market* – has been the single most important banana concession in Schedule CXL. In contrast to *the prohibitive €680/mt rate, under which virtually no Latin American volumes have ever been entered,* the €75/mt concession is the only rate that enabled Latin American market access to the EC market from 1995 to 2005. Unless the €75/mt bound rate receives the full protections of GATT Article II, the entire value of the EC's mandatory Uruguay Round concessions will be nullified". (Emphasis added). Can Nicaragua and Panama provide evidence for their assertions. If MFN banana imports have increased under an applied tariff rate of €176/mt, as argued by the EC, how can this be reconciled with the statement that "a €75/mt concession is the only rate that enabled Latin American market access to the EC market from 1995 to 2005"? Can Nicaragua and Panama clarify what would be meant by "providing the full protections of GATT Article II" to the €75/mt tariff rate. Can Parties provide a reasoned answer as to whether they agree with the assertions made by Nicaragua and Panama.

Ecuador may comment further after reviewing the response of Nicaragua and Panama. However, each of the quota assertions in Ecuador's view is correct and supported by the record of this dispute. In particular, evidence introduced by both parties demonstrated that no statistically significant imports occurred at the €680/mt, and all or virtually all imports into the EC of MFN bananas occurred at the €75/mt rate, within the tariff quota. Ecuador has already indicated its agreement that if the panel were to find that the €75/mt tariff quota is no longer bound, the EC's Uruguay Round "concessions" would become simply the prohibitive €680/mt rate. Ecuador believes that Nicaragua and Panama were simply comparing the 75 and 680 rates, which, were the only rates applicable to MFN bananas in 1995-2005.

91. (Both Parties, Nicaragua and Panama) In paragraph 19 of their combined statement during the substantive meeting with the Panel, Nicaragua and Panama argue that "[t]he EC tariff, which was the EC's scheduled banana concession from 1963-1994, was the equivalent of about 80 euro per tonne." Can Nicaragua and Panama elaborate on this argument and provide evidence for their assertions, as appropriate. Can the Parties comment on the argument and assertions.

Ecuador believes that this calculation was demonstrated before the Arbitrator. Ecuador may comment further on seeing the response of Nicaragua and Panama.

92. (Both Parties and Suriname) In paragraph 10 of its statement during the substantive meeting with the Panel, Suriname argues that "[b]oth the Doha Waiver and the Understanding on Bananas were negotiated by the WTO members, including the interested parties, after the DSB adopted its recommendations and rulings in the original Bananas dispute. These two instruments constitute new secondary WTO law and create an entirely new legal framework for the issues that are now pending before the Panel. These new instruments clearly strike a new balance of rights and obligations for the entire WTO membership, in addition to the parties to the dispute." Can Suriname elaborate on these arguments. Can both Parties provide a reasoned answer as to whether they agree with Suriname.

In Ecuador's opinion, the Doha Waiver, which was granted by the WTO membership on a time-limited and conditional basis, does affect rights and obligations of WTO members. A waiver granted by WTO Members in accordance with the rules can modify those rules for WTO purposes. However, the Understanding was between Ecuador and the EC, and is not an agreement that can modify rights and obligations of anyone under the WTO.

93. (Both Parties and the US) Is there any particular reason why the Understandings on Bananas that the EC reached with Ecuador and the US respectively in April 2001 were only notified to the DSB more than two months later? Is there any reason why such agreements were not notified jointly to the DSB by both parties to the respective agreements?

As is evident in the response to other questions and the different notifications that were made, the parties did not have the same view of the significance and effect of the respective agreements.

94. (Both Parties and US) Paragraph G of the *Understanding on Bananas* reached between the EC and Ecuador of 30 April 2001 (documents WT/DS27/58 and WT/DS27/60), states that "[t]he EC and Ecuador consider that this Understanding constitutes a mutually agreed solution to the banana dispute". In turn, the *Understanding on Bananas* reached between the EC and the US on 11 April 2001 (document WT/DS27/59), contain no equivalent statement. What value, if any, should be given to the statement contained in Paragraph G of the *Understanding on Bananas* reached between the EC and Ecuador? What value, if any, should be given to the different language contained in both understandings regarding this issue?

Ecuador believes that the United States may have had a better appreciation at the time it concluded its negotiations as to how the EC might attempt to misconstrue or misuse the provision in question. In any event, Ecuador does not consider that this difference between the two Understandings has any legal effect in a WTO proceeding. Paragraph G could not have made the Understanding into a mutually agreed solution in the sense of Article 3 if that had been Ecuador's intent. Further, as noted previously, a mutually agreed solution in any event does not limit a Member's dispute settlement rights, nor may a Panel modify its determination of rights and obligations under the WTO to take account of the US or Ecuadorian Understandings with EC, whether or not either is a mutually agreed solution in the view of the Panel.

95. (Ecuador and all Third Parties) In paragraph 6 of its oral statement during the substantive meeting with the Panel, Ecuador mentions that "Ecuador's per capita GDP for 2005 was about 8 per cent of the per capita average of the EC, and also is less than that of many of the ACP countries." In turn, in paragraph 16 of their combined statement during the substantive meeting with the Panel, Nicaragua and Panama state that Nicaragua's "Gross National Income of $910 is below the GNIs of several LDCs and well behind the GNIs of most ACP countries." Can Ecuador, Nicaragua and Panama provide the data sources that were used to make their respective assertions and specify the per capita GDP figures in those sources for Ecuador, the EC and the MFN suppliers and ACP countries that are participating as Third

Parties in these proceedings. Can other Third Parties provide a reasoned answer as to whether they agree with the assertions made by Ecuador, Nicaragua and Panama.

Attached as Exhibit ECU-12, please find the data sources for the assertion made by Ecuador in its oral statement. In that regard, the GDP per capita of Ecuador for the year 2007 according to the IMF, is lower than: Belize, Dominica, Dominican Republic, Jamaica, Saint Vincent and the Grenadines, Suriname and almost two times lower than that of Saint Lucia. Regarding Ecuador's GDP per capita in comparison to that of the EC-27, for the year 2007 and according to EUROSTAT data, our GDP its 9 per cent of that of the EC. The data changes because Ecuador made its first calculation, asserted in our oral statement, comparing the EC-25 for the year 2005.

96. (Ecuador and Nicaragua) In paragraph 6 of its closing statement during the substantive meeting with the Panel, the EC argues that "the draft dated November 2, 2001, which Nicaragua has attached to its third party submission as Exhibit N-1, provided that the Doha Waiver would be terminated automatically within two months after the notification of the arbitration award to the General Council. However, this provision was not included in the final version of the Doha Waiver. The link between the awards of the arbitrator and the termination of the Doha Waiver was abandoned." Can Ecuador and Nicaragua provide a reasoned answer as to whether they agree with the statement.

The EC is wrong in claiming that this preparatory waiver document shows that "the link between the awards of the arbitrator and the termination of the Doha Waiver was abandoned."[24] It proves exactly the contrary.

The document to which the EC is referring was a relatively early version of the draft banana provisions of the waiver.[25] Developed by the EC, not the MFN supplying countries, it was put forward before the notion of an Annex had even emerged. As evidenced by its proposed text, the EC already well understood by the time this version was put forward that absent a "*multilateral control*" on "*any re-binding*,"[26] and a waiver termination provision linked to that multilateral control,[27] this waiver would not be approved.

The two-month termination provision in the EC's proposed text was an early iteration of what later became the waiver's mandatory termination provision "upon entry into force of the new EC tariff regime." The EC used the phrase "two months after the notification of the arbitration award" for the simple reason that under the approach it was proposing, there were still no requirements as to when the arbitration procedure would need to begin and end. Indeed, the EC was still envisioning in this draft that arbitration would occur *after* the new regime took effect, and, thus, framed the waiver standard in the present tense, not the future conditional tense (*i.e.* "does not result in ...," rather than "would result in ..."), and pegged the termination provision to the notification of the award, whenever that might occur.

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[24] Closing statement of the European Communities, 19 September 2007, para. 5.

[25] *See* Council for Trade in Goods, *European Communities – The ACP-EC Partnership Agreement: Revision* (Communication from the European Communities), G/C/W/187/Add. 2/Rev. 1, 2 November 2001. Both Nicaragua and Panama attached this document to their third party written submissions as Exhibits N-1 and P-1, respectively.

[26] *Id.*, Noting Clause 3 in this same document.

[27] *Id.*, 3ter.

None of the MFN drafters was willing to accept this imprecisely defined EC draft.[28] As subsequent drafts and the final waiver text made clear, they insisted, instead, on more elaborated, carefully sequenced procedures entailing consultations and two rounds of arbitration that would have to be concluded in their entirety *before* the regime took effect.[29] Once the arbitration provisions were refined by the negotiators to require a conclusion of all procedures before 2006, the waiver termination provision, which remained an absolute prerequisite throughout this drafting period, was necessarily also refined to take effect "upon entry into force of the new EC tariff regime."

The EC, having already acknowledged in its earlier draft the necessity of a lapsed waiver linked to arbitration, cannot be allowed to claim now that the *strengthened* final text of the waiver no longer contained that same linkage and granted, instead, blanket authority to the EC to install whatever regime it wanted to as of 2006.

97. (Ecuador, Nicaragua and Panama) What are exactly, in your view, the current binding concessions that the EC has, relating to bananas? Is it the TRQ as described in the EC's Schedules LXXX and CXL; is it a single duty of €75/mt; or is it rather something else? If it was a single duty of €75/mt, please explain why the Panel should consider that the 2.2 million mt volume and the out-of-quota duty of €680/mt are not a relevant part of the EC's current concessions.

Please see Ecuador's responses to question 46.

98. (Ecuador, Nicaragua and Panama) Does the Framework Agreement on Bananas (BFA) include "terms, conditions or qualifications" to the EC's relevant concession on bananas in the sense of Article II(1)(b) of the GATT?

As Ecuador has previously noted, all the provisions of the agreement that might have been considered "terms, conditions or qualifications" of the concession have either been superseded or found inconsistent with the EC's obligations or both, insofar as Ecuador is aware. The €75/mt tariff quota, while also required by the BFA, is not a term, condition or qualification of the concession, but rather was a plurilateral commitment to make that concession, which the EC duly made. Other terms gave or purported to give procedural rights to BFA parties that are now moot. As Ecuador has explained previously, Article 9 terminates the BFA, but does not purport to terminate the €75/mt concession.

99. (Ecuador, Nicaragua and Panama) Do you agree with the EC that a Member could, through a "term, condition or qualification" on a concession that was included in its Schedule and accepted by the other Members, provide for the elimination of a bound TRQ?

Traditionally, it was possible (though extraordinarily rare) to provide for a concession of limited duration. Whether that is still possible, particularly for an agricultural product and in the light of commitments made in the Agreement on Agriculture, is a point on which Ecuador wishes to defer comment. In Ecuador's view, the record plainly establishes that, even if there were such a theoretical

[28] There were several other elements of this draft that the Latin American negotiators considered unacceptable, including: (i) a waiver access standard expressed as an "aim," not a requirement (3bis); (ii) an access standard that protected both MFN and ACP suppliers, not just MFN suppliers (3bis, 3ter); (iii) an access standard that would be analyzed by the Arbitrator after the fact ("does not result in"), rather than prospectively ("would result in ..."); and (iv) an access standard that would only be measured "at the time of the re-binding," not over time (3ter). The MFN negotiators insisted on striking every one of these proposed EC elements. By replacing (i) and (iii) above with the final waiver text, the MFN negotiators were further reinforcing the unseverable link between the pre-2006 arbitration awards and the termination of the waiver.

[29] *See* Draft EC Proposal for Article I waiver, 11 November 2001, in Exhibits P-1 and N-1; Ministerial Conference, *European Communities – The ACP-EC Partnership Agreement*, WT/MIN(01)/15, 14 November 2001, WT/L/436 ("Article I waiver"), Annex in Exhibit EC-2.

possibility, the EC did not make its bound TRQ terminate in 2002, and the record, including of the EC's own actions and arguments show that this argument is wrong and that the EC even making the argument is contrary to the principle of good faith that the EC so frequently invokes.

100. (Ecuador, Nicaragua and Panama) In paragraph 79 of its second written submission, the EC argues that:

> **"[I]n paragraph 59 of its second written submission, Ecuador argues that 'it is scarcely likely that the negotiators of the BFA would consider as satisfactory solution a system that as of 2003 would leave all their banana exports to the EC subject to an essentially prohibitive duty of €680/mt'. This statement is in full contradiction with paragraph 25 of Ecuador's second written submission, where it is stated that 'in every negotiation parties strive for a balance of benefits, but the reality does not always turn out as the negotiators were expecting or assuming at the time of the negotiations. It would destabilize the entire premise of the WTO tariff system of concessions were to be adjusted according to whether the concessions had the result contemplated at the time that the concession was granted'. Perhaps Ecuador should explain whether its statement in paragraph 25 is correct, in which case it would lose its Article II claims, or whether its statement in paragraph 59 is correct, in which case it would lose its Article I claims."**

Can Ecuador, Nicaragua and Panama provide a reasoned answer as to whether they agree with the EC's arguments.

The two statements are not inconsistent.

Paragraph 59 is part of Ecuador's argument that there are many factors that support the view that the termination clause of the Banana Framework Agreement did not and was never intended to terminate the EC's €75/mt tariff quota concession. There is no disagreement that a tariff of €680/mt is essentially prohibitive. While countries occasionally make unwise bargains, the Panel would have to presume that the BFA members, as well as all the non-EC members of the WTO were insane or incompetent to accept, in place of the tariff quota that the EC had proposed, a modest improvement for 8 years, following which the concession would disappear the EC would be allowed to essentially prohibit all imports with a duty up to €680/mt. The EC's only effort to explain this extraordinary "concession" it achieved in 1994 and rediscovered in the summer of 2007 has been to say that the EC promised to consult with the BFA parties. It would have been a dismal consultation had the EC's current argument been true. It is not technically impossible that a group of small developing countries or even all of the other WTO members would make a miscalculation of colossal portions such as the EC is ascribing in this argument to the BFA parties and the acquiescent WTO members, but it is highly unlikely and a further reason, added to all the other evidence that the EC and all parties always considered and even argued that the concession continued, to suspect that no one understood the concession to terminate as now argued by the EC.

Paragraph 25 of Ecuador's submission addresses the EC's argument that the Doha Waiver must have meant that the EC was free to set the duty of its choosing so long as it maintained market access measured, according to the EC, by current trade. Ecuador was pointing out that the norm in concessions is that a party takes the risk that the concessions it bargains for, and the concessions it grants, may not turn out to have the same commercial value that the party projects during negotiations. Paragraph 59 deals with the current case, where what is disputed is the continued existence of a concession, an issue which would have extraordinary effects, rendering largely pointless this dispute and most of the discussion of bananas for at least the last 5 years. Paragraph 25

is simply making the point that concessions that all parties agree were validly made may have not turn out to be as commercially valuable, or may be more valuable, than originally projected.

101. (Ecuador, Nicaragua, Panama and the US) In paragraph 4 of its closing statement during the substantive meeting with the Panel, referring to the alleged termination of the Doha Waiver, the EC argues that "[i]f the Doha Waiver wanted to say what Ecuador, Nicaragua and Panama are arguing, the text should have read that the waiver would terminate 'if the *Arbitrator concludes* that the EC has failed to rectify the matter'. The Doha Waiver does not say so." Can Ecuador, Nicaragua and Panama provide a reasoned answer as to whether they agree with this statement. Could the US comment on the same, in the light of its argument in paragraph 21 of its statement during the substantive meeting with the Panel, reproduced in the previous question.

As Ecuador explained in paragraph 24 of Ecuador's second submission, the reasonable interpretation of the fifth Tiret is that the waiver expires after the Arbitrator's finding that the EC has failed to rectify the matter, without the need for extra words that the EC claims are needed. The use of identical and somewhat legalistic terminology of rectifying the matter supports this meaning. This is reinforced by the architecture of the waiver, directed at resolving the issue before 1 January 2006, while still giving the EC the chance to reach agreement with interested parties or failing that, to persuade a neutral arbitrator that the EC had met the waiver standards. This is a far more plausible reading than the EC's interpretation that all those complex and compressed dispute settlement and consultative procedures were all but meaningless, because the EC was then free to implement unilaterally whatever the EC chose.

ANNEX D-2

RESPONSES BY THE EUROPEAN COMMUNITIES TO QUESTIONS POSED BY THE PANEL

QUESTIONS ADDRESSED TO PARTIES

1. (Both Parties) In paragraph 39 of its third party submission, Colombia concludes that "the tariff level that would result in at least maintaining the conditions of competition between MFN bananas and ACP bananas is the difference between the price gap for MFN bananas (€97/tonne) and the price gap for ACP bananas (€86/tonne), or €11/tonne." Can the Parties provide a reasoned answer as to whether they agree with the argument raised by Colombia.

1. The European Communities observes that Colombia's statement echoes price-gap methodologies suggested during the 2005 Arbitrations. The outcomes of the Arbitration awards have confirmed the limits of these estimation exercises. With regard to the Colombia's suggestions, the first Arbitral Award (in paragraph 92) acknowledged that the price gap methodology implies "difficulties with the availability and reliability of actual market prices".

2. Today, the use of such a methodology is not justified any longer. Almost two years after the introduction of the new banana import regime there is plenty of real market data available that show us what has really happened. There is no more need to work with uncertain estimates. The real market data confirms that the tariff currently applied by the European Communities has more than maintained the total market access of the MFN suppliers. Consequently, the European Communities does not consider that there is any scope for further discussing Colombia's suggestions.

2. (Both Parties) How has the EC been applying the MFN tariff of €176/mt to individual imports? What volume and share of its imports have been subject to that tariff?

3. The European Communities applies a single tariff of €176/mt to all bananas imported into the European Communities, with the exception of the first 775 000 tons of bananas coming from ACP countries which are imported at a zero tariff.

4. The aggregate quantity of bananas imported into the European Communities in 2006 was 4,184,897 tons. The tariff of €176 per ton was applied to 3,409,897 tons and the zero duty was applied to the 775,000 tons of ACP bananas.

3. (Both Parties) In paragraph 15 of its first written submission, Ecuador states that, subsequent to adopting Council Regulation No. 1964/2005, "the EC has issued implementing regulations ancillary to [such regulation]." Can Parties identify all ancillary or implementing regulations associated with Council Regulation No. 1964/2005 adopted by the EC since November 2005, if any.

5. The implementing Regulations have been adopted by the European Commission on the basis of the authorisation granted through Regulation 1964/2005. These are:

(i) Commission Regulation (EC) No 2015/2005 of 9 December 2005 on imports during January and February 2006 of bananas originating in ACP countries.

(ii) Commission Regulation 219/2006 of 8 February 2006, on imports of bananas from ACP countries for the period 1 March to 31 December 2006.

(iii) Commission Regulation (EC) No 1789/2006 of 5 December 2006, on imports of bananas from ACP countries for the period 1 January to 31 December 2007.

4. (Both Parties) Is the import regime for bananas contained in EC Council Regulation No. 1964/2005, to be considered "the new EC tariff regime", in the sense that the term is used in the Doha Waiver? What is the exact date of entry into force of "the new EC tariff regime"? Has the EC Council Regulation No. 1964/2005 been modified in any way since its entry into force?

6. The European Communities understands that the Panel's question refers to the third line from the end of the last paragraph, where it is stated that "if the EC has failed to rectify the matter, this waiver shall cease to apply to bananas upon the entry into force of the new EC tariff regime".

7. As mentioned in paragraph 71 of the first written submission of the European Communities and in paragraph 41 of the second written submission of the European Communities, the European Communities considers that "the new EC tariff regime" the introduction of which could bring the termination of the Doha Waiver could only be the tariff regime that was presented to the Arbitrator and on which the Arbitrator made a pronouncement in its Award. As further mentioned in paragraph 72 of the first written submission of the European Communities, the European Communities never introduced the tariff regime that was presented to the Arbitrator and on which the Arbitrator made a pronouncement in its Award. On 1 January 2006, the European Communities introduced, through Regulation 1964/2005, a different import regime than the one analysed by the Arbitrator.

8. In light of the above, the European Communities takes the view that Regulation 1964/2005 is not the "new EC tariff regime", the introduction of which could bring the termination of the Doha Waiver.

9. Regulation 1964/2005 has not been amended since its adoption on 29 November 2005.

5. (Both Parties) Ecuador has advanced claims against the preferences granted by the EC to ACP bananas under both Articles I and XIII of the GATT 1994. Do Parties see any particular order in which these two claims should be considered in this dispute? Does Ecuador consider its claim under Article XIII of the GATT 1994 a subsidiary or secondary claim to its claim under Article I? If the preferences granted by the EC to ACP bananas are inconsistent with either Article I or Article XIII of the GATT 1994, on what grounds would Ecuador argue that additional findings regarding the same preferences under the other provision, i.e. Article XIII or Article I of the GATT, respectively, would also be necessary to resolve the matter at issue?

10. The European Communities has provided facts and arguments in its two Written Submissions and in its two Statements supporting the conclusion that its current banana import regime violates neither Article I, nor Article XIII of the GATT.

11. The European Communities considers that the Panel should first analyse the claims raised under Article I, because this analysis is a necessary element in assessing Ecuador's claims under Article XIII.

6. (Both Parties) In paragraph 37 of their joint third party submission, Belize, Cameroon, Côte d'Ivoire, Dominica, the Dominican Republic, Ghana, Jamaica, Madagascar, Saint Lucia, Saint Vincent and the Grenadines, and Suriname state that:

> **"pursuant to the Understanding [on Bananas reached between the EC and Ecuador on 30 April 2001], the banana dispute was taken off the agenda of the**

> **DSB in accordance with Article 21.6 of the DSU. Indeed, at the DSB meeting held on 1 February 2002 [footnote omitted], the representative of the EC noted that the EC had implemented the second phase of the Understanding on Bananas which would be applicable until the time the EC's banana import regime became a tariff-only regime i.e. at the latest by 1 January 2006, and that the EC considered that this matter should therefore be withdrawn from the DSB agenda. Ecuador agreed by stating that it 'also considered that this item should no longer appear on the agenda of future DSB meeting.'"**

Can Parties confirm that the issue of the implementation of the rulings and recommendations of the DSB in the *EC – Bananas III* dispute was withdrawn from the DSB's agenda with the consent of both the EC and Ecuador, in accordance with Article 21.6 of the DSU.

12. The issue of the implementation of the *EC – Bananas III* DSB recommendations and rulings was indeed withdrawn from the DSB's agenda with the consent of both the European Communities and Ecuador, in accordance with Article 21.6 of the DSU. Given that this Article provides that the issue of implementation "shall remain on the DSB's agenda until the issue is solved", the removal of the item from the agenda of the DSB supports the argument that Ecuador considered that the issue was solved with the introduction in 2002 of the new tariff-quota-based import regime as envisaged in the Understanding.

7. (Both Parties) In paragraph 4 of its statement during the substantive meeting with the Panel, Brazil argues that "Article 3.7 of the DSU should be interpreted in its integrality, with due account of all the provisions contained therein, that is to say the preference for negotiated solutions and the conformity with WTO agreements. Those two elements permit us to conclude that compliance with the covered agreements has precedence over negotiated solutions and that parties to an agreed solution are not authorized by such instrument to circumvent their obligations under the multilateral trading rules." Can the Parties provide a reasoned answer as to whether they agree with this statement.

13. The European Communities considers that the provisions of the Understanding are in conformity with the WTO rules. As mentioned in paragraph 15 of the second written submission of the European Communities, Ecuador does not explain how an initially "consistent with the covered agreements" Understanding (as evidenced by Ecuador's initial compliance with its provisions) has suddenly become "inconsistent with the covered agreements". Indeed, neither Ecuador, nor Brazil explains which aspects of the Understanding are not in conformity with a WTO rule (and with which WTO rule). For these reasons, the European Communities does not understand Ecuador's and certain Third Parties' assertions that the Understanding is not a "mutually agreed solution" because allegedly it is not in conformity with the WTO agreements.

14. In any event, as mentioned in paragraph 15 of the second written submission of the European Communities, Ecuador cannot escape the obligations it has undertaken with the Understanding by claiming the Understanding's alleged non-conformity with the WTO rules. The application of the principle of *bona fides* (good faith) bars Ecuador from relying on the alleged "illegality" of the Understanding in order to avoid the obligations it has undertaken through it, when Ecuador has already reaped the benefits of the Understanding and had from the very beginning full knowledge of the legal status of the Understanding.

8. (Both Parties) If the Panel was to examine whether the current EC regime for bananas results "in at least maintaining total market access for MFN banana suppliers", what should be the appropriate criteria to consider? Would the relevant criteria be the same that were considered by the Arbitrator in its Awards of August 2005 and October 2005?

15. As mentioned in the answer to Question 1, predicting the future is an imprecise exercise by its own nature. The models used are not perfect and they rely on uncertain assumptions. Fortunately, we do not need to rely on such imperfect criteria and uncertain methods any more. Two years after the introduction of the new import regime of the European Communities there is ample evidence and real market data that can establish quite easily that the total market access of the MFN suppliers has been more than maintained.

16. The European Communities considers that the Panel can use market statistics that show a significant increase in the volumes of MFN bananas imported into the European Communities and market statistics that show that the growth of MFN imports is greater than the growth of the total market for bananas in the European Communities as evidence establishing that the total market access of the MFN suppliers has been more than maintained.

9. (Both Parties) In paragraph 38 of its statement during the substantive meeting with the Panel, Ecuador argues that "[i]t will be recalled that the waiver in any event expires 1 January 2008, but the MFN duty continues, and will be the margin of preference for any preferences that the EC grants inconsistent with WTO rules into the future, past 2007. It will be recalled that the EC had made plain its intent to use not only the 'Everything but Arms' initiative but also WTO-conforming free trade agreements to carry on with preferences past 2007. Further, even if the EC were to grant no future preferences, the duty will restrict future banana imports." Can Ecuador elaborate on these arguments, and can the EC provide a reasoned answer as to whether it agrees.

17. The European Communities notes the inconsistencies in Ecuador's statements in paragraph 38 of Ecuador's oral statement. Ecuador starts by referring to "any preferences that the EC grants *inconsistent* with WTO rules into the future". Then, Ecuador goes on to refer to the EC's intent to use "WTO *conforming* free trade agreements to carry on with preferences past 2007". And then Ecuador concludes by stating that "even if the EC were to grant *no future preferences*, the duty will restrict future banana imports".

18. It is clear that these statements have no relevance for the analysis of whether the Doha Waiver continues to cover the Cotonou Preference until the end of 2007. These statements simply confirm that Ecuador has brought these proceedings in order to exercise pressure in the tariff negotiations that the European Communities is currently holding with Latin American banana exporting countries. In this paragraph, Ecuador rather cynically admits that the examination of the legality of the Doha Waiver is of secondary importance, since the Doha Waiver and the Cotonou Preference will in any event expire at the end of 2007. What really interests Ecuador is to seek to influence the "MFN duty" that will "continue past 2007" and which is currently under negotiation.

19. The European Communities invites the Panel to resist Ecuador's attempt to use the WTO dispute settlement system in order to influence arms-length tariff negotiations which are taking place in accordance with Article XXVIII of the GATT and in parallel with the negotiations in the Doha round.

10. (Both Parties) In paragraph 71 of its first written submission, the EC argues that the phrase "the new EC tariff regime" can only refer to the tariff regime that was presented to the Arbitrator and on which the Arbitrator made a pronouncement in its Award. Can Ecuador provide a reasoned answer as to whether it agrees with this statement. Would the EC consider its argument valid even if it was established that the TRQ to which the Banana Framework Agreement (BFA) relates has not expired at the end of 2002? Does the EC refer to the applied system and not the rebinding?

20. As mentioned in paragraph 71 of its first written submission, the European Communities takes the view that the correct interpretation of the Doha Waiver is that it would expire upon the European Communities' implementation of the banana import regime analysed by the Arbitrator and found not to at least maintain the total market access of the MFN suppliers. Given that this situation relates to the implementation of a new import regime after the end of 2005, this conclusion is not affected by the characteristics of the banana import regime that the European Communities had in place until the end of 2005.

21. As far as the last part of the question is concerned: the European Communities notes that the Doha Waiver provides that "the EC shall rectify the matter". The European Communities considers that this means that the continued operation of the Doha Waiver depended on whether the European Communities would indeed put in place a banana import regime that would at least maintain the total market access of the MFN suppliers. The European Communities does not consider that a "rebinding" was the only way that the "matter" could be "rectified". This is evidenced by the fact that the Doha Waiver provides that "the EC shall rectify the matter" and not that "the EC shall rectify the matter *through a new rebinding*". Therefore, the European Communities considers that it has "rectified the matter" by applying a tariff that more than maintains the total market access of the MFN suppliers.

11. (Both Parties) In paragraph 23 of its first written submission, the EC argues that "on 1 January 2006, the European Communities introduced a tariff only system and the Cotonou Preference took the form of a tariff quota for certain volumes of bananas coming from Cotonou beneficiary developing countries". Can the EC provide a reasoned answer as to how can an MFN tariff combined with a tariff-rate quota for ACP countries qualify as a "tariff-only system". Can Ecuador provide a reasoned answer as to whether it agrees with the EC's statement in paragraph 23 and, if not, what would qualify, in its view, as a "tariff-only system".

22. As mentioned in paragraph 24 of the first written submission of the European Communities, the "tariff only" nature of the banana import regime of the European Communities cannot be disputed. The fact that there is a limit on the quantity of ACP bananas that can be imported free of duty does not change this fact.

23. The GATT itself recognizes that tariff quotas are tariff measures and not ordinary quantitative restrictions. This is seen from the fact that GATT Article XIII, paragraph 5 expressly provides that the rules of GATT Article XIII "shall also apply to tariff quotas". If tariff quotas were quantitative restrictions, then there would be no need for GATT Article XIII, paragraph 5 at all.

24. This is a generally accepted principle, which has also been expressly recognized, e.g., in the First Arbitration Award, where it is stated that "tariff quota commitments constitute, in the WTO context, a variant of a tariff concession rather than a non-tariff measure per se"[1]. The Arbitrator went on to conclude that in the particular circumstances of the import regime that the European Communities had in place until the end of 2005, the economic effect of the particular tariff quotas applied by the European Communities was comparable to a quota regime (non-tariff measure), because virtually all imports were being effected through these tariff quotas.

25. Moreover, the fact that a tariff quota with the characteristics of the Cotonou Preference does not alter the tariff only character of the import regime is also confirmed in the previous report of this Panel under Article 21.5, where it is stated in paragraph 6.157 that the European Communities could adopt a "tariff only system with a tariff quota for ACP bananas". This statement shows that the imposition of a "cap" on a tariff preference does not alter the tariff-only character of an import regime. This is even more so in the present case, where the European Communities needed to impose a "cap"

[1] Para 60.

on the trade preference offered to the ACP countries in order to maintain the total market access of the MFN suppliers, in accordance with the provisions of the Doha Waiver.

26. Last, it should be pointed out that in the process of tariffication carried out regarding agricultural products in the Uruguay Round, it is evident that tariff quotas were regarded as tariffs since the Modalities Paper explicitly envisaged a role for them in the new tariffied system[2]:

Minimum access opportunities shall be implemented on the basis of a tariff quota at a low or minimal rate and shall be provided on an m.f.n. basis.

27. The legal basis for tariffication is contained in Article 4.2 of the Agriculture Agreement. The measures that were to be tariffied are listed in the footnote to that provision, and they do not include tariff quotas.

12. (Both Parties) In paragraph 26 of its first written submission, Ecuador argues that "[t]he burden is on the EC if it wishes to claim that it still has a valid waiver with respect to bananas, and that this waiver covers the EC measures at issue. [E]ven if the burden were on Ecuador …" Could the Parties develop their legal arguments as to which of them should bear the burden of proving that the Doha Waiver is still valid and whether it covers the EC measure at issue.

28. The European Communities considers that each party needs to provide sufficient evidence and legal arguments in order to support its claims. In the particular case of the Doha Waiver, the European Communities notes that the Doha Waiver was lawfully granted by the competent authorities of the WTO. Its continued operation has not been challenged before any WTO body and no WTO body has taken the decision to revoke or terminate it. Therefore, if Ecuador wishes to claim that the Doha Waiver is not applicable any more, it must provide the evidence and legal arguments necessary in order to support its claims.

13. (Both Parties) In paragraph 43 of their respective third party submissions, Nicaragua and Panama argue that the Latin American suppliers insisted on inserting, into the Bananas Annex of the Doha Waiver, the sentence "If the EC has failed to rectify the matter, this waiver shall cease to apply to bananas upon entry into force of the new EC tariff regime", which did not appear in the original EC draft. Nicaragua and Panama argue further that the insertion of such sentence is an "explicit penalty for EC unilateralism following two arbitration losses", without which the waiver would not have been approved. Can the Parties provide a reasoned answer as to whether they agree with this statement.

29. In that section of their third party submissions, Nicaragua and Panama have tried to show that the negotiating history of the Doha Waiver supports their interpretation of the Doha Waiver. However, as mentioned in paragraph 6 of the closing statement of the European Communities, the negotiating history of the Doha Waiver establishes exactly the opposite of what Nicaragua and Panama assert and provides support for the European Communities' interpretation of the waiver's terms. In particular, the draft waiver dated 2 November 2001, which Nicaragua and Panama have attached to their third party submissions as Exhibit 1, provided that the Doha Waiver would terminate automatically within two months from the notification of the arbitration award to the General Council. This provision was not included in the final version of the Doha Waiver. The final version provides that the Doha Waiver would terminate if the European Communities fails to "rectify the matter". The link between the awards of the Arbitrator and the automatic termination of the Doha Waiver was abandoned.

[2] Annex 3, para. 14.

30. This shows that the correct interpretation of the Doha Waiver is that the termination of the Doha Waiver would not be automatic and directly related to the outcome of the Arbitration awards, but that it would depend on whether the European Communities would actually "rectify the matter".

31. Nicaragua and Panama pretend that an extreme penalty, such as the termination of the waiver, was merely linked to a procedural step. However, this interpretation of the Doha Waiver is neither supported by the text of the Waiver, nor by the negotiating history of the Waiver.

14. (Both Parties) Under the fifth tiret of the Bananas Annex of the Doha Waiver, can Parties identify the specific conditions listed therein and explain how many of those would have to be fulfilled for the waiver to cease to apply to bananas?

32. As mentioned in paragraphs 36 and 37 of the first written submission of the European Communities, the European Communities considers that the Doha Waiver would terminate if the European Communities failed to introduce an import regime that would at least maintain the total market access of the MFN suppliers. Maintaining total market access for MFN suppliers was the only condition that had to be satisfied for the continued operation of the Doha Waiver at that stage.

33. Therefore, the only point that Ecuador has raised and which the Panel is invited to rule upon, is whether the condition for the continued existence of the Doha Waiver was (a) that the European Communities implements a new import regime that would at least maintain total market access for the MFN suppliers; or (b) that the Arbitrator be convinced that the system proposed by the European Communities at that time was likely to maintain such total market access in the future. The European Communities respectfully submits that the Panel should find that the correct interpretation of the Doha Waiver is that the condition for the continued existence of the Doha Waiver is (a).

34. The Annex also imposed on the European Communities certain other obligations that had to be complied with at an earlier stage, such as the obligation to timely initiate negotiations with interested parties and the obligation to provide to the interested parties information on the methodology followed for the calculation of the new level of tariffs. The European Communities has complied with all these obligations and Ecuador did not challenge this fact in its request for the establishment of the Panel, or in any of its Written Submissions or oral statements. As these obligations are not included in the fifth tiret of the Annex, to which the question of the Panel refers, the European Communities mentions them here for the sake of completeness.

15. (Both Parties) On what grounds does the EC argue that the phrase "suitable waiver" in paragraph 6.158 of the report of the first *EC – Bananas III* compliance Panel should be interpreted to mean a waiver from only Article I of the GATT 1994? On what grounds does Ecuador argue that the same term should be interpreted as referring to a waiver to both Articles I and XIII of the GATT 1994?

35. As mentioned in paragraphs 81 and 82 of the first written submission and paragraphs 29 to 34 of the second written submission of the European Communities, there are a number of considerations establishing that the "suitable waiver" in paragraph 6.157 of the first Article 21.5 Panel report is a waiver from Article I of the GATT and not from Article XIII of the GATT.

36. First, where the Panel considered that a waiver from Article XIII was required, the Panel expressly said so. For example, the Panel expressly stated that a waiver from GATT Article XIII was needed for the system suggested in paragraph 6.158 of its report. In the system under the 6.158 suggestion (i) all imports would be made pursuant to tariff quotas (as a result of which the economic effect of the particular tariff quotas would be comparable to a quota regime, as concluded in paragraph 60 of the First Arbitration Award); and (ii) the tariff quotas would be administered in ways that would not necessarily comply with GATT Article XIII, paragraph 2. The Panel found that such

an import regime would need a waiver from GATT Article XIII. If the Panel had considered that the system suggested in paragraph 6.157 of its report also needed a waiver from GATT Article XIII, it would have expressly stated so.

37. Second, a tariff only import regime with a tariff preference for certain WTO Members subject to a "cap", may need a waiver from GATT Article I, but does not need a waiver from GATT Article XIII. As already mentioned, it would be absurd to consider that an *unlimited* tariff preference offered to the ACP countries would be fully compatible with Article XIII, but that a *limited* tariff preference is not compatible with Article XIII. This would amount to saying that the rights of the MFN suppliers are hurt when their competitors enjoy a limited tariff preference, but are not hurt when that tariff preference is completely unlimited.

38. Third, there is no authority in any of the previous banana disputes supporting the proposition that an import regime with the characteristics of the current import regime of the European Communities would need a waiver from Article XIII. For example, during the arbitration that took place in accordance with the provisions of the Doha Waiver, the Arbitrator took note of the disagreement of the parties as to the need for an Article XIII waiver and did not reach any conclusion as to whether such a waiver was needed. Likewise, the *Bananas III* jurisprudence relates to an import regime that was the equivalent of a "quota regime", because all imports were made pursuant to tariff quotas. The characteristics of the 1997 import regime were completely different from the characteristics of the current import regime and, therefore, the Appellate Body's findings of 1997 are not relevant in the current situation. The same is true for the import regime that was in place in 1999 and which was analysed by this Panel in 1999.

39. There is extensive GATT and WTO practice to support the view that Members do not regard exclusion from a tariff quota as a matter governed by Article XIII. This practice is to be found in the waivers that have been granted for various preferential schemes. With few exceptions (such as the 2001 waiver respecting bananas) these waivers are limited to Article I:1, and yet the preferences granted under these waivers regularly include tariff quotas for the beneficiary countries only.

40. Under the Generalized System of Preferences (GSP), first adopted as a policy by UNCTAD II in 1968, the major developed countries have introduced systems of tariff preferences for the products of the developing world[3]. Such schemes required waiver from GATT obligations and the first of these was given to Australia in 1966 to 'grant preferential tariff treatment to certain goods of less-developed countries'[4]. The waiver was from Article I:1 only, and it explicitly authorized the use of tariff quotas (in fact these are listed in an annex). The decision contained no reference to Article XIII. However, this Article was referred to in the working party discussion of the waiver[5]:

> One delegation stated that Article XIII:5 of the General Agreement provided for the non-discriminatory application of tariff quotas in accordance with the rules in respect of the administration of quota restrictions contained in that Article. Since the Australian scheme established preferential tariff quotas for certain imports from less-developed countries and territories. it was essential that quotas should be so administered as to involve no discrimination between such countries or territories.

41. Thus, it was the evident understanding of those participating that the favourable treatment for developing countries in the form of tariff quotas required a waiver of Article I:1 but not Article XIII. However, Article XIII did apply regarding the internal distribution of the tariff quota.

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[3] See, UNCTAD, Agreed conclusions of the Special Committee on Preferences, doc. TD/B/330, 1970; 10 ILM 1083 (1971).

[4] L/2627, 1966, BISD 14S/23.

[5] L/2527, 1966; BISD 14S/162, para. 30.

42. The GSP schemes of WTO Members are now authorized by the CONTRACTING PARTIES' decision of 1979 known as the Enabling Clause[6]. The operative words of this document say 'Notwithstanding the provisions of Article I of the General Agreement, contracting parties may accord differential and more favourable treatment to developing countries'. There is no specific reference in the text authorizing the use of tariff quotas, but Members have often included them in their schemes. Thus, a WTO report of 2001[7] reported that the US scheme used tariff quotas[8], as did that of Japan to a limited extent[9], and that the EC scheme had previously made use of them[10].

43. Perhaps the waiver that most directly establishes the understanding of Members in this regard is that of 1973 in which the CONTRACTING PARTIES decided to waive Article I:1 (only) in respect of 'tariff-free quotas for handicraft products from South Pacific Islands'.[11]

44. It should be emphasized that, as decisions of the CONTRACTING PARTIES, all these instruments form part of GATT 1994 (under Annex 1A of the WTO Agreement)[12]. They all indicate that Members assumed that the grant of a tariff quota for the benefit of certain countries to the exclusion of other Members would be an infringement of Article I:1, but not of other GATT obligations, such as Article XIII.

45. In light of the above, the European Communities considers that its current banana import regime, which has all the characteristics described by the Panel in paragraph 6.157 of its first Article 21.5 report, does not need a waiver from the application of Article XIII of the GATT.

16. (Both Parties) In paragraph 96 of its first written submission, the EC states that "the text of GATT Article XIII, paragraph 1 makes clear that a Member can successfully claim that another Member's measures violate the provisions of GATT Article XIII, only if its can show that ... the allegedly offending Member imposes a prohibition or restriction on products originating from the complaining Member and, in principle, there is a nullification and impairment of a benefit accruing to the complaining Member". Can the EC elaborate its arguments in support of each of these propositions, i.e. that in order to make a successful claim under Article XIII:1 of the GATT 1994, the complaining Member must show: (a) that the challenged measure must be a prohibition or restriction on products originating from the complaining Member; and, (b) that there is a nullification and impairment of a benefit accruing to the complaining Member. Can Ecuador provide a reasoned answer as to whether it agrees with the arguments raised by the EC.

46. (a) The European Communities understand this question as mainly concerning the meaning of paragraph 5 of Article XIII. In the European Communities' view the ordinary meaning of the words 'shall apply' in the first part of the paragraph must be considered in their context and in the light of the object and purpose of the GATT. In particular, the European Communities has in mind the basic GATT principle that it creates rights for Members but not for non-Members. This principle is itself an application of the broader principle that contractual arrangements are assumed to create rights only for the parties. This is not to deny that parties to a treaty could if they chose agree with each other to give benefits to third parties. However, there is no indication that WTO Members have undertaken such obligations as parties to the GATT. Rather, it is clear that, as illustrated in matters such as anti-

[6] BISD 26S/203 (1980).
[7] The Generalised System of Preferences, WT/COMTD/W/93, 2001.
[8] Ibid. para. 49
[9] Ibid., para. 43.
[10] Ibid. para. 29
[11] L/3968, 1973, BISD 20S/29
[12] Appellate Body Report *EC – Tariff Preferences*, para. 90.

dumping and countervailing duty law, Members have felt themselves free to disregard WTO obligations when they are dealing with imports from non-Members.

47. As noted in the European Communities' second written submission, depending on the circumstances, the imposition of a tariff quota can be either beneficial or prejudicial to the Member on whose trade the tariff quota has been imposed. In contrast, the 'prohibition or restriction' referred to in paragraph 1 is inherently a prejudicial action. In the European Communities' view this characteristic must also be respected in the process of 'applying' Article XIII to tariff quotas. If it is not, it will have the effect of imposing on Members obligations to give benefits to non-Members of the WTO contrary to the principle just mentioned.

48. To be specific, the problem becomes apparent if paragraph 1 is read (taking the circumstances of the present case) as saying the following:

49. "No tariff quota may be applied to the importation of any product of the territory of an ACP Member or on the exportation of any product destined for the territory of an ACP Member, unless the importation of the like product of all third countries or the exportation of the like product to all third countries is similarly accorded a quota."

50. This reading would mean that an advantage could not be given to an ACP Member unless a similar advantage had been given to all third countries. These countries would, of course, include non-Members of the WTO. The reduction *ad absurdum* would arise where tariff quotas were given (without discrimination) to all WTO Members, but not to other countries. On the above reading of Article XIII this would be forbidden. In the European Communities' view such an outcome conflicts with WTO principles.

51. Consequently, the European Communities' view is that in 'applying' paragraph 1 of Article XIII to tariff quotas account must be taken of the essential characteristic of paragraph 1 – that it is forbidding the imposition of a prejudicial measure.

52. There are of course many situations where paragraph 1 can be applied to tariff quotas while still respecting this principle. In the European Communities' view the essential field of application of Article XIII as regards tariff quotas is in the division of the quota element of a tariff quota regime. Thus, in the context of paragraph 1, if a Member divides up a tariff quota in a way that one Member's allocation is worse than those of other countries it may invoke paragraph 1 to say that a tariff quota has been imposed on it when similar tariff quotas have not been imposed on other countries.

53. On the other hand, the situation were a tariff quota had been conferred on imports from certain countries, but other countries had been subjected to a higher tariff, the prejudiced Members would have their remedy in the rule on preventing tariff discrimination contained in Article I:1.

54. Thus, Article XIII:1 would come into play if a tariff quota had been imposed on banana imports from the MFN countries and on the ACP countries, in that the MFN countries might, in appropriate circumstances, claim that the tariff quotas allocated to them were unfairly small compared to those allocated to the ACP countries. However, since in circumstances of the present case no tariff quota was imposed on imports from MFN countries no such claim is available to them.

55. In its submission the European Communities' summed up this legal situation by saying that the challenged measure must be a prohibition or restriction on products originating from the complaining Member.

56. (b) In the remarks on nullification and impairment referred to by the Panel, the European Communities does not intend any departure from the usual interpretation of the presumption contained in Article 3.8 of the DSU.

17. (Both Parties) In paragraph 60 of its second written submission, the EC argued that "[i]n effect, Ecuador is saying that the discrimination constitutes the 'restriction' [within the context of Article XIII:2 of the GATT 1994]. Having created this 'restriction' it then compares it with that on ACP products and comes, *not surprisingly*, to the conclusion that there is discrimination, which it assumes falls within paragraph 2 [of Article XIII]". (Emphasis added) Can Ecuador provide a reasoned answer as to whether it agrees with this statement. Do the words "not surprisingly" in the EC statement mean that, provided that the existence of the restriction mentioned by the EC can be proven, the EC accepts that there would be a violation of Article XIII:2?

57. The explanation of the statement quoted by the Panel is as follows. The situation being examined by the Panel is essentially one of tariff discrimination that is governed by Article I:1 rather than Article XIII. Ecuador attempts to artificially extend the scope of Article XIII by finding 'prohibitions and restrictions' that do not exist. It argues that for the MFN countries not to be given the benefit of the tariff quota that is accorded to the ACP countries is a restriction. Forgetting for the moment the meaning that 'restriction' has in the GATT, and in particular in Article XIII, one could, in everyday speech, say that higher tariffs tend to restrict imports more than lower tariffs. What Ecuador is trying to do is, in essence, to take that everyday usage and inset it into Article XIII in order to treat the MFN countries treatment as a restriction for the purposes of paragraphs 1 and 2. The European Communities' use of 'not surprisingly' was meant simply to indicate that a higher tariff would obviously be regarded as a greater restriction than a lower tariff, again, using the word 'restriction' in that broader, everyday sense. However, the flaw in Ecuador's argument is that in Article XIII, as in Article XI, the word restriction does not include tariff discrimination. Put another way, although tariff discrimination may reduce imports from the countries suffering the discrimination, that does not make such discrimination into a 'restriction'.

58. Thus, the direct answer to the Panel's question is that if the existence of restrictions in terms of Article XIII:2 can be proven, and there is discrimination, the European Communities accepts that there would be a violation of Article XIII:2.

18. (Both Parties) In paragraph 51 of its statement during the substantive meeting with the Panel, Ecuador argues that its "exports are restricted by the high duty compared to those who participate in the zero duty quota. The only difference between a straight quota and a tariff quota in this regard is that exclusion from a straight quota means no access, while exclusion from a tariff quota means access restricted by the higher duty that applies to imports not benefiting from the tariff quota, which may be prohibitive in effect." In paragraph 52 of the same statement, Ecuador adds that "[i]t is true that unlimited preferences for ACP bananas would be worse than the tariff quota only for ACP countries, but exclusion from the tariff quota is more restrictive of Ecuador and other members than if they were allowed to participate in the zero duty tariff quota as they are entitled under Article XIII." Can the EC provide a reasoned answer as to whether it agrees with this statement. Can Ecuador clarify whether it is arguing that any high duty would qualify as a "restriction" under Article XIII of the GATT 1994. If yes, why? Can Ecuador also clarify on what grounds, and according to what criteria, would a tariff be considered to be "prohibitive in effect". In Ecuador's view, does the restriction result from the in-quota tariff or the out-of-quota tariff?

59. The basis of the answer to this question is essentially the same as that for Question 17. Ecuador is seeking to blur the distinction between tariff barriers and non-tariff barriers (notably quotas). The distinction is a vital one in GATT. It was created not only because of conceptual

differences but for very practical reasons to do with strategies for achieving trade liberalization. The basic GATT strategy was to abolish non-tariff barriers (as manifested in Article XI), or convert them into tariffs, and to negotiate mutual reductions in tariffs (as indicated in Article XXVIIIbis). It is a strategy which has been pursued throughout the history of GATT, most recently in the tariffication process applied to agricultural non-tariff barriers in the Uruguay Round.

60. To implement this strategy required separate rules to be made for tariffs and non-tariff barriers, and therefore, as far as possible, for a clear distinction to be made between the two concepts. As with any area of law, drawing distinctions between concepts can give rise to difficulties. In the case of tariff quotas the problem of interpretation is aggravated by the unspecific language of Article XIII:5, which merely states that 'The provisions of this Article shall apply to any tariff quota instituted or maintained by any contracting party'. However, the present circumstances do not present difficult issues.

19. (Both Parties) In paragraph 57 of its statement during the substantive meeting with the Panel, Ecuador argues that "[i]t is a fact that the restriction in a tariff quota is achieved by means of a tariff – the higher duty applied to products imported outside the quota than inside the quota. That is not a problem because Article XIII specifically applies to any tariff quota, and, unlike Article XI the reference to restrictions in Article XIII does not exclude taxes, duties or other charges." Can Ecuador elaborate on this argument, and the EC provide a reasoned answer as to whether it agrees with Ecuador's arguments in this context.

61. This observation of Ecuador was addressed in the European Communities' Closing Statement (at paragraph 8) where it was pointed out that the interpretation that it presents would reduce Article I:1, perhaps the most well-known of all international trade rules, to an irrelevancy.

62. The EC explains elsewhere the fundamental distinction made in the GATT between tariff and non-tariff barriers, a division which is reflected in the relative scopes of Articles I:1 and XIII. As it does in regard to term 'shall apply' in paragraph 5, Ecuador is endorsing an interpretation that is in purely literal terms consistent with the words of Article XIII, without taking account of their context or object and purpose.

20. (Both Parties) If, under Article II of the GATT 1994, the EC was bound to a €75/mt tariff rate in-quota duty for 2.2 million metric tons of bananas, in addition to the zero-duty TRQ of 775,000 metric tons for ACP bananas, should such a finding affect the manner in which the Panel conducts its analysis under Article XIII?

63. The European Communities considers that the only binding it currently has for the importation of bananas is for a tariff of €680 per ton. The current import regime (i.e. with an applied tariff of €176 per ton) has never coincided with any other binding.

64. The European Communities also notes that the Cotonou Preference has never been bound in its Schedule of Concessions.

65. The European Communities does not see how the hypothetical in this question can have any relevance for the application of Article XIII of the GATT on the current banana import regime of the European Communities.

21. (Both Parties) In paragraph 19 of its opening statement during the substantive meeting with the Panel, the EC argues that "[t]he complainants attempt to draw some analogy with the regimes analysed by this Panel in 1997 and 1999. This is not correct. Following the abolition of the tariff-quota-based system in 2006, the current regime is so different to those of the 1990s

that no analogy can be drawn." Can the EC elaborate on this argument, and Ecuador provide a reasoned answer as to whether it agrees with the same.

66. The European Communities' argument in this extract reflected the fact that the regimes analysed by the panel in 1997 and 1999 were ones in which the legality of certain tariff quotas was being determined in regard to their relationship with other tariff quotas. In those circumstances a meaningful comparison could be made of the quantities of the various tariff quotas since the applicable tariffs were all at the same level. In such a situation it is possible for paragraph 1 of Article XIII to be invoked because one can say whether similar restrictions of a quantitative character are being applied. Likewise the distribution rules of paragraph 2 can be invoked because one can compare the quantities assigned to the various benefiting Members.

67. In contrast, no such comparisons (between the relative position of ACP and MFN countries) are possible regarding the regime being examined in the present dispute because imports from MFN countries are not subject to any tariff quota, still less a tariff quota at the level enjoyed by the ACP countries. Although the ACP have identifiable quantities, for the MFN countries there are none and so there is nothing on which the comparison may be based. The difference in the treatment of imports in the two groups lies solely in the field of tariffs.

22. (Both Parties) In paragraph 10 of its statement during the substantive meeting with the Panel, Brazil argues that "the EC abruptly jumps to the flawed conclusion that because the Member has chosen to implement a suggestion by the panel such Member would always be in compliance with its obligations under the covered agreements." In paragraph 11 of the same statement, Brazil adds that "[i]n no provision does the DSU grant Members certainty as to the 'lawfulness' of a measure taken to comply just because such measure is intended to implement a suggestion made by a panel. To the contrary, Article 21.5 sets forth the Members' right to resort to a panel where there is disagreement as to the consistency with covered agreements of the measures taken to comply." Can the Parties provide a reasoned answer as to whether they agree with Brazil's argument.

68. Brazil's statements echo the position expressed by Ecuador in paragraph 44 of its second written submission. The European Communities considers that this position is not correct.

69. As mentioned in paragraphs 22 to 25 of the second written submission of the European Communities, it is settled law that panel reports that have been adopted by the DSB are binding for both the complaining and the defending parties to the dispute. A panel's suggestions as to how the defending party may put itself in compliance with the WTO rules are not binding for the defending party: the defending party enjoys the freedom to choose any of the various options that may exist to bring about compliance. However, this does not mean that suggestions are entirely devoid of legal significance. On the contrary, a suggestion contains a significant legal ruling. In suggesting a particular course of action, the Panel is finding that such action is lawful and that the implementation of this suggestion will lead to the defending party's compliance with the obligations found to have been infringed.

70. The European Communities considers that if the complaining party does not appeal the suggestions made by the panel, then following the adoption of the panel's report by the DSB there is a presumption of legality covering these suggestions which makes them binding on the complaining party. This means that if the defending party decides to implement the measures suggested by the panel, the complaining party may not challenge the conformity of these measures with the WTO rules in an Article 21.5 procedure. Allowing such a challenge would be inconsistent with Article 17.14 of the DSU read together with Article 16.4 of the DSU, Article 19.1 of the DSU and Article 21.1 of the DSU, because it would mean that the complaining party does not "unconditionally accept" the panel's report.

71. To hold otherwise would create an undue legal uncertainty for the defending party as to the course of action that it should follow. It would also seriously compromise the credibility of panels and of the DSB, because it would create the possibility for Article 21.5 Panels to reverse decisions taken by the DSB. This would curtail the panels' ability to make suggestions and would render the relevant provisions of Article 19.1 of the DSU inoperative.

72. Conversely, finding that the measures suggested by a panel cannot be challenged in an Article 21.5 procedure would not deprive complaining parties of any procedural rights. A complaining party disagreeing with a particular suggestion of the panel would always have the right to lodge an appeal with the Appellate Body, in accordance with the procedures and time limits provided for in the DSU.

73. Moreover, Brazil's position leads to a confusion of the roles of the Appellate Body and of Article 21.5 panels and opens the door for an abuse of Article 21.5 of the DSU, as well as of Article 16.4 and Article 17 of the DSU, which describe the procedures and time limits within which appeals against panel reports should be lodged.

74. As mentioned in paragraphs 27 and 28 of the second written submission of the European Communities, challenges to panel reports can be brought only in accordance with specific procedures and within specific time limits, described in Article 16.4, Article 17.4 and Article 17.6 of the DSU. Article 21.5 of the DSU is meant to cover only the very specific situation where there is a disagreement as to the proper implementation of the panels findings by the defending party. Article 21.5 cannot and should not be used to challenge the panel's findings themselves. This is why a complaining party should not be allowed to challenge before an Article 21.5 panel any measures of the defending party that were expressly suggested in the panel report and have been adopted by the DSB, which means that they have not been the subject of a successful appeal.

75. To hold otherwise would amount to giving complaining parties the right to "bypass" the strict procedural requirements for appellate review and "replace" the procedures before the Appellate Body with procedures before Article 21.5 panels. Such a serious weakening of the role of the Appellate Body would run against the basic principles of the DSU.

76. In light of the above the European Communities considers that, once the Panel has satisfied itself that the current import regime of the European Communities has the characteristics of the import regime suggested by the Panel in paragraph 6.157 of its first Article 21.5 report, it should reject the Article XIII claims of Ecuador outright.

23. (Both Parties) The Understanding on Bananas signed by the EC with Ecuador and the US seems to include references, in both Phases I and II, to a bound tariff-rate quota, designated as "quota 'A'", of 2.2 million metric tons with an in-quota tariff rate not exceeding €75/mt, that would possibly extend beyond the end of 2002. Can Parties provide a reasoned answer as to whether they agree with this reading of the Understanding. Can the EC explain how this can be reconciled with its argument that the TRQ expired at the end of 2002, considering that the EC has been arguing for the binding nature of the Understanding on Bananas and that it would constitute a mutually agreed solution?

77. The European Communities considers that these specific provisions do not contradict any of the arguments advanced in the written submissions and oral statements of the European Communities. First, at the time the Understanding was signed (i.e. in April 2001), the tariff quota for the 2.2 million tons of bananas was still bound. Second, Phase I would be implemented during a period of time that the tariff quota for the 2.2 million tons would still be bound (i.e. between 1 July 2001 and 31 December 2001). Therefore, it is normal that the description of Phase I includes a reference to the "bound tariff rate quota designated as quota A" and set at 2.2 million tons of bananas.

78. Moreover, part of Phase II would also be implemented during a period of time that the tariff quota for the 2.2 million of tons would still be bound (i.e. between 1 January 2002 and 31 December 2002). This explains why the description of the Phase II includes the statement that "during Phase II, the provisions applying to Phase I will continue". However, the casual reference to the continued application of the provisions of Phase I during Phase II does not have any broader legal significance. The main points that the description of Phase II sought to address was (i) the increase in the quantities of bananas imported from MFN countries and the corresponding reduction in the quantities of bananas imported from ACP countries during Phase II and (ii) the allocation of licenses for traders of MFN bananas during Phase II. The drafters of the Understanding did not need to add to that part of the Understanding a more detailed analysis of the legal nature of tariff quota "A" (i.e. that it would be bound until the end of 2002 and then continue as an autonomous, unbound tariff quota until the end of 2005).

24. (Both Parties) Irrespective of their differences in the interpretation of the Framework Agreement on Bananas (BFA), can the Parties identify the document that constitutes the legally binding schedules of the European Communities for bananas at the date of the establishment of this Panel on 20 March 2007, indicating its WTO document symbol if any, and specify any changes to that document that might have taken place in regard to bananas.

79. As mentioned in paragraphs 5 to 8 of the first written submission of the European Communities, the banana concessions were initially contained in Schedule LXXX, which was executed on 15 April 1994 and withdrawn on 1 January 1995, in light of the European Communities' enlargement to 15 Member States.

80. A new Schedule CXL was submitted to the WTO on 14 March 1996, which has not yet been certified, because certain WTO Members have not yet lifted all their objections. Schedule CXL was withdrawn on 1 May 2004, in light of the European Communities' enlargement to 25 Member States. The European Communities has not submitted a new Schedule of Concessions yet, as the relevant negotiations under Article XXIV and Article XXVIII of the GATT are still pending.

81. In any event, the European Communities' banana concessions are the same in both Schedule LXXX and Schedule CXL.

25. (Both Parties) Paragraph 9 of the Framework Agreement on Bananas (BFA) annexed to the EC Schedules provides that "[t]his agreement shall apply until 31 December 2002" (Emphasis added). Could it be concluded from this language that only the Framework Agreement on Bananas annexed to the EC Schedules expired on 31 December 2002, but not Section I B of the EC Schedules, where the tariff rate quota (TRQ) is also indicated? Please provide a reasoned response.

82. This question reflects the argument advanced in paragraph 58 of Ecuador's second written submission. As mentioned in paragraph 77 of the second written submission of the European Communities, Ecuador's argument is not correct.

83. First, the Annex is an integral part of the Schedule and contains the terms, conditions and qualifications to which the relevant concession is subject. The entries into Section I B of the Schedule do not have a life independent from the Annex. This is made clear on page 9 of Section I B, where it is expressly stated that the concession for the 2.2 million tons is granted "as indicated in the Annex". The space limitations of page 9 of Section I B of the Schedule, which forced its drafters to put the time limitation in the Annex and not on page 9 itself, cannot be given a legal significance.

84. Second, if indeed the intention was to establish a perpetual concession for the 2.2 million tons, the European Communities (and the other signatories of the banana framework agreement) could

have simply included in the Schedules the concession without incorporating the provision that limits the concession's duration. Even better, the European Communities (and the other parties) could have stated that the concession for the 2.2 million tons is perpetual and that the expiration date of 31 December 2002 applies only to other aspects of the Annex. This they did not do. The fact that the entire text of the agreement was incorporated into the Annex shows that it was clear from the very beginning that the expiration clause applied to all the terms of the concession for the tariff quota of 2.2 million tons.

85. Third, the date of 31.12.2002 as end of the BFA was chosen for a specific reason. Council Regulation (EEC) No 404/93 of 13 February 1993 on the common organization of the market,[13] in Article 32 provided what follows:

> No later than the end of the third year after the entry into force of this Regulation and, in any case, when the flat-rate reference income referred to in Article 12 (4) is reviewed, the Commission shall submit a report to the European Parliament and the Council on the operation of this Regulation.
>
> This report shall contain among other things an analysis of the development of Community, of third-country and ACP banana marketing flows since the implementation of these arrangements. The report shall be accompanied where necessary by appropriate proposals.
>
> The Commission shall again report to the European Parliament and the Council by 31 December 2001 on the operation of this Regulation and make appropriate proposals concerning the new arrangements to apply after *31 December 2002*.[14]

86. In very simple words, the European Communities had thus decided to make a "state of play" 10 years after the Regulation had entered into force and, following this reflection exercise, make appropriate proposals concerning the new arrangements to apply after 31 December 2002.

87. This explains why the same date was included in the BFA and why there was this end date for the TRQ.

88. In light of the above, the European Communities considers that the Panel should reject the argument put forward by Ecuador.

26. (Both Parties) Should the expressions "agreed system" used in paragraph 8 of the Framework Agreement on Bananas (BFA) annexed to the EC Schedules, "the agreement" used in paragraph 9, and "this agreement" used in paragraphs 9, 10 and 11, be considered to be equivalent?

89. As mentioned in paragraph 9 of its first written submission, the European Communities considers that these provisions of the Annex to the Schedule of Concessions of the European Communities establish (i) the starting date of the concession for the tariff quota of the 2.2 million tons (i.e. October 1, 1994, in accordance with paragraph 8) and (ii) the termination date for that concession (i.e. 31 December 2002, in accordance with paragraph 9).

27. (Both Parties) Should paragraph 9 of the Framework Agreement on Bananas (BFA) be interpreted as a stand-alone provision or by taking into account other parts and sections of the EC's Schedule, as well as the intentions of the parties in all subsequent procedures?

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[13] Official Journal L 047, 25/02/1993, p. 1-11.
[14] Emphasis adedd.

90. The European Communities notes that, as mentioned above, the concession was granted "as indicated in the Annex". Therefore, the Panel needs to interpret the concession contained in page 9 of Section I B of the European Communities' Schedule on the basis of the terms, conditions and qualifications of the Annex as a whole, including the clause providing that the concession would expire at the end of 2002.

91. The European Communities cannot see the relevance of "the intentions of the parties in all subsequent procedures" for the Panel's analysis of the terms, conditions and qualifications incorporated in the Schedule of the European Communities.

92. It is noted that Ecuador was not a party to the Banana Framework Agreement.

28. (Both Parties) In paragraph 69 of its statement during the substantive meeting with the Panel, Ecuador argues that "[t]ariff quota concessions can be withdrawn, but the withdrawing member must follow Article XXVIII procedures which the Doha Waiver required and the European Communities failed to do." Can Ecuador clarify in what specific way the EC has "failed" to follow Article XXVIII procedures and what would be the legal consequences of such failure. Can the EC provide a reasoned answer as to whether it agrees with Ecuador's assertion that it has failed to follow Article XXVIII procedures.

93. As mentioned in paragraph 92 of the second written submission of the European Communities, the Panel should disregard Ecuador's claims under Article XXVIII of the GATT, because Ecuador did not include any Article XXVIII claims in its request for the establishment of the Panel and, therefore, an analysis of Article XXVIII issues is not within the Terms of Reference of this Panel.

94. In any event, the European Communities considers that it has not violated Article XXVIII and that there is no scope for a claim that Article XXVIII has been breached.

QUESTIONS ADDRESSED TO THE EUROPEAN COMMUNITIES

48. (EC) In its first written submission, the EC identifies an Exhibit EC-6, which is described as "[i]ntentionally left blank". Can the EC explain the reason for that.

95. The legal team representing the European Communities had scanned the documents annexed as Exhibits to the first written submission of the European Communities. Due to a mistake in the numbering of these documents, the indication "Exhibit EC-6" was not assigned to any document. In order to save time, the legal team representing the European Communities decided to leave the indication "Exhibit EC-6" blank, instead of renumbering and rescanning all Exhibits after Exhibit EC-5.

49. (EC) Can the EC expand on the factual information provided in Exhibit EC-3 of its submission by providing annual import data (and their sources) for each year from 1999 to 2003 for EC15 and from 2004 to 2006 for EC25 (also showing separately the EC15 imports from 2004 to 2006, if possible) and for the first half of 2007 for EC27 for the following:

(a) Volume, CIF value (in Euros/mt and USD/mt) and average unit value (in Euros/mt and USD/mt) of banana imports by the EC from Ecuador, from each of the other MFN suppliers, and from each of the ACP countries;

(b) Ecuador's share (percentage) of EC banana imports, both in volume and value terms;

(c) Ecuador's share (percentage) of total volume of banana imports by the EC divided by Ecuador's share of global banana exports; and,

(d) EC's tariff revenue on bananas for the period between 1999 and mid-2007.

96. Exhibit EC-12 illustrates the volume, CIF value and average unit value of banana imports by the EC from Ecuador, from each of the other MFN suppliers, and from each of the ACP countries.

97. Exhibit EC-13 indicates Ecuador's share of EC banana imports, both in volume and value terms as well as Ecuador's share of total volume of banana imports by the EC divided by Ecuador's share of global banana exports.

98. Lastly, Exhibit EC-14 concerns EC's tariff revenue on bananas for the period between 1999 and mid-2007.

99. Import data concerning the European Communities were extracted from Comext (Eurostat), on 26 September 2007. They consist of the imports for EC-15 from 1999 to 2003, from 2004 to 2006 for EC-25, and for the first half of 2007 for EU-27.

100. Figures concerning EC-15 from 2004 to 2006 are also included in Exhibit EC-12 (Table 4), as requested by the Panel. However, these figures are not completely accurate and thus can be taken only as indicative. In fact, once bananas have been legally imported into the Common Market, they enjoy the right to freely circulate between the different Member States. Therefore part of bananas consumed in the 10 new Member States has been imported via the EC-15.

50. (EC) Can the EC also provide annual import data (and their sources) for each year from 1988 to 1998 for EC12 and EC15, as appropriate (showing separately the EC12 imports, if possible) with the information requested in letters (a) to (d) of the previous question.

101. The European Communities has consulted the data made available by Eurostat but found out that there are not accurate estimates. The reason has been explained in the answer given to Question 49.

102. The only figures which are available to the European Communities concern volumes imported and average unit value during the relevant period, and are illustrated in Exhibit EC-15.

51. (EC) Can the EC expand on the factual information provided in Exhibit EC-3 by providing annual consumption and production data (and their sources) for each of the EC member States, and for each of the years in the period 1999-2006, as well as for the fist half of 2007, for the following:

(a) Total volume of banana production in the EC;

(b) Total volume and FOB value of bananas exports by the EC, if any;

(c) Consumption volumes for each of the EU 27 member States;

(d) Total sales of bananas within the EC, i.e. domestic consumption including waste, which equals EC production plus imports minus exports; and,

(e) Share (percentage) of the total volume of domestic sales within the EC that is supplied by Ecuador, by other MFN suppliers, and by ACP suppliers.

103. Exhibit EC-16 shows the total annual production in the European Communities from 1999 to 2006. To date, there are no official figures for the EC production in 2007. However, according to industry and specialised press information, European Communities' production in 2007 is estimated to be lower than in the previous year since bananas plantations in Martinique and Guadeloupe have been destroyed by Hurricane Dean on 17 August 2007.

104. There are no exports of bananas from the European Communities.

105. The European Communities does not have data on consumption volumes for each of the EU 27. In fact, data collected by Eurostat concern only imports. Just to give an example: Belgium imports almost 30% of MFN bananas, but this does not imply that all these fruits are consumed in Belgium. Indeed, a large part of them will be sold and consumed in Germany.

106. Exhibit EC-17 concerns total sales of bananas within the European Communities. One has to bear in mind that there are no bananas produced in the European Communities which are exported outside the Communities.

107. Exhibit EC-18 contains shares of the total volume of domestic sales within the European Communities supplied by Ecuador, by other MFN suppliers, and by ACP suppliers.

52. (EC) In paragraph 36 of its second written submission, the EC states that "during the period between its first written submission and its second written submission, the European Communities has updated the information on the first quarter of 2007 with market data from April and May 2007." Can the EC provide the data source that was used to make the assertions mentioned subsequently in that same paragraph.

108. All data concerning the internal market submitted by the European Communities have been provided by Eurostat. These figures are regularly updated (often on a daily basis). This explains why there can be slight differences between different tables provided, or between estimates provided at different moments in time.

53. (EC) Can the EC provide information about the Everything But Arms (EBA) scheme in respect to bananas imports? Are EC banana imports subject to any other preferential systems? If yes, please describe those systems, indicating the relevant dates, and focusing your response on the period 1999 to 2007.

109. The EBA scheme is laid down in Council Regulation (EC) no. 980/2005 of 27 June of 2005, applying a scheme of generalised tariff preferences (GSP), more particularly its Chapter II Section 3 ("Special arrangement for least developed countries").

110. According to Article 12.3 of this EC Regulation "Common Customs Tariff duties on the products of CN code 0803 00 19 shall be reduced by 20% annually as from 1 January 2002. They shall be entirely suspended as from 1 January 2006". Accordingly, imports of bananas originating from least developed countries will benefit from duty-free treatment in the EC market.

111. It is worth noting that few least developed countries have the capacity to export bananas. Since 2000, only four LDCs have exported to the European Communities (Rwanda, Uganda, Somalia and Cape Verde) and in very limited quantities. Contrary to the baseless assertions contained in the study produced by the Center for International Economics and submitted by Nicaragua and Panama, the export potential of countries such as Angola and Mozambique is extremely limited.

112. The EC does not offer any other preferential system for banana imports, with the exception of the Cotonou Preference.

54. (EC) How did the actual conditions for the import of bananas change following the various enlargements of the EC in the period 1999 and 2007?

113. Between 1 January 1999 and 31 December 2006, there has been only one enlargement of the European Communities, which brought the Member States from 15 to 25. In this context, and taking into account historical imports of bananas by the new 10 Member States, the European Communities opened an autonomous TRQ of 300,000 mt subject to the in-quota tariff of €75MT for the period 1 May 2004-31 December 2004. For the year 2005, a TRQ of 460,000 mt was opened. As a result, the total MFN TRQs increased to 3.113 million MT.

55. (EC) In paragraph 11 of its opening statement during the substantive meeting with the Panel, the EC argues that Ecuador does "not wish to allow the ACP countries to have their trade preference until the end of this year." Can the EC explain the reasons for its reference to the "end of this year" in this statement.

114. As mentioned in paragraph 34 of the first written submission of the European Communities, the duration of the Doha Waiver is commensurate to the duration of the corresponding trade preferences found in Article 37 of the Cotonou Agreement, i.e. until 31 December 2007. Moreover, the Annex to the Doha Waiver provides that the waiver would also cover bananas until 31 December 2007, provided that the terms of the Annex are satisfied. Ecuador claims that these terms have not been satisfied and, therefore, that the Doha Waiver on bananas was terminated on 31 December 2005 and, consequently, does not cover bananas until 31 December 2007.

115. Given that the oral statement of the European Communities was delivered on 18 September 2007, which is in the same year with 31 December 2007, the European Communities used the expression "the end of this year" instead of "31 December 2007".

56. (EC) In paragraph 7 of its first written submission, the EC mentions that on 19 January 2004, it had announced its intention to withdraw Schedule CXL, in the context of the EC enlargement from 15 to 25, and then to 27, member States. Can the EC specify which are the relevant documents in this respect and whether its concession(s) on bananas was/were described therein. If so, how was it/were they described? Also, can the EC specify the similar relevant documents in regard to its enlargement in 2007, and how its concession(s) on bananas was/were described therein.

116. The European Communities announced on 19 January 2004 the withdrawal of the commitments in its Schedule of Concession, together with the commitments in the Schedules of Concessions of 10 other WTO Members. The withdrawal of the commitments was effective as of 1 May 2004, date on which these 10 WTO Members became Member States of the European Communities. The relevant document is G/SECRET/20, dated 30 January 2004. This document did not make a specific reference to the commitments on bananas, which were withdrawn together with all other commitments in the Schedules.

117. The relevant negotiations between the European Communities and the other WTO Members have not been concluded yet and the European Communities has not submitted a new Schedule of Concessions yet.

118. It is noted that the European Communities has also withdrawn specifically its banana concessions on 15 July 2004. The relevant document is G/SECRET/22, dated 2 August 2004. Following this withdrawal, the European Communities announced its intention to grant a banana

concession for a bound duty of €230 per ton on 31 January 2005. The relevant document is G/SECRET/22/Add.1.

57. (EC) Can the EC confirm that Part I, Section 1.B of the EC's schedule LXXX and CXL is divided in three sub-sections (i.e. 1. Current Access Quotas; 2. Non-Tariffied Product Quotas; and, 3. Minimum Access Quotas). Do you agree with the argument in paragraph 85 of the respective third party submissions by Nicaragua and Panama in the sense that the "2,200,000 mt dutiable at 75 ECU/mt" quota is classified under the "current access" sub-section of the EC schedule? If that was the case, please provide an explanation of the reasons for classifying it under that sub-section.

119. Indeed, Part I, Section I-B of Schedules LXXX and CXL include these three sub-sections. However, these subsections do not affect in any way the administration of the corresponding tariff quotas. The European Communities had used these subsections during the Uruguay Round for historical reasons (e.g., "Current Access Quotas" covered products the imports of which represented a substantial part of the European Communities' market, while "Minimum Access Quotas" covered products with minimal imports into the European Communities). These subsections never had and still do not have any legal significance in this context.

58. (EC) In paragraph 65 of its first written submission, the EC requests the Panel "to dismiss the relevant Ecuador claims in their entirety". In paragraph 6 of its second written submission, the EC adds that "the provisions of the Understanding are binding upon Ecuador and bar Ecuador from challenging an import regime with the characteristics of the current import regime of the [EC]". What is the nature of the EC's argument in this regard? Does the EC argue that the Panel has no jurisdiction to hear Ecuador's claims?

120. The European Communities does not challenge the Panel's jurisdiction with this preliminary objection, but rather Ecuador's right to bring these claims.

121. The European Communities considers that the Panel should first find that Ecuador is bound by the terms of the Understanding. Then, the Panel should find that, through the Understanding, Ecuador accepted that the Cotonou Preference would continue to exist for the entire duration of the waiver that the European Communities had requested at the time the Understanding was signed and the grant of which Ecuador accepted to support in the Understanding. Finally, the Panel should find that Ecuador must now comply with its undertakings and, therefore, that Ecuador cannot challenge the Cotonou Preference.

59. (EC) At the DSB meeting of 1 February 2002, Ecuador stated that "Ecuador, like other countries, also considered that this item should no longer appear on the agenda of future DSB meetings." (WT/DSB/M/119, para. 5) This sentence was preceded by the following statement by Ecuador:

> **"During the dispute settlement process, Ecuador had demonstrated patience and flexibility and had, in this spirit, signed a bilateral Understanding on Bananas with the EC on 30 April 2001. This Understanding constituted a sound basis for the EC to implement a transitional banana import regime so that by 1 January 2006, at the latest, a WTO-compatible tariff-only regime would be put into place. The transitional regime contained various phases, stages and elements to be implemented. One element was to obtain waivers from Articles I and XIII of the GATT 1994. However, the decision to grant these waivers included new stages which would have to be carried out in order to ensure a proper transition to a tariff-only banana import regime, as from 1 January 2006. *Accordingly, insofar as the EC continued to implement the DSB's recommendations by meeting its***

> ***commitments, Ecuador wished to reserve its rights under Article 21 of the DSU. Therefore if there was any disagreement concerning the measures applied by the EC, the matter could be referred to the original Panel pursuant to Article 21.5 of the DSU*." (WT/DSB/M/119, para. 5, emphasis added)**

Can the EC provide a legally reasoned comment on this apparent reservation by Ecuador of its right to invoke Article 21.5.

122. The European Communities has not argued that the withdrawal of the issue on the implementation of the DSB rulings and recommendations from the agenda of the DSB has any particular legal significance. The European Communities has argued that Ecuador is barred from challenging the Cotonou Preference because it had accepted the existence of the Cotonou Preference until the end of 2007 in the Understanding.

60. (EC) In paragraph 4 of its statement during the substantive meeting with the Panel, the US argues that:

> **"The Understanding [on Bananas] is not a 'covered agreement' – it is not listed in Appendix 1. Accordingly, the DSU cannot be used to settle a dispute as to the meaning or effect of the Understanding, and the DSU cannot enforce the Understanding by blocking a party to the Understanding from recourse to the DSU. The EC itself has in fact conceded that there is no bar to proceeding with dispute settlement even in the face of a mutually agreed solution. It is worth noting that, during the *India – Autos* proceeding (which, like the negotiation of the Bananas Understandings, took place in the spring of 2001), the EC also held that view that a mutually agreed solution could not prevent recourse to the DSU ... "**

Can the EC provide a reasoned answer as to whether it agrees with this statement and whether there are any differences between the circumstances of the current proceedings and those in the *India – Autos* case regarding a mutually agreed solution.

123. It is important to note, first of all, that *India – Autos* was an ordinary Article XXIII dispute whereas the present dispute is a 'compliance' case under DSU Article 21.5. In effect, the mutually agreed settlement is an acceptance that the respondent has complied with the DSB recommendations and rulings, since it must be in accordance with WTO rules. It would therefore be perverse to allow the complainant to commence proceedings that explicitly denied this. By respecting the Understanding the panel would be doing what is required of it in the DSU, which is of course a covered agreement.

124. Moreover, the European Communities notes that the report of the panel in the *India – Autos* case states in paragraph 7.113:

> […] such agreements are expressly referred to and supported by the DSU. It is certainly reasonable to assume, particularly on the basis of Article 3 of the DSU […] that these agreed solutions are intended to reflect a settlement of the dispute in question, which both parties expect will bring a final conclusion to the relevant proceedings.[15]

[15] See the report of the panel in *India – Measures Affecting the Automotive Sector*, dated 21 December 2001, ("*India - Autos*"), at paragraph 7.113.

The European Communities also notes that the panel found in paragraph 7.115 of its report that "it may also be the case that it cannot be lightly assumed that those drafters intended mutually agreed solutions, expressly promoted by the DSU, to have no meaningful legal effect in subsequent proceedings". These statements confirm that the panel in *India – Autos* considered it possible that a mutually agreed solution could bar a party from commencing dispute settlement proceedings.

61. (EC) In paragraph 16 of its second written submission, Ecuador states that "[t]he EC does not contest that it grants preferences that are contrary to Article I, but argues that the preferences it grants to bananas of ACP origin are covered by the Doha Waiver through 31 December 2007." A similar characterization is also made by Nicaragua and Panama in paragraph 19 of their respective third party submissions and by the US in paragraph 19 of its statement during the substantive meeting with the Panel. Can the EC provide a reasoned answer as to whether it agrees with this statement.

125. The European Communities considers that the Doha Waiver covers the Cotonou Preference and waives the application of Article I of the GATT until the end of 2007. In light of this fact, the European Communities does not wish to invoke any other arguments in favour of the Cotonou Preference's compatibility with Article I of the GATT.

62. (EC) In paragraph 36 of its statement during the substantive meeting with the Panel, Ecuador argues that "[i]n its own second submission, the EC did not attempt to refute Ecuador's analysis of why, following Vienna Convention principles, it is plain that the waiver had expired, and why the EC arguments were not sustainable. Instead, the EC simply reaffirmed its position and dismissed Ecuador's reliance on the ordinary meaning of the words of the waiver in their context and in light of the object and purpose as 'formalistic'." Can the EC provide a reasoned answer as to whether it agrees with this statement.

126. The European Communities did not simply dismiss Ecuador's arguments as "formalistic", but rather based its position on the facts and legal arguments mentioned in its Written Submissions and oral statements that establish that all the conditions for the continued application of the Doha Waiver until the end of 2007 have been satisfied. The European Communities has also demonstrated the absurd results to which Ecuador's arguments lead. None of Ecuador's arguments adequately rebut the facts and arguments presented by the European Communities.

63. (EC) In paragraphs 13 and 14 of their respective third party submissions, Nicaragua and Panama state that "[t]he EC would hardly have agreed to negotiate the terms of the Article I waiver with Ecuador had Ecuador already given away its Article I rights... [and that t]he EC would not have had to worry about Ecuador's waiver concerns in November 2001 if Ecuador had already 'contractually' obligated itself in April 2001 to accept any future Article I violation". Can the EC provide a reasoned answer as to whether it agrees with this statement.

127. This naïve statement echoes a similar argument advanced in Ecuador's second written submission and is equally baseless. Irrespective of the obligations that Ecuador had undertaken with the Understanding, it is a fact that Ecuador and the other Latin American countries were blocking the grant of the waiver for the Cotonou Agreement. Paradoxically, Nicaragua and Panama do confirm this fact. Therefore, the European Communities had no choice other than to negotiate with Ecuador and the other Latin American countries a solution that would allow the Cotonou Agreement to receive its waiver.

64. (EC) In paragraph 24 of their respective third party submissions, Nicaragua and Panama state that the expression "in clinical isolation", which was coined by the Appellate Body in *US – Gasoline* when referring to public international law, would not be relevant as used

by the EC, as in paragraph 68 of its first written submission, when referring to the "real world". Can the EC provide a reasoned answer as to whether it agrees with this statement.

128. The statement criticized by Panama and Nicaragua needs to be read very closely. In fact, it is only "paraphrasing" an expression used in a previous Appellate Body report.

129. The arguments advanced by Ecuador and the Third Parties that support it in this case have confirmed that the Panel is indeed invited to rule in this case "in clinical isolation" from the real situation in the banana market.

65. (EC) On page 7 of their respective third party submissions – based on the use of the expressions "whether the EC has rectified the matter" and "if the EC has failed to rectify the matter" in tiret 5 of the Banana Annex to the Doha Waiver, as well as on the expressions "the new EC tariff regime" and "the new EC tariff only regime" in tirets one and five – Nicaragua and Panama conclude that, after two negative findings by the Arbitrator, the new EC tariff regime introduced thereafter would not fulfil the "tariff only" requirements of the Annex and, therefore, would lose waiver coverage "upon its entry into force, and not at some later point". Can the EC provide a reasoned answer as to whether it agrees with this statement.

130. See the answer provided in Questions 4 and 13, above.

66. (EC) In paragraph 27 of their respective third party submissions, Nicaragua and Panama argue that the EC's waiver for bananas was authorized to continue beyond 2006 only if the EC either: (a) received a first arbitration determination that its "envisaged rebinding would result in at least maintaining total market access for MFN banana suppliers, taking into account all EC WTO market access commitments; (b) rectified the matter by reaching a mutually satisfactory solution with the interested parties; or, (c) received a determination in the second arbitration that the EC had rectified the matter. Can the EC provide a reasoned answer as to whether it agrees with this statement.

131. It is the opinion of the European Communities that the text of the Doha Waiver makes it clear that such a waiver would continue to apply until the end of year 2007 under the condition that the European Communities introduced an import regime that would maintain the total market access of the MFN banana suppliers. This regime, moreover, would need to be different from the ones that the Arbitrators had found unlikely to maintain such market access.

67. (EC) In paragraph 36 of their combined statement during the substantive meeting with the Panel, Nicaragua and Panama argue that "[a]s confirmed by its eleventh recital, th[e Article I Doha] waiver was only able to receive the collective endorsement of the Membership after the EC committed in the Annex to a strict 'multilateral control' on 'any rebinding.'" Can the EC provide a reasoned answer as to whether it agrees with this statement.

132. The European Communities considers that the condition for the continued application of the Doha Waiver until the end of 2007 was the introduction of an import regime that would maintain the total market access of the MFN suppliers. The section of the recital cited in this question confirms the European Communities' interpretation of the Doha Waiver.

68. (EC) In paragraph 39 of their combined statement during the substantive meeting with the Panel, Nicaragua and Panama argue that "[i]f the DSB panel erroneously revisited the defunct waiver access standard and confirmed what the Arbitrator's prior analytical framework makes obvious – that a 135% increase in the MFN tariff, and ACP and EBA margin of preference, definitionally fails to result 'in at least maintaining' MFN conditions of competition into the future – the EC would be undeterred. It would simply do what it did in

late 2005. It would reduce its tariff by only a few digits and call the matter 'rectified'. If the Latin American suppliers then returned to the same panel, the EC could merely continue the same sequence for as long as it needed to, reducing its tariff by minuscule amounts, digit-by-digit, until the Partnership Agreement expired on its own terms." Can the EC provide a reasoned answer as to whether it agrees with this statement.

133. The market reality, as evidenced by the statistics and data at the disposal of the Panel, shows the flaws in the arguments of Nicaragua and Panama. The European Communities' current import regime has more than maintained the total market access of the MFN suppliers. This shows that the European Communities has fulfilled the obligations it undertook in the Doha Waiver.

134. Moreover, this statement of Nicaragua and Panama confirms once more that the real intention of Ecuador and the Third Parties that support it, is to use (or rather abuse) these dispute settlement proceedings in order to influence the tariff negotiations with the European Communities. Indeed, Ecuador and these Third Parties ostensibly request the Panel to find that the Doha Waiver has expired. However, a Panel finding that the Doha Waiver has expired would not have any impact on the tariff applied by the European Communities to bananas from MFN countries, as incorrectly stated by the legal advisors of Nicaragua and Panama. This lapsus in the reasoning of the legal advisors of Nicaragua and Panama confirms that their challenge to the Cotonou Preference is in reality a disguised effort to achieve an advantage in the tariff negotiations.

135. The European Communities respectfully requests the Panel once more not to allow Ecuador and the Third Parties that support it to distort the role of the WTO dispute settlement procedures.

69. (EC) In paragraph 21 of its statement during the substantive meeting with the Panel, the US argues that "[t]he phrase '[i]f the EC has failed to rectify the matter', at the beginning of the fifth sentence in tiret 5 of the [bananas] Annex [to the Article I Doha Waiver] can only refer back to the determination made by the second arbitrator following the EC's effort to 'rectify the matter.'" Can the EC provide a reasoned answer as to whether it agrees with the statement.

136. See answer provided to Question 13.

70. (EC) In paragraph 33 of its first written submission, the EC argues that "[a] similar waiver [from Article XIII of the GATT 1994, to the one that expired on December 31, 2005] is not needed anymore, because in contrast to the old all-tariff-quota regime, the new banana import system that the European Communities applies since 1 January 2006 is not 'comparable to a quota regime'". Can the EC elaborate on this point.

137. See the answers provided in Question 11 and Question 15, above.

71. (EC) In paragraph 61 of their respective third party submissions, Nicaragua and Panama argue that the EC has essentially confirmed its violations of Articles XIII:1 and 2 by repeatedly acknowledging that a tariff quota reserved for the ACP would require an Article XIII waiver of those two paragraphs. In support of this statement, Nicaragua and Panama contend that: (a) The Understanding the EC signed with Ecuador and the US in 2001, stipulated that the EC would request a waiver of Article XIII of the GATT 1994 needed for the management of the [750,000 mt ACP] quota; (b) The EC's 2001 request for a waiver of Articles XIII:1 and 2 reiterated that the limited tariff quota set aside for ACP countries required a waiver from the obligations established under Article XIII of the GATT; and, (c) The EC's October 2005 waiver request sought Article XIII coverage for its proposal to institute a 775,000 mt ACP tariff quota in combination with a €187/mt MFN tariff (i.e. an arrangement that, like the current one, would have subjected ACP bananas to a tariff quota and MFN bananas to a flat tariff). Can the EC confirm the accuracy of the factual assertions raised by

Nicaragua and Panama, and provide a reasoned answer as to whether it agrees with the arguments raised by these Members.

138. As already mentioned, the import regime that the European Communities had in place until the end of 2005 was the equivalent of quota regime because virtually all banana imports were made under tariff quotas. Moreover, there were different tariff quotas allocated to different groups of countries and administered in different ways. In these circumstances, it is normal that the European Communities sought and obtained a relevant waiver from the application of Article XIII of the GATT for that particular import regime.

139. Such a waiver is not needed after the introduction of the tariff only regime on 1 January 2006. However, in order to provide all parties with additional legal security, the European Communities had placed a request for a new waiver from the application of Article XIII in late 2005. At that time the Arbitration was still pending and the final form of the import regime that the European Communities would implement as of 1 January 2006 was not yet clear. Following the introduction of the current tariff only import regime such a waiver is no longer necessary and this is why the European Communities does not pursue it anymore.

72. (EC) In paragraph 42 of their respective third party submissions, Nicaragua and Panama argue that the Latin American banana-supplying countries agreed to review and approve a waiver without a specified 2006 tariff-only rate, only after a number of pre-2006 multilateral controls were built into the text and drafted to their satisfaction. Before approving the waiver, the MFN drafters insisted that the Annex: (a) Set forth mandatory commitments (rather than "aims"); (b) Protect only MFN suppliers (rather than both MFN and ACP suppliers); (c) Protect against the erosion of pre-2006 applied MFN access conditions over time (rather than only bound concessions in the short term); (d) Automatically terminate the waiver in the event of a negative second arbitration determination (rather than end the process with a simple notification to the General Council); and, (e) Clarify that the arbitration and Article XXVIII procedures had to be concluded prior to the 2006 tariff-only regime (rather than allow the procedures to be conducted without a pre-2006 deadline). Can the EC provide a reasoned answer as to whether it agrees with the statement. Can the EC also confirm the accuracy of the factual assertions raised by Nicaragua and Panama.

140. Please see the answer to Question 13.

73. (EC) In paragraph 46 of their combined statement during the substantive meeting with the Panel, Nicaragua and Panama argue that "[t]he Bananas III panel and Appellate Body already expressly found that Article XIII, including Article XIII:5, applies to all bananas irrespective of origin and irrespective of the regulatory means by which those bananas are entered. If the unconditional obligations of Article XIII were interpreted otherwise, any Member could apply a discriminatory tariff quota with impunity, so long as one or more suppliers were regulated by other means." Can the EC provide a reasoned answer as to whether it agrees with these arguments.

141. The European Communities believes that the implementation of a tariff only system for bananas, following the suggestion of the Panel in Bananas III, would require only a Waiver of GATT's Article I. As explained in its first written submission, the language used by the Panel in its report appears to support the said interpretation.

142. More importantly, however, this interpretation is supported by sound legal reasoning. Indeed, the title of Article XIII of the GATT makes it clear that it does not apply to tariffs ("Non-discriminatory Administration of Quantitative Restrictions").

143. The constant reference in paragraphs 2, 3 and 4 of Article XIII to "quotas" makes it very clear what the scope of this provision is. The text of paragraph 5 of the same provision is even more enlightening on this point: "[t]he provisions of this Article shall apply to any tariff quota instituted or maintained by any contracting party, and, in so far as applicable, the principles of this Article shall also extend to export restrictions" .

144. In addition, if GATT Article XIII was meant to cover also ordinary tariffs, there would be no reason of existence for GATT Article I, paragraph 1 nor of several other GATT provisions. In fact, if any kind of "prohibition or restriction" on imports and exports of goods is caught by Article XIII, paragraph 1, then the European Communities wonder why the GATT contains different provisions, each dedicated to a different type of obstacle to trade.

145. Moreover, the Communities wonder why such a general, far reaching and catch-all provision has not been included in Part I of the GATT, where the basilar and general principles of the agreement are enshrined, instead of being foreseen after Article XI which concerns "General Elimination of Quantitative Restrictions".

146. It is thus not by accident that – to the Communities' best knowledge – there has never been a single case in which a measure has been found to be in breach of both Article I and Article XIII GATT.

147. Finally, the absurd results to which it would lead the interpretation suggested by Ecuador, Nicaragua and Panama have been illustrated in the oral statement of the European Communities (paragraphs 17 to 20) and it is therefore unnecessary to repeat them.

148. The European Communities finds regrettable that Nicaragua and Panama distort the Panel and Appellate Body reports in Bananas III to have these reports say what they actually do not say. Suffices it to stress once again that those reports assessed a different regime, which – unlike the current one – included quotas.

74. (EC) If the EC's concession on bananas is still the TRQ as described in Schedules LXXX and CXL, including the quota volume of 2.2 million metric tons and the in-quota duty of €75/mt), would the EC agree that an applied duty of €176/mt would be in breach of Article II:1(a) and (b) of the GATT 1994? If not, why not?

149. The European Communities notes that Article II:1(a) provides that "each contracting party shall afford to the commerce of the other contracting parties treatment no less favourable than that provided in the […] Schedule …". The European Communities also notes that Article II:1(b) provides that "the products […] shall on their importation into the territory to which the Schedule relates and subject to the terms, conditions or qualifications set forth in that Schedule, be exempt from ordinary customs duties in excess of those set forth and provided therein."

150. Therefore, the answer to the hypothetical question asked by the Panel would depend on whether the tariff applied by the European Communities was found to be *less favourable treatment* than that provided in the European Communities' Schedules. It would also depend on whether the tariff applied was found to be in excess of the *ordinary customs duties* provided in the Schedule, subject to the terms, conditions and qualifications contained in the Schedule.

151. The Panel does not need to answer these questions in the present case, because the only banana binding in the European Communities Schedules of Concessions is a tariff of €680 per ton.

75. (EC) In paragraph 83 of their respective third party submissions, Nicaragua and Panama argue that the EC's "commitments in the case of 'fresh bananas' (0803 00 19) are its

Uruguay Round tariffication concessions scheduled to replace its pre-existing consolidated banana tariff of 20% ad valorem (approximately 80 ECU/mt) in effect since 1963 pursuant to Uruguay Round tariffication". (Footnotes omitted). Can the EC provide a reasoned answer as to whether it agrees with the arguments of Nicaragua and Panama.

152. As mentioned in paragraph 72 of the European Communities' second written submission, the Marrakesh Agreements constitute a fresh start in the process of accumulating obligations from the Schedules. As a consequence, the European Communities' concessions in the Uruguay Round Schedule must be read as they stand, without any reference to earlier concessions. Therefore, the statement of Nicaragua and Panama does not have any relevance for the current proceedings.

76. (EC) In paragraph 70 of its second written submission, the EC quoted language from the 1993 Uruguay Round Agriculture Modalities paper according to which such paper "shall not be used as a basis for dispute settlement proceedings under the [WTO] Agreement." In the subsequent paragraph of its submission, the EC states that the Appellate Body has confirmed that the Agriculture Modalities paper "does not constitute an agreement among the WTO Members". In response, in paragraph 63 of its statement during the substantive meeting with the Panel, Ecuador argues that "[t]he EC does not deny that a time-limited concession would have been inconsistent with the agreed Uruguay Round modalities, but the EC complains that those modalities should be ignored because they were not to be used as a basis for dispute settlement. Ecuador is not making a claim that the EC is violating the modalities, but only pointing out that the modalities were such that, if the EC intended or was thought by anyone to have made a time limited access commitment on a product as important as bananas, it is inconceivable that it would have passed unnoticed." Can the EC provide a reasoned answer as to whether it agrees with Ecuador's arguments.

153. In paragraphs 116 and 117 of its first written submission, the European Communities referred to the consistent jurisprudence under the GATT and the WTO which allows WTO Members to subject their concessions to time limitations, such as the time limitation which the European Communities had put in its concession for the tariff quota of the 2.2 million tons of bananas. Neither Ecuador, nor the joint submissions of Nicaragua and Panama have attempted to refute this legal argument of the European Communities.

154. The European Communities regrets the fact that Ecuador tries to use the modalities paper as a basis for litigation in the present case, when the modalities paper was issued with the explicit qualification that it "shall not be used as a basis for dispute settlement proceedings" under the WTO and DSU rules. This reflects the WTO Members' desire to ensure that only their actual commitments are referred to in dispute settlement proceedings. In paragraph 72 of its second written submission the European Communities has provided additional arguments establishing that Ecuador's arguments based on the modalities paper should be rejected.

77. (EC) In paragraphs 9 and 10 of its communication to the Arbitrator in the context of the first Arbitration under the Annex to the Doha Waiver, dated 13 May 2005, reproduced in Exhibit ECU-4, the EC stated that it "also has a bound tariff rate quota of 2,200,000 tonnes, with an in-quota rate of 75€/t. The EC has no other commitments for bananas. Until 31 December 2002, the EC was also bound by the Framework Agreement on Bananas which had been incorporated into the EC's Schedule. It is no longer in force." Can the EC advance legal reasons to reconcile the above with its argument in this dispute that the TRQ of 2.2 million metric tons would now not be in force as a result of the expiration of the Framework Agreement on Bananas (BFA).

155. As mentioned in paragraph 89 of the second written submission of the European Communities, the description of the European Communities' banana import regime in the Arbitration Awards and in its own submissions during these Arbitrations is not correct.

156. Moreover, as mentioned in paragraph 90 of the second written submission of the European Communities, these descriptions do not have any relevance for the present procedure for a number of reasons. First, because the Arbitration was not held within the context of the DSU. Second, because the subject matter of the Arbitration was to determine whether the new import regime of the European Communities would maintain total market access for MFN suppliers and not to determine what were the concessions bound in Schedule CXL at the time the Arbitration was held. Therefore, any relevant statements in the Arbitration Awards should be treated as simple *dicta* that are not binding upon the parties to this dispute.

157. Moreover, there is no provision in the DSU that could support the proposition that a party's incorrect description of facts in a different context and in non-DSU proceedings can be taken into consideration by a panel in order to define that party's rights and obligations under the GATT. The European Communities respectfully invites the Panel to disregard any such statements made in a different context and outside the DSU and to interpret the Schedules of Concessions of the European Communities on the basis of the terms of the Schedules themselves.

78. (EC) Can the EC confirm, providing appropriate evidence, that the only tariff rate quota (TRQ) it has been applying since the beginning of 2006 is the zero-duty TRQ of 750,000 metric tons of bananas, and that in practice it has not been applying the TRQ of 2.2 million metric tons at an in-quota duty of €75/metric ton beyond the end of 2002.

158. The European Communities confirms that the only "tariff quota" applied since 1 January 2006 is the autonomous tariff quota for the Cotonou Preference, applied to 775.000 tons of bananas of ACP origin. As evidence, the European Communities refers to the implementing Commission Regulations, mentioned in Question 3 above.

159. In the period between the end of 2002 and the end of 2005, the European Communities was still implementing the tariff-quota-based import regime, as agreed in the Understanding. In accordance with the provisions of the Understanding, the EC allocated to MFN countries an autonomous tariff quota for a total of 2.65 million tons of bananas, i.e. for much more than the 2.2 million tons that was bound in its Schedules until the end of 2002. Following the enlargement of the European Communities in 2004, the European Communities accepted another 300,000 tons for the period 1 May 2004 to 31 December 2004, which went up to 460,000 tons in 2005. Therefore, the European Communities accepted a total of 3.113 million tons of bananas imported from MFN suppliers in 2005 at a tariff of €75.

160. As already mentioned, after the end of 2002, the European Communities accepted these ever increasing quantities of MFN bananas because it complied in good faith with the provisions of the Understanding and not because it had a relevant binding in its Schedules. This practice was duly discontinued at the end of 2005, again in accordance with the provisions of the Understanding, to which the European Communities complied in good faith until the end.

79. (EC) In paragraph 20 of its rebuttal submission to the Arbitrator in the context of the first arbitration under the Annex to the Doha Waiver, dated 7 June 2005, reproduced in Exhibit ECU-5, the EC stated that:

> **"In Article XXVIII negotiations, a Member may seek to modify the concessions which it has bound itself to provide. Merely changing the form of an import regime does not in itself require a Member to go through an Article XXVIII**

> **procedure. It is only where a Member cannot change the form of an import regime consistently with its concessions that it is required to go through an Article XXVIII procedure (otherwise it will act inconsistently with Article II GATT). In the present case, if the EC was proposing to apply a duty of €75/t or less on an unlimited basis it would not need to go through an Article XXVIII procedure because it could provide such treatment consistently with its current commitment of an in-quota duty of €75/t within a tariff-rate quota of 2,200,000 tonnes and an out-of-quota rate of €680. If the duty is to be €76/t or above the EC has to conduct an Article XXVIII process. The fact that the Waiver Decision and the Waiver Annex is replete with references to Article XXVIII GATT proves that it was accepted that the EC's MFN tariff under a tariff-only regime would be greater than €75/t" (Footnote omitted).**

How does the EC relate its above statement with its argument in paragraph 10 of its first written submission that the EC's tariff concessions contain only one bound tariff rate for bananas, i.e. €680 per ton?

161. As mentioned in paragraph 88 of its second written submission, the European Communities has engaged in good faith negotiations under Article XXVIII of the GATT because it has undertaken to do so in the Understanding. Moreover, the European Communities has noted that the panel report in *EEC – Newsprint* may support the proposition that "under long standing GATT practice, even purely formal changes in the tariff schedules of a contracting party which may not affect the GATT rights of other countries […] have been considered to require renegotiations". Therefore, Article XXVIII negotiations are not necessary *only* where a WTO Member seeks to increase the level of its bound tariffs, but may also be necessary when it seeks to decrease the level of its bound tariffs. Consequently, if the European Communities' statements before the Arbitration took a different view, those statements were wrong.

162. However, as already mentioned in Question 77, any erroneous statements made by the European Communities in a different context and in a non-DSU procedure do not have any legal significance for the current proceedings before the Panel.

80. (EC) In paragraph 99 of their respective third party submissions, Nicaragua and Panama argue that the EC's "legal instruments, WTO assertions, and other official statements consistently confirm the enduring validity of a €75/mt concession". Nicaragua and Panama further argue that examples have already been referenced by Ecuador, and offer the following additional ones: (a) In Regulation 216, the EC would have explicitly referenced a tariff quota of 2 200 000 tonnes at a rate of €75 as bound in the WTO until the entry into force of a tariff-only regime; (b) In its GATT Article I waiver discussions, the EC confirmed it intended to adopt a tariff-only system in 2006, which would entail a re-binding of its 75 and 680 €/tonne bound rates under the relevant procedures of Article XXVIII of the GATT 1994; and, (c) In an internal communication to its own Member States, the EC confirmed that, should the Community wish to move to a tariff-only system at a rate higher than €75/t., GATT Article XXVIII provided that such modification should be notified to all GATT Contracting Parties. Can the EC confirm the accuracy of the factual assertions raised by Nicaragua and Panama, and provide a reasoned answer as to whether it agrees with the arguments raised by these Members.

163. The documents cited by Nicaragua and Panama pre-date the expiry of the binding for the tariff quota for the 2.2 million tons. Council Regulation (EC) No. 216/2001 was approved on 29 January 2001, was applied as of 1 April 2001 and was replaced by Regulation 2587/2001 on 19 December 2001. The document cited by Nicaragua and Panama in the context of the GATT Article I waiver discussions is dated 5 November 2001, when the binding for the tariff quota of the 2.2 million tons was still in place and it was still unclear what bindings the European Communities

would agree with banana suppliers in the future. The Communication of the Commission to the Council, to which Nicaragua and Panama refer, is also dated 1 June 1999.

164. The Annex to the Schedule of the European Communities provided that consultations for the replacement of the concession on the tariff quota for the 2.2 million tons of bananas would start in 2001. Moreover, the European Communities agreed in the Understanding (which was signed in April of 2001) that it would hold Article XXVIII negotiations in order to agree on the new system that would replace the then applicable banana import regime. All of the documents cited by Nicaragua, Panama and Ecuador were prepared before the expiration of the tariff quota for the 2.2 million tons of bananas at the end of 2002 and at a time when the European Communities was either about to start negotiations, or was already holding negotiations for a new import regime. At that time it was not yet clear what would be the outcome of these negotiations. This explains these documents' references to then bound tariff quota for 2.2 million tons of bananas. It is evident that these statements do not amount to a rebinding of that tariff quota.

81. (EC) In paragraph 95 of their respective third party submissions, Nicaragua and Panama argue that the phrase "This agreement shall apply until 31 December 2002", contained in the Framework Agreement on Bananas "did not say or mean that the EC's multilateral current-access concessions on bananas would also terminate as of 31 December 2002. If the parties had intended to terminate multilateral concessions in their plurilateral agreement, they would have stated this with specificity in the BFA and provided their justification for doing so. Their use of the alternative word 'agreement' made clear they had no intention of revoking the actual concessions themselves." Can the EC provide a reasoned answer as to whether it agrees with the arguments raised by Nicaragua and Panama.

165. Please see the answer to Question 25.

82. (EC) In paragraph 93 of their respective third party submissions, Nicaragua and Panama argue that the EC commitments appearing in column 4 [of its Schedules] would not have been identified as 'final', much less 'current access quotas' or 'concessions,' if they were to lapse shortly after the close of the Uruguay Round implementation period and be replaced by a €680/mt stand-alone bound rate that would functionally ban all MFN access.[16]" Can the EC provide a reasoned answer as to whether it agrees with the arguments raised by Nicaragua and Panama.

166. There are a number of flaws in this assertion, most of which have already been identified by the European Communities in its written submissions and oral statements. First, this assertion ignores the fact that the BFA was agreed in the aftermath of certain GATT dispute settlement procedures and not within the context of the Uruguay Round. The simple timing coincidence in these two independent events does not allow Nicaragua and Panama to use the one event in order to make an argument for the other.

167. Second, the BFA provided that consultations would commence in 2001 (i.e. one year before the expiration of the concession) for the system that would replace that concession. Therefore, the arrangement achieved for the MFN suppliers participating in the BFA was quite positive: a bound concession for 8 years and the possibility to negotiate a new deal better adapted to the market conditions between 2001 and 2002.

168. Third, the fact that this concession was included under both the "Initial Quota" and the "Final Quota" columns simply meant that there would be no period during which there would be successive

[16] (*footnote original*) As the 2005 Arbitrator found, and the EC confirmed, barely negligible volumes of imports (10,000-20,000 mt) could enter the EC at the 680 €/mt rate. *See AAI*, para. 60, n.52.

progressive reductions in the bindings of the European Communities. This confirms that the tariff quota was indeed granted "as indicated in the Annex", because the Annex expressly provides that the starting date for the operation of the concession would be a fixed date, i.e. October 1, 1994. For the avoidance of any doubt, the European Communities notes that the word "Final Quota" in that column obviously does not mean that the concession would be in place at the end of time.

169. Fourth, as already mentioned, the division of the European Communities' Schedules into "Current Access Quotas" and "Minimum Access Quotas" was simply reflecting the percentage of the total market for the specific product that was covered by imports prior to the conclusion of the Uruguay Round. This division does not have any legal implications, it does not affect the way in which the tariff quotas were administered and it does not create any additional rights for the exporting countries.

83. (EC) In Exhibits N-1 and P-1 to their respective third party submissions, Nicaragua and Panama submit a number of documents as "Article I waiver negotiating history documents". Can the EC confirm the accuracy of those documents and provide the Panel with any further relevant documents relating to those negotiations.

170. Please see the answer to Question 13.

84. (EC) In Exhibits N-2 and P-2 to their respective third party submissions, Nicaragua and Panama submit an analysis made by the Centre for International Economics, dated August 2007, the main findings of which would be reflected in paragraph 47 of their third party submissions. Can the EC provide a reasoned answer as to whether it agrees with the main findings or any other relevant points in the analysis made by the Centre for International Economics, quoted by Nicaragua and Panama.

171. The European Communities does not agree with the conclusions of the above-mentioned analysis.

172. The study produced by the Centre for International Economics (the "CIE") is based on totally incorrect assumptions and contains a number of predictions which are turning out to be erroneous and unfounded.

173. For instance, the study predicts (page 14) for year 2007 a 44 000 tonnes increase in ACP bananas imports into the European Communities (for a total of 950 000 tonnes). However, the facts show this prediction to be completely wrong. In fact, in year 2007 the European Communities will import less ACP bananas than it did in the previous year.

174. Again, the study estimates for year 2008 total imports of ACP bananas into the European Communities to amount to 1 022 000 tonnes. However, actual sales data and trends show that this forecast will not materialise.

175. The study seems to ignore some basic facts. For instance, one may observe that the only ACP countries which have recently increased their exports are Dominican Republic and Ghana. Dominican Republic has specialised in organic bananas, which represent 80% of their exports and constitute a niche in the banana market. Ghana is, on his part, only a small producer and a very minor player in both the European and, even more, the worldwide banana market. Another indicative fact is that the only new plantation started since the end of 2005 has been in Brazil, not in ACP countries, where Fyffes started a new plantation in January 2006 and this contributed to the great increase of Brazilian exports to the European Communities' market in 2006 and 2007.

176. The lack of credibility of this study does not surprise the European Communities, since the author of the study, the CIE, has also in the past produced studies which turned out to be completely unreliable.

177. For instance, during the arbitration proceedings Panama presented another study prepared by the CIE. In page 28 of this document it is stated that at any tariff level above €75 a tonne, Latin America bananas producers would be severely harmed. At page 29, this loss is quantified in the following terms: "for every €10 a tonne increase in the tariff, there is a likely 87 000 tonne loss of Latin American access".

178. However, reality shows that, in spite of a duty of €101/mt higher than the one indicated in the study (€176/mt instead of €75/mt), in 2006 Latin American countries have exported into the European Communities 10% more than 2005. Furthermore, in 2007, first semester, there is an additional increase of 8%, compared to 2006.

179. Another false prediction of the previous CIE's study is as follows: access into the European Communities' bananas market for Latin America's producers was supposed to be reduced by 870 000 tonnes, due to the increase of the level of duty to €176/tonne. Facts show, however, that Latin America access instead has increased by 470 000 tonnes in only 18 months.

180. This is not all. Similarly, other studies presented by Panama in past procedures turned out to forecast wrong events. The Angolan feasibility study submitted during the Arbitration procedures included forecasts on production in Angola which never materialised. None of the 1890 hectares of land which should have progressively produced bananas in that country has so far produced any.

181. The European Communities also refers to the considerations developed by the Ivory Cost in its oral statement (points 17 et seq.).

182. In the light of this, the European Communities urges the Panel to disregard the study submitted by Panama and to form its opinion on the basis of the actual sales data which are undisputed and publicly available.

85. (EC) In Exhibits N-3 and P-3 to their respective third party submissions, Nicaragua and Panama submit a copy of the "EC's Draft Request for Article XIII Waiver, 21 May 2001". Could the EC confirm the accuracy of that document and provide the Panel with any further relevant documents relating to the negotiations for that Article XIII waiver.

183. The European Communities observes that the draft request submitted by Nicaragua and Panama is irrelevant for the purpose of determining whether the current ACP TRQ of 775,000 is in violation of Article XIII of the GATT. The draft request refers to the tariff-quota-based banana import regime that the European Communities had in place between 1 July 2001 and 31 December 2005, as agreed in the Understanding. As already mentioned, virtually all imports under that import regime were made under tariff quotas and there were different tariff quotas allocated to different groups of countries with different terms. As this Panel had found in paragraph 6.158 of its first Article 21.5 report, such an import regime would need a waiver from the application of Article XIII of the GATT. Such a waiver is no longer necessary, because the European Communities has introduced a tariff only import regime on 1 January 2006.

QUESTIONS ADDRESSED TO PARTIES AND THIRD PARTIES

86. (Both Parties, Belize, Cameroon, Côte d'Ivoire, Dominica, the Dominican Republic, Ghana, Jamaica, Madagascar, Saint Lucia, Saint Vincent and the Grenadines, and Suriname) In paragraph 31 of its statement during the substantive meeting with the Panel, Cameroon

argues that "[c]'est un fait reconnu que les producteurs de bananes ACP sont moins compétitifs que les producteurs NPF. Comparés à ces derniers, les producteurs ACP produisent à un coût plus élevé. Pour des raisons historiques et géographiques, ils ne disposent pas des mêmes économies d'échelle que les producteurs NPF. Dès lors, les producteurs ACP ne peuvent les concurrencer que sur les marches où ils bénéficient d'un accès préférentiel." Can Cameroon provide evidence for its assertions. Can Belize, Côte d'Ivoire, Dominica, the Dominican Republic, Ghana, Jamaica, Madagascar, Saint Lucia, Saint Vincent and the Grenadines, and Suriname confirm that they agree with these specific assertions made by Cameroon. Can Cameroon, as well as Belize, Côte d'Ivoire, Dominica, the Dominican Republic, Ghana, Jamaica, Madagascar, Saint Lucia, Saint Vincent and the Grenadines, and Suriname specify the relevance of this argument, if any, in the context of its eventual analysis of Article XIII of the GATT 1994, in particular as regards the chapeau of Article XIII:2. Can the Parties provide a reasoned answer as to whether they agree with these assertions, and specify, in their view, how the same should be taken into account in the context of an eventual analysis of Article XIII of the GATT 1994, in particular as regards the chapeau of Article XIII:2.

184. The European Communities believes that the facts described by Cameroon are manifestly accurate and correct.

185. However, if these elements could have a certain relevance within an analysis of the WTO compatibility of a regime providing for quantitative restrictions, they are certainly irrelevant in the context of an analysis of a tariff-only regime under Article XIII of the GATT 1994.

186. In fact, for the reasons explained in the answer to Question 73, above, Article XIII applies to quantitative restrictions and not *any* kind of trade restriction.

87. (Both Parties and Brazil) In paragraph 17 of its statement during the substantive meeting with the Panel, Brazil argues that "a Member is not exempted from discharging its burden of proof as regards the compliance of the new measures with the DSB recommendations and rulings even if such measures are intended to implement a suggestion by the panel." Can Brazil elaborate on this argument, and the Parties provide a reasoned answer as to whether they agree with Brazil's argument.

187. The general principles applicable to burden of proof in WTO dispute settlement require that the party claiming a violation of a provision of the WTO agreements bears the burden of demonstrating that the measure is not consistent with the relevant provisions of the agreements. As most recently confirmed in paragraph 6.4 of the report of the Article 21.5 Panel in *Korea – Anti-Dumping Duties on Imports of Certain Paper from Indonesia, Recourse to Article 21.5 by Indonesia*, dated 28 September 2007 (DS312), this principle also applies in the context of Article 21.5 proceedings, where the complaining party bears the burden of demonstrating its claim that the measure taken to comply by the defending party is not consistent with the WTO rules.

88. (Both Parties and Colombia) In paragraph 16 of its third party submission, Colombia argues that "[a]n applied tariff of €176/tonne does not constitute a 'rebinding' [under the Doha Waiver]." Can Colombia elaborate on this argument, and the Parties provide a reasoned answer as to whether they agree with it.

188. The European Communities reserves its answer to this question until it has seen Colombia's elaboration of its argument.

89. (Both Parties and Côte d'Ivoire) In paragraph 21 of its oral statement during the substantive meeting with the Panel, Côte d'Ivoire argues that "moins d'une année suffit pour produire et exporter des bananes". Can Côte d'Ivoire provide evidence for its argument. Can

the Parties comment on the argument made by Côte d'Ivoire, and explain how rapidly banana production and exports can be expanded, and how much time is necessary for suppliers to fully respond to a change in market conditions, such as a change in the EC's import regime for bananas.

189. The European Communities reserves its answer to this question until it has seen the response of Cote d'Ivoire.

90. (Both Parties, Nicaragua and Panama) In paragraph 108 of their respective third party submissions, Nicaragua and Panama argue that "[t]he EC's 75 €/mt concession – which from 1995 to 2005 covered all bound in-quota Latin American imports and informed the rate applicable to all other Latin American bananas entering the EC market – has been the single most important banana concession in Schedule CXL. In contrast to the prohibitive 680 €/mt rate, under which virtually no Latin American volumes have ever been entered, the 75 €/mt concession is the only rate that enabled Latin American market access to the EC market from 1995 to 2005. Unless the 75 €/mt bound rate receives the full protections of GATT Article II, the entire value of the EC's mandatory Uruguay Round concessions will be nullified". (Emphasis added). Can Nicaragua and Panama provide evidence for their assertions. If MFN banana imports have increased under an applied tariff rate of 176€/mt, as argued by the EC, how can this be reconciled with the statement that "a 75 €/mt concession is the only rate that enabled Latin American market access to the EC market from 1995 to 2005"? Can Nicaragua and Panama clarify what would be meant by "providing the full protections of GATT Article II" to the 75 €/mt tariff rate. Can Parties provide a reasoned answer as to whether they agree with the assertions made by Nicaragua and Panama.

190. The European Communities considers that the assertion of Nicaragua and Panama should be rejected, because it requests the Panel to find that an "applied tariff" becomes a "bound tariff" simply by virtue of its being applied. If accepted, such a proposition would lead to the collapse of the whole GATT system and the Doha round negotiations.

191. The European Communities reserves the right to provide more comments once it has seen Nicaragua's and Panama's response to this question.

91. (Both Parties, Nicaragua and Panama) In paragraph 19 of their combined statement during the substantive meeting with the Panel, Nicaragua and Panama argue that "[t]he EC tariff, which was the EC's scheduled banana concession from 1963-1994, was the equivalent of about 80 euro per tonne." Can Nicaragua and Panama elaborate on this argument and provide evidence for their assertions, as appropriate. Can the Parties comment on the argument and assertions.

192. The European Communities is not able to understand the calculations supporting the assertion of Nicaragua and Panama. The European Communities reserves its answer to this question until it has seen Nicaragua and Panama's elaboration of their argument.

92. (Both Parties and Suriname) In paragraph 10 of its statement during the substantive meeting with the Panel, Suriname argues that "[b]oth the Doha Waiver and the Understanding on Bananas were negotiated by the WTO members, including the interested parties, after the DSB adopted its recommendations and rulings in the original Bananas dispute. These two instruments constitute new secondary WTO law and create an entirely new legal framework for the issues that are now pending before the Panel. These new instruments clearly strike a new balance of rights and obligations for the entire WTO membership, in addition to the parties to the dispute." Can Suriname elaborate on these arguments. Can both Parties provide a reasoned answer as to whether they agree with Suriname.

193. The European Communities reserves its answer to this question until it has seen Suriname's elaboration of its argument.

93. (Both Parties and the US) Is there any particular reason why the Understandings on Bananas that the EC reached with Ecuador and the US respectively in April 2001 were only notified to the DSB more than two months later? Is there any reason why such agreements were not notified jointly to the DSB by both parties to the respective agreements?

194. The European Communities does not know the answer to this question.

94. (Both Parties and US) Paragraph G of the Understanding on Bananas reached between the EC and Ecuador of 30 April 2001 (documents WT/DS27/58 and WT/DS27/60), states that "[t]he EC and Ecuador consider that this Understanding constitutes a mutually agreed solution to the banana dispute". In turn, the Understanding on Bananas reached between the EC and the US on 11 April 2001 (document WT/DS27/59), contains no equivalent statement. What value, if any, should be given to the statement contained in Paragraph G of the Understanding on Bananas reached between the EC and Ecuador? What value, if any, should be given to the different language contained in both understandings regarding this issue?

195. The European Communities considers that the analysis of the legal status and effect of the Understanding should be primarily based on its content and not on any unilateral statements issued by the signatories after its signing. In that regard, the European Communities notes that the Understanding (i) describes in great detail the characteristics of the two banana import regimes that the European Communities should implement by 1 July 2001 and by 1 January 2002 respectively and (ii) expressly provides that Ecuador's right to retaliate will be terminated. In light of the content of the Understanding and the rights and obligations mutually accepted by both parties, the European Communities respectfully submits that the Understanding is indeed a "mutually agreed solution" to the banana dispute between Ecuador and the European Communities.

196. The European Communities considers that the inclusion in the text of the Understanding of the phrase "the EC and Ecuador consider that this Understanding constitutes a mutually agreed solution to the banana dispute" confirms the European Communities' interpretation of the legal status and effect of the Understanding.

102. (EC, Nicaragua and Panama) In paragraph 44 of their combined statement during the substantive meeting with the Panel, Nicaragua and Panama argue that "[t]he [first compliance] panel's second suggestion never absolved any discriminatory ACP tariff quota from the obligations of Article XIII, however the larger import regime might be structured. To the contrary, the panel, only paragraphs before, found the EC's exclusive ACP tariff quota, by its own specific shape and nature, to be a quantitative restriction covered by Article XIII:5 that failed to treat like products 'equally, irrespective of origin,' in violation of Article XIII. No subsequent compliance suggestion can be read to nullify that actual finding of law." Can Nicaragua and Panama elaborate on these arguments. Can the EC provide a reasoned answer as to whether it agrees with the argument.

197. The European Communities does not agree with this view of the first Article 21.5 panel's application of Article XII. In the first place, the phrase 'own specific shape and nature' does not appear in the panel's report. Secondly, the European Communities is not even certain what the phrase means in the context of tariff quotas, but will assume that the Nicaragua and Panama imply that the finding of breach of Article XIII regarding the tariff quota for ACP countries was made irrespective of whether or not other countries were subject to tariff quotas.

198. The European Communities notes that at paragraph 6.25 of that report, in application of the principles enunciated by the Appellate Body in Bananas III, the panel said:

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

199. Thus, it is evident that the panel in reaching its conclusion had explicitly in mind that tariff quotas were being applied to imports both from the ACP and from the MFN countries. Furthermore, this statement was made by way of introduction to the panel's analysis of the application of paragraphs 1 and 2 of Article XIII.

ANNEX D-3

RESPONSES BY BELIZE, CAMEROON, CÔTE D'IVOIRE, DOMINICA, DOMINICAN REPUBLIC, GHANA, JAMAICA, MADAGASCAR, SAINT LUCIA, SAINT VINCENT AND THE GRENADINES, AND SURINAME TO QUESTIONS POSED BY THE PANEL

86. (Both Parties, Belize, Cameroon, Côte d'Ivoire, Dominica, the Dominican Republic, Ghana, Jamaica, Madagascar, Saint Lucia, Saint Vincent and the Grenadines, and Suriname) In paragraph 31 of its statement during the substantive meeting with the Panel, Cameroon argues that "[c]'est un fait reconnu que les producteurs de bananes ACP sont moins compétitifs que les producteurs NPF. Comparés à ces derniers, les producteurs ACP produisent à un coût plus élevé. Pour des raisons historiques et géographiques, ils ne disposent pas des mêmes économies d'échelle que les producteurs NPF. Dès lors, les producteurs ACP ne peuvent les concurrencer que sur les marches où ils bénéficient d'un accès préférentiel." Can Cameroon provide evidence for its assertions?

There are various elements relating to the production of bananas and the placing on the market of bananas which determine the competitiveness of banana producers.

First, there are natural factors. In that respect, the ACP producers are in a worse position than the MFN producers, in particular with respect to the following elements :

- scarcity of land which is appropriate for growing bananas;
- the poor quality of the ground on which the bananas are grown;
- more significant temperature differences;
- the need to irrigate and drain the ground on which the bananas are grown;
- more frequent ground infestations, necessitating replanting every five or six years (compared with several decades for MFN countries).

Second, there are the economic and human factors in relation to which the ACP countries also find themselves in a worse position:

- higher input costs (fertilizers, treatment products, packaging, etc.). These costs are significant due to the lack of local producers of these input products;

- the impossibility of economies of scales due to the limited size of the plantations. Where the ACP country with the highest production annually exports around 250,000 tons only, Ecuador exports more than 4,000,000 tonnes.

- more expensive shipping costs due to the limited size of the volumes which are shipped and due to the insularity of the countries concerned, which does not allow producers and transporters to optimise costs;

As a result:

- the yields amount to around 40 tonnes per hectare in the ACP countries compared with 50 tonnes per hectare in MFN countries;

- the number of boxes obtained per stem of bananas is around 1 in ACP countries compared with 1.25 in MFN countries;

– the productivity of the workers is much higher in MFN countries than in ACP countries (0.7 man per ha in the MFN countries and 1.15 man per ha in the ACP countries).

As a result of the more limited yields and the higher costs, the banana producers in the ACP countries are less competitive than the banana producers in MFN countries. The less competitive position of ACP banana producers has also been noted by the President of Chiquita Europe in an interview in 2007 which was annexed to Côte d'Ivoire's Oral Statement.[1] The lack of competitiveness is also demonstrated by the fact that the ACP countries from the Carribean are unable to export to the US market which is geographically much closer than the EC market.

Can Belize, Côte d'Ivoire, Dominica, the Dominican Republic, Ghana, Jamaica, Madagascar, Saint Lucia, Saint Vincent and the Grenadines, and Suriname confirm that they agree with these specific assertions?

Yes.

Can Cameroon, Belize, Côte d'Ivoire, Dominica, the Dominican Republic, Ghana, Jamaica, Madagascar, Saint Lucia, Saint Vincent and the Grenadines, and Suriname specify the relevance of this argument, if any, in the context of its eventual analysis of Article XIII of the GATT 1994, in particular as regards the chapeau of Article XIII:2?

As a preliminary remark, Cameroon, Belize, Côte d'Ivoire, Dominica, the Dominican Republic, Ghana, Jamaica, Madagascar, Saint Lucia, Saint Vincent and the Grenadines, and Suriname (hereinafter referred to as the ACP third parties) would like to reassert that they do not consider Article XIII of the GATT to be relevant in the present case since no prohibition or quantitative restriction on imports of bananas exists and *a fortiori* no such prohibition or quantitative restriction is imposed by the EC on Ecuador or other MFN suppliers.

If, however, the Panel would reach the surprising conclusion that the cap of 775,000 tons imposed on the preferential tariff treatment granted to the ACP countries in the context of a flat tariff regime allowing unlimited supplies at the MFN rate is a restriction within the meaning of GATT Article XIII, it should, in order to interpret that provision, take into account that the limitation of 775,000 is a limitation <u>on a preference</u> covered by an Article I waiver. It is as such a disadvantage to the ACP countries which are the beneficiaries of the preference. Therefore, the shares which the ACP countries might be expected to obtain in the absence of such a restriction on their preferential access would be at a minimum equivalent to their current share. Indeed, the ACP countries would, in such a case, benefit from an unlimited preferential tariff access.

89. (Côte d'Ivoire) In paragraph 81 of its oral statement during the substantive meeting with the Panel, Côte d'Ivoire argues that "moins d'une année suffit pour produire et exporter des bananas". Can Côte d'Ivoire provide evidence for its argument?

In its Oral Statement, Côte d'Ivoire has indicated that "In 2007, the Center for International economics has postponed the outcome of its predictions to 2014 in order to explain the reasons of the failure of its forecasting model. According to it, projects would currently be ongoing in Mozambique and Angola. Why would we need to wait until 2014 to evaluate the results while less than a year is sufficient to produce and export bananas." If a project had been initiated in 2005 or beginning of 2006 when the European Communities implemented its new import regime, this new production would

[1] See also the Italtrend Report on "Etat des lieux et compétitivité des plantations de bananas en Côte d'Ivoire" and the Horus Report on "La banane africaine dans l'Union européenne", which are attached as an Annex to this Reply.

have been placed on the market around September 2006, consistent with the agronomic possibilities of this plant as demonstrated by the official information from the Agricultural Research Center for International Development (CIRAD) which is attached as an annex to this reply.[2]

92. (Suriname) In paragraph 10 of its statement during the substantive meeting with the Panel, Suriname argues that "[b]oth the Doha Waiver and the Understanding on Bananas were negotiated by the WTO Members, including the interested parties, after the DSB adopted is recommendations and rulings in the original Bananas dispute. These two instruments constitute new secondary WTO law and create an entirely new legal framework for the issues that are now pending before the Panel. These new instruments clearly strike a new balance of rights and obligations for the entire WTO membership, in addition to the parties to the dispute." Can Suriname elaborate on these arguments?

The legal background against which the WTO compatibility of the measures which are challenged in the present dispute needs to be assessed is radically different from the legal framework existing at the time the original *Bananas III* dispute was decided. This new legal framework now includes the Doha Waiver and the Understandings on Bananas.

The Understanding on Bananas is secondary WTO law to the extent that it is a mutually agreed solution putting an end to a dispute brought before the Dispute Settlement Body. The Understanding was duly notified to the DSB and is, indeed, referred to in the Doha Waiver.

The Doha Waiver is secondary WTO law since it is a decision by all WTO Members to grant a waiver of the obligations under Article I of the GATT in order to make the Cotonou preference possible.

These two new legal instruments must be taken into account to decide on the WTO compatibility of the new EC banana import regime. Since these two new instruments were not in existence at the time of the decision of the *Bananas III* dispute, it is clear that the legal framework has changed fundamentally. The adoption of these new legal instruments has modified the balance of rights and obligations for the WTO Members and as such constitutes a clear break in the chain of events between the original dispute and the new EC banana import regime. The legal analysis which must be carried out in examining the WTO compatibility of the new EC banana regime is therefore substantially different from the analysis carried out in the context of an Article 21.5 compliance review. The fact that any challenge of the new EC banana import regime must take place in the framework of new dispute settlement proceedings is also consistent with the Panel's findings in *Canada – Aircraft II* where it rejected Canada's argument that certain claims were not properly before the Panel and stated that *de novo* proceedings are appropriate where the matters are different or broader than those that were the subject of the original dispute (at para. 7.18)

The existence of this new legal background, i.e. the Understanding on Bananas and the Doha Waiver adopted to make possible the implementation of the Cotonou Agreement as opposed to the former Lomé Agreement, also means that the measures being challenged by Ecuador are not measures taken to comply with the recommendations and rulings of the DSB in the original *Bananas III* dispute. Indeed, these measures being challenged have been adopted to implement the commitments undertaken in the Understanding on Bananas and in the Doha Waiver which were adopted after the DSB issued its recommendations and rulings in the original *Bananas III* case. Any challenge of the new EC banana import regime should therefore be subject to new dispute settlement proceedings under Article 6 of the DSU.

95. (Ecuador and all third parties) In paragraph 6 of its oral statement during the substantive meeting with the Panel, Ecuador mentions that "Ecuador's per capita GDP for 2005

[2] Exhibit CI-1.

was about 8 per cent of the per capita average of the EC, and also is less than that of many of the ACP countries." In turn, in paragraph 16 of their combined statement during the substantive meeting with the Panel, Nicaragua and Panama state that Nicaragua's "Gross National Income of $910 is below the GNIs of several LDCs and well behind the GNIs of most ACP countries." Can Ecuador, Nicaragua and Panama provide the data sources that were used to make their respective assertions and specify the per capita GDP figures in those sources for Ecuador, the EC and the MFN suppliers and ACP countries that are participating as Third Parties in these proceedings? Can other Third Parties provide a reasoned answer as to whether they agree with the assertions made by Ecuador, Nicaragua and Panama?

Cameroon, Belize, Côte d'Ivoire, Dominica, the Dominican Republic, Ghana, Jamaica, Madagascar, Saint Lucia, Saint Vincent and the Grenadines, and Suriname consider that it is regrettable that Ecuador, in order to support its case, tries to create conflicts among developing countries and that it does not take into account the fact that, with respect to bananas, some countries clearly benefit from production conditions and distribution opportunities which are largely more favourable than those enjoyed by other countries.

In any case, Cameroon, Belize, Côte d'Ivoire, Dominica, the Dominican Republic, Ghana, Jamaica, Madagascar, Saint Lucia, Saint Vincent and the Grenadines, and Suriname consider that the GDP and the GNI are not decisive criteria in assessing the development of countries. If one wants to do so, it is more appropriate to refer to the development index elaborated by the United Nations in the framework of its development program. In the 2006 Human Development Report of the UNDP which is attached as an annex to this reply, Ecuador and the other MFN countries are ranked at a more developed level than most ACP countries.

103. (Cameroon) In paragraphs 16-19 of its oral statement during the substantive meeting with the Panel, Cameroon makes reference to a series of statistics about the volume of imports of MFN bananas to the EC. Can Cameroon provide its data sources?

Data concerning import volumes into the EC have been taken from Eurostat and were annexed to the ACP third party written submission.

Data concerning import volumes into the United States have been taken from USDA and were annexed to the ACP third party written submission.

The source of the data concerning wholesales prices is the European Commission. The price data used were annexed to the EC's first written submission as Exhibit EC-7.

105. (Côte d'Ivoire) In paragraphs 4 to 6 of its oral statement during the substantive meeting with the Panel, Côte d'Ivoire refers to trade statistics for the years of 2005 to 2007. Can Côte d'Ivoire provide its data source?

Data were taken from Eurostat and were annexed to the ACP third party written submission.

114. (Suriname) In paragraph 7 of its statement during the substantive meeting with the Panel, Suriname argues that "[t]o allow Ecuador to challenge the new EC banana import regime in the framework of Article 21.5 compliance proceedings *would be equivalent to ignoring the legal effects of the mutually agreed solution* reached between Ecuador and the EC". (emphasis added). In Suriname's view what are the main legal effects under the DSU of a mutually agreed solution reached between the parties to a dispute?

A mutually agreed solution has mainly two major legal effects.

First, a mutually agreed solution is the preferred way of settling a dispute which is the ultimate objective of the dispute settlement system. As stated by Article 3.7 of the DSU: "the aim of the dispute settlement mechanism is to secure a positive solution to a dispute. A solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred." By solving the dispute, the mutually agreed solution thus puts an end to the dispute with respect to which it has been agreed. As a result, subsequent measures that would be adopted in the same sector, for instance in order to implement the mutually agreed solution, cannot be challenged through compliance proceedings. Thus, the mutually agreed solution constitutes a bar to any further Article 21.5 proceedings. Any measures taken to implement the mutually agreed solution are no longer measures taken to comply with the recommendations and rulings of the original dispute. There is a break in the link between the recommendations and rulings of the DSB in the original dispute and subsequent measures adopted to implement a mutually agreed solution.

It has been argued by Ecuador that any solution which serves the purpose of Article 3 of the DSU should be consistent with the WTO rules. The solution agreed in the Understanding on Bananas between Ecuador and the EC was fully consistent with WTO rules. Indeed, it provides for the introduction of a tariff-only regime for imports of bananas no later than 1 January 2006 and requires that Ecuador lifts its reserve concerning the waiver of Article I of the GATT requested by the EC for the Cotonou preference. Thus, the solution envisaged in the Understanding is fully consistent with WTO rules. Whether the waiver covering the Cotonou preference is still valid taking into account the provisions and the terms of the waiver is a different issue which would need to be examined, if challenged, in the framework of new dispute settlement proceedings but not in the framework of Article 21.5 compliance proceedings.

Second, a mutually agreed solution is a binding international agreement whereby the parties are free to make concessions to achieve an acceptable balance of concessions between them. Parties negotiating a mutually agreed solution may go beyond the issues at stake in the specific dispute. A mutually agreed solution is in the first place an agreement between sovereign states which are free to accept and grant rights and obligations in areas other than those covered by the dispute in order to achieve an equitable overall balance. A mutually agreed solution is therefore not to be equated to the simple implementation of the recommendations and rulings of the DSB. For that reason, Article 3.7 DSU states "[i]n the absence of a mutually agreed solution, the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements". A mutually agreed solution, being an agreement between sovereign states, is binding upon its parties pursuant to public international law. Both parties have to comply with its terms in good faith and cannot put its terms into question thereafter.

As a final remark, it should be emphasized that the issue as to whether the Understanding on Bananas is a covered agreement under the DSU does not appear to be relevant. Indeed, the issue in the present case is not to examine whether the new EC banana import regime is consistent with the Understanding on Bananas, but about the legal effects of the Understanding on Bananas in subsequent proceedings, in particular in Article 21.5 proceedings, in the framework of the DSU. As noted by the Panel in *India – Autos*, "At the very least, the Panel sees merits in India's argument that **the issue** in this respect **is** not solely whether the mutually agreed solution is a covered agreement, **but rather**, **what effects it may have on the exercise of procedural rights under the DSU in subsequent proceedings**."(at para. 7.116)

In that case, India had argued that the issue was whether the DSU may be invoked again in respect of a matter formally raised under the DSU and settled through a mutually agreed solution. India's argument was based on the premise that the matter raised before the Panel was the same as the matter which had been settled through the mutually agreed solution and that this prevented from challenging it in the framework of **new dispute settlement proceedings**. The Panel, however, found that the

matter referred to it had not been settled by the mutually agreed solution. Thus, there was no need to rule on the legal effects of mutually agreed solutions.

The argument raised by the ACP third parties in the present case is different. The ACP Third Parties submit that the existence of a mutually agreed solution means that the original dispute has been settled and thus prevents the parties from challenging subsequent measures in the framework of **Article 21.5 proceedings**. However, it is similar to India's argument in *India – Autos* in the sense that it requires the Panel to rule on the effects which mutually agreed solutions may have on the exercise of procedural rights in subsequent proceedings. The DSU which is a covered agreement expressly refers to mutually agreed solutions. The Panel in the present case should thus determine the impact, in procedural terms, of the Understanding on Bananas in the Article 21.5 proceedings initiated by Ecuador. The ACP Third Parties submit that the Panel should conclude that this mutually agreed solution prevents Ecuador from challenging the new EC banana import regime in the framework of Article 21.5 proceedings.

115. (Suriname) In paragraph 8 of its statement during the substantive meeting with the Panel, Suriname argues that "Ecuador should not be allowed to bring this case before a compliance panel [because] the measures now challenged are not measures taken to comply with the recommendations and rulings of the original Panel [but] constitute an entirely new import regime. Can Suriname elaborate on the reasons why, in its view, the EC banana import regime challenged by Ecuador is not a measure taken to comply with the rulings and recommendations of the DSB in the original Bananas III case. It is because, as stated in paragraph 10 if the same statement, "[b]oth the Doha Waiver and the Understanding on Bananas were negotiated by the WTO Members, including the interested parties, after the DSB adopted its recommendations and rulings" or for some other reason? Please provide a reasoned response, making reference to any relevant legal sources.

Two points are relevant to explain why the EC banana import regime challenged by Ecuador in the present dispute is not a measure taken to comply with the recommendations and rulings of the DSB in the original *Bananas III* case.

First, the measure being challenged in the present dispute is radically different from the measure examined by the Panel and the Appellate Body in the original dispute: the new regime is a tariff-only regime while the previous regime was a quota regime whereby various quotas were allocated to various groups.

Second, the measure being challenged has not been taken to implement the recommendations and rulings of the DSB in the original *Bananas III* case but to implement the Understanding on Bananas and the Doha Waiver. The existence of this new legal framework which did not exist at the time the original dispute was decided breaks any possible link between the new EC banana import regime and the recommendations and rulings of the original dispute.

The above is confirmed by the minutes of the DSB. Once the Understandings on Bananas were concluded and notified to the DSB, at the regular DSB meetings, WTO Members did no longer refer anymore to the implementation of the recommendations and rulings of the DSB in the original *Bananas III* dispute but to the implementation of the Understandings. For instance, the representative of Ecuador, at the DSB meeting held on 16 May 2001(WT/DSB/M/105) stated that "[h]is country would follow closely the implementation of both Understandings reached by the EC in this case." Similarly, during the meeting of 20 June 2001 (WT/DSB/M/106), he indicated that "his country would monitor closely the implementation of the Understanding reached between the EC and Ecuador, which provided that a new banana regime based on tariffs would become effective in 2006. Ecuador would also monitor closely a transitional regime to be put in place in the meantime." In other

words, once the Understandings were agreed between the EC and Ecuador and the US, the issue became an issue about the implementation of the Understandings.

ANNEX D-4

RESPONSES BY BRAZIL TO QUESTIONS POSED BY THE PANEL

87. (Both Parties and Brazil) In paragraph 17 of its statement during the substantive meeting with the Panel, Brazil argues that a "Member is not exempted from discharging its burden of proof as regards the compliance of the new measures with the DSB recommendations and rulings even if such measures are intended to implement a suggestion by the panel". Can Brazil elaborate on this argument, and the parties provide a reasoned answer as to whether they agree with Brazil's argument.

The Appellate Body has already established that "in WTO dispute settlement, as in most legal systems and international tribunals, the burden of proof rests on the party that asserts the affirmative of a claim or defence".[1] In Brazil's opinion, "the EC's claim is based on nothing more than the Communities' own assertion that it has implemented a suggestion by a panel. By solely *declaring* – unilaterally – that the current import regime is compatible with the WTO rule because it derives from a suggestion made by the panel, the EC is not supporting its claim".[2]

In addition, the fact that the EC has chosen to bring its measures into compliance by supposedly implementing one of the panel's three suggestions does not lead to automatic compliance with the covered agreements, exempting the Communities from discharging its burden of proof. The EC remains to prove how and why the new measures comply with the DSB rulings and recommendations.

Contrarily to what the Communities purports, there is no automatic compliance in the DSU. In no provision does the DSU grant Members certainty as to the "lawfulness" of a measure taken to comply just because such measure is intended to implement a suggestion made by a panel. Neither does the DSU oblige Members to implement such a suggestion. Rather, the DSU sets out that those suggestions derive from a *discretionary right* conferred to panels and the Appellate Body. [3] This being the case, even if a panel or the Appellate Body makes a suggestion under Article 19.1 of the DSU, according to the WTO jurisprudence, "members remain free to choose how they implement the DSB recommendations and rulings".[4]

Moreover, as stressed by Brazil before the panel, "whether or not a Member's <u>intention</u> to comply meets the test of consistency with covered agreements is an assessment that should be left to a panel. That is so because even in the case a Member chooses to implement a suggestion by the panel, such a measure is still subject to an Article 21.5 review.[5] (…) [W]ithin Article 21 (…), the *declarations* of the implementing Member form an integral part of the surveillance of implementation, but they do not stand alone. Rather, *they are complemented by, and subject to, multilateral review within the WTO*".[6] (emphasis added)

Brazil reiterates that "if the EC's arguments were to prevail, they would lead to absurd results. If accepted, they would render Article 21.5 devoid of any significance, for the reason that any

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[1] See Appellate Body Reports in *Chile – Price Band System (Article 21.5 – Argentina)*, para. 134; *US – Wool Shirts and Blouses*, para. 335; and *EC – Sardines*, para. 270.

[2] See Brazil's third party oral statement, para. 8.

[3] See Appellate Body Reports *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, paras. 182 and 189.

[4] See Panel Report in *EC – Bananas III (Article 21.5 – Ecuador)*, para. 6.154.

[5] See Brazil's third party submission, para. 12.

[6] See Appellate Body Report in *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 70.

measure based on a panel's suggestion would automatically escape the test of consistency with the covered agreements. Thereby it would give the implementing Member a blanket waiver from proving that it has met its obligations and depriving the complaining party of any surveillance of the implementation process"[7].

95. (Ecuador and Third Parties) In paragraph 6 of its oral statement during the substantive meeting with the Panel, Ecuador mentions that "Ecuador's per capita GDP for 2005 was about 8 per cent of the per capita average of the EC, and also is less than that of many of the ACP countries". In turn, in paragraph 16 of their combined statement during the substantive meeting with the Panel, Nicaragua and Panama state that Nicaragua's "Gross National Income of $910 is below the GNIs of several LDCs and well behind the GNIs of most ACP countries". Can Ecuador, Nicaragua and Panama provide the data sources that were used to make their respective assertions and specify the per capita GDP figures in those sources for Ecuador, the EC and the MFN suppliers and ACP countries that are participating as Third Parties in these proceedings. Can other Third Parties provide a reasoned answer as to whether they agree with the assertions made by Ecuador, Nicaragua and Panama.

At the outset, it should be noted that Brazil has had no access to the figures used by Ecuador, Nicaragua and Panama in order to make such assertions. Notwithstanding, it is possible to affirm that the ACP group consists of African, Caribbean and Pacific countries that were, at some point in history, colonies or territories of European countries. To Brazil's knowledge, the fundamental criteria that determine the participation of a country in the ACP group would be the historical ties that link the ACP countries to some European nations. Those criteria being essentially of a political nature, it would not be impossible that social and economic conditions in other countries from either Latin America or other parts of the world are worse than those in some ACP countries.

[7] See Brazil's third party submission, para. 14.

ANNEX D-5

RESPONSES BY COLOMBIA TO QUESTIONS POSED BY THE PANEL

1. (Both Parties) In paragraph 39 of its third party submission, Colombia concludes that "the tariff level that would result in at least maintaining the conditions of competition between *MFN bananas and ACP bananas* is the difference between the price gap for MFN bananas (€97/tonne) and the price gap for ACP bananas (€86/tonne), or €11/tonne." Can the Parties provide a reasoned answer as to whether they agree with the argument raised by Colombia.

Colombia would like to take this opportunity to better explain the statement in paragraph 39 of its third party submission.

The use of the price-gap methodology provides an estimate of a tariff equivalent of a trade restriction. The larger the price-gap, the larger is the level of protection accorded to the domestic producers.

The difference between the price-gap of MFN bananas and the price-gap of ACP bananas for the EC market gives the relative commercial disadvantage of MFN bananas with respect to ACP bananas, on account of the trade restrictions imposed by the EC. A difference of zero means that the tariff equivalents are the same and the conditions of competition are equal. On the other hand, a large difference means that their tariff equivalents are wide apart, and it is a measure of the differences in conditions of competition of one supplier with respect to the other supplier.

Therefore, the €11/ton should be the margin of preference for ACP bananas in order to at least maintain the conditions of competition between MFN bananas and ACP bananas.

88. (Both Parties and Colombia) In paragraph 16 of its third party submission, Colombia argues that "[a]n applied tariff of €176/tonne does not constitute a 'rebinding' [under the Doha Waiver]." Can Colombia elaborate on this argument, and the Parties provide a reasoned answer as to whether they agree with it.

Pursuant to the Understanding on Bananas between the EC and Ecuador of 30 April 2001, the EC undertook– among other things – to initiate GATT Article XXVIII negotiations. This commitment was incorporated in two recitals of the "Decision of 14 November 2001" (WT/L/436) under which the EC was granted a waiver from Article I:1 of the GATT in order to provide preferential tariff treatment to products originating in ACP States. The relevant recitals state:

- "Noting that the implementation of the preferential tariff treatment for bananas may be affected as a result of GATT Article XXVIII negotiations"

- "Noting the assurances from the Parties to the Agreement that any re-binding of the EC tariff on bananas under the relevant GATT Article XXVIII procedures should result in at least maintaining total market access for MFN banana suppliers and their willingness to accept a multilateral control on the implementation of this commitment"

Additionally, the Annex to the waiver provides that if any interested party requests arbitration, "the mandate of the arbitrator shall be to determine … whether the envisaged *rebinding* of the EC tariff on bananas would result in at least maintaining total market access for MFN banana supplier ...".

For Colombia, measures that do not take the form of a binding in the EC's schedule cannot be considered as fulfilling the EC's commitments under the Doha Waiver.

To illustrate why this is so, let us assume that the EC has an applied tariff of €11/tonne[1], but does not commit itself to bind this tariff. Although this tariff level would certainly comply with the tariff level standard, this action does not rectify the matter. This is because the Annex to the Doha Waiver requires that the instrument used to ensure at least maintaining total market access for MFN bananas must take the form of a "rebinding". Autonomous or unilateral concessions which do not take the form of a binding are not envisaged in the Annex to the Doha Waiver. This is because the level of certainty and security of market access that is provided by an autonomous concession simply cannot be compared with the legally binding guarantee provided by a tariff binding in a Member's schedule. An autonomous concession cannot be enforced in ordinary dispute settlement proceedings under Article II of the GATT, and it does not give rise to negotiating rights under Article XXVIII of the GATT.

Furthermore, Colombia notes that,in paragraph 36 of its first award the Arbitrator ruled that "all EC WTO market-access commitments relating to bananas includes commitments incurred as a result of EC enlargement under Articles XXIV:6 and XXVIII of GATT 1994". In the negotiations regarding EC enlargement from fifteen to twenty five Member States, the EC has claimed that its applied tariff of €176 per metric ton amounts to adequate compensation for its enlargement. Since the €176 per metric ton tariff is not bound, the general level of reciprocal and mutually advantageous concessions envisaged in paragraph 2 of Article XXVIII of the GATT have not been re-established. Thus, by failing to alter its scheduled commitment on bananas, the EC has also failed to comply with commitments arising from its enlargement.

The foregoing is the elaboration of Colombia's prior statement that "[a]n applied tariff of €176/tonne does not constitute a 'rebinding' [under the Doha Waiver]." [Colombia notes that similar objections have been raised by Ecuador.[2]]

104. (Colombia and Panama) In paragraph 6 of its oral statement during the substantive meeting with the Panel, Cote d'Ivoire said that:

> **"Ces données statistiques révèlent que la plupart des pays NPF ont réduit leur approvisionnement du marché américain, dont ils sont les fournisseurs exclusifs, pour approvisionner davantage le marché européen. Ainsi:**
>
> - **En 2006, la Colombie a augmenté ses exportations vers l'Union Européenne de 59.000 tonnes par rapport à 2005 et diminué de 40 000 tonnes celles à destination des USA,**
> - **le Costa Rica a accru de près de 200.000 tonnes ses exportations vers l'Union Européenne et de 105.000 tonnes ses exportations vers les USA,**
> - **le Panama a préféré également accroître ses apports au marché européen de 29.000 tonnes alors que ses exportations vers les USA n'ont progressé que de 5.500 tonnes,**

[1] The tariff level that would maintain conditions of competition between ACP bananas and MFN bananas with 2002-2004 as the reference period. See first written submission of Colombia, Costa Rica, Ecuador, and Guatemala, 24 June 2005, footnote 84; Responses of Colombia, Costa Rica, Ecuador, and Guatemala to Question No. 3 from the Arbitrator, 22 June 2005.

[2] See second written submission of Ecuador, para. 34.

- **le Pérou a doublé ses exportations vers l'Union Européenne avec 22.400 tonnes alors qu'il n'a augmenté ses exportations vers les USA que de 2.700 tonnes."**

Can Colombia and Panama provide a reasoned answer as to whether they agree with the assertions made by Côte d'Ivoire.

First of all, Colombia wishes to underline the following finding of the Arbitrator in its first Award: "… it has been stated that tariff bindings under Article II of GATT 1994 represent generally, "commitments on conditions of competition for trade, not on volume trade" … Indeed, as far as market access opportunities provided through tariff concessions are concerned, all that is guaranteed for an exporting Member is an opportunity to enter the market of an importing Member under secure and predictable conditions (but not a guarantee to export certain volumes to that market)" (WT/L/616 paragraph 30).

Now, according to Eurostat, imports of bananas from Colombian to the EC-25 increased 69.257 tons or 7.8% from 2005 to 2006 and, according to Colombian statistics, Colombian exports of bananas to the United States decreased 46.700 ton or 8.9% for the same period. However, the increase in banana exports to the EC–25 is not necessarily related with the decrease in exports to the United States during the same period of time.

As Colombia explained during the Panel hearing, trade flows are explained by a number of factors, especially variations in conditions of supply and demand. Indeed, although the tariff rate for bananas in the United States is 0%, Colombian exports to the United States went down in 2006.

Variations in conditions of supply include improvements in the productivity of foreign suppliers, changes in the behaviour of competitive foreigner suppliers to the EU market, variations in conditions of supply for domestic producers and external shocks. Variations in the conditions of demand include changes in relative prices, appreciation of the Euro, substitution in consumption and increases in disposable income.

As stated in paragraph 24 of Colombia's third party submission, "it is impossible to isolate the impact of the measure at issue on trade flows from the myriad of other factors that constantly affect fluctuations in international trade (whether on the supply-side, demand-side or other)".

It is important for all parties to remember that the relevant issue before the Panel is whether the EC has at least maintained total market access for MFN Banana exporters. In this regard an improvement in the volume of exports to the EC does not establish that the EC is complying with its obligations under the Doha Waiver.

ANNEX D-6

RESPONSE BY JAPAN TO THE QUESTION POSED BY THE PANEL

106. (Japan) In paragraph 7 of its third party submission, Japan argues that it "understands the point here to be that the fact that *the EC's current import regime is the measure taken in accordance with the Understanding, that is, a mutually agreed solution, itself was not established at the time when Ecuador initiated this panel proceeding*. [Footnote omitted] Therefore, even if the EC's argument concerning the validity of the Doha Waiver for Article I of the GATT is justified in the later proceeding, and thus the EC's current import regime is established to be in compliance with the mutually agreed solution, there is still a merit in bringing this claim to the panel under Article 21.5 of the DSU" (Emphasis added). Can Japan elaborate on the emphasized part of the above argument.

1. The argument of Japan in paragraph 9 of its third party submission (paragraph 7 of its Executive Summary) relates to the EC's statement in paragraph 38 of its second written submission, to which Japan referred in its submission at footnote 15. The EC's statement in the said paragraph reads as follows: "[i]t is a *well established fact* that the current import regime more than maintains the market access of Ecuador and the other MFN countries and Ecuador already knew this *fact* when it initiated the current proceedings." (Emphasis added.) In this regard, even if the EC's argument is right in that the current import regime is consistent with the Understanding as long as it actually maintains the market access of MFN countries, Japan considers that the above-mentioned fact was not established when Ecuador initiated this panel proceeding, and thus, the fact that "the EC's current import regime is the measure taken in accordance with the Understanding" was not established, either.

2. Japan understands that, in this compliance panel, one of the core issues is the question whether or not the EC maintains a valid waiver from GATT Article I for implementing its preferential import regime in accordance with the EC-Ecuador "Understanding of Bananas." The validity of the waiver is subject to the fulfillment of the conditions set out in the Annex of the "Doha Waiver", and one of those conditions is that the EC's scheme "maintains total market access for MFN suppliers."

3. In Japan's view, the question whether the EC's import regime would result in maintaining the market access for MFN countries or not primarily requires a careful examination of the meaning of the term, "maintaining the market access", which does not seem so obvious in the context of the Doha Waiver. It was also an issue in the past two arbitration proceedings, whose mandate was to determine whether the proposed EC regime would preserve the market access for MFN countries: EC's calculation methodology for assessing the market access was much contended among the interested parties.

4. Moreover, Ecuador mentions that the current EC banana measures would not have found to meet the requirement of the waiver even if it had been proposed as the second EC proposal prior to 2006.[1] Japan believes that such Ecuador's comment indicates that Ecuador does not consider that the EC's current regime *actually* maintains the market access for MFN countries.

5. For the above reasons, Japan considers that the EC's statement that the "*fact* that the current import regime more than maintains the market access of Ecuador" is "*well established*" is too assertive and unilateral, and thus, in Japan's view, the fact the EC's current import regime was consistent with the Understanding was not yet established when Ecuador initiated this panel proceeding. Therefore, Japan believes that such a statement of the EC will not make Ecuador's claim without merit.

[1] Second written submission of Ecuador, para. 17.

ANNEX D-7

RESPONSES BY NICARAGUA AND PANAMA TO QUESTIONS POSED BY THE PANEL

The Governments of Nicaragua and Panama set forth below their written responses to the 25 September 2007 Questions of the Panel directed to Nicaragua and Panama, virtually all of which are posed to both countries in combination. In the two instances in which questions are posed to Nicaragua and not Panama, and the one instance in which a question is posed to Panama and not Nicaragua, the answers provided are the views of that country to which the question is addressed.

90. (Both Parties, Nicaragua and Panama) In paragraph 108 of their respective third party submissions, Nicaragua and Panama argue that "[t]he EC's €75/mt concession – *which from 1995 to 2005 covered all bound in-quota Latin American imports and informed the rate applicable to all other Latin American bananas entering the EC market* – has been the single most important banana concession in Schedule CXL. In contrast to *the prohibitive €680/mt rate, under which virtually no Latin American volumes have ever been entered,* the €75/mt concession is the only rate that enabled Latin American market access to the EC market from 1995 to 2005. Unless the €75/mt bound rate receives the full protections of GATT Article II, the entire value of the EC's mandatory Uruguay Round concessions will be nullified". (Emphasis added). Can Nicaragua and Panama provide evidence for their assertions. If MFN banana imports have increased under an applied tariff rate of €176/mt, as argued by the EC, how can this be reconciled with the statement that "a €75/mt concession is the only rate that enabled Latin American market access to the EC market from 1995 to 2005"? Can Nicaragua and Panama clarify what would be meant by "providing the full protections of GATT Article II" to the €75/mt tariff rate. Can Parties provide a reasoned answer as to whether they agree with the assertions made by Nicaragua and Panama.

This multi-part question asks that the statements in paragraph 108 of the third party submissions of Nicaragua and Panama be substantiated, related to market access under the current arrangement, and clarified as they relate to Article II "protections."

Paragraph 108

Paragraph 108 states that *as between* the EC's in-quota and over-quota concessions on bananas, MFN access during the years 1995-2005 was essentially only possible at the €75/mt in-quota rate, and not at the €680/mt over-quota rate. This same point was confirmed by the Arbitrator in 2005:

> [T]he economic effect of the EC tariff quotas for bananas is, in an analytical sense, comparable to a quota regime (non-tariff measure), as evidenced by the negligible volume of banana imports entering the European Communities at the out-of-quota tariff.[1]

[1] Award of the Arbitrator, *European Communities – The ACP-EC Partnership Agreement – Recourse to Arbitration Pursuant to the Decision of 14 November 2001*, WT/L/616, 1 August 2005 ("*AAI*"), para. 60; *see also* third party written submission of Panama, 20 August 2007 ("third party written submission of Panama"), n. 106; third party written submission of Nicaragua, 20 August 2007 ("third party written submission of Nicaragua"), n. 106.

To support that conclusion, the Arbitrator referenced information supplied by the EC indicating that:

> between 10,000 to 20,000 tonnes of bananas are imported out of quota every year. That represents about 0.3% of the total imports and they correspond to marginal imports of residual quantities, consisting for the most part of a few tonnes, in consignments. There is no consolidated information about their origin.[2]

Since Nicaragua and Panama were only commenting in paragraph 108 on MFN access under the rates bound in the EC's Schedule, MFN market access under the current deconsolidated arrangement was not intended to be addressed by the passage quoted above.

Market access under the current arrangement

On the issue of market access under the current arrangement, the position of Nicaragua and Panama remains as follows:

- As of 1 January 2006, the issue of market access lost all legal relevance when the waiver for bananas lapsed.

- Even if the waiver had not lapsed, the current EC arrangement – which represents a 135% increase in the €75/mt tariff applied to all MFN banana imports from 1995 to 2005, a 135% increase in the prior ACP and EBA margin of preference of €75/mt, and a 25,000 mt increase in the prior exclusive ACP tariff quota – fails on its face to preserve into the future total competitive opportunities as between MFN and EC producers, and MFN and ACP producers.

- The trade-flow and pricing arguments put forward by the EC find no place in the WTO's legal concept of market access. In any event, those selectively-presented, short-term data badly misrepresent the relative and evolving picture in the EC marketplace for MFN and ACP banana imports.

Article II protections

In stating that the EC's concessions are entitled to Article II protection, Nicaragua and Panama were making the point that the EC must uphold the guarantees built into Article II to give "security and predictability" to all, not just some, of its scheduled concessions.[3] Article II:1(a) ensures MFN banana-supplying Members that the EC will not accord import treatment less favourable than that provided for in its Schedule. Article II:1(b) ensures MFN suppliers that the EC will not apply a customs duty in excess of those provided for in its Schedule. By applying an ordinary customs duty far in excess of €75/mt to *all* imports of MFN bananas, the EC has breached both of those Article II protections.

91. (Both Parties, Nicaragua and Panama) In paragraph 19 of their combined statement during the substantive meeting with the Panel, Nicaragua and Panama argue that "[t]he EC

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[2] *AAI*, n.52.

[3] *See* GATT Panel Report, *Panel on Newsprint*, L/5680, adopted 20 November 1984, BISD 31S/114 ("*Newsprint*"), para. 52 (wherein the panel "*shared the view expressed before it relating to the fundamental importance of the security and predictability of GATT tariff bindings, a principle which constitutes a central obligation in the system of the General Agreement*.") (Emphasis added); and Appellate Body Report, *European Communities – Customs Classification of Certain Computer Equipment*, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, adopted 22 June 1998 ("*EC – Computer Equipment (AB)*"), para. 82 (wherein the Appellate Body stated that "Article II:1 of the GATT 1994 ensures the maintenance of the security and predictability of tariff concessions by requiring that Members not accord treatment less favourable to the commerce of *other* Members than that provided for in their Schedules.") (emphasis in original).

tariff, which was the EC's scheduled banana concession from 1963-1994, was the equivalent of about €80 per tonne." Can Nicaragua and Panama elaborate on this argument and provide evidence for their assertions, as appropriate. Can the Parties comment on the argument and assertions.

The full passage at issue in this question reads as follows:

> Access was possible [for Nicaragua] because those markets were encumbered by a simple tariff of 20% *ad valorem* and, in the case of Germany, no tariff at all. The 20% tariff, which was the EC's scheduled banana concession from 1963-1994, was the equivalent of about 80 Euro per tonne.

The level and duration of the prior EC banana concession from 1963 to 1990 was confirmed by the *Bananas III* panel: "From 1963, the EC had a consolidated tariff of 20 per cent ad valorem on bananas."[4] As regards MFN access under that former concession, most Latin American bananas entered the EC through the northern EC Member States.[5] Belgium, Denmark, Ireland, Luxemburg and the Netherlands all allowed MFN access subject only to the EC's 20% bound tariff rate. Germany, which accounted for approximately one-third of all MFN imports into the EC,[6] accorded pursuant to the Treaty of Rome a tariff-free quota for imports of bananas from all sources in an amount equivalent to Germany's total consumption (*i.e.* duty-free access for all imports).[7]

The estimated €80/mt referenced in the question above was derivatively calculated from the tariff conversions put forward in *Bananas III* and *Bananas II*:

- As stated in the *Bananas III* Report,

  > Guatemala and Honduras submitted data showing the following three-month average ad valorem equivalencies: (a) based on 1993 data: (i) ECU 100 per tonne - 30.03 per cent; and (ii) ECU 75 per tonne – 22.6 per cent."[8]

  The EC did not provide any contradictory data in that proceeding. Using these conversion ratios, a 20% bound rate would have approximated 75 ECU/mt.[9]

- In the *Bananas II* Report, the complainants submitted evidence showing that 100 ECU/mt equaled to over 25 per cent *ad valorem*.[10] Here, too, the EC did not submit evidence to the

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[4] Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Complaints by Ecuador, Guatemala and Honduras, Mexico, and the United States*, WT/DS27/R, adopted 25 September 1997, as modified by Appellate Body Report, WT/DS27/AB/R ("*Bananas III (Panel)*"), para. 3.31, *see also* Panel Report, *EEC – Member States' Import Regimes for Bananas*, 3 June 1993, unadopted, DS32/R ("*Bananas I*"), para 13.

[5] *Bananas I*, para. 12.

[6] *Id.*

[7] *Id.*, para 17.

[8] *Bananas III (Panel)*, para. 4.96.

[9] Guatemala and Honduras calculated the *ad valorem* equivalents for each of weeks 29-41 and then averaged those AVEs as shown in Exhibit N/P-1 (For purposes of this submission, Panama and Nicaragua have used the designation N/P-*x* to identify joint exhibits). If an average per metric tonne price for weeks 29-41 is used, the calculations would be as follows: 100 ECU ÷ 332 ECU/mt price = 30%; and 75 ECU ÷ 332 ECU/mt price = 22.6%.

[10] Panel Report, *EEC – Import Regime for Bananas*, 11 February 1994, unadopted, DS38/R ("*Bananas II*"), para. 24.

contrary.[11] Using that conversion as the reference point, a 20% bound rate would have approximated 80 ECU/mt.[12]

Whichever of these two calculations is used, the point remains that, *for decades*, Nicaragua had access to the northern EC markets free of duty in the case of Germany, and at a duty the equivalent of 75-80 ECU/mt in all other EC markets into which its product entered. Today, after winning multiple dispute settlement actions, Nicaragua faces a €176/mt ($4.33/box) customs burden; a €176/mt tariff disadvantage relative to the EC's preferred suppliers; and an exclusive ACP tariff quota in which Nicaragua has no right to participate. Thus, while ACP suppliers (most of which are economically far better situated than Nicaragua) have seen their discriminatory access advantages multiply, Nicaragua has seen its access opportunities deteriorate, so much so that its producers can no longer even enter the EC's banana market.

95. (Ecuador and all Third Parties) In paragraph 6 of its oral statement during the substantive meeting with the Panel, Ecuador mentions that "Ecuador's per capita GDP for 2005 was about 8 per cent of the per capita average of the EC, and also is less than that of many of the ACP countries." In turn, in paragraph 16 of their combined statement during the substantive meeting with the Panel, Nicaragua and Panama state that Nicaragua's "Gross National Income of $910 is below the GNIs of several LDCs and well behind the GNIs of most ACP countries." Can Ecuador, Nicaragua and Panama provide the data sources that were used to make their respective assertions and specify the per capita GDP figures in those sources for Ecuador, the EC and the MFN suppliers and ACP countries that are participating as Third Parties in these proceedings. Can other Third Parties provide a reasoned answer as to whether they agree with the assertions made by Ecuador, Nicaragua and Panama.

Nicaragua's Gross National Income ("GNI") of $910 for 2005 was obtained from the World Bank preliminary estimates set forth in Exhibit N/P-2. The updated World Bank data, also included in that Exhibit, reflect a slightly higher 2005 GNI for Nicaragua of $950, which is still well below the GNIs of most ACP countries. The requested per capita GDP figures for all Parties and Third Parties in this proceeding can also be found in Exhibit N/P-2.

96. (Ecuador and Nicaragua) In paragraph 6 of its closing statement during the substantive meeting with the Panel, the EC argues that "the draft dated 2 November 2001, which Nicaragua has attached to its third party submission as Exhibit N-1, provided that the Doha Waiver would be terminated automatically within two months after the notification of the arbitration award to the General Council. However, this provision was not included in the final version of the Doha Waiver. The link between the awards of the arbitrator and the termination of the Doha Waiver was abandoned." Can Ecuador and Nicaragua provide a reasoned answer as to whether they agree with the statement.

The EC is wrong in claiming that this preparatory waiver document shows that "the link between the awards of the arbitrator and the termination of the Doha Waiver was abandoned."[13] It proves exactly the contrary.

The document to which the EC is referring was a relatively early version of the draft banana provisions of the waiver.[14] Developed by the EC, not the MFN supplying countries, it was put

[11] *Id.*, para. 134.

[12] 100 ECU ÷ 400 ECU/mt price = 25%; and 80 ECU ÷ 400 ECU/mt price = 20%.

[13] Closing statement of the European Communities, 19 September 2007, para. 5.

[14] *See* Council for Trade in Goods, *European Communities – The ACP-EC Partnership Agreement: Revision* (Communication from the European Communities), G/C/W/187/Add.2/Rev.1, 2 November 2001. Both

forward before the notion of an Annex had even emerged. As evidenced by its proposed text, the EC already well understood by the time this version was put forward that absent a "*multilateral control*" on "*any re-binding*,"[15] and a waiver termination provision linked to that multilateral control,[16] this waiver would not be approved.

The two-month termination provision in the EC's proposed text was an early iteration of what later became the waiver's mandatory termination provision "upon entry into force of the new EC tariff regime." The EC used the phrase "two months after the notification of the arbitration award" for the simple reason that under the approach it was proposing, there were still no requirements as to when the arbitration procedure would need to begin and end. Indeed, the EC was still envisioning in this draft that arbitration would occur *after* the new regime took effect, and, thus, framed the waiver standard in the present tense, not the future conditional tense (*i.e.* "does not result in ... ," rather than "would result in ..."), and pegged the termination provision to the notification of the award, whenever that might occur.

None of the MFN drafters was willing to accept this imprecisely defined EC draft.[17] As subsequent drafts and the final waiver text made clear, they insisted, instead, on more elaborated, carefully sequenced procedures entailing consultations and two rounds of arbitration that would have to be concluded in their entirety *before* the regime took effect.[18] Once the arbitration provisions were refined by the negotiators to require a conclusion of all procedures before 2006, the waiver termination provision, which remained an absolute prerequisite throughout this drafting period, was necessarily also refined to take effect "upon entry into force of the new EC tariff regime."

The EC, having already acknowledged in its earlier draft the necessity of a lapsed waiver linked to arbitration, cannot be allowed to claim now that the *strengthened* final text of the waiver no longer contained that same linkage and granted, instead, blanket authority to the EC to install whatever regime it wanted to as of 2006.

97. (Ecuador, Nicaragua and Panama) What are exactly, in your view, the current binding concessions that the EC has, relating to bananas? Is it the TRQ as described in the EC's Schedules LXXX and CXL; is it a single duty of €75/mt; or is it rather something else? If it was a single duty of €75/mt, please explain why the Panel should consider that the 2.2 million mt volume and the out-of-quota duty of €680/mt are not a relevant part of the EC's current concessions.

The EC's in-quota concessions are €75/mt for 2.2 million mt; its over-quota concession is €680/mt. The continuing effect of those concessions, in their entirety, is confirmed by Sections 1A and 1B of the EC's Schedule; by the findings of *Bananas III*; by the findings of the 2005 Arbitrator,

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Nicaragua and Panama attached this document to their third party written submissions as Exhibit N-1 and Exhibit P-1, respectively.

[15] *Id.*, Noting Clause 3 in the same document.

[16] *Id.*, 3ter.

[17] There were several other elements of this draft that the Latin American negotiators considered unacceptable, including: (i) a waiver access standard expressed as an "aim," not a requirement (3bis); (ii) an access standard that protected both MFN and ACP suppliers, not just MFN suppliers (3bis, 3ter); (iii) an access standard that would be analyzed by the Arbitrator after the fact ("does not result in"), rather than prospectively ("would result in ..."); and (iv) an access standard that would only be measured "at the time of the re-binding," not over time (3ter). The MFN negotiators insisted on striking every one of these proposed EC elements. By replacing (i) and (iii) above with the final waiver text, the MFN negotiators were further reinforcing the unseverable link between the pre-2006 arbitration awards and the termination of the waiver.

[18] *See* Draft EC Proposal for Article I waiver, 11 November 2001, in Exhibit P-1 and Exhibit N-1; Ministerial Conference, *European Communities – The ACP-EC Partnership Agreement*, WT/MIN(01)/15, 14 November 2001, WT/L/436 ("Article I waiver"), Annex in Exhibit EC-2.

and by the EC's own common, consistent, discernable pattern of acts and pronouncements evidenced throughout the period in which those bindings have been in effect.[19]

It bears noting that these EC Uruguay Round concessions were for the EC of 12. There are now 15 other EC Member States. The great majority of those 15 Member States had an incidence of bound duties and regulations on banana imports prior to accession that was *far* less restrictive than the incidence of banana duties and restrictions applied following accession.[20] The EC has yet to fulfil its GATT Article XXIV obligation to adjust its Uruguay Round concessions (or provide compensation) to redress these accession abrogations.

98. (Ecuador, Nicaragua and Panama) Does the Framework Agreement on Bananas (BFA) include "terms, conditions or qualifications" to the EC's relevant concession on bananas in the sense of Article II(1)(b) of the GATT?

As defined by prior cases, the phrase "terms, conditions or qualifications" used in GATT Article II:1(b) covers qualifying restrictions or conditions made to the substantive content or scope of concessions[21] that do not otherwise diminish a Member's multilateral obligations.[22] The BFA does not include "terms, conditions or qualifications" to the EC's relevant concessions in the sense of Article II:1(b).

The so-called "terms and conditions" alleged by the EC were not even a part of the BFA. As explained in the third party submissions and oral statements of Nicaragua and Panama, the BFA contained no qualification of any sort relating to the continuing effect of the EC's in-quota concessions.[23] This plurilateral "agreement," signed well before the EC's Uruguay Round Schedules were even finalized, primarily related to country allocations and the administration of those allocations under terms favourable to the four Latin American signatories. While that plurilaterally "*agreed system*" and "*agreement*" were qualified by the termination language of paragraph 9, the BFA nowhere stated that the EC's multilaterally-required "current access" *concessions*, which the EC still separately needed to schedule in the Uruguay Round, would be null and void as of 2003.

As regards the numerous tariff-quota allocation, re-allocation, and administrative provisions of the BFA that were not otherwise addressed in the EC's attempted termination claim, these were all found to be inconsistent with the EC's WTO obligations in the 1997 *Bananas III* rulings.[24] The illegality of those provisions prevented them from being "terms, conditions or qualifications" in the sense of Article II(1)(b).

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[19] Third party written submission of Panama, paras. 99-100; third party written submission of Nicaragua, paras. 99-100.

[20] *E.g.*, Prior to 1995, Austria, Finland, and Sweden accorded unlimited bound duty-free access to banana imports. Likewise, prior to 2004, most of the ten Central and Eastern European countries accorded bound zero-duty or low-duty access to banana imports. None of the 15 countries that acceded to the EC from 1995 forward accorded preferential access to the ACP.

[21] Appellate Body Report, *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, WT/DS103/R, WT/DS113/R and Corr. 1, adopted 27 October 1999, para. 134.

[22] Appellate Body Report, *European Communities – Measures Affecting the Importation of Certain Poultry Products*, WT/DS69/AB/R, adopted 23 July 1998, para. 98; and *Bananas III (Panel)*, paras. 7.113-7.114.

[23] Third party written submission of Panama, para. 95; third party written submission of Nicaragua, para. 95; Oral Statements of Panama and Nicaragua, para. 50.

[24] *See Bananas III (Panel)*, para. 7.399; Appellate Body Report, *European Communities – Regime for Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted 25 September 1997 ("*Bananas III (AB)*"), para. 255.

99. (Ecuador, Nicaragua and Panama) Do you agree with the EC that a Member could, through a "term, condition or qualification" on a concession that was included in its Schedule and accepted by the other Members, provide for the elimination of a bound TRQ?

Although no WTO case has yet examined the issue of whether a Member in the Uruguay Round was entitled to insert a "term, condition or qualification" into its Schedule that would later eliminate an agricultural current-access tariff quota, it is hard to see how a scheduled elimination of *any* current-access quota would be consistent with the Uruguay Round reform process and the WTO *Agreement on Agriculture* ("*AoA*"). Unlike the circumstances in the *US – Sugar Waiver* case, where request-and-offer concessions in the Annecy Round were at issue, the issue here is a current-access tariff quota formed pursuant to the Uruguay Round Draft Modalities. The "tariffication" principles of those Draft Modalities "*required* [Members] *to maintain*, for tariffied products, current import access opportunities at levels corresponding to those existing during the 1986-88 base period."[25] As confirmed in the *AoA* itself, the objective of the tariffication process was to enable the "substantial progressive reduction in agricultural ... protection ... over an agreed period of time."[26] The *Bananas III* Appellate Body considered this reform objective to be embodied in *AoA* Article 4.1:

> 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.*[27]

If the "agricultural reform process" underlying the *AoA* and the principle of "significant, new market access concessions" acknowledged in *AoA* Article 4.1 are to have meaning, they should, at a minimum, be read to create a presumption against a scheduled revocation of the very same current-access opportunities that were required in that "agricultural reform process." Absent a showing by the Member alleging the revocation that (i) it had *expressly* notified the Membership of its intention to deny future current-access opportunities, and (ii) the Membership had *expressly* authorized that intention, a Uruguay Round "term, condition or qualification" that revoked "current access" should not otherwise be allowed.

Nicaragua and Panama are aware of no current-access revocation authority extended to *any* agricultural product during the Uruguay Round. To the contrary, where there were "special treatment cases" under the access modalities (all of which related to rice), these were specifically delineated in Annex 5 of the *AoA*, and required minimum-access opportunities and reform over time.

In the case of bananas, not only was there no express authority from the Membership to revoke the EC's in-quota concessions, none of the five BFA signatories themselves understood at that

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[25] Third party written submission of Panama, para. 80, n. 89; third party written submission of Nicaragua, para. 80, n. 89 (emphasis added).

[26] *Id.*, para. 81, n.90.

[27] *Bananas III (AB)*, para. 156 (emphasis added).

time, or in the 13 years thereafter, that the in-quota concessions would terminate. The EC's own consistent validation of the in-quota bindings throughout the years confirms this was so.

As to the non-BFA countries, it bears noting that the EC submitted the BFA as a Corrigendum to its Schedule on 29 March 1994, *4 days after* the end of the Uruguay Round schedule verification process was closed.[28] It is impossible to see how the entire Membership can now be held subject to BFA provisions that most had never seen before the Schedules closed and that, in any case, contained no language anywhere within its four corners that expressly terminated the EC's Section 1B Uruguay Round concessions on this product.

100. (Ecuador, Nicaragua and Panama) In paragraph 79 of its second written submission, the EC argues that:

> **"[I]n paragraph 59 of its second written submission, Ecuador argues that 'it is scarcely likely that the negotiators of the BFA would consider as satisfactory solution a system that as of 2003 would leave all their banana exports to the EC subject to an essentially prohibitive duty of €680/mt'. This statement is in full contradiction with paragraph 25 of Ecuador's second written submission, where it is stated that 'in every negotiation parties strive for a balance of benefits, but the reality does not always turn out as the negotiators were expecting or assuming at the time of the negotiations. It would destabilize the entire premise of the WTO tariff system of concessions were to be adjusted according to whether the concessions had the result contemplated at the time that the concession was granted'. Perhaps Ecuador should explain whether its statement in paragraph 25 is correct, in which case it would lose its Article II claims, or whether its statement in paragraph 59 is correct, in which case it would lose its Article I claims."**

Can Ecuador, Nicaragua and Panama provide a reasoned answer as to whether they agree with the EC's arguments.

The two quoted statements are addressing two entirely unrelated points, are in no respect contradictory, and are both correct.

First statement

The first statement ("it is scarcely likely that the negotiators of the BFA would consider a satisfactory solution a system that, as of 2003, would leave all their banana exports to the EC subject to an essentially prohibitive duty of 680 €/mt") is a point that Nicaragua and Panama themselves made in their third party submissions. It is a point that correctly highlights the absurdity of inferring into the BFA a "term, condition or qualification" (*i.e.* prohibited access as of 2003) that would nullify the BFA's sole purpose of improving access in order to "settle" *Bananas II*.

The statement's underlying point – that texts cannot be read in a way that leads to absurd results – is equally valid in the case of Ecuador's Article I claim. Like the EC's BFA reading, the EC's assertion that it was free to establish a regime of its own choosing after two rounds of exhaustive arbitration would absurdly nullify the Annex's sole purpose of requiring a "multilateral control" on "*any* rebinding." The principle of effectiveness being asserted in Ecuador's first statement, thus, broadly upholds Ecuador's Article I claim, not causes it to fail.

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[28] *See* Trade Negotiations Committee, *Informal Meeting of Heads of Delegation*, 20 January 1994, MTN.TNC/W/131; Trade Negotiations Committee, *Informal Meeting of Heads of Delegation*, 24 March 1994, MTN.TNC/W/139, 29 March 1994; *EC – Computer Equipment (AB)*, para. 95, n.92.

Second statement

The second statement ("in every negotiation parties strive for a balance of benefits, but the reality does not always turn out as the negotiators were expecting or assuming at the time of the negotiations") was made by Ecuador in response to the EC's argument that Ecuador's interpretation of the waiver would lead to an "unreasonable" result. The "unreasonable" result alleged by the EC was one under which the EC would still be able to benefit from the waiver even if the Arbitrator had validated a proposed rate that later caused MFN volumes to diminish.

Ecuador's second statement draws an analogy to Article II to make the point that even if the EC's hypothetical occurred, it would not have been "unreasonable" under GATT practice. Ecuador correctly notes that whenever countries set concessions, they have no advance certainty as to the impact those concessions will have on future trade flows. As the *Oilseeds* panel confirmed, Article II can only be read to protect "competitive conditions" because governments can neither "predict with precision what the impact of their interventions on import volumes will be ... ,"[29] nor later determine whether the trade impact "following a change in policies is attributable to that change or to other factors." Ecuador was, thus, simply saying that the Annex's prospective assessment of conditions of competition, which the Arbitrator was required to apply under the ordinary meaning of its text, entailed an orientation broadly comparable to that used when rights are established under Article II on the basis of a prospective assessment of conditions of competition. Hence, there was nothing "unreasonable" or irregular about this orientation.

The EC's proposed reading, on the other hand – under which the EC would be free to establish whatever arrangement it wants to following two rounds of exhaustive arbitration based on its unilateral assessment of "real world" trade flows at some post-2006 point in time – truly would be unreasonable and contrary to WTO practice. There is nothing in the WTO rules or prior cases that would support an *ad hoc* volume assessment of a "new tariff regime" (indeed, an autonomous one) *after* it has already taken effect.

The issue present in Ecuador's second statement – *i.e.* the necessity and appropriateness of assessing an "envisaged rebinding" prospectively, rather than after the fact – is entirely unrelated to Ecuador's Article II argument. In the case of the EC's scheduled concessions, the MFN suppliers could not possibly have assessed prospectively a 680 €/mt stand alone tariff for the simple reason that there was no such stand-alone concession to assess. The EC's assertion that Ecuador's second statement causes Ecuador to "lose its Article II claim," is, thus, an unfortunate confusion of both that second statement and the Article II claim itself.

101. (Ecuador, Nicaragua, Panama and the US) In paragraph 4 of its closing statement during the substantive meeting with the Panel, referring to the alleged termination of the Doha Waiver, the EC argues that "[i]f the Doha Waiver wanted to say what Ecuador, Nicaragua and Panama are arguing, the text should have read that the waiver would terminate 'if the *Arbitrator concludes* that the EC has failed to rectify the matter'. The Doha Waiver does not say so." Can Ecuador, Nicaragua and Panama provide a reasoned answer as to whether they agree with this statement. Could the US comment on the same, in the light of its argument in paragraph 21 of its statement during the substantive meeting with the Panel, reproduced in the previous question.

Tiret five did not have to use the words "*the Arbitrator concludes that*" because those words were already obviously captured by sentences three, four, and five of that tiret.

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[29] GATT Panel Report, *European Economic Community – Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins*, L/6627, adopted 25 January 1990, BISD 37S/86 ("*EEC –Oilseeds I")*, paras. 150-151.

As demonstrated in the third party submissions of Nicaragua and Panama, the EC had two ways to "rectify the matter" under tiret five. It could reach a "mutually satisfactory solution" with the interested parties prior to the Second Arbitration or, in the absence of a mutually satisfactory solution, it could receive a Second Arbitration determination that it "has rectified the matter."

Sentences two and three of tiret five ("Within 10 days of the notification of the arbitration award to the General Council, the EC will enter into consultations with those interested parties that requested the arbitration. In the absence of a mutually satisfactory solution, the same arbitrator will be asked ...") address the "mutually satisfactory solution" option. Read together they make clear that if a Second Arbitration is initiated, a "mutually satisfactory solution" is no longer an option achievable under the timetable called for by the Annex.

The ensuing sentences, thus, speak solely to the second rectification option, a Second Arbitration ("... the same arbitrator will be asked to determine, within 30 days of the new arbitration request, whether the EC has rectified the matter. The second arbitration award will be notified to the General Council. If the EC has failed to rectify the matter, this waiver shall cease to apply to bananas upon entry into force of the new EC tariff regime."). In the last of those sentences, the phrase "if the EC has failed to rectify the matter" conspicuously repeats the same past-perfect formulation of the Second Arbitration's terms of reference defined in sentence three ("whether the EC has rectified the matter"). The replicated terms of reference in sentence five, following two sentences that solely and explicitly relate to the Second Arbitration, instil the phrase "if the EC has failed to rectify the matter" with a meaning identical to "if the Arbitrator concluded that the EC has failed to rectify the matter." Indeed, the Arbitrator fulfilled that very meaning by determining the EC "has failed to rectify the matter" in its final determination. [30]

There is a special irony in the EC's query as to why the fifth sentence did not state "if the Arbitrator concludes." Whereas Ecuador, Nicaragua, Panama, and the Untied States can easily demonstrate that those words were redundant under the ordinary meaning of tiret five, the EC cannot possibly explain why the drafters neglected to write into tiret five the numerous words needed to substantiate its tortured reading (*i.e.* "*only if the EC implements the exact arrangement invalidated in Arbitration, or forgets to declare another regime of its own choosing 'rectified,'*" will the waiver cease to apply). Not a single word or passage of the Annex supports that alleged meaning.

102. (EC, Nicaragua and Panama) In paragraph 44 of their combined statement during the substantive meeting with the Panel, Nicaragua and Panama argue that "[t]he [first compliance] panel's second suggestion never absolved *any* discriminatory ACP tariff quota from the obligations of Article XIII, however the larger import regime might be structured. To the contrary, the panel, only paragraphs before, found the EC's exclusive ACP tariff quota, *by its own specific shape and nature,* to be a quantitative restriction covered by Article XIII:5 that failed to treat like products 'equally, irrespective of origin,' in violation of Article XIII. No subsequent compliance suggestion can be read to nullify that *actual* finding of law." Can Nicaragua and Panama elaborate on these arguments. Can the EC provide a reasoned answer as to whether it agrees with the argument.

In a number of carefully reasoned passages, the *Bananas III (Article 21.5 – Ecuador)* panel explicitly found the EC's exclusive ACP tariff quota, by its own specific shape and nature, to be a quantitative restriction covered by Article XIII:5 that failed to treat like products "equally, irrespective of origins" in violation of Article XIII:

[30] Award of the Arbitrator, *European Communities – The ACP-EC Partnership Agreement – Second Recourse to Arbitration Pursuant to the Decision of 14 November 2001*, WT/L/625, 27 October 2005 ("*AAII*"), para. 127.

- In response to the EC's claim that the ACP tariff quota constitutes an "upper limit on a tariff preference and is not a tariff quota subject to Article XIII," the panel confirmed that the reserve was definitionally a tariff quota covered under Article XIII:

> Article XIII:5 provides that the provisions of Article XIII apply to "tariff quotas". The European Communities essentially argues that the amount of 857,700 tonnes for traditional imports from ACP States constitutes an upper limit on a tariff preference and is not a tariff quota subject to Article XIII. *However, by definition, a tariff quota is a quantitative limit on the availability of a specific tariff rate. Thus, Article XIII applies to the 857,700 tonne limit*.[31]

- In response to the EC's claim that the ACP tariff quota is unreviewable under Article XIII because it constitutes a "regime" separate and distinguishable from the MFN tariff arrangement, the panel found that the "separate" ACP arrangement was still necessarily covered by the non-discrimination obligations of Article XIII:

> The issue here is not whether the European Communities is correct in stating that two separate regimes exist for bananas, but whether the existence of two, or more, separate EC import regimes is of any relevance for the application of the non-discrimination provisions of the GATT 1994 and the other Annex 1A agreements. *The essence of the non-discrimination obligations is that like products should be treated equally, irrespective of their origin. As no participant disputes that all bananas are like products, the non-discrimination provisions apply to all imports of bananas, irrespective of whether and how a Member categorises or subdivides these imports for administrative or other reasons.* If, by choosing a different legal basis for imposing import restrictions, or by applying different tariff rates, a Member could avoid the application of the non-discrimination provisions to the imports of like products from different Members, the object and purpose of the non-discrimination provisions would be defeated. It would be very easy for a Member to circumvent the non-discrimination provisions of the GATT 1994 and the other Annex 1A agreements, if these provisions apply only within regulatory regimes established by that Member.[32]

Since the foregoing findings would be nullified by the EC's contention that the panel's "second suggestion" absolves the current exclusive ACP tariff quota of all GATT Article XIII obligations, that EC reading of the suggestion cannot be correct.

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[31] Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 of the DSU by Ecuador*, WT/DS27/RW/ECU, adopted 6 May 1999 ("*Bananas III (Article 21.5 – Ecuador)*"), para. 6.20. (Emphasis added.)

[32] *Id.*, para. 6.24 quoting *Bananas III (AB)*, para. 190. (Emphasis added.)

QUESTIONS ADDRESSED TO THIRD PARTIES

104. (Colombia and Panama) In paragraph 6 of its oral statement during the substantive meeting with the Panel, Cote d'Ivoire said that:

> **"Ces données statistiques révèlent que la plupart des pays NPF ont réduit leur approvisionnement du marché américain, dont ils sont les fournisseurs exclusifs, pour approvisionner davantage le marché européen. Ainsi:**
>
> - **En 2006, la Colombie a augmenté ses exportations vers l'Union Européenne de 59.000 tonnes par rapport à 2005 et diminué de 40 000 tonnes celles à destination des USA,**
> - **le Costa Rica a accru de près de 200.000 tonnes ses exportations vers l'Union Européenne et de 105.000 tonnes ses exportations vers les USA,**
> - **le Panama a préféré également accroître ses apports au marché européen de 29.000 tonnes alors que ses exportations vers les USA n'ont progressé que de 5.500 tonnes,**
> - **le Pérou a doublé ses exportations vers l'Union Européenne avec 22.400 tonnes alors qu'il n'a augmenté ses exportations vers les USA que de 2.700 tonnes."**

Can Colombia and Panama provide a reasoned answer as to whether they agree with the assertions made by Côte d'Ivoire.

Panama does not accept the assertions made by Côte d'Ivoire on either legal or factual grounds.

As a legal matter, the issue of market access to the EC market no longer has relevance under GATT Article I. Even if it had relevance, a Member's volume performance is not part of the WTO's legal concept of "market access." Conditions of competition (in this case, "as applied" conditions of competition between MFN and EC producers, and MFN and ACP producers) are what is covered by that term. A regime that installs a 135% increase in the €75/mt tariff on MFN bananas applied from 1995 to 2005, a 135% increase in the prior ACP and EBA margin of preference of €75/mt, and a 25,000 mt increase in the prior exclusive ACP tariff quota cannot be considered to preserve prior conditions of competition.

Even on purely factual grounds, the Ivory Coast's selective reference to Panama's export levels conveys a distorted impression of the EC market. In 1999, when the EC became obligated to come into compliance with *Bananas III*, Panama's banana exports to the EC were 465,000 mt.[33] Panama's EC exports have systematically dropped in virtually every year since then, reaching only 311,000 mt in 2006. This represents *a 33% decline* since 1999. The picture for the group of ACP suppliers, on the other hand, is exactly the reverse. The ACP saw their 1999 export volume of 688,000 mt systematically grow to 891,000 mt in 2006, reflecting *a 30% increase* since 1999. The graph set forth in Exhibit N/P-3 portrays these strikingly divergent market trends.

107. (Nicaragua) Since Nicaragua was a party to the negotiations of the Framework Agreement on Bananas (BFA), can Nicaragua clarify what was, in its view, the purpose and

[33] Exhibit N/P-3.

meaning of paragraph 9 of the BFA. More specifically, what is the precise (nature of the) "agreement" that "shall apply until 31 December 2002"?

Paragraph 9 of the BFA states that "*[t]his agreement* shall apply until 31 December 2002."[34] For reasons relating to the nature of the BFA (and for the interpretive reasons separately addressed in Nicaragua's third party submission, oral statement, and response to Question 110 below), Nicaragua and the other BFA signatories included paragraph 9 to terminate the plurilateral "agreement" itself by 2003, but certainly not to terminate the separate multilateral concessions set forth in the EC's Schedule.

The "agreed system" laid down in the BFA included a number of administrative provisions for allocating and reallocating quantities under the EC's banana tariff quota. All signatories recognized the complexity of that "agreed system." Its export quota-allocation, quota-transferability, and licensing rules, which themselves were complex, had to be integrated into the equally complex import-quota and licensing rules of Regulation 404. The signatories recognized, too, that the EC's future enlargements, referenced in paragraph 1 of the BFA ("... subject to any increase resulting from the enlargement of the Community"), would compound the administrative challenge and require regulatory adaptations to ensure proper implementation of the BFA's "agreed system."

Because of these various complexities and future developments, and the EC's insistence that the Latin American signatories agree to a "peace clause" throughout the duration of the BFA, Nicaragua and the other signatories considered a termination date to be prudent. The termination provision was to serve as a check, or quality control, on the functioning of the "agreed system," and a backstop to ensure that the rights of the Latin American signatories would continue to be upheld as the EC Member States grew in number. Thus, when the BFA signatories stated in paragraph 9 that "*[t]his* agreement shall apply ...," they meant simply that the *BFA itself* would terminate. They never once contemplated a termination of the multilateral concessions separately contained in the EC's Schedule.

Indeed, because the BFA, by its very nature, was a plurilateral agreement, it *could not have* set a limitation on the multilateral concessions contained in the EC's Schedule. The five signing countries, which reached this agreement before the EC had even officially scheduled its multilateral banana commitment, had no legal authority to invalidate future multilateral concessions. If Members were free to pre-empt concessions on a bilateral or plurilateral basis, the global trading system of multilateral concessions would lose the certainty, security, and predictability guaranteed under GATT Article II.[35]

108. (Nicaragua and Panama) In paragraph 6 of their respective third party submissions, Nicaragua and Panama state that:

> **"when the EC contends in this proceeding that its current measures fulfil its important 'international development efforts,' it is conspicuously obscuring the paramount objective underlying the measures at issue, the protection of its own heavily subsidized production". (Footnote omitted)**

Could Nicaragua and Panama elaborate on such statement and explain in what manner, if any, such circumstance would become relevant for the Panel's analysis in the current proceedings.

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[34] Emphasis added.

[35] *See EC – Computer Equipment (AB)*, para. 82; *Newsprint*, para. 52.

The EC's banana regime's objective of ensuring the "satisfactory marketing of bananas produced within the Community"[36]

The EC produces bananas in Spain (the Canary Islands), France (Guadeloupe and Martinique), Portugal (continental Portugal, Madeira, and the Azores), Greece (Crete), and Cyprus.[37] Despite only modest production levels, EC producers have for decades insisted on support and market protections to insulate local production from external competition.

Regulation 404 was premised on the guarantee that bananas produced in the EC would not be "place[d] in a worse situation" than before the introduction of the Common Market Organization ("CMO") and would be "disposed of on the Community market providing an adequate income for [EC] producers."[38] Those pre-eminent CMO guarantees, while not emphasized when the EC externally defends its banana policies, have guided the structure of the EC's successive banana regimes since 1993.

To ensure remunerative prices for EC-grown bananas, the EC's original banana CMO, and every modified CMO since then, has relied on two forms of EC grower protections: large banana subsidy payments and strict limitations on EC access for Latin American bananas. The producing Member States and EC Commission have considered these two protections to be inextricably linked. In their view, large subsidies put an "adequate income" into the pocket of the producers, while border restrictions ensure the marketing and fiscal stability needed to sustain those payments over time.

Of those two forms of protection, banana subsidies have always been the true centerpiece of the CMO, around which the border measures have been structured for fiscal reinforcement.[39]

- From 1993 through 2006, the subsidy scheme, known as "compensatory aid," conferred a type of deficiency payment to EC producers. Under that arrangement, total compensatory aid payments in recent years amounted on average to over $300 million annually (or approximately $7.50 a box), making bananas *one of the most subsidized* of all products covered by the EC's Common Agricultural Policy.[40]

- As of 1 January 2007, the EC "reformed" its banana subsidy scheme by *enlarging* its "envelope" of production-oriented subsidies for the sector. The new scheme, amounting to approximately $380 million annually for the next 6 years,[41] continues to be for the express purpose of "support[ing] [EC] banana production" and "ensur[ing] a fair standard of living for EC banana producers."[42] The enlarged "envelope" is being allocated to Spain, France, and Portugal for distribution as those Member States see fit, including through nationally administered "system[s] of deficiency payments close to the [prior] scheme" of compensatory

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[36] Council Regulation (EEC) 404/93 of 13 February 1993 on the common organization of the market in bananas, OJ L 47/1, 25 February 1993 (hereinafter "Regulation 404"), Whereas clause 10.

[37] In recent years, total EC banana production has averaged approximately 750,000 mt annually, historically amounting to 16% or less of total EC consumption.

[38] Regulation 404, Whereas clauses 3 and 7, and Title III.

[39] *Id*., Title III and Whereas clauses 3, 4, and 7.

[40] *Id*. *See also* "A Tariff Only Regime for Bananas – Why the Tariff Rate Should be Set at a Low Level," Swedish Ministry of Agriculture, Food, and Consumer Affairs, 23 September 2004, pp. 3-4.

[41] *See* "CAP Reform: Commission welcomes Council agreement on reform of banana regime," *EC Press Release*, IP/06/1842, 19 December 2006, providing that € 280 million of aid is provided to banana growers as of 1 January 2007, with € 278.8 million transferred to the POSEI program and € 1.2 million to the single payment scheme. This equates to $380 million at an exchange rate of € 1.36 = $1.

[42] Council Regulation (EC) No. 2013/2006 of 19 December 2006 amending Regulations (EEC) No. 404/93, (EC) No. 1782/2003, and (EC) No. 247/2006 as regards the banana sector, OJ L 384/13, 29 December 2006, Whereas clauses 1 and 5.

aid.[43] The new payment level equates to a subsidy of $9.50 per box, an amount almost equivalent to Latin America's entire per-box FOB, ocean freight, discharge, and handling costs to the EC market.

The EC's border restrictions have served to "ring-fence" those ample subsidies as follows:

- From 1993 to the end of 2005, the EC's restrictive tariff-quota system created an artificially high, stable internal price and "supply balance," thereby better ensuring "profitable [grower] prices" and fiscal predictability in subsidy outlays.[44]

- Likewise, from 2006 forward, the EC has chosen a high tariff only a few digits lower than the one rejected in Arbitration and a tariff quota on competitive ACP bananas expressly for the purpose of "*ensur[ing] that Community production is maintained and that these producers are not put in a less favourable situation as before the entering into force of its import quota regime in 1993*."[45]

Legal relevance

Given that conditions of competition as between MFN and EC banana producers lost legal relevance after the GATT Article I waiver lapsed, the EC's extensive, and now enlarged, banana subsidy payments merely help set this dispute in its proper factual context.

If the lapsed waiver standard (and, hence, conditions of competition) were still relevant, however, prior WTO cases have found that MFN "competitive opportunities" are nullified or impaired by the subsequent modification and enlargement of domestic subsidy measures.[46] Thus, under the prior waiver standard, the EC's enlarged banana subsidy payments as of 2007 would simply have reaffirmed that MFN conditions of competition are not being maintained by the current regime.

109. (Nicaragua and Panama) In paragraph 48 of their combined statement during the substantive meeting with the Panel, Nicaragua and Panama argue that "[t]he EC itself appears to recognize that its Article XIII defences are not convincing. Why else would it still have a request pending for a renewed Article XIII waiver to cover its exclusive ACP tariff quota under an arrangement in which MFN bananas would separately be entered under a flat tariff?" Can Nicaragua and Panama provide evidence of the factual assertions raised in this statement.

The chronological sequence of the EC's renewed Article XIII waiver request[47] has been as follows:

- On 31 December 2005, the EC's 2001 Article XIII waiver for its exclusive ACP tariff-quota expired.

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[43] Towards a Reform of the Internal Aspects of the Common Organisation of the Market in Bananas, Consultation Document of the Impact Analysis Steering Group, 3 April 2006, p. 8.

[44] Regulation 404, Whereas clauses 3, 4, 9, and 10; and Article 16.

[45] European Commission, *Communication from the Commission on the Modification of the European Community's Import Regime for Bananas*, COM (2004) 399, final, 2 June 2004, p. 4. (Emphasis added.)

[46] Panel Report, *Japan – Measures Affecting Consumer Photographic Film and Paper*, WT/DS44/R, adopted 22 April 1998, paras. 10.33-10.41 (emphasis added); *EEC–Oilseeds I*, paras. 142-151 (emphasis added).

[47] *Request for Extension of a Waiver Under GATT Article XIII, Tariff Rate Quota for Bananas of ACP Origin*, G/C/W/529, 11 October 2005.

- On 7 October 2005, the EC requested an "extension" of that waiver until 31 December 2007 to cover its proposal to install as of 1 January 2006 a 775,000 mt ACP duty-free tariff quota in combination with a 187 €/mt MFN tariff.[48]

- On 10 March 2006, 9 May 2006, 12 July 2006, and 20 November 2006, the EC's Article XIII waiver request was taken up by the Council for Trade in Goods ("CTG").[49] In each of those meetings, the Latin American supplier countries raised concerns about the technical deficiencies of that request and the unsettled nature of the banana dispute.

- On 19 March 2007, also in the context of a CTG meeting, the EC asked "to suspend the discussions on [its] request for the extension of the Article XIII waiver ... until further notice."[50] The EC made clear at the time that although it was requesting a "delay" in the debate on the waiver in light of the concerns raised by the Latin Americans, it was "definitely maintaining its request," not withdrawing it.[51]

There has been no further action on the EC's waiver request since that time.

110. (Nicaragua and Panama) In their respective third party submissions, Nicaragua and Panama seem to argue that several drafting-history considerations, subsequent developments and contextual elements should be taken into account in interpreting Paragraph 9 of the Framework Agreement on Bananas (BFA) ("[t]his *agreement* shall apply until 31 December 2002"). If so, can Nicaragua and Panama elaborate on the legal reasons as to why that should be the case.

Interpretive framework

The Panel's interpretation of the BFA should be governed by the rules of the Vienna Convention.

Because the EC has argued that the terms of the BFA set a time limitation on its WTO Schedule, and Ecuador, Nicaragua, and Panama have argued to the contrary, an interpretation of the EC's Schedule and BFA has become necessary.[52] As reaffirmed by the Appellate Body in *U.S.-Gambling*, interpreting the text of a Member's Schedule "involves identifying the *common intention* of Members, and is to be achieved by following the customary rules of interpretation of public international law, codified in Articles 31 and 32 of the *Vienna Convention*."[53] The Panel should accordingly interpret the ordinary meaning of the Schedule and BFA, taking into account contextual

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[48] *Id.*

[49] *See* Council for Trade in Goods, *Minutes of the Meeting of the Council for Trade in Goods – 10 March 2006*, G/C/M/83, 1 May 2006, para. 5.2; Council for Trade in Goods, *Minutes of the Meeting of the Council for Trade in Goods – 9 May 2006*, G/C/M/84, 29 June 2006, para. 6.2; Council for Trade in Goods, *Minutes of the Meeting of the Council for Trade in Goods – 12 July 2006*, G/C/M/85, 14 September 2006, paras. 4.1-4.4; Council for Trade in Goods, *Minutes of the Meeting of the Council for Trade in Goods – 20 November 2006*, G/C/M/86, 3 January 2007, paras. 6.1-6.3.

[50] Council for Trade in Goods, *Minutes of the Council for Trade in Goods – 19 March 2007*, G/C/M/88, 26 April 2007, paras. 3.2, 3.3. Exhibit N/P–4.

[51] *Id.*, para. 3.2.

[52] *See* first written submission of the European Communities, 20 July 2007, para. 9 and para. 114 ("The Annex, which is an *integral part of the Schedules* ... .") (emphasis added); second written submission of the European Communities, 13 August 2007, para. 69.

[53] Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, adopted 20 April 2005 ("*US – Gambling (AB)*"), para. 159, citing *EC – Computer Equipment (AB)*, para. 109 (emphasis in original).

elements, objectives, drafting histories, and subsequent developments, to determine the common intention of Members respecting paragraph 9 and the other relevant text in question.[54]

Text

The clear text of the BFA and the EC's Schedule demonstrates that paragraph 9 of the BFA did not set a time limitation on the EC's banana concession. As demonstrated by Panama and Nicaragua in their written submissions, the ordinary meaning of the terms "final," "current access quotas," and "concessions," used to define the banana commitments inscribed in the EC's Schedule, cannot be reconciled with commitments that lapsed shortly after the Uruguay Round implementation period.

As further explained by Nicaragua in its response to Question 107 above, the cross-reference to the BFA in column 7 of the EC's Schedule does nothing to change the finality of those concessions. While the BFA terminated itself, it did not terminate the EC's scheduled multilateral commitments, nor could it due to its plurilateral nature.

Context and purpose

The contextual elements reinforce that reading. The BFA was intended to improve access for the MFN signatories for the purpose of "settling" *Bananas II*. A €680/mt stand-alone tariff would create a prohibitive regime as of 2003 worse than the one challenged in *Bananas II*.

Likewise, multilateral concessions are intended to "yield rights and grant benefits,"[55] not erect a stand-alone tariff higher than any the EC had ever scheduled before.

Subsequent practice

As noted by the Appellate Body in *US – Gambling*, in order for subsequent "practice" within the meaning of Article 31(3)(b) of the Vienna Convention to be established "(i) there must be a common, consistent, discernible pattern of acts or pronouncements; *and* (ii) those acts or pronouncements must imply agreement on the interpretation of the relevant provision."[56]

Both of these cumulative conditions are satisfied here. The EC has consistently pronounced that the banana commitments set out in its Schedule are bound. Until this dispute, the EC continued to state as much in public announcements, and continued to accord imports the treatment described in its Schedule well after the purported 2002 "termination" of its concessions.[57] Those pronouncements and actions reflect the same understanding shared by the other parties to the BFA, the Latin American signatories. Thus, subsequent practice confirms that the EC's €75 binding did not expire.

Supplementary means

In *US – Gambling*, the Appellate Body relied on several supplementary means – including explanatory notes on drafts of the US Schedule and Uruguay Round scheduling guidelines (the "1993 Scheduling Guidelines") – to complete its interpretation of the U.S. Schedule.[58] In this dispute, the

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[54] Even if the BFA is not integral to the EC's Schedule, it is nevertheless an agreement among States that should be interpreted according to the rules of the Vienna Convention. *See* Panel Report, *India – Measures Affecting the Automotive Sector*, WT/DS146/R, WT/DS175/R and Corr. 1, adopted 5 April 2002, para. 7.118.

[55] *Bananas III (AB)*, para. 154.

[56] *US – Gambling (AB)*, para. 192 (emphasis in original).

[57] *See* Exhibit N/P-5.

[58] *See US – Gambling (AB)*, paras. 204-213.

original draft of the EC's Uruguay Round Schedule proposed a bound tariff rate of 100 ECU/mt without time limitations of any sort, confirming the absence of any EC intention to set a termination date for its concession. Further, the Uruguay Round "Draft Modalities" from which these concessions were formed, required the EC "to maintain, for tarrified products, current import access opportunities at levels corresponding to those existing during the 1986-88 base period," meaning that "current access" would need to be bound from that point forward.[59] The EC's suggestion that the BFA imposes a termination date on its banana concession ignores that drafting mandate.

Thus, every element of the required Vienna Convention analysis confirms that the "common intention" of WTO Members regarding the EC's scheduled banana commitments was, and is, that those commitments have no limitation in time.

111. (Nicaragua and Panama) In paragraph 50 of their combined statement during the substantive meeting with the Panel,, under a number of bullet points, Nicaragua and Panama make reference to various documents, such as for instance "the EC's 1994 corrigendum". Are the contents of this "EC's 1994 corrigendum" contained in the EC's Schedules LXXX and CXL? Can Nicaragua and Panama specify the references to those documents that are not annexed to their respective submissions and provide copies of the same, if possible.

The Corrigendum – Section 1-B of Schedule LXXX

The EC's 29 March 1994 "corrigendum to the European Communities schedule of concessions for agricultural products as regards bananas" was made part of the EC's Uruguay Round Schedule LXXX, which governed the EC of 12. That corrigendum, set forth in Exhibits N-5 and P-5 of the third party written submissions of Nicaragua and Panama, contains Section 1-B (Tariff Quotas) of Schedule LXXX, which reflects the EC's scheduled in-quota concession on bananas (75 ECU/t for 2.2 million tones) and, behind that, the BFA.

Section 1-A of Schedule LXXX

The corrigendum did not include Section 1-A (Tariffs) of Schedule LXXX, which sets forth the EC's Uruguay Round out-of-quota banana concession (850 ECU/t, to be reduced over the six-year Uruguay Round reduction period to 680 ECU/t). Section 1-A (Tariffs) of Schedule LXXX is set forth in Exhibits N-4 and P-4 of the third party written submissions of Nicaragua and Panama.

Schedule CXL

Schedule CXL, governing the EC of 15, was submitted to the WTO on 28 February 1996, but has never been certified by the WTO.[60] The banana commitments in Schedule CXL, which can be found in Exhibit EC-1, are the same as those in Sections 1-A and 1-B of Schedule LXXX. As in Schedule LXXX, the BFA appears in a separate Annex.

112. (Nicaragua and Panama) In paragraph 52 of their combined statement during the substantive meeting with the Panel, Nicaragua and Panama argue that "there is ample paper trail of EC acknowledgements that [the EC's] €75/mt concession would have to be accorded

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[59] Modalities for the Establishment of Specific Binding Commitments Under the Reform Programme, Market Access, Annex 3, MTN.GNG/MA/W/24, 20 December 1993 ("Draft Modalities"). *Agriculture: Explanation: Market Access*, www.wto.org/English/tratop_e/agric_e/ag_intro02_access_e.htm (last visited 14 August 2007).

[60] *See* GATT, *Procedures for the Modification and Rectification of Schedules of Tariff Concessions*, L/4962, 28 March 1980.

Article II protection in the EC's move to 'tariff only'." Can Nicaragua and Panama specify the documents referenced and provide copies of the same, if possible.

Since June 1999 when the EC first announced its proposal to move to a tariff-only regime to comply with the *Bananas III* ruling, the EC has consistently made clear that its €75/mt in-quota Uruguay Round rate has continuing bound effect (*i.e.* continuing coverage under GATT Article II). A long list of EC statements confirming the continuing effect of the €75/mt concession and its obligation to conduct Article XXVIII negotiations for any tariff over that rate (as well as the relevant documents from which those statements are taken) can be found in Exhibit N/P-5.

ANNEX D-8

RESPONSES BY THE UNITED STATES TO QUESTIONS POSED BY THE PANEL

93. (Both Parties and the US) Is there any particular reason why the Understandings on Bananas that the EC reached with Ecuador and the US respectively in April 2001 were only notified to the DSB more than two months later? Is there any reason why such agreements were not notified jointly to the DSB by both parties to the respective agreements?

1. The Understanding between the United States and the EC was not itself a mutually agreed solution, but only a step in the process that could have led to a mutually agreed solution. As a result, Article 3.6 of the DSU did not apply to the Understanding, and there was no need to notify the Understanding to the Dispute Settlement Body.

2. Without seeking the consent of the United States, in June 2001, the EC notified the EC-US Understanding to the DSB and, incorrectly, asserted that the Understanding was a "mutually agreed solution" for purposes of Article 3.6. In a communication to the DSB on 26 June 2001, the United States corrected the record by explaining that the EC-US Understanding was not a mutually agreed solution for purposes of Article 3.6 of the DSU. The United States said:

> As we have explained to the EC during bilateral discussions last week and indicated at meetings of the DSB, the Understanding identifies the means by which the long-standing dispute over the EC's banana import regime can be resolved, but, as is obvious from its own text, it does not in itself constitute a mutually agreed solution pursuant to Article 3.6 of the DSU. In addition, in view of the steps yet to be taken by all parties, it would also be premature to take this item off the DSB agenda.[1]

94. (Both Parties and the US) Paragraph G of the *Understanding on Bananas* reached between the EC and Ecuador of 30 April 2001 (documents WT/DS27/58 and WT/DS27/60), states that "[t]he EC and Ecuador consider that this Understanding constitutes a mutually agreed solution to the banana dispute". In turn, the *Understanding on Bananas* reached between the EC and the US on 11 April 2001 (document WT/DS27/59), contain no equivalent statement. What value, if any, should be given to the statement contained in Paragraph G of the *Understanding on Bananas* reached between the EC and Ecuador? What value, if any, should be given to the different language contained in both understandings regarding this issue?

3. The United States would leave to Ecuador and the EC, as the negotiators and drafters of the Understanding between them, the question of what value to place on the language in Paragraph G of the Ecuador-EC Understanding. In this regard, the explanations expressed by Ecuador after the unilateral notification by the EC of both the Ecuador-EC Understanding and the EC-US Understanding, would appear helpful. In a communication to the DSB[2], Ecuador emphasized that the Understanding "identified means by which the long-standing dispute" could be solved, but that the Understanding was comprised of phases and required implementation of several key features requiring collective WTO membership action.[3] Ecuador also noted that since "several steps" needed to be taken, "it would be premature to take this item off the DSB agenda which considers this issue at every regular meeting pursuant to Article 21.6 of the DSU."[4] Finally, Ecuador concluded that

[1] WT/DS27/59, G/C/W/270, 2 July 2001, second paragraph.
[2] WT/DS27/60, G/C/W/274, 9 July 2001
[3] *Id*., para. 1.
[4] *Id*., para. 3.

although it "sees the Understanding as an agreed solution that can *contribute* to an overall, definite and universally accepted solution, it must be made clear that the provisions of Article 3.6 of the DSU *are not applicable*."[5] (Emphasis added).

4. In any event, as the United States explained in its third party oral statement, whether the Understandings were a "mutually agreed solution" or not is irrelevant. Nothing in the Dispute Settlement Understanding (DSU) precludes a party to a mutually agreed solution from having recourse to the DSU. The US arguments on this point are set out in paragraphs 3 through 13 of its third party oral statement.

101. (Ecuador, Nicaragua, Panama and the US) In paragraph 4 of its closing statement during the substantive meeting with the Panel, referring to the alleged termination of the Doha Waiver, the EC argues that "[i]f the Doha Waiver wanted to say what Ecuador, Nicaragua and Panama are arguing, the text should have read that the waiver would terminate 'if the *Arbitrator concludes* that the EC has failed to rectify the matter'. The Doha Waiver does not say so." Can Ecuador, Nicaragua and Panama provide a reasoned answer as to whether they agree with this statement. Could the US comment on the same, in the light of its argument in paragraph 21 of its statement during the substantive meeting with the Panel, reproduced in the previous question.

5. The Annex clearly sets out a mechanism whereby once an arbitrator found twice that the EC had presented a tariff proposal that did not meet the conditions of the Annex, the waiver would automatically expire once the new EC tariff regime went into effect. The EC argument ignores the plain text of the waiver and the Annex. As the United States explained in paragraph 21 of its third party statement, the phrase "[i]f the EC has failed to rectify the matter", at the beginning of the fifth sentence in tiret 5 of the Annex, can only refer back to the determination required to be made by the arbitrator pursuant to the third sentence of tiret 5. The fourth sentence requires that the arbitration award be notified to the General Council. The fifth sentence then provides the consequence arising from such a notified arbitration award where the arbitrator found that the EC failed to "rectify the matter" – the waiver shall cease to apply upon entry into force of the new EC tariff regime. There is no need to explain again in the fifth sentence that it was the arbitrator who had to conclude that the EC had failed, since the sentence and the actions therewith flow from the preceding two sentences. The EC's interpretation would "read" the role of the second arbitrator out of the Annex, allowing for a unilateral determination by the EC itself that its new regime met the conditions of the Annex.

6. The United States notes that recital 11 to the Article I waiver provides context supporting the above reading of the Annex. Recital 11 states:

> any re-binding of the EC tariff on bananas under the relevant GATT Article XXVIII procedures *should result in at least maintaining total market access for MFN banana suppliers* and their willingness to accept a *multilateral control on the implementation of this commitment*.[6]

The reference to "*multilateral control*"refers to the Annex arbitration procedures and argues against any EC interpretation that would allow the waiver to continue in effect in the face of the two negative arbitral determinations and a subsequent unilateral determination of "compliance", or unilateral choice of banana import regime, by the EC.

116. (US) In paragraph 4 of its statement during the substantive meeting with the Panel, the US argues that the *Understanding on Bananas* reached between the EC and US on 11 April 2001

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[5] *Id.*., paragraph after numbered para. 3.
[6] Article I Waiver, Recital 11 (emphasis added).

(document WT/DS27/59) "is <u>not</u> a 'covered agreement' – it is not listed in Appendix 1." Does the US argue that, under the DSU, a panel should attribute no legal consequences to a mutually agreed solution reached between the parties to a dispute? Does, in the view of the US, the fact that a particular agreement between WTO Members is not part of the list of "Agreements Covered by the Understanding" in Appendix 1 of the DSU, mean that a WTO Panel should attribute no legal consequences to such agreement in the context of a particular dispute?

7. With respect to the first part of the Panel's question, in which the Panel inquires about the legal consequences of a mutually agreed solution, the United States wishes to begin by recalling that the EC-US Understanding on Bananas is not a mutually agreed solution.

8. The United States recognizes that the EC-US Understanding, as well as the Ecuador-EC Understanding, are important documents. Indeed, there was great expectation that the Understandings would serve as the path to the eventual resolution of the dispute. Nonetheless, the importance ascribed to the Understandings is a separate matter from the question of whether any legal consequences arise from them.

9. Turning to the question of the legal consequences of mutually agreed solutions in general, the United States notes that the DSU does not itself provide for any legal consequences, with only three exceptions. Article 3.6 requires that mutually agreed solutions be notified to the DSB and the relevant Councils and Committees. Article 12.7 provides that the existence of a mutually satisfactory solution reached prior to the conclusion of a panel proceeding affects the form and content of the panel's report: "Where a settlement of the matter among the parties to the dispute has been found, the report of the panel shall be confined to a brief description of the case and to reporting that a solution has been reached." Article 22.8 provides that "the suspension of concessions or other obligations shall be temporary and shall only be applied until such time as the measure found to be inconsistent with a covered agreement has been removed, or the Member that must implement recommendations or rulings provides a solution to the nullification or impairment of benefits, or a mutually satisfactory solution is reached." The fact that the legal consequences of a mutually agreed solution are spelled out in these three provisions is significant because it stands in stark contrast to the lack of any provision that assigns the legal consequences that the EC would now attribute to such solutions. There is therefore no basis in the DSU for attributing any legal consequences to a mutually agreed solution other than the limited ones specified in Articles 3.6, 12.7, and 22.8.

10. In particular, there is no basis in the DSU, or elsewhere in the covered agreements, for the EC argument that parties to a "mutually agreed solution" are precluded from having recourse to Article 21.5 proceedings. The US arguments on this point are set out in paragraphs 6 through 13 of its third party oral statement. Indeed, and as noted in our third party oral statement, the EC agreed with this position in the *India – Autos* proceeding. There, the EC held the view that a mutually agreed solution could not prevent recourse to the DSU. The EC argued that the relevant 1997 EC-India Agreement was not a "covered agreement" in the sense of Article 1.1 of the DSU and therefore the rights and obligations of the parties under the 1997 Agreement were not enforceable under the DSU.[7]

11. Mutually agreed solutions are not "covered agreements" within the meaning of Article 1 of the DSU. Indeed, a mutually agreed solution may not take the form of a written agreement at all.[8]

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[7] Panel Report, *India – Measures Affecting the Automotive Sector*, WT/DS146/R, WT/DS175/R, adopted 5 April 2002, para. 4.38.

[8] There is no requirement in the DSU that the "mutually agreed solution" be in writing or even "agreed" before the "solution" is accepted. For example, a responding Member may take an action on its own that is then considered acceptable by the complaining party. At that point, after the action has been taken, the complaining party may "agree" with the respondent that the action constitutes a "mutually agreed solution" that needs to be notified pursuant to Article 3.6.

Since mutually agreed solutions are not "covered agreements," the dispute settlement mechanism of the WTO is not available to enforce the provisions of mutually agreed solutions that take the form of a written agreement. The EC position, if adopted by this Panel, would therefore lead to very unfortunate consequences: a responding Member that failed to comply with the terms of a mutually agreed solution would appear to be able to claim immunity both from further proceedings on the original dispute (by virtue of the EC position on the legal effect of mutually agreed solutions) as well as from a claim under the mutually agreed solution (in view of the absence of mutually agreed solutions from the list of covered agreements in the DSU). Nothing in the DSU suggests that a complaining Member should lose its rights in such a way.

12. The second part of the Panel's question asks whether a WTO Panel should attribute no legal consequences to an agreement between the parties in the context of a particular dispute. To be clear, the United States has argued in this dispute that the alleged mutually agreed solution between the EC and Ecuador would not have the legal consequences suggested by the EC – that is, to bar Ecuador from bringing this proceeding. The United States has not advanced, and would not support, the proposition that any agreement between the parties is never entitled to legal consequences in WTO dispute settlement. To the contrary, some DSU provisions provide explicitly for certain agreements to have such consequences, for example, DSU Articles 4.3, 21.3(b), and 25. In addition, certain other WTO agreements provide for legal consequences of agreements between Members; free trade agreements meeting the requirements of Article XXIV of the GATT 1994 are one example. And, it has sometimes been necessary to examine the legal consequences of an agreement among Members in order to understand the meaning of a WTO legal obligation that makes reference to that agreement; for example, in the original *Bananas* proceeding it was necessary to examine the Lomé Convention in order to understand the waiver, adopted pursuant to Articles IX:3 and IX:4 of the Marrakesh Agreement, for the then-extant EC bananas regime. And as noted above, in Articles 3.6, 12.7, and 22.8, the DSU does assign certain legal consequences to mutually agreed solutions.

13. However, in each such situation, it is an identifiable provision of the covered agreements that forms the basis for ascribing legal consequences within WTO dispute settlement to an agreement other than a covered agreement. By contrast, in this proceeding, the EC has not identified – and cannot identify – any WTO provision that would give the Understanding the legal consequences that the EC claims. As a result, there is no basis for this Panel to ascribe any such legal consequences to the Understanding either.

ANNEX D-9

COMMENTS BY ECUADOR TO THE RESPONSES OF THE EUROPEAN COMMUNITIES AND THIRD PARTIES

13. (Both Parties) In paragraph 43 of their respective third party submissions, Nicaragua and Panama argue that the Latin American suppliers insisted on inserting, into the *Bananas Annex* of the Doha Waiver, the sentence "If the EC has failed to rectify the matter, this waiver shall cease to apply to bananas upon entry into force of the new EC tariff regime", which did not appear in the original EC draft. Nicaragua and Panama argue further that the insertion of such sentence is an "explicit penalty for EC unilateralism following two arbitration losses", without which the waiver would not have been approved. Can the Parties provide a reasoned answer as to whether they agree with this statement.

Ecuador agrees with the response of Nicaragua and Panama and disagrees with that of the EC. Further evidence that the EC once shared the view of Ecuador, Nicaragua and Panama is found in the EC's closing statement to the Arbitrator:

> Mr. Chairman, Distinguished Arbitrators, today, we all stand on a precipice. In one week's time you will render your Award ... If the Award is negative, then all the parties represented here fall off the precipice together. The landing risks to be hard. The EC loses its waiver for the ACP preference upon the entry into force of tariff-only yet it is required, by the ACP-EC Partnership Agreement, to ensure preferential treatment for ACP products.[1]

15. (Both Parties) On what grounds does the EC argue that the phrase "suitable waiver" in paragraph 6.158 of the report of the first *EC – Bananas III* compliance Panel should be interpreted to mean a waiver from only Article I of the GATT 1994? On what grounds does Ecuador argue that the same term should be interpreted as referring to a waiver to both Articles I and XIII of the GATT 1994?

Ecuador reaffirms its response to Question 15, but wishes to add further comments in response to the EC argument that "extensive GATT and WTO practice" supports the EC argument that "exclusion from a tariff quota" is a matter governed not by Article XIII, but by Article I. This aspect of the EC response is contained in paragraphs numbered 38-44 of the EC response.

First, the EC renews its assertion that the *Bananas III* findings were not relevant because they concerned a regime with multiple tariff quotas, while now there is only a single tariff quota with duty free preference for ACP countries. However, nothing in the findings of the *Bananas III* Appellate Body and Article 21. 5 reports suggests that it would make any difference how many tariff quotas a country created. The Panel said, at paragraph 6.20 of the Article 21.5 report:

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

[1] Award of the Arbitrator, *European Communities – The ACP-EC Partnership Agreement – Second Recourse to Arbitration Pursuant to the Decision of 14 November 2001*, WT/L/625, 27 October 2005 ("*AAII*"), Oral Statement by the European Communities, 19 October 2005, para. 4, *available at* http://trade,ec,europa.eu/wtodispute/show.cfm?id=239&code=2 (emphasis added).

> is a quantitative limit on the availability of a specific tariff rate. Thus, Article XIII applies to the 857,700 tonne limit.[2]

The Appellate Body, in a finding cited by the Article 21.5 Panel, said:

> The issue here is not whether the European Communities is correct in stating that two separate regimes exist for bananas, but whether the existence of two, or more, separate EC import regimes is of any relevance for the application of the non-discrimination provisions of the GATT 1994 and the other Annex 1A agreements. The essence of the non-discrimination obligations is that like products should be treated equally, irrespective of their origin. As no participant disputes that all bananas are like products, the non-discrimination provisions apply to all imports of bananas, irrespective of whether and how a Member categorises or subdivides these imports for administrative or other reasons. If, by choosing a different legal basis for imposing import restrictions, or by applying different tariff rates, a Member could avoid the application of the non-discrimination provisions to the imports of like products from different Members, the object and purpose of the non-discrimination provisions would be defeated. It would be very easy for a Member to circumvent the non-discrimination provisions of the GATT 1994 and the other Annex 1A agreements, if these provisions apply only within regulatory regimes established by that Member.[3]

Certainly there is nothing in the text of Article XIII of the GATT that could lead to another conclusion. Article XIII:5 does not limit any aspect of the application of the provisions of Article XIII to situations where there is more than one tariff quota or more than one regime.

As Ecuador has discussed in prior submissions, in accordance with the *Bananas III* rulings and recommendations, the 2001 Understanding called for waivers of *both* Articles XIII and I to cover the exclusive "interim" ACP tariff quota to be implemented by the EC in various stages prior to "tariff only." The EC in fact obtained such waivers and sought but did not obtain an extension of the Article XIII waiver for its ACP tariff quota.

The EC has continued to seek approval of that Article XIII request, albeit feigning, in the light of its unsuccessful pursuit of the waiver that a waiver is for security rather than necessity.[4]

Against the plain language of Article XIII, the rulings in *Bananas III*, and this waiver practice, the EC now argues in its response that "extensive practice" establishes that a waiver of Article I is sufficient to cover a tariff quota whose preferential rate of duty is limited to a few countries and excludes principal suppliers. However, the "practice " to which the EC refers appears to be an EC assertion that a few Members maintain or have maintained what the EC says are tariff quotas under their respective generalized systems of preferences, notwithstanding that the waiver for generalized preferences, as originally granted and as incorporated in the Enabling Clause, was only a waiver of Article I. The EC also points to a 1973 waiver of Article 1:1 for "tariff-free quotas for handicraft products from South Pacific Islands."

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[2] Appellate Body Report, *European Communities – Regime for Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted 25 September 1997 ("*Bananas III (AB)*"), para. 190.

[3] Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Complaints by Ecuador, Guatemala and Honduras, Mexico, and the United States*, WT/DS27/R, adopted 25 September 1997, para. 7.69. ("*Bananas III (Panel)*"), as modified by *Bananas III (AB)*.

[4] Although the EC "suspended" discussion of the proposed extension on 19 March 2007, the EC stated at the time that it was "definitely maintaining its request," not withdrawing it. Council for Trade in Goods, *Minutes of the Council for Trade in Goods – 19 March 2007*, G/C/M/88, 26 April 2007, para. 3.2. Exhibit N/P-4.

As the EC would have to agree, the Enabling Clause and GSP preferences are not at issue here. If they were, the EC would be required to extend GSP preferences to *all* similarly-situated developing countries, including the Latin American supplying countries, which it has never been willing to do in the case of bananas. Neither are the measures of other countries that the EC says are tariff quotas at issue in this dispute, including the measures for handicraft products of South Pacific Islands. It may be that the measures are not tariff quotas, or have some other justification, or it may be that the measures, if challenged under Article XIII, would be found inconsistent with the obligations of the countries concerned. None of that is relevant. It is not a defense for the violations of any WTO rules that the defending party thinks that other countries may also violate that rule, nor does the absence of a challenge of particular measures establish that those measures are consistent with the rules. There are many instances in which measures so very long standing have been found inconsistent with WTO rules when finally challenged; the EC's successful challenges of Canada's automotive measures thirty five years after they were instituted or FSC measures of the United States taxation measures nearly 20 years after they were implemented are just two examples.[5]

The EC's effort, even now, to try to induce this Panel on such a flimsy basis to ignore the provisions of Article XIII and overrule prior rulings only underlines the need for this Panel to rule on all of Ecuador's claims.

16. (Both Parties) In paragraph 96 of its first written submission, the EC states that "the text of GATT Article XIII, paragraph 1 makes clear that a Member can successfully claim that another Member's measures violate the provisions of GATT Article XIII, only if its can show that... the allegedly offending Member imposes a prohibition or restriction on products originating from the complaining Member and, in principle, there is a nullification and impairment of a benefit accruing to the complaining Member". Can the EC elaborate its arguments in support of each of these propositions, i.e. that in order to make a successful claim under Article XIII:1 of the GATT 1994, the complaining Member must show: (a) that the challenged measure must be a prohibition or restriction *on products originating from the complaining Member*; and, (b) that there is a *nullification and impairment of a benefit* accruing to the complaining Member. Can Ecuador provide a reasoned answer as to whether it agrees with the arguments raised by the EC.

The EC responds as if Article XIII:1 provided that no *benefit* could be conferred on products of a Member unless the same *benefit* were conferred on every other country, including non-members. The EC then becomes very angry with the straw man it has created. However, unfortunately for the EC, the prohibition in Article XIII:1 is against imposing a restriction on products of a member if products of other countries are not similarly restricted. In the case of any tariff quota, the restriction is the higher duty imposed on imports not benefiting from the preferential tariff quota. The EC can impose any higher duty it wishes on non-members. What the EC cannot do under WTO rules is consign Ecuadorian and other MFN bananas to the high duty, while excluding them from fair participation in the zero duty tariff quota.

22. (Both Parties) In paragraph 10 of its statement during the substantive meeting with the Panel, Brazil argues that "the EC abruptly jumps to the flawed conclusion that because the Member has chosen to implement a suggestion by the panel such Member would always be in compliance with its obligations under the covered agreements." In paragraph 11 of the same statement, Brazil adds that "[i]n no provision does the DSU grant Members certainty as to the 'lawfulness' of a measure taken to comply just because such measure is intended to implement a

[5] Appellate Body Report, *Canada – Certain Measures Affecting the Automotive Industry*, WT/DS139/AB/R, WT/DS142/AB/R, adopted 31 May 2000; Panel Report, *United States – Tax Treatment for "Foreign Sales Corporations"*, WT/DS108/R, adopted 8 October 1999.

suggestion made by a panel. To the contrary, Article 21.5 sets forth the Members' right to resort to a panel where there is disagreement as to the consistency with covered agreements of the measures taken to comply." Can the Parties provide a reasoned answer as to whether they agree with Brazil's argument.

Among the myriad of fallacies in the EC argument, it is perhaps sufficient to note again here that accepting a panel report, unconditionally or otherwise, does not mean accepting the wholly unfounded interpretation that the other Party in the dispute opts to impute to a suggestion in the Panel report.

25. (Both Parties) Paragraph 9 of the Framework Agreement on Bananas (BFA) annexed to the EC Schedules provides that "[t]his *agreement* shall apply until 31 December 2002" (Emphasis added). Could it be concluded from this language that only the Framework Agreement on Bananas annexed to the EC Schedules expired on 31 December 2002, but not Section I B of the EC Schedules, where the tariff rate quota (TRQ) is also indicated? Please provide a reasoned response.

Throughout this proceeding, the EC has been unable to point to a single EC act or pronouncement from 1994 forward that supports its contention that the BFA terminated the EC's in-quota banana concessions as of 31 December 2002. Every utterance the EC has made on the matter until this dispute settlement proceeding demonstrates implicitly or explicitly that the EC considered the 75 Ecu/mt concession on 2.2 million mt to have no termination date.

The EC errs in thinking it was necessary to state that the concession was perpetual, because concession are presumed to be without time limit, all the more so in light of the modalities governing the agriculture negotiations, of which the EC is quick to claim the advantage when it suits. The concession does not state that it was granted as indicated in the Annex, but that the further conditions were as indicated in the Annex.

The EC's argument that it's newly discovered termination theory for the banana concession gains is justified by the hopes of EC internal regulations is not serious. The EC argues that the date of termination of the BFA was designed to coincide with the date in 2002 on which the EC's internal regulation of 1993 aspired that the EC would be able to have a new banana regime. This is not credible, as there is no evidence even from the EC that even BFA signatories were aware of or considered credible, let alone binding, the EC's ten year projections for it to undertake reforms. Certainly WTO members cannot be charged with agreeing that the EC's vague and unilateral plans should inform the understanding of the EC's tariff quota concession in this regard.

Even the EC's own authors of the EC's final report on the operation of the EC banana regime fully understood that those in-quota concessions would endure. When the EC issued that report in 2005, it confirmed (yet again) that "Quota A" covered "2.200.000 tonnes at a *bound tariff rate of EUR 75/t.*"[6]

80. (EC) In paragraph 99 of their respective third party submissions, Nicaragua and Panama argue that the EC's "legal instruments, WTO assertions, and other official statements consistently confirm the enduring validity of a €75/mt concession". Nicaragua and Panama further argue that examples have already been referenced by Ecuador, and offer the following additional ones: (a) In Regulation 216, the EC would have explicitly referenced a tariff quota of 2 200 000 tonnes at a rate of €75 as bound in the WTO until the entry into force of a tariff-only regime; (b) In its GATT Article I waiver discussions, the EC confirmed it intended to adopt a tariff-only system in 2006, which would entail a re-binding of its 75 and 680 €/tonne bound rates under the relevant procedures of Article XXVIII of the GATT 1994; and, (c) In an internal

[6] Report from the Commission to the European Parliament and the Council on the Operation of the Common Organisation of the Market in Bananas (SEC(2005) XXX), COM(2005 50 final, § 1.4.1

communication to its own Member States, the EC confirmed that, should the Community wish to move to a tariff-only system at a rate higher than €75/t., GATT Article XXVIII provided that such modification should be notified to all GATT Contracting Parties. Can the EC confirm the accuracy of the factual assertions raised by Nicaragua and Panama, and provide a reasoned answer as to whether it agrees with the arguments raised by these Members.

The EC asks the Panel to believe that in November of 2001, knowing that (according to the EC) the binding on the 75 Ecu/mt tariff quota was going to expire leaving in place (according to the EC 2007) only the 680 Ecu/mt duty, the EC was unclear what tariff binding the EC would agree with banana suppliers in the future. Ecuador asks that the Panel, in evaluating the credibility of the EC in asserting to this panel that the tariff concession expired 31 December 2002, consider not only the language of the concession and the consistent record of the EC and the WTO until this Panel proceeding, but also that the EC has repeatedly argued that statements it makes in a dispute settlement proceeding (at least in regard to this topic) should be dismissed if "erroneous" or made "in the heat of litigation.".

ANNEX D-10

COMMENTS BY THE EUROPEAN COMMUNITIES TO THE RESPONSES OF ECUADOR AND THIRD PARTIES

QUESTIONS ADDRESSED TO PARTIES

2. (Both Parties) How has the EC been applying the MFN tariff of €176/mt to individual imports? What volume and share of its imports have been subject to that tariff?

1. The European Communities notes that there are certain mistakes in the market data provided by Ecuador. For example, Ecuador's data shows in Exhibit ECU-6 that Uganda imported 1,128 mt of bananas into the European Communities in year 2006, while the correct figure is only 28 mt.[1]

9. (Both Parties) In paragraph 38 of its statement during the substantive meeting with the Panel, Ecuador argues that "[i]t will be recalled that the waiver in any event expires 1 January 2008, but the MFN duty continues, and will be the margin of preference for any preferences that the EC grants inconsistent with WTO rules into the future, past 2007. It will be recalled that the EC had made plain its intent to use not only the 'Everything but Arms' initiative but also WTO-conforming free trade agreements to carry on with preferences past 2007. Further, even if the EC were to grant no future preferences, the duty will restrict future banana imports." Can Ecuador elaborate on these arguments, and can the EC provide a reasoned answer as to whether it agrees.

2. Ecuador's response to this question is not correct for a number of reasons. First, the market data establishes that the domestic banana production of the European Communities has decreased following the introduction of the new import regime on 1 January 2006. Therefore, Ecuador's assertion that the tariff currently applied to banana imports "protects EC domestic banana production" more than the import regime in place prior to 1 January 2006 is factually incorrect. Second, the market data also shows that imports from the group of MFN suppliers grow at a higher rate than imports from the group of ACP suppliers. Therefore, Ecuador's assertion that the tariff currently applied does not maintain the pre-2006 total market access of the MFN group of suppliers vis-à-vis the group of ACP suppliers is factually incorrect. Third, the conditions for the continued existence of the Doha Waiver until the end of 2007 have no relation to any market developments that may occur after the expiration of the Doha Waiver and the Cotonou Preference (i.e. after 31 December 2007). Therefore, Ecuador's assertions are not relevant for the proceedings before this Panel.

12. (Both Parties) In paragraph 26 of its first written submission, Ecuador argues that "[t]he burden is on the EC if it wishes to claim that it still has a valid waiver with respect to bananas, and that this waiver covers the EC measures at issue. [E]ven if the burden were on Ecuador …" Could the Parties develop their legal arguments as to which of them should bear the burden of proving that the Doha Waiver is still valid and whether it covers the EC measure at issue.

3. The European Communities does not agree with what Ecuador states in its response to the Panel's questions. The European Communities believes that Ecuador's arguments are manifestly in contradiction with the settled case-law.

4. The basic rule concerning the allocation of burden of proof in WTO disputes has been clearly established in *US – Wool Shirts and Blouses*, where the Appellate Body stated that "the burden of

[1] See Exhibit EC-19. Source of data: Eurostat.

proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence. If that party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption."[2]

5. The situation in the current proceedings is very different from that of the *European Communities-conditions for the granting of tariff preferences to developing countries*. In that case the contested measure was considered to be in violation of Article I, unless covered by the Enabling Clause. In our case it is undisputed that the WTO has granted a waiver covering the Cotonou Preference and that such waiver is in force until proven to have terminated.

6. In the first written submission of Ecuador, Ecuador argues that:

> "Pursuant to [the] provisions [of the two Understandings on Bananas], and with the participation and consent of other WTO members, suitable GATT Article I and GATT Article XIII waiver conditions applicable to bananas were negotiated and granted at the Doha Ministerial Conference in November 2001. As discussed more fully below, the Article I Waiver included an Annex on bananas requiring that the EC's future tariff-only regime "result in at least maintaining total market access for MFN banana suppliers," taking into account "all EC WTO market-access commitments relating to bananas ...". In the event of disagreement over whether the proposed regime met the conditions of the Annex, the Annex provided for arbitration. If the EC was found by the Arbitrator twice to have failed to satisfy the terms of the Annex standard, the waiver of Article I with respect to bananas would expire. In 2005, the EC twice proposed a new MFN rate for bananas that was, in each case, challenged by substantial suppliers and rejected by Arbitrators as not meeting the standards of the Article I waiver. The EC, nevertheless, proceeded to impose a new MFN duty at €176/mt, with a tariff rate quota for ACP countries at a zero duty for 775,000 mt., notwithstanding the termination of the Article I waiver with respect to bananas."[3]

7. It is therefore evident that Ecuador's acknowledges that the Cotonou preference enjoyed a legally valid waiver from Article I of the GATT 1994 but claims that, following the two arbitrations, that waiver has ceased to apply. Therefore, Ecuador, as a Party asserting a fact, ought to prove that its arguments regarding the termination of the Doha Waiver are founded. The European Communities submits that Ecuador has failed to discharge such burden of proof.

14. (Both Parties) Under the fifth tiret of the Bananas Annex of the Doha Waiver, can Parties identify the specific conditions listed therein and explain how many of those would have to be fulfilled for the waiver to cease to apply to bananas?

8. The European Communities has already provided its interpretation as to the conditions that had to be satisfied in order for the Doha Waiver to be terminated at the end of 2005. The European Communities considers that these conditions have not been satisfied and, therefore, that the Doha Waiver continues to exist until the end of 2007.

9. Ecuador seeks to rely on Article XXVIII in order to support its claims. The European Communities notes that Article XXVIII provides the framework through which WTO Members are supposed to negotiate. Contrary to Ecuador's assertions, a failure to reach a negotiated agreement cannot be impugned only upon one of the negotiating parties. Ecuador and the Third Parties that

[2] Page 14.
[3] Paras 11 to 13.

support it in these proceedings prevented the successful conclusion of the negotiations by not agreeing with the proposals of the European Communities. In fact, Ecuador still prevents the successful conclusion of the negotiations today, by initiating these proceedings. Therefore, Ecuador cannot rely on the non-conclusion of the negotiations to support its claims, because this non-conclusion is as much its fault as it is the fault of the other negotiating parties.

10. The European Communities considers that this interpretation is in accordance with the principle of good faith (*bona fides*), which is enshrined in Article 31 of the Vienna Convention, according to which "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". Accordingly, in *Korea – Procurement*, the panel found that this principle, expression of a principle of public international law, must be taken into account by WTO adjudicating bodies.

16. (Both Parties) In paragraph 96 of its first written submission, the EC states that "the text of GATT Article XIII, paragraph 1 makes clear that a Member can successfully claim that another Member's measures violate the provisions of GATT Article XIII, only if its can show that... the allegedly offending Member imposes a prohibition or restriction on products originating from the complaining Member and, in principle, there is a nullification and impairment of a benefit accruing to the complaining Member". Can the EC elaborate its arguments in support of each of these propositions, i.e. that in order to make a successful claim under Article XIII:1 of the GATT 1994, the complaining Member must show: (a) that the challenged measure must be a prohibition or restriction on products originating from the complaining Member; and, (b) that there is a nullification and impairment of a benefit accruing to the complaining Member. Can Ecuador provide a reasoned answer as to whether it agrees with the arguments raised by the EC.

11. The European Communities has already provided its views on the proper interpretation of Article XIII and its application to facts such as those faced by the Panel in this case. The *Bananas III* panel, which dealt with facts that were completely different from the facts of the present case, can hardly have intended in this single sentence to reject a well-established GATT practice in this regard.

12. In any event, in accordance with DSU Article 3.8, the European Communities has demonstrated that subjecting the tariff preference granted to ACP countries to a "cap" does not cause Ecuador any "nullification or impairment".

23. (Both Parties) The Understanding on Bananas signed by the EC with Ecuador and the US seems to include references, in both Phases I and II, to a bound tariff-rate quota, designated as "quota 'A'", of 2.2 million metric tons with an in-quota tariff rate not exceeding €75/mt, that would possibly extend beyond the end of 2002. Can Parties provide a reasoned answer as to whether they agree with this reading of the Understanding. Can the EC explain how this can be reconciled with its argument that the TRQ expired at the end of 2002, considering that the EC has been arguing for the binding nature of the Understanding on Bananas and that it would constitute a mutually agreed solution?

13. The European Communities notes with satisfaction that Ecuador does <u>not</u> claim that the Understanding amounted to a rebinding of the European Communities' concession for the 2.2 million tons of bananas. The European Communities agrees with this position and, therefore, for purposes of these proceedings it is undisputed that the Understanding does not have the effect of rebinding this concession.

28. (Both Parties) In paragraph 69 of its statement during the substantive meeting with the Panel, Ecuador argues that "[t]ariff quota concessions can be withdrawn, but the withdrawing member must follow Article XXVIII procedures which the Doha Waiver required and the EC

failed to do." Can Ecuador clarify in what specific way the EC has "failed" to follow Article XXVIII procedures and what would be the legal consequences of such failure. Can the EC provide a reasoned answer as to whether it agrees with Ecuador's assertion that it has failed to follow Article XXVIII procedures.

14. As the European Communities has already explained, the only binding in its Schedules of Concessions on 1 January 2006 was for a tariff of €680 per ton of bananas imported. An applied tariff of €176 per ton constitutes neither a "rebinding in violation of Article XXVIII", nor a violation of Article II. Therefore, Ecuador's claims are factually incorrect.

15. Moreover, as already mentioned, the European Communities initiated the negotiations in full compliance with the provisions of the Doha Waiver. However, it takes two parties to reach an agreement in negotiations. Ecuador cannot put the blame solely on the European Communities for the fact that a negotiated agreement has not yet been reached.

QUESTIONS ADDRESSED TO ECUADOR

29. (Ecuador) Can Ecuador expand on the factual information provided in Chart 1 of its first written submission by providing annual data (and their sources) for each year from 1999 (where "EC" refers from 1999 to 2003 to EC15 and from 2004 to 2006 to EC25, but, if possible, also show separately EC15 from 2004 to 2006; and for the first half of 2007 for EC27) for the following:

(a) Volume, FOB value and average unit value (in Euros/mt and USD/mt) of banana exports from Ecuador to the EC, and to the rest of the world;

(b) Share (percentage) of banana exports from Ecuador going to the EC, in volume and value terms;

(c) Share (percentage) of total volume of banana exports by Ecuador going to the EC divided by the EC's share of global banana imports; and,

(d) Amount of duties paid to the EC for the importation of bananas from Ecuador for each of the years specified above.

16. The European Communities has some doubts on the accuracy of certain figures provided by Ecuador in the Exhibits ECU-8, ECU-9, ECU-10 as well as in its in response to Panel's questions 29, 30, 31, 32, 33, 34, and 35. For instance, the European Communities observes a major discrepancy between the data contained in Exhibit ECU-8, part (a) continued, under B (world imports from Ecuador) and the answer provided by Ecuador to questions 29-35, page 2, table on volume exports from Ecuador. Some differences between these tables are quite significant (for instance, in 2006, more than 550,000 tons).

17. The European Communities would like to point out that the figures it had provided in its own submissions on this point were taken from the Ecuadorean Central bank (Exhibit EC-13 Table 9).

18. The discrepancies signalled above appear, in turn, to affect the shares in Exhibit ECU-8, part (b), since it seems that worldwide exports taken into account in this table could be higher than the real ones. Therefore, the European Communities considers that this table may not be accurate.

19. In addition, the same problem seems to arise with regard to the data on world imports shown in part (c) of same Exhibit. Indeed, FAO data on world imports and exports are much lower than those

shown in Exhibit ECU-8, part (c). So, the EC's shares of global imports indicated under letter G may not be completely correct.

20. Import and export data, as provided by FAO are enclosed in Exhibit EC-20.

30. (Ecuador) Chart II in Exhibit ECU-3 refers to "Imports of Bananas by The EU – 27" for the years 2005-2007. In regard to this chart, could Ecuador:

(a) Explain how it calculated the figures for 2005-2006, i.e. before the enlargement of the EU to 27 member States;

(b) Clarify whether the figures for 2007 are estimates and, if so, explain the calculations involved; and,

(c) State whether the figures for 2007 need any rectification, in the light of any relevant subsequent events since the submission of Ecuador's first written submission.

21. See above, paragraphs 16 and seq.

31. (Ecuador) In paragraph 46 of its first written submission, the EC mentions that "although the group of MFN countries (to which Ecuador belongs) has seen a spectacular increase in the volumes exported into the European Communities since 1 January 2006, Ecuador has experienced a slight reduction in its own exports: its 2006 volumes were approximately 3.6% below its 2005 volumes." In paragraph 7 of its opening statement during the substantive meeting with the Panel, the EC goes on to argue that "[t]he group of MFN banana suppliers had never exported so many bananas into the European Communities as it did in 2006." Can Ecuador provide a reasoned answer as to whether it agrees with these statements. If so, what are the reasons to explain the decrease in EC imports of bananas from Ecuador, accompanied by an apparent increase in the EC imports of other MFN bananas?

22. Ecuador submits market data that are not relevant to the issues before this Panel and that seek to confuse the issues. First, the Doha Waiver obliged the European Communities to maintain the total market access of the group of MFN suppliers. This means that the relevant periods that must be compared are (i) the period under the new import regime (i.e. 2006 and the first 6 months of 2007) with (ii) the period under the old regime (i.e. 1 January 2002 until 31 December 2005). Therefore, Ecuador's comparison of the export performance of the MFN and ACP countries between 1999 and 2005 has no relation to the question of whether the standard of the Doha Waiver has been satisfied. In contrast, the European Communities has provided market data comparing the relevant periods and establishing that the MFN suppliers' market access was more than maintained under the current regime.

23. Second, as already explained, it is not necessary any more to use the methods used by the Arbitrators prior to the introduction of the current import regime of the European Communities. At that time, the Arbitrators were trying to predict the future and were relying on various assumptions and models. This is not needed anymore, given that there is now ample evidence and market data from the real operation of the import regime that establishes that the MFN suppliers' market access has been more than maintained.

24. Third, the table provided by Ecuador confirms the fact that the MFN suppliers exported to the European Communities larger quantities of bananas in 2006 than in any other year since 1999.

25. Finally, Ecuador chooses not to provide any market data for 2007. As already explained, these data confirm the trends observed in 2006 and establish that the growth in MFN imports is larger than the growth in ACP imports.

32. (Ecuador) In paragraph 50 of its first written submission, the EC argues that:

> **"there is ample evidence that Ecuador's banana industry is facing a number of difficulties that have nothing to do with the new import regime of the European Communities. These difficulties include:**
>
> **(i) Adverse climatic conditions negatively affecting the 2006 production: the drought at the end of 2005 was followed by heavy rain at the beginning of 2006.**
>
> **(ii) According to Aprobanec, the Association of banana growers in Quevedo, Ecuador's banana production was significantly damaged by the eruption of the volcano Tungurahua on August 16, 2006. The volcano caused significant damage to approximately 35% of the banana plantations in the Los Rios province, which produces about 30% of all Ecuadorian bananas.**
>
> **(iii) Ecuador introduced certain administrative measures that encouraged traders operating in the European Communities' market to source bananas from other countries. For example, a letter sent by the Association of German Fruit Importers to Mr. Rizzo, Minister of Agriculture in Ecuador on 15 August 2006, expresses the discontent of the German traders with an Ecuadorian decree providing that the fruit should be inspected only at the plantation and not at the port. This administrative measure incited German traders to source bananas from other MFN countries, neighbouring Ecuador. Another administrative measure with a similar effect on European traders was adopted in August 2006: it imposed a minimum price of $3.25 per box and obliged exporters to pay producers via the Central Bank." (Footnotes omitted)**

Can Ecuador provide a reasoned answer as to whether it agrees with these assertions.

26. The European Communities notes that Ecuador's response does not deny the accuracy of the facts mentioned in the first submission of the European Communities. The European Communities considers that these facts have affected the decisions of traders sourcing bananas for the European markets and helps explains the reasons for the small reduction in the quantities of bananas exported from Ecuador into the European Communities. The European Communities also notes that, despite these problems, the quantity of bananas exported from Ecuador into the European Communities in 2006 is greater than the quantity of bananas exported in 2004 (under the old import regime). This confirms that the new import regime has not restricted in any way Ecuador's market access into the European Communities.

27. Further information on the adverse climatic conditions are included in Exhibit EC-21 and Exhibit EC-22. The former is a report published on the web-site of FAO in May 2006 which specifically describes the effects of the adverse climatic conditions on the bananas production of, among other countries, Ecuador[4]. The latter is a general description of the heavy rainfall and flooding

[4] http://www.fao.org/es/esc/en/20953/20987/highlight_107821en.html

which occurred in Ecuador in year 2006, and is taken from the web-site of NOAA's Satellite and Information Services[5].

28. In Exhibit EC-23 also it is also shown that Ecuador is diverting some of its sales to countries other than the European Communities and the United States (e.g. Russia, Ukraine etc.) where it can have better prices, and that its plantations suffer of some structural problems in comparison to other MFN bananas producers (e.g. Costa Rica and Colombia).

37. (Ecuador) Can Ecuador confirm that it signed an Understanding on Bananas with the EC on 30 April 2001, the text of which is reproduced in documents WT/DS27/58 and WT/DS27/60. If so, did the legal and factual assumptions based upon which Ecuador signed such understanding on 30 April 2001 change by June 2001 when the Understanding was notified to the DSB?

29. The European Communities notes that the text of the Understanding itself provides that it is a "mutually agreed solution". The European Communities has never understood what prompted Ecuador to seek to re-characterise the legal nature of the Understanding after its signing. In any event, Ecuador's unilateral statement cannot affect the legal nature of the Understanding as established by the Understanding's express provisions and its general content.

38. (Ecuador) Paragraph G of the Banana Understanding provides that "[t]he EC and Ecuador consider that this Understanding constitutes a mutually agreed solution to the banana dispute." Why did Ecuador then state in its notification of the Understanding to the DSB (document WT/DS27/60) that "although Ecuador sees the Understanding as an agreed solution which can contribute to an overall, definite and universally accepted solution, it must be made clear that the provisions of Article 3.6 of the DSU are not applicable in this case"? Please provide a reasoned response.

30. The European Communities notes that Ecuador's response confirms its desire to avoid compliance with the provisions of the Understanding by seeking to re-characterise its legal nature. The European Communities respectfully requests the Panel not to allow Ecuador to distort to true nature of the Understanding.

40. (Ecuador) In paragraph 4 of its statement during the substantive meeting with the Panel, Suriname argues that "[i]n this case there can be no doubt that a mutually agreed solution exists. Therefore, there cannot be any disagreement in the sense of Article 21.5 of the DSU." Provided that a mutually agreed solution exists, can Ecuador provide a reasoned answer as to whether it agrees with Suriname's conclusion in regard to Article 21.5 of the DSU.

31. Ecuador merely states that it disagrees with Suriname's assertion for two reasons: (i) there is no provision of the DSU that precludes bringing a complaint under Article 21.5 even if presence of a mutually agreed solution, and (ii) such a rule would be a "disincentive for parties to try to negotiate solutions".

32. On the former, paraphrasing Ecuador's statement, one could argue that there also is no provision of the DSU which precludes a Panel to take into account a mutually agreed solution. On the contrary, the European Communities believes that bilateral agreements between WTO members form part of the "applicable rules of law" between the parties to the dispute, in conformity with Article 31, paragraph 3(c) of the Vienna Convention on the Law of Treaties. On the latter, the European Communities believes that, actually, the contrary of what Ecuador states holds true. In fact, were WTO Members free to disregard their commitments provided for in a mutually agreed solution, this

[5] http://www.ncdc.noaa.gov/oa/climate/research/2006/mar/hazards.html

would really be a disincentive for parties to negotiate solutions. In fact, the value of a mutually agreed solution would be largely thwarted by such a rule.

33. In this context, the European Communities notes that even the Unites States does not argue that mutually agreed solutions cannot not be taken into consideration by the DSB. In its answer to Panel's question 101, the Unites States in fact asserts that "[t]he United States has not advanced, and would not support, the proposition that any agreement between the parties is never entitled to legal consequences in WTO dispute settlement."

42. (Ecuador) Is Ecuador arguing that any non-reciprocal preferential quota can be WTO-consistent only if covered by an Article XIII waiver? Alternatively, could other provisions in WTO agreements, such as the Enabling Clause or Article XXIV of the GATT 1994, also excuse such non-reciprocal preferential quotas from inconsistency with WTO obligations, in the absence of an Article XIII waiver?

34. As the European Communities has shown in paragraphs 35 to 45 of the European Communities' Answers to the Panel's Questions, the GATT CONTRACTING PARTIES repeatedly authorized the use of tariff quotas by granting waivers, such as the Enabling Clause, which covered Article I but made no reference to Article XIII. In the form of the Enabling Clause, at least, they continue to operate and to be taken advantage of under the WTO in order to justify exclusion from preferences granted by tariff quotas. These waivers and their application constitute concordant, common and consistent practice and as such are 'subsequent practice' within the meaning of Article 31(3)(b) of the Vienna Convention on the Law of Treaties indicating that Article XIII does not regulate exclusion from tariff quotas.

35. Another example of such waivers from Article I:1 of the GATT regarding tariff quotas is the *Italy – Preferences for Libya* Decision of 9 October 1952 (see Exhibit EC-24).[6] One can observe that a waiver from Article XIII was neither considered necessary, nor ever discussed.

45. (Ecuador) In what way should paragraph 9 of the Framework Agreement on Bananas (BFA) be interpreted, if not to establish an expiration of a 2.2 mt tariff rate quota (TRQ)? In other words, what exactly has expired, under the terms of paragraph 9, on 31 December 2002?

36. The European Communities disagrees with Ecuador's answer to the present question. The European Communities does not understand the reasons why – according to Ecuador - other parts of the BFA have expired at the end of year 2002, while the €75/mt concession has not.

37. Ecuador's assertion that "the EC made that concession *independently* in its schedule" is simply untrue, considering that the Schedule of the European Communities makes an explicit reference to its Annex for the "terms and condition" applying to that concession.

46. (Ecuador) In paragraph 93 of its second written submission, the EC argues that:

> **"Ecuador's second written submission goes on to assert in paragraphs 69 and 70 that 'eliminating the volume restraint element of a tariff quota does not authorize ignoring the tariff binding'. In other words, Ecuador seems to imply that once a tariff quota is granted in a WTO Member's schedules, the tariff part somehow becomes obligatory and perpetual, while the quota part may be freely eliminated. This assertion is not supported by any provision of WTO law and**

[6] The Exhibit contains a copy of the mentioned decision (document L/2824, p. 7) as well as a copy of the Report by the Working Party on Italy/Libya and Italy/Somalia Waivers in which the various modifications and extension of the Waiver for Libya are described.

> **Ecuador's second written submission does not even attempt to offer any explanation as to its legal basis. Moreover, accepting that the 'tariff element' and the 'quota element' of a tariff quota are completely separable and each has a 'life of its own' leads to unreasonable results. For example, Ecuador should explain why the rule that it proposes should not be the other way round, i.e. that the 'tariff element' of a tariff quota may be freely amended, while the 'quota element' should be treated as obligatory and perpetual."**

Can Ecuador provide a reasoned answer as to whether it agrees with the EC's arguments.

38. The European Communities notes that the OECD glossary of statistical terms gives the following definition of "tariff quota": "A tariff quota is a quantitative threshold (quota) on imports above which a higher tariff is applied. The lower tariff rate applies to imports within the quota". This makes it evident that the tariff and the quantitative threshold are inextricably and inevitably linked, as one is set at a given level because of the other, and vice-versa. The European Communities is unaware of any dispute arisen because a WTO Member contended that another Member would be bound to apply to future imports the in-quota tariff after the elimination of a tariff quota.

QUESTIONS ADDRESSED TO PARTIES AND THIRD PARTIES

90. (Both Parties, Nicaragua and Panama) In paragraph 108 of their respective third party submissions, Nicaragua and Panama argue that "[t]he EC's €75/mt concession – which from 1995 to 2005 covered all bound in-quota Latin American imports and informed the rate applicable to all other Latin American bananas entering the EC market – has been the single most important banana concession in Schedule CXL. In contrast to the prohibitive €680/mt rate, under which virtually no Latin American volumes have ever been entered, the €75/mt concession is the only rate that enabled Latin American market access to the EC market from 1995 to 2005. Unless the €75/mt bound rate receives the full protections of GATT Article II, the entire value of the EC's mandatory Uruguay Round concessions will be nullified". (Emphasis added). Can Nicaragua and Panama provide evidence for their assertions. If MFN banana imports have increased under an applied tariff rate of €176/mt, as argued by the EC, how can this be reconciled with the statement that "a €75/mt concession is the only rate that enabled Latin American market access to the EC market from 1995 to 2005"? Can Nicaragua and Panama clarify what would be meant by "providing the full protections of GATT Article II" to the €75/mt tariff rate. Can Parties provide a reasoned answer as to whether they agree with the assertions made by Nicaragua and Panama.

39. The question already highlights the inconsistency of the thesis supported by Nicaragua and Panama: the fact that MFN banana imports increased under a €176/mt duty shows clearly that it cannot be argued that "a €75/mt concession is the only rate that enabled Latin American market access to the EC market from 1995 to 2005".

40. The European Communities has provided the proper market data relating to the properly defined relevant periods which establish that Nicaragua and Panama's assertions are not correct.

91. (Both Parties, Nicaragua and Panama) In paragraph 19 of their combined statement during the substantive meeting with the Panel, Nicaragua and Panama argue that "[t]he EC tariff, which was the EC's scheduled banana concession from 1963-1994, was the equivalent of about €80 per tonne." Can Nicaragua and Panama elaborate on this argument and provide evidence for their assertions, as appropriate. Can the Parties comment on the argument and assertions.

41. As the European Communities has already explained, the concessions resulting from the Uruguay Round must be read on their own. The European Communities does not have the information necessary to calculate what would be the equivalence in today's prices for the European Communities of 25 Member States of the tariffs applied by various European countries in the 1960s and 1970s. Moreover, these assertions of Nicaragua and Panama have no relevance to the issues before the Panel.

92. (Both Parties and Suriname) In paragraph 10 of its statement during the substantive meeting with the Panel, Suriname argues that "[b]oth the Doha Waiver and the Understanding on Bananas were negotiated by the WTO members, including the interested parties, after the DSB adopted its recommendations and rulings in the original Bananas dispute. These two instruments constitute new secondary WTO law and create an entirely new legal framework for the issues that are now pending before the Panel. These new instruments clearly strike a new balance of rights and obligations for the entire WTO membership, in addition to the parties to the dispute." Can Suriname elaborate on these arguments. Can both Parties provide a reasoned answer as to whether they agree with Suriname.

42. The European Communities generally agrees with the arguments developed by Suriname in its response.

96. (Ecuador and Nicaragua) In paragraph 6 of its closing statement during the substantive meeting with the Panel, the EC argues that "the draft dated 2 November 2001, which Nicaragua has attached to its Third Party submission as Exhibit N-1, provided that the Doha Waiver would be terminated automatically within two months after the notification of the arbitration award to the General Council. However, this provision was not included in the final version of the Doha Waiver. The link between the awards of the arbitrator and the termination of the Doha Waiver was abandoned." Can Ecuador and Nicaragua provide a reasoned answer as to whether they agree with the statement.

43. The European Communities disagrees with the interpretation provided by Ecuador and by Nicaragua and Panama. The European Communities was never prepared to accept (and did not accept with the Doha Waiver) a system whereby the Doha Waiver would terminate automatically on the basis of predictions about the future found in an Arbitration award.

102. (EC, Nicaragua and Panama) In paragraph 44 of their combined statement during the substantive meeting with the Panel, Nicaragua and Panama argue that "[t]he [first compliance] panel's second suggestion never absolved any discriminatory ACP tariff quota from the obligations of Article XIII, however the larger import regime might be structured. To the contrary, the panel, only paragraphs before, found the EC's exclusive ACP tariff quota, by its own specific shape and nature, to be a quantitative restriction covered by Article XIII:5 that failed to treat like products 'equally, irrespective of origin,' in violation of Article XIII. No subsequent compliance suggestion can be read to nullify that actual finding of law." Can Nicaragua and Panama elaborate on these arguments. Can the EC provide a reasoned answer as to whether it agrees with the argument.

44. The European Communities does not agree with Nicaragua and Panama. Nicaragua and Panama continue to misuse the findings of the Panel in 1999, in an attempt to apply these findings to the current regime. However, the European Communities wishes to stress once gain that the current regime presents a large number of differences from the one scrutinised by the Panel in 1999. Thus, the comparison between the two systems, made by Nicaragua and Panama, is incorrect and misleading.

113. (Saint Lucia) In paragraph 3 of its statement during the substantive meeting with the Panel, Saint Lucia argues that "[i]n 2005 WTO Ministers in Hong Kong accepted the

tariffication proposal in which the TRQ was replaced by a single tariff of €176 per tonne. Indeed, the Ecuadorian delegation was a leading campaigner for this change and Minister Støre of Norway was charged with monitoring trade flows that would indicate if the change had in fact disadvantaged MFN suppliers." Can Saint Lucia provide evidence to support its assertion that in Hong Kong WTO Ministers accepted the tariffication proposal in which the TRQ was replaced by a single tariff of €176 per tonne.

45. The European Communities considers that the description of meetings at the WTO Ministerial of Hong Kong made by Santa Lucia is accurate.

46. Also, the European Commission would like to stress how the "Understanding between Costa Rica Columbia, Ecuador, Guatemala and the European Commission on the Banana Issue" (annexed to Santa Lucia's answer to the Panel's question) shows the good faith in which the European Communities negotiated a solution with the MFN countries and its willingness to revise its tariff level "if the collected data indicates market imbalances" (see point 7 of the Understanding).