

GENERAL AGREEMENT ON

RESTRICTED

TARIFFS AND TRADE

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EEC - MEMBER STATES' IMPORT REGIMES FOR BANANAS

Report of the Panel

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I. INTRODUCTION

1. On 12 June 1992, Colombia, Costa Rica, Guatemala, Nicaragua and Venezuela requested the European Economic Community (hereinafter "EEC") to hold consultations pursuant to Article XXII:1 of the General Agreement on import measures maintained on fresh bananas by individual member States of the EEC. These consultations were held on 9 July and 9 September 1992. As they did not result in a mutually satisfactory solution of the matter, Colombia, Costa Rica, Guatemala, Nicaragua and Venezuela, in a communication dated 21 September 1992, requested the Director-General to use his good offices in an *ex officio* capacity, in accordance with the provisions of paragraph 1 of the Decision of 1966 on the Procedures under Article XXIII. The good offices did not result in a satisfactory solution of the dispute. On 8 February 1993, Colombia, Costa Rica, Guatemala, Nicaragua, and Venezuela therefore requested the immediate establishment of a panel in accordance with the procedures provided for in paragraph 5 of the 1966 Decision.

2. The Council, at its meeting on 10 February, established a Panel on the matter in accordance with the requirements of the 1966 Decision and authorized the Chairman of the Council to designate the Chairman and the members of the Panel. The Panel would have standard terms of reference unless the parties to the dispute agreed otherwise within 20 days of the establishment of the Panel. The following contracting parties reserved their rights to make a submission to the Panel: Brazil, Chile, Cuba, Japan, Korea, Mexico and the Philippines. Only Brazil, Mexico and the Philippines availed themselves of this opportunity.

Terms of Reference

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

"To examine, in the light of the relevant provisions of the General Agreement, the matter referred to the CONTRACTING PARTIES by Colombia, Costa Rica, Guatemala, Nicaragua and Venezuela in document DS32/9 and to make such findings as will assist the CONTRACTING PARTIES in making the recommendations or in giving the rulings provided for in Article XXIII:2."

Composition

4. On 2 March 1993, the Director-General was requested to compose the Panel by virtue of Section F(c)5 of the Decision of the CONTRACTING PARTIES of 12 April 1989 concerning Improvements to the GATT Dispute Settlement Rules and Procedures (BISD 36S/61).

5. The Director-General composed the Panel as follows:

Chairman: Mr. I.G. Patel
Members: Mrs. Naoko Saiki
Mr. Peter Hamilton

6. The Panel met with the Parties on 7 and 8 April, and on 16 and 17 April 1993. It submitted its report to the Parties to the dispute on 19 May 1993.

Participation of other contracting parties

7. At the meeting of the Council on 10 February 1993, the representatives of Cameroon, Côte d'Ivoire, Jamaica, Madagascar and Senegal expressed their respective Governments' wish to participate in the work of the Panel. The Council took note of these statements.

8. Subsequently, the Parties agreed as follows:

(i) that the representatives of the Governments of Cameroon, Côte d'Ivoire, Jamaica, Madagascar and Senegal would be invited to all Panel meetings at which the parties were present;

(ii) that the above contracting parties would have to make a submission if they were to attend Panel meetings and that submissions made by such contracting parties should be made in writing, or if made orally, would also be made available in writing;

(iii) that the representatives of these contracting parties present at Panel meetings would receive all submissions of the parties; and

(iv) that these same contracting parties would be invited by the Panel to speak as appropriate.

9. In light of the above the Panel considered, in the interest of transparency among the contracting parties participating in the Panel process, that it would be reasonable to invite such countries to meetings of the Panel at which the parties were present. The Panel was of the view that this procedure should not be considered a precedent for future panels in light of the very special circumstances of this case.

10. On 5 April 1993, the Panel received a letter from Belize, requesting formally that the Panel suspend its proceedings and with immediate effect request the parties to commence consultations on the issues raised by the complaining parties. Belize also requested that it be admitted as full participant in the Panel proceedings. The Panel informed Belize that the Panel had been established by the GATT Council in accordance with the 1966 Decision, the rules of which obliged the Panel to finish its work and present its findings within 60 days. It was, therefore, not in a position to accept Belize's request for suspension. As concerns the request for full participation in the proceedings, the Panel informed Belize that, on its own, the Panel was not authorized to accept the participation of any country in the Panel process, but that such participation could possibly be agreed between the parties to the dispute. Since the parties were not able to reach such an agreement in the short time available for consultations on this issue before the Panel proceedings commenced, the Panel informed Belize that it could not be admitted as a full participant in the proceedings of the Panel.

II. FACTUAL ASPECTS

General

11. The Panel understood the complaint of the Parties to relate to the EEC import régimes for bananas existing on 31 December 1992. The following section summarizes the information provided by the parties on these régimes.

12. Since 1988, the EEC has been the world's largest importer of bananas, followed by the United States and Japan. In 1991, the EEC imported some 4 million tons of *fresh and dried* bananas, approximately 38 per cent of world imports, compared to 2.9 million tons for the United States and 0.8 million tons for Japan.¹ Total supplies of *fresh* bananas in the EEC in 1991 amounted to some 3.7 million tons, two thirds of which originated in Latin American countries. Major suppliers of Latin American bananas to the EEC in 1991 were Ecuador, Costa Rica, Colombia, Panama and Honduras. Domestic producers supplied approximately 19 per cent of EEC banana consumption, the main producing areas being Canary Islands, Martinique and Guadeloupe. Sixteen per cent were supplied by African, Caribbean and Pacific countries (hereinafter ACP countries). All EEC member States - except Spain - imported Latin American bananas although to widely varying degrees. Germany, which accounted for approximately one third of EEC banana imports, by far the largest EEC market, imported almost all its bananas from Latin America. Similarly, Belgium, Denmark, Ireland, Luxembourg and the Netherlands imported nearly exclusively from Latin American suppliers. In contrast, Spain did not import third country bananas, consuming bananas produced domestically in the Canary Islands. Domestically produced bananas were also consumed in France, Greece and Portugal. ACP bananas were primarily imported by the United Kingdom and France. Major suppliers of ACP bananas to the EEC in 1991 were Cameroon, Côte d'Ivoire, St. Lucia, Jamaica, St. Vincent and Dominica (for more details see Annexes I and II).

13. On 31 December 1992, imports of bananas into the EEC were not subject to a common policy, but since 1963 the EEC has had a consolidated common external tariff on bananas of 20 per cent *ad valorem*. There were several different national import systems for bananas in the various member States of the EEC.

14. By virtue of Article 163(1) of the fourth Lomé Convention, signed in 1989, which was identical to corresponding Articles in previous Conventions, imports of bananas from ACP countries entered the EEC duty free. Under Protocol 5 of the fourth Lomé Convention which was virtually identical to corresponding protocols in the previous conventions, the EEC was committed to maintain the traditional advantage of ACP banana suppliers on those markets. The Protocol stated: "no ACP State shall be placed, as regards access to its traditional markets and its advantages on these markets, in a less favourable situation than in the past or at present". The successive Lomé Conventions, including the relevant Protocol concerning bananas, had been notified to the GATT.

15. National restrictions applied by the EEC member States on imports of bananas from Latin America were placed on the list of residual restrictions of member States, as annexed to Council Regulation (EEC) No. 288/82 of 5 February 1982 relating to the common system applicable to imports. This Regulation concerned trade measures applied by the member States prior to the creation of the EEC and maintained thereafter due to the lack of a common policy in respect of banana imports. The list of national restrictions was communicated to the GATT by the EC Commission in 1982 after Council Regulation (EEC) No. 288/82 had been published in the Official Journal of the EEC. The notification was updated in 1987 following the Spanish and Portuguese accessions to the EEC. The various import régimes in the member States were due to expire on 30 June 1993. In February 1993, the EC Council

¹Source: FAO.

(Agriculture) adopted Regulation (EEC) No. 404/93 to establish a common market organization in the banana sector, including *inter alia* a new import régime. The new régime was to take effect on 1 July 1993.

Measures in individual countries

16. On 31 December 1992, Belgium, Denmark, Ireland, Luxembourg and the Netherlands used the tariff as sole border measure. These member States imported mainly Latin American bananas, at the bound tariff of 20 per cent, ad valorem. However, as all other EEC member States, they applied a zero rate to bananas imported from ACP countries.

17. Under the Treaty of Rome, Germany was accorded a tariff-free quota for imports of bananas from all sources, at the level of estimated consumption.

18. France, Greece, Italy, Portugal and the United Kingdom restricted imports of bananas by means of various quantitative restrictions and licensing requirements. Spain maintained a *de facto* prohibition on imports of bananas.

(a) France

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

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

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

22. Import licences were granted to the GIEB by the government. The GIEB was exclusively responsible for purchasing and importing bananas directly from third countries. Imported quantities were then sold by the GIEB at the domestic market price. The "mark-up" was transferred to the Treasury. In addition to the national market organization, France was authorized, under the provisions

of Article 115 of the Treaty of Rome, not to grant EEC treatment to bananas originating in certain third countries and put into free circulation in another EEC member State.

23. France was one of the original contracting parties to GATT in 1947.

(b) Greece

24. Until 15 February 1990, Greece used to acquire its bananas almost exclusively from domestic sources (Crete), while imposing restrictions on imports from third countries. In addition, Greece sought and obtained Commission authorization under Article 115 of the Treaty of Rome to restrict its banana imports through other member States. However, on 15 February 1990, import restrictions on bananas from all third countries were abolished by Decision of the Minister of Commerce (E3-1310/15-2-1990). Since then, Greece has imported increasing quantities of bananas both from ACP countries (Windward Islands in particular), at zero duty, and from third countries, subject to the 20 per cent duty.

25. Greece joined the GATT in 1950.

(c) Italy

26. In Italy, Decree-Law No. 2085 of 2 December 1935 established a State monopoly on trade in bananas. It was subsequently transformed into formal Law No. 899, adopted on 6 April 1936. In accordance with the provisions of Law No. 899, the State monopoly had responsibility for the shipping, commerce and industrial processing of bananas (Article 1). Banana production and imports could be marketed only through the State monopoly (Article 2). The monopoly was under the direct financial control of the State (Article 8). The State monopoly remained in place until 1964, when it was abolished by Law No. 986 of 9 October 1964, in order to bring Italian law into conformity with Article 37 of the Treaty of Rome. As of 1 January 1965, a consumption tax of 70 lira/kg was imposed on bananas of all sources. The rate of the consumption tax was subsequently increased, in absolute proportion to the level of restriction applied originally (except for bananas from the former colony of Somalia for which a tax of 60 lira/kg for a maximum quantity of 1 million quintals was imposed). This tax was repealed in 1991.

27. Moreover, a temporary import régime for bananas was introduced for calendar year 1965, with a quota level of 180,000 tons. Between 1966 and 1973, the quota régime was applied *erga omnes*, by Ministerial circulars with no subdivision among countries or groups of countries. In 1973, the quota was increased and divided between the EEC and preferential suppliers on the one hand and third countries on the other hand. As from 1974, the import quota was abolished for bananas of EEC and ACP origin. Imports from third countries were subject to an annual quota and a special authorization procedure; licences were distributed on a monthly basis. The level of the quota was determined by the Italian authorities, taking into account Italy's obligations under EEC law and the supply and demand conditions in the Italian market. Once a third country quota for bananas was opened, the licences were issued by the Ministry of Commerce. Public notice was given to potential importers. In 1976, a Ministerial Decree from 6 May confirmed the system of global quotas.

28. Italy joined the GATT in 1950.

(d) Portugal

29. The Portuguese market for fruits, including bananas, was originally organized in application of Decree-Law No. 26:757 of 8 July 1936 and by Decree No. 27:355 of 17 December 1936. The Decree Law established rules regarding the organs of economic co-ordination for various sectors of the Portuguese economy particularly dependent on imports or exports and provided for the general

framework of a corporatist economic structure in Portugal. It was complemented by a Decree No. 27:355 of 17 December 1936 which created a "*Junta Nacional das Frutas*" (National Committee on Fruit), a State-controlled entity in charge of promoting and organizing production, domestic supply and trade of various agricultural products, including bananas. The Decree-Law and the Decree established a régime under which, in practice, no imports of bananas occurred as long as domestic consumption could be covered by domestic production and supply from the Portuguese colonies (e.g., Angola, Cape Verde). Officially, in case of shortage, importation could take place through a system of licences granted by the *Junta*, by delegation of authority from the Directorate General for Foreign Trade. In practice, no licences were granted until the independence of the Portuguese colonies. The first substantial imports took place in 1976.

30. In 1985, the Portuguese banana market was organized by Decree Law No. 503/85 of 30 December 1985. The *Junta* was abolished, and the organization of the national market for bananas was administered by the Government, with the help or advice of a number of new entities. Under the new régime, imports of bananas were expressly subject to quantitative restrictions, whatever their origin (Article 16:1 of the Decree-Law). The monthly domestic production was taken as a basis for the opening of a monthly quota for imports. If domestic production fell below the forecasted quantity, the quantity allowed for imports for the following month was increased by a corresponding amount. Under the 1985 régime, a system of licences was still applied, but the licences were now auctioned directly by the Directorate General for External Trade.

31. In 1985, the Portuguese government introduced a régime to promote greater efficiency in banana production by various means such as, incentives to restructure the production, transformation or marketing of bananas within the framework of approved programmes and concentration of production on the most appropriate land. Finally, in application of the provisions of the Act of Accession of Portugal to the EEC, Portugal was permitted to treat bananas from other member States in the same way as bananas imported from third countries. Imports from ACP countries could enter duty free but were nonetheless subject to quantitative restrictions and licensing requirements. This treatment could continue until 31 December 1995 or until the entry into force of an EEC market organization for bananas.

32. Portugal joined the GATT in 1962.

(e) *Spain*

33. In 1937, the Confederación Regional de la Exportación del Plátano (CREP) (Regional Confederation of Banana Exports) was established (Decree No. 408 of 10 November 1937). The CREP was a public organ depending on the Ministry of Industry and Commerce (Article 1). The powers and functions of CREP required it, among other tasks, to fix export prices for bananas from the Canary Islands and the quantities each export entity was allowed to export (Article 1 (c) and (d)). It was also required to co-operate with other services responsible for inspecting and controlling the quality of the product and determining the types of packaging.

34. On 29 January 1954, Decree No. 408 was replaced by a new Decree which *inter alia* clarified the powers of CREP as regards the national organization of the market for bananas. Furthermore, Law No. 30/72 of 22 July 1972 concerning the Canary Islands' economic and fiscal régime, introduced a more favourable fiscal régime for these islands, on the grounds that their insularity handicapped their economic development. Article 9(a) of the Law stated that the whole Spanish market was reserved for Canarian production, thus restricting imports from all sources to protect national production. The Law also maintained CREP as the organ responsible for the management of the banana market, and empowered the government to take the necessary measures for the implementation of the Law within the limits and subject to conditions laid down therein.

35. By Royal Decree of 6 June 1978, some changes and a certain degree of flexibility in the application of Law No. 30/72 were introduced. The CREP was replaced by the Comisión Regional del Plátano (CRP), (Regional Commission for Bananas), a publicly-owned corporation (Article 1). The Minister of Commerce and Tourism was given the specific authority to ensure that, in the application of Law No. 30/72, the interests of the consumers' were taken into account (Article 5). A Ministerial Order of 16 November 1978 specified in detail the functions and powers of the CRP. These powers included the right to be informed of the weekly production in the Canary Islands and to fix weekly the volume of bananas to be sent to the Spanish market and to third-country markets (Article 1). After Spain's accession to the EEC, Protocol No. 2 of the Act of Accession authorized Spain to maintain, during a transitional period up to 31 December 1995 or until the entry into force of an EEC wide market organization for bananas, import restrictions for bananas from the other member States of the EEC and from third countries (Article 4(2)(b)).

36. Spain joined the GATT in 1963.

(f) United Kingdom

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

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

39. The United Kingdom was among the original contracting parties to the GATT in 1947.

III. MAIN ARGUMENTS

General

40. **Costa Rica, Guatemala, Nicaragua and Venezuela** requested the Panel to find that the banana import régimes maintained by Belgium, Denmark, France, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain and the United Kingdom were inconsistent with Articles I, II, XI and XIII, as well as Part IV of the General Agreement and that these régimes were not justified by any of the exceptions of the General Agreement. Also, such infringements implied the nullification or impairment of benefits accruing to Costa Rica, Guatemala, Nicaragua and Venezuela under the General Agreement. Accordingly, the above-mentioned contracting parties asked the Panel to recommend to the CONTRACTING PARTIES that they request the banana import régimes maintained by the above-mentioned EEC member States be brought into conformity with the provisions of the General Agreement.

41. **Colombia** considered that the EEC acted inconsistently with Articles I, III, VIII, XI, XIII, XXXVI and XXXVII; whether or not the import régimes were consistent with the obligations of the EEC, they nullified or impaired benefits accruing to Colombia under the General Agreement within the meaning of Article XXIII:1(b). It asked the Panel to recommend to the CONTRACTING PARTIES that they request the EEC to modify its banana import régimes to make them consistent with the General Agreement.

42. The EEC requested the Panel to find that the banana import régimes were in conformity with the General Agreement as interpreted in accordance with subsequent practice of the CONTRACTING PARTIES. The EEC was also of the view that the complaining parties were "estopped" from invoking their rights under Part II of the General Agreement. The EEC submitted that the quantitative import restrictions maintained by its member States on bananas were justified by Article XI:2(c), Article XXIV taken in conjunction with Part IV or the provisions of the existing legislation clause in Article 1(b) or corresponding provisions in the relevant Protocols of Accession. The EEC further submitted that the tariff preferences accorded to the ACP countries were justified by Article XXIV taken in conjunction with Part IV of the General Agreement.

Procedural objections

43. The EEC contended that since neither the consultations under Article XXII:1 of the General Agreement, nor the good offices procedure under paragraph 1 of the 1966 Decision on the application of Article XXIII extended to the import régimes of Belgium, Denmark, Ireland, Luxembourg and the Netherlands, nor to an alleged violation of Articles I, II, III, VIII and a nullification or impairment under Article XXIII:1(b) of the General Agreement, the EEC had not been afforded sufficient opportunity to effect a satisfactory adjustment through bilateral consultations. Therefore, it was the submission of the EEC that for the items just mentioned, the procedure leading to recourse to Article XXIII:2, as laid down in Article XXIII:1 and the 1989 Decision on improvements to the GATT Dispute Settlement Rules and Procedures (Section C.2), had not been followed. In addition, as far as the alleged violation of Articles III and VIII was concerned, the terms of reference of the Panel laid down in documents DS32/9 and DS32/10 did not unequivocally refer to those provisions. Under these circumstances, the matters referred to in the present paragraph had been put before the Panel in an irregular manner and the Panel should therefore refrain from giving a ruling on these issues. An examination of these matters by the Panel would constitute a violation of the EEC's procedural rights in the present case.

44. **Costa Rica, Guatemala, Nicaragua and Venezuela** noted that these aspects were discussed during the bilateral consultations and the good offices process, and therefore the EEC could not validly claim that it was unable to make a "satisfactory adjustment" at that time. Furthermore, in the request for consultations as well as in the document submitted by the Director-General in the good offices

context, the complaining parties had explicitly and formally reserved the right to invoke other provisions of the General Agreement and to expand the legal arguments during the dispute settlement process. Again, in the factual description included in that document, the different régimes in force in the EEC member States in question were clearly specified, as was the discrimination against imports from the complaining parties. In document DS32/9, referred to in DS32/10 containing the terms of reference for the Panel, explicit mention was made of the situation in the markets of all the member States, except Germany, and there was an unequivocal statement of the complaining parties desire that the Panel should analyze these banana import régimes in the light of the EEC's obligations under Articles I, II, XI, XIII, XXIV and Part IV, taking as a basis for this request the nullification or impairment of the complaining parties' rights and benefits as provided for in Articles XXIII:1(a) and (b).

45. In addition, there was no rule whereby the failure to mention a specific provision in the notification to the Council concerning the consultation process or, as the case may be, the good offices process, should prevent the Panel from examining the compatibility of the measures in question with that provision of the General Agreement, particularly when these were explicitly mentioned in the terms of reference given to the Panel by the CONTRACTING PARTIES.

46. **Colombia** stated that the complaining parties had clarified at various points during the consultations under Article XXII:1 to the EEC, and to the Director General throughout the exercise of "good offices" under the 1966 Decision, that they objected to the current EEC banana régime on all possible GATT grounds, which included the above-mentioned provisions of the General Agreement as well as others. In the course of the consultations, it was inevitable that the complaining parties would stress those provisions of the General Agreement that the EEC banana régime violated most egregiously. Such emphasis, however, could not reasonably be mistaken for any narrowing of the complaining parties' legal bases for complaint. More specifically, the Ambassador of Costa Rica in a detailed oral presentation had explicitly introduced the subject of the violation by the EEC of Articles I and III, during the consultations at the EC Mission in Geneva on 9 July 1992. As for the claim that the EEC's restrictive practices in respect of imports nullified or impaired benefits under the General Agreement, the issue was necessarily part of any consultation under Article XXII:1 or XXIII:1; since the question of nullification or impairment was intrinsic to the dispute settlement process. The EEC's procedural objections were also unwarranted in light of the terms of reference of the Panel, as agreed to by the parties to the dispute. These terms of reference were sufficiently general and comprehensive in scope, i.e., to examine the banana import régimes in the light of Articles I, II, XI, XIII, XXIV, Part IV, and all other relevant provisions of the General Agreement (see documents DS32/9 and DS32/10).

47. The EEC argued that the special provisions of the 1966 Decision had not modified the standard rules for the definition of "the matter" that was brought for consideration before the Panel, in accordance with its terms of reference. Moreover, there was nothing in the discussion of the GATT Council on 10 February 1993, that led to the establishment of the present Panel, to suggest that it intended to grant a very wide mandate or to define the term "the matter" in a way different from what standard dispute settlement rules provided under the General Agreement. Therefore, as document DS32/9 had to be viewed in light of previous consultations held on this matter between the Parties and the discussion in the Council meeting of 10 February 1993, the EEC submitted that the phrase "all other relevant Articles of the General Agreement" in document DS 32/9 could not be taken by the Panel as granting it an unlimited mandate to review "the matter" in complete disregard of the limits imposed by the extent of the consultations the Parties had held under Article XXII of the General Agreement.

Article XI - General Elimination of Quantitative Restrictions

(a) Article XI:1

48. **Costa Rica, Guatemala, Nicaragua and Venezuela** stated that the régimes regulating banana imports from third country suppliers in France, Italy, Spain, Portugal and the United Kingdom constituted a violation of Article XI. With regard to Spain, the import prohibition was the clearest case of infringement of Article XI, insofar as that Article prevented the imposition of import prohibitions. However, the British, French, Portuguese and Italian régimes also violated this provision, not only in that they established quantitative restrictions to limit imports of third country bananas, but also because the systems used for this purpose, based on licensing, were themselves contrary to this Article and were not justified by any of the exceptions provided for in the Article itself or elsewhere in the General Agreement.

49. The clarity of Article XI reflected the importance which the General Agreement attached to the non-use of import prohibitions or restrictions in any form. It followed from Article XI that there was a presumption that any quantitative restriction was illegal, not only on account of the restrictive effect that it had on the quantities of the product available on a market but also because it increased costs and created uncertainties in the market.²

50. Article XI had been interpreted narrowly by a number of panels. Thus, the panel which examined the quantitative restrictions against imports of certain products from Hong Kong rejected the argument put forward by the EEC that quantitative restrictions in breach of Article XI could acquire legality from their duration over a prolonged period.³ Further evidence that the prohibition in Article XI should be interpreted narrowly was to be found in the reports of some panels which had recognized that the term "restrictions" included not only quotas *stricto sensu* but also systems based on minimum import prices and non-automatic export licences.⁴

51. **Colombia** stated that there was a strong presumption under Article XI that quantitative restrictions were illegal, not only because of the restrictive effect they had on the volume of trade, but also because they generated large transactional costs and market place uncertainties.⁵ Reflecting the view of the GATT drafters that a quota, "of all the forms of restrictionism ever devised by the mind of man ... was the worst,"⁶ Article XI contained an unambiguous general prohibition against their use. To strengthen the prohibition even more, the very few exceptions to this general prohibition were construed narrowly, and any contracting party invoking an exception had to prove it had satisfied all the conditions of the exception.⁷ The banana import régimes of the EEC member States consisted of a number of quantitative restrictions aimed at tightly restricting, and sometimes blocking altogether, imports of bananas from Colombia and other Latin American countries. These restrictions flouted the obligations of the EEC under Article XI, which generally prohibited a contracting party from imposing quantitative restrictions.

52. Moreover, GATT panels had interpreted this prohibition strictly, regularly concluding that such indirect and heavy-handed import limitations were inconsistent with the obligations of Article XI.

²Report of the Panel on "Japanese Measures on Imports of Leather", BISD 31S/94 paragraph 55 (adopted on 15/16 May 1984).

³Report of the Panel on "EEC - Quantitative Restrictions Against Imports of Certain Products from Hong Kong", BISD 30S/129, paragraph 29 (adopted on 12 July 1983).

⁴Reports of the Panels on "EEC - Programme of Minimum Import Prices, Licences and Security Deposits for certain Processed Fruits and Vegetables", BISD 25S/68 paragraph 4.9, (adopted on 18 October 1978); and "Japan - Trade in Semi-conductors, BISD 35S/116, paragraphs 105 and 117 (adopted on 4 May 1988).

⁵Report of the Panel on "Japanese Measures on Imports of Leather", BISD 31S/94 (adopted on 15/16 May 1984).

⁶Document E/PC/T/A/PV.22, at 16 (1947).

⁷Report of the Panel on "Japan - Restrictions on Imports of Certain Agricultural Products", BISD 35S/163 (adopted on 2 February 1988).

By its own terms, the message of Article XI, as reinforced by the strict interpretation of many panels, was unambiguously clear, i.e., as a general rule, the GATT would not abide quantitative restrictions. Given this principle, there could be no question that the quotas maintained by France, Italy, Portugal, Spain and the United Kingdom were inconsistent with their obligations under Article XI.

53. In addition, these quantitative restrictions were exacerbated by the restrictive licensing procedures of various member States. For example, in the limited circumstances when imports of third country bananas were permitted into France, import licences were required. Such licences were issued on a discretionary basis, and in practice were granted exclusively to an association of particular banana producers and marketers. This association bought third country bananas, and then sold them to a government-controlled committee at the higher prices for domestic and ACP bananas. The difference was remitted to the government. Thus, the French licensing system protected domestic and ACP bananas from price competition from bananas originating in Latin America. Likewise, the already stringent United Kingdom quota for imports of third country bananas was exacerbated by the system through which licences were issued.

54. The EEC responded that the Hong Kong panel ruled only that a panel was obliged to make a purely legal interpretation of Article XI, and that the social and economic justifications of the restrictions did not come within the purview of Articles XI and XIII of the General Agreement.⁸ Furthermore, the Hong Kong panel found that in its case there was no "absence of law" so that the principle of the "law-creating force derived from circumstances" could not be applied.⁹ In the present case, however, a purely legal interpretation of Part II of the General Agreement taking the subsequent practice of the CONTRACTING PARTIES into account, would admit the consistency of the banana import rules of some member States of the EEC with the General Agreement.

55. Equally, the findings of the Panel on "Japanese Measures on Imports of Leather"¹⁰ did not appear to contradict the EEC's legal analysis. That panel simply ruled that the "special historical, cultural and socio-economic circumstances referred to by Japan could not be taken into account by (the panel) in this context", and that these circumstances did not amount to a justification for import restrictions.¹¹ In the present case, however, the EEC was referring primarily to a legal interpretation of Part II of the General Agreement, using well-established means of interpretation in international law.

(b) Article XI:2

56. The EEC noted that pursuant to the report of the Panel on Japan-Restrictions on Import of Certain Agricultural Products,¹² an import régime claiming the benefit of Article XI:2(c)(i) must meet the following seven conditions:

- (i) the measure must be an import restriction, not amounting to a complete import prohibition;
- (ii) the measure must be a restriction applicable to an agricultural or fisheries product;

⁸Report of the Panel on "EEC - Quantitative Restrictions Against Imports of Certain Products from Hong Kong", BISD 30S/129 (adopted on 12 July 1983).

⁹Idem.

¹⁰Report of the Panel on "Japanese Measures on Imports of Leather", BISD 31S/94 (adopted on 15/16 May 1984).

¹¹Idem.

¹²Report of the Panel on "Japan - Restrictions on Imports of Certain Agricultural Products", BISD 35S/163 (adopted on 2 February 1988).

- (iii) there must be a governmental measure operating to restrict the quantities of a product to be marketed or produced, i.e., to keep output below the level (which would have existed) in the absence of restrictions;
- (iv) the import restriction and domestic supply restriction must apply to "like" products;
- (v) the import restriction must be "necessary" to the enforcement of the domestic supply restriction;
- (vi) a public notice must be given of the total quantity or value of the quota for each product; and
- (vii) reasonable proportion must be observed between the internal restriction and the restriction on imports.

The EEC claimed that the import régimes applied by France, Spain and Portugal met all these conditions.

57. **Costa Rica, Guatemala, Nicaragua and Venezuela** argued that the exceptions to Article XI:1 were precisely delimited and defined by paragraph 2 of that Article. It had already been repeatedly upheld, in the reports of various panels established to rule on specific quantitative restrictions, that if the grounds put forward by a party for maintaining such restrictions did not fall within the purview of Article XI - and justifications based on historical, cultural or socio-economic circumstances did not - they fell outside the consideration of the Panel¹³.

58. Thus, the imposition of any prohibition or restriction on imports had to come within one of the exceptions provided for in Article XI:2, and the exceptions had to be invoked by the party maintaining the restriction¹⁴, in this case France, Italy, Portugal, Spain and the United Kingdom, demonstrating compliance with each and every one of the requirements and conditions laid down in that provision.¹⁵ If this was not done, it was not up to the Panel to examine whether such measures would be justified by any of these provisions. Also, it should be made absolutely clear that any exception to the General Agreement, and particularly as concerned Article XI:2, had to be interpreted as narrowly as possible.¹⁶

59. Furthermore, Article XI distinguished between prohibitions and restrictions: whereas the former might be justified under sub-paragraph 2 (a) or (b), they were not covered by sub-paragraph (c), which could only be invoked in the case of restrictions.¹⁷ Restrictions could theoretically be justified under any of the three sub-paragraphs, although for the case under consideration sub-paragraph (a) was not relevant in that it referred to export prohibitions or restrictions. Likewise, sub-paragraph (b) did not concern the case under consideration, in that the exception was based on the measure being necessary "to the application of standards or regulations for the classification, grading or marketing of commodities in international trade". Hence, it had to be stated that any import prohibition not coming within this last exception was not justifiable, and was in breach of the General Agreement, in accordance with Article XI:1 itself. Thus, the Spanish prohibition on banana imports could not be justified from any

¹³Reports of the Panels on "EEC - Quantitative Restrictions Against Imports of Certain Products from Hong Kong", BISD 30S/129, paragraph 27, (adopted on 12 July 1983); and "Japanese Measures on Imports of Leather", BISD 31S/94, paragraph 44 (adopted on 15/16 May 1984).

¹⁴Idem.

¹⁵Report of the Panel on "Japan - Restrictions on Imports of Certain Agricultural Products," BISD 35S/163, paragraph 5.1.3.1 (adopted on 22 March 1988).

¹⁶Reports of the Panels on "Canada - Administration of the Foreign Investment Review Act", BISD 30S/140, paragraph 5.14 (adopted on 7 February 1984); and "Canada - Import Restrictions on Ice Cream and Yoghurt", BISD 36S/68, paragraph 59 (adopted on 5 December 1989).

¹⁷Report of the Panel on "Japan - Restrictions on Imports of Certain Agricultural Products", BISD 35S/163, paragraph 5.1.3.1 (adopted on 2 February 1988).

standpoint, since it did not fall within the above-mentioned sub-paragraphs (a) or (b), and therefore constituted a clear infringement of the General Agreement.

60. In the case of import restrictions, these could only be exempted from the general prohibition in Article XI:1 if they fell under sub-paragraph (c) of Article XI:2, and specifically indents (i) or (ii). As concerns Article XI:2(c)(i), it was necessary that a governmental measure should exist which operated to restrict the quantities of a product permitted to be marketed or produced. It was understood, however, that this exception was not intended to provide a means of protecting domestic producers against foreign competition.¹⁸ There had to be domestic restrictions which kept domestic output below the level which it would have attained in the absence of such restrictions.¹⁹ In addition, it had been established that it was necessary to satisfy all the conditions laid down in Article XI:2(c)(i) for this provision to be invoked, which made it extremely difficult to apply.²⁰ As a minimum, there must exist some governmental measure intended to have such a restrictive effect. In the absence of such a measure, the possibility of invoking Article XI:2(c)(i) as an exception was ruled out, and consequently there was a breach of Article XI:1. This was the case of the French and Portuguese régimes. There was domestic production, but it was not subject in either of the two countries to any governmental measure to restrict it; therefore, this exception could not be invoked to cover these régimes. When there was no domestic production of the product in question, as in the case of Italy or the United Kingdom, this analysis did not even have to be made, since the exception did not apply.

61. The conclusion could be drawn from the foregoing that any import prohibition or restriction, based on grounds other than those clearly delimited in Article XI:2 were of a historical, cultural, socio-economic or political nature, and did not, therefore, fall within the purview of the General Agreement. Consequently, this could not be taken into consideration to justify infringement of Article XI. This was particularly relevant to the matter before the present Panel, as the EEC had already tried to argue in an earlier case, examined in GATT, that economic or social reasons justified the imposition of quantitative restrictions, an argument which was rejected in the report of the panel set up to examine the matter.²¹

62. **Colombia** claimed that the ban on quantitative restrictions in Article XI was not categorical. Article XI:2 set forth a number of exceptions to the general prohibitions of Article XI:1. However, these exceptions were construed narrowly,²² and any contracting party invoking such an exception had to prove it had satisfied all the conditions.²³ The EEC had failed to justify its quotas on the basis of the limited, narrowly construed exceptions to Article XI. In fact, the EEC offered a defence to its violation of Article XI only in respect of France, Portugal and Spain. Even in respect of these countries, the EEC relied on an exception, sub-paragraph 2(c)(i), which had never been successfully invoked. As the party invoking an exception to the General Agreement, the EEC had to bear the burden of proving that the exception applied. In this case, the EEC had failed to demonstrate affirmatively that it had satisfied each of the seven conditions required by Article XI:2(c)(i), all of which had to be satisfied for the exception to be successfully invoked.

63. Colombia argued that the EEC could not, in respect of any of the member States, satisfy the condition that quotas under Article XI:2(c)(i) should not reduce the total of imports relative to domestic

¹⁸See Havana Reports, ICITO/I/8, page 89.

¹⁹Idem, paragraph 17.

²⁰Report of the Panel on "EEC - Restrictions on Imports of Dessert Apples - Complaint by Chile", BISD 36S/93, paragraph 12.4 (adopted on 22 June 1989).

²¹Report of the Panel on "EEC - Quantitative Restrictions Against Imports of Certain Products from Hong Kong", BISD 30S/129, paragraph 27 (adopted on 12 July 1983).

²²Idem.

²³Reports of the Panels on "Japan - Restrictions on Imports of Certain Agricultural Products", BISD 35S/163 (adopted on 2 February 1988); and "EEC - Restrictions on Imports of Dessert Apples - Complaint by Chile", BISD 36S/93 (adopted on 22 June 1989).

production as compared with the proportion which might reasonably be expected to rule between the two in the absence of restrictions during a previous "representative period." As a panel had recently held, where a party had maintained import restrictions for a long time, so that it was impossible to determine a "previous period" free of restrictions, the party could not invoke the exception provided in Article XI:2(c)(i), because, as a practical matter, the party could not satisfy its burden of proof.²⁴ Unable to satisfy this condition, the EEC's reliance on the entire exception must fail, too, since to invoke any exception successfully a contracting party had to fulfil each condition of the exception.

64. In short, the GATT-inconsistent quotas of France, Italy, Portugal, Spain and the United Kingdom were not justified, excused or otherwise mitigated by any exception provided for in Article XI. Further, the infringement of obligations under Article XI established a *prima facie* case of nullification or impairment of benefits accruing to a contracting party under the General Agreement.²⁵

65. The EEC considered that the panel report referred to by Colombia did not exclude that a régime which had been restricting imports for a long period of time could meet the proportionality test. It simply confirmed that the burden of proof remained, in such a situation, on the responding contracting party and, in this respect, the EEC considered that it had brought sufficient evidence that the régimes of the member States concerned fully met the condition of proportionality.

66. In analyzing the seven conditions required for compliance with Article XI:2(c), the EEC stated that the Portuguese legislation met the four first requirements (described in paragraph 56 above). Indeed, since 1985:

- (i) the measures taken in application of Decree-Law (503/85) resulted only in a restriction of imports, not in a total prohibition of imports;
- (ii) fresh bananas were an agricultural product;
- (iii) import and domestic restrictions clearly applied to "like" products (i.e., bananas); and
- (iv) there were governmental measures operating to restrict the quantities of bananas to be marketed or produced.

67. In the present case, it was clear that a measure intended to improve the quality of production and to restrict the production of bananas to the most appropriate soil attained such a result. Moreover, the Panel on Japanese Import Restrictions on Certain Agricultural Products²⁶ further specified that production restrictions under Article XI:2(c)(i) could in principle co-exist with production subsidies. Consequently, any governmental programme having the effect of limiting production met the requirement of Article XI:2(c)(i), even in the presence of subsidies. In the present case, the aim of the 1985 Decree Law (see Articles 9:1 (a) and 9:2 (a)) was to rationalize the production by, e.g., concentrating it on the most appropriate lands. Subsidies were granted within that framework, thus operating as an aid conditional upon rationalization.

68. As regards condition (v) it was clear that the measure was necessary. The aim of the national market organization established by the Decree-Law of 1985 was, *inter alia*, to rationalize the banana

²⁴Report of the Panel on "Japan - Restrictions on Imports of Certain Agricultural Products", BISD 35S/163 (adopted on 2 February 1988).

²⁵Report of the Panel on "EEC - Quantitative Restrictions Against Imports of Certain Products from Hong Kong", BISD 30S/129 (adopted on 12 July 1983).

²⁶Report of the Panel on "Japan - Restrictions on Imports of Certain Agricultural Products", BISD 35S/163 (adopted on 2 February 1988).

industry in order to maintain such activity in a region which was extremely dependent on it for its economy. However, the Portuguese production costs were much higher than those of competitors. Consequently, their selling prices were much higher. If no quotas were imposed, the Portuguese production could not be sold domestically and would have to be dumped on foreign markets, thus distorting those markets. Import quotas allowing for the reservation of a share of the Portuguese market was, therefore, a necessary measure for the implementation of the rationalization programme for domestic production.

69. With respect to condition (vi), the Decree-Law of 1985 substantially improved the level of transparency with regard to the allocation of quotas, *inter alia*, by providing for objective criteria for their calculation. The opening of quotas accompanied by administrative notices, published on a regular basis and providing for the quantity of imports, allowed it to conform with this requirement.²⁷ Consequently, this condition was fully met by Portugal.

70. As concerns the seventh condition, it was not possible, in the present case, to estimate the proportion which existed before restrictions were applied, as such restrictions had always been applied. The EEC nonetheless considered that the significant increase of imports compared with domestic production and the removal of balance-of-payments restrictions were clear evidence that the import quota system applied in connection with the Portuguese restructuring programme did not prejudice Latin American exports of bananas. In 1991, the Portuguese production represented less than 28 per cent of the market. For these reasons, the EEC considered that the restrictions imposed by Portugal did not reduce the total of imports of Latin American bananas below the proportion which might have ruled in the absence of quantitative restrictions. Consequently, the programme implemented by the Portuguese authorities was eligible to benefit from the provisions of Article XI:2(c)(i) and thus was exempted from the requirements of Article XI:1.

71. **Costa Rica, Guatemala, Nicaragua and Venezuela** argued that with respect to Portugal, the EEC had not demonstrated that the governmental measures mentioned had the effect of reducing production in Madeira below the level it would have attained in the absence of the restrictions. In its written submission, the EEC itself recognized that the quantitative restrictions were the means by which national production was protected against imports of fruit from other suppliers, and that the latter imports, being produced in more efficient and competitive conditions, would be sold at lower prices which allegedly would make it impossible to sell the domestic product.

72. **Colombia** said that, as regards Portugal, the EEC had not shown, as required, that the governmental measure restricted production with respect to a specific quantitative target; the EEC merely asserted that "a measure intended to improve the quality of production and to restrict the production of bananas to the most appropriate soil attains such a result". If one closely examined the text of Decree 53 of 1985, this regulation referred basically to quality standards (Title I), producers' associations (Title II) and assistance measures (Title III), which clearly did not qualify as "governmental measures to restrict domestic production", as required by Article XI:2(c)(i). Instead, they aimed precisely at a contrary objective, i.e., that of promoting greater efficiency of domestic production. Therefore, it was plain that the "necessity" test also failed, insofar as import restrictions were complementary to measures devised to promote, not restrict, domestic production.

73. The **EEC** said that the governmental measures were required to operate so as to keep the domestic output below what it would have been in the absence of such measures. Moreover, Article XI:2 (c) (i) did not specify how the production restriction had to be imposed.

²⁷See, e.g. Despacho Normativo No. 51/88.

74. With respect to Spain, the EEC contended that the Spanish import régime for bananas was complementary to a rationalization programme, and thus fell within the scope of Article XI:2(c)(i) of the General Agreement. In the Report of the Panel on "Japan-Restrictions on Imports of Certain Agricultural Products"²⁸, the panel referred to a previous report of the Panel on "United-States - Prohibition on Imports of Tuna and Tuna products from Canada"²⁹ and quoted that "the provisions of Article XI:2(c) could not justify the application of an import prohibition".

75. However, it should be noted that the circumstances of the United States-Canada tuna case, which led to the conclusion that only restrictions would be allowed under the exception of Article XI:(2)(c)(i), were different from those existing in the present case. Indeed, the EEC was of the opinion that what the panel actually condemned was the imposition of a prohibition on imports of all species of tuna from Canada, in case all these species were not similarly covered by restrictions in the United States. In other words, the panel apparently did not expressly rule out the possibility of imposing prohibitions on all imports, if restrictions also applied on all categories of tuna fished by United States vessels. In the present case, the import measure implemented by Spain covered one product: fresh bananas. The domestic programme applied to the same product. Consequently, the circumstances identified by the panel in the United States-Canada tuna case did not apply to the present situation.

76. The second argument of the panel in the United States-Canada tuna case (i.e., the absence of reference to "prohibition" in the language of Article XI:2(c)) was more compelling. Yet, should this consideration prevail, the EEC submitted that when considering the Spanish régime, attention should be focused on the intent of the legislation and the situation of the Spanish banana sector. It was known that the Spanish banana industry had for a long time experienced a situation of over-production compared to domestic demand. This situation was not recent, as substantial imports from Spain into France were recorded as early as 1931. This was also confirmed by the existence of explicit provisions on exports in the original Spanish legislation on banana production. However, the development of competition on the international market had made Spanish bananas less competitive, thus justifying the restructuring of this sector.

77. The importance of this sector for the Canary Islands justified that an outlet be guaranteed for domestic production while it carried out its restructuring in order to ease economic and social costs. Article 9(a) of Law No. 30/72 reserved the Spanish market to Canary Islands production. Yet, a few years later, the effects of the programme of control carried out by CREP began to be more visible, as domestic production fell below 294,000 tonnes (1977). There was a clear risk that, due to the reservation of the Spanish market by law to the Canarian production, and because of the rationalization programmes, shortages of supply and higher prices would occur at the expense of Spanish consumers. This apparently led the Spanish authorities to amend their legislation in order to take into account the consumers' interests (see: Decree of 6 June 1978). While, *de facto*, the situation remained close to prohibition, the 1978 amendments made imports possible in order to match domestic demand. Moreover, since the 1970s, the Spanish production of bananas had either remained stable or decreased. Because such a situation was likely to continue due to the control activities of the Government, the gap between domestic consumption and national production was likely to widen, thus making room for more substantial imports. Therefore, the Spanish legislation did not intend to impose a prohibition on imports and, as it applied to the same product as the one domestically subject to restrictions of production, it met the first condition attached to Article XI:2(c)(i).

²⁸Report of the Panel on "Japan - Restrictions on Imports of Certain Agricultural Products", BISD 35S/163, paragraph 5.1.3.1 (adopted on 2 February 1988).

²⁹Report of the Panel on "United States - Prohibition of Imports of Tuna and Tuna Products from Canada", BISD 29S/91 (adopted on 22 February 1982).

78. Furthermore, as in the case of Portugal, the restrictions applied only to fresh bananas. There was no doubt that bananas (falling within Chapter 8 of the HS) were agricultural products for the purpose of this condition. As far as the third condition was concerned, in the report of the Panel on EEC-Restrictions on Imports of Dessert Apples from Chile³⁰, the panel acknowledged that a régime which did not restrict production but restricted marketing, even through a system of market withdrawals carried out by producer groups would meet the above condition. The large variety of systems found to fulfil the above requirement led the EEC to consider that the Spanish legislation was a governmental measure having the effect of restricting production or marketing of bananas from the Canary Islands. Indeed, it was legally applied under the control of a public entity and controlled by government appointed authority. It had both an immediate and a long-term impact. In the short term, the restrictions were applied by a system of weekly marketing quotas fixed by the public authorities. In the long term, the measures involved creating disincentives for the extension of banana plantations by, e.g., refusing loans for such extensions, improving quality and rationalizing existing plantations. In other words, the Spanish authorities had made efforts, especially since the granting of autonomy to the Islands in 1982, not only to protect the Canarian production but, at the same time, to restrict it to acceptable levels, by creating schemes that favoured quality and rationalization of the industry. The fourth condition was obviously met by the Spanish régime, as both the import restrictions and the domestic restrictions applied solely to fresh bananas.

79. As concerned the fifth condition, the Spanish production was not only significant but also faced high production costs. Given its importance to the economy of the Canary Islands, and in the absence of any alternative economic activities which could rapidly create as many jobs as the banana sector, it could not be reasonably envisaged that the banana industry in the Canary Islands should be allowed to collapse. Moreover, given the high costs of production of the Canary Islands' producers, any export programme which could be substituted for import restrictions would require a large amount of subsidies which, in addition, would have implied a risk of trade disturbance on world export markets. It was, therefore, reasonable to reserve part of the domestic market to Canary bananas while rationalizing the sector, because this was the less disturbing approach from the economic and social point of view, and no less restrictive option would achieve the same results.

80. Condition number six was not applicable, given the fact that Spanish consumption had apparently not yet gone beyond the level of domestic supply, and therefore no licences had yet been issued or substantial quantities imported. However, it could be reasonably assumed that the régime would meet condition number six once large imports took place. The last condition did not as such require that significant imports be allowed into Spain, but that a reasonable proportion be respected in the reduction. In this respect, the EEC stressed that the particular conditions applying to the Spanish banana industry justified the disproportionate treatment of imports until domestic production was completely rationalized. Consequently, while in other circumstances this condition would have to be applied strictly, it was submitted that, in the specific facts of the present situation, this condition could not be met without jeopardizing the otherwise clear demonstration that the Spanish import régime fulfilled the requirements of Article XI:2(c)(i).

81. **Costa Rica, Guatemala, Nicaragua and Venezuela** stated that the exceptions provided for in Article XI:2(c) did not cover the application of prohibitions, and they therefore considered that the EEC's claim to justify the Spanish régime under this exception was inadmissible. Notwithstanding the EEC's insistence that there was no banana import prohibition in Spain - on the grounds that the Law did not use this terminology - the fact was that in practice no imports of bananas were authorized at all.

³⁰Report of the Panel on "EEC - Restrictions on Imports of Dessert Apples - Complaint by Chile", BISD S36/93 (adopted on 22 June 1989).

82. The complaining parties recognized that the letter of the Law did not mention the term prohibition and that powers were given to the governmental authorities to supervise in parallel form the interests and needs of domestic consumption. However, this did not in any way imply there was no import prohibition. A recent panel report was absolutely clear on this subject:

"The Panel notes that Article XI:2(c)(i) does not permit the prohibition of imports but only their restriction. It finds that Japan maintains a *de facto* prohibition on the importation of ... The Panel concludes that these prohibitions maintained by Japan are contrary to Article XI."³¹

To date, no quotas had been opened to import any fruit from other suppliers and import licences were not issued - further proof of the existence of a prohibition, even though the EEC attributed these aspects to the stagnation of consumption, which in this case could only be understood as a necessary consequence of the system and not as its cause.

83. **Colombia** was also of the view that the exception in Article XI:2(c)(i) could not be invoked with respect to Spain, because the exception could be invoked only in cases of import restrictions, whereas Spain prohibited imports of bananas. The argument that Spain's system established an import prohibition was in itself so categorical that it was redundant to examine additional criteria.

84. The **EEC** claimed that France was applying a rationalization programme for the banana sector which met the requirements of Article XI:2(c)(i). As to the first condition, the French market was by no means closed to imports from third countries. Indeed, more than one third of demand was covered by imports, either from ACP or from ACP and Latin American suppliers. Under those circumstances, one could not consider that there was a prohibition of imports of bananas into the French market but only restrictions. There was no doubt also, as in the case of Portugal and Spain, that the French régime for bananas applied to an agricultural product.

85. As concerned the third condition, a number of measures had been taken both at the national and the EEC levels with respect to banana production. At the national level, set aside measures were being applied, together with programmes for the improvement of quality, which would justify the difference in price between bananas from the Antilles and from Latin America. At the national level, a series of diversification programmes had been launched with the aim of limiting the importance of the banana sector in the French overseas departments (DOM). The French government also took advantage of the substantial damage caused by the recent hurricanes to limit, through restriction of financial support, the re-establishment of banana plantations. At the EEC level, a specific programme for overseas development had been developed in 1989.³² This programme, called "Poseidom", was intended to provide a framework for structural development of the DOM. The Council Decision which set up this programme expressly addressed the issue of dependency of these territories on a limited number of products (*inter alia* bananas) and intended to improve the conditions of production and competition in the banana sector. While these measures did not expressly provide for the reduction of production, they were designed to make the DOM less dependent on a small number of products (rum, bananas) by promoting diversification in the agricultural sector. Consequently, it could objectively be argued that governmental measures existed in France to limit the production of bananas in the French overseas departments.

86. With respect to the fifth condition, a reasoning identical to that used for Portugal and Spain could be developed for France, as the conditions were the same as concerned the economic importance of bananas in the economy of the DOM. However, one additional factor made the imposition of quanti-

³¹Report of the Panel on "Japan - Restrictions on Imports of Certain Agricultural Products", BISD 35S/163, paragraph 6.4 (adopted on 2 February 1988).

³²Council Decision of 22 December 1989, O.J. of the European Communities No. L 399/99 of 30 December 1989.

tative restrictions on bananas from the Latin American countries necessary: France's obligations vis-à-vis its ACP suppliers. These obligations, which resulted from France's historical relations with these countries, from the "Communauté" (between formerly dependent territories and France)³³ and from later agreements, obliged France to grant preferential treatment to imports of ACP bananas. In other words, the restrictions of access to the French market were not only necessary to allow an outlet for domestic bananas but also for ACP bananas. As a result, France had a double obligation to respect. This made the imposition of import restrictions on Latin American bananas absolutely necessary.

87. The sixth condition was met since the French government regularly issued public notices to importers which informed them of the opening of import quotas. While the report of the Panel on "Japan - Restrictions on Imports of Certain Agricultural Products" stated that public notice should be given of the total quantity or value of the quota, it was submitted here that, given the broad variety of the sources of supply (Antilles and ACP), flexibility was needed in the administration of quotas, thus making a preliminary determination of the volume of the quota hardly possible.

88. Regarding the last condition, the French régime, in some aspects, did not seem to respect the required proportionality between the restrictions applied to domestic production and restrictions applied to imports from the Latin American suppliers. However, the EEC stressed that this disproportionality resulted primarily from France's obligation to grant preferential access to ACP production, thereby limiting the share of the French market which would otherwise be held by Latin American exports. Under these circumstances, it was submitted that the Panel, when considering this last condition, should take into account the special legal obligations of France (preferential arrangements) and the fact that imports from Latin American countries were not otherwise limited when imported by the GIEB. For these reasons, it was submitted that the régime applied by France should also be considered as meeting the seventh condition.

89. **Costa Rica, Guatemala, Nicaragua and Venezuela** said that in the case of France, the EEC had recognized that the governmental measures referred to in its written submission were not expressly aimed at reducing domestic production as was required by Article XI:2(c)(i). Moreover, the EEC had indicated that protection was the real objective pursued by quantitative restrictions when it had stated that in their absence the situation would be more difficult not only for its domestic producers but also for the ACP countries. In no respect could it be argued that these were measures limiting domestic production. Insofar as the restrictions also provided protection to ACP banana production, they went beyond what could possibly be considered "necessary" to the enforcement of governmental measures which operated to reduce domestic production - assuming that such measures existed.

90. Finally, it was clear from the EEC's written submission that neither in the case of France nor of Portugal had the EEC demonstrated that the requirement of proportionality between total imports and domestic production, in comparison with what might be reasonably expected in the absence of the restrictions, was satisfied.

91. **Colombia** agreed that the EEC had not identified a governmental measure that explicitly and concretely restricted the production or marketing of bananas in France, a key condition to the exception under Article XI:2(c)(i). In this respect, according to the drafting history of this Article, the term "restrict" was interpreted to mean that "the measures of domestic restriction must effectively keep output below the level which it would have attained in the absence of restrictions".³⁴ In fact, the EEC had conceded that France did not maintain any governmental measure that expressly provided for the reduction of production.

³³See French Constitution from 1958, title XII.

³⁴Havana Report page 83, Analytical Index.

92. Moreover, the EEC had not demonstrated that the restrictions applied in the case of France were "necessary" for the implementation of governmental measures designed to restrict the level of domestic production of bananas. On the contrary, besides the fact that the measures in question were not meant to restrict domestic production of bananas, the EEC had admitted that the French restrictions applied to bananas from Latin America were "necessary" to protect domestic production and to allow an outlet to bananas from ACP sources. This was in contravention of the strict requirements for exceptions to Article XI.

Article XIII - Non-discriminatory Administration of Quantitative Restrictions

93. **Costa Rica, Guatemala, Nicaragua and Venezuela** said that even though the provisions of Article XIII presupposed that the application of quantitative restrictions was justified - which was not the case of any of the import régimes under consideration, making it unnecessary to analyze the compatibility of the existing measures with this provision - the Article conclusively established that the restrictions had to be applied uniformly to all suppliers, i.e., without discrimination. In the present case, the restrictions maintained by France, Italy, Portugal and the United Kingdom were applied exclusively to some suppliers, essentially the Latin American countries, while the ACP countries enjoyed access free of quantitative restrictions to the markets of these countries. This established the discriminatory treatment that infringed the provisions of Article XIII:1 of the General Agreement.

94. The EEC had argued that these discriminatory restrictions were justified by the need to preserve and protect the economic interests of suppliers which had historically enjoyed a preferential relationship, an argument that was inadmissible under the General Agreement. Thus, a panel report had already established that to differentiate between suppliers according to their different geographical zones raised questions of compatibility with Article XIII.³⁵

95. The report of another panel which analyzed this very provision and the possibility of discriminating among countries stated that:

"While noting that provision for some developing exporting countries of assured increase in access to Norway's textile and clothing markets might be consistent for those countries with the spirit and objectives of Part IV of the GATT, this could not be cited as justification for actions which would be inconsistent with a country's obligations under Part II of the GATT."³⁶

96. **Colombia** argued that the measures applied to banana imports by France, Italy, Portugal, Spain and the United Kingdom were administered in a discriminatory manner, favouring certain ACP countries at the expense of Colombia and other Latin American countries. The EEC had conceded that some of its member States engaged in such administrative discrimination. Such discriminatory practices were prohibited by Article XIII. In the narrowly circumscribed circumstances where Article XI permitted quantitative restrictions, Article XIII required that a contracting party administer the quota in a non-discriminatory manner. To ensure that a contracting party did not breach this prohibition, Article XIII outlined in detail the acceptable means by which quotas might be allocated among different supplying contracting parties.³⁷ The underlying premise for these guidelines was that such allocation must approximate "as closely as possible the shares which the various contracting parties might be expected to obtain in the absence of such restrictions".³⁸ Because the quotas imposed by the five EEC member States were designed expressly to favour certain ACP countries, and not to approximate the market

³⁵Report of the Panel on "EEC - Quantitative Restrictions Against Imports of Certain Products from Hong Kong", BISD 30S/129, paragraph 33 (adopted on 12 July 1983).

³⁶Report of the Panel on "Norway - Restrictions on Imports of Certain Textile Products", BISD 27S/119, paragraph 15 (adopted on 18 June 1980).

³⁷Article XIII:2(a)-(d).

³⁸Article XIII:2.

shares that would otherwise have ruled under unrestricted conditions, they did not adhere to the strict allocation provisions set forth in Article XIII:2(a)-(d).

97. Past panels had confirmed and reinforced a contracting party's obligations under Article XIII to implement and administer any quota régime in a non-discriminatory fashion.³⁹ For example, in one case, a panel found that Norway acted inconsistently with Article XIII when it implemented global import quotas on various textile items, but reserved certain market shares for six countries. According to the panel, Hong Kong, which had "a substantial interest in supplying" the textile products but which had not received a reserved market share, had the right to expect the allocation of a share of the quotas in a non-discriminatory manner pursuant to Article XIII. Accordingly, the panel concluded that Norway should end its discriminatory quota practices.⁴⁰

98. This finding applied with equal force to the quantitative restrictions on bananas administered by the five EEC member States. Colombia and the other complaining parties had a "substantial interest" in supplying bananas to the EEC. Infringement of Article XIII was regarded being no less serious by panels than infringement of Article XI; such infringement independently constituted *prima facie* nullification or impairment of benefits to which Colombia was entitled under the General Agreement.⁴¹ Consequently, France, Italy, Portugal, Spain and the United Kingdom had aggravated the EEC's breach of Article XI by violating Article XIII as well.

99. The EEC stated that the regulation of import restrictions by certain member States was in conformity with the requirements of Articles XIII and XVII of the General Agreement. The management by national authorities of their quantitative restrictions conformed with the requirements of Article XIII of the General Agreement. This was evident with respect to Portugal which applied quantitative restrictions on imports of all origins, pursuant to the provisions of its Act of Accession. This was also the case as regards France, which applied a non-discriminatory régime for imports intended to make up for insufficient supply from the Antilles or preferential ACP producers under Article XVII of the General Agreement. The French licensing system was also applied in conformity with Article XIII:2(b) of the General Agreement, for indirect imports through other member States.

100. As concerned Portugal, Decree-Law No. 503/85 provided, in Article 16, for the general framework of the administration of import licences. Pursuant to Article 16(2), quotas were fixed on 1 April every year, and subdivided into periods according to the production cycle. The amounts of the quotas were established by joint ministerial orders of the Minister for the Azores and Madeira and of the Ministers of Agriculture, Trade and Tourism. The allocation of quotas was made on the basis of a public auction open to all entities located in Portugal. Insufficient domestic supply was made up by additional quotas on the basis of forecasts. More detailed rules had been set forth in *despachos normativos* published in the Portuguese Official Journal.⁴² The Portuguese import régime, therefore, fully met the requirement of, *inter alia*, Article XIII:2(a) and 3(b) of the General Agreement.

101. In France, the GIEB was the only entity entitled to import bananas directly from third countries (i.e., excluding preferential suppliers). It was, in a sense, in the position of an enterprise to which special privileges were granted within the meaning of Article XVII:1 of the General Agreement. The French practice provided that the GIEB, which was in charge of purchasing bananas on third-country markets when domestic and ACP supplies did not meet demand, was required to proceed on the basis

³⁹Reports of the Panels on "Norway - Restrictions on Imports of Certain Textile Products", BISD 27S/119 (adopted on 18 June 1980). "United States - Imports of Sugar from Nicaragua" BISD 31S/67 (adopted on 13 March 1984); and "EEC - Restrictions on Imports of Dessert Apples - Complaint by Chile", BISD 36S/93 (adopted on 22 June 1989).

⁴⁰Report of the Panel on "Norway - Restrictions on Imports of Certain Textile Products", BISD 27S/119 (adopted on 18 June 1980).

⁴¹Idem.

⁴²E.g., Despacho Normativo No.51188.

of three objective criteria, namely, the date of availability of the goods, the quality of the products available at the time of delivery, and the price of the product.

102. Apart from the objective discrimination resulting from the potential non-availability of specific qualities in some regions of production at a particular period of the year, no discrimination was applied on the basis of origin for these supplies. One could objectively consider that when purchasing abroad, GIEB fulfilled, as regards direct imports, the requirements of Article XVII:1(a) and (b) of the General Agreement.

103. More generally, and with respect to imports through other member States, the French authorities regularly published notices to importers. Licences usually had a validity of six months and were granted after a simultaneous examination of the applications. Consequently, it appeared that the administration of licences by the French authorities with respect to indirect imports met the requirements of Article XIII:2(b) of the General Agreement.

104. **Colombia** said that the EEC offered arguments only in defense of France and Portugal, which left one to infer that with respect to other member States the EEC conceded that they did discriminate in violation of Article XIII. Further, in a previous case involving EEC textile quotas against Hong Kong, the panel found that any quota differentiation between suppliers depending on their categorization in different geographical zones was incompatible with the non-discrimination mandate of Article XIII:1. Similarly, in another case, a panel held that Norway's desire to aid developing countries in accordance with Part IV of the General Agreement did not justify discrimination against other countries.

Article II - Schedules of Concessions

105. **Costa Rica, Guatemala, Nicaragua, and Venezuela** said this Article was designed to ensure the security and predictability of concessions granted by one contracting party to all other contracting parties. The EEC had bound its 20 per cent *ad valorem* import duty for bananas in 1963. It had resubmitted its Schedule of Concessions during the period 1973-1974, when Denmark, Ireland and the United Kingdom joined the EEC, and again bound the 20 per cent tariff for bananas on each occasion. Subsequently, when Greece, Spain and Portugal joined the EEC, the Schedule of Concessions of the EEC (Schedule LXXX) once again included the 20 per cent bound duty for bananas. This concession was made without any reservation by the EEC, and it had therefore to be understood that the 20 per cent binding was an unconditional concession that could not be impaired or changed for the worse without violating Article II of the General Agreement. The Latin American banana exporting countries, contracting parties of the GATT, had, as principal suppliers of bananas to the EEC market, a direct interest in the tariff concession granted by the EEC for bananas. This binding constituted a contractual obligation for the EEC which was, moreover, an integral part of the General Agreement through Article II:7. Consequently, pursuant to this Article, the EEC was obliged to refrain from applying any measure that impaired the concession granted.

106. In the case under consideration, the quantitative restrictions and licensing systems applied by France, Italy, Portugal, Spain and the United Kingdom to banana imports from the Latin American countries restricted and, in certain cases, totally prevented access to the markets of various EEC countries, thus impairing and even nullifying the value of the above-mentioned concession. It was reasonable to assume that the complaining parties when assessing the value of the concession granted by the EEC, took into account the benefits accruing to them from the binding including the security that this concession would be maintained over time, thus permitting future trade opportunities. Although the EEC had not formally modified the 20 per cent binding, in practice it had diminished the value of the concession granted for bananas from the outset, thereby affecting a crucial principle which was

an essential element of the GATT system, namely, the predictability and security of tariff bindings.⁴³ Hence, the restrictions adopted by some member States had nullified the validity of this assumption, and thus impaired the value of the concession obtained by the complaining parties.⁴⁴ Consequently, the régimes existing in certain EEC member States infringed Article II:1(a) insofar as they constituted less favourable treatment than that provided for in the Schedule of Concessions of the EEC annexed to the General Agreement, which could not be justified under any of the provisions of the General Agreement.

107. The EEC considered that the question of a violation of, *inter alia*, Article II had not been discussed during consultations or good offices. Therefore, the EEC considered that the Panel should refrain from ruling on the above issue. The EEC referred to its argumentation on Article XXIV (see: paragraph 216 et seq.).

Article III - National Treatment on Internal Taxation and Regulation

108. **Colombia** said that once products of a GATT contracting party entered into the commerce of another contracting party, Article III prohibited any discrimination against such products through laws or regulations affecting their internal sale, offering for sale, purchase or distribution. Article III required that products of a contracting party be accorded treatment no less favourable than that accorded to domestic products.

109. In violation of this requirement, the licensing schemes of France had the purpose and effect of protecting domestically produced bananas from competition from Latin American bananas by inflating prices for the latter. Under the French licensing scheme for bananas, import licences for Latin American bananas were granted only to an association of banana producers and marketers. This association then sold the Latin American bananas to a government-controlled committee, at the price prevailing for domestic and certain ACP bananas. The licensing system thus added an unnecessary layer of transactions that increased the price of Latin American bananas, reducing their competitiveness against domestic and ACP bananas.

110. While maintaining its procedural objections regarding Colombia's claim under Article III, the EEC replied that it was the EEC's understanding that what Colombia was complaining about was more related to the functioning of the GIEB than to any issue relating to Article III. Moreover, the language of Article III supported the conclusion that Article III related to measures by governments, not to measures by entities with special privileges which fell under Article XVII. The GIEB was an entity to which special privileges had been granted by the French authorities. It consequently fell within the scope of Article XVII of the General Agreement. Article XVII did not require contracting parties to eliminate monopolies. Therefore, the introduction into the banana trade of an additional "layer of transaction", i.e., the GIEB was not in violation of the General Agreement. The obligations borne by the GIEB under Article XVII could be summarized as follows:

- (i) the entity should act when purchasing or selling on a non-discriminatory basis (Article XVII:1(a));
- (ii) the entity should make purchases or sales solely in accordance with commercial considerations (Article XVII:1(b)); and

⁴³Report of the Panel on "EEC - Restrictions on Imports of Apples from Chile", BISD 27S/112, paragraph 4.2 (adopted on 10 November 1980).

⁴⁴Report of the Panel on "Treatment by Germany of Imports of Sardines", BISD 1S/53, paragraph 17 (adopted on 31 October 1952).

- (iii) the entity should afford the enterprises of the other contracting parties adequate opportunity, in accordance with customary business practices, to compete for participation in such purchases or sales (Articles XVII:l(b)).

111. With respect to condition (i), nothing supported the Colombian claim that Latin American products imported by the GIEB were treated in a discriminatory manner. In this respect, it should be noted that the GIEB could not discriminate against Latin American bananas when reselling them, as they were most of the time the only products imported by this entity to make up for the shortage of supply by domestic and ACP producers. Regarding condition (ii), it should be recalled that the GIEB, in selling imported bananas at the domestic market price, was acting in accordance with commercial considerations. By doing so, the GIEB did not reduce the competitiveness of Latin American bananas as, by the time they were imported (i.e., in case of shortage), there was no longer competition from domestic or ACP production. Consequently, the French import mechanism did not fall within the scope of Article III:4 and fully complied with the requirements of Article XVII. With respect to condition (iii) above, it had already been demonstrated that it was fully met by the GIEB.

112. **Colombia** rejected this explanation. Whether Article XVII or Article III applied to the GIEB was of little consequence. What was of consequence to this Panel was that the GIEB functioned in a manner inconsistent with the EEC's obligations under the General Agreement. This entity, however characterized, served to increase the price of Latin American bananas to the levels prevailing in the domestic market for more costly, otherwise non-competitive bananas. Colombia requested the Panel to find that this was a denial of national treatment under Article III, because it had the purpose and effect of making Latin American bananas less competitive.

113. Alternatively, the Panel should find a violation of Article XVII, which expressly required that the State-trading enterprises act in a non-discriminatory manner, because the GIEB:

- (i) discriminated by buying and ratcheting upward the prices of Latin American bananas;
- (ii) did not make purchases or sales solely in accordance with commercial considerations, but rather operated for the purpose and with the effect of protecting domestic and ACP bananas from Latin American banana competition; and
- (iii) did not accord the complaining parties and the ACP contracting parties equally the opportunity to be subjected to such price-ratcheting operations.

114. The **EEC** replied that the Colombian submission apparently neglected an essential element of the functioning of the GIEB, which was that the GIEB only intervened in case of shortages of supply from domestic and ACP suppliers. Any "mark-up" made by the GIEB on sales of bananas was by no means a denial of national treatment because nothing in the fact that bananas from Latin America were sold at the French market price could lead to the conclusion that they were granted less favourable treatment, within the meaning of Article III:4, after they were imported into France. Moreover, once requested to purchase bananas, the GIEB did not commit any of the infringements of Article XVII alleged by Colombia. Indeed, marking-up a purchase price was normal commercial behaviour and no evidence had been submitted that the GIEB would sell above the French domestic price; no intention of protecting ACP or domestic producers materially resulted from the purchasing action of the GIEB and, finally, there was no issue such as subjecting ACP and Latin American bananas to "price ratcheting" as the GIEB was not in charge of purchasing bananas from ACP countries.

115. **Colombia** said that the Portuguese licensing tender system had similar purposes and effects. The Portuguese government announced a tender for a certain amount of third country bananas at a specified reference price. The government then granted licences to importers who proposed the highest

quoted price exceeding the reference price. Like the French licensing scheme, the Portuguese scheme kept prices for Latin American banana imports artificially high to maintain a price preference for domestically grown bananas. These practices denied Latin American banana imports treatment as favourable as that accorded to domestic bananas, thereby violating Article III:4 of the General Agreement.⁴⁵

116. The **EEC** replied that the Portuguese licensing system fully met the requirements of Article XIII and the relevant provisions of the 1979 Tokyo Round Agreement on Import Licensing Procedures. The EEC also recalled that it was generally recognized that the auctioning of licences was among the fairest systems available in the administration of licences.

Article VIII - Fees and Formalities Connected with Importation and Exportation

117. **Colombia** argued that Article VIII disallowed fees and formalities associated with import licensing requirements that served as "indirect protection to domestic products". Yet, in the case of France, the bananas from Latin America that were allowed entry were subject to import licensing regulations designed expressly to inflate the price of the third country fruit to the level of the higher-priced domestic fruit. Latin American banana exporting countries were thus denied their comparative advantage, as well as their General Agreement rights under Article VIII.

118. France allowed banana imports from Latin America only when internal demand exceeded supply from the EEC and ACP countries. The balance of supply was then subject to a complex licensing tender system granted to the highest bidder, which artificially increased the price of bananas from Latin America compared to EEC and ACP bananas. The system became in practice a mechanism to protect EEC and ACP bananas. As a result of their lower level of competitiveness, prices of Latin American bananas were driven up in order to reach the same level as bananas in the EEC and ACP countries. The import system applied in France was therefore contrary to Article VIII:1(a). This import requirement also maximized the incidence of the discriminatory application of import formalities in a clear violation of Article VIII:1(c).

119. The **EEC** replied that Colombia had made an irrelevant link between the licensing system and the resale price applied by the GIEB. Indeed, the licensing system, as applied by France, did not as such result in a price increase. The price increase resulted from the intervention of the GIEB, not from the licensing scheme. Any mark-up by the GIEB was by no means a "fee associated with import licensing requirements"; it only resulted from the costs of the functioning of the GIEB, which acted as an importer, and from the French market price.

120. **Colombia** claimed that in Portugal a licensing tender system inflated the price of bananas from Latin America so as to maintain a price preference for bananas from Madeira. This import requirement established in fact a minimum import price, i.e., the licensing tender system pushed up the price of Latin American bananas, thereby giving additional protection to the domestic producers, in violation of Article VIII:1(a).

121. With respect to the Portuguese licensing system, the **EEC** responded that this régime fully met the requirements of Article XIII and the relevant provisions of the 1979 Tokyo Round Agreement on Import Licensing Procedures. It was also generally recognized that the auctioning of licences was among the fairest systems available in the administration of licences.

122. **Colombia** argued that in the United Kingdom banana imports from Latin America were subject to licensing to cover the supply balance left after ACP bananas had acquired their allotted share of

⁴⁵Report of the Panel on "EEC - Measures on Animal Feed Proteins", BISD 25S/49 (adopted on 14 March 1978).

the market. The Banana Trade Advisory Committee allocated import licences on a monthly basis to ripeners located in the EEC. This monthly allocation of import licences was an additional import burden for Latin American exporters who could not predict, in time, when and how the banana market was going to be open, which in turn meant more burdensome import requirements and formalities in violation of Article VIII:1(c).

123. The EEC replied that the system was applied in a transparent and objective manner, in conformity with the requirements of the Agreement on Import Licensing Procedures negotiated in the Tokyo Round. Colombia had adduced no evidence to demonstrate that the United Kingdom licensing authorities applied the system in a discriminatory fashion or that they charged fees or made applications subject to formalities which violated the provisions of Article VIII of the General Agreement.

Subsequent Practice, Acquiescence and Estoppel

124. The EEC argued that the subsequent practice of the CONTRACTING PARTIES had modified the obligations of the contracting parties under Part II of the GATT in a way that the specific residual restrictions on the importation of bananas from the complaining countries were not illegal. Under the law governing international trade it was established that subsequent practice by the parties in the application of a treaty had to be taken into account as a primary means of interpreting the treaty provision concerned. This rule was well-established in public international law, and codified in Article 31(3)(b) of the Vienna Convention on the Law of Treaties (1969). It had been acknowledged in past GATT panel reports⁴⁶ and was recognized and defended by scholars of international trade law.⁴⁷

125. Furthermore, it was firmly established under customary international law, that subsequent practice by the parties could not only affect the interpretation of treaty provisions but could also modify such provisions. This followed from the basic rule that rights and obligations, as well as procedural mechanisms in international bodies, could be altered by the consensus of the parties concerned. The practice of the parties concerned did not need to be in any way formal,⁴⁸ or even express. Under the concept of "acquiescence", recognized by the International Court of Justice, for example, in the "Temple of Préah Vihéar" case,⁴⁹ the mere tolerance of the practice of other contracting parties could modify the respective rights and obligations of the parties under a treaty.

126. In the "Canada-EC Arbitration on the Agreement on Ordinary Wheat", the arbitrator, Mr. Patterson, used the principle of acquiescence to interpret the General Agreement and the Agreement on Ordinary Wheat. The award had expressly stated that:

"a properly functioning multilateral international trading system does require that after a certain period silence must be considered acceptance of a state of affairs or abandonment of a claim. The predictability and stability that are central features of the GATT system require that. I conclude that by silence for so long on the Agreement on Ordinary Wheat Canada has relinquished any rights under the General Agreement she might have possessed under it in 1962."⁵⁰

⁴⁶Report of the Panel on "Japan - Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages", BISD 34S/83 (adopted on 10 November 1987); and "United States - Restrictions on Imports of Sugar", BISD 36S/331, 342 s. (adopted on 22 June 1989).

⁴⁷Jackson, *The World Trading System* (1989), page 88 ss.; *Hudec*, *The GATT Legal System and World Trade Diplomacy* (1975), pages 187 and 205; *Long*, *Law and its Limitations in the GATT Multilateral Trade System* (1985), pages 19 and 94 ss.; *Petersmann*, *Strengthening the GATT Procedures for Settling Trade Disputes*, *The World Economy* 11 (1988) 65 s.; *Benedek*, *Die Rechtsordnung des GATT aus Völkerrechtlicher Sicht*, pages 128 ss. and 147 ss.

⁴⁸Beigel Channel arbitration, ILR 52, page 224.

⁴⁹I.C.J. Rep. 1962, page 33.

⁵⁰Canada - European Communities Article XXVIII Rights, Award by the Arbitrator, BISD 37S/80.

127. The EEC believed that the Panel should find with regard to the banana import régimes in this specific case that there was a long-standing practice by the CONTRACTING PARTIES to exempt these residual régimes temporarily from the rules in Part II of the General Agreement as far as they prohibited import restrictions. This conclusion should be reached by considering: (a) the notoriety of the facts involved; (b) the general tolerance of these measures by the GATT contracting parties, especially by those most interested in the matter; (c) the period of time the parties tolerated restrictions associated with the EEC banana import régimes; (d) the area of law concerned; and (e) the basic aims and mechanisms of the General Agreement.

128. The CONTRACTING PARTIES had been notified by the member States of the existence and the scope of all import restrictions regarding bananas, either under the existing legislation clause, or under the procedures established for residual restrictions, or under the import or export licensing requirements of the Agreement on Import Licensing Procedures or the Agreement on Technical Barriers to Trade. The import restrictions applied by member States of the EEC were listed in a comprehensive way in numerous documents,⁵¹ some of them provided by the Secretariat of the GATT. These legal régimes were known to all contracting parties, and were made known to acceding parties at the time of the negotiations for the accession of these countries. The banana import régimes of the member States of the EEC had been tolerated since the time of their establishment. According to the Agriculture Documentation Inventory of Non-Tariff Measures from 22 July 1982, only Brazil commented on the import restrictions for bananas by France and the United Kingdom; Nicaragua as well as Colombia, both GATT contracting parties at that time, neither protested nor commented on these régimes.⁵² A lengthy period of time had lapsed before the five Latin American countries for the first time complained about the banana import restrictions operated by some member States of the EEC. Nicaragua had been a GATT contracting party since 1950, Colombia since 1980, Costa Rica and Venezuela since 1990, and Guatemala since 1991.

129. Also, the import régimes in question were "residual restrictions" for agricultural products. Residual restrictions were temporary exemptions from the overall trade liberalization because of specific economic and social situations in the sectors concerned. The contracting parties had tolerated these quantitative restrictions since the 1950s and had instituted a notification system to make the restrictions applied transparent. In October 1983, the Chairman of the Committee on Trade in Agriculture had stated in his report:

"The cross-examination of trading policies very clearly demonstrated a well-known phenomenon, namely that the contracting parties have all had recourse to a more or less broad range of restrictive practices, affecting both imports and exports. The perception which governments have of such restrictive measures is, broadly speaking, that their rights under the GATT permit them to take such measures."⁵³

130. Furthermore, in the view of the EEC, the basic aim of the General Agreement was to establish security and predictability in international trade relations.⁵⁴ The more predictable the legal rules were, the better international trade performed. In this respect, actual practice mattered most. Therefore, the Panel had to give specific consideration to the practice of the CONTRACTING PARTIES while stating the existing law to ensure the basic aims of the GATT. The Panel also had to give weight to the nature of the GATT system as a dynamic process of readjusting the respective rights and obligations through "mutual claims and tolerances".

⁵¹E.g., L/1769 (29 May 1962); L/3754/Add.2 (1 February 1973); AG/FOR/REV/EEC/1 (6 July 1987); NTM/W/6.

⁵²AG/DOC/2/EEC/1, pages 33 and 35.

⁵³"Progress Report to the Council of Representatives" (L/5563), BISD 30S/100, page 101.

⁵⁴Report of the Panel on "United States Manufacturing Clause", BISD 31S/74 (adopted on 15 May 1984).

131. Finally, the Panel should give ample attention to the specific facts of this case while interpreting Part II of General Agreement. Such a case-by-case approach, which could permit an ad hoc interpretation of a provision of the General Agreement, was the standard method of interpretation of the General Agreement evidenced by past panel reports.⁵⁵ Taking all these elements into consideration, there could be no doubt that the practice of the CONTRACTING PARTIES had modified the rules of Part II of the General Agreement as to the banana import restrictions by some of the EEC member States. They were, therefore, consistent with Part II of the General Agreement.

132. **Costa Rica, Guatemala, Nicaragua and Venezuela** said that it could not be argued at any time that the long-standing existence of the national regulations not being challenged in any way justified breaches of the General Agreement. Nor could it be claimed that failure to challenge these measures in the past implied tacit acceptance of them. GATT practice in this area had been clear and convincing, and there was no reason whatsoever to justify disregarding it in this case. In accordance with this practice, it had been recognized that restrictive measures that had been in force for a long time did not alter the obligations assumed by contracting parties under the General Agreement.

Thus, a panel report adopted in 1983 had stated that:

"it would be erroneous to interpret the fact that the measure had not been subject to Article XXIII over a number of years, as tantamount to its tacit acceptance by contracting parties".⁵⁶

The report of another panel, adopted in 1984, unequivocally confirmed GATT practice in this sense, reaffirming that the fact that restrictions had been in existence for a long time did not alter the obligations which contracting parties had accepted under provisions of the General Agreement.⁵⁷

133. Given the special character of the General Agreement and the existence of clearly established rules and practices for its application and interpretation, there could be no doubt that in this case the Panel had to resolve the matter strictly in the light of the provisions of the General Agreement and on the basis of the above-mentioned practice that had been developed through the decisions of the CONTRACTING PARTIES. Since it had been made clear that the reports of other panels dealing with this subject matter unquestionably applied in the present case, even if one wished to apply the principles of international law invoked by the EEC to the present dispute, it would not be possible to do so because the requirements for doing so had not been satisfied. One could not draw the conclusion that the actions of the complaining parties' governments concerned implied tacit recognition of, or consent to, the régimes under consideration. Thus, it had to be borne in mind that, in international law, treaty provisions tended to prevail over customary rules for reasons of legal security, so that the non-formal expression of the parties' wishes, such as the mere tolerance of the infringement of contractual obligations, was only accepted on an exceptional basis.

134. Moreover, an argument of acquiescence would clearly be unacceptable in the case of some of the complaining parties which had acceded to GATT as recently as in 1990 or 1991, and which in this short time had repeatedly expressed to the EEC their desire that it should bring the régimes in question into conformity with the General Agreement. To claim that the failure to challenge these régimes during the process of the accession of the complaining parties to GATT was tantamount to a modification of rights and obligations under the General Agreement would be to disregard completely the true nature of these processes. It would be unacceptable to claim that during the negotiations for

⁵⁵Reports of the Panels on "Japan - Restrictions on Imports of Certain Agricultural Products", BISD 35S/163 (adopted on 2 February 1988); "Japan - Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages", BISD 34S/83, paragraph 5.6 (adopted on 10 November 1987); and "Jamaica - Margins of Preference", BISD 18S/183, page 187 (adopted on 2 February 1971).

⁵⁶Report of the Panel on "EEC - Quantitative Restrictions Against Imports of Certain Products from Hong Kong", BISD 30S/129, paragraph 28 (adopted on 12 July 1983).

⁵⁷Report of the Panel on "Japanese Measures on Imports of Leather", BISD 31S/94, paragraph 45 (adopted on 15/16 May 1984).

accession, measures maintained by a contracting party contrary to the General Agreement could be legitimized simply because the acceding party did not refer to their existence at that time. It should be borne in mind, also, that accession processes were unilateral, with the acceding party alone being requested to bring its trade régime into conformity with the General Agreement, in addition to the concessions it had to make as its "admission price". In such situations, it was easy to see why international law had accepted that silence did not necessarily mean acquiescence. In joining GATT, the complaining parties' governments concerned had assumed all the rights and obligations stemming from the General Agreement, and could not accept the assertion that they had renounced some of these rights in exchange for alleged benefits from the EEC's member States. It was true that for many years Nicaragua did not lodge any complaint in GATT concerning EEC restrictions on banana imports, but it was likewise true that Nicaragua had not been a banana exporter. Its production was very small and its share in foreign trade of very little importance. Furthermore, banana exports were somewhat sporadic, as production was not always sufficient. In addition, Nicaragua's banana exports were not directed towards the European countries having the more restrictive systems.

135. **Colombia** argued that an acceding country was in no position to negotiate on individual restrictions applied by contracting parties. On the contrary, following GATT practice, the acceding country had to pay for its "entry". This contribution was made through a list of concessions that was added to the General Agreement. The acceding country was called upon by individual contracting parties to make tariff and sometimes non-tariff concessions.⁵⁸ It followed, then, that Colombia had not been in a position to challenge the import régimes applied to bananas by some EEC member States which were inconsistent with the General Agreement.

136. Colombia rejected the EEC's argument that the "subsequent practice" or behaviour of the contracting parties legitimized its illegal conduct. Reliance on the Vienna Convention to interpret the General Agreement was misguided for several reasons. First, it did not formally apply to the General Agreement, but was often considered as a codification of customary international law. Second, the Convention did not assign "subsequent practice" a primary role as an interpretative tool of treaties. Article 31 stated that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in the context and in light of its object and purpose."⁵⁹ Applying the Vienna Convention's prescribed method of construction, then, the EEC's illegal practices could not be considered consistent with the "ordinary meaning" of the General Agreement and could not be considered acceptable when they undermined the very "object and purpose" of the General Agreement, namely trade liberalization.

137. To support the argument of acquiescence, the EEC invoked an arbitration case of 1990 between the EEC and Canada, which Colombia did not recognize as a precedent for this case, for two reasons: the dispute between the EEC and Canada took place in very special and clearly distinct circumstances, involving the examination of a bilateral agreement concluded between the two parties mentioned. In a Decision of 9 August 1949, the CONTRACTING PARTIES expressly stated that the determination of rights and obligations arising under a bilateral agreement was not a matter within the competence of the CONTRACTING PARTIES. The force and validity of arbitration awards were different from that of Decisions of the CONTRACTING PARTIES. While arbitration was explicitly provided for in the 1989 Decision, paragraph E.3 expressly stated that "the parties to the proceeding shall agree to abide by the arbitration award." Moreover, the relevant provisions of the bilateral agreement between the EEC and Canada referred to future legislation and not to existing, already negotiated, rules such as Articles I, II, III, VIII, XI, XIII, XXIV, and Part IV of the General Agreement, with reference to which the Panel had to rule in this dispute. Colombia said it might therefore be concluded that the

⁵⁸Long, *Law and its Limitations in the GATT Multilateral Trade System*, page 36.

⁵⁹"Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations", 25 I.L.M. 543 (1986), reproduced from UN General Assembly Document A/CONF.129/15 20 March 1986.

above mentioned bilateral award had effects "inter partes", but without thereby binding or committing in any way the CONTRACTING PARTIES.

138. In addition to the above, the EEC's argument faltered on numerous factual grounds. Colombia and the other complaining parties had not acquiesced in the EEC's banana régime, but had protested against it on many occasions. Recalling that GATT was at the same time a legal framework and a forum for negotiations, Colombia mentioned how, for example, from the time Colombia acceded provisionally to the GATT (1975), and through the conclusion of the Tokyo Round, Colombia actively participated in the process of further liberalization of tropical products, having bananas clearly in mind. Likewise, Colombia did participate fully in the preparation of the work programme adopted at the Ministerial Session of the CONTRACTING PARTIES held in November 1982, favouring further liberalization of tropical products. Since then, and particularly in 1986, Colombia had proposed, as an objective for the negotiations in the area of tropical products, the fullest trade liberalization of all tropical products, an objective that was finally accepted by all participants in the Uruguay Round, including the EEC.

139. Furthermore, the EEC's reference to a previous panel report regarding Japan - Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages merely confirmed the above rule, in the sense that subsequent practice was then subordinated to the "ordinary meaning of the terms in the context and purpose of the treaty", as a primary means of interpretation.

140. The EEC argued that the Panel should prevent the complaining parties from invoking their rights under Part II of the General Agreement by applying the principle of "estoppel". The complaining parties had not only "slept upon their rights" but they had, in particular, allowed member States of the EEC to continue with the application of the banana import restrictions while deriving negotiating benefits in other areas of international trade from EEC member States.

141. The concept of "estoppel", was based on the notions of equity and good faith performance of rights, and prevented a party from asserting a right under international law without abrogating it materially. This rule of law was firmly established in customary international law, often applied by international tribunals,⁶⁰ and was partly codified in Article 45 of the Vienna Convention on the Law of Treaties (1969). The principle of estoppel was equally applied by the arbitrator in the Canada-EEC Arbitration on the Agreement on Ordinary Wheat, while stating the respective rights and obligations of the parties under the General Agreement and the Agreement on Ordinary Wheat.⁶¹

142. The complaining parties had been expressly notified by the EEC member States of the existence and the scope of the banana import régimes. Neither in the negotiations concerning the specific terms of their accession to the GATT, nor in those as regards the various co-operation agreements concluded between them and the EEC, had the complaining parties asked for the termination of the banana import régimes in place. If indeed the banana trade was of such vital interest to the Latin American exporters, they were under a legal duty to complain about the banana import régimes. Because they did not protest but accepted other trade benefits in exchange for the continuation of the banana trade restrictions, they should now be barred from claiming the inconsistency of the EEC's banana import régimes with Part II of the General Agreement. If the Panel were to find that the complaining countries were not prevented from claiming an infringement of their rights under Part II of the General Agreement, the Panel would give the complaining parties benefits which they had not bargained for, and they could not legitimately expect to obtain. The Panel would thus alter the carefully negotiated balance of rights and obligations between the two sides.

⁶⁰E.g., Fisheries Case (United Kingdom v. Norway), I.C.J. Rep. 1951, page 139; Arbitral Award of the King of Spain, I.C.J. Rep. 1960, page 209 and 213; Temple of Préah Viehéar, I.C.J. Rep. 1962, page 32; Flegenheimer Claim, ILR Vol.25, page 151.

⁶¹"Canada/European Communities Article XXVIII Rights, Award by the Arbitrator, BISD 37S/80, page 86.

143. **Costa Rica, Guatemala, Nicaragua and Venezuela** said that application of the procedural principle of "estoppel" to this case would be inadmissible. As had been clearly established by international doctrine and precedent, for "estoppel" to exist it was not sufficient for a party to act in a specific way, but there must also be an injury resulting from this action from another party. Underlying "estoppel" was the principle of good faith, whereby the behaviour or attitude of a state that encouraged another to adopt a certain position could not cause injury to the latter.

144. The complaining parties had not acted in any way that could be interpreted as acceptance of the régimes in question, or as recognition of an alleged change in the obligations ensuing from Part II of the General Agreement for the EEC. Consequently, under no circumstance could it be claimed that the complaining parties, through their behaviour in legally significant situations, had led the EEC to take positions in which they would be injured if the Panel were to uphold the complaint.

145. **Colombia** argued that it and the other complaining parties were not "estopped" from challenging the EEC banana régime. First, there was no clear doctrine of "estoppel" in the GATT. To recognize such a doctrine would threaten the objectives and purposes of the General Agreement, i.e., to hold that any violation must be immediately challenged once it occurred or it would be otherwise forfeited, would undermine the GATT's goal of greater trade liberalization. Colombia referred to one of the findings of the Panel on "EEC - Quantitative Restrictions Against Imports of Certain Products from Hong Kong":⁶²

"The Panel considered it would be erroneous to interpret the fact that a measure had not been subjected to Article XXIII over a number of years, as tantamount to its tacit acceptance by contracting parties".

Colombia agreed fully with this statement of principle.

146. Colombia further stated that the findings of the above panel should be enforced to ensure that contracting parties (such as the EEC) observed what little discipline the General Agreement did provide for agricultural products. Furthermore, as stated by the Hong Kong panel itself, the economic and social circumstances lay outside the Panel's consideration, since they did not come within the purview of Articles XI and XIII of the General Agreement. Colombia requested the Panel to reject, as having no basis in GATT jurisprudence, the EEC's arguments that the complaining parties, including Colombia, were prevented from challenging the EEC's violations of the General Agreement because of "estoppel" principles and subsequent practice.

Existing legislation

147. The EEC noted that paragraph 1(b) of the Protocol of Provisional Application (PPA) provided that the signatories undertook to apply provisionally:

"Part II of (the General Agreement on Tariffs and Trade) to the fullest extent not inconsistent with existing legislation".

148. The legal effect of paragraph 1(b) (and of the respective provisions of subsequent protocols of accession) was that legislation of contracting parties which existed at the date of the PPA (or at the subsequent date of accession) should not be affected by the implementation of the provisions of Part II of the General Agreement. Therefore, once a valid case under paragraph 1(b) of the PPA was made by a contracting party, this amounted to a general exemption for that party from bringing its existing

⁶²Report of the Panel on "EEC - Quantitative Restrictions Against Imports of Certain Products from Hong Kong", BISD 30S/129, page 138 (adopted on 12 July 1983).

legislation into conformity with Part II of the General Agreement. Subsequent GATT practice and panel reports had clarified the conditions under which a contracting party's legislation might be considered to fall within the existing legislation exemption. In order to be eligible for this exemption such legislation had to:

- (i) predate the PPA;
- (ii) be legislation in a formal sense; and
- (iii) be mandatory in character by its terms or expressed intent.⁶³

149. As concerned the first condition, the EEC stated that in a ruling of 11 August 1949, the Chairman of the CONTRACTING PARTIES decided that "existing" legislation in paragraph 1(b) of the PPA referred to legislation that existed on 30 October 1947.⁶⁴ For those countries which were not among the original contracting parties, the date was that of the protocol providing for their accession to the GATT. Furthermore, it was well-established GATT practice and law that subsequent amendments did not result in the original "existing legislation" losing its status, provided that the degree of inconsistency with Part II of the General Agreement, as a result of the amendment, was not increased.⁶⁵ In this respect, it should be recalled that amendments should not be confused with implementing measures, i.e., such measures should not be considered for the purpose of establishing whether the legislation had become less inconsistent. Also, a mere change of statutory form - as opposed to substantive changes - would not disqualify a provision as an exception under the PPA. The issue was discussed in the "Brazilian Internal Taxes" case (BISD Vol.II/181), the conclusions of which were based on the assumption that the fact of amending the provision was irrelevant to the question of legality under the PPA. Rather, it was the content of the amendment which was of importance. This finding was subsequently confirmed by the "United States Manufacturing Clause" case (BISD 31S/74). The legislation of all the member States applying import restrictions complied with the above conditions. The legislation that established for the first time the import restriction or other type of import régime was introduced well before 30 October 1947 or the date of accession to the GATT for those member States that were not among the original signatories to the GATT.

150. As concerned notification requirements, it was well-established GATT law that there was no obligation to notify existing legislation to the GATT in order to be able to claim the existing legislation exception. Failure to report existing legislation pursuant to requests made by the GATT in 1955-1958 could neither be taken as evidence that those countries claimed no existing legislation rights, nor that only reported legislation was covered by the existing legislation clause.

151. **Costa Rica, Guatemala, Nicaragua and Venezuela** argued that proof that the EEC had no rights under the existing legislation clause was provided by the fact that although it had had various opportunities in GATT to notify the other contracting parties of the existence of rights under this clause, the EEC had never done so. When in 1955 the contracting parties were requested to provide information on their mandatory legislation in force that was inconsistent with Part II of the General Agreement, none of the member States that were GATT contracting parties at the time had notified any such legislation.⁶⁶ They referred to two panel reports which confirmed this point of view.⁶⁷ During the Uruguay Round negotiations, the EEC had proposed that the Protocol of Provisional Application be

⁶³Report of the Panel on "Norway-Restrictions on Imports of Apples and Pears", BISD 36S/306 (adopted on 22 June 1989).

⁶⁴BISD Vol. II/35.

⁶⁵BISD Vol. IIS/181(1949); and document L/5609 (1984).

⁶⁶Document L/309 of 19 January 1955 and its addenda.

⁶⁷Reports of the Panels on "Norway - Restrictions on Imports of Apples and Pears", BISD 36S/306", paragraph 5.9 (adopted on 22 June 1989); and "EEC - Quantitative Restrictions Against Imports of Certain Products from Hong Kong, BISD 30S/129 (adopted on 12 July 1983).

reviewed on the grounds that "the continued possibility to justify certain forms of trade restriction on the basis of legislation predating the establishment of the General Agreement is an anachronism".⁶⁸ In its proposal, the EEC stated that the Protocol of Provisional Application was never conceived as a permanent derogation from Part II of the General Agreement. In the Uruguay Round, it had been agreed that information should be requested from governments on the legislation which they considered to be covered by the terms of paragraph 1(b) of the Protocol of Provisional Application. As a result, 17 contracting parties replied to the questionnaire, including the EEC, which stated in a letter dated 9 February 1992 that it did not maintain any legislation of this kind.⁶⁹

152. **Colombia** argued that the national legislation for which the EEC had invoked the existing legislation clause did not meet the requirements of that clause.

153. Moreover, Colombia recalled that the reference to the PPA by the EEC was inconsistent with the EEC's position in the Uruguay Round concerning the desirability of eliminating this instrument. The EEC had stated itself that a decision to put an end to the special derogations of the PPA "would constitute a timely signal of commitment to the multilateral trading system", "the PPA was never conceived as a permanent derogation from Part II of the General Agreement"; and "the PPA constituted an anachronism".

154. The **EEC** replied that the existing legislation clause of the PPA had now been in force since 1947 and all the attempts that had been undertaken until now to eliminate or progressively phase out its applicability had failed. It was, therefore, reasonable to suggest that the existing legislation clause had acquired life and trade value of its own in the maintenance of the balance of rights and obligations under the General Agreement, and the EEC should not be expected to abandon unilaterally its rights under it. This had been also the position taken by the EEC in the Uruguay Round Negotiating Group on GATT Articles.

155. Concerning the second condition, the EEC noted that the condition that the legislation under consideration must be legislation "in a formal sense" was added for the first time in 1989 by the report of the Panel on "Norway - Restrictions on Imports of Apples and Pears". Until then, GATT practice and panel reports had explicitly or implicitly accepted that the term "legislation" covered legislation adopted by parliament or the executive branch in a broad sense, as long as such legislation laid down rules of law, in the areas covered by Part II of the General Agreement, that were mandatory for the executive. For example, in the Report of the Panel on "Belgium - Family Allowances"⁷⁰ the legislation in question was a Royal Decree of 19 December 1939. The fact that it was a "decree", not a "law" passed by parliament, in no way made any difference or influenced the reasoning of the panel. Indeed, it was the lack of mandatory nature of the Royal Decree of 1939 that led to the panel's specific decision in that case.

156. In the Report by the Panel on "Norway - Restrictions on Imports of Apples and Pears" (BISD 36S/306), the panel did not state that Act No. 5 was not legislation in a "formal sense" because it was passed by the King and not by the Norwegian parliament. The panel had simply held that, since Act No. 5 was enabling (not mandatory) in character, this character could not be converted into a mandatory one by the political programmes, white papers, recommendations etc., which had been discussed in parliament but did not actually result in the adoption of formal legislation (whether by parliament or by the King himself). This panel report, therefore, was clearly distinguishable on the facts and in no way could be seen as modifying the above-mentioned long standing GATT practice

⁶⁸MTN.GNG/NG7/W/27 of 16 October 1987.

⁶⁹Document MTN.GNG/NG7/W/71; and document circulated by the GATT Secretariat, "Protocol of Provisional Application, Submissions Received", dated 25 March 1992.

⁷⁰Report of the Panel on "Belgium - Family Allowances", BISD 1S/59 (adopted on 7 November 1952).

and case law, according to which, in the view of the EEC, the term "legislation" covered any type of legislation emanating either from parliament or from the executive branch, provided that it was mandatory in character by its terms or expressed intent.

157. The specific rôle played by statutory law differed depending on the constitutional setting, and lost legal relevance, for instance, whenever State law failed to distinguish between legislative and executive power. As was clear from the previous description of the legal régimes of the member States applying import restrictions, some of the legislation of the member States was adopted in certain legal or social circumstances during World War II, in the middle of a civil war, or in a period of political instability, when parliaments might not have existed or could not be convened in normal sessions. Under such circumstances, the executive branch had to fill the gap and take the necessary legal measures that were required for the State to perform its legal functions (at least under the principle of implied powers in emergency cases). Although reviewing and taking into account the constitutional status of these measures in the particular legal and time frame of their adoption might be a very difficult task for the Panel to assume, it was clearly not outside the normal rôle of a panel in a dispute settlement context and it was permitted by the existing GATT rules on dispute settlement.⁷¹

158. The EEC concluded that, as regards the second condition for the application of the existing legislation clause, the concept of existing legislation covered not only "laws" in the formal sense, but at least also legislative measures taken by the executive branch in execution of powers delegated to it by parliament, "when such delegated powers were mandatory for the executive branch". The EEC also held the view that, under certain exceptional circumstances to be interpreted strictly, legislative measures adopted by the executive branch, even in the absence of delegation by parliament, should also be covered by the existing legislation clause. The term "exceptional circumstances" should be interpreted strictly and should normally cover situations of war, arbitrary political régimes etc., or political systems in which the principle of separation of powers was not recognized, or when the act of the executive authority was absolutely necessary for the State to perform its basic functions. Conversely, merely implementing measures taken by the government or non-binding recommendations or guidelines or white papers etc. would not be covered by the existing legislation clause, because they were not of a mandatory character for the executive branch.

159. Concerning the third condition, in the report of the Working Party on "Notifications of Existing Measures and Procedural Questions"⁷², approved by the CONTRACTING PARTIES on 10 August 1949, it was agreed that the existing legislation clause of the PPA applied to existing legislation, provided that the legislation upon which it was based was of a mandatory character by its terms or expressed intent, that is, that it imposed on the executive authority requirements which could not be modified by executive action. This requirement was examined in the "Belgium - Family Allowances" (BISD 1S/59), case. In this case, the panel did not rule out the possibility that the existing legislation (a Royal Decree of 19.12.1939) could qualify as mandatory⁷³. Indeed, the conclusions of the panel appeared to be based not on the fact that the Royal Decree permitted the government to grant, under certain well-specified conditions, exemptions to countries applying comparable systems of family social security protection, but on the fact that the Belgian administration deviated from the specified conditions without giving any reasonable explanation for its action. It was the EEC's submission that, even though the Royal Decree had left some discretion to the executive authority to modify it under certain conditions, this discretionary aspect of the Decree did not affect its mandatory character.

⁷¹"Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance", BISD 26S/210, at point 16 (adopted on 28 November 1979).

⁷²BISD, Vol. II/49.

⁷³Report of the Panel on "Belgium - Family Allowances", BISD 1S/59, paragraph 7 (adopted on 7 November 1952).

160. **Costa Rica, Guatemala, Nicaragua and Venezuela** replied that the purpose of paragraph 1(b) of the Protocol of Provisional Application was to enable the General Agreement to enter into force without the impediments that would otherwise arise owing to the time it would take for countries to bring their legislation into conformity with Part II of the General Agreement. As this was the purpose of the provision, it was unacceptable that it should be interpreted as having a wider scope than that it had always been considered to have. This had been recognized in the report of a panel which noted that "it would not be justified to give this clause four decades after the entry into force of the Protocol an interpretation that would extend its functions beyond those it was originally designed to serve".⁷⁴ This limited scope called for a consistent, i.e., narrow interpretation of the content of this provision by the contracting parties in such a way as to further the full application of the General Agreement. This was recognized by the panel that examined the Norwegian restrictions on imports of apples and pears⁷⁵, which in turn confirmed the interpretation that had been made of this provision by the CONTRACTING PARTIES since 1949.

161. In the report of the Working Party on "Notifications of Existing Measures and Procedural Questions", referred to above by the EEC, it was agreed that the existing legislation clause applied only to "legislation which was of a mandatory character by its terms or expressed intent - that is, it imposes on the executive authority requirements which cannot be modified by executive action".⁷⁶ The interpretation which the CONTRACTING PARTIES had made of this provision was quite clear: "existing legislation" was only legislation that could not be modified by the executive authority; hence, the unquestionable conclusion reached by the panel that examined the Norwegian restrictions on imports of apples and pears that for legislation to be considered "existing legislation" under paragraph 1(b) of the Protocol of Provisional Application, such legislation must be legislation in a formal sense, predate the Protocol and be mandatory in character.

162. **Colombia** said that GATT panels would not recognize legislation as "mandatory" for purposes of the Protocol if the authority charged with administering the legislation could exercise any discretion in its application of the legislation.⁷⁷ Where the executive authority had ultimate discretionary control over the application and enforcement of all laws, including those falling under the jurisdiction of the General Agreement, or where discretionary authority was built into the administration of the import régime, the legislation was not viewed as "mandatory" under the Protocol.

163. Colombia added that the Panel must therefore take executive action into account in this regard. If early executive action constituted sufficient legislation to warrant possible existing legislation treatment, then subsequent executive implementing measures likewise could constitute amendment thereof. If early executive action was not sufficient legislation, however, then the existing legislation clause had no applicability in most of the instances in which the EEC invoked it.

164. Consistency with EEC law did not, in Colombia's view, excuse or otherwise mitigate the EEC's breach of its obligations under the General Agreement. For example, the mere fact that Spain had EEC approval, under the terms of its 1985 accession to the EEC, to maintain until 1995 its national market organization was irrelevant to this Panel's inquiry, including its consideration of the issue of the Protocol's existing legislation clause. Colombia requested the Panel to reject the EEC's argument that amendments were "a mere change of statutory form or type of restriction", thus warranting continued existing legislation protection from major responsibilities under the General Agreement. A quota was clearly not a tax, which in turn was not a tariff; these different forms of trade protection, which all

⁷⁴Report of the Panel on "Norway - Restrictions on Imports of Apples and Pears", BISD 36S/306 (adopted on 22 June 1989).

⁷⁵Idem.

⁷⁶BISD, Vol. II/49, page 62, paragraph 99.

⁷⁷Report of the Panel on "Canada-Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies", DS17/R (adopted on 18 February 1992).

distorted trade and nullified or impaired the benefits of contracting parties, were covered by different Articles of the General Agreement (e.g., Articles I, III, and XI, respectively).

165. Moreover, Colombia rejected the EEC's contention that once quotas allegedly protected by the Protocol had been applied to a contracting party, it was entitled to perpetuate such import restrictive measures *ad infinitum* through any other means of protection, including tariffs and taxes, provided only that the net levels of trade distortion did not increase. This conception of the existing legislation function of the Protocol was far too expansive and conflicted with the narrow construction given it by GATT interpretative decisions and panel actions.

166. The EEC replied that the existing legislation clause had acquired life and trade value of its own, as was evidenced by the practice of including such a clause in all the protocols of accession to GATT until the present. It was the substance of the existing legislation clause that mattered most, therefore, not its secondary function to bring into force the tariff commitments negotiated in 1947. The contention that the EEC's view amounted to an expansion of the existing legislation clause did not conform with the drafting history, purpose and subsequent practice of the CONTRACTING PARTIES.

(a) *France*

167. The EEC said that the French import régime for bananas was enacted through a Decree of the President of the Republic of 9 December 1931. It was consequently the highest act which could be passed by the Government. Moreover, given the period of political instability in which it was adopted and the constitutional practice of the time, it was undoubtedly a law creating act. From a formal point of view, the use of a Decree to regulate trade should not be surprising, as the evolution of the legislative practice at the end of the third French Republic resulted in the executive regulating *de facto* an increasingly large part of economic activity.⁷⁸ Furthermore, recourse to a Decree was justified by the urgent need for action.

168. Also, as concerned the third condition, Article 1 of the Decree of 9 December 1931 provided that:

"Exceptionally and temporarily, importation of foreign goods listed hereafter shall only be made within the limits of quotas and following modalities determined by administrative order (arrêté)".

169. While it did not specifically provide for quantities or values, the Decree expressly required that a system of quotas be applied to imports of bananas in bunch or detached. Under GATT practice and case law, this was sufficient to make the French quota régime mandatory and eligible for the status of existing legislation. Indeed, it created a general requirement that administrative authorities must follow. The Decree of 1931 had not been amended since its entry into force and remained the sole basis for the existing scheme. Such continued application was a further indication of its mandatory character.

170. The EEC submitted that these "amendments" did not make the French régime generally more restrictive than that which existed on 30 October 1947 with respect to third countries not covered by preferential agreements, as the import régime generally favoured the most competitive suppliers of the Latin American countries. The condition laid down in the Decree that there had to be a quota for bananas could not be modified by executive action. The executive authority was required to take action under certain well-specified conditions, which it clearly could not disregard. Therefore, there was no discretion left to the executive authority as to the imposition of the import quota. As a Decree of the President of the Republic it would need, at least under the parallelism of acts, a Decree of the

⁷⁸Droit Constitutionnel et Science Politique, 299 ss. (1983).

President to be amended. It followed from these arguments that the French régime met all the requirements of the existing legislation clause as interpreted in GATT practice.

171. **Costa Rica, Guatemala, Nicaragua and Venezuela** argued that the regulation which, according to the EEC, constituted the legal basis for France's quantitative restrictions was a decree, and therefore did not impose mandatory obligations on the executive power as was required by the PPA. Moreover, the discretionary regulations issued by the executive, regulating banana imports from different origins, had been modified over time, increasing their degree of inconsistency with the General Agreement. This became obvious when France extended the preferences originally granted to its colonies - subsequently independent States - to all ACP States, thus increasing the number of preferential competitors in the French market. An additional inconsistency arose when the restrictions ceased to have the character (exceptional and temporary) specified in the Decree of 1931.

172. **Colombia** claimed that the French quota régime failed to satisfy any of the conditions of the existing legislation clause of the PPA. First, the French Decree of 1931 was administrative rather than legislative in character. It was thus not legislation in the formal sense. Further, the French Decree did not establish quota levels within the decree; the levels of such allegedly mandatory quotas were, therefore, entirely discretionary. This was evidenced by Article 1 of the French Decree of 1931, which provided for importation "within the limits of quotas", but in any case, "following modalities determined by administrative order", a clearly unspecified and variable administrative procedure.

173. Even assuming *arguendo*, that the original decree was considered mandatory legislation for purposes of the Protocol's existing legislation clause, the French government had amended it so fundamentally and frequently as to lose any original existing legislation protection. France's preferences for bananas from ACP countries drew their authority, in part, from successive Lomé Conventions, including most recently Protocol 5 to the Lomé IV Convention, all of which postdated 3 October 1947, the effective date for the Protocol's existing legislation clause. Other authority for the quota régime in France included Article 115 of the Treaty of Rome and the French Decree of 16 May 1960⁷⁹, both of which, again, postdated 3 October 1947.

174. In addition, as the CONTRACTING PARTIES had held in a previous case, "existing legislation" lost its protected status under the Protocol's existing legislation clause if the law was modified so that it increased its degree of inconsistency with the General Agreement.⁸⁰ The EEC had conceded that the French banana quota régime had increased its level of inconsistency with the General Agreement over the years. For example, in its submission the EEC observed that the current banana régime in France allowed imports "only to the extent that the national and preferential imports could not meet domestic demand". According to the EEC's submission, the practice before the Lomé Conventions was to impose quotas solely "to the extent necessary to allow national producers to sell their production". The EEC had thus increased the inconsistency with the General Agreement and could not invoke the Protocol's protection with respect to France's banana import régime.

175. Further, at least one panel had established that any extension of the expiry date of legislation affording existing legislation protection constituted a revision that increased the law's degree of inconsistency with the General Agreement.⁸¹ The French import quota régime thus lost any existing legislation protection under this rule as well, since the Lomé Convention, under which France implemented its quota régime, had been extended several times in the past. Likewise, France's authority for its practices under the Treaty of Rome, Article 115, which was inconsistent with the General

⁷⁹Page 7 above

⁸⁰Report of the Working Party on the "Brazilian Internal Taxes", BISD, Vol.II/181 (adopted on 30 June 1949); and Report of the Panel on "United States Manufacturing Clause", BISD 31S/74 (adopted on 15 May 1984).

⁸¹Report of the Panel on "United States Manufacturing Clause", BISD 31S/74, page 76 (adopted on 15 May 1984).

Agreement, had also been extended in the past.⁸² Most recently, that authority lapsed at the close of 1992, and new applications for Article 115 authority were granted earlier this year.

176. Finally, the French Decree of 1931 - besides being discretionary in nature - envisaged quotas on imports of bananas solely on an "exceptional" and "temporary" basis (Article 1), which in turn responded to the need to counter a temporary and substantial increase in imports of bananas from Spain⁸³. This circumstance was inconsistent with the fact that quantitative restrictions had been in place for more than sixty years, and had been extended to a number of banana exporting countries.

177. The EEC replied that the room of manoeuvre left to the executive authority was limited to review the level only of Latin American imports during a given period. The exercise of this limited room of manoeuvre by the executive could in no way abrogate the formal legal obligation to subject imports of bananas from Latin American sources to quantitative restrictions. As domestic production could vary, depending on natural circumstances, the five member States had the option either of the legislature fixing definitively the level of import quotas (an option not very positive from the perspective of liberalizing trade under the General Agreement) or of permitting the executive branch to vary the level of the quota under specific conditions (a positive option from the perspective of further reducing trade restrictions under General Agreement).

178. The EEC had never said that the mandatory nature of the French legislation was based on Article 115 of the Treaty of Rome or on Protocol 5 of the Lomé Convention. Article 115 was a provision which permitted safeguard action for any kind of product in free circulation inside the EEC, i.e., it could not be applied and had never been applied to limit direct imports from third countries into the EEC. The fact that the Decree of 1931 was initially intended to be of an exceptional and temporary nature did not affect in any way its mandatory character. There was nothing in GATT law or previous panel reports to suggest such an interpretation of the existing legislation clause. Regarding the alleged increased restrictiveness of the French régime, the EEC submitted that the French régime had to be viewed globally under the General Agreement, not vis-à-vis each contracting party individually, and by taking into account its historical evolution. What counted was that, overall, the French régime became more consistent with the General Agreement between 1947 and today.

(b) Italy

179. The EEC said that in Italy, Decree-Law No. 2085 had full force of law in a formal sense. The fundamental Statute of the Kingdom of 1848 did not explicitly provide for the Government to adopt measures having the character of primary legislation. Indeed, the fundamental Statute seemed to exclude such a possibility, since Articles 3 and 6 entrusted legislative power only to Parliament and to the King jointly. However, from the first years of application of the fundamental Statute, the government adopted, in case of necessity, "Decree-Laws" by which it exercised *de facto* legislative power. As a rule, "Decree-laws" were submitted to Parliament for endorsement, the result being that laws by decree were formally converted into statutes. Thus, Decree-Law No. 2085 was converted into Law No. 899 of 6 April 1936. There was, therefore, no doubt that the Italian legislation fulfilled the second criterion for the application of the existing legislation clause. Later, in 1964, the Italian State monopoly, established by Law No. 2085, was abolished by a formal act of Parliament, Law No. 986, which also introduced a consumption tax on bananas. This régime was replaced by a system of global quotas introduced by Ministerial Decree of 14 December 1964. This Decree was also formal legislation in the sense of the existing legislation clause, because it was taken by the executive branch in execution of the powers delegated to it by the Italian Parliament.

⁸²E.g. EEC Decision 87/433/EEC, 22 July 1987; EEC Decision 90/4/EEC 19 December 1989.

⁸³"Rapport au Président de la République Française", 9/12/1931.

180. Further, it was clear from the text and expressed intent of Decree-law No. 2085 that imports of bananas into Italy could not take place other than through the State monopoly. Given the purpose for which the State monopoly was established, there was no discretion left to the administration as to whether or not it should apply the import restrictions. The monopoly was only given a certain margin in regulating the level of quantities to be allowed into the Italian market, taking into account the interests of producers and consumers. Such discretion in implementing the obligations imposed on the executive or the administration by the law could in no way affect the mandatory character of the legislation. The subsequent amendments of the Italian legislation raised the issue of the level of restriction applied during the lifetime of each of these amendments, compared with the level of restriction previously applied. A mere change of statutory form or type of restriction (from a State monopoly to a quantitative restriction) did not disqualify a law under the existing legislation clause as long as the substantive changes did not increase the degree of inconsistency with the General Agreement.⁸⁴ In accordance with GATT case law, the rate of duty could be increased if the absolute - not the proportional - level of protection was maintained.⁸⁵

181. The type of amendment the Italian legislation had undergone raised the question of devising an acceptable method of comparing the restrictive effects on trade of each measure. There was, however, no *a priori* reason to believe that each amendment had the effect of increasing the level of the inconsistency with the General Agreement previously applied. The EEC submitted, therefore, that there was sufficient evidence to show that the Italian legislation also fulfilled the third criterion for the application of the existing legislation clause.

182. **Costa Rica, Guatemala, Nicaragua and Venezuela** argued that the content of the regulations on the basis of which the EEC sought to invoke the PPA for Italy did not match the subject matter which these provisions regulated according to the EEC. Under the Decree of 1935 and the Law of 1936, a State monopoly was established for the banana trade, but it could not be claimed under any circumstances that this gave rise to an obligation on the executive power to apply quantitative restrictions on imports.

183. It was not until 1976⁸⁶ that for the first time a global system of quotas was established, a date subsequent to Italy's accession to GATT in 1950. Even though the foregoing was enough to disqualify the above mentioned provisions from being covered by the PPA, the State monopoly had been abolished in 1964 and an internal tax on fresh bananas had been introduced. With regard to the various modifications of these Italian provisions, the EEC had made a surprising assertion that a change in the type of restriction, from what was described as a "quantitative restriction" - which it certainly was not - to the introduction of a consumption tax, was in the EEC's opinion not only a mere administrative change but furthermore did not increase the degree of inconsistency with the General Agreement. This could not be accepted from any standpoint, even though for the present case the application of the PPA had to be rejected anyway because the legal basis for the banana restrictions was subsequent to the country's accession to GATT.

184. **Colombia** argued that the pre-GATT accession executive actions taken in Italy came at a time when the country had a government with both executive and legislative powers. Such actions clearly could not be considered mandatory for purposes of invoking existing legislation protection under the Protocol, even if they were regarded as legislation in a formal sense. In any event, Italy's licensing authority presently charged with administering the quota régime had substantial executive discretion in exercising its power, i.e., in setting the annual quota for the imports from Latin American banana

⁸⁴Report of the Panel on "United States Manufacturing Clause", BISD 31S/74, paragraph 36 (adopted on 15 May 1984).

⁸⁵BISD Vol II/181.

⁸⁶Decree of 6 May 1976.

exporting countries. Given this latitude, it was not possible to consider the Italian quota régime "mandatory" within the meaning of the Protocol's existing legislation clause.

185. Moreover, the present Italian banana régime did not antedate the Protocol because it had been transformed fundamentally on several occasions, first from a State monopoly to a system of consumption taxes, then to a system of quotas and import licences. At the outset, a State monopoly was established by Decree 2085/35 to regulate trade in bananas on a discretionary basis, as had been shown. Then in 1964, Law 986 expressly abolished this form of restriction by replacing it with a consumption tax. Finally, in 1976 a Ministerial Decree introduced a system of global quotas which superseded the previous régime and was currently in force. From this analysis, it followed that even if, pursuant to the PPA, the measures had been justifiable at some point in time, such justification had been lost entirely through these successive amendments, which fundamentally altered the restriction.

186. The EEC replied that GATT practice confirmed that mere changes of statutory form - as opposed to substantive changes - would not disqualify a provision to be protected under the existing legislation clause. As regards the substance of the amendments the Italian régime had gone through, the EEC explained that the original State monopoly had been notified to GATT and that Italy had claimed protection of the existing legislation clause on that occasion.⁸⁷ The introduction of a global quota did not make the Italian régime more inconsistent with the General Agreement, even though the legal basis of the import régime had changed.

(c) *Portugal*

187. The EEC stated that the original import régime for bananas in Portugal resulted from Decree Law No. 26:757 of 8 July 1936 on the organs of economic co-ordination as applied by a Decree of 19 December 1936. This Decree established a new administrative organ in charge of managing the Portuguese banana market: the *Junta Nacional das Frutas*. The basis of the Portuguese régime was consequently a legislative act from both a formal and material point of view. Indeed, under the constitution of 1933, a Decree law had the same value as laws of parliament. The Decree of 1936 had also a legislative rather than an administrative effect. Even if the Panel considered that recourse to a Decree (creating the *Junta Nacional das Frutas*) made it an administrative rather than a legislative act, the EEC submitted that, in this case it should not be considered as determinant since the Decree was signed by the President of the Portuguese Republic of the time, thus giving it the necessary political importance. Despite the parliamentary structure of the Portuguese constitution of 1933, the Government had in practice a wide discretion to legislate without referring to the parliament. Finally, the original régime was amended in 1985 by a Decree-law⁸⁸. The fact that a Decree-law was needed under the new constitution to amend a Decree was clear evidence that the Portuguese authorities considered that the organization of the banana market actually resulted from the Decree-law of 1936. Furthermore, with respect to the legislation applied since 1985, its mandatory character could not be put in doubt, since Article 16(1) of Decree-law No. 503/85 expressly provided that: "importation of bananas are subject to quantitative restrictions whatever their origin". Consequently, this legislation was obviously mandatory by its terms and expressed intent.

188. Moreover, due to its constitutional ranking, the requirements it imposed on the executive authority could not be modified by purely executive actions. Indeed, under Portuguese constitutional law, Decree laws taken on the basis of a law of habilitation passed by parliament⁸⁹ could not be repealed by the

⁸⁷Document L/1769/Add.6 of 21 August 1963.

⁸⁸Decree-Law No. 503/85 of December 1985.

⁸⁹Under Article 168(2) of the Portuguese Constitution of 1976, the Parliament, when having recourse to a law of legislative authorization (Lei de autorização legislativa) was required to define the subject, the sense, the extension and the duration of the delegation under which the government may take Decree-laws.

executive authority on its own initiative. In other words, the executive could not change the above-mentioned requirements without infringing the authority delegated by parliament, if such requirements fell within the field of competence of the parliament under Article 168 of the Constitution.⁹⁰

189. As far as the Decree-law and the Decree of 1936 were concerned, it should be kept in mind that the main concern of the legislation was to re-organize the sector of fruit production. In a period when all the supply was provided by Madeira or by the colonies, imports were not a real matter of concern because of the substantial preference which was given to domestic production. The mandatory character of the import restrictions was confirmed, however, by the fact that it was only when the supply from the former colonies was insufficient that some imports were allowed.

190. The Portuguese legislation was applied without any amendment between 1936 and 1985. Moreover, no further amendment had taken place since the Decree-law of 1985. It was, therefore, only necessary to address the issue of the amendments made by the Decree-law No. 503/85. GATT practice allowed amendments to existing legislation, provided that the degree of inconsistency with the General Agreement was not increased compared with its lowest level of inconsistency achieved since accession to the GATT. Also, the comparison should be made between the existing legislation itself and the amending legislation. In this examination, implementing measures should be disregarded. Under these circumstances, it was clear that the Decree-law No. 503/85 did not make the Portuguese régime on imports of bananas less consistent with the General Agreement. The original legislation established a *de facto* import ban. The new legislation in Article 16(1) provided for the application of quantitative restrictions. Compared with the original régime, the situation resulting from the amendment would be, at most, as inconsistent with the General Agreement as it was before. Furthermore, it represented a move towards greater consistency with the General Agreement and particularly with Article XIII, by introducing transparency in the management of the quota. Consequently, there could be no doubt that, whatever criterion was applied by the Panel, the Portuguese legislation was currently less inconsistent with the General Agreement than it was in 1962, thus complying with the well established GATT practice concerning amendments to existing legislation covered by the PPA and the respective protocols of accession, including identical provisions as the PPA.

191. **Costa Rica, Guatemala, Nicaragua and Venezuela** were of the view that the Portuguese regulations in question were executive decrees, and therefore did not satisfy the requirements of being legislation in a formal sense and of being mandatory. Nevertheless, the EEC had sought to give these Decrees a scope that went beyond their own content, as they referred to the creation of the National Export Board - subsequently the National Fruit Board - whose functions did not include the obligation to impose quantitative restrictions on banana imports from Latin America. It was only with the promulgation of a Decree-law in 1976⁹¹, and with reference to balance-of-payments problems, that the temporary possibility of imposing import quotas for specific products was established. However, the quantitative restrictions on banana imports were first explicitly established by a Decree-law in 1985.⁹²

192. **Colombia** argued that the Portuguese law concerned was in fact a Decree, not legislation in a formal sense, as was required for the purpose of invoking the protection of the existing legislation clause in its protocol of accession to the GATT. Secondly, the question of whether the decrees (26,757 and 27,355 of 1936) were mandatory did not even arise, to the extent that they had introduced no powers to regulate imports. The EEC's statement that imports were restricted to shortages in domestic production and subject to licences was misleading. Decrees 26,757 and 27,355 mentioned no such thing. On the contrary, they were simply organizational in nature, establishing the National "Juntas", and the "Junta Nacional das Frutas" in particular, with no power to restrict imports, but confined rather

⁹⁰Decree-law No. 503/85 was passed on the basis of the Law of Authorization No. 2-B/85 on the budget.

⁹¹Decree-law No. 720-A of 9 October 1976.

⁹²Decree-law No. 503/85, Article 16.

to general, non-regulatory functions such as studying market conditions, determining broad guidelines for the fruit market and promoting exports. A system of import controls - through reference prices and quantitative restrictions - was not established until 1985, through Decree No. 503 (Articles 14-16). These amendments increased the inconsistency with the General Agreement of the Portuguese banana import régime. Likewise, the extension of the restrictions through 1995 also increased the level of inconsistency and even then, the procedures to determine quotas were highly discretionary, and dependent upon administrative action. For at least the period 1963-1974, the laws constituting the banana régime were not mandatory within the meaning of Portugal's protocol, because the government retained both executive and legislative powers. The régime in power following Portugal's accession to the GATT had total discretionary authority over all laws of the land.

193. With respect to the import régime of Portugal, the EEC considered that it resulted from the Decree-law of 8 July 1936 and the Decree of 19 December 1936 that Portugal established State-controlled entities with exclusive power to regulate production and trade in agricultural products, including bananas. It was obvious that in the presence of sufficient domestic and colonial supplies of bananas, the situation did not require an express reference to the possibility of importing bananas. The whole structure of trade in agricultural products during the period in question, and the wide powers granted in this respect to the State entities, confirmed that they had the legal power to regulate imports of bananas as well. This was stated in GATT document L/1411 of 31 January 1961 dealing with Portugal's accession to GATT (page 29 and Annex D). The Portuguese legislation was, therefore, clearly of a mandatory nature.

(d) Spain

194. The EEC noted that the national market organization for bananas in Spain was established by Decree No. 408 of 1937. In 1937, there was no parliament in Spain, as the Cortes was not created until 1942. It was generally admitted by Spanish courts and scholars on constitutional law that during the period of civil war and General Franco's era the legislative powers were exercised by the military and then by the Government by means of decrees, until the Laws of 30 January 1938 and of 8 August 1939 officially conferred legislative power on the Head of State. Under the exceptional circumstances of civil war, during which the principle of separation of powers was not recognized, the EEC considered that the Decree of 1937 should be considered to be a law in the formal sense. The same reasoning also applied to the Decree of 29 January 1954, which maintained the regulatory powers of the State entity (CREP), since at that time, the principle of separation of powers was still not applied in Spain. When the political and legal situation in Spain developed towards more politically accountable institutions, the Spanish Parliament passed formal Law No. 30/72 which reserved the Spanish market for production from the Canary Islands. This imposed a mandatory obligation on the Government to restrict imports from all sources. The subsequent Royal Decree of 1978 and the Ministerial Orders of 1978 did not modify the legal régime created by Law No. 30/72, since they were simply implementing measures. Spain's 1985 Act of Accession to the EEC (O.J. of the EEC L 302 of 15 November 1985) was an act of parliament and ranked, as an international treaty, higher than normal laws. The Act of Accession explicitly provided that Spain could maintain, until 31 December 1995, its national market organization for bananas. It was, therefore, beyond any doubt that the Spanish legislation which existed before the date of accession to the GATT (1963), as well as after that date, fulfilled the criterion of formal legislation under the PPA.

195. As concerned the third condition, both Decree No. 408 and Law No. 30/72 imposed an obligation on the executive authorities to restrict imports of bananas from all origins. The mandatory character of the 1937 Decree was explained above. The 1972 Law provided in the relevant part that "... the supply of the domestic market was reserved for production from Canary Islands ..." (Article 9(a)). It followed from the terms and expressed intent of the above provision that no discretion was left to the executive authorities, as the whole Spanish market was reserved for Canarian production. A certain

degree of discretion was introduced by Ministerial Order of 16 November 1978, which provided that the Minister of Commerce and Tourism was authorized to take the necessary measures in order to harmonize the reservation of the domestic market to production from the Canary Islands (in accordance with Article 9 of Law No. 30/72) with the interest and necessities of domestic consumption (of bananas) (Article 5). The terms and expressed intent of this provision did not change in any material way the mandatory character of the obligation imposed by Article 9 (a) of Law No. 30/72. The Administration was only permitted under well specified conditions to take account, in the management of the import prohibition, of the interests of producers and consumers. The mandatory character of the prohibition was subsequently confirmed by Spain's Act of Accession to the EEC. The EEC submitted, therefore, that Spain's legislation fulfilled the third condition for the application of the existing legislation clause.

196. **Costa Rica, Guatemala, Nicaragua and Venezuela** were of the view that the Spanish regulation which, according to the EEC, was the basis for invoking the existing legislation clause, was an executive decree, and consequently was not legislation in a formal sense, as it did not prevent the executive from amending it at any time. Thus, it was not mandatory. In addition, the EEC sought to give this regulation a scope that went beyond its own content, as the decree itself was confined to setting up the regional confederation of banana exporters and giving it a number of functions which did not in any way include the obligation to impose "quantitative restrictions" on banana imports. It was not until 1972 that, for the first time, the prohibition on imports of bananas from Latin America was established by reserving the Spanish market for produce from the Canary Islands. This was subsequent to the date of the Protocol of Accession of Spain to GATT, so that in this case the requirement that the existing legislation predate the PPA was likewise not satisfied.

197. **Colombia** argued that the Spanish laws concerned were in fact a number of decrees, which, as in the case of Portugal, were not legislation in the formal sense. The Spanish decrees did not even qualify for a test of their mandatory nature. This clearly flowed from the text of the 1937 and 1954 Decrees, which organized the Regional Banana Federation (CREP) as an agency involved in several promotional stages of banana production (e.g., transportation, export prices for Canarian bananas, and distribution of exports) but was in no way concerned with, or empowered to institute, import restrictions. It was not until 1972 that the national market was reserved, by Law No. 30, for Canarian production (Article 9(a)). However, Law 30/72 did not predate Spain's accession to the GATT (1963), nor did the Royal Decree and the Ministerial Order of 1978, both of which introduced organizational changes and provided for implementation of the 1972 market reservation. In addition to the above, it had been able to modify or revoke discretionally the executive actions, taken between 1939 and 1975, by an administrative action. Thus, the Spanish Decree establishing the banana régime failed the "existing legislation" test.

(e) United Kingdom

198. The EEC said that import restrictions on bananas in the United Kingdom were based on the Import, Export and Customs Powers (Defence) Act of 1939, which was clearly a law in a formal sense. In the execution of the powers conferred upon the Minister of Trade, the importation of all goods was prohibited unless a special licence was obtained (see Article 2 of the Import of Goods Order of 1940, as amended in 1954). There was no doubt, therefore, that the Act of 1939 fulfilled the second condition for the application of the existing legislation clause.

199. As concerned the third condition, the United Kingdom was obliged by the Ottawa Agreement Act of 1932 (a formal law in the sense explained above) to grant preferences to imports of bananas from Jamaica and other countries of the British Empire. This was a legal obligation which was subsequently recognized and accepted by the GATT itself by providing in Articles I:2 and XXIV:9 for express derogations from the most-favoured nation principle. There was no doubt, therefore, that from the legal point of view the Act of 1939 and the Import Control Order of 1940 (as amended in

1954) left no discretion to the executive branch as to whether import restrictions on bananas should be applied or not. Although the language of the 1939 Act seemed to be of enabling character for import prohibitions of other types of goods (to be decided on a case-by-case basis), as regards imports of bananas there was no doubt in 1947 that past import restrictions would have to be continued in any case. Therefore, put in its factual and legal context, the legislator's intent was clearly to continue applying restrictions on bananas in order to honour previous tariff commitments taken on the basis of an international treaty (the 1932 Ottawa Agreement Act).

200. The same legislation had been applied since then without any material amendment. In the allocation of import licences, however, the United Kingdom authorities took into account the supply and demand situation in the preferential producer countries as well as domestic demand. This adjustment of the volume of imports did not take away the mandatory character of the 1939 Act. As no material discretion was left to the executive branch both from the legal and the *de facto* point of view, the EEC submitted that the United Kingdom legislation fulfilled the third condition for the application of the existing legislation clause.

201. **Costa Rica, Guatemala, Nicaragua and Venezuela** argued that the legislation cited for the United Kingdom failed to meet the essential requirement of being mandatory since it gave the Board of Trade the discretionary power to prohibit or regulate the import of goods into the United Kingdom as it saw fit.⁹³ As mentioned before, the mandatory character of legislation in force existed to the extent that obligations were imposed on the executive power which it could not modify. In other words, the mere fact of conferring powers upon the executive authorities to act in a discretionary manner, even when it did not do so, ruled out the possibility of classifying a regulation as existing legislation covered by the PPA. This had been recognized by other panels. Not only were these original provisions discretionary, but furthermore they were expressly revoked by the Act of 1954, thus breaking the chain of existing legislation.

202. The non-mandatory nature of the above-mentioned provision had been explicitly recognized by the EEC, which in 1981 stated with regard to this Act that "the legislation leaves the designation of controlled products to administrative discretion and the control could be abolished without legislative approval".⁹⁴ Further proof that there was no ground for considering quantitative restrictions imposed on bananas by the United Kingdom as falling under the existing legislation clause was the notification made by that country to GATT in which it explicitly stated that none of the quantitative restrictions referred to in this document - which included those on bananas - was applied under the terms of the Protocol of Provisional Application.⁹⁵

203. The EEC explained that the purpose for which the information regarding existing legislation was collected by the contracting parties in 1962 was mainly to set up an inventory of the restrictions applied and not to examine the compatibility of such legislation with the provisions of General Agreement or the existing legislation clause of the PPA. Notification of the legislation claimed to benefit from the existing legislation clause was clearly not required. It was difficult to see in what way the view of the administrative authorities of the United Kingdom, as it was expressed at that time in the GATT documents quoted by the complaining parties, could or should deprive the Panel now from proceeding with a full examination of the United Kingdom's legislation under the conditions which must be fulfilled for the application of the existing legislation clause, as these conditions had been clarified by a number of panel reports since that date.

⁹³Import, Export and Customs Powers (Defence) Act, 1939, Article 1(1).

⁹⁴Replies to questionnaire on import licensing procedures - European Communities and Member States (document L/5169/Add.1 of 30 October 1981, page 7, paragraph 5).

⁹⁵Notifications of Import Restrictions Applied Inconsistently with the Provisions of GATT and not Covered by Waivers, Addendum 10, United Kingdom (Document L/3212/Add.10 of 22 July 1969).

204. **Colombia** noted that the EEC had conceded that the United Kingdom's law at issue was discretionary. On its face, it authorized, but did not require, certain restrictions. It not only appeared, but was, "of enabling rather than mandatory character", insofar as the Board of Trade could prohibit or regulate imports, under Section 1(1) of the Import, Export and Customs Power (Defence) Act of 1940. Further, authorized restrictions could apply to "all goods" or to "goods of any specified description", expressions which were so broad in their meaning that they could not be construed as mandatory barriers to banana trade.

205. Specifically, under the United Kingdom régime, the Banana Trade Advisory Committee, operating under the auspices of the Ministry of Agriculture, Fisheries and Food, periodically established the permissible level of Latin American banana imports into the United Kingdom. The final decision regarding the allowable level of imports of Latin American bananas was entirely at the discretion of the Banana Trade Advisory Committee.

206. In addition, the EEC could not contend that the United Kingdom's banana régime satisfied the existing legislation requirement of paragraph 1(b) of the Protocol. The United Kingdom's present quota régime derived its authority from Protocol 5 to the Lomé IV Convention and Article 115 of the Treaty of Rome.⁹⁶ Both the Lomé Convention and Article 115 authority had been extended several times in the past. As previous panels had held, this renewal of authority constituted a revision that increased the law's degree of inconsistency with the General Agreement, because such extensions violated the notion of security and predictability in trade relations among contracting parties, and undermined the balance and value of tariff concessions, the protection of which was one of the basic purposes of the provisional application of Part II.⁹⁷

Articles I, XXIV and Part IV

207. **Costa Rica, Guatemala, Nicaragua and Venezuela** claimed that the banana import régimes of some EEC member States infringed the most-favoured-nation clause in Article I of the General Agreement by establishing different and discriminatory treatment of imports of bananas from Latin America. The purpose of the existing regulations was to make market access conditions different for various contracting parties to which end-use was made of discriminatory tariffs and quotas. The consequence of this discriminatory treatment was to preserve a number of privileges for a small group of suppliers, to the disadvantage of the more efficient banana producers in the Latin American countries. Thus, while bananas from preferential suppliers received preferential tariff treatment, in the form of a zero tariff rate, on the markets of Belgium, Denmark, France, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal and the United Kingdom, the like product coming from the Latin American countries was subject to the payment of a 20 per cent duty in these same countries. This discriminatory treatment was prohibited by both the letter and spirit of Article I:1 of the General Agreement. Article I explicitly referred to "customs duties and charges of any kind" as one of the cases where discrimination among contracting parties was unacceptable.

208. There were precedents where it had been determined that changes in the tariff structure, which had the effect of imposing different duties for like products, were contrary to, and in breach of, the provisions of the General Agreement:

"The Panel further noted that Brazil exported to Spain mainly "unwashed arabica" and also Robusta coffee which were both presently charged with higher duties than that applied to "mild" coffee. Since these were considered to be "like products" the Panel concluded that the tariff

⁹⁶See EEC Decision 90/4.EEC of 19 December 1989.

⁹⁷Report of the Panel on "United States Manufacturing Clause", BISD 31S/74 (adopted on 15 May 1984).

régime as presently applied by Spain was discriminatory vis-à-vis unroasted coffee originating in Brazil".⁹⁸

If unroasted, non-decaffeinated coffee and mild coffee, which were classified under different tariff sub-headings, were like products, then all the more so were bananas which were classified in a single tariff line, regardless of geographical factors or cultivation methods that affected production. In addition, the licensing systems by which these régimes were administered constituted charges of an administrative or other nature, and therefore fell within the meaning of "charges of any kind" to which the infringed Article referred. It should be borne in mind that, while discriminatory treatment in the application of the quantitative restrictions was governed specifically by Article XIII of the General Agreement, this did not stand in the way of the conclusion that there was also violation of the general principle set forth in Article I:1 of the General Agreement.

209. None of the exceptions to the most-favoured-nation principle was applicable to the discriminatory treatment accorded by the challenged régimes. Neither Part IV nor Article XXIV empowered the above-mentioned countries to discriminate against banana imports from Latin American countries. Part IV of the General Agreement could not be invoked as an exception in this case, as it envisaged differences in trade treatment between developed contracting parties and developing contracting parties, and not between two groups of developing contracting parties, as was the case of the preferential recipients on the one hand and the Latin American countries on the other.

210. Also, Article XXIV of the General Agreement relieved contracting parties of their non-discrimination obligation in the case of the formation of free-trade areas and customs unions, within the meaning of paragraph 8 of the Article. However, there was no question here of a customs union or a free-trade area between the ACP countries and their European trading partners. On the contrary, it was a question of a unilateral and non-reciprocal relationship which was not covered by Article XXIV of the General Agreement. The parameters laid down by Article XXIV which authorized exceptional discriminatory treatment were precisely those that prevented the trade treatment granted by the European countries to the beneficiaries of the Lomé IV Convention from falling within the scope of that Article.

211. **Colombia** claimed that the concept of most-favoured-nation ("MFN") treatment was "very basic" to the General Agreement; according to one scholar, it "ensure[s] equality of opportunity for exports in all countries at the highest level of trade liberalization."⁹⁹ Further, because so large a part of the effectiveness of the General Agreement hinged on the principle of non-discrimination, panels regularly had construed its requirements very strictly.¹⁰⁰

212. Under Article I, therefore, the EEC and its member States were prohibited from treating products of Colombia and other complaining parties any less favourably than products originating in any other contracting party. Despite this prohibition, nearly all EEC member States (all but Germany and perhaps Spain) provided duty-free market access to bananas of ACP countries, but denied equally favourable treatment to bananas from Latin American banana exporting countries, including Colombia.

213. Colombia rejected the EEC's claim that the GATT could not scrutinize the consistency of the EEC preferences for bananas from ACP countries with its obligations under the General Agreement, simply because they involved the Lomé Conventions. The complaining parties did not seek a sweeping injunction that such conventions were in violation of the General Agreement; rather, Colombia requested

⁹⁸Report of the Panel on "Spain - Tariff Treatment of Unroasted Coffee", BISD 28S/102, paragraph 4.10 (adopted on 11 June 1981).

⁹⁹*Pescatore et al.*, Handbook of GATT Dispute Settlement 22 (1991). See also *Jackson*, World Trade and the Law of the GATT 249-72 (1969).

¹⁰⁰Reports of the Panels on "Spain - Tariff Treatment of Unroasted Coffee", BISD 28S/102, (adopted on 11 June 1981); and "European Economic Community - Imports of Beef from Canada", BISD 28S/92 (adopted on 10 March 1981).

only that the EEC come into compliance with its obligations under the General Agreement to the complaining parties with respect to its restrictive and discriminatory banana trade practices.

214. Colombia also rejected the notion advanced by the EEC that a discriminatory tariff, in violation of Article I, was justified by the minimal adverse effects generated by such discrimination. In a recent case, a panel had rejected analogous arguments by the United States that its discriminatory taxes and tax differential were *de minimis*, and therefore did not nullify or impair benefits under the General Agreement.¹⁰¹ The panel had stated that the contention that the tax differential "was so small that its trade effects were minimal or nil", and thus did not nullify or impair benefits under the General Agreement, was irrelevant, since the presumption of nullification or impairment following a *prima facie* violation of the General Agreement "in practice operated as an irrefutable presumption"¹⁰².

215. The logic of the "Superfund" case applied with equal force to the present situation. The only point of consequence was the EEC's violation of Article I as a result of the banana preferences it extended to the ACP countries; arguments, that the adverse effects of these preferences were minimal, immaterial.

216. The EEC underlined that the preferential systems between the United Kingdom and its dependent territories, as well as between France and its dependent territories, were originally covered by Article I:2 in combination with Annexes A and B of the General Agreement. Upon accession to the EEC, these preferences were still covered by Article XXIV:9, at least so long as the other member States were able, under the transitional arrangements, to collect the difference between the preferential rate and the ordinary rate at the internal border (see annotation ad Article XXIV:9).

217. The EEC did not claim that this coverage, which followed from explicit provisions contained in Article I:2, Article XXIV:9 and Annexes A and B of the General Agreement, continued on the same basis after the extension of the preferential treatment to the whole territory of the EEC (as far as tariffs were concerned). A customs union only had an outer customs limit and member States were, therefore, not equipped to collect duty differentials at internal borders. It was, thus, not possible, even from a purely technical point of view, to continue the preferential treatment without jeopardizing the functioning of the EEC as a customs union. It should be clear, however, that the preferential treatment of products originating in ACP countries by the EEC was at the core of the Lomé IV Convention and its predecessor conventions (see Article 168 of the Lomé IV Convention). It was the basis for the free-trade area created between the ACP countries and the EEC. The EEC considered that, contrary to the allegations of the complaining parties, the Lomé IV Convention, as its predecessor conventions, created a free-trade area in the sense of Article XXIV:5(b) and 8(b) taken in conjunction with Part IV of General Agreement (especially Article XXXVI:8).

218. The EEC noted that imports of bananas originating in ACP countries entered the EEC free of duties under Article 168(1) of the Lomé IV Convention. Moreover, quantitative restrictions existing in some member States were not applied to ACP bananas (Article 169(1) of Lomé IV). ACP bananas could not penetrate the markets of those member States which did not apply quantitative restrictions on bananas from non-ACP origin (i.e., Belgium, Denmark, Greece, Ireland, Luxembourg and the Netherlands). This had to do with the competitive disadvantages of ACP bananas described earlier. These competitive disadvantages were not offset by the 20 per cent tariff applied in most member States. Given this factual situation, access to the markets of the EEC was in no way made more difficult by the 20 per cent duty, since ACP bananas, which were theoretically admitted at a zero-rate, were not actually present on those markets where the tariff measure alone applied. As far as those markets were concerned, it was clear that the complaint was directed against the preferential system that the EEC

¹⁰¹Report of the Panel on "United States - Taxes on Petroleum and Certain Imported Substances", BISD 34S/136, page 158 (adopted on 17 June 1987).

¹⁰²Idem at paragraphs 5.1.2 and 5.1.7.

generally applied to ACP countries for all products. In this respect, therefore, the complaint went beyond a question concerning merely the market access conditions for bananas in the EEC. It thus exceeded the product-related measures and attacked the contractual preferential relationship that the EEC entertained with the ACP countries.

219. This factual assessment concerning the core of the complaint had inevitable procedural consequences. The Panel should be aware that the statements made by the complaining parties could lead it beyond its terms of reference. The Panel should, therefore, refrain from making findings on this issue. Moreover, a Working Party had been established which would in due course start its examination of the fourth Lomé Convention under relevant provisions of the General Agreement, including Part IV. In these circumstances, it would be inappropriate for the Panel to try and second-guess, on the basis of Article XXIII:2, the findings and conclusions of the CONTRACTING PARTIES which they were called upon to make on the basis of a different procedure, in particular Article XXIV:7(b). First, the complaining parties did not ask the Panel in their conclusions to make recommendations on the compatibility with the General Agreement of the preferential system in favour of the ACP countries. Second, Article XXIV:7(b) provided for a specific procedure for the examination of agreements setting up customs unions or free-trade areas which might lead to recommendations of the CONTRACTING PARTIES with respect to the conformity with the General Agreement of such agreements. In this context, the EEC referred to a statement by the panel in the "Citrus" case which, in its opinion, confirmed this view.¹⁰³

220. Even though this panel report was not adopted, the position of the panel appeared well-founded and was based on a long-standing practice in the GATT. The legal certainty with respect to international contractual relations duly notified to the GATT would be severely affected, if many years after the coming into effect of an international convention which was examined by the appropriate GATT bodies, its conformity with the General Agreement could be questioned anew. Such a re-examination of a well-established practice would be in breach of the legitimate expectations of the parties to these Conventions to be able to maintain them without modification (see last sentence of Article XXIV:7(b)).

221. Furthermore, the EEC recalled the arguments it had already advanced on this question in paragraphs 216 and 217 above. Pursuant to Article 174(1) of the Lomé Convention, the EEC did not expect full reciprocity from the ACP countries for the preferential treatment it accorded to them. There was no obligation in the General Agreement to do so in order to qualify for a free trade area, if such a free trade area was created between developed and developing countries as was the case here. The EEC had always defended this position which was discussed at length in the reports of the working parties which had examined successive Lomé Conventions. For the purposes of the present procedure, all that was necessary was to underline once again that, if the preferential treatment of ACP countries provided for in the Lomé IV Convention and its predecessor conventions was to be declared inconsistent with the General Agreement, this would mean that it would be nearly impossible to create a free-trade area between developed and developing countries.

222. The EEC further submitted that not only the continuation of the tariff preferences but also the continuation of the preferential treatment with respect to quantitative restrictions were justified under the Lomé IV Convention for the following reasons :

- Article XXIV:5 contained an exception not only to Article I but also to Article XI (and, accordingly, to Article XIII). Within a free trade area, as defined in Article XXIV:8(b), "... other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI... XIII...) are eliminated on substantially all the trade between the constituent territories

¹⁰³Report of the Panel on "EEC - Tariff Treatment of Imports of Citrus Products from Certain Countries in the Mediterranean Region", document L/5776 of 7 February 1985, paragraph 4.16 (not adopted).

in products originating in such territories." The preference, therefore, could not be limited to tariff measures but must also include all other restrictive measures.

- In accordance with Article XXIV:5(b), restrictive measures could be maintained if they existed before the establishment of the free trade area. There could be no doubt that all the quantitative restrictions presently applied pre-existed even the GATT. It was, therefore, not the establishment of the free-trade area between the EEC and the ACP countries that had, in any way, reinforced those measures.

223. Furthermore, Protocol No. 5 of the Lomé IV Convention provided explicitly that :

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

This provision had to be read as an obligation on the EEC to ensure traditional market access and advantages for the ACP countries.

224. As long as the market access was guaranteed on a national basis by the member States, with the authorization of the EEC, there was no other choice than to maintain national quantitative restrictions. Even with the authorization of the EEC, it would not have been possible to charge different customs duties on entry into different member States, since the EEC's customs union completion in 1968 almost eliminated any technical possibility to maintain national tariffs. The only way to comply with the obligations under the Lomé Convention on a national basis, therefore, was the continuation of pre-existing national quantitative restrictions.

225. It followed from the terms of Article XXIV:7(b) last sentence that a free trade agreement with all its features might be maintained as long as no recommendation to modify it had been addressed to the parties of the agreement by the CONTRACTING PARTIES. Therefore, the continuation of the national quantitative restrictions for non-ACP bananas appeared justified. The parties to the Lomé Convention had a legitimate expectation under Article XXIV:7(b) of the General Agreement to be able to maintain the measures provided for in the ACP-EEC Convention until the CONTRACTING PARTIES required a modification of their agreement, in conformity with the procedures laid down in the General Agreement.

226. The EEC had consistently considered that the Lomé Conventions were covered by Article XXIV taken in conjunction with Part IV (in particular Article XXXVI:8) of the General Agreement. This view was already submitted when the first Lomé Convention was considered by a GATT working party, as could be seen from the Working Party report adopted on 15 July 1976. The view expressed at that time by the EEC was that it had:

"complied with the obligation to eliminate customs duties and other restrictive regulations of commerce with respect to substantially all trade with the ACP. In the light of their development needs and the principles of Part IV of the General Agreement, the EEC had not demanded reciprocity in its trade with the ACP".¹⁰⁴

227. The first of these two sentences referred to the definition of a free-trade area contained in Article XXIV:8(b) of the General Agreement, while the reference to Part IV more specifically pointed to Article XXXVI:8. Moreover, this had been further clarified in paragraph 23 of the same working party report, where these Articles were explicitly quoted together with Article I:2, which at that stage could still be invoked as a basis for the preferential treatment between the United Kingdom and its

¹⁰⁴Report of the Working Party on "ACP-EEC Convention of Lomé", BISD 23S/46, page 48, paragraph 4 (adopted on 15 July 1976).

former dependent territories, as was set out in Article XXIV:9 (at that time other member States of the EEC were still authorized to collect the duty differential under transitional provisions of the Act of Accession for Denmark, Ireland and the United Kingdom to the EEC).

228. When the Lomé II Convention was examined by a working party, the EEC noted that:

"The new Convention (...) was based on the same (...) legal provisions as the first Convention."¹⁰⁵

It could be seen from the report of the Working Party that this was understood to mean, as in the case of the first Lomé Convention, that the EEC intended to invoke Article XXIV in conjunction with Part IV of the General Agreement. This followed in particular from a critical observation by another participant of the Working Party recorded at paragraph 9 of the report¹⁰⁶. It was in this context also that the EEC's reply to a question concerning possible effects on other developing contracting parties should be seen¹⁰⁷. The reply clearly referred to Article XXIV (without claiming that this provision alone would cover the Lomé II Convention) and explained that effects on trade with other developing contracting parties could not be completely ruled out, as was generally the case when free-trade areas were created. The EEC had made its views very clear when the Lomé III Convention was examined by a GATT working party¹⁰⁸, and this view was fully in line with the view expressed when the first Lomé Convention had been examined.

229. Under Article 2 of Protocol 5 on bananas which was attached to the Lomé IV Convention, the EEC had committed itself to assist the ACP banana producing countries to improve the conditions for the production and marketing of bananas. The EEC, therefore, had not taken a static position simply maintaining traditional access and advantages for ACP bananas on the EEC markets, but had recognized the need for a more dynamic approach. However, the limits of such actions were obvious in those cases where geographic conditions restricted the possibilities for the use of modern cultivation techniques, as was the case of several island ACP countries.

230. **Costa Rica, Guatemala, Nicaragua and Venezuela** argued that the requirements laid down by Article XXIV to permit exceptional discriminatory treatment obviously ruled out the possibility that the trade treatment granted by the EEC to the beneficiaries of the Lomé IV Convention could fall within the parameters laid down for the existence of a free-trade area. This could be shown by the fact that successive Conventions had not met the requirements set forth in Article XXIV, paragraphs 5 and 8. These provisions required that there be a binding undertaking to establish a free-trade area as well as a plan or schedule for the establishment of such an area, and that duties and other trade restrictions should be eliminated with respect to substantially all the trade between the parties.

231. In the present case, it could not be said that the ACP countries, under the Lomé Convention, had entered into an undertaking with the EEC to establish a free-trade area, nor that a plan or schedule had been established for the formation of such an area. Nor could it be asserted that the Convention provided for the elimination of customs duties and other trade restrictions with respect to substantially all the trade between the parties. Furthermore, the ACP countries were not obliged to grant reciprocal preferences to the EEC. Article 174.1 of the Lomé IV Convention specifically established that while the Convention was in force the ACP States should not be required to assume, with respect to imports of products originating in the EEC, obligations corresponding to the commitment undertaken by the EEC with respect to imports of products originating in the ACP States. On the contrary, Article 174.2

¹⁰⁵Report of the Working Party on the Second ACP-EEC Convention of Lomé, BISD 29S/119, paragraph 5 (adopted on 31 March 1982).

¹⁰⁶Idem, paragraph 9.

¹⁰⁷L/5273, page 4.

¹⁰⁸Report of the Working Party on "Third ACP-EEC Convention of Lomé", BISD, 35S/321, page 327, paragraph 19 (adopted on 22 September 1988).

of the Lomé IV Convention stated that they shall grant the EEC treatment no less favourable than the most-favoured-nation treatment.

232. The EEC's argument seeking to justify non-compliance with these requirements through the application of Article XXIV in conjunction with Part IV of the General Agreement was not admissible. The infringement of the principle of Article I and the failure to grant reciprocal concessions in Article XXIV could not be justified by Part IV itself. Neither the letter of Part IV, nor the spirit underlying its adoption, could produce an interpretation that enabled Part IV to be used to replace the obligation of the most-favoured-nation clause or the requirement of reciprocity set out in Article XXIV.

233. The EEC had argued that the reciprocity requirement of Article XXIV was not essential in the case of an association with developing countries, basing this assertion on a broad interpretation of the Interpretative Note *ad* Article XXXVI:8 of the General Agreement. It was clear from the content and nature of this Note that it was intended to limit its scope to a specific number of Articles of the General Agreement which were expressly named, and which did not include Article XXIV; consequently, the text of that Note could not in any way waive the reciprocity requirement of Article XXIV.

234. Moreover, it was never the purpose of Part IV to discriminate among developing countries; it was intended to be applied on a most favoured nation basis to all developing countries.¹⁰⁹ The fact that the EEC was complying with its Part IV obligations with respect to ACP developing countries did not exempt it from fulfilling them with respect to the complaining parties. This had already been established in the report of a panel in which differences among developing countries were analyzed, and the very clear conclusion was reached that Part IV did not operate in this way.¹¹⁰

235. The legal obligations, in light of which the import régimes of some EEC member States were to be examined, were obligations stemming from the General Agreement and not from obligations the EEC might have entered into outside the GATT. The complaining parties did not intend to obtain a ruling on the compatibility of the Lomé Convention, or any other preferential agreement the EEC might have had, with the General Agreement. Their governments had pointed out the infringements of the General Agreement by the banana import régimes of eleven member States of the EEC, which included the breach of the most-favoured-nation clause in Article I. The EEC claimed that provisions of Article XXIV taken jointly with Part IV of the General Agreement should turn the Lomé Convention into a free-trade area and thus justify the above-mentioned infringements of Article I. While it was not the intention of the complaining parties to obtain a ruling on the Lomé Convention, the fact that the EEC was using it as a justification for infringements of Article I meant that the Panel had to take a position in this matter in order to fulfil its terms of reference.

236. On the contrary, during the examination of the successive Conventions by the working parties, it had been established that "while the parties to the Convention stated that the trade commitments it contained were compatible with the relevant provisions of the General Agreement as a whole and with its objectives, some members of the working party considered it doubtful that the Convention could be fully justified in terms of the legal requirements of the General Agreement."¹¹¹ It was also understood in these working parties that these Conventions would in no way be considered "as affecting the legal rights of contracting parties under the General Agreement."¹¹²

¹⁰⁹L/5776, paragraph 3.24.

¹¹⁰Report of the Panel on "Norway - Restrictions on Imports of Certain Textile Products", BISD 27S/119 (adopted on 18 June 1980).

¹¹¹Reports of the Working Parties on the Third ACP-EEC Convention of Lomé, BISD 35S/321 (adopted on 22 September 1988); "Second ACP-EEC Convention of Lomé", BISD 29S/119 (adopted on 31 March 1982); and "ACP-EEC Convention of Lomé, BISD 23S/46 (adopted on 15 July 1976).

¹¹²Idem.

237. The exception invoked by the EEC to justify the infringement of Article I by the banana import régimes was not admissible for the reasons stated above. Even supposing that this dispute referred to the granting of preferences that were possibly compatible with the General Agreement or that the Panel decided not to rule on this point on the basis of the provisions of Article XXIII:1(a), the complaint by Costa Rica, Guatemala, Nicaragua and Venezuela was also justified under Article XXIII:1(b). It was clear that the discriminatory régimes had caused serious prejudice to the Latin American banana producers, by affecting the total value and volume of their exports. Not only had they limited the export volumes of the Latin American countries, but the latter had also lost major opportunities to sell in new markets and achieve a better competitive position. The discriminatory restrictions and prohibitions had unquestionably led to a rise in prices and prevented a rise in consumption which would have taken place had the markets not been protected, thus adversely affecting complaining parties exports and thereby causing impairment of the benefits accruing to them under the General Agreement.

238. **Colombia** rejected the EEC's argument that its preferential measures for ACP countries were justified under Article XXIV. The invocation of Article XXIV "in conjunction with" Part IV of the General Agreement as a defence might indeed be creative, yet it had no ground in GATT precedent or public policy. Colombia also recalled that past working party reports had repeatedly stated concerns as to the full consistency of the Lomé Conventions with the legal requirements of the General Agreement.

239. It was obvious that the preferential arrangements were not authorized under Article XXIV:8(b), which defined a free-trade area as "two or more customs territories in which the duties and other restrictive regulations of commerce . . . were eliminated on substantially all the trade between the constituent territories of products originating in such territories" . In short, the preferential arrangement between the EEC and the ACP countries was neither reciprocal nor applicable to substantially all trade between the two groups; in fact, duties and other commercial regulations still figured very prominently in trade between the EEC and the ACP States that were parties to the Lomé Convention.

240. In addition, the EEC's preferential arrangements with Lomé Convention countries did not constitute an "interim agreement" leading to the creation of a free-trade area. To qualify, interim agreements must, when created, "include a plan and schedule for the formation of such a . . . free-trade area within a reasonable length of time." (Article XXIV:5(c)) The EEC's notification of its preferential arrangements with Lomé Convention signatories was not accompanied by any such plan or schedule; nor had the preferential arrangement led to the formation of a free-trade area within a reasonable length of time.

241. If the EEC wished to enter into one-way, non-reciprocal arrangements with Lomé Convention signatories on some, but not all, trade, it could have followed the example of the United States in seeking, with respect to the "Caribbean Basin Economic Recovery Act" a waiver from the General Agreement under Article XXV:5. However, it had not done so. Alternatively, the EEC could have followed the recent precedent of Canada, Mexico and the United States in negotiating a North American Free Trade Agreement in which the developing and developed parties alike exchanged reciprocal concessions covering substantially all trade. Again, the EEC had not done so.

242. In the final analysis, banana trade between the EEC and the ACP countries was not part of a larger free-trade area deserving of Article XXIV exemption from GATT obligations. This Panel should, therefore, reject the notion that any interweaving of Article XXIV and Part IV, however creative, would allow a developed country to discriminate - non-reciprocally, regarding selective products - against one set of developing contracting parties and in favour of another, in violation of the most fundamental obligations of the General Agreement. This was confirmed by the Report of the Panel on "Norway - Restrictions on Imports of Certain Textile Products", wherein the panel concluded as follows:

"While noting that provision for some developing exporting countries of assured increase in access to Norway's textile and clothing markets might be consistent for those countries with

the spirit and objectives of Part IV of the GATT, this could not be cited as justification for actions which would be inconsistent with a country's obligations under Part II of the GATT".¹¹³

243. In any case, aside from the legal status of the Lomé Conventions, the restrictive banana régimes in several EEC member States were, in Colombia's view, individually and on their own, contrary to the legal obligations of the General Agreement. National systems imposing illegal quotas and licences derived their force from legislative or administrative acts which in themselves contradicted the legal system of the General Agreement (e.g., Articles XI and XIII), aside from preferential "associations" entered into with the ACP countries. Accordingly, no alleged one-way free trade area which exempted banana imports of those countries from quantitative restrictions could in any way justify national legislations which were otherwise not consistent with the General Agreement, and which adversely affected bananas from the complaining parties.

244. **Costa Rica, Guatemala, Nicaragua and Venezuela** argued that the principles and objectives set forth in Part IV represented an expression of solidarity between the more developed contracting parties and all developing countries. Hence, its provisions¹¹⁴ envisaged concrete action to achieve these objectives which was, therefore, an obligation that the EEC member States had to honour.

245. Part IV did not contain any provision authorizing the granting of trade advantages that discriminated among different groups of developing countries. The fact that the EEC was complying with its Part IV obligations vis-à-vis other developing countries did not exempt it from fulfilling these obligations towards the complaining parties.¹¹⁵ The report of the Working Party that analyzed "the United States Caribbean Basin Economic Recovery Act" stated that the provisions of Part IV did not provide authority for discriminatory preferential treatment.¹¹⁶ Nor could the EEC be said to have accorded high priority to the reduction and elimination of barriers to trade in products of interest to less-developed contracting parties, since it maintained in force highly restrictive régimes for trade in bananas from the complaining parties.

246. The EEC said that it did not invoke Part IV of the General Agreement as a justification for its preferential treatment of the ACP countries. Rather, the EEC argued that it had established a free trade area between the EEC and each of the ACP countries, and that in light of Article XXIV:5 in conjunction with Article XXXVI:8 it was entitled to establish a free-trade area which was not based on full reciprocity, and that this free trade area justified the preferential treatment of the ACP countries. The annotation ad Article XXXVI:8 explicitly referred *in fine* to "any other procedure under this Agreement". This clearly showed that an application of Article XXXVI:8 in conjunction with other procedures of the General Agreement was envisaged from the outset.

¹¹³Report of the Panel on "Norway - Restrictions on Imports of Certain Textile Products", BISD 27S/119, paragraph 15 (adopted on 18 June 1980).

¹¹⁴Article XXXVII:1 of the General Agreement provided that the developed contracting parties shall to the fullest extent possible,

"accord high priority to the reduction and elimination of barriers to products currently or potentially of particular export interest to less-developed contracting parties ... and refrain from introducing or increasing the incidence of customs duties or non-tariff import barriers on products currently or potentially of particular interest to less-developed contracting parties ...".

In paragraph 3(c), the Article provided that developed contracting parties shall,

"... explore all possibilities of constructive remedies before applying such measures where they would affect essential interests of those contracting parties."

¹¹⁵Report of the Panel on "Norway - Restrictions on Imports of Certain Textile Products", BISD 27S/119, paragraph 15 (adopted on 18 June 1980).

¹¹⁶Report of the Working Party on "The United States Caribbean Basin Economic Recovery Act", BISD 31S/180, paragraph 31 (adopted on 6-8 and 20 November 1984).

247. **Costa Rica, Guatemala, Nicaragua and Venezuela** said that the purpose of Part IV was the reduction and elimination of trade barriers on products of interest to the less-developed contracting parties, not the erection or preservation of such barriers. This should be understood in the sense that fostering new and better opportunities of access for other developing countries was in no way questionable provided this was not done in a discriminatory manner. Thus, the member States which maintained restrictions on Latin American imports violated their commitments to refrain from establishing tariff and non-tariff barriers to imports of products of interest to developing countries.

248. The economic and social importance of the banana trade for the complaining parties was beyond discussion; in many cases, it was their most important export product. The importance of the markets of the EEC for the banana trade was likewise manifest: in many cases, these were the main export markets for the complaining parties. In addition, it could not be argued in this case that the EEC had done everything in its power to apply constructive remedies in order to avoid adopting discriminatory measures against less-developed contracting parties such as the complaining parties. The EEC's argument that ACP countries would not be able to penetrate the market of member States that did not apply quantitative restrictions on banana imports was inaccurate, as demonstrated by the statistics showing exports by ACP countries to these markets.

249. There were precedents in panel reports that referred to the commitment included in Part IV of the General Agreement relating to the need to make "serious efforts to avoid taking protective measures ...".¹¹⁷ The EEC member States in question had repeatedly prolonged the discriminatory and restrictive measures against imports from the complaining parties, without exploring any other possibilities aimed at avoiding such discrimination and application of restrictions which, in some cases, constituted outright prohibitions of imports from the complaining parties. In the case under consideration, it was, therefore, clear that the banana import régimes applied by various EEC member States violated the EEC's commitments under Part IV of the General Agreement.

250. The EEC said it was not correct to allege that the EEC had systematically hampered imports of bananas from the Latin American suppliers. In reality, as was borne out by all the trade statistics, imports of bananas from the complaining parties and other banana producing countries in Latin America, had had an impressive growth rate over the last few years. In particular, the EEC had refrained from introducing any new trade barriers. The existing mechanisms of some member States, which had a restrictive effect on banana imports from the complaining parties and other Latin American banana producers, had been applied in a measured way, without any intention of prejudicing the complaining parties' interests. These mechanisms had been applied primarily in order to maintain a limited production in the EEC on the one hand, and to allow for traditional market access for ACP bananas on the other. Under these circumstances, the EEC was at a loss to see how the measures complained of could be considered contrary to the objectives of Part IV of the General Agreement.

251. More specifically, with respect to the language at the beginning of Article XXXVII, the 1964 Committee on the Legal and Institutional Framework of the GATT in Relation to Less-Developed Countries stated in its report that it "recognized that the phrase 'to the fullest extent possible' would have the effect of leaving the applicability of the provisions of sub-paragraphs (a), (b) and (c) of paragraph A exclusively to the judgement of each contracting party subject to them..."¹¹⁸ In the view of the EEC, the language of Article XXXVII stated a political objective, but it could not be understood to contain a legal obligation with the effect that actions taken by developed contracting parties could be found in violation of this provision. Such a construction would be contrary to the plain language of the text and would not conform to the drafting history shown in the quotation which dated from

¹¹⁷Report of the Panel on "EEC Restrictions on Imports of Apples From Chile", BISD 27S/98, paragraph 4.23. (adopted on 10 November 1980).

¹¹⁸L/2281, paragraph 4.

1964. The EEC, therefore, considered that the allegations of the complaining parties in this respect were unreasonable, and submitted that they did not fit with the factual situation, nor with a proper legal analysis of the General Agreement.

252. **Costa Rica, Guatemala, Nicaragua and Venezuela** replied that while it was common to attach merely political value to Part IV, this did not exempt the EEC from fulfilling its provisions. This was all the more so, if the EEC itself was trying to justify nothing less than exceptions to the most-favoured-nation clause on the very grounds that it was applying Part IV. Much of the EEC's argument before this Panel was based on a wrongful invocation of Part IV. It was unacceptable for the EEC to try to make discretionary use of this part of the General Agreement to the detriment of a group of developing countries.

253. Furthermore, there was nothing in the provisions of Part IV to authorize the granting of trade benefits which discriminated among different groups of developing countries; this had been recognized in various panel reports.¹¹⁹ As the EEC had not shown that the infringement of the most-favoured-nation principle was justified under any of the relevant provisions of the General Agreement, and as its failure to comply with the objectives and principles laid down in Article XXXVII had been demonstrated, it was clear that the banana import régimes applied by various EEC member States were in breach of Part IV of the General Agreement.

254. **Colombia** stated that the General Agreement was replete with provisions designed specifically to assist and further the economic progress of developing countries.¹²⁰ The GATT, through various decisions and Ministerial Declarations, had consistently recognized its special obligations to developing countries.¹²¹ The overriding purpose of these provisions was to enable developing countries to improve their economic development and thus to generate more trade and help maximize world wealth. The provisions also facilitated the integration of developing countries into the global trade framework governed by the General Agreement. With their unique economic concerns accommodated by such special provisions, developing countries were more inclined to commit themselves to the rules of the General Agreement concerning liberalization of trade. In short, without such special provisions, the developing countries' climb toward greater economic achievements would be far steeper, and their place in the global trading system far more uncertain and fragile - to the detriment of developing and developed countries alike.

255. In Colombia's view, the EEC had failed to undertake positive efforts to ensure that banana exporting developing countries secured a share in the growth of international trade commensurate with the needs of their economic development. The EEC had also failed to provide more favourable and acceptable conditions of access to its markets for bananas, and to devise measures to stabilize and improve conditions of world banana markets. Moreover, the EEC banana restrictions and discriminatory policies flouted the principle set forth in Article XXXVI:4.

256. The EEC replied that concerning the principles of Article XXXVI:3 and 4 of the General Agreement, it sufficed to carefully read the relevant provisions¹²² to see that they contained a political objective, not an obligation which could result in a finding of a violation of the General Agreement.

¹¹⁹Report of the Panel on "Norway - Restrictions on Imports of Certain Textile Products", BISD 27S/119, paragraph 15 (adopted on 18 June 1980); and Report by the Working Party on "United States - Caribbean Basin Economic Recovery Act", BISD 31S/180, paragraph 31 (adopted on 6-8 and 20 November 1984).

¹²⁰See, Article XVIII.

¹²¹1966 Decision on Procedures Under Article XXIII, BISD 14S/18; Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries, Decision of 28 Nov. 1979; and Ministerial Declaration: Thirty Eighth Session at Ministerial Level.

¹²²E.g., Article XXXVI:4 spoke about "the largest possible measure" and Article XXXVI:3 contained the words "There was need for positive efforts..."

Again, the EEC disagreed with the analysis made by Colombia according to which the EEC had made no effort to improve the situation of banana exports by the complaining parties. The trade statistics showed the growth of those exports in a very clear way. There was no reason to believe that the EEC had disregarded any of its obligations under Part IV of the General Agreement.

257. **Colombia** responded that the quantitative restrictions and discriminatory tariffs maintained by EEC member States ran counter to the letter and spirit of this provision. Instead of providing "more favourable and acceptable conditions of access" to its markets for bananas from Colombia and other complaining parties, EEC member States' national quotas and licensing schemes, their discriminatory application, discriminatory tariffs and other restrictions blocked such access. Instead of "[devising] measures designed to stabilize and improve conditions" of world banana markets, the EEC member States imposed quotas and other barriers that distorted the market for bananas.

258. The actions of all the EEC member States, except Germany, constituted an egregious breach of Article XXXVI's principles and objectives. Not only had the actions of the EEC member States resulted in a disrupted market, but their restrictive practices had virtually denied Colombia and other complaining parties access to their lucrative banana markets. Accordingly, the Panel should find that the EEC and certain member States had not acted in conformity with the principles and objectives of Article XXXVI.

259. It was wholly inadequate, moreover, to counter the foregoing arguments with the assertion that the EEC's restrictive banana practices benefited other developing countries, namely certain ACP countries. This reasoning suffered from several flaws. First, the quantitative restrictions and other discriminatory measures favoured EEC banana production, as well as the imports from the members of the Lomé Convention, at the expense of banana imports from Colombia and the other complaining parties. Enhancing or protecting the opportunities of developed contracting parties while diminishing those available to developing contracting parties was not consistent with the EEC's obligations under Article XXXVI.

260. Second, Colombia and the other complaining parties did not challenge *per se* the import opportunities that these restrictive practices made available to the countries that were members of the Lomé Convention. Nor were they arguing that they should be afforded preferential access to the EEC market relative to the access enjoyed by the ACP countries. Rather, Colombia's objection was that the preferential market opportunities afforded to the ACP countries were part of a régime that was discriminatory toward Colombia and the other complaining parties. Consistent with their obligations under Article XXXVI, Colombia believed that the EEC member States concerned should eliminate their quantitative restrictions and other barriers in consistent with the General Agreement on all banana imports, thereby affording all developing countries, not just a favoured few, the same access to their markets. Only this action would "ensure" that developing contracting parties "secure a share in the growth in international trade commensurate with the needs of their economic development", and provided all developing contracting parties "more favourable and acceptable conditions of access to world [banana] markets" (Article XXXVI).

261. The EEC said that the complaining parties knew very well that the ACP countries suffered from serious competitive disadvantages due to the climatical and topographical conditions prevailing in those countries. They had explicitly recognized until very recently the reasons for this preferential treatment. It was all the more surprising that in the present proceedings they attacked the general tariff preferences which was the cornerstone of the Lomé Convention, although it did not do any harm to them in real trade terms, since they were able to pay the 20 per cent *ad valorem* duty and still supplant ACP bananas in the markets of those member States which did not apply quantitative restrictions.

262. **Colombia** said that the Latin American banana exporting countries had a "particular export interest" (Article XXXVII:1(a)) in bananas; yet the EEC had failed to accord a high priority to eliminating its member States' many barriers to imports of Latin American bananas. Further, paragraph 1(b) of Article XXXVII required the EEC, as a developed group of countries, to "refrain from introducing, or increasing the incidence of, customs duties or non-tariff import barriers on products currently or potentially of particular export interest to less-developed contracting parties" Bananas were a product of current, particular export interest to Colombia and the other complaining parties. Yet, the EEC had undertaken commitments regarding banana imports under successive Lomé Conventions, in disregard of this obligation as it applied to Latin American bananas. Moreover, the EEC had permitted several of its member States to accede to, and become members of, the EEC without reforming their banana régimes. Thus, new tariff and non-tariff barriers to imports of Latin American bananas had been introduced and increased within the EEC. Given the great significance of these imports to Colombia and the intent and impact of the EEC's restrictive practices, one could scarcely imagine a clearer violation of a contracting party's commitments under Article XXXVII:1(b).

263. The **EEC** replied that there were noticeable differences between bananas originating in ACP countries and in Latin America. The ACP bananas were, generally speaking, smaller in size than the Latin American bananas. Banana plantations in ACP countries were in most cases small and run on a family basis. In many cases, these plantations were cultivated on volcanic soil which did not lend itself to large plantations. The bananas were harvested by hand and grown in a way respecting the environment. Latin American bananas usually came from very large plantations often run by a small number of multinational companies. Their bananas were mostly cultivated on an industrial scale. This meant that Latin American bananas could be produced at substantially lower cost. Due to the difference in production costs, but also because of different marketing methods, the price differential was usually very high. ACP bananas were, generally speaking, 1.5 to 2 times more expensive than Latin American bananas. ACP bananas, therefore, were only able to penetrate markets where they were protected against unlimited competition from Latin American bananas.

264. Imports of bananas originating in ACP countries entered the EEC free of customs duties under Article 168 of the Lomé IV Convention (document L/7153/Add.1). Similar preferential treatment was accorded to bananas under the preceding Lomé Conventions and under the two Yaoundé Conventions of 1963 and 1969.¹²³ Prior to this, Articles 131 to 136 of the Treaty of Rome provided for preferential treatment for the former dependent territories of the original member States.¹²⁴ Moreover, quantitative restrictions existing in some member States with respect to bananas were not applied to bananas originating in ACP countries. This preferential treatment was based on Article 169(1) of the Lomé IV Convention and on similar provisions in the previous Lomé Conventions. Spain restricted banana imports from all sources except the Canary Islands in accordance with Article 4, paragraph 2, of Protocol No.2 on the Canary Islands (attached to the Act of Accession of Spain and Portugal to the European Communities)¹²⁵, and maintained these restrictions vis-à-vis the ACP countries on the basis of Article 171 of the Lomé IV Convention. These restrictions could not be maintained after the entry into force of a common market organization for bananas.

265. **Costa Rica, Guatemala, Nicaragua, and Venezuela** stated that Nicaragua, Colombia and Ecuador had their own marketing firms, while Costa Rica had a national company which exported bananas to Europe. Furthermore, as far as investments in Latin American banana production were concerned, it was inaccurate to speak only of United States multinationals. For example, in Costa Rica, apart from major domestic investment, there were also Mexican, Colombian and British, as well as United

¹²³These Conventions had all been examined by GATT working parties.

¹²⁴The Treaty of Rome was examined by a GATT Committee under Article XXIV:7(b), BIDS 6S/68, conclusions BIDS 7S/69.

¹²⁵The Act of Accession of Spain and Portugal to the European Communities was examined by a GATT working party under Article XXIV:7(b), see BIDS 35S/293.

States, investors. The same could be said of the production of African countries, where there was also investment from various origins. As concerns the activity of multinationals in the marketing chain in Latin America, the companies which marketed Latin American bananas took them, in most cases, as far as to the European port. From there onwards, control of the chain was in European hands in almost all cases, so that it was wrong to speak of a full vertical integration in the case of Latin American bananas. Moreover, ripening was clearly controlled by European companies. As the EEC had rightly stated, the influence of these companies was highly important in the marketing chain. It was well known that the difference between the price to the producer and the transporter's selling price at the European port was not very great compared with the price increments that occurred throughout the rest of the chain after the fruit had reached the European port. The firms which did have vertical integration in the marketing chain, even including production, were the companies which marketed ACP bananas. Many of them not only profited from importation and ripening but also owned plantations in ACP countries. It was in these cases that there was a vertical integration in the banana production and marketing chain, and it was these companies which really benefited from the EEC preferential system, through their monopoly profits.

266. Furthermore, it should not be forgotten that the complaining parties, too, had serious social and economic problems and that the banana industry was enormously important in the quest for development. Following many years of effort and technological development in the Latin American countries, banana production had reached levels of efficiency that placed these countries in a competitive position which could not be ignored. These advantages had not brought the complaining parties the benefits they ought to have done because of the distortions introduced by the EEC through its current systems of protection. In addition, these measures had the natural consequence of making industry in the protected countries permanently inefficient.

Article XXIII:1 - Nullification or Impairment

267. **Costa Rica, Guatemala, Nicaragua and Venezuela**, noted that in accordance with GATT practice, as described in paragraph 5 of the Annex to the Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance,

"In cases where there is an infringement of the obligations assumed under the General Agreement, the action is considered *prima facie* to constitute a case of nullification or impairment ...".¹²⁶

This Annex established a presumption that the burden of proof that there was no such nullification or impairment lay with the contracting party that was alleged to have violated the General Agreement.

268. In the case under consideration, the restrictions applied by France, Italy, Portugal, Spain and the United Kingdom in the form of import quotas and licences and the discriminatory tariff treatment practised by those countries, as well as by Belgium, Denmark, Greece, Ireland, Luxembourg and the Netherlands against banana imports from various Latin American countries, constituted a violation of the provisions of the General Agreement, in particular of Articles I, II, XI, XIII and Part IV of the General Agreement. Consequently, and pursuant to the provisions of Article XXIII, there was a *prima facie* case of nullification or impairment of the benefits accruing to the complaining parties. It was up to the EEC to rebut.

269. As had already been established¹²⁷, the benefits accruing from the General Agreement comprised not only those stemming from the Agreement at the time when a concession came into effect but also

¹²⁶Annex to the "Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance", BISD 26S/210, paragraph 5, (adopted on 28 November 1979).

¹²⁷Report of the Panel on "Canada - Administration of the Foreign Investment Review Act", BISD 30S/140 (adopted on 7 February 1984).

the future opportunities for trade that would result from the concession. In this sense, and by virtue of the presumption of nullification or impairment of benefits that existed in cases of violation of the provisions of the General Agreement, the complaints submitted by one or more contracting parties with regard to régimes that were in breach of the General Agreement had to be admitted even where statistical evidence of trade injury did not exist.

270. Nullification or impairment should be considered not only in relation to the effect that the violation concerned might have had on the volume of trade, but also in relation to possible increases in transaction costs and the creation of uncertainties which could affect investment plans¹²⁸ The complaining parties said that the Panel should examine the matter in the light of the provisions of Article XXIII:1(a) and also paragraph (b), if it should consider it pertinent to do so.

271. **Colombia** argued that even if the Panel were to find, that the EEC's banana practices were not inconsistent with the General Agreement, it was nevertheless undeniable that Colombia and the other complaining parties had suffered grievously from the nullification or impairment of their benefits under the General Agreement, within the meaning of Article XXIII, as a direct result of these restrictive measures. According to long-established GATT practice,¹²⁹ this Panel should presume the nullification or impairment of benefits under the General Agreement within the meaning of Article XXIII, for three reasons. First, the EEC had violated many of its obligations under the General Agreement. When a GATT contracting party had violated its obligations under the General Agreement, nullification or impairment was presumed unless the contracting party whose measures were challenged submitted positive counter-evidence establishing authoritatively that nullification or impairment had not occurred.¹³⁰ Second, *prima facie* nullification or impairment had been found in cases where, as here, quantitative restrictions were complained of.¹³¹ Third, the EEC measures had been introduced or intensified after the EEC had negotiated the concession on bananas under Article II in 1963

272. Even if, *arguendo*, the EEC member States' measures did not violate provisions of the General Agreement, Colombia and the other complaining parties nonetheless would be entitled to relief under Article XXIII because those measures had nullified or impaired benefits under the General Agreement they had reasonably anticipated. The complaining parties expected to benefit from the EEC's 20 per cent tariff binding on bananas by increasing exports to the EEC market. Yet, those anticipated benefits were nullified or impaired by the many restrictions imposed on banana imports from the complaining parties.

273. The quantitative restrictions and other restrictions inconsistent with the General Agreement at issue in the present case had upset the balance of rights and obligations under the General Agreement. The following evidence constituted a more than ample "detailed justification" in support of Colombia's allegations of nullification or impairment under Article XXIII:1(b).¹³² Nullification or impairment of benefits was illustrated by the export opportunities that the complaining parties, in particular Colombia, had lost in terms of access to EEC markets which were subject to national market organizations. Quantitative restrictions applied in each of those countries denied access to large volumes of Latin American or non-preferential bananas, thereby causing adverse trade effects to the complaining parties and to their economic development as a whole. Foregone trade opportunities flowed from both a static perspective (i.e., ignoring the possible growth in EEC consumption which would have taken place, in the absence of barriers) and a dynamic one (i.e., taking into account that variable).

¹²⁸Report of the Panel on "Japanese Measures on Imports of Leather", BISD 31S/94, paragraph 55 (adopted on 15/16 May 1984).

¹²⁹Jackson, *World Trade and the Law of the GATT* (8.5 at 182, 1969).

¹³⁰Report of the Panel on "Import Restrictions on Uruguayan Products", BISD 11S/95, paragraph 15.

¹³¹GATT Document L/1222/Add.1 (1960).

¹³²"Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance", BISD 26S/210, page 216 (adopted on 28 November 1979); and Report of the Panel on "United States-Restrictions on the Importation of Sugar and Sugar-containing Products Applied under the Headnote to the Schedule of Tariff Concessions", BISD 37S/228 (adopted on 7 November 1990).

274. The patterns of imports in EEC markets which were traditionally unrestricted or subject only to a 20 per cent *ad valorem* duty were indicative of the patterns of imports under conditions of free competition. Such markets comprised Belgium, Denmark, Germany, Ireland, Luxembourg and the Netherlands. During 1991, the Latin American share of total banana consumption in those countries, on a weighted average basis, was 94.2 per cent. In contrast, non-preferential bananas accounted for 33.6 per cent of consumption in France, Italy and the United Kingdom, which together represented more than 70 per cent of consumption in EEC countries subject to national market organizations (roughly 1.3 million metric tons during 1991). If Spain was added to this list (20.3 per cent of total consumption in restricted markets), the average would be even lower, given that non-preferential imports (and non-Canarian supply, in general) were virtually excluded from the Spanish market. In the absence of import restrictions in the latter countries, Latin American countries would have participated in their total banana consumption in a manner similar to that in unrestricted markets. Therefore, the 94.2 per cent average share for Latin America could be applied to the total consumption of restricting countries over a reference period, in order to compare it with the actual amount that such countries imported from Latin America. The difference would show foregone opportunities of trade to these sources, in terms of non-exported volumes.

275. During the period 1982-1991, consumption of bananas in France, Italy and the United Kingdom totalled 11.8 million metric tons, of which only 3.9 million - or 33.6 per cent - had been sourced from Latin American countries. Had these countries applied the 20 per cent EEC-bound rate, instead of systems inconsistent with the General Agreement, and applying the 1991 Latin American import share in unrestricted markets, imports from Latin America could have been in the order of 11.1 million (94.2 per cent of the total). The difference - 7.1 million metric tons - represented lost exports for Latin America as a whole in the period 1982-1991. If Spain was taken into account in this estimate, foregone exports of Latin America would have been much larger: around 9.4 million metric tons during that period.

276. In respect of Colombia, lost export opportunities were no less significant. In 1991, Colombia accounted for 17.3 per cent of total banana consumption in the EEC's unrestricted markets, on a weighted-average basis. This yielded a total loss of 1.1 million metric tons in the restricted markets (Spain included), or 112,500 metric tons each year during the period 1982-1991. Thus, in ten years alone, Colombia believed it had lost nearly 35 per cent of its annual average exports to the EEC (321,900 metric tons), as a result of existing barriers to trade in bananas.

277. In addition to the above analysis, a further loss of export opportunities to Latin American countries could be demonstrated by comparing annual average growth rates in unrestricted markets during a given period to similar rates in traditionally protected markets. As a consequence of open markets, consumption rates had on the whole grown faster in unrestricted markets than in those subject to restrictions, and the difference, in absolute terms, showed consumption foregone in the latter ones. This consumption would presumably have occurred in the absence of the measures which were not consistent with the General Agreement, with Latin American countries supplying a very significant share of it.

278. During the period 1986-1991, the annual rate of growth in consumption averaged 13.2 per cent for unrestricted markets, in contrast to a mere 4.9 per cent for those subject to restrictions. Assuming that consumption in restricted markets had grown at a similar pace to that of free EEC markets, foregone banana consumption amounted to 738,000 metric tons during this period, and to an estimated 1.2 million metric tons in a ten-year period (1982-1991). Accordingly, Latin America's participation would have been in the order of 695,000 metric tons and 1.1 million metric tons, for a six- and ten-year period, respectively, assuming that the average share of Latin American countries in the EEC's unrestricted markets had been around 94.2 per cent.

279. Applying this same methodology to Colombia (17.3 per cent of the market), export losses as a result of foregone consumption totalled 200,000 metric tons during a ten year period. This in turn represented an annual loss of 6.2 per cent of its average exports to the EEC (321,900 tons).

280. Finally, if both losses from a reduced share in EEC's restricted markets and those related to a low growth in consumption were taken into account, total lost exports to Latin America amounted to 8.2 million metric tons in the period 1982-1991, and 10.5 million if Spain was included. For Colombia, total losses during the same period equalled 1.05 million metric tons, and 1.3 million (including Spain).

281. It was evident, therefore, that the complaining parties, and Colombia in particular, had incurred considerable trade losses throughout the years, as a result of existing national market organizations in several EEC member States. Aside from the illegality of such measures in the context of the General Agreement, which had amply been shown and in itself constituted a *prima facie* case of nullification or impairment, adverse effects to Colombia's trade were on their own a compelling evidence of such nullification or impairment.

282. The EEC considered that any contention from the complaining parties with respect to nullification or impairment under Article XXIII:1(b) was inadmissible. Firstly, as was explained by the EEC in its procedural objections, Article XXIII:1(b) was never discussed during the consultations or the good offices and, consequently, it was not covered by the mandate given to the Panel. Secondly, by the time the complaining parties acceded to GATT, the measures complained of were already in existence. Therefore, they could not have any reasonable expectation that benefits would not be nullified or impaired. Thirdly, the EEC strongly disagreed with the figures and calculations presented by the complaining parties, which were based on inaccurate assumptions. Fourthly, the EEC brought forward data showing that imports from the complaining parties into the EEC had not been affected by the measures complained of but, on the contrary, had regularly and substantially increased in all the member States concerned.

IV. PARTICIPATING AND OTHER THIRD CONTRACTING PARTIES

283. **Cameroon, Côte d'Ivoire, Madagascar and Senegal** were of the view that the complaint by Colombia under Articles XXXVI and XXXVII of the General Agreement should be considered in light of overall efforts of the EEC to promote the development of less developed contracting parties, and not only in relation to the specific issues relating to imports of bananas (see BISD 27S/69, paragraph 4.30). The very substantial expansion of non-preferential banana exports to the EEC markets deprived such arguments of any real substance.

284. However, the preferential tariff treatment complained of by the five complaining parties was initially fully justified, and in principle continued to be justified, under the provisions of Article I:2 of the General Agreement and the relevant Annexes thereto. This preferential tariff treatment had been subsumed by trade arrangements under successive Lomé Conventions which constituted, for the purposes of the General Agreement, a free-trade area under Article XXIV:5(b) between the ACP countries and the EEC. It was essentially on this basis that the preferential zero duty tariff treatment in respect of imports of bananas from ACP countries was justified under the General Agreement.

285. The validity of the preferential tariff treatment accorded to imports of ACP bananas could not be considered in isolation from the trade provisions of the Lomé Convention as a free-trade agreement pursuant to Article XXIV:5(b). What was at issue in the context of an Article XXIII:1(a) complaint in relation to the preferential tariff treatment was whether the EEC by according such treatment had failed "to carry out its obligations under this Agreement". The jurisdiction of the Panel under Article XXIII:1(a) was, therefore, clearly limited to an examination of the EEC's obligations under Article XXIV in relation to the trade arrangements on bananas under the Lomé Convention.

286. A working party had recently been established to conduct an examination under Article XXIV:7 of the trade provisions of the fourth Lomé Convention. The present Panel, having no specific mandate in the matter and with its jurisdiction under Article XXIII:1(a) limited exclusively to an examination of the EEC's obligations, was *a fortiori* precluded from making any complete or balanced judgement concerning the conformity of these trade arrangements, including the preferential tariff treatment on bananas resulting therefrom, with the relevant provisions of Article XXIV. The procedural approach followed in the Korean beef panel (BISD 36S/202, 227) was not applicable here because the present case could not be adjudicated exclusively on the basis of the EEC's obligations under Article XXIII:1(a).

287. In the absence of any recommendation to the parties to the trade arrangements under the Lomé Convention, formulated by the CONTRACTING PARTIES pursuant to Article XXIV:7(b), the Panel was precluded: (i) from finding that the EEC had failed to carry out its obligations under the General Agreement as regards the treatment it accorded to ACP banana imports; or (ii) from drawing any inferences adverse to the parties to the Convention in the present proceedings.

288. The African ACP contracting parties supported the arguments of the EEC that there were substantive procedural objections to any examination at this stage of the complaints raised by Colombia under Articles III and VIII. Furthermore, the ACP parties considered that there was no basis on which a non-violation complaint could be sustained in the circumstances of the present case, quite apart from the procedural objections outlined in the initial submission of the EEC which the ACP contracting parties endorsed.

289. **Jamaica** said that it would confine its examination of the applicability of the existing legislation clause to the case of the United Kingdom, as Jamaica and its Caribbean counterparts were the beneficiaries of the banana import régime of this country. Jamaica was of the opinion that the régime pre-dated the PPA of 1947 as the legislation governing the restrictions were authorized by Chapter 69 of the Import, Export and Customs Powers (Defense) Act of 1939.

290. Additionally, it was well established in the GATT that subsequent amendments made to "existing legislation" did not result in that legislation losing its status as long as it did not increase the degree of inconsistency with Part II of the General Agreement. In this respect, Jamaica referred to the Brazilian Internal Taxes case and to the case of the "United States Manufacturing Clause" (BISD 31S/74). Lomé I and its successors did not increase the level of inconsistency with the General Agreement. Amendments were not to be confused with implementing measures. Consequently, comparison of the original legislation should only be made with its amendments and not its implementing measures. Mere changes in statutory form - as opposed to substantive changes - would not disqualify a provision as an exception under the PPA.

291. In Jamaica's view, "legislation" meant legislation adopted by parliament or the executive branch in a broad sense, so long as such legislation laid down rules of law. The qualification of formality was introduced only recently, in 1989. The purpose of the qualification was to limit coverage of the existing legislation clause to legislation emanating from parliament or the executive branch, provided that it was of mandatory character by its terms or its expressed intent. The Import, Export and Customs Powers (Defense) Act in the United Kingdom was clearly a law in the formal sense. There was no doubt that the Act of 1939 fulfilled this condition. Also, the Act of 1939 was undeniably mandatory in character since it imposed upon the executive authority requirements that could not be modified by executive action. Therefore, since the arrangements governing the United Kingdom's banana import régime pre-existed the General Agreement itself, constituted formal legislation, and were mandated by the laws of that country, they were covered by the existing legislation clause. Accordingly, the United Kingdom was required only to apply Part II of the General Agreement to the fullest extent not inconsistent with its existing laws.

292. The preferential tariff treatment complained of by the five complaining parties was initially fully justified, and in principle continued to be justified under the provisions of Article I:2 of the General Agreement and the relevant Annexes thereto. This preferential tariff treatment had been subsumed by trade arrangements under successive Lomé Conventions which constituted, for the purposes of the General Agreement, a free-trade area under Article XXIV:5(b) between the ACP countries as a single customs territory and the EEC. It was essentially on this basis that the preferential zero tariff treatment in respect of imports of bananas from ACP parties was justified under the General Agreement.

293. However, the validity of the preferential tariff treatment accorded to imports of ACP bananas, even though such treatment could be justified on a less comprehensive basis under Article I:2, could not be considered in isolation from the trade provisions of the Lomé Convention as a free-trade agreement under Article XXIV:5(b). The jurisdiction of the Panel under Article XXIII:1(a) was circumscribed by its terms of reference, as it had no mandate to examine the EEC's obligations under Article XXIV in relation to the trade arrangements on bananas under the Lomé Convention. The trade arrangements under successive Lomé Conventions had been notified to the CONTRACTING PARTIES under Article XXIV:7(a) of the General Agreement as constituting a free-trade area between the member States of the EEC and the ACP countries.

294. Referring to the unadopted Citrus Panel Report, Jamaica said it was not within the competence of the Panel to examine or to draw conclusions regarding the compatibility of the trade arrangements under the Lomé Convention with the provisions relating to free-trade areas under Article XXIV. It was Jamaica's view, and there was clearly established precedent to support this view, that the Panel would be exceeding its jurisdiction if it examined or adjudicated upon the provisions of the Lomé Convention. Jamaica agreed with the view expressed by Cameroon and other African ACP contracting parties, in paragraph 286 above, that the panel was *a fortiori* precluded from making any judgement concerning the conformity of these trade arrangements, including the preferential tariff treatment on bananas resulting therefrom, with the relevant provisions of Article XXIV.

295. Furthermore, by virtue of the provisions of Part IV of the General Agreement, in particular Article XXXVI:8 thereof, and in view of their development needs, the ACP countries were not required, for the duration of the Convention, to assume, in respect of products originating in the EEC, obligations corresponding to the commitments entered into by the member States of the EEC. The principle embodied in Article XXXVI:8 relating to non-reciprocity was fully applicable by virtue of the Note Ad Article XXXVI:8 to action under any procedure under the General Agreement, including action under procedures involving the establishment of a free-trade area.

296. Successive examinations of the trade arrangements under the Lomé Convention pursuant to Article XXIV:7 of the General Agreement had not led to any recommendations addressed to the parties to the trade agreement embodied in the Lomé Convention under Article XXIV:7(b). The allegations of the complaining parties that these trade arrangements did not constitute a free-trade area under Article XXIV were, therefore, entirely unfounded and should be rejected by the Panel. Although Part IV did not take precedence over Article XXIV or other Articles, it had to be given its proper weight and be taken into account in a balanced way in conjunction with Article XXIV.

297. The Enabling Clause (the Decision of 28 November 1979 on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries) authorized differential and more favourable treatment for developing countries. Paragraph 1 of this Decision stated "notwithstanding the provisions of Article I of the General Agreement, contracting parties may accord differential and more favourable treatment to developing countries, without according such treatment to other contracting parties".

298. The preferential treatment bestowed upon ACP countries fitted squarely within Section 2(d) of the Enabling Clause. Many ACP countries, Somalia for example, were categorized as least developed countries and, hence, were clearly "among the least developed of the developing countries." Moreover, assuming for argument's sake that the preferences granted under the Lomé Convention did not fall within the itemized examples contained in the Enabling Clause, this list was not exhaustive. The contracting parties expressed their intention that this list not be deemed exhaustive in footnote 2 of Section 2, thereby providing an even broader exception for preferential arrangements for developing countries.

299. The jurisdiction of the Panel under Article XXIII:1(a) was limited to an examination of the EEC's obligations under Article XXIV in relation to the trade arrangements on bananas under the Lomé Convention. Were the Panel to determine, however, that there was an implicit requirement on the part of the EEC, as one of the principal parties to the trade arrangements under the Lomé Convention, to ensure that the Article XXIV obligations of other principal parties were also complied with, then any such requirement would have to be assessed in conjunction with other provisions of the General Agreement, in *pari materia*, in particular Article XXXVI:8. In this context, Jamaica referred to the Report of the Panel on "United Kingdom Dollar Area Quotas".¹³³

300. In Jamaica's view, the Panel should interpret Article XIII in light of the specific interests of the developing Caribbean banana exporters, in particular Jamaica and the Windward Islands. The Panel would be reinforced in this approach by the Tokyo Round Agreement on Import Licensing Procedures. In general, this Agreement obligated signatories to avoid using licensing procedures in a trade-restrictive manner. However, Article 3 of the Agreement, relating to non-automatic licensing, provided as follows:

"Consideration shall be given to ensuring a reasonable distribution of licences to new importers, taking into account the desirability of issuing licences for products in economic quantities. In this regard, special consideration should be given to those importers

¹³³Report of the Panel on "United Kingdom-Dollar Area Quotas", BISD 20S/230, paragraph 6 (adopted on 30 July 1973).

importing products originating in developing countries and, in particular, in the least-developed countries."

301. The present conditions in the EEC market for banana imports indicated that the exports of the complaining parties needed no special consideration in order to gain EEC market share. EEC imports from the Latin American countries had increased substantially over the last five years, in spite of the market access preference for ACP States. Specifically, Latin American exports to the United Kingdom had increased. It could hardly be maintained that bananas from Jamaica and the Windward Islands significantly impeded the ability of the complaining parties to sell their bananas on the world banana market. Not only did Latin American banana producers possess a significant share of the EEC banana market, they also dominated other developed banana markets, such as the United States and Japanese markets. If the efforts of the complaining parties in this proceeding were successful, Jamaica believed they would monopolize the world banana market. Consequently, they were not in need of the "special consideration to be given to those importers importing products originating in developing countries and, in particular, in the least-developed countries".

302. However, the exports of Jamaica and the Windward Islands were in need of special consideration. The factors ruling in banana production in Jamaica and the Windward Islands and in the national economies of these countries generally reflected precisely the situation anticipated by the Agreement on Import Licensing Procedures. More specifically, viewing the United Kingdom's banana régime in the context of the Lomé Convention, the provisions of the Agreement on Import Licensing Procedures should be liberally applied in this case so as not to disturb the EEC régime as it affected Jamaican and Windward Island exports to the United Kingdom. Jamaica considered that there was no basis on which a non-violation complaint could be sustained in the circumstances of the present case.

303. **Mexico** expressed its deep concern about the adverse effects which the import régimes for bananas in the EEC had on international trade of this product, and more specifically on exports from Latin American countries. Mexico attached great importance to the expansion of the global market for bananas, particularly in light of the importance that bananas had for the economies of some developing countries, including those from Latin America.

304. Mexico was of the opinion that import restrictions for bananas imposed by certain EEC member States were neither consistent with the prohibition expressed in Article XI:1, nor justifiable under Article XI:2 of the General Agreement. Mexico argued that the import licences required by the EEC violated Article XIII:1 since they discriminated against imports from Latin America. Likewise, those licences were not in conformity with Article XIII:2 because when applied they did not allocate trade among contracting parties as one would have expected if those licences had not existed.

305. As concerned Part IV of the General Agreement, Mexico considered that the EEC had not fulfilled its obligations under Articles XXXVII:1(a) and XXXVII:1(b) with respect to Latin American producers/exporters of bananas. Some member States of the EEC did not in practice attach high priority to the reduction and elimination of trade obstacles for products of particular export interest to less-developed contracting parties. Furthermore, member States which applied those import régimes had not shown restraint in introducing non-tariff import barriers for products of particular export interest to less-developed contracting parties.

306. Furthermore, the system of import licensing of certain EEC member States was unnecessarily complicated and violated Article VIII:1(a) because it represented an indirect protection for national products. On the other hand, these licensing systems did not conform with Article VIII:1(c) since they did not minimize the effects and complexity of the formalities.

307. **Brazil** noted that it was no longer a large exporter of bananas to the EEC market, but had been an important supplier in the past and held initial negotiating rights with the EEC on bananas. Had it not been for the trade diversion non-tariff barriers invariably caused to trade flows, Brazil might have maintained or even increased its share in the EEC market. Brazil was the second largest producer of bananas in the world and had an interest of principle in the matter. Brazilian exporters had expressed concern about the adverse effects the EEC's non-tariff measures had on trade flows of bananas in the Latin American region. They were also disturbed by the eventual displacement of Brazilian exports to traditional neighbouring markets, especially in the light of recently approved EEC legislation, which confirmed the EEC's intention to maintain its restrictions.

308. Brazil said that the present EEC import régime for bananas negatively affected contracting parties' rights under Article II of the General Agreement. Also, the EEC's restrictions constituted a breach of Article XI:1 and could not be justified as an exception under the remaining provisions of Article XI. They, moreover, ran counter to Article XIII, since the restrictions were not applied uniformly to third countries; and they disregarded the provisions of Part IV, in particular Articles XXXVI and XXXVII.

309. Furthermore, it should not be forgotten that bananas were a tropical product and as such should be the subject of fullest liberalization in the Uruguay Round negotiations, as set out in the Punta del Este Declaration and the Montreal Decision. As regards previous commitments entered into by the EEC with other contracting parties, such commitments should not prevent the General Agreement, nor the multilateral trading system, from functioning in a smooth and legal manner.

310. The **Philippines** queried whether the EEC's banana import régimes were consistent with the provisions of Article XI, paragraph 1, which provided that "no prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product ...". Moreover, and recognizing that exceptions to Article XI, paragraph 1, were available, the import régimes needed to be verified against conformity with the conditions in Article XI, paragraph 2, sub-paragraphs (a), (b) and (c).

311. It also needed to be verified how the import régimes had affected the EEC's tariff binding for bananas, and if there was nullification or impairment, in the sense of Article XXIII, of concessions granted under Article II. The Philippines' interest in this issue was also related to the implications of the import régimes on efficiency in resource allocation in both banana producing and exporting countries on the one hand, and in importing countries on the other. Thus:

- (i) consumers in the EEC might be paying for the inefficiencies that accompanied trade restrictions in the form of higher prices and lower quality;
- (ii) the main beneficiaries could very well be the few importers or traders in the EEC which reaped the economic rents associated with import restrictions; and
- (iii) the economic incentive for developing country exporters in general might be diminished by the price depression in the world market that resulted from restrictions to access of the large EEC market. Other importers largely benefited from the abundant global supply and depressed prices caused by such restrictions.

V. FINDINGS

Introduction

312. The Panel noted that the essential facts relevant to its examination were as follows. Imports of bananas into the European Economic Community ("EEC") were subject to quantitative restrictions in certain member States and a tariff preference favouring certain African, Caribbean and Pacific ("ACP") countries. The Panel understood the complaint of the parties to relate to the EEC import régimes for bananas existing on 31 December 1992. Relevant aspects of these régimes, and those applied at the time the member State concerned became a contracting party to the General Agreement, are summarized below.

(a) France

313. On 31 December 1992, France maintained a quota on imports of bananas by virtue of a Presidential Decree providing that "on an exceptional and temporary basis, the importation of [bananas] will only take place within the limits of quotas and according to the modalities determined by Ministerial order."¹³⁴ By a Presidential determination, two-thirds of the market was allocated to domestic producers and one-third to certain African countries.¹³⁵ The government set the exact amount of the quota on the advice of an entity composed of government and banana sector representatives, the Comité Interprofessionnel Bananier ("CIB"). The CIB established the levels of purchases to be made from domestic and ACP sources, but did not itself trade in bananas. In case of a shortfall of supplies from domestic and ACP sources, the government issued a licence to the Groupement d'Intérêt Economique Bananier ("GIEB"), a group of private banana importers which had the exclusive right in such cases to purchase and import bananas directly from third countries, or to individual private importers who could then make indirect imports of third-country bananas through other EEC member States. Bananas entering France were subject to the EEC bound tariff of 20 per cent, except for bananas originating in ACP countries, which entered duty-free.

314. France became a contracting party to the General Agreement through the Protocol of Provisional Application of 30 October 1947. At that date, France maintained a quota régime for imports of bananas that was based on the same Presidential Decree that was in effect on 31 December 1992.¹³⁶

(b) Italy

315. On 31 December 1992, Italy maintained by Decree a quota on imports of bananas other than those originating in EEC member States and ACP countries.¹³⁷ Licences for third-country imports were granted under the quota at levels varying with market conditions. Bananas entering Italy were subject to the EEC bound tariff of 20 per cent, except for bananas originating in ACP countries, which entered duty-free.

316. Italy became a contracting party to the General Agreement through the Annecy Protocol on Terms of Accession of 10 October 1949. At that date, a state monopoly for bananas, with broad powers over the shipping, commerce and processing of bananas, existed by virtue of a law of parliament.¹³⁸

¹³⁴Unofficial translation. Presidential Decree of 9 December 1931. Original text reads: "Art 1^{er}. -- A titre exceptionnel et temporaire, l'importation des marchandises étrangères ci-après énumérées ne pourra être effectuée que dans la limite de contingents et suivant des modalités déterminées par arrêté. Désignation des marchandises: Bananes, en régimes ou détachées."

¹³⁵Letter of 24 January 1962 from the Prime Minister of France to the Minister responsible for the Sahara and overseas departments and territories conveying the arbitral decision of the President of France.

¹³⁶Presidential Decree of 9 December 1931.

¹³⁷Decree of 6 May 1976.

¹³⁸Law 899, adopted on 6 April 1936.

(c) Portugal

317. On 31 December 1992, Portugal maintained a quota on imports of bananas by virtue of a Decree-law which states that "the importation of bananas is subject to quantitative restrictions, whatever their origin."¹³⁹ Import quotas were fixed by the government,¹⁴⁰ in consultation with a banana sector advisory committee, the Comissão Permanente da Produção e Comercialização da Banana.¹⁴¹ Import licences were accorded by auction.¹⁴² Bananas entering Portugal were subject to the EEC bound tariff of 20 per cent, except for bananas originating in ACP countries, which entered duty-free.

318. Portugal became a contracting party to the General Agreement through a Protocol of Accession of 6 April 1962. At that date, a state entity, the Junta Nacional das Frutas ("Junta") had general authority to promote and organize the banana market by virtue of a Decree-law.¹⁴³ Although no power to restrict imports of bananas was formally accorded to the Junta, in practice the Foreign Trade Office had delegated to it authority to issue import licences.¹⁴⁴

(d) Spain

319. On 31 December 1992, the banana market in Spain was reserved to domestic production by virtue of a law of parliament.¹⁴⁵ A public corporation established by Royal Decree,¹⁴⁶ the Comisión Regional del Plátano ("CRP"), allocated levels of domestic production and exports in consultation with other government bodies.¹⁴⁷ Bananas entering Spain were subject to the EEC bound tariff of 20 per cent.

320. Spain became a contracting party to the General Agreement through a Protocol of Accession of 1 July 1963. At that date, a State entity, the Confederación Regional de la Exportación del Plátano ("CREP"), established by Decree,¹⁴⁸ had primary responsibility for managing the banana market, including the fixing of export prices and quantities.¹⁴⁹ No laws or regulations expressly required or permitted the CREP to restrict banana imports.

(e) United Kingdom

321. On 31 December 1992, the United Kingdom maintained a quota on imports of bananas by virtue of an Act of parliament which stated that "the Board of Trade may by order make such provision as the Board think expedient for prohibiting or regulating ... the importation into, or exportation from, the United Kingdom ... of all goods or goods of any specified description".¹⁵⁰ A Ministerial Order provided for a general import prohibition, except for "the importation of any goods under the authority of any licence granted by the Board of Trade".¹⁵¹ An import quota for bananas was set by the government on advice from the Banana Trade Advisory Committee, a group composed of representatives of government and commercial interests. Quotas were maintained on bananas originating in the

¹³⁹Unofficial translation. Decree-law 503/85 of 30 December 1985, Article 16:1.

¹⁴⁰Idem, Article 16:3.

¹⁴¹Idem, Article 17:1.

¹⁴²Idem, Article 16:1.

¹⁴³Decree-law 26:757 of 8 July 1936; implemented by Decree 27:355 of 17 December 1936.

¹⁴⁴Decree-law 38:008 of 23 October 1950; Report of the Working Party on Accession of Portugal, L/1411, page 29 (31 January 1961).

¹⁴⁵Law 30/72 of 22 July 1972. Modified by Royal Decree of 6 June 1978.

¹⁴⁶Royal Decree of 6 June 1978.

¹⁴⁷Ministerial Order of 16 November 1978.

¹⁴⁸Decree of 29 January 1954, Article I.

¹⁴⁹Idem, Article II.

¹⁵⁰Import, Export and Customs Powers (Defence) Act, 1939.

¹⁵¹Import of Goods (Control) Order, 1954.

complaining parties. Bananas entering the United Kingdom were subject to the EEC bound tariff of 20 per cent, except for bananas originating in ACP countries, which entered duty-free.

322. The United Kingdom became a contracting party to the General Agreement through the Protocol of Provisional Application of 30 October 1947. At that date, the laws and regulations concerning the banana quota applying to imports of bananas were substantially the same as those applied on 31 December 1992.¹⁵²

(f) *Belgium, Denmark, Greece, Ireland, Luxembourg and the Netherlands*

323. On 31 December 1992, bananas entering Belgium, Denmark, Greece, Ireland, Luxembourg and the Netherlands were subject only to the EEC bound tariff of 20 per cent, except for bananas originating in ACP countries, which entered duty-free. These member States maintained no import quotas on bananas.

Scope of terms of reference

324. The Panel noted the EEC's argument that the terms of reference of the Panel did not extend to an examination of the banana import régimes of Belgium, Denmark, Greece, Ireland, Luxembourg and the Netherlands, nor to issues under Articles I, II, III, VIII and XXIII:1(b) of the General Agreement. The EEC contended that these régimes and Articles were not specifically cited in the documents referred to in the terms of reference given to the Panel by the CONTRACTING PARTIES, and had not been discussed during the consultations. The complaining parties maintained, on the other hand, that the régimes in the above-mentioned member States as well as Articles I, II, XI, XIII, XXIV, Part IV and "all other relevant Articles" had been mentioned by reference in the Panel's terms of reference as set out in GATT document DS32/10, and had been discussed during the consultations.

325. The Panel recalled that its terms of reference were "to examine, in the light of the relevant GATT provisions, the matter referred to the CONTRACTING PARTIES by Colombia, Costa Rica, Guatemala, Nicaragua and Venezuela in document DS32/9 ...". In examining GATT document DS32/9, the Panel noted direct references to the régimes of Belgium, Denmark, France, Greece, Ireland, Italy, Luxembourg, the Netherlands, Spain, Portugal and the United Kingdom, and to Articles I, II, XI, XIII, XXIII, XXIV, Part IV and "all other relevant Articles" of the General Agreement. It further noted that the text of the request by Colombia, Costa Rica, Guatemala, Nicaragua and Venezuela for consultations with the EEC did not expressly limit the scope of régimes and obligations to be discussed, stating that "the information contained herein does not limit the scope of our request for consultations".¹⁵³ The Panel therefore decided to examine the banana import régimes of all of the EEC member States on which the complaining parties requested findings, and all the legal claims made by the complaining parties.

Article XI

326. The Panel noted that the complaining parties argued that the restrictions or prohibitions maintained by France, Italy, Portugal, Spain and the United Kingdom affecting imports of bananas were inconsistent with Article XI:1, which stated in part:

"No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the

¹⁵²Import, Export and Customs Powers (Defence) Act, 1939; Import of Goods (Control) Order, 1940.

¹⁵³DS32/1.

importation of any product of the territory of any other contracting party
..."

The Panel noted that imports of bananas into France, Italy, Portugal, Spain and the United Kingdom were restricted or prohibited through measures other than duties, taxes or other charges, and found therefore that the EEC had acted inconsistently with Article XI:1.

327. The Panel then proceeded to examine the EEC's argument that the restrictive measures taken by France, Portugal and Spain affecting imports of bananas, even if inconsistent with Article XI:1, were covered by Article XI:2 which stated in part:

" The provisions of paragraph 1 of this Article shall not extend to the following: ...

(c) Import restrictions on any agricultural or fisheries product, imported in any form, necessary to the enforcement of governmental measures which operate:

(i) to restrict the quantities of the like domestic product permitted to be marketed or produced ...

Any contracting party applying restrictions on the importation of any product pursuant to sub-paragraph (c) of this paragraph shall give public notice of the total quantity or value of the product permitted to be imported during a specified future period and of any change in such quantity or value. Moreover, any restrictions applied under (i) above shall not be such as will reduce the total of imports relative to the total of domestic production, as compared with the proportion which might reasonably be expected to rule between the two in the absence of restrictions. In determining this proportion, the contracting party shall pay due regard to the proportion prevailing during a previous representative period and to any special factors which may have affected or may be affecting the trade in the product concerned."

A note to Article XI provided that the term "special factors" included "changes in relative productive efficiency as between domestic and foreign producers, or as between different foreign producers, but not changes artificially brought about by means not permitted under the Agreement."

328. The Panel noted that the text of Article XI:2 set out specific conditions that had to be met before a party would benefit from the exception provided in sub-paragraph (c). It considered, as had other panels¹⁵⁴ and the parties to the dispute, that these conditions could be summarized as follows:

- (i) the measure must constitute an import restriction;
- (ii) the import restriction must be on an agricultural or fisheries product;
- (iii) there must be a governmental measure which operates to restrict the quantities of a product permitted to be marketed or produced;
- (iv) the import restriction must be necessary to the enforcement of the domestic supply restriction;
- (v) the restriction on imports must not reduce the total of imports relative to the total of domestic production, as compared with the proportion which might reasonably be expected to rule between the two in the absence of restrictions;

¹⁵⁴Reports of the Panels on "Canada - Import Restrictions on Ice Cream and Yogurt", BISD 36S/68, pages 85-86, paragraph 62 (adopted on 5 December 1989); "EEC - Restrictions on Imports of Dessert Apples - Complaint by Chile", BISD 36S/93, pages 124-125, paragraph 12.3 (adopted on 22 June 1989); "EEC - Restrictions on Imports of Apples - Complaint by the United States", BISD 36S/135, page 160, paragraph 5.3 (adopted on 22 June 1989); "Japan - Restrictions on Imports of Certain Agricultural Products", BISD 35S/163, pages 223-227, paragraph 5.1.3 (adopted on 2 February 1988).

- (vi) the import restriction and the domestic supply restriction must in principle apply to "like" products (or directly substitutable products if there is no substantial production of the like product); and
- (vii) public notice must be given of the total quantity or value of the quota for each product.

The Panel agreed with the parties that the relevant import measures concerned an agricultural product, fresh bananas, and that the relevant import and domestic measures concerned "like" products. The Panel then proceeded to examine whether the remaining conditions were fulfilled with respect to the measures of each member State that the EEC considered to be covered by this provision. The Panel recalled that the party invoking the provision bore the burden of proving that each of these conditions was met¹⁵⁵.

(a) *The measure must constitute an import restriction*

i) France and Portugal

329. The Panel agreed with the parties that the measures taken by France and Portugal constituted import restrictions within the meaning of Article XI:2(c).

ii) Spain

330. The Panel noted that the Spanish banana market was reserved by law for domestic production, and that no imports of any consequence had been permitted. The EEC argued, nonetheless, that this measure constituted a "restriction" within the meaning of Article XI:2(c). The complaining parties countered that a prohibition of imports could not be considered a restriction for the purposes of Article XI:2(c). The Panel noted that Article XI:2 referred in sub-paragraphs (a) and (b) to "prohibitions or restrictions", whereas in sub-paragraph (c) the reference was solely to "restrictions". The Panel agreed with previous panels¹⁵⁶ examining this provision that the omission by the drafters of the term "prohibitions" in Article XI:2(c) was intentional. Indeed, the Panel could not see how the condition that the domestic supply restriction be proportional to the import restriction, as required by the last paragraph of Article XI:2, could be met through an import prohibition. Accordingly, the Panel found that the measure applied by Spain, operating as a prohibition on imports, was not an import restriction in the sense of Article XI:2.

(b) *There must be a governmental measure which operates to restrict the quantities of a product permitted to be marketed or produced*

331. The EEC contended that France, Portugal and Spain had taken measures which restricted the domestic production or marketing of bananas. The complaining parties disagreed.

i) France

332. The EEC claimed that, in order to restrict production, France had taken measures to encourage the set-aside of banana-growing land and to improve the quality of bananas. Similarly, the EEC had taken measures in France to improve the conditions of production and competition in the banana sector. The EEC acknowledged that these measures did not expressly provide for the reduction of production,

¹⁵⁵Report of the Panel on "United States - Measures Affecting Alcoholic and Malt Beverages", DS23/R, page 84, paragraph 5.44 (adopted on 19 June 1992).

¹⁵⁶Reports of the Panels on "United States - Prohibition on Imports of Tuna and Tuna Products from Canada", BISD 29S/91, page 107, paragraph 4.6 (adopted on 22 February 1982); "Japan - Restrictions on Imports of Certain Agricultural Products", BISD 35S/163, page 223, paragraph 5.1.3.1 (adopted on 2 February 1988); and "Canada - Import Restrictions on Ice Cream and Yoghurt" BISD 36S/68, page 85, paragraph 62 (adopted on 5 December 1989).

but emphasized that they were intended to have that effect. The complaining parties argued that these measures did not effectively restrict production.

333. The Panel first examined the meaning to be given, in this particular context, to the term "to restrict". It recalled that in discussing the analogous provision in the Havana Charter, the drafters had stated that "the essential point was that the measures of domestic restriction must effectively keep output below the level which it would have attained in the absence of restrictions".¹⁵⁷ The drafters had stated further that "the restrictions on domestic production should be effectively enforced".¹⁵⁸ Mere regulation of production, for example through price stabilization programmes, was not enough.¹⁵⁹ The Panel noted that these interpretations had been confirmed in previous panel reports.¹⁶⁰ For example, a previous panel had examined under Article XI:2(c) a measure restricting the area of land under cultivation, and had found that

"restrictions on planted area could not be considered the equivalent of restrictions on production or marketing unless they demonstrably had that effect... In this regard, [it] noted that there was no penalty or charge imposed on Japanese producers who exceeded their target cultivation area, but rather they could lose eligibility to receive a benefit in the form of a subsidy or loan."¹⁶¹

The Panel considered that the EEC had not demonstrated that the measures taken by France had been effective in restricting production in the sense of Article XI:2(c). The Panel furthermore considered that, on the basis of the facts submitted by the EEC, the measures taken by France and the EEC to improve the quality of bananas produced or the efficiency of banana production could plausibly lead to an increase, not a restriction, in banana production relative to what it would have been otherwise. For these reasons, the Panel found that measures taken in relation to production of bananas in France did not restrict production in the sense of Article XI:2(c).

ii) Portugal

334. The Panel then examined measures taken in relation to the production of bananas in Portugal. The EEC argued that Decree-law 503/85¹⁶² encouraged the improvement of the quality and efficiency of banana production, and the concentration of production to the most appropriate land, thereby restricting production. The complaining parties disagreed. The Panel, bearing in mind the meaning that had been accorded to the term "to restrict", and its findings in the previous paragraph, considered that, on the basis of the facts submitted by the EEC, the measures taken by Portugal could plausibly lead to an increase, not a restriction, in the production of bananas. It therefore found that the EEC had not demonstrated that the type of measures referred to constituted an effective restriction of production in the sense of Article XI:2(c).

iii) Spain

335. The Panel then examined measures taken in relation to the production and marketing of bananas in Spain. The EEC stated that Spain had taken several measures to restrict the production and marketing

¹⁵⁷Sub-Committee E of the Third Committee on Quantitative Restrictions at the Havana Conference, Havana Reports, page 89, paragraph 17.

¹⁵⁸Idem, p. 90, paragraph 22.

¹⁵⁹E/PC/T/A/PV/19.

¹⁶⁰Reports of the Panels on "EEC - Programme of Minimum Import Prices, Licences and Surety Deposits for Certain Processed Fruits and Vegetables", BISD 25S/68, pages 102-103, paragraph 4.13 (adopted on 18 October 1978); and "Japan - Restrictions on Imports of Certain Agricultural Products", BISD 35S/163, pages 222-224, paragraph 5.1.3.3 (adopted on 2 February 1988).

¹⁶¹Report of the Panel on "Japan - Restrictions on Imports of Certain Agricultural Products", BISD 35S/163, pages 236-237, paragraph 5.3.8.1 (adopted on 2 February 1988).

¹⁶²Decree-law 503/85 of 30 December 1985.

of bananas. They included weekly marketing quotas allocated by the CRP to local producers, quality controls, improvement of irrigation and water control, and creating disincentives for the extension of banana plantations. Spain had also refused loans for such extensions and authorizations for projects leading to increased banana production.¹⁶³ The complaining parties disagreed that these measures could effectively restrict the production or marketing of bananas. The Panel, again bearing in mind the meaning that had to be accorded to the term "to restrict", and recalling its findings in section i) above, considered that the EEC had not demonstrated that these various measures effectively restricted the quantities of bananas permitted to be marketed or produced in the sense of Article XI:2(c). In particular, the EEC had not demonstrated how an effective restriction on the total quantity of bananas permitted to be marketed in Spain resulted from the weekly distribution of quotas by the CRP to local banana producers.

(c) The restriction on imports must not reduce the total of imports relative to the total of domestic production, as compared with the proportion which might reasonably be expected to rule between the two in the absence of restrictions

336. Although the Panel had found that the measures taken by Spain were not restrictions, and that the measures taken by France, Portugal and Spain did not restrict the quantities of bananas permitted to be produced or marketed in the sense of Article XI:2(c), it decided nonetheless to examine further whether, assuming such conditions had been met, the requirement that imports and domestic production be reduced proportionally had been fulfilled.

i) France

337. The EEC recognized that the import and production restrictions in France were not proportional, but argued that they should nonetheless be considered as meeting the requirements of Article XI:2(c) in the light of the special obligations of France toward certain ACP countries. The Panel noted that Article XI:2, last paragraph, specified that the proportion was "the *total* of imports relative to the total of domestic production" (emphasis added). In the absence of proof as to the proportionality of the total of imports, the Panel found that the measures maintained by France restricting the imports of bananas were not proportional in the sense of Article XI:2(c).

ii) Portugal

338. The Panel then examined the proportionality of the import restrictions maintained by Portugal. The EEC argued that it was not possible to estimate the proportion which had existed before restrictions were applied, as such restrictions had always been applied. The complaining parties maintained that, however difficult the proof, the demonstration of proportionality had to be made. The Panel noted that long-standing restrictions would in effect make it difficult to prove proportionality. However, the text of the General Agreement made no exception for this particular case and, strictly interpreted, the Panel could not find that long-standing restrictions could excuse a party from demonstrating this condition. The Panel recalled that on this issue another panel had commented that

"a strict application of this burden of proof rule had the consequence that Article XI:2(c) could in practice not be invoked in cases in which the restrictions had been maintained for such a long time that the proportion between imports and domestic supplies that would prevail in the absence of restrictions could no longer be determined on the basis of a previous representative period."¹⁶⁴

¹⁶³Point 1.5 of Ministerial Order of 26 December 1988.

¹⁶⁴Report of the Panel on "Japan - Restrictions on Imports of Certain Agricultural Products", BISD 35S/163, pages 226-227, paragraph 5.1.3.7 (adopted on 2 February 1988).

That same panel had considered whether the burden of proof in such cases should be lessened, and had concluded that

"any ... change in the burden of proof to make Article XI:2(c)(i) operational in the case of long-term import and/or supply restrictions would have consequences equivalent to those of an amendment of this provision and could therefore seriously affect the balance of tariff concessions negotiated among contracting parties."¹⁶⁵

The Panel, noting that the EEC acknowledged that it could not demonstrate the proportionality of domestic production measures, found that the EEC had not met the conditions required by Article XI:2(c) in the case of measures taken by Portugal restricting imports of bananas.

iii) Spain

339. The Panel then examined the proportionality of import measures taken by Spain. Although Spain maintained a prohibition on imports of bananas, the EEC argued that a wide interpretation should be adopted by the Panel, taking into account the importance of the banana sector in Spain. The complaining parties argued that the existence of a prohibition prevented the EEC from demonstrating any proportionality whatsoever. The Panel recalled that the burden of proof was on the party invoking an Article XI:2 exception, and that such exceptions were to be interpreted narrowly. In this light, the Panel could not see how a measure operating as a ban on imports could meet the proportionality requirement of Article XI:2, last paragraph. The Panel found, therefore, that the EEC had not demonstrated that the measures maintained by Spain on imports of bananas were proportional.

340. The Panel considered that, since its preceding analysis had shown that two or more conditions of Article XI:2(c) had not been met with respect to the measures taken by France, Portugal and Spain, it was not necessary to examine these measures in the light of the remaining conditions under that Article.

341. Summing up its examination of measures taken by EEC member States in the light of Article XI, the Panel found that the measures taken by France, Portugal and Spain were inconsistent with Article XI:1 and not justified under Article XI:2(c)(i), and that the measures taken by the United Kingdom and Italy were inconsistent with Article XI:1 and not claimed by the EEC to be consistent with Article XI:2(c)(i) of the General Agreement.

Existing legislation clause

342. The Panel then proceeded to examine the EEC's contention that the measures affecting imports of bananas maintained by France, Italy, Portugal, Spain and the United Kingdom, even if inconsistent with provisions of Part II of the General Agreement, were nonetheless exempted from their application by virtue of the existing legislation clause contained in the protocols by which these countries had become contracting parties. The EEC claimed that the measures affecting imports of bananas were based on formal legislation which was mandatory and had existed at the time of the relevant protocols. The complaining parties argued that the relevant measures did not meet the conditions of the existing legislation clause, notably that the legislation was not mandatory and that it had not existed prior to the date of the relevant protocol.

¹⁶⁵Idem.

343. The Panel first examined the text of the existing legislation clause, materially the same in each of the relevant protocols, which required that on the coming into force of the protocol the contracting party apply provisionally Parts I and III of the General Agreement, and Part II

"to the fullest extent not inconsistent with its legislation existing on the date of the protocol."¹⁶⁶

The Panel considered that, in interpreting this provision, it was necessary to examine its context, object and purpose. The Panel noted that Article XXIX:2 of the General Agreement provided that Part II of the Agreement would be suspended on the day on which the Havana Charter entered into force. It observed that the purpose of the Protocol of Provisional Application was to allow the rapid entry into force of the tariff concessions negotiated in the context of the General Agreement, while protecting those concessions from the effect of new non-tariff measures which were subject to Part II. The Panel noted that a recent panel had commented:

"Paragraph 1(b) of the Protocol served a well determined purpose in a particular historical situation. It was to enable, in 1947, governments to accept the obligations of Part II of the General Agreement without having to adjust their domestic legislation. The drafters of the Protocol expected the General Agreement to be superseded soon by the ITO [Havana] Charter and they felt that legislative changes should not be required at that time because such changes would have delayed the acceptance of the obligations under the General Agreement and could have prejudged the outcome of the negotiations on the Charter ... In the light of this purpose of the existing legislation clause, the Panel considered that it would not be justified to give this clause four decades after the entry into force of the Protocol an interpretation that would extend its functions beyond those it was originally designed to serve."¹⁶⁷

344. The Panel further noted that the provisions of Part II of the General Agreement were substantially the same as the corresponding draft provisions of the Havana Charter, and were known at the time when tariffs were being negotiated under the General Agreement. The Panel therefore considered that, with the expectation of early entry into force of provisions of the Havana Charter limiting the use of non-tariff measures, the tariff concessions under the General Agreement had been negotiated in the expectation that the obligations set out therein would have to be fully met. In the Panel's view, these considerations pointed toward a restrictive interpretation of the existing legislation clause.

345. The Panel noted that a restrictive interpretation of the applicability of the existing legislation clause had been amply confirmed in subsequent GATT practice.¹⁶⁸ The Panel recalled that a recent panel report, after reviewing GATT practice, had considered that legislation meeting the conditions of the existing legislation clause had to (1) be legislation in a formal sense, (2) predate the Protocol, and (3) be mandatory in character by its terms or expressed intent.¹⁶⁹

¹⁶⁶Article 1(a)(ii) of the Ancey Protocol on Terms of Accession (admitting Italy); Article 1(b) of the Protocol for the Accession of Spain; Article 1(b) of the Protocol for the Accession of Portugal. Article 1(b) of the Protocol of Provisional Application (for France and the United Kingdom) omits express mention of the date of existing legislation, which however was determined in a 1949 Chairman's ruling (BISD Vol. II/35) to be 30 October 1947, the date of signature of the Protocol.

¹⁶⁷Report of the Panel on "Norway - Restrictions on Imports of Apples and Pears", BISD 36S/306, page 319, paragraph 5.5 (adopted on 22 June 1989).

¹⁶⁸Reports of the Panels on "Belgium - Family Allowances", BISD 1S/59, page 61, paragraph 7 (adopted on 7 November 1952); "United States Manufacturing Clause", BISD 31S/74, page 88, paragraphs 35-39 (adopted on 15 May 1984); and "Norway - Restrictions on Imports of Apples and Pears", BISD 36S/306, pages 319-320, paragraphs 5.5-5.7 (adopted on 22 June 1989).

¹⁶⁹Report of the Panel on "Norway - Restrictions on Imports of Apples and Pears", BISD 36S/306, page 320, paragraph 5.7 (adopted on 22 June 1989).

346. The Panel proceeded first to examine whether the legislation claimed to exist at the date of the relevant protocol was in fact *mandatory* in character by its terms or expressed intent. The Panel recalled that the mandatory nature of legislation eligible for the existing legislation clause had been discussed during the deliberations in 1947 of the Tariff Agreement Committee, where it was stated:

"the intent is that it should be what the executive authority can do - in other words, the administration would be required to give effect to the general provisions to the extent that it could do so without either (1) changing the existing legislation or (2) violating existing legislation. If a particular administrative regulation is necessary to carry out the law ... that regulation would, of course, have to stand; but to the extent that the administration had the authority within the framework of existing laws to carry out these provisions, it would be required to do so."¹⁷⁰

A 1949 working party, examining, in the course of its work, measures that could be permitted to be exempted under the existing legislation clause, confirmed this view:

"The working party agreed that a measure is so permitted, provided that the legislation on which it is based is *by its terms or expressed intent of a mandatory character - that is, it imposes on the executive authority requirements which cannot be modified by executive action*" (emphasis added).¹⁷¹

This interpretation has been reflected regularly in subsequent working parties and panels.¹⁷²

347. The Panel observed that according to the above interpretation legislation could be considered to be mandatory only if the executive could neither *apply* the legislation consistently with the General Agreement nor *change* the legislation to bring it into conformity with the General Agreement.

348. The Panel then proceeded to examine whether the inability of the executive to *apply* the legislation in a manner consistent with the General Agreement had to result from legal requirements or could also result from political constraints. The Panel, noting that the CONTRACTING PARTIES had decided that the mandatory character of the existing legislation had to arise from the terms of the legislation itself or from an intent expressed in it, considered that the inability of the executive had to arise from legal requirements. The Panel further noted in this respect that a recent panel¹⁷³ had found that a measure authorizing the establishment of retail outlets only for domestic, and not foreign, brewers could be applied in a manner consistent with the General Agreement by the authorities not issuing any retail authorizations to domestic brewers. Likewise, another panel¹⁷⁴ had found that a measure providing for restrictions on imports of apples could be applied consistently with the General Agreement by allowing such imports, even though doing so would in that case not necessarily have accorded with stated government policy objectives. In the Panel's view, these cases illustrated that even severe political

¹⁷⁰EPCT/TAC/PV.5 page 20.

¹⁷¹BISD Vol. II/49, page 62, paragraph 99.

¹⁷²Report of the Panel on "Belgium - Family Allowances", BISD 1S/59, page 61, paragraph 6 (adopted on 7 November 1952); Reports of the Working Parties on "Organizational and Functional Questions", BISD 3S/231, page 249, paragraph 58 (adopted on 28 February, 5 and 7 March 1955); and "Import Restrictions of the Federal Republic of Germany", BISD 6S/55, page 60, paragraph 12 (adopted on 30 November 1957); Reports of the Panels on "Norway - Restrictions on Imports of Apples and Pears", BISD 36S/306, pages 319-320, paragraph 5.6 (adopted on 22 June 1989); "Thailand - Restrictions on Importation of, and Internal Taxes on, Cigarettes", BISD 37S/200, page 226, paragraph 83 (adopted on 7 November 1990); "Canada - Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies" DS17/R, pages 56-57, paragraph 5.9 (adopted on 18 February 1992); and "United States - Measures Affecting Alcoholic and Malt Beverages" DS23/R, pages 84-85, paragraph 5.44 (adopted on 19 June 1992).

¹⁷³Report of the Panel on "Canada - Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies", DS17/R, pages 56-57, paragraph 5.9 (adopted on 18 February 1992).

¹⁷⁴Report of the Panel on "Norway - Restrictions on Imports of Apples and Pears", BISD 36S/306, page 321, paragraph 5.11, (adopted on 22 June 1989).

difficulties, when not reflected in legal requirements, could not be taken into account when determining whether the executive could apply a measure in a manner consistent with the General Agreement for the purposes of the existing legislation clause.

349. The Panel next examined whether the inability of the executive to *change* the legislation had to result from legal requirements or could also result from political constraints. The EEC had argued that certain acts of the executive taken at the highest level, or in cases where there was no formal separation of powers, should be considered as mandatory legislation. The Panel recognized that measures taken within the executive branch at the highest level could in a practical sense be more difficult to change than those taken at a lower level. However, the Panel, recalling the object and purpose of the existing legislation clause, considered that the inability had to be of a legal nature. The purpose of the clause was to exempt, from the provisions of Part II, legislation that the authority negotiating and signing the Protocol (usually the executive) was not legally able, under its constitutional structure, to change. This implied that where the executive was legally able to change inconsistent legislation, the measure based on it could not be exempted under the existing legislation clause, even if the legislation had been adopted at the highest executive level, or the executive had exercised legislative functions. The Panel noted that a recent panel¹⁷⁵ had found that where an action of the United States federal executive could override state legislation, the state legislation could not be considered to be mandatory for the purposes of the existing legislation clause. This showed, in the Panel's view, that even in the case where the legislation was adopted by the legislative branch of a different level of government, the criterion remained the legal ability of the executive to change the inconsistent legislation.

350. The Panel then proceeded to examine whether the restrictions on imports of bananas into France, Italy, Portugal, Spain and the United Kingdom were based on mandatory legislation. It noted that the EEC, as the party invoking the exception, bore the burden of proof.¹⁷⁶

(a) France

351. The Panel noted that the EEC had argued that mandatory legislation restricting imports of bananas had existed in France on 30 October 1947, in the form of the Presidential Decree of 9 December 1931 which stated: "on an exceptional and temporary basis, the importation of [bananas] can only be carried out within the limits of quotas and according to the modalities determined by Ministerial Order." The complaining parties argued on the contrary that this measure was an act of the executive branch which could therefore be changed by the executive or, in any event, could be applied by the executive in a manner consistent with the General Agreement. The Panel noted that the EEC did not claim that this Decree was not an act of the executive. Further, the EEC did not point to any evidence showing that the executive could not, at the date of the Protocol, have changed that act to make it consistent with the General Agreement. The Panel found, therefore, that the legislation existing at the time France became a contracting party was not mandatory legislation in the meaning of the existing legislation clause. Having made this finding, the Panel did not consider it necessary to examine whether the act could have been applied consistently with the General Agreement.

(b) Italy

352. The Panel noted that the EEC had argued that relevant mandatory legislation restricting imports of bananas had existed in Italy on 10 October 1949 in the form of a law of parliament creating a state monopoly.¹⁷⁷ It further argued that under that law the import monopoly was required to take into account

¹⁷⁵Report of the Panel on "United States - Measures Affecting Alcoholic and Malt Beverages", DS23/R, page 87, paragraph 5.48 (adopted on 19 June 1992).

¹⁷⁶DS23/R, page 84, paragraph 5.44.

¹⁷⁷Law 899 of 6 April 1936.

the interests of banana producers in the Italian colonies. The Panel, observing that the relevant legislation was a law of parliament, presumed that it could not legally be changed by the executive. However the Panel, recalling its interpretation of the term "mandatory", noted that the EEC had not pointed to any provision in this law requiring the Italian executive, or the State monopoly, to apply it in a manner inconsistent with the General Agreement. The Panel found, therefore, that the Italian legislation existing at the time it became a contracting party was not mandatory legislation within the meaning of the existing legislation clause.

(c) Portugal

353. The Panel noted that the EEC had argued that mandatory legislation restricting imports of bananas had existed in Portugal on 6 April 1962 in the form of a Decree-law.¹⁷⁸ The Panel noted that the EEC did not claim that this legislation was not an act of the executive. Further, the EEC did not point to any provision in the Decree-law that, at the time of accession to the General Agreement, would have legally prevented the executive from changing it, if necessary, to bring it into consistency with the General Agreement. In addition, the Panel observed that the EEC had not pointed to any provision in the Decree-law legally requiring action inconsistent with the General Agreement. The Panel considered that no evidence had been presented by the EEC that the Junta which organized and promoted the banana sector in Portugal at that time had an obligation to apply import restrictions on bananas. The Panel found, therefore, that the Portuguese legislation existing at the time it became a contracting party was not mandatory legislation in the meaning of the existing legislation clause.

(d) Spain

354. The Panel noted that the EEC had argued that mandatory legislation restricting the import of bananas had existed in Spain on 1 July 1963 in the form of a Decree.¹⁷⁹ The EEC did not claim that this was not an act of the executive. Further, the EEC did not point to any relevant provision which, at the time of accession to the General Agreement, would have legally prevented the executive from changing the legislation, if necessary, to bring it into consistency with the General Agreement. The Panel noted, moreover, that no evidence had been presented by the EEC that the Decree legally required action inconsistent with the General Agreement. The CREP, a public entity, had general responsibilities relating to the banana sector in Spain but had no explicit powers to regulate imports of bananas, let alone an obligation to apply restrictions to them. The Panel found, therefore, that the Spanish legislation existing at the time it became a contracting party was not mandatory legislation in the meaning of the existing legislation clause.

(e) United Kingdom

355. The Panel noted that the EEC had argued that mandatory legislation restricting imports of bananas had existed in the United Kingdom on 30 October 1947 in the form of an Act of parliament.¹⁸⁰ This Act stated that "the Board of Trade may by order make such provision as the Board think expedient for prohibiting or regulating ... the importation into, or exportation from, the United Kingdom ... of all goods or goods of any specified description". The Panel observed that this legislation was an Act of parliament which, presumably, could not be changed legally by the executive to bring it, if necessary, into conformity with the General Agreement. However, the Panel considered that, since the executive was given the power but not the obligation to restrict imports of bananas, the Act could by its terms or expressed intent be applied in a manner consistent with the General Agreement. The EEC further argued that the Ottawa Agreements Act, 1932, which provided for tariff preferences for goods imported

¹⁷⁸Decree-law 26:757 of 8 July 1936; applied by Decree 27:355 of 17 December 1936.

¹⁷⁹Decree of 29 January 1954.

¹⁸⁰Import, Export and Customs Powers (Defence) Act, 1939.

from the British Empire, made mandatory the introduction of restrictions under the Import, Export and Customs Powers (Defence) Act. However, the EEC had not demonstrated how a legal requirement for the executive to impose import quotas on bananas resulted from that or any other Act. The Panel found, therefore, that the United Kingdom legislation existing at the time it became a contracting party was not mandatory legislation in the meaning of the existing legislation clause.

356. Having found that the measures taken by France, Italy, Portugal, Spain and the United Kingdom were not based on mandatory legislation, the Panel did not consider it necessary to examine whether the relevant legislation predated the Protocol or constituted legislation in a formal sense.

357. In light of the above, the Panel found that the quantitative restrictions maintained by France, Italy, Portugal, Spain and the United Kingdom on imports of bananas, found inconsistent with Article XI, were not justified under the existing legislation clauses in the protocols through which these EEC member States became contracting parties.

Articles XI and XXIV

358. The Panel noted the argument of the EEC that the restrictions and prohibitions on imports of bananas, even if inconsistent with Article XI:1, were nonetheless consistent with the General Agreement because they were covered under the provisions of Article XXIV. The Panel noted that Article XXIV:5 to 8 permitted the contracting parties to deviate from their obligations under other provisions of the General Agreement for the purpose of forming a customs union or free-trade area, or adopting an interim agreement leading to the formation of a customs union or free-trade area, but not for any other purpose. Article XXIV:5 to 8 therefore did not provide contracting parties with a justification for restrictive import measures as such; it merely provided them - within the limits set out in this provision - with a justification for not applying to imports originating in such a union or area the restrictive import measures that they were permitted to impose under other provisions of the General Agreement. The Panel therefore considered that the import restrictions on bananas could not be justified by Article XXIV.

Articles II, III, VIII, XIII and Part IV

359. The Panel noted that the complaining parties argued that measures affecting imports of bananas taken by certain EEC member States which maintained quotas were also inconsistent with Articles II, III, VIII and XIII. Since the measures claimed to be inconsistent with these Articles resulted from the application of quotas which were contrary to Article XI, and which were not justified under Article XXIV or the existing legislation clauses in the protocols through which these EEC member states had become contracting parties, the Panel did not consider it necessary to examine these measures in the light of those Articles invoked by the complaining parties.

360. The complaining parties also claimed that the EEC failed to meet its obligations under Part IV of the General Agreement. The Panel noted, as had a previous panel,¹⁸¹ that the commitments entered into by contracting parties under Part IV were additional to their obligations under the other parts of the General Agreement and consequently applied only to measures permitted under these other Parts. Having found the quantitative restrictions to be inconsistent with the provisions of Part II, the Panel therefore did not examine these measures further in the light of Part IV.

¹⁸¹Report of the Panel in "EEC - Restrictions on Imports of Dessert Apples - Complaint by Chile", BISD 36S/93, page 134, paragraph 12.32 (adopted on 22 June 1989).

Subsequent practice, acquiescence and estoppel

361. The Panel noted the EEC's argument that subsequent practice of the CONTRACTING PARTIES, or of the parties to the dispute, with respect to the banana import régimes of EEC member States, had resulted in a modification of the rights and obligations under Part II of the General Agreement, or in the complaining parties being estopped (i.e., legally prevented) from raising such rights. In examining this argument, the Panel considered that such modification or estoppel could only result from the express, or in exceptional cases implied, consent of such parties or of the CONTRACTING PARTIES.

362. The Panel considered that the decision of a contracting party not to invoke a right under the General Agreement at a particular point in time could be due to circumstances that change over time. For instance, a contracting party may not wish to invoke a right under the General Agreement pending the outcome of a multilateral trade negotiation, such as the Uruguay Round, or pending an assessment of the trade effects of a measure. The decision of a contracting party not to invoke a right vis-à-vis another contracting party at a particular point in time can therefore, by itself, not reasonably be assumed to be a decision to release that other contracting party from its obligations under the General Agreement. The Panel noted in this context that previous panels had based their findings on measures which had remained unchallenged for long periods of time.¹⁸² The Panel therefore found that the mere fact that the complaining parties had not invoked their rights under the General Agreement in the past had not modified these rights and did not prevent them from invoking these rights now.

363. With respect to subsequent practice of the CONTRACTING PARTIES, the Panel considered that the mere fact that the EEC had notified these restrictions to the CONTRACTING PARTIES, and that such measures had not been acted upon by them until now had not changed the obligations of the EEC under the General Agreement. Any action of the CONTRACTING PARTIES on these notifications would normally have resulted from a request for such action by individual contracting parties. Since, for the reasons set out in the preceding paragraph, the mere failure to make such a request could not be interpreted as a decision to abandon the right to make such a request, the mere inaction of the CONTRACTING PARTIES could not in good faith be interpreted as the expression of their consent to release the EEC from its obligations under Part II of the General Agreement.

Articles I, XXIV and Part IV

364. The Panel then examined the EEC's argument that the tariff preference on bananas granted by certain member States, although inconsistent with Article I, was covered by Article XXIV of the General Agreement taken in conjunction with Part IV. The EEC was of the view that the requirement of Article XXIV:8 according to which free-trade areas must cover substantially all the trade between the constituent territories did not apply in respect of free-trade areas between developed contracting parties and developing countries. Because of the principle of non-reciprocity set out in Part IV, the duties and other restrictive regulations of commerce in the case of such free-trade areas had to be eliminated only with respect to imports into the customs territory of the developed contracting party participating in such free-trade areas. The EEC further claimed that this question could not be examined under the procedures of Article XXIII by which the Panel was established, because Article XXIV:7 provided for specific procedures for the examination of free-trade areas by the CONTRACTING PARTIES, procedures under which relevant previous agreements had in fact been examined.

365. The Panel noted that the EEC's argument raised the general question of the relationship between the dispute settlement procedures under Article XXIII and other procedures under the General Agreement

¹⁸²Reports of the Panels on "Japan - Restrictions on Imports of Certain Agricultural Products", BISD 35S/163, pages 168-183, paragraphs 2.2-2.9 (adopted on 2 February 1988); and "United States - Measures Affecting Alcoholic and Malt Beverages", DS23/R, see paragraphs 3.87-3.93 (adopted on 19 June 1992).

enabling the CONTRACTING PARTIES to address recommendations to individual contracting parties. The Panel noted that this issue had been discussed by the CONTRACTING PARTIES on several occasions, but that they had so far not reached a definitive conclusion on it. The Panel noted in particular the conclusions of three panels, whose reports had been adopted, on the issue of the relationship between Article XVIII:B review procedures for balance-of-payment measures and Article XXIII:

"It was the view of the Panel that excluding the possibility of bringing a complaint under Article XXIII against measures for which there was claimed balance-of-payments cover would unnecessarily restrict the application of the General Agreement. This did not preclude, however, resort to special review procedures under Article XVIII:B. Indeed, either procedure, that of Article XVIII:12(d) or Article XXIII, could have been pursued by the parties in this dispute. But as far as this Panel is concerned, the parties had chosen to proceed under Article XXIII."¹⁸³

366. The Panel also noted that in an unadopted report a panel had examined the relationship between Articles XXIII and XXIV and had expressed the following opinion:

"The Panel considered that the practice, so far followed by the CONTRACTING PARTIES, never to use the procedures of Article XXIII:2 to make recommendations or rulings on the GATT-conformity of measures subject to special review procedures was sound. It felt that the purposes served and the balance of interests underlying them would be lost if contracting parties could invoke the general procedures of Article XXIII:2 for the purpose of requesting decisions by the CONTRACTING PARTIES, on measures to be reviewed under the special procedures. The panel therefore concluded that it should, in the absence of a specific mandate by the Council to the contrary, follow this practice also in the case before it and therefore abstain from an overall examination of the bilateral agreements."¹⁸⁴

367. Hence it could be argued either that Article XXIII was applicable to all disputes, including those arising under Article XXIV, or that Article XXIII was not applicable to matters on which the CONTRACTING PARTIES could take decisions under the procedures of Article XXIV. The Panel was of the view that, even if the latter argument were accepted, the procedures of Article XXIV could reasonably be considered to prevail over those of Article XXIII only in those cases in which the agreement for which Article XXIV was invoked was *prima facie* the type of agreement covered by this provision, i.e., on the face of it capable of justification under it. If preferences granted under *any* agreement for which Article XXIV had been invoked could not be investigated under Article XXIII, any contracting party, merely by invoking Article XXIV, could deprive other contracting parties of their rights under Article XXIII.

368. The Panel therefore examined whether the agreement under which the tariff preference had been granted was *prima facie* an agreement of the type envisaged in Article XXIV. The Panel noted that Article XXIV:8(b) clearly defined free-trade areas as areas in which duties and other restrictive regulations of commerce are eliminated on substantially all the trade *between* the constituent territories, not merely on the imports into one of the constituent territories. The Panel noted that the EEC itself considered that the preference was justified not by Article XXIV on its own, but by Article XXIV taken in combination with the provisions of Part IV of the General Agreement. The Panel further

¹⁸³Reports of the Panels on "Republic of Korea - Restrictions on Imports of Beef - Complaint by Australia", BISD 36S/202, page 227, paragraph 97 (adopted on 7 November 1989); "Republic of Korea - Restrictions on Imports of Beef - Complaint by New Zealand", BISD 36S/234, page 265, paragraph 113 (adopted on 7 November 1989); and "Republic of Korea - Restrictions on Imports of Beef - Complaint by the United States", BISD 36S/268, page 303, paragraph 119 (adopted on 7 November 1989).

¹⁸⁴Report of the Panel on "European Community - Tariff Treatment on Imports of Citrus Products from Certain Countries in the Mediterranean Region", L/5776, page 81, paragraph 4.16 (circulated 7 February 1985).

noted that the EEC did not seek to justify the preference in respect of any member State under the provisions of Article I:2. The issue to be examined by the Panel was therefore whether Article XXIV taken in conjunction with Part IV covered agreements that provide for the liberalization of imports into only one of its parties.

369. The Panel noted that Part IV of the General Agreement did not permit contracting parties to accord preferences inconsistent with Article I. This Part of the General Agreement provided for certain measures in respect of products of export interest to less developed contracting parties, but not for tariff preferences granted to developing countries. The Panel noted, as had a previous panel,¹⁸⁵ that Part IV of the General Agreement was intended to create obligations for developed contracting parties *additional* to those contained in the other Parts of the General Agreement. It was not intended to permit developed contracting parties to *subtract* from those obligations, in particular not from those under Article I. The legal basis for tariff preferences in favour of developing countries was the Enabling Clause, which limited such preferences to those granted under the Generalized System of Preferences.¹⁸⁶ If Part IV were to provide a legal basis for tariff preferences in favour of developing countries, the adoption of the Enabling Clause would not have been necessary. The Panel noted in this respect that a previous panel had found that a quantitative restriction inconsistent with Article XIII could not be justified under Part IV and that the reasoning of that panel applied equally to tariffs inconsistent with Article I.¹⁸⁷ However, an acceptance of the EEC's argument would imply that Part IV could be - in combination with another provision of the General Agreement - a legal basis for the elimination of rights under Article I.

370. The Panel observed further that the note to Article XXXVI made clear that the principles of this Article applied only to procedures under the General Agreement. An acceptance of the EEC's argument that this Article applied also to negotiations under a free-trade area agreement would imply that this provision applied also to negotiations not held in the framework of procedures under the General Agreement. The note further made clear that Article XXXVI applied only in relations between contracting parties. The Panel noted that not all of the beneficiaries of the preference granted by the EEC were contracting parties. If the EEC's argument were accepted, this provision - in combination with Article XXIV - would constitute a legal basis for not extending to contracting parties benefits accorded to non-contracting parties.

371. The Panel considered for these reasons that the interpretation proposed by the EEC would be consistent neither with the wording of Part IV nor with its purpose and function in the GATT legal system. The interpretation proposed would in fact introduce into the General Agreement a new exception from the most-favoured-nation principle that was never negotiated among contracting parties. The CONTRACTING PARTIES have decided that the dispute settlement process in the GATT "cannot add to or diminish the rights and obligations provided in the General Agreement".¹⁸⁸ The interpretation proposed by the EEC would be inconsistent with this decision.

372. The Panel, therefore, found that the requirements of Article XXIV were not modified by the provisions of Part IV. The Panel consequently had to conclude that a legal justification for the tariff preference accorded by the EEC to imports of bananas originating in the ACP countries could not emerge from an application of Article XXIV to the type of agreement described by the EEC in the Panel's proceedings, but only from an action of the CONTRACTING PARTIES under Article XXV. Such

¹⁸⁵Report of the Panel on "EEC - Restrictions on Imports of Dessert Apples - Complaint by Chile", BISD 36S/93, page 134, paragraph 12.32 (adopted on 22 June 1989).

¹⁸⁶Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries, L/4903, Decision of 28 November 1979.

¹⁸⁷Report of the Panel on "Norway - Restrictions on Imports of Certain Textile Products", BISD 27S/119, pages 125-126, paragraph 15 (adopted on 18 June 1980).

¹⁸⁸Ministerial Declaration, BISD 29S/9, page 16 (adopted on 29 November 1982).

action would enable the CONTRACTING PARTIES to provide both the parties to this agreement and any contracting party affected by the tariff preference with the benefit of legal certainty for planning investments and conducting trade in bananas.

Article XXIII:1(b)

373. In view of its findings on the consistency of the measures applied by the EEC to imports of bananas, the Panel was of the view that it was not necessary to examine the claim that the measures nullified or impaired benefits accruing under the General Agreement within the meaning of Article XXIII:1(b).

VI. CONCLUSIONS

374. In the light of its findings above, the Panel concluded that the quantitative restrictions maintained by France, Italy, Portugal, Spain and the United Kingdom on imports of bananas were inconsistent with Article XI:1 and were not justified by Article XI:2(c)(i), Article XXIV, or the existing legislation clauses in the protocols through which these EEC member States had become contracting parties. The Panel *recommends* that the CONTRACTING PARTIES request the EEC to bring these restrictions into conformity with the General Agreement.

375. The Panel further concluded that the tariff preference accorded by the EEC to imports of bananas originating in ACP countries was inconsistent with Article I and that a legal justification for the preference could not emerge from an application of Article XXIV to the type of agreement described by the EEC in the Panel's proceedings, but only from an action of the CONTRACTING PARTIES under Article XXV. The Panel *recommends* that the CONTRACTING PARTIES request the EEC to bring the preference into conformity with the General Agreement unless, in accordance with the provisions of Article XXV, the EEC were authorized to maintain this preference.

ANNEX I

WORLD PRODUCTION OF BANANAS, 1989-91

'000 Metric Tons

COUNTRIES	1989		1990		1991	
	AMOUNT	%	AMOUNT	%	AMOUNT	%
INDIA	6,056	13.5%	6,734	14.3%	6,400	13.4%
BRAZIL	5,505	12.2%	5,506	11.7%	5,526	11.5%
PHILIPPINES	3,733	8.3%	2,913	6.2%	2,951	6.2%
ECUADOR	2,576	5.7%	3,055	6.5%	3,525	7.4%
INDONESIA	2,192	4.9%	2,411	5.1%	2,472	5.2%
CHINA	1,602	3.6%	1,657	3.5%	2,097	4.4%
MEXICO	1,185	2.6%	1,986	4.2%	1,889	3.9%
COSTA RICA	1,512	3.4%	1,740	3.7%	1,700	3.5%
COLOMBIA	1,450	3.2%	1,600	3.4%	1,700	3.5%
THAILAND	1,610	3.6%	1,613	3.4%	1,620	3.4%
BURUNDI	1,608	3.6%	1,547	3.3%	1,550	3.2%
VIET NAM	1,186	2.6%	1,200	2.6%	1,250	2.6%
VENEZUELA	1,134	2.5%	1,167	2.5%	1,215	2.5%
PAPUA & NEW G.	1,150	2.6%	1,200	2.6%	1,200	2.5%
PANAMA	1,254	2.8%	1,166	2.5%	1,170	2.4%
HONDURAS	1,092	2.4%	999	2.1%	1,088	2.3%
TANZANIA	743	1.7%	823	1.8%	750	1.6%
BANGLADESH	637	1.4%	624	1.3%	620	1.3%
UGANDA	490	1.1%	560	1.2%	570	1.2%
CAMEROON	508	1.1%	510	1.1%	520	1.1%
MALAYSIA	500	1.1%	505	1.1%	509	1.1%
GUATEMALA	420	0.9%	478	1.0%	470	1.0%
BOLIVIA	355	0.8%	302	0.6%	413	0.9%
ZAIRE	404	0.9%	404	0.9%	405	0.8%
SPAIN	397	0.9%	380	0.8%	405	0.8%
EGYPT	388	0.9%	408	0.9%	442	0.9%
DOMINICAN REP.	384	0.9%	395	0.8%	389	0.8%
ARGENTINA	240	0.5%	260	0.6%	283	0.6%
ANGOLA	280	0.6%	280	0.6%	280	0.6%
MARTINIQUE	241	0.5%	246	0.5%	255	0.5%
HAITI	225	0.5%	235	0.5%	220	0.5%
KENYA	190	0.4%	200	0.4%	210	0.4%
MADAGASCAR	217	0.5%	220	0.5%	218	0.5%
AUSTRALIA	180	0.4%	165	0.4%	210	0.4%
CUBA	183	0.4%	200	0.4%	200	0.4%
IVORY COAST	133	0.3%	146	0.3%	177	0.4%
SOUTH AFRICA	180	0.4%	182	0.4%	182	0.4%
GUINEA	110	0.2%	165	0.4%	165	0.3%
ST LUCIA	145	0.3%	155	0.3%	155	0.3%
PARAGUAY	297	0.7%	310	0.7%	144	0.3%
JAMAICA	130	0.3%	128	0.3%	128	0.3%
CAMBODIA	112	0.2%	115	0.2%	120	0.3%
PAKISTAN	205	0.5%	210	0.4%	202	0.4%
NICARAGUA	90	0.2%	104	0.2%	114	0.2%
GUADELOUPE	109	0.2%	102	0.2%	95	0.2%
CENTRAL AFRICA	91	0.2%	92	0.2%	93	0.2%
MALAWI	88	0.2%	89	0.2%	90	0.2%
SOMALIA	105	0.2%	110	0.2%	90	0.2%
ISRAEL	83	0.2%	61	0.1%	83	0.2%
ETHIOPIA	77	0.2%	78	0.2%	79	0.2%
MOZAMBIQUE	84	0.2%	85	0.2%	80	0.2%
LIBERIA	80	0.2%	80	0.2%	80	0.2%
ST VINCENT	67	0.1%	80	0.2%	80	0.2%
ZIMBABWE	72	0.2%	74	0.2%	76	0.2%
DOMINICA	58	0.1%	65	0.1%	67	0.1%
PUERTO RICO	85	0.2%	67	0.1%	68	0.1%
SUDAN	45	0.1%	45	0.1%	63	0.1%
EL SALVADOR	61	0.1%	63	0.1%	63	0.1%
COMOROS	50	0.1%	50	0.1%	52	0.1%
OTHERS	586	1.3%	662	1.4%	639	1.3%
WORLD	44,970	100.0%	47,007	100.0%	47,907	100.0%

Source: FAO Production Yearbooks 1991 and 1992

EEC SOURCES OF BANANAS

1989

In Metric Tons

DESTINATION ORIGIN	BELGIUM- LUXEMBURG	DENMARK	GERMANY	GREECE	SPAIN	FRANCE	IRELAND	ITALY	NETHERLANDS	PORTUGAL	UNITED KINGDOM	TOTAL EEC
COSTA RICA	24,216	16,255	213,972	1,074		4,356	25,213	124,088	17,083	11,537	11,324	449,118
PANAMA	32,251	14,274	267,515	266		351	1,618	50,536	25,894	6,450	1,342	400,497
CANARY IS.			249		340,783	72				240		341,344
COLOMBIA	47,308	4,863	129,378	612		3,007	10,752	50,663	52,196	11,390	21,136	331,305
ECUADOR	24,440	2,788	154,486	22		2,644	2,886	51,770	15,101	14,670	5,092	273,899
MARTINIQUE				35		197,907		131			353	198,426
HONDURAS	10,766	7,021	68,908	99			2,433	33,659	10,581	9,703	5,676	148,846
ST LUCIA				6,408				8,949			100,928	116,285
GUADELOUPE						91,318						91,318
IVORY COAST			6			84,781		305	1		66	85,159
ST VINCENT G.				2,221				2,056			63,319	67,596
GUATEMALA	6,650	344	18,670			3,590	872	23,122	3,621	1,476	3,482	61,827
SOMALIA				22,300				36,708	371	9		59,388
CAMEROON				21		54,306		226			1,518	56,071
DOMINICA		17		1,559				3,626		20	46,092	51,314
JAMAICA							99		19		39,101	39,219
SURINAME											29,945	29,945
NICARAGUA	10,295	4,074	10,410	4				36	1,497	2,580	141	29,037
BELIZE											26,580	26,580
PHILIPPINES	59		755	33		4,694	19	9,848	20	4,544	1	19,973
GRENADA								426	2		7,840	8,268
CAPE VERDE										2,734		2,734
DOMINICAN RP.	8		66	646					40		95	855
MADEIRA										37		37
OTHERS	257	150	523	466		70	223	74	289	60	485	2,597
WORLD	156,250	49,786	864,938	35,766	340,783	447,096	44,115	396,223	126,735	65,430	364,516	2,891,638

ANNEX I (cont'd)

Source: NIMEX 1989

EEC SOURCES OF BANANAS

1990

In Metric Tons

DESTINATION ORIGIN	BELGIUM- LUXEMBURG	DENMARK	GERMANY	GREECE	SPAIN	FRANCE	IRELAND	ITALY	NETHERLANDS	PORTUGAL	UNITED KINGDOM	TOTAL EEC
COSTA RICA	31,504	20,120	343,844	4,907		5,770	2,549	105,134	18,469	4,845	11,378	548,520
PANAMA	39,919	11,579	351,282	4,595		793	1,912	81,855	33,297	1,448	827	527,507
COLOMBIA	70,652	3,709	210,535	3,254		3,775	2,862	44,785	22,420	29,365	10,553	401,910
ECUADOR	14,501	1,765	158,821	16,193		17,102	25,405	66,374	12,061	29,299	10,739	352,260
CANARY IS.			543		345,935	47				5,071	6	351,602
MARTINIQUE	38		185			216,907			20		2,290	219,440
ST LUCIA				1,117		537		15,623			109,948	127,225
HONDURAS	6,779	6,278	63,471	1,357		1,531	2,029	20,524	4,464	3,628	13,419	123,480
IVORY COAST	45	17	109			94,306		132	361		260	95,230
ST VINCENT, G			361	172				569	1		80,433	81,536
CAMEROON						74,891		107	1		2,629	77,628
GUADELOUPE			45			73,869		614	11		69	74,608
JAMAICA											63,181	63,181
SOMALIA				13,710				44,075				57,785
DOMINICA			13	326				5,824	26		46,227	52,416
NICARAGUA	5,416	2,055	31,602	17		1,007		207	1,732	4,841	723	47,600
SURINAME				9					4		27,692	27,705
BELIZE									9		24,030	24,039
GUATEMALA	2,873	290	1,512			1,225	218		1,149		2,103	9,370
GRENADA									15		8,174	8,189
PHILIPPINES			386			671		738		3,229		5,024
DOMINICAN REP.	22		1,050	286			562		1,748		161	3,829
UNITED STATES		1	1,125			2	207	2,337	5		1	3,678
CAPE VERDE										2,715		2,715
MADEIRA										38		38
OTHERS	1,321	92	664	15		26	71	2,512	507		313	5,521
WORLD	173,070	45,906	1,165,548	45,958	345,935	492,459	35,815	391,410	96,300	84,479	415,156	3,292,036

ANNEX I (cont'd)

Source: NIMEX 1990

EEC SOURCES OF BANANAS

1991

In Metric Tons

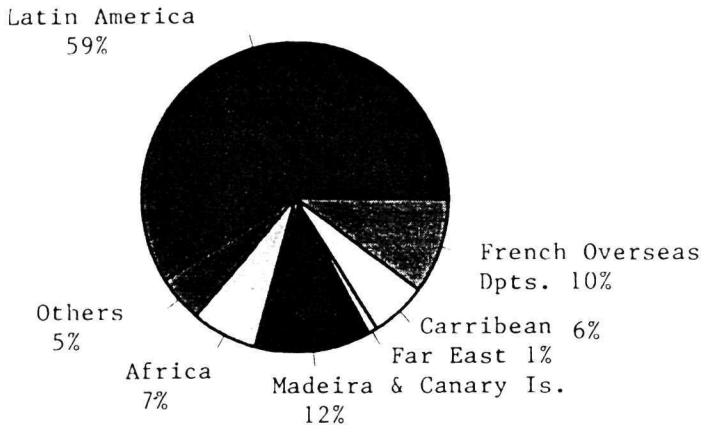
DESTINATION ORIGIN	BELGIUM- LUXEMBURG	DENMARK	GERMANY	GREECE	SPAIN	FRANCE	IRELAND	ITALY	NETHERLANDS	PORTUGAL	UNITED KINGDOM	TOTAL EEC
ECUADOR	26,846	9,536	355,239	13,314			26,344	102,098	23,943	25,580	17,866	600,766
COSTA RICA	35,533	22,871	341,291	5,160		20	1,891	137,676	8,141	5,955	10,835	569,373
COLOMBIA	85,134	3,796	248,990	7,851		145	11,637	90,554	11,012	26,536	26,692	512,347
PANAMA	37,861	5,213	296,757	8,791			71	104,148	21,642	6,839	3,252	484,574
CANARY IS.			637		338,768	15		2	1		27	339,450
MARTINIQUE			7			179,785		38			1,239	181,069
HONDURAS	10,816	4,041	64,955	972			280	14,212	2,052	28,233	12,835	138,396
IVORY COAST	146	86	160			115,396		40	214	73	310	116,425
GUADELOUPE		53	7			116,046					18	116,124
CAMEROON						89,070		23,050		227	3,494	115,841
ST LUCIA				114				17,438			85,099	102,651
JAMAICA	5						19	590			69,502	70,116
NICARAGUA	3,146	5,657	37,553	372			17	13,534	3,116	1,787	36	65,218
ST VINCENT, G				6				2,090			60,967	63,063
DOMINICA				5			52	6,835	36		48,033	54,961
SURINAME									45		27,699	27,744
BELIZE	117							356			19,143	19,616
GUATEMALA	1,875	904	147				150		435		9,675	13,186
DOMINICAN REP.	652	2,658	1,200				1,542	648	1,635		1,963	10,298
GRENADA									5	1,407	6,774	8,186
SOMALIA				2,671				5,506				8,177
CAPE VERDE										3,011		3,011
UNITED STATES	404		1,196	44			291		19		11	1,965
MALAYSIA									5		1,419	1,424
KENYA	3		55					1,334	21		5	1,418
MADEIRA										40		40
OTHERS	1,316	39	1,040	223		14	221		310	19	552	3,734
WORLD	203,854	54,854	1,349,234	39,523	338,768	500,491	42,515	520,148	72,632	99,707	407,446	3,629,172

ANNEX I (cont'd)

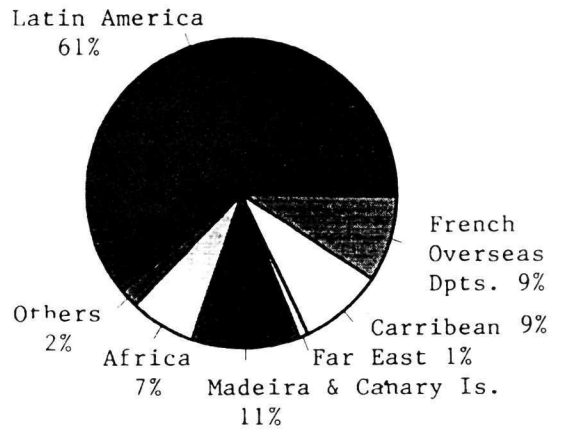
Source: NIMEX 1991

ANNEX II

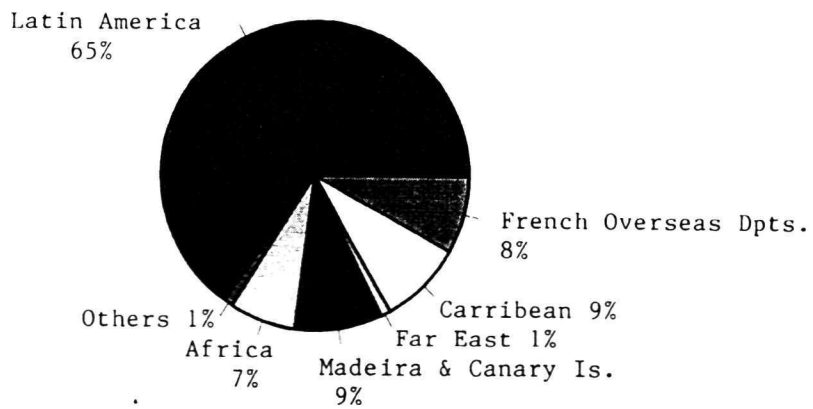
EEC SOURCES OF BANANAS



1989



1990



1991