11 February 1994

EEC - IMPORT REGIME FOR BANANAS

Report of the Panel
(DS38/R)

TABLE OF CONTENTS

l.

I. INTRODUCTION

1. On 28 January 1993, Colombia, Costa Rica, Guatemala, Nicaragua and Venezuela requested the European Economic Community ("EEC") to hold consultations pursuant to Article XXII:1 of the General Agreement concerning the decision of 17 December 1992 of the Council of Ministers of the EEC on the common organization of the market in bananas (DS38/1). The EEC was not able to accept the request on the grounds that the meeting of the Council of Ministers on 17 December 1992 did not result in a formal decision concerning the banana import régime, only a discussion of future policy in the banana sector. In the view of the EEC, this discussion could not be considered as a *measure* under Articles XXII:1 or XXIII:1 of the General Agreement allowing for formal consultations under

policy

o

[1]. This was approximately 38 per cent of world trade in bananas, and compared to imports of 2,9 million tons for the United States and 0,8 million tons for Japan[2]. 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 the bananas consumed in the EEC, the main producing areas being the Canary Islands, Martinique and Guadeloupe. Sixteen per cent were supplied by African, Caribbean and Pacific countries ("ACP" countries). Major suppliers of ACP bananas to the EEC in 1991 were Cameroon, Côte d' Ivoire, St. Lucia, Jamaica, St. Vincent and Dominica. It is estimated that total supplies of bananas in the EEC in 1992 amounted to some 3,76 million tons[3], 689,710 tons of which originated in ACP countries and 2,409,255 tons in Latin America, of which the complaining parties provided 1,042,810 tons[4] (for details see the Annex).

11. On 1 July 1993, the EEC iTmTf(tons) TjETBT1 0

Source: Nimex 1991.

[2]Source: FAO.

[3]Provisional.

[4]Source: Nimex 1992, as revised.

[5]As supplemented by, for instance, Commission

subject to a tariff quota of 2 million tons (net weight).[8] Bananas from ACP countries entered duty-free within this quota whereas third country bananas were subject to a tariff of 100 ECUs per ton. Imports above the tariff quota were subject to a tariff of 750 ECUs per ton for bananas from ACP countries and to 850 ECUs per ton from third countries. The quota could be adjusted on the basis of a supply balance for production and consumption prepared in advance of each year. All imports of bananas from third countries were contingent on an import license and subject to a security deposit.

14. Licenses for third country and/or non-traditional ACP fruit were distributed to three broad categories of operators established in the EEC. Sixty-six point five per cent of the tariff quota was available to operators who had marketed third country and/or non-traditional ACP bananas (category (a)); 30 per cent to operators who had sold EEC and/or traditional ACP bananas (category (b)); and 3.5 per cent to operators established in the EEC who started marketing bananas other than EEC and/or traditional ACP bananas as from 1992 (category (c)). Operators in category (a) and (b) were to obtain import licenses on the basis of the average quantities of bananas that they had sold in the three most recent years for which figures were available.[9] The (a) and (b) operator categories were further subdivided into three types of qualifying entities, *i.e.* those that produced (or purchased from the producer), consigned and sold bananas in the EEC; those that owned, supplied and released bananas for free circulation in the EEC; and those that owned and ripened bananas within the EEC. Each type was assigned a weighting coefficient (57, 15 and 28 per cent, respectively), which, multiplied by the average quantity of bananas sold by each operator in the three most recent years, determined the individual operator's reference quantity entitlement.

15. Between 1963 and 1 July 1993, the EEC maintained a consolidated tariff rate on bananas of 20 per cent *ad valorem*. Initial negotiating rights were held by Brazil. On 19 October 1993, the EEC notified the CONTRACTING PARTIES of its intention to renegotiate the 1963 concession on bananas in accordance with the provisions of Article XXVIII, paragraph 5.

16. By virtue of Article 168(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 Lomé IV Convention, which was virtually the same as corresponding protocols in the earlier 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 Protocols concerning bananas, had been notified to the GATT and had been discussed in working parties.

[8]Article 18 of Council Regulation (EEC) No. 404/93.

[9]Detailed rules concerning imports of bananas inside and outside the quota were to be found in Council Regulation (EEC) No 1442/93, as amended by Commission Regulation (EEC)No 2009/93.

III. MAIN ARGUMENTS

General

17. **Colombia, Costa Rica, Guatemala, Nicaragua** and **Venezuela** requested the Panel to find that the import régime for bananas introduced in the EEC on 1 July 1993 was inconsistent with Articles II, XI and XIII of the General Agreement. **Colombia, Costa Rica, Guatemala and Nicaragua** also requested the Panel to find that the import régime was inconsistent with Article I. **Colombia, Guatemala and Venezuela** requested the Panel to find furthermore that the EEC import régime for bananas was not in conformity with the provisions of Articles III and

the method of

by other dispute panels.[16] The establishment of a tariff of 850 ECUs per ton for any imports over and above the established quota exceeded the bound rate and prevented trade in the product in question in the

Article XXVIII itself. Moreover, the language and drafting history of Article XXVIII indicated that negotiations and consultations had to precede any withdrawal of a concession pursuant to that provision. If a contracting party considered it necessary to modify its schedule of concessions before completing the unbinding process provided for in Article XXVIII, GATT practice, in compliance with the rules of the General Agreement, required the contracting party concerned to request to be exempted from this obligation through a waiver under Article XXV. Until some actual change in the binding occurred, this Panel was charged with addressing the issues before it with reference to the 20 per cent bound rate.

28. **Colombia and Guatemala** added that recourse to Article XXVIII would not legitimize the violations of Article II as Article XXVIII could only be pursued to negotiate withdrawal of concessions on a non-discriminatory basis, with due regard to the m.f.n. principle.[18] Fundamental to Article XXVIII was the obligation to maintain "a level of reciprocal and mutually advantageous concessions not less favourable to trade than that provided for in this Agreement."[19] The obligation made clear that Article XXVIII compensation had to be derived from GATT-legal levels of trade. In this case, where the EEC's breach of the binding was interconnected with other violations of the General Agreement, the trade levels guaranteed by Article XXVIII could not be calculated until the Panel issued a comprehensive ruling as to all violations at issue.

Articles I, XXIV and Part IV - Preferential treatment

29. **Colombia, Costa Rica, Guatemala and Nicaragua** considered that the EEC Regulations[20] introducing and implementing a common organization of the banana market in the EEC violated the principle of the most-favoured-nation treatment in Article I. It provided that traditional ACP imports could enter the EEC market free of any

ETETBT1 0 0 1 262.322 680.146.16 434.4 Tm/F8 1.68 745 0 1 152.88 434. 0 180.185.52 434.4 Tm/F8 1 TiETBT1 0 0 1 312.

that those arguments, like those submitted by the EEC and the ACP countries, had to be carefully examined by the Panel.

32. The **EEC** contended that the tariff preferences accorded to bananas from ACP countries, even if inconsistent with Article I:1 of the General Agreement, were justified under Article XXIV, read in the light of Part IV of the General Agreement. The EEC further explained that nearly all of the countries which were currently parties to the Lomé IV Convention were earlier dependent territories of EEC member states. It was for this reason that France and the United Kingdom, who were original members of the General Agreement in 1947, obtained the recognition of the existing preferences in Article I:2 and Annexes A and B to the General Agreement. Moreover, Article XXIV:9 of the General Agreement specifically provided that these preferences could be maintained also in a situation where the contracting party having granted the preference became a party to a customs union or a free trade agreement in accordance with Article XXIV:9.

33. **Colombia, Costa Rica, Guatemala and Nicaragua** submitted that the parameters laid down by Article XXIV were precisely what prevented the trade treatment granted by the EEC to the beneficiaries of the Lomé IV Convention from falling within the scope of that Article. The trade régime established under the Lomé IV Convention was neither a customs union nor a free-trade area between the ACP countries and the EEC but a unilateral and non-reciprocal relationship not provided for in Article XXIV. The report of the panel on EEC - Member States

since the creation of the EEC such preferences had been granted to ACP countries. This was well known to GATT contracting parties, particularly because the granting of these preferences occupied a prominent place in the examination of the Treaty of Rome by a GATT working party[27]. The preferential treatment of ACP countries was essential for the EEC for political, economic and legal reasons. The EEC market was for all practical purposes the only viable outlet for ACP-bananas, while Latin American bananas were exported to many other destinations. ACP-bananas would be completely eliminated from the EEC market by the highly competitive Latin American bananas, if the EEC did not grant preferential treatment to ACP-bananas. This could also lead to a total collapse of the economy of certain ACP countries.

36. **Colombia, Costa Rica, Guatemala and Nicaragua** replied that past panels had consistently held that when called upon, as here, to examine the GATT-legality of a contracting party's rules or regulations "in light of relevant

the preferential tariff treatment by developed countries, authorized by the Enabling Clause, was limited to concessions granted under the Generalized System of Preferences, which was obviously not applicable.

39. The **EEC** submitted that it was clear from the annotation *ad Article* XXXVI:8 that this provision had to be read together with "any other procedure under this Agreement". The exception from Article I found its basis in Article XXIV:5 alone, and the EEC did not suggest that it could be found in Part IV. But Article XXIV, paragraphs 5 and 8 construed in the light of Article XXXVI:8, permitted the establishment of free-trade areas between developed and developing countries without immediate full reciprocity. Without this interpretation it would be extremely difficult to create a free-trade area between developed and developing countries under the General Agreement. The EEC was, moreover, of the opinion that neither the text, object or purpose, nor the drafting history of Article XXIV supported the view that the General Agreement was intended to exclude free trade agreements in which non-GATT members participated.[32] The reference in paragraph 5 of Article XXIV to "as between the territories of contracting parties" did not appear in either paragraph 4 or paragraph 8 of Article XXIV, which referred only to "as between the constituent territories". Therefore, "constituent territories" could very well include territories of non-GATT members. But in any case, established practice of the CONTRACTING PARTIES confirmed the view defended by the EEC on this issue[33].

40. The footnote to Article XXXVI:8 had to be interpreted by using the generally accepted principles of treaty interpretation as laid down in the 1969 Vienna Convention on the Law of Treaties. Applying these principles, the EEC had reached the conclusion that the langETBT1 0 0 1 315.36 499.2 TmI76.96 Tm/F8 11

include

favoured-nation principle. Free trade areas and customs unions established under Article XXIV were designed to eliminate barriers on "substantially all trade" and to achieve a "closer integration between the economies" of its constituent parties. Given these objectives, it was impossible to see how the "non-reciprocity" commitment of Article XXXVI:8 could facilitate the achievement of free trade areas and customs unions. The very concept of non-reciprocity was fundamentally irreconcilable with the notion of a free trade area or customs union. It should be recalled that exceptions to the rules had to be interpreted restrictively. Article XXIV constituted an exception to the fundamental principle of the GATT system, namely the most-favoured-nation principle. Consequently, the provisions set forth in article XXIV were intended to restrict the scope of application of the exception as such, for which purpose they established a series of requirements which had to be strictly observed. The possibility of a derogation from the most-favoured-nation principle in a case which did not fall within the express requirements laid down in this Article did not follow from either the letter or the spirit of the Article.

42. **Guatemala** added that Article XXIV agreements between developed and developing countries had already been executed on the basis of reciprocity, and many more were expected on that same basis over the next five years.[35] Furthermore, the first banana panel provided four valid reasons why there could be no derogation from the reciprocity requirement in Article XXIV, namely (1) Part IV could not be used to subtract from other parts of the General Agreement; (2) the enabling clause did not extend to Article XXIV; (3) the Lomé IV Convention did not derive from "procedures" under the General Agreement as required under *ad Article* XXXVI:8; and (4) Part IV could not be read to extend treatment more favourable to non-contracting parties than that accorded to contracting parties. Finally, Guatemala argued that the preparatory working documents cited by the EEC did not relate to Article XXIV. They dealt with exceptions described in Annexes A-H of the General Agreement. As to those exceptions, the negotiators took pains to point out that preferences under the General Agreement had to be reciprocal unless expressly indicated otherwise.[36]

43. **Colombia** noted that the first adopted working par

facie principle as elaborated by the first banana panel could not be applied to this type of agreement as covered by Article XXIV for substantive, procedural and historic reasons. The substantive reasons were in essence based on the view that Article XXIV-type agreements were complex and technical, thus requiring a careful examination by trade experts. The General Agreement had recognized this truth by requiring the parties to such types of agreements to notify them to the CONTRACTING PARTIES. The practice since the entry into force of the General Agreement had invariably been to examine such agreements in the framework of specially established working parties. Article

were competent to adopt decisions or recommendations under established procedures, as in the case of Article XXIV, the fact was that in this case the Panel was not dealing with an agreement that was *prima facie* of the kind provided for in that Article. To accept that the invocation of any preferential agreement under Article XXIV could prevent it from being examined under

restriction that was contrary to Article XI:1 of the General Agreement. The text of this Article banned measures that operated to restrict imports of a product of the territory of another contracting party, whether made

concluded that: "In addition, nothing in Article XI, nor for that matter in Articles XII through XIV, prohibits the use of a "tariff quota", whereby a product may be imported under one tariff

Licenses for imports in excess of the tariff quota were granted automatically. According to Commission Regulation (EEC) No 1442/93, the licenses could be used by the operators to import bananas from any third non-ACP country; that Article 13 of the same Regulation allowed transfer of license rights between the three categories of operators established therein; that t

license

to import bananas. Once the entitlement rights had been set and the import licenses had been issued to the operators, each one of them was entirely free to import from any third non-ACP country and from any ACP country (for non-traditional quantities only). In other words, the figures 66.5 per cent, 30 per cent and 3.5 per cent established no link and did not restrict in any way the freedom of the qualified operators holding import licenses to import bananas from the country of their choice. The provisions of Article 19(1) of the Regulation set up a mechanism that related exclusively to the definition of the operators entitled to obtain an import license and did in no way affect, influence or determine externally the country or source of the tariff-quota bananas. The mechanism of distributing the licenses established by the new EEC régime therefore in no way "requires", in the sense of Article XIII:2(c), a certain country or source of import. In addition, Article 13 of Regulation 1442/93 allowed for the free transfer of license rights between the different categories of operators, introducing thus

68. **Colombia, Costa Rica, Guatemala, Nicaragua and Venezuela** submitted that to ensure that a contracting party did not breach the prohibition against discrimination, Article XIII:2 provided the criteria to guarantee that the distribution approached the level that could have been expected

72. **Colombia, Costa Rica, Guatemala, Nicaragua and Venezuela** submitted that although the EEC had not distributed the tariff quota into individual shares for particular contracting parties, neither had it opened the entire quota to all imports; instead, the EEC had used the allocations of licenses to fix effectively the source of supply of bananas. Once the EEC had decided to allocate access to the quota, rather than opening the quota globally, it was obligated under Article XIII to do so in a manner that reflected the share of the EEC banana trade that the contracting parties would have

79. **Colombia** added that, in addition to strictly narrowing the

quota rents which often arose in systems of tariff quotas, again there was no provision in the General Agreement which entitled exporting countries to such rent.

83. **Colombia and Venezuela** submitted, furthermore, that under Article 19 of the Regulation, the EEC calculated the quota on the basis of the average quantities of

and there was no indication that the banana exporters could not freely negotiate about price and delivery terms with those who had access to the tariff quota.

Article VIII - Fees and Formalities Connected with Importation

88. **Colombia, Guatemala, and Venezuela** claimed that the licensing provisions of the Regulation infringed Article VIII regarding import formalities. Article VIII:1(a) and Article VIII:4 of the General Agreement disallowed the use of licensing requirements as a means of providing indirect protection to domestic products or taxation of imports for fiscal purposes. This proscription had to be extended to include any licensing effect that could provide advantages to domestic fruit.[75] The licensing system restricted Latin American exporters' performance in the market to the benefit of domestic producers. Those provisions that artificially prevented the complainants from selling to the operators of their choice, would benefit the domestic producers because their fruit could trade freely in the market. Moreover, the import formalities of the licensing system set forth in the Regulation were incompatible with Article VIII:1(a).

89. Furthermore, under Article 17 of the Regulation, import licenses had to be accompanied by a security, which was forfeited if the transaction was not carried out pursuant to specified terms. The cost of this security was one more expense an importer had to account for in pricing imported bananas; as a result, the security requirement necessarily inflated the price of imported bananas from Latin American banana exporting countries, thereby denying them their comparative advantage. The security requirement thus constituted both indirect protection to domestic bananas, which were not subject to any such requirement, and a taxation of imports for fiscal purposes.

90. The **EEC** submitted that the security requirements set forth in Article 17 of the Regulation did not violate any of the provisions of Article VIII, nor were they contrary to any provision of the General Agreement or of the Licensing Code. None of these texts expressly prohibited recourse to securities in connection with import licenses. The cost of securities could not be interpreted as providing an indirect protection to domestic production, nor could it be assimilated to a taxation for fiscal purposes. Indeed, a security deposit was only meant to ensure that the importer would actually carry out the operation for which he had applied for licenses and that the quantities for which licenses had been granted would in fact be imported. The security was released in total if the importation took place as scheduled. Furthermore, forfeiture of the security could not be considered to be a tax on imports for fiscal purposes as it was a penalty imposed on the importer for not having fulfilled his obligations as the beneficiary of the license. The fact that forfeiture of security deposits was not contrary

92. The

Article XXIII - Nullification or Impairment

97. **Colombia, Costa Rica, Guatemala, Nicaragua and Venezuela** considered that in the case under consideration, the restrictions applied by the EEC and the import licensing system for the administration of these restrictions, as well as the discriminatory tariff treatment established by the Regulation 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 in paragraph 5 of the Annex the Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance, there was a *prima facie* case of nullification and impairment of the benefits accruing to the Latin American countries, which it was up to the EEC to rebut. 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 the future opportunities for trade that would result from the concession.

98. **Colombia** added that even if a panel were to find that the EEC's Regulation was not contrary to its obligations under the General Agreement, Colombia and the other Latin American banana exporting countries would still be entitled to relief under Article XXIII because the EEC's new banana regime would nullify and impair their benefits under the General Agreement.[9] Colombia and the other Latin American banana exporting countries had reasonably expected to increase their exports to the EEC market as a result of the EEC 20 per cent *ad valorem* tariff binding in the Dillon Round; this legitimate expectation had been dashed and anticipated benefits nullified and impaired, by the many restrictions and discriminatory burdens the EEC had imposed on banana imports from Colombia and other Latin American banana exporting countries.

real and immediate losses as a result of the new Regulation already in 1993. In anticipation of a liberalized EEC market, Guatemala had expanded its area devoted to banana production by 2,000 hectares. All of this area was intended to produce bananas for export to the EEC, where free market prices of about US$10.70 per box were expected. Instead, because of a more restrictive EEC market that locked out this additional production, the extra 100,000 tons, or 5 million boxes, of bananas had to be diverted to the depressed United States market where prices were US$4.50 per box or lower. The price differential would cause a loss of revenue this year alone estimated at US$31.9 million. Future

Finally, the data provided by the complainants did not address the core of the matter which was trade effects and, in particular, the conditions of competition for trade. While the complainants attempted to address these issues in the "violation" parts of their submissions, they totally overlooked this essential aspect in their claims on non-violation. As a result, the EEC could not but assume that the claim of the complainants on non-violation was not founded. Furthermore, in its report on the Follow-up of the report of the panel on EEC - Payment and Subsidies paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins,[85] the reconvened panel considered that an appropriate way to eliminate the impairment of a tariff concession was to enter into a renegotiation of the tariff concession under Article XXVIII. Accordingly, the EEC while not acknowledging any violation of the provisions of the General Agreement, nor any nullification or impairment of benefits accruing to contracting parties, had informed the Panel that it had notified the Director-General of the GATT of its intention to apply the procedures of Article XXVIII.

104. The **EEC** argued that none of the complainants had established non-violation nullification or impairment of their benefits. Firstly, the tariff quota was fixed at 2 million tons whereas the complaining parties exported only half that tonnage to the EEC. Secondly, investments did not establish legitimate expectations since a non-violation case could not be claimed for future, potential damage.

[85]DS28/R, 31 March 1992.

109.

114. The African banana

incorporated by reference in the form of a special banana protocol, which appeared as Protocol 5 of the Lomé IV Convention. Protocol 5 subsumed the United Kingdom's long-standing arrangements with the Caribbean banana producers and other former British territories, as well as arrangements by other EEC countries in favour of their former dependencies, notably France in relation to West Africa, and Italy in relation to Somalia. The provisions of the new EEC régime were designed to assure continued access for traditional volumes of EEC and ACP fruit. In theory, the combined total of each ACP state's quota substantially exceeded past total ACP imports. However, these quotas were not transferable, even between individual islands of the Windward's Group.

119. Even assuming, for the sake of argument, that the preferences for imports of bananas from the Caribbean banana producers did not survive directly from Article I:2 and Article XXIV, they continued because of the implicit approval of Article XXVI:5(c). Since the Caribbean banana producers became contracting parties under Article XXVI, they owed no concessions in return for their accession. By virtue of their "no-ticket" admission, the Caribbean banana producers could therefore continue to receive *all* the benefits they had

had been promulgated by the CONTRACTING PARTIES, there was no reason why this submission to the CONTRACTING PARTIES and examination by working parties should not be regarded as fulfilling any procedural requirements. Therefore, it would appear that Protocol 5 was "… submitted to the contracting parties and not disapproved by them. …" as required by Article XX(h).

123. Even if the Panel found that the EEC's new banana import régime was not exempt from the obligations of the General Agreement, the Caribbean banana producers considered that it had to find that the preference in the scheme were not inconsistent with the General Agreement because the allocation of the tariff rate quota was in conformity with the EEC's obligations under Article XIII of the General Agreement as import licenses were issued automatically commensurate with a recent, representative period. The Caribbean banana producers recalled that the EEC's tariff rate quota distinguished between the bananas that were imported into the EEC within the general tariff-rate quota and those in excess of this quota. Since agreement among the EEC, the ACP banana producers and the Latin American producers regarding the allocation of shares in the quota had been impossible, the EEC had, in compliance with paragraph 2(d) of Article XIII, allotted shares in the tariff-rate quota to the Latin American exporters commensurate with the "proportions supplied by such contracting parties during a previous representative period…".[87]

124. The complainants suggested that the EEC did not follow Article XIII:2(d) to the letter because it allotted to traders in ACP and EEC bananas too high a share of the quota. The Caribbean banana producers considered that this claim was misplaced as the complainants' had used incorrect figures to calculate this proportion. Secondly, Article XIII:2(d) made explicit accommodation for any special factors affecting ACP trade in bananas. The special needs of the Caribbean banana producers were such a special factor since these countries would face economic disaster if they were unable to dispose of their major agricultural product in the EEC market. Quoting Article 3, paragraph (l) of the Licensing Code, the Caribbean banana producers were of the view that the present conditions in the EEC market for banana imports strongly indicated that the exports of the Latin American countries needed no special consideration in order to gain EEC market share, contrary to the Caribbean banana producers.

125. Furthermore, discrimination among developing countries as concerned the tariff preference in favour of ACP bananas was consistent with GATT practice. Some of the ACP banana producers were among the least developed countries in the world within the meaning of paragraphs 2(d) and 8 of the Tokyo Round decision of 28 November 1989, and the EEC, in providing a special benefit, had targeted developing countries with a series of special problems: they were poor island nations, only recently independent. Moreover, this type of discrimination was no different from the Generalized System of Preferences that were endorsed, approved, and extended in perpetuity by the results of the Tokyo Round of Multilateral Trade Negotiations.

126. Finally, the new EEC banana import régime did not nullify or impair any reasonable interest of the complaining contracting parties. The complainants had no legitimate expectation of permanence of the value of the 20 per cent tariff concession because they were not parties to the initial tariff negotiations at which the special conditions of the ACP banana trade were considered and accommodated. Nor was the competitive position of the complainants upset by the EEC's banana import régime.

127. **Tanzania** noted that its production of bananas was presently consumed domestically but that there existed a potential to develop production for exports. Tanzania was concerned that the deliberations of this Panel could have negative effects for those ACP countries that benefitted from

V. FINDINGS

128. The Panel noted that the issues in dispute arose essentially from the following facts, as described in greater detail in Part II of this report. Colombia, Costa Rica, Guatemala, Nicaragua and Venezuela export bananas to the EEC. In 1992, they supplied over one million tons, more than one-quarter of the EEC market. Until 1 July 1993, bananas from these countries imported into the EEC were subject to a 20 per cent *ad valorem* bound tariff rate, applied in all EEC member states except Germany. They also faced quantitative restrictionto

131. Apportioning of the tariff quota is determined, initially, on the basis of past sources of supply of the bananas marketed by the operators:

Category	Type	Proportion
Category (a):	Operators who have marketed third-country or non-traditional ACP bananas;	66.5%
Category (b):	Operators who have marketed EEC or traditional ACP bananas;	30%
Category (c):	Operators who have since 1992 started marketing third-country or non-traditional ACP bananas.	3.5%

The tariff quota is then apportioned within the operator categories on the basis of the average quantities of bananas sold by an operator in the three most recent years for which figures are available, and is weighted according to the marketing activities of the individual operators.

Article II - Tariff Binding

132. The Panel noted that **Colombia, Costa Rica, Guatemala, Nicaragua** and **Venezuela** were of the view that the tariff rates applicable to bananas imported from their territories into the EEC were inconsistent with the EEC's tariff binding of 20 per cent *ad valorem* appearing in its Schedule. For bananas imported within the tariff quota, the new specific rate of 100 ECUs per ton was in their view equivalent to at least 23 percent *ad valorem* and thus in excess of the 20 per cent *ad valorem* rate. For bananas imported outside the tariff quota, the new specific rate of 850 ECUs per ton was equivalent to well above 160 per cent

party is free to give effect to agreed changes in its schedule only from the date on which the conclusion of

Panel agreed with these statements and findings and concluded that, in determining whether treatment accorded by a tariff measure was no less favourable than that provided for in the Schedule, it had to take into account not only the actual consequences of that measure for present imports but also its effects on possible future imports. This followed from the principle recognized by many previous panels that the provisions of the General Agreement serve not only to protect actual trade flows but also to create predictability for future trade.[94]

136. The Panel found therefore that the specific tariffs applied by the EEC on imports of bananas since 1 July 1993 accord treatment to imports of bananas less favourable than that provided for in the EEC's Schedule of Concessions and were, therefore, inconsistent with the EEC's obligations under Article II:1. The Panel could not agree with the argument presented by the EEC that this inconsistency with Article II could be justified by the fact that the EEC had removed the previously existing quantitative import restrictions on bananas. The Panel noted that the 20 per cent *ad valorem* tariff binding of the EEC was not made conditional upon the existence of these quantitative restrictions. Regardless of the legal status of these restrictions (which, in the still unadopted panel report on "EEC - Member States' Import Régimes for Bananas" (DS32/R), had been found to be inconsistent with Article XI:1 of the General Agreement), their removal could not justify the change from *ad valorem* to specific tariffs.

Article XI - Tariff Quotas

137. The Panel noted that **Colombia, Costa Rica, Guatemala, Nicaragua and Venezuela** considered that the tariff quota imposed by the EEC on imports of bananas from third countries was inconsistent with Article XI:1 because (a) the tariff quota, (b) the high over-quota tariff rate, and (c) the non-automatic licenses within the tariff quota had to be assimilated to quantitative restrictions

panels had pointed out that, in determining whether a measure constitutes a quantitative restriction, the actual impact of the measure on trade flows at a given point in time is irrelevant. Thus, a recent panel had observed:

> "The CONTRACTING PARTIES have consistently interpreted the basic provisions of the General Agreement on restrictive trade measures as provisions establishing conditions of competition. Thus they decided that an import quota constitutes an import restriction within the meaning of Article XI:1 whether or not it actually impeded imports."[95]

The Panel further noted that the CONTRACTING PARTIES had never taken the view that high tariff rates constituted quantitative restrictions in terms of Article XI:1 merely becausTBT1 0 0 1 342.24 64BTBT1 0 0 1 177.6 6

who have obtained a tariff quota license may use it for imports of bananas from any source. The Panel therefore found that the EEC's tariff quota for imports of bananas does not discriminate between sources of supply in the sense of Article XIII.

Articles III and I - Internal Measures Discriminating Between Sources

143. The Panel noted that **Colombia, Guatemala and Venezuela** were of the view that the EEC acted inconsistently with Article III:4 by reserving 30 per cent of the licenses under the tariff quota to operators who marketed EEC or traditional ACP bananas during a preceding period. This regulation gave operators an incentive to purchase EEC or traditional ACP bananas because, by doing so, they could obtain a larger share of the tariff quota licenses and, with them,

> requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products."[97]

The Panel further noted that previous panels had found consistently that this obligation applies

requirement under Article XVI:1, since it was up to the contracting party which considered that a subsidy caused or threatened to cause serious prejudice to its interests to request discussions under Artic

decisions relating to the various Lomé Conventions had not explicitly decided on this issue. The notifications of the Lomé Conventions to the CONTRACTING PARTIES had not specifically referred to Article XXIV[103]. Likewise, the terms of

in Article 174 to non-reciprocal obligations for the duration of the convention might indicate the possibility of a policy change after the expiration of this Lomé Convention, it did not establish an obligation to liberalize imports originating in the EEC. This lack of

negotiating status from the General Agreement, nor were they bound to follow procedures set out under the General Agreement for the conclusion of the agreement. The wording and underlying rationale of the Note to Article XXXVI:8 thus suggested to the Panel that Article XXXVI:8 and its Note were not intended to apply to negotiations outside the procedural framework of the General Agreement, such as negotiations of a free trade area.

162. The Panel further observed that this interpretation was consistent with the findings of a previous panel. That panel, in examining the allocation of quotas under Article XIII, had found that the provisions of Part IV cannot override obligations, in particular the obligation to accord most-favoured-nation treatment, owed under other parts of the General Agreement. That panel had stated:

> "While noting that provision for some developing exporting countries of assured increase in access

Article XXIV:8(b) nor to justify

A Note to Article XX(h) further adds:

"Thcle

violation of provisions of the General Agreement had nullified or impaired benefits of the complaining parties.

Concluding Remarks by the Panel

168. The Panel, throughout its proceedings, was well aware of the economic and social effects of the EEC measures on the ACP banana exporting countries, as well as on the Latin American banana exporting countries. However, it had to take into account that its terms of reference were to examine the EEC measures at issue exclusively in terms of their legal consistency with the General Agreement. The procedures of Article XXIII serve to ensure the settlement of disputes arising from the existing provisions of the General Agreement. The purpose of these procedures is not to modify the rights and obligations under the existing provisions in the light of social and economic considerations. The Panel wishes to point out, however, that the CONTRACTING PARTIES have at their disposal other procedures under the General Agreement, including Articles XXIV:10 and XXV:5, that are designed to allow CONTRACTING PARTIES to take into account, in the view of the Panel, economic and social considerations. The adoption of this report would not prevent the CONTRACTING PARTIES from taking action under any of these Articles. The Panel also wishes to emphasize that

VI. CONCLUSIONS

169. In the light of its findings set out above, the Panel **concluded** that:

(a) the tariff quota on imports of bananas was not inconsistent with Articles XI and XIII;

(b) the security requirements and other formalities connected with the importation of bananas were not inconsistent with Article VIII; and

(c) the EEC had not acted inconsistently with its

[redacted]

EEC SOURCES OF BANANAS - 1990

In Metric

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 ISLANDS			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											

EEC SOURCES OF BANANAS - 1992

In Metric Tons

DESTINATION / ORIGIN	BELGIUM-LUXEMBOURG	DENMARK	GERMANY	GREECE	SPAIN	FRANCE	IRELAND	ITALY	NETHERLANDS	PORTUGAL	UNITED KINGDOM	TOTAL EEC