

**EUROPEAN COMMUNITIES – THE ACP-EC PARTNERSHIP AGREEMENT –
RECOURSE TO ARBITRATION PURSUANT TO THE
DECISION OF 14 NOVEMBER 2001¹**

AWARD OF THE ARBITRATOR

¹ For previous documents with respect to this arbitration, see WT/L/607 and addenda 1-12.

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I. BACKGROUND

1. The present arbitration was initiated pursuant to the procedures set out in the Annex to the waiver decision with respect to Article I of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994") contained in the document "European Communities – The ACP-EC Partnership Agreement, Decision of 14 November 2001" (the "Doha Waiver", attached).² This was one of two waivers adopted at the Doha Ministerial Conference, *inter alia*, to facilitate implementation by the European Communities of two understandings (between the European Communities and the United States, and the European Communities and Ecuador³, respectively) relating to the resolution of the WTO *EC – Bananas III* dispute.

2. As part of those understandings, the European Communities undertook to reform its banana regime so as to replace its then existing WTO-inconsistent measures based on several tariff rate quotas with a "Tariff Only regime for imports of bananas". The tariff-only regime is to be implemented by 1 January 2006, with interim tariff quota arrangements until that date. The *EC - Bananas III* dispute was initiated by Ecuador, Guatemala, Honduras, Mexico and the United States in 1996 and addressed the then EC banana regime. In the context of those proceedings, Ecuador and the United States were authorized by the Dispute Settlement Body (the "DSB") to suspend certain concessions and, in the case of Ecuador, other WTO obligations towards the European Communities. In the context of seeking to resolve outstanding implementation issues, Ecuador and the United States negotiated understandings with the European Communities that included, *inter alia*, suspension (United States) or termination (Ecuador) of the right to suspend concessions or other obligations *vis-à-vis* the European Communities, adjustment of the tariff quota levels and the introduction of a tariff-only regime for imports of bananas as from 1 January 2006 as well as the lifting of these countries' reservation with respect to the banana waiver.

3. On 15 July 2004, the European Communities announced, in a communication to WTO Members, that it intended to modify, in accordance with Article XXVIII, paragraph 5 of GATT 1994, its concessions with respect to tariff item CN 08030019 (bananas) included in the EC Schedule CXL⁴.

4. In a communication dated 31 January 2005, the European Communities notified the Members of the WTO that it intended "to replace its concessions on item CN 08030019 (bananas) included in Schedule CXL of the European Communities annexed to the General Agreement with a bound duty of 230€/t." It also indicated that the communication constituted "the announcement under the terms of the Annex to the Decision of the WTO Ministerial Conference of 14 November 2001 concerning the ACP-EC Partnership Agreement (WT/MIN(01)/15)".⁵

5. At the invitation of the Parties to the Cotonou Agreement⁶ and in accordance with the procedures of the Annex to the Doha Waiver, consultations were held on 22 February 2005 with WTO Members exporting bananas to the European Communities on an MFN basis, in order to "provide in particular an opportunity to answer any question which interested parties may have concerning the methodology used for the rebinding of the EC tariff on bananas."⁷

²WT/MIN(01)/15, Attachment 1 to this Award.

³WT/DS27/58 and WT/DS27/60.

⁴G/SECRET/22.

⁵G/SECRET/22/Add.1.

⁶The official title of the Agreement is the "ACP-EC Partnership Agreement". It was signed in Cotonou on 23 June 2000. The parties to the Cotonou Agreement are the EC, on the one hand, and certain African, Caribbean and Pacific ("ACP") countries, on the other.

⁷WT/L/602.

6. On 30 March 2005, Colombia, Costa Rica, Ecuador, Guatemala, Honduras and Panama, followed by the Bolivarian Republic of Venezuela and Nicaragua on 31 March 2005 and Brazil⁸ in a communication dated 1 April 2005, notified the WTO that they were requesting arbitration pursuant to the procedures in the Annex to the Doha Waiver.⁹ According to the Annex, "the arbitrator shall be appointed within ten days following the request ... failing which the arbitrator shall be appointed by the Director-General of the WTO, following consultations with the parties, within 30 days of the arbitration request."

7. On 12 April, the parties notified the Director-General that no agreement had been reached between the parties within the stipulated ten days with respect to the appointment of the arbitrator. After consultations with the parties on 15 and 18 April 2005, the Director-General appointed the Arbitrator on 2 May 2005 as follows:

John Weekes, Chairman

John Lockhart

Yasuhei Taniguchi.

8. The Annex to the Doha Waiver provides, *inter alia*, that the "mandate of the arbitrator shall be to determine, within 90 days of his appointment, whether the envisaged rebinding of the EC tariff on bananas would result in at least maintaining total market access for MFN banana suppliers, taking into account the above-mentioned EC commitments."¹⁰

9. At the request of certain African, Caribbean and Pacific ("ACP") banana exporting countries, the Arbitrator, after consultations with the parties, invited Saint Lucia, Cameroon, Côte d'Ivoire, Dominica, Dominican Republic, Ghana, Grenada, Jamaica, Kenya, Madagascar, Suriname, Tanzania, Belize and Saint Vincent and the Grenadines (the "relevant ACP Members") to participate, in a limited manner, in this arbitration.

10. The Arbitrator explained its decision in a letter to the parties and the relevant ACP Members. It noted in particular that there was no rule precluding participation by such Members and that the Arbitrator enjoyed the discretion to organize the conduct of the proceedings. The Arbitrator further noted that such participation should have no adverse effect either on the timetable for the proceedings, or on the timeframe for the conclusion of the Arbitration, as foreseen in the Annex to the Doha Waiver. Accordingly, the relevant ACP Members were invited to make a written communication to the Arbitrator, in the form of one collective submission. The relevant ACP Members were also invited to attend the meeting with the parties and were given the opportunity to make a single brief statement at that meeting and to answer questions by the Arbitrator. Furthermore, the relevant ACP Members were given access to the submissions made by the parties prior to the hearing with the Arbitrator.

11. In the course of the proceedings, the Arbitrator requested¹¹ and received information from the Food and Agriculture Organization of the United Nations (the "FAO") with respect to certain price data collected by that organization.¹²

⁸ That group of Members is referred to, in this Award, as the "Interested Parties".

⁹ WT/L/607/Add.1-9, respectively.

¹⁰ Fourth indent of the Annex to the Doha Waiver.

¹¹ This request was contained in a letter dated 1 July 2005 from the Secretary to the Arbitrator, copied to the parties and the relevant ACP Members.

¹² The FAO responded by facsimile on 5 July 2005. The FAO's response was distributed to the parties.

12. The Arbitrator met with the parties and relevant ACP Members on 28, 29 and 30 June 2005. The Arbitrator decided that its Award should be distributed to the parties at 12 noon on 1 August 2005, and notified to the General Council as well as circulated to the Members of the WTO by 5 p.m. on that date.

II. THE EC BANANA REGIME

13. Schedule CXL of the EC-15 records commitments by the European Communities detailing a 2.2 million metric ton tariff quota with a bound in-quota tariff of €75 per metric ton and a final bound out-of-quota tariff of €680 per metric ton. The current EC banana import system is based on three tariff quotas: A, B and C.

14. Since the introduction of the common organization of the EC banana market in 1993, the EC import regime for bananas has changed several times. From 1 January 1995 to 30 June 2001, specific country shares were allocated to some Latin American exporters and to non-traditional ACP banana suppliers, totalling 2.553 million metric tons (of which 2.2 million metric tons was bound (tariff quota A) and the rest was autonomous, unbound, quantities (tariff quota B)). Traditional ACP suppliers enjoyed a duty-free tariff quota of 857,700 metric tons (tariff quota C).

15. On 1 July 2001, country specific allocations within the 2.553 million metric tons tariff quotas A/B were abolished. These tariff quotas were now also available to both traditional and non-traditional ACP suppliers. As a result of the *EC – Bananas III* understandings with Ecuador and the United States, respectively, the European Communities increased, from 1 January 2002, the unbound, autonomous, tariff quota B to 453,000 metric tons and reduced the C tariff quota to 750,000 metric tons. Preferential suppliers continued to have exclusive access to tariff quota C.

16. On 1 May 2004, following the accession of ten Central and Eastern European countries to the European Communities, the European Communities enlarged the autonomous tariff quota adding 300,000 metric tons for the period 1 May 2004-31 December 2004. For the year 2005, the additional quantity was fixed at 460,000 metric tons, increasing the total MFN tariff quotas to 3.113 million metric tons, of which 2.2 million metric tons are bound (tariff quota A).

17. Tariff quotas A and B are open to all suppliers, at a tariff of €75 per metric ton for suppliers other than preferential suppliers, and at a zero duty level for preferential suppliers. The out-of-quota rate for non-preferential suppliers is €680 per metric ton and for preferential suppliers €380 per metric ton.

18. In summary, the existing EC banana import system consists of tariff quotas totalling 3.113 million metric tons open to all suppliers, and a tariff quota of 750,000 metric tons at zero duty open exclusively to preferential suppliers. MFN suppliers are subject to a bound in-quota tariff of €75 per metric ton, whereas all in-quota banana imports from preferential suppliers enter the European Communities at zero duty. In 2004, the EC-25 imported a total of 3.87 million metric tons of bananas.¹³ More detailed data on EC imports of bananas is contained in Attachment 2.

¹³Excluding all intra-EC trade. The enlargement of the EC took place on 1 May 2004. Thus the figure includes imports into the ten new Member States when they were not yet part of the common market on bananas. Source of the data: Eurostat (information extracted or downloaded on 20 July 2005).

III. THE MANDATE OF THE ARBITRATOR

A. INTRODUCTION AND ARGUMENTS OF THE PARTIES

19. The mandate of the Arbitrator is set out as follows in the Annex to the Doha Waiver:

... to determine, ... whether the envisaged rebinding of the EC tariff on bananas would result in at least maintaining total market access for MFN banana suppliers, taking into account [all EC WTO market-access commitments relating to bananas].¹⁴

20. The terms of the mandate thus require the Arbitrator to consider whether or not a certain outcome "would result" from a certain action. The text of the mandate may be broken down into three elements. The first is the "envisaged rebinding of the EC tariff on bananas". This language describes the action at the centre of the required analysis. The second element comprises a benchmark against which the envisaged rebinding of the EC tariff on bananas is to be assessed. Thus, this element of the mandate requires the Arbitrator to determine whether the envisaged rebinding "would result in at least maintaining total market access for MFN banana suppliers". The third, and final, element is a direction to the Arbitrator to take into account all EC WTO market-access commitments relating to bananas whilst performing the analysis under its mandate.

21. There is no disagreement as to the meaning and scope of the first element of the mandate. The parties agree that the "envisaged rebinding of the EC tariff on bananas" is reflected in the EC proposal to record a new commitment in its WTO schedule under tariff heading CN 08030019 at €230 per metric ton.¹⁵

22. The parties differ, however, over the interpretation of the second and third textual elements of the mandate. With respect to the second element, the Interested Parties generally argue that the concept of "at least maintaining" denotes that—at a minimum—the European Communities must keep in existence and must not allow diminution of the relevant market access of MFN suppliers through the rebinding.¹⁶ The European Communities, for its part, submits that the Arbitrators are required to examine "if the proposed new concession would not increase the level of protection (and conversely diminish the market access rights of MFN suppliers) as compared with the level of protection offered by the European Communities' current concession".¹⁷ The Interested Parties add that "maintaining"

¹⁴The parties agree that "the above-mentioned EC commitments" specified in the fourth tirit of the Annex are "all EC WTO market-access commitments relating to bananas", as referred to in the second indent of the Annex. First Written Submission of the EC, para. 5; and the respective First Written Submissions of Honduras, Nicaragua and Panama, para. 240. All parties confirmed their acceptance of the proposition that "the above-mentioned EC commitments" means "all EC WTO market-access commitments relating to bananas" in response to questions at the oral hearing.

¹⁵In "Article XXVIII:5 Negotiations: Schedule CXL – European Communities – Addendum", G/SECRET/22/Add.1 (1 February 2005), the EC notified:

that it intends to replace its concessions on item 08030019 (bananas) included in Schedule CXL of the European Communities annexed to the General Agreement with a bound duty of 230€/t.

The Interested Parties referred to this announcement in their requests for arbitration: see documents referred to *supra*, footnote 8.

¹⁶First Written Submission of Brazil, paras. 151-154; First Written Submission of Colombia, Costa Rica, Ecuador and Guatemala, para. 57-58; respective First Written Submissions of Honduras, Nicaragua and Panama, paras. 233-234. The Arbitrator notes that, in a letter dated 24 May 2005, the Bolivarian Republic of Venezuela associated itself with, and endorsed as its own, the First Written Submission of Colombia, Costa Rica, Ecuador and Guatemala. Subsequent references to that submission should be read in that light.

¹⁷First Written Submission of the EC, para. 8.

total market access carries with it a temporal, prospective dimension, such that total market access—appropriately defined—must be preserved in time.¹⁸

23. The parties offer markedly different interpretations as to the meaning of the phrase "total market access for MFN banana suppliers", and the significance and scope of the EC commitments to be taken into account. The European Communities reads these two textual elements of the mandate together and argues that the level of protection for EC banana producers (or, conversely, the degree of liberalization) accorded by the tariff commitments scheduled in the EC-15 Schedule CXL *alone* comprises the benchmark against which its envisaged rebinding is to be compared.¹⁹ Colombia, Costa Rica, Ecuador and Guatemala, as well as Brazil, argue that the concept of "total market access for MFN banana suppliers" requires a broader analysis, including, but not limited to, the European Communities' scheduled commitments, and which would encompass analysis of all relevant conditions affecting competition in the marketplace, including both the level of protection accorded to EC producers and the margin of preference enjoyed by preferential suppliers to the EC banana market.²⁰ Honduras, Nicaragua and Panama also contend that the position of preferential suppliers is relevant to an assessment of whether the envisaged rebinding "would result in at least maintaining total market access for MFN banana suppliers".²¹ In addition, these parties argue that an analysis of "total market access for MFN banana suppliers" must be "quantity-based, exclusive to MFN suppliers, and encompasses the full amount of MFN volumes now authorized for MFN entry".²² Honduras, Nicaragua and Panama submit that the taking into account of "all EC WTO market-access commitments relating to bananas" must go beyond consideration of the European Communities' scheduled commitments, and must include analysis of commitments owed to MFN suppliers in the light of EC enlargement²³; under the understandings concluded between the European Communities and the United States and Ecuador respectively in the context of the settlement of the *EC – Bananas III* dispute; under the negotiating mandate of the Doha Development Agenda (the "DDA"), as well as under the Doha Waiver itself.²⁴

B. ANALYSIS

24. The starting point for the Arbitrator's analysis is the "envisaged rebinding of the EC tariff on bananas". The parties agree that the envisaged rebinding referred to in the mandate is the EC proposal, announced in a communication to WTO Members on 1 February 2005, to rebind its concessions for bananas under tariff heading CN 08030019 at €230 per metric ton.²⁵

¹⁸First Written Submission of Brazil, para. 154; First Written Submission of Colombia, Costa Rica, Ecuador and Guatemala, para. 57; Honduras, Nicaragua and Panama first submission, para. 234. At the oral hearing, the EC indicated that the rebinding of the EC tariff would lead to a new WTO concession for the EC in respect of bananas and that concession would be maintained in time, in the sense that it would be a bound commitment. See also First Written Submission of the EC, para. 8.

¹⁹Rebuttal Submission of the EC, paras. 28-57. The EC confirmed its submission that the scheduled commitments are the exclusive benchmark against which the proposed tariff is to be assessed in response to questions at the oral hearing.

²⁰First Written Submission of Colombia, Costa Rica, Ecuador and Guatemala, para. 53; and First Written Submission of Brazil, para. 160.

²¹Honduras, Nicaragua and Panama accordingly factor the capacity of certain ACP banana suppliers to increase exports into their analysis of the envisaged rebinding: see, for example, respective First Written Submissions of Honduras, Nicaragua and Panama, paras. 266 ff.

²²Respective First Written Submissions of Honduras, Nicaragua and Panama, para. 235. (Emphasis original.)

²³Following the enlargement of the EC from 12 to 15 and then to 25 member States, the overall quantities of bananas benefiting from the in-quota tariff rate of €75 per metric ton have been expanded through "autonomous" tariff quotas not recorded in the EC's tariff schedule. *Supra*, paras. 13-18.

²⁴Respective First Written Submissions of Honduras, Nicaragua and Panama, paras. 243-244.

²⁵G/SECRET/22/Add.1.

25. The Arbitrator's task is to determine whether this envisaged rebinding "would result in at least maintaining total market access for MFN banana suppliers". In doing so, the Arbitrator must take into account "all EC WTO market-access commitments relating to bananas".

26. The phrase "would result in at least maintaining" centres on the word "maintaining". "Maintaining" is synonymous with "preserving" or "causing to continue" and carries with it the connotation of guarding from loss or deterioration.²⁶ The "maintaining" of a state of affairs denotes a temporal, prospective element in the sense that the state of affairs must continue. Accordingly, in the context of the Annex, "maintaining" indicates that the "total market access for MFN banana suppliers" enjoyed before the envisaged rebinding must continue following that rebinding.

27. The word "maintaining" is qualified in several ways by the terms that precede it in the phrase "would result in at least maintaining". "Would" is a conditional form of "will". In the current context, the use of "would" with the verb "maintain" denotes both a prospective analysis as well as conditionality: the specified result *will* follow, if the condition (here, the rebinding of the EC banana tariff) comes to pass. "Result" describes a relationship of cause and effect. "At least" underscores the concept of guarding from loss that is inherent in the word "maintaining". The expression "at least maintaining" requires that "total market access for MFN banana suppliers" is the *minimum* level that must be maintained. Read together, therefore, the words in the expression "would result in at least maintaining" denote that the effect of the envisaged rebinding, if it is put in place, will, at a minimum, be the continuation or preservation of "total market access for MFN banana suppliers". The phrase "would result in at least maintaining" describes the relationship that is required between the "envisaged rebinding" and the benchmark of "total market access for MFN banana suppliers".

28. The phrase "total market access for MFN banana suppliers" centres on the expression "market access". The ordinary meaning of the term "access" suggests that it relates to "a way or means to approach or entrance".²⁷ The ordinary meaning of the term "market", in turn, may be defined as "a locus of competition for sales of a particular commodity".²⁸ Read together, the meanings of the terms "market" and "access" indicate that "market access" deals with the conditions under which suppliers may enter a product (or service) into an area of economic activity, so as to compete for sales with other suppliers. In other words, market access relates to the conditions of entry of the product into the market. In the context of the current proceeding, the relevant "market" is the market of the European Communities for bananas. Insofar as bananas of different origins are in competition on the market²⁹, outcomes within the EC market for bananas will be a function, *inter alia*, of the conditions within which different suppliers are allowed to compete for sales of bananas.

29. This general definition of "market access" is consistent with the use of the term in the context of the *Marrakech Agreement Establishing the World Trade Organization* (the "*WTO Agreement*"), where "market access" (or "market-access") in respect of trade in goods relates to the conditions imposed upon foreign goods by an importing Member on entry into that Member's market. Such measures imposed at the time of entry impact on the competitiveness of foreign suppliers in the market of the Member concerned. In the WTO context, the expression "market access" is generally used in describing tariff concessions, as well as other commitments, such as tariff quota commitments, used in relation to the importation of goods by WTO Members. Indeed, the final element of the

²⁶*Shorter Oxford English Dictionary*, 5th edn, W.R. Trumble, A. Stevenson (eds) (Oxford University Press, 2002), Vol. 1, p. 1674.

²⁷*Ibid.*, p. 13.

²⁸Panel Report, *US – Upland Cotton*, para. 7.1429. This definition, which arose in the context of a discussion of "world market share" in Article 6.3(d) of the *Agreement on Subsidies and Countervailing Measures* (the "*SCM Agreement*"), was not addressed by the Appellate Body.

²⁹The panel in *EC – Bananas III* concluded that "bananas are 'like' products, for purposes of Articles I, III, X, and XIII of GATT 1994, irrespective of whether they originate in the EC, in ACP countries, in BFA countries or in other third countries". (Panel Report, *EC – Bananas III*, para 7.63) This finding of the panel was not appealed.

mandate—which refers to "all EC WTO market-access commitments relating to bananas"—uses just such a construction. A similar construction is used in Article 4.1 of the *Agreement on Agriculture*, which defines a category of "[m]arket access concessions contained in Schedules". These "relate to bindings and reductions of tariffs, and other market access commitments as specified therein". By referring to bindings in Schedules, Article 4.1 of the *Agreement on Agriculture* evokes Article II of GATT 1994, the provision that provides for the scheduling of tariff concessions and that requires the commerce of WTO Members to be accorded "treatment no less favourable than that provided for in the appropriate part of the appropriate Schedule". The Arbitrator notes, at this point, that the "envisaged rebinding of the EC tariff on bananas"—the proposal to be measured against the benchmark of "total market access for MFN banana suppliers"—is an envisaged tariff binding governed by Article II of GATT 1994. As such, Article II may provide contextual assistance for defining correctly the benchmark level.

30. The essence of a commitment under Article II of GATT 1994 is an undertaking not to apply a tariff above the level specified in the Schedule of the Member concerned. The exercise is therefore fundamentally about guaranteeing certain conditions of entry into the EC market through an undertaking not to apply protective instruments or a level of protection above a bound level. For this reason, it has been stated that tariff bindings under Article II of GATT 1994 represent, generally, "commitments on conditions of competition for trade, not on volumes of trade".³⁰ Market access *commitments* undertaken in the context of Article II of GATT 1994 have often been described as giving rise to market access *opportunities* for the Members benefiting from the concessions.³¹ These opportunities afforded by the granting of tariff concessions relate to certain legal conditions governing the ability of exporters to enter and compete on the market of another Member. Indeed, as far as market access opportunities provided through tariff concessions are concerned, all that is guaranteed for an exporting Member is an opportunity to enter the market of an importing Member under secure and predictable conditions (but not a guarantee to export certain volumes to that market).

31. In the context of this proceeding, the "envisaged rebinding" referred to in the mandate is a proposed *tariff binding* to be undertaken by the European Communities under Article II of GATT 1994. The benchmark against which it is to be assessed is not the specific concept of tariff bindings, but the more general concept of "*market access*" for the MFN suppliers. Although tariff bindings under Article II of GATT 1994 are an aspect of "market access", the general concept of "market access" may involve other aspects of the conditions under which suppliers enter a market to compete for sales. Moreover, the question to be resolved in this proceeding does not deal with the expression "market access" in isolation. Nor indeed does it deal with "market access commitments", other than to require that such commitments be taken into account. Instead, the term "market access" is qualified in the context of the Annex by two further expressions: the mandate requires analysis of "*total market access for MFN banana suppliers*".

³⁰GATT Panel Report, *EC – Oilseeds*, para. 150.

³¹This notion has been referred to in particular in the context of defining the legitimate expectations arising from tariff bindings, in the context of analyses of non-violation claims. The panel on *Japan – Film* thus found that:

The second required element which must be considered to establish a case of non-violation nullification or impairment under Article XXIII:1(b) is the existence of a benefit accruing to a WTO Member under the relevant agreement (in this case, GATT 1994). In all but one of the past GATT cases dealing with Article XXIII:1(b) claims, the claimed benefit has been that of legitimate expectations of improved market-access opportunities arising out of relevant tariff concessions.

(Panel Report, *Japan – Film*, para. 8.285)

32. The phrase "for MFN banana suppliers" indicates that the benchmark against which the European Communities' envisaged rebinding is to be measured is to be determined from the perspective of the opportunities afforded to MFN suppliers by the existing conditions of entry to the EC market.

33. The ordinary meaning of the adjective "total" is "[o]f or pertaining to the whole of something".³² It denotes completeness or all-inclusiveness and may also indicate an aggregate measurement. The use of the expression "*total* market access" further clarifies that what is to be taken into account is the *entirety* of the opportunity actually afforded to MFN suppliers by the existing conditions of entry to the EC market.

34. In the light of the above, it is difficult to accept the submission of the European Communities that an assessment of "total market access for MFN banana suppliers" in the context of the Annex must be limited *exclusively* to the market access commitments recorded in the European Communities' Schedule CXL. Such commitments may well be an important factor affecting the opportunity afforded by the conditions of entry for MFN banana suppliers, and the mandate clearly requires that such commitments - which are certainly included in the phrase "all EC WTO market-access commitments relating to bananas" - be taken into account during the analysis. Nevertheless, it is clear that the scheduled commitments of the European Communities relating to bananas do not exhaust the full scope of "total market access for MFN banana suppliers" currently enjoyed. As noted above, the European Communities grants MFN suppliers a greater opportunity to enter the EC banana market than is recorded in its Schedule CXL, through additional "autonomous" tariff quota amounts.³³ They form part of the opportunities enjoyed by the MFN banana suppliers on the EC market and thus part of the "total market access for MFN suppliers" that is to be maintained, or preserved, under the new tariff.

35. The third and final element of the mandate requires that "all EC WTO market-access commitments relating to bananas" be "tak[en] into account". This requires that such commitments be considered in the Arbitrator's analysis. The expression "taking into account" does not, however, in itself require that such factors be the *only* factors to be considered.

36. The parties have expressed differing views as to what is encompassed in the expression "all EC WTO market-access commitments relating to bananas". The parties agree that "all EC WTO market-access commitments relating to bananas" includes the European Communities' scheduled commitments.³⁴ Honduras, Nicaragua and Panama argue however that other commitments are also captured by this phrase, notably commitments arising out of EC expansion (including under Article XXIV:6 of GATT 1994), the negotiating mandate of the DDA, under the *EC – Bananas III* understandings with the United States and Ecuador, and under the Doha Waiver itself. The Arbitrator finds that "all EC WTO market-access commitments relating to bananas" includes commitments incurred as a result of EC enlargement under Articles XXIV:6 and XXVIII of GATT 1994. The Arbitrator also accepts that the European Communities has commitments under the negotiating mandate of the DDA. However, these commitments consist of a political undertaking to achieve market access improvements, including for bananas. As such, the Arbitrator finds that these commitments are not of a character that would allow them to be factored into the analysis under the mandate. As regards the understandings concluded between the European Communities and the United States and the European Communities and Ecuador, as well as the Doha Waiver itself, these clearly comprise important background to the arbitration and the Arbitrator has taken them into account as well.

³²*Shorter Oxford English Dictionary*, 5th edn, W.R. Trumble, A. Stevenson (eds) (Oxford University Press, 2002), Vol. 2, p. 3305.

³³*Supra*, paras. 13-18.

³⁴First Written Submission of the EC, para. 8; respective First Written Submission of Honduras, Nicaragua and Panama, Table 11.

37. In summary, the mandate requires a determination as to whether the proposed new EC tariff for bananas would preserve, at a minimum, the effective opportunities to enter the EC banana market afforded to MFN suppliers by the existing conditions of entry. The analysis must factor in, not only bound commitments, but all other aspects of the import regime, *as applied*. The Arbitrator notes that, because it relates to certain opportunities to enter the market, "total market access for MFN banana suppliers" is not a guarantee of any particular level or volume of trade or price. Rather, it relates to the opportunity for MFN suppliers to enter and compete on the EC banana market.

IV. CLAIM UNDER PARAGRAPH 1 OF THE DOHA WAIVER

A. ARGUMENTS OF THE PARTIES

38. Honduras, Nicaragua and Panama argue that the scope of the arbitration is not limited to the consideration of whether the envisaged rebinding of the European Communities' tariff on bananas would result in at least maintaining total market access for MFN banana suppliers, and instead submit that the Arbitrator may also review the EC proposal under the terms of Paragraph 1 of the Doha Waiver.³⁵ Honduras, Nicaragua and Panama thus call for the Arbitrator to examine whether the proposed EC rebinding is "necessary" within the terms of Paragraph 1, or "required" pursuant to the relevant provisions of the Cotonou Agreement. They submit that an interpretation that did not lead to an examination of Paragraph 1 would render meaningless the term "additional" in Paragraph 3*bis* of the Doha Waiver, because "additional" denotes that the provisions are "extra" rules that apply on top of the general provisions. They argue that such an interpretation is also consistent with the negotiating history and would avoid an absurd result whereby interested parties, in addition to having recourse to arbitration under the Annex to the Doha Waiver, would have to follow ordinary dispute settlement rules in order to bring a claim under Paragraph 1.

39. The European Communities submits that such an examination is outside the specific terms of the mandate of the Arbitrator, which refers only to the determination of whether the envisaged rebinding "would result in at least maintaining total market access for MFN banana suppliers". The European Communities submits that, were the Arbitrator to address this issue, it would deny it (and the ACP countries) important due process rights.³⁶

B. ANALYSIS

40. As noted above, the mandate of the Arbitrator in this proceeding is defined in the fourth tiret of the Annex to the Doha Waiver as follows:

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

41. Paragraph 1 of the Doha Waiver provides as follows:

Subject to the terms and conditions set out hereunder, Article I, paragraph 1 of the General Agreement shall be waived, until 31 December 2007, to the extent necessary to permit the European Communities to provide preferential tariff treatment for products originating in ACP States as required by Article 36.3, Annex 5 and its Protocols of the ACP-EC Partnership Agreement, without being

³⁵Respective First Written Submissions of Honduras, Nicaragua and Panama, paras. 168 ff.

³⁶Rebuttal Submission of the EC, paras. 71-85.

required to extend the same preferential treatment to like products of any other member. (footnote omitted)

42. It is clear, on a plain reading of the fourth tirit of the Annex to the Doha Waiver, that the Arbitrator's mandate does not explicitly require the Arbitrator to assess whether the European Communities' envisaged rebinding is consistent with the conditions set forth in Paragraph 1 of the Doha Waiver. Honduras, Nicaragua and Panama argue, however, that the Arbitrator may consider substantive claims that the European Communities' envisaged rebinding does not comply with the conditions of the Doha Waiver, and request the Arbitrator to review the consistency of the European Communities' proposed rebinding against the terms of Paragraph 1. The European Communities contests this submission, submitting that the Arbitrator's "terms of reference" (or "jurisdiction") are limited to the terms of the mandate.³⁷

43. In seeking to show that an examination under Paragraph 1 of the Doha Waiver is within the jurisdiction of the Arbitrator in this proceeding, notwithstanding the lack of any express authority for such jurisdiction within the terms of the Annex to the Doha Waiver, Honduras, Nicaragua and Panama rely, in particular, upon the wording of Paragraph 3bis of the Doha Waiver, which provides that:

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

44. Honduras, Nicaragua and Panama submit that the use of the term "additional" means that both the general requirements of the Waiver, *and* the "additional" provisions of the Annex, apply in respect of bananas. Thus, in the submission of Honduras, Nicaragua and Panama, claims under the general provisions of the Waiver may be brought before the Arbitrator.

45. The Arbitrator agrees with Honduras, Nicaragua and Panama that *both* the "additional" Annex provisions as well as the general provisions of the Doha Waiver apply to bananas. Compliance with the Doha Waiver in respect of bananas does not turn solely upon fulfilment of the standard of "at least maintaining total market access for MFN banana suppliers" reflected in the fourth tirit of the Annex. Instead, it is clear that, in respect of bananas, as well as all other products covered by the Waiver, the European Communities must comply with all of the conditions of the Waiver, including those in Paragraph 1.

46. However, the jurisdiction of the Arbitrator is governed by the terms of the Annex. That mandate is limited, specifically, to determining whether the "envisaged rebinding would result in at least maintaining total market access for MFN banana suppliers". The Arbitrator is not free to expand its mandate. It must find its jurisdiction in the instrument establishing its authority. There is no indication that the Arbitrator may determine other matters, such as the consistency of the European Communities' envisaged rebinding with Paragraph 1 of the Doha Waiver (which, by its nature would also include consideration of the terms of the Cotonou Agreement to determine what is "required" under that Agreement³⁸). The Arbitrator finds, therefore, that this claim by Honduras, Panama and Nicaragua is beyond its jurisdiction.

47. This interpretation does not render the word "additional" in Paragraph 3bis meaningless. Pursuant to the "additional" procedure, the task of the Arbitrator is to review the envisaged rebinding of the EC tariff on bananas against the benchmark laid out in the mandate. This procedure is "additional" in the sense that it provides for a *sui generis* process, with its own benchmark, that would not otherwise have existed, were it not for the additional procedures of the Annex. Again, it must be emphasized that this does not mean that the general provisions of the Doha Waiver do not apply or do

³⁷Responses to questions at the oral hearing.

³⁸See Appellate Body Report, *EC – Bananas III*, para. 167.

not have legal effect; it means, rather, that the Arbitrator is not authorized or required to determine the issue. The compliance of the European Communities with the conditions of the Doha Waiver may be the subject of review in the context of dispute settlement, a point expressly confirmed by Paragraph 6 of the Waiver, which states that:

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

Such procedures safeguard, within an overall balance of rights and obligations agreed by WTO Members, not only the rights of a complaining Member to bring disputes in respect of matters covered by the Doha Waiver, but also the due process rights of other WTO Members.

V. ASSESSMENT OF THE EUROPEAN COMMUNITIES' ENVISAGED REBINDING

48. As observed above, the Arbitrator is required to determine whether the European Communities' envisaged rebinding for bananas would result, at a minimum, in the preservation of the effective opportunities to enter the EC banana market afforded to MFN suppliers by the existing conditions of entry prior to the rebinding. In this assessment, the scheduled market access commitments undertaken by the European Communities are to be taken into account, but the appropriate benchmark is the totality of the opportunities afforded by the existing conditions of entry encountered by MFN suppliers.

49. In this light, the Arbitrator will first outline the main elements of the European Communities' envisaged rebinding. Whether that envisaged rebinding meets the requirement described in the mandate for this arbitration will then be analyzed, in light of the arguments of the parties.

A. THE ENVISAGED REBINDING

50. As noted above, the European Communities has notified its intention to replace its concessions on bananas with a bound duty of €230 per metric ton. This rebinding exercise takes place in the context of the European Communities' move to a tariff-only regime, as described in the Doha Waiver. The proposed rate is to take effect on 1 January 2006.³⁹

51. In the course of the proceedings, the European Communities explained that, in arriving at its proposed rate, it had employed the price gap methodology used in the Uruguay Round agriculture negotiations. This methodology has since been incorporated, with minor modifications, into the *WTO Agreement* as the Attachment to Annex 5 of the *Agreement on Agriculture*. The European Communities had "sought a methodology which would ensure that the new tariff would maintain the same level of protection as did the existing concessions."⁴⁰ According to the European Communities, the price gap methodology "was devised precisely to measure the level of protection provided by different types of instruments affecting market access and to convert it into a tariff equivalent."⁴¹ "The exercise envisaged in the Waiver Annex, namely the rebinding of the EC tariff on bananas, while maintaining total market access for MFN banana suppliers, is analogous to the type of exercise for which the price-gap methodology has been used."⁴² The European Communities also noted that the price gap methodology is familiar to all WTO Members who participated in the Uruguay Round negotiations, that it was simple, and that it was part of the *WTO Agreement on Agriculture*.⁴³

³⁹G/SECRET/22/Add.1, 1 February 2005.

⁴⁰First Written Submission of the EC, para. 3.

⁴¹*Ibid.*, para. 9.

⁴²*Ibid.*, para. 11.

⁴³*Ibid.*

52. The price gap methodology as employed by the European Communities involves calculating the difference between internal and external prices of bananas during a reference period. The difference between the two (i.e., the "price gap") provides a measure of the level of protection afforded to domestic producers on the market. In this instance, the European Communities chose 2000-2002 as the reference period.⁴⁴

53. The external price was obtained using Eurostat data with respect to the volume and c.i.f. value of banana imports into the EC-25 from MFN suppliers.⁴⁵ To calculate the external price, the c.i.f. value of banana imports from MFN suppliers was divided by the volume of imports. The European Communities arrived at an external price for the EC-25 of €559 per metric ton, averaged over the period 2000-2002. With the exception of the question of the appropriate reference period, the calculation of the external prices based on Eurostat data is not in dispute.

54. To calculate the internal price, the European Communities used price data collected by the FAO and made available through a publicly accessible database. At the time the European Communities carried out the price gap calculation, i.e., in June 2004, the data series was referred to as "Bananas (C. America, f.o.b. Hamburg - EC duty paid)". The description has since been changed to "L. America, f.o.t. Benelux/Hamburg – EC duty paid".

55. The European Communities then applied a series of coefficients to that price data, to adjust for:

- the higher average price of bananas originating in Central America compared to those originating in South America;
- the higher average price of bananas in Germany compared to the rest of EC-15; and
- the higher average price of bananas in the EC-15 compared to the ten new members of the European Communities.

56. After making these adjustments, the European Communities arrived at an internal EC-25 price of €789 per metric ton. The gap between the external price of €559 per metric ton and the internal price calculated by the European Communities for the 25 member States (€789 per metric ton), amounted to €230 per metric ton in the period 2000-2002, proposed by the European Communities as the new tariff.

57. The Interested Parties have challenged the envisaged rebinding both in respect of the methodology and in respect of the price data used to arrive at the envisaged rebinding. In particular, they have argued that:

- (a) the price gap methodology used by the European Communities cannot meet the requirements of the mandate. One important reason is that it fails to take into account the impact of the increase in the preference margin that would result from the rebinding;
- (b) even assuming that the price gap methodology were appropriate in the circumstances, the reference period and the price data upon which the European Communities has relied in its calculations are flawed.

The Arbitrator will now consider these issues.

⁴⁴In respect of the choice of the reference period, see *infra*, paras. 80-83.

⁴⁵Exhibit EC-4.

B. APPROPRIATENESS OF THE PRICE GAP METHODOLOGY

58. The Interested Parties have questioned the validity of the price gap methodology to calculate the level at which the EC tariff on bananas should be rebound. Most importantly, they have argued that the price gap methodology fails to account for the impact of the increase in preference margin that would result from the envisaged rebinding. The Interested Parties have argued that the proposed tariff would significantly increase the margin of preference between MFN bananas and preferential bananas.⁴⁶ This widening of the preference margin would alter the conditions of competition between preferential and MFN banana suppliers to the latter's disadvantage.⁴⁷ Honduras, Nicaragua and Panama have also questioned the applicability of the price gap methodology to calculate the new tariff for the reason that the EC banana regime has already been subjected to tariffication in the Uruguay Round.⁴⁸

59. The European Communities, for its part, submits that the Annex standard requires that the tariff proposed by the European Communities must maintain the level of liberalisation/level of protection provided by its current WTO commitments. Analyzing the level of liberalisation does not imply, according to the European Communities, taking into account any margin of preference granted to bananas originating in the ACP. Accordingly, the European Communities did not address those criticisms in its arguments on the calculations, because they were rendered irrelevant by its interpretation of the Annex to the Doha Waiver.⁴⁹

60. At the outset, the Arbitrator observes that the fact that there was a tariffication exercise for the EC banana regime during the Uruguay Round does not in itself rule out the use of the price gap approach to determine a tariff equivalent to the existing EC banana regime. The Uruguay Round tariffication involved a price gap calculation of a tariff equivalent to measure the effect of various non-tariff measures that existed during the period 1986-1988. Since then, the European Communities

⁴⁶The Interested Parties have argued that the proposed tariff would increase the margin of preference from the current €75 per metric ton in respect of in-quota imports to €230 per metric ton.

⁴⁷Brazil notes that the single tariff to be applied on 1 January 2006 will not apply to imports of all origins. The ACP imports will still enjoy duty-free access to the EC market. Brazil states that the issue is whether the €230 per metric ton single-tariff will, or will not result in hampering the access of the MFN bananas to the European market to the benefit of the ACP duty-free suppliers. It argues that the EC's envisaged bound duty of €230 per metric ton will distort the market in favour of the ACP countries and that the MFN suppliers will lose significant market shares. The Bolivarian Republic of Venezuela, Colombia, Costa Rica, Ecuador and Guatemala argue that the EC's price gap methodology fails to address the effects of the envisaged tariff on the conditions under which MFN bananas compete with ACP bananas. The EC considers that compliance with the standard that applies under the Annex to the Doha Waiver requires only the maintenance of the conditions under which MFN bananas compete with EC bananas. However, the Bolivarian Republic of Venezuela, Colombia, Costa Rica, Ecuador and Guatemala argue that the phrase "total market access" requires not merely maintenance of the conditions under which MFN bananas compete with EC bananas, but also maintenance of the conditions under which MFN bananas compete with ACP bananas. They submit that increasing the margin of preference between ACP bananas and MFN bananas to any level higher than the current €75 per metric ton would adversely affect total market access for MFN bananas. In the view of Honduras, Panama and Nicaragua, the price gap method fails to take into account a key factor bearing on a proper analysis of the standard under the Annex to the Doha Waiver, namely the extent to which a subset of the ACP countries-Africa, Belize, and the Dominican Republic-will respond to an enlarged tariff preference by increasing their exports to the EC market. Honduras, Panama and Nicaragua submit that these countries have soils, topography, climate, cost structures and other resources that closely resemble, and are competitive with, those in Latin America. They submit that the envisaged tariff of €230 per metric ton will increase the existing margin of preference between MFN bananas and ACP bananas and create incentives for multinational banana marketing and production companies to expand production in Africa. Since tariff quotas would be removed on ACP bananas, it would enable banana suppliers in Africa to gain unlimited, duty-free access to the EC market leading to displacement of MFN banana suppliers.

⁴⁸Respective First Written Submissions of Honduras, Nicaragua and Panama, para. 300.

⁴⁹Rebuttal Submission of the EC, para. 92.

has implemented tariff quotas, increased the volumes subject to in-quota tariff rates and/or made the conditions less restrictive, for example, through the removal of country-specific allocations. The current rebinding exercise involves the calculation of a tariff equivalent for bananas that would estimate the protective effect of the conditions of entry during the period 2000-2002, adjusted for the EC-25. Indeed, Colombia, Costa Rica, Ecuador and Guatemala admit that, in principle, and if applied correctly, the difference between the internal and external prices could be equated to the effects of the existing trade restriction, measured by its equivalent tariff.⁵⁰ The Interested Parties themselves have drawn the Arbitrator's attention to studies from the economic literature which provide, despite its practical difficulties, credibility to the use of the price gap method for measuring non-tariff barriers.⁵¹ While the tariff quota commitments constitute, in the WTO context, a variant of a tariff concession, rather than a non-tariff measure *per se*, the economic effect of the EC tariff quotas for bananas is, in an analytical sense, comparable to a quota regime (non-tariff measure), as evidenced by the negligible volume of banana imports entering the European Communities at the out-of-quota tariff.⁵²

61. The principal issue in this instance, however, is whether the result of the EC price gap calculation, i.e., the proposed tariff rebinding, meets the standard of preserving, at a minimum, the effective opportunities to enter the EC banana market afforded to MFN suppliers by the existing conditions of entry.

62. As a preliminary matter, the Arbitrator notes that the result of the EC price gap calculation reflects actual access opportunities during the reference period 2000-2002. Contrary to the European Communities' assertion that the exclusive benchmark for the assessment should be the scheduled commitments⁵³, it has, in fact, implicitly taken into account the effective access conditions prevailing on the EC-25 banana market during the chosen reference period. As noted above in the analysis of the mandate, "total market access for MFN banana suppliers" requires consideration of the effective opportunities to enter the EC banana market afforded to MFN suppliers by the existing conditions of entry. Accordingly, the analysis must factor in not only bound commitments, but all other aspects of the import regime, *as applied*.⁵⁴ It was therefore appropriate for the European Communities to take into account the autonomous tariff quotas currently available to MFN suppliers in addition to its scheduled commitments in its calculations.

63. However, the principal question raised by the Interested Parties in respect of the price gap methodology used by the European Communities is its failure-and inability, in the submission of the Interested Parties-to take into account the impact of the increase in the preference margin that would result from the rebinding. According to the European Communities, this is not relevant to the

⁵⁰First Written Submission of Colombia, Costa Rica, Ecuador and Guatemala, para. 89.

⁵¹For example, "Measuring Nontariff Barriers" by Robert E. Baldwin, referred to in the First Submission of Brazil, paras. 207 and 208. Exhibit EC-10, available on-line at <http://www.nber.org/papers/w2978.pdf>; Measurement of Non-Tariff Barriers by Alan V. Deardorff and Robert M. Stern (University of Michigan), available on-line at: <http://www.oecd.org/dataoecd/34/3/1863859.pdf>

⁵²The EC has indicated that:

"According to the information received by the European Commission from the EC member States pursuant to Article 22 (4) of Commission Regulation 896/2001 (4), between 10,000 to 20,000 tonnes of bananas are imported out of quota every year. That represents about 0.3% of the total imports and they correspond to marginal imports of residual quantities, consisting for the most part of a few tonnes, in consignments. There is no consolidated information about their origin."

(Written answer by the EC to a question by the Arbitrator)

⁵³EC statement at the oral hearing in response to a question by the Arbitrator.

⁵⁴In practice, the EC has actually granted MFN suppliers more market access than the minimum recorded in its Schedule. *Supra*, paras. 13-18.

assessment. This question was extensively discussed both in the written submissions of the parties and during the oral hearing.

64. The Interested Parties have stressed that the competitive environment they face in entering the EC banana market is affected importantly by the existence of preferential treatment granted to ACP suppliers. These preferences, which would otherwise be contrary to Article I of GATT 1994, are made possible by a waiver of the European Communities' obligations under that Article. This waiver was granted by the WTO Members subject to certain conditions. In particular, it includes the Annex under which this arbitration procedure is foreseen. This arbitration procedure therefore forms an integral part of the agreement reached by WTO Members in granting the waiver. Indeed, the very continuation of the waiver in respect of bananas is also intimately tied to the conclusion of the rebinding exercise.

65. These elements suggest that the rebinding exercise and the procedures under the Annex were considered *in the context of* the preferences that would be granted under the then proposed waiver. They also suggest that the standard by which the rebinding is to be assessed in these proceedings was developed in consideration of these preferences. Indeed, the essence of the preferences is to exempt their beneficiaries from the application of the MFN tariff rate. There is a direct correlation between that MFN rate and the level of the preferences actually granted: the greater the difference between the MFN rate and the preferential rate, the greater the margin of the preference. These elements suggest at a minimum that, while the mandate refers specifically to MFN suppliers, the context in which this arbitration is being carried out bears a close relationship to the preferences authorized in the same legal instrument (the Doha Waiver) in favour of other suppliers: the level of the MFN tariff and the margin of preference are, in a sense, two sides of the same coin.

66. Bearing in mind that context and turning to the specific assessment that is required under the benchmark in the Annex, it can be recalled that, as determined above, "maintaining total market access for MFN banana suppliers" relates to the preservation of the effective opportunities afforded to MFN suppliers by the existing conditions of entry to the EC banana market. Different suppliers—including MFN and preferential suppliers—compete on the EC market. The existing conditions of entry impact upon the relative competitiveness of each of these groups of suppliers, in that they partly define the competitive environment in which the various suppliers operate. Specifically, the conditions of entry for MFN suppliers have an impact on the competitive relationship between MFN and preferential suppliers. To examine the conditions of entry for MFN banana suppliers under the envisaged rebinding—and the opportunity that would be afforded by such conditions—without consideration of the impact of the rebinding on the preferential suppliers would amount to ignoring a key component of the market on which MFN (and preferential) suppliers compete.

67. Furthermore, the fact that the mandate requires a specific focus on the position of the MFN banana suppliers inevitably involves an examination of the supply response by the ACP suppliers as a result of the rebinding.

68. The Arbitrator therefore finds that the potential impact of the preferences granted to ACP banana suppliers on the effective opportunities afforded by the existing conditions of entry to the MFN banana suppliers is a necessary consideration in assessing the European Communities' envisaged rebinding. In reaching this conclusion, the Arbitrator is not suggesting that it is required, or that it would be appropriate, to consider the treatment that will be granted by the European Communities to preferential suppliers *per se*. Rather, the focus of the analysis, as set out in the mandate, is the access to the EC market *for MFN banana suppliers*. The manner in which the

European Communities may decide to preserve also market access for ACP suppliers is, as such, beyond the realm of this arbitration.⁵⁵

69. The European Communities has used the price gap methodology that was used in the Uruguay Round agriculture negotiations for the conversion of non-tariff measures to tariff equivalents. Using the correct prices, this methodology would produce an estimate of the tariff equivalent that, all other things being equal, would confer the same level of protection to domestic producers as the border measures being replaced by the tariff equivalent. Correctly applied, the price gap methodology would be broadly neutral in its effects on domestic producers and on total imports. Thus the price gap methodology would accurately reflect the level of protection accorded to domestic or EC growers from foreign competitors. However, the standard price gap formula does not take into account how the competitive relationship may change between imports from different sources, i.e., MFN and preferential banana suppliers. In this instance, the European Communities' proposed tariff equivalent would result in an increase of the margin of preference enjoyed by ACP suppliers from €75 per metric ton in respect of in-quota imports to €230 per metric ton, significantly increasing the advantage they have enjoyed over MFN banana suppliers prior to the rebinding. Given that the use of the price gap methodology means that the rebinding would have neutral effects on *total* imports, any gains achieved by the preferential suppliers in the EC market as a result of this added advantage would, other factors remaining constant, come at the expense of MFN banana suppliers.

70. A positive supply response from preferential banana suppliers to the increased margin of preference can reasonably be expected. Although the Arbitrator makes no finding as to the correct value to be attributed to that supply response, it observes that all available information on this matter provided by the parties suggests that the export supply elasticity of at least some of the ACP suppliers in this instance is in fact significant.⁵⁶ In the model presented by Honduras, Panama and Nicaragua, an export supply elasticity of between 1 to 6 was assumed for ACP suppliers.⁵⁷ The European Communities has also provided information about the values of the export supply elasticities of various ACP suppliers based on a number of studies of the banana market.⁵⁸ Out of thirteen such estimates listed, none is lower than 1 while the maximum is 1.1.⁵⁹

71. The Arbitrator is therefore satisfied that, in a tariff quota-free environment, at least some of the preferential suppliers would have the capacity to respond positively to the increase in the margin of preference resulting from the proposed rebinding. That increase would therefore be such as to affect the effective opportunities afforded to MFN suppliers by the existing conditions of entry to the EC banana market. This has not been taken into account in the calculation of the proposed rebinding.⁶⁰ This demonstrates that, absent any adjustment to account for the impact of the rebinding on the margin of preference accorded to ACP suppliers, the price gap methodology used by the European

⁵⁵It should be noted that any rebinding above €75 per metric ton automatically increases the preference enjoyed by ACP suppliers over MFN suppliers. Under the EC's proposal of €230 metric ton, and using its calculation of the external price of €559 per metric ton, the preference enjoyed by ACP suppliers would rise from 13.4 per cent for in-quota imports to 41.1 per cent.

⁵⁶The elasticity of export supply is a measure of how much additional export volumes can be produced in response to a given increase in price. It is defined as the ratio of the percentage change in exports supplied to the percentage change in price. The higher the export supply elasticity, the greater the amount of exports that can be supplied from a given increase in price.

⁵⁷Respective First Submissions of Honduras, Nicaragua and Panama, para. 281.

⁵⁸Exhibit EC-24.

⁵⁹Exhibit EC-24 also contains information on sixteen estimates of domestic supply elasticities of various ACP suppliers. These reflect a wider range in the values of domestic supply elasticities, from a maximum of 1.3 to a low of 0.16. But nine of these sixteen domestic supply elasticities are equal to or greater than 1.

⁶⁰Indeed, in its written submissions, the EC did not suggest that the €230 per metric ton envisaged rebinding would have no effect on the margin of preference to ACP suppliers. Rather, it simply considered that this was not relevant to the assessment.

Communities to arrive at its envisaged rebinding leads to an outcome that would not result in at least maintaining total market access for MFN banana suppliers.

72. This conclusion is not modified by the European Communities' assertion at the oral hearing that it would limit duty-free/preferential imports from ACP countries by means of a tariff quota once the rebinding would come into force.⁶¹ According to the European Communities, this intention is based on its objective that the whole change of regime should be "neutral in terms of the level of protection offered in respect both of MFN suppliers and in respect of preferential suppliers".⁶² The Interested Parties questioned the consistency with the European Communities' WTO obligations of such an approach, and asked for clarification of the details of what was envisaged by the European Communities.⁶³

73. The European Communities declined to provide any further indication as to how such a tariff quota might be implemented. In particular, it has not indicated at what level the tariff quota might be set, in other words, what volumes of preferential ACP imports would be granted duty-free access. The European Communities argued that this aspect of the regime is not pertinent to the assessment because it relates to the ACP preferences rather than to the MFN rebinding. However, as found earlier, the Arbitrator considers that the impact of the margin of preferences for the ACP suppliers on the rebinding *is* a necessary consideration in assessing whether the envisaged rebinding would maintain total market access for MFN suppliers.

74. The Arbitrator is not convinced that a simple cap in the volume of preferential imports would necessarily address the concern of ensuring that the envisaged rebinding would result in at least maintaining total market access for MFN banana suppliers. Indeed, in the absence of any information as to how such a tariff quota might be administered, it is impossible to assess the effects that would be created by the new system. The Arbitrator also notes that least-developed countries benefiting from the European Communities' Everything But Arms initiative ("EBA") are to be granted duty-free access to the EC market as of 1 January 2006. The terms of access to be granted to certain countries under the EBA do not involve tariff quota restrictions and may affect the competitive situation of MFN banana suppliers.⁶⁴ Leaving aside the procedural issues related to the late stage at which the argument was put forward by the European Communities, the Arbitrator therefore sees no basis for modifying its earlier conclusion that the envisaged rebinding would not result in at least maintaining total market access for MFN banana suppliers.

75. In making this determination, the Arbitrator is mindful that it is not requested, in this proceeding, to determine any specific appropriate level of rebinding, or even any specific methodology through which such level might be appropriately determined. Rather, the Arbitrator is required to assess specifically whether the European Communities' proposed rebinding would meet the standard defined in the mandate for this Arbitration.

76. The Interested Parties have suggested that only economic simulation models would provide an adequate tool to determine an appropriate level of rebinding for bananas, and they have presented some results of economic modelling to illustrate the effects of the proposed rebinding on competitive opportunities for MFN suppliers.⁶⁵ Specifically, Honduras, Nicaragua and Panama used a simulation

⁶¹The EC, in response to a question by the Arbitrator, indicated that it was simply providing this information in order to highlight that the assumptions upon which the Interested Parties were basing their calculations, i.e. an unlimited duty-free access to the EC market for preferential suppliers, were incorrect.

⁶²EC statement at the oral hearing, in response to a question.

⁶³The Interested Parties have questioned in particular how this would be compatible with the provisions of Article XIII of GATT 1994.

⁶⁴First Submission of Honduras, Nicaragua and Panama, paras. 89 and 91.

⁶⁵Honduras, Nicaragua and Panama stress that it is a theoretically consistent tool for analyzing a wide range of potential changes in the world banana market over time (respective First Written Submissions of Honduras, Nicaragua and Panama, paras. 264-265). Brazil states that the use of models would offer more

of a specific model⁶⁶ to argue that the proposed EC rebinding using the price gap methodology would not maintain total market access for MFN banana suppliers.

77. The Interested Parties argue in particular that a simulation model can take into account the capacity of certain ACP banana suppliers to increase exports under various tariff scenarios.⁶⁷ These models take into account a range of factors and attempt to capture certain future evolutions in the market, based on certain assumptions about the behaviour of the market under the proposed rebinding. The European Communities, however, has questioned the validity of a number of these assumptions as well as their relevance in the context of its tariff rebinding on bananas.

78. The arguments and factual elements presented in the course of this proceeding suggest that economic modelling affords the analyst the possibility of taking into account a range of factors, as well as the ability to conduct simulations in the banana market that may allow one to obtain a range of tariff equivalents corresponding to the scenario that the analyst believes is the most likely to occur.

79. Some of the factors relied upon by the Interested Parties in their arguments appear to reflect in particular an intention to capture future evolutions of the market, including evolutions based on factors extraneous to the imposition of duties and other charges on importation by the European Communities. The Arbitrator sees difficulty in the suggestion that that hypothetical future evolutions not resulting from the rebinding itself should necessarily be part of the assessment. More generally, although the requirement of "maintaining" total market access for MFN suppliers involves some degree of prospective assessment, the Arbitrator is not convinced that this standard necessarily implies a preservation "at all times into the future" as some Interested Parties have argued. It was also apparent from the exchange of arguments between the parties that the choice and assignment of specific values to the various parameters in an economic modelling simulation can in itself be a source of complexities. Simulation models require more data than the price gap methodology, and the choice of parameters as well as the assignment of values to them make the results of such modelling as vulnerable (or as solid) as the assumptions upon which they are based. The Arbitrator does not find it necessary or appropriate, to take a position on the relative merits and adequacy of the various models presented by the Interested Parties as such. It notes that the benefits from their use must be carefully balanced against the technical hurdles and uncertainties posed by the choice of parameters and data.

C. REFERENCE PERIOD

80. The use of the reference period 2000-2002 by the European Communities for its price gap calculation has been criticized by some of the Interested Parties. Brazil noted in its submission that over the base period selected by the European Communities, 2000-2002, the EC common market organization for bananas had at least three different regimes. It submits that an aggregation of these regimes into the same base period renders any result of the price gap methodology meaningless.⁶⁸

81. Colombia, Costa Rica, Ecuador, and Guatemala have submitted that the appropriate reference period should commence in 2002. This is because the EC banana regime, as it is currently applied, was implemented on 1 January 2002, in accordance with the understandings between the European Communities and Ecuador, and the European Communities and the United States, in the *EC - Bananas III* dispute. It is this modified regime, which includes tariff quotas for both MFN suppliers

accurate results and that modelling could provide a far better idea about how the market would behave after the adoption of the single-tariff regime (First Written Submission of Brazil, para. 235). The Bolivarian Republic of Venezuela, Colombia, Costa Rica, Ecuador and Guatemala believe that the use of a model will demonstrate the effects of the envisaged tariff on total market access for MFN bananas, taking into account competition between MFN bananas and ACP bananas (First Written Submission of Colombia, Costa Rica, Ecuador and Guatemala, para. 120).

⁶⁶Attachment 2 of the respective First Written Submissions of Honduras, Nicaragua and Panama.

⁶⁷Respective First Written Submissions of Honduras, Nicaragua and Panama, para. 266.

⁶⁸First Written Submission of Brazil, para. 216.

and ACP suppliers, that will be converted into a tariff-only regime.⁶⁹ But the European Communities contends that the period 2002-2004 is not representative due to abnormally high freight rates in 2003 and 2004.⁷⁰ Moreover, it was pointed out by the European Communities that the 2000-2002 period was based on the most recent Eurostat data available at the time when the European Communities notified its intention to modify its concessions regarding bananas (15 July 2004).⁷¹

82. The Arbitrator notes that the practice to date in the GATT and the WTO suggests that the reference period should normally be the most recent representative three-year period for which data is available. For example, the "Procedures for Negotiations Under Article XXVIII" (adopted on 10 November 1980) foresee that the notification or request for negotiations should be accompanied by statistics of imports of the products involved "for the last three years for which statistics are available".⁷² Paragraph 6 of the *Understanding on the Interpretation of Article XXVIII of the General Agreement on Tariffs and Trade 1994* also provides for the use of trade data on "the most recent representative three year period" in the calculation of future trade prospects in the context of compensation to be granted upon replacement of an unlimited tariff concession by a tariff quota.

83. In the light of the foregoing, the Arbitrator's view is that it is important to reflect in the price gap calculation the existing EC banana regime. The use of the most recent representative reference period minimizes the need for *ad hoc* adjustments to be made to the data and corresponds as closely as possible to the trade regime as applied.

D. PRICE DATA

84. The Interested Parties also challenged the validity of the European Communities' proposed rebinding on the basis that the data upon which it has relied upon in its calculation of the price gap is flawed. Whereas the data used for the calculation of the external price is not in dispute, the European Communities and the Interested Parties differed significantly on what data was appropriate for calculating the internal price of bananas.

85. The European Communities used price data from the FAO to calculate the internal price.⁷³ The European Communities indicated that it chose to base its calculations on data from the FAO, an international organization, in an effort to avoid conflicts of interests in the characterization of the internal price.⁷⁴ The European Communities also noted that the FAO web site, from which it downloaded the prices, also publishes prices concerning other international markets for bananas, like the United States, Eastern Europe and European Free Trade Area countries. It thus considered FAO prices as "the most reliable actual prices."⁷⁵

⁶⁹Replies of Colombia, Costa Rica, Ecuador, and Guatemala to Questions Posed by the Arbitrator.

⁷⁰The EC explained that

"According to an article published in 'Fruitrop' in January 2005 (Exhibit EC-30) and based on the presentation made by the director of the company Fruta Rica in Guayaquil (Ecuador) in November 2004, full season prices in 2003 were the highest for seven years and spot market prices were 20 to 25 per cent higher than in 2002. The upward trend continued or even increased in 2004."

(Comments of the European Communities on the Responses of the Interested Parties to the Questions from the Arbitrator, para. 3.)

⁷¹Reply to question by the Arbitrator.

⁷²"Procedures for negotiations under Article XXVIII", Guidelines adopted on 10 November 1980, BISD 27S/26-28, para. 2.

⁷³*Supra*, para. 54.

⁷⁴Rebuttal Submission of the EC, para. 136.

⁷⁵First Written Submission of the EC, para. 146.

86. The Interested Parties challenged the relevance of these prices. In particular, Colombia, Costa Rica, Ecuador and Guatemala submitted that the prices were derived from price quotations obtained from traders, not actual prices. These price quotations in the banana sector are, according to them, typically well above the actual selling prices at wholesale level.⁷⁶ Colombia, Costa Rica, Ecuador and Guatemala also produced affidavits from traders to support their argument that the FAO prices were quoted prices and that actual prices were lower than quoted prices.⁷⁷ One of these affidavits was from a trader certifying that it regularly transmitted data to the FAO on quoted prices of bananas.⁷⁸ The European Communities disputed the validity of the distinction between quoted and actual prices. It has also pointed to the difficulties associated with obtaining actual price data from transactions on the market, as this information is private.

87. In the light of the questions raised by the parties' arguments in respect of the nature and sources of the FAO data, the Arbitrator wrote to the FAO to obtain further clarification of these issues. In response to a question in the letter in relation to the collection of the relevant data, the FAO confirmed that "... these are price quotations announced by the traders at the ports of entry and probably not the prices paid by purchasers of bananas at the end of the transaction".⁷⁹ In reply to the question "Could the FAO provide information as to the precise source ... and an indication as to the number of sources from which data is obtained ...", the FAO replied that though it could not disclose the source of the data, "the data come from one source".⁸⁰

88. The parties do not appear to differ on the necessity of using data reflecting actual prices in a price gap calculation. The replies provided by the FAO support the proposition put forward by the Interested Parties that the data relied upon by the European Communities reflects offer prices rather than actual prices. The FAO also clarified that the collection of this data was initiated "in the context of a proposal for an international banana agreement."⁸¹ The submissions by Colombia, Costa Rica, Ecuador and Guatemala provide some evidence that actual prices are lower. They include an attachment⁸² from Sopisco News⁸³ which documents "Banana selling prices in Euro at the Hamburg market for deliveries next week". It distinguishes between "actual" and "official" prices of various brands of bananas sold in the EC market, with the "actual" prices being in a range that is generally lower than the "official" prices.

89. On the basis of the evidence provided, the Arbitrator concludes that the data from the FAO does not reflect actual internal prices.⁸⁴

90. The Interested Parties have submitted various alternative calculations of the internal price, based on reports by external auditors, "reconstructed prices", or data obtained from Corbana in Costa Rica.⁸⁵

⁷⁶Respective First Written Submissions of Honduras, Nicaragua and Panama, para. 316.

⁷⁷Exhibits CCEG-13, CCEG-14, CCEG-18 and CCEG-25.

⁷⁸Exhibits CCEG-13, CCEG-14 and CCEG-15.

⁷⁹*Ibid.*

⁸⁰FAO letter addressed to the Secretary of the Arbitrator, dated 5 July 2005.

⁸¹*Ibid.*

⁸²Exhibit CCEG-17.

⁸³Sopisco News is a newsletter dealing with the international banana trade and reefer shipping.

⁸⁴The EC has argued that the Attachment to Annex 5 of the *Agreement on Agriculture* provides an appropriate basis for the calculations. The use of the FAO data as such will not produce the "actual difference" between external and internal prices referred to in paragraph 1 of that Attachment.

⁸⁵The submissions by Honduras, Nicaragua and Panama provide four alternative calculations of the internal price, progressively widening the coverage of bananas: (i) EC grown; (ii) EC and ACP bananas; (iii) EC, ACP and MFN bananas (using German ZMP⁸⁵ and Aldi/Cirad⁸⁵ prices); and (iv) EC, ACP and MFN bananas (using audited data provided by the German Fruit and Vegetable Importers Association). Prices for EC-grown bananas are obtained from "compensatory aid" documents. ACP banana prices are taken from CIRAD. The internal price calculated by Honduras, Nicaragua and Panama range from €552 per metric ton to €617 per metric ton. The submission by Colombia, Costa Rica, Ecuador, and Guatemala provides an internal

These alternative sources of price data, however, are all criticized by the European Communities.⁸⁶ In particular, the European Communities questioned the price gap calculations derived from these alternatives data by the Interested Parties, which lead to price gaps of less than €75 per metric ton. The Arbitrator notes that this is less than the current in-quota tariff rate, and does not appear to reflect any value for the existence of the tariff quota itself.

91. The Arbitrator takes note that some Interested Parties⁸⁷ have also claimed that the internal price used by the European Communities constitutes an f.o.t. (free on truck) price and as such is distorted by the inclusion of discharge and handling costs borne by the seller. These costs arise from discharging the bananas from the vessel at the port of entry and loading them onto railway wagons or truck for transport.⁸⁸ Costa Rica, Colombia, Ecuador and Guatemala submit that such costs should be deducted because "it is essential that the difference between the external and internal prices reflects only the effects of the trade restriction and is not distorted by other elements affecting prices that are unrelated to the trade restriction, such discharge and loading costs."⁸⁹ The European Communities observed that its internal price is a wholesale price that properly includes handling and transport costs, consistent with the guidelines for price gap calculations in the *Agreement on Agriculture*.⁹⁰ The Arbitrator notes that how these charges are accounted for could have a significant bearing on the price data calculation.

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

price based on a certified report made by an auditor (Osterloh & Nottbohm GmbH) hired by the association of German banana importers and wholesalers (Deutscher Fruchthandelsverband e. V.) to verify the actual f.o.t. selling price of green bananas in Hamburg. This results in an estimated internal price of €592.09 per metric ton. Brazil calculates an internal price based on weekly market reports issued by Corbana adjusted for discharge and loading costs estimates from Sopisco News. Corbana (National Banana Corporation) is a public non-governmental body in Costa Rica which was created by national law in 1971. It has been designated as the regulatory body of the Costa Rican banana industry, and its mission is to "serve national producers". Sopisco News publishes a weekly newsletter covering information on banana prices, freight rates, reefer vessel schedules, exchange rates, etc. Based on these sources of information Brazil calculates the internal price at €690.37 per metric ton.

⁸⁶The EC disputes the calculation of the internal price based on a certified report made by an external auditor submitted by Colombia, Costa Rica, Ecuador and Guatemala on the grounds that the audited companies are directly involved in the banana business and have a strong conflict of interest in this matter. (Rebuttal Submission of the EC, para. 164) It also takes issue with the use by Honduras, Panama and Nicaragua of "reconstructed" price data from specific sources, suggesting that these data were used "to avoid already available German, Swedish, Dutch, and other EC Member States' prices transmitted by the 15 competent authorities, on the basis of a Commission Regulation, for wholesale yellow banana prices." (*Ibid.*, para. 170) With regard to Brazil's use of price data from Corbana, the EC states that it has no access to the information (it does not appear in the website of Corbana) and that Brazil does not advance any evidence to prove that this data is reliable (*Ibid.*, para. 175) In addition, some of the Interested Parties themselves have questioned Corbana prices. Honduras makes the point that these prices "are informal, unpublished data that are intended by Corbana only to spot broad pricing trends, not to reflect real prices. Moreover, even if Corbana's tracking mechanisms were more comprehensive, Costa Rican banana volume represents less than 30 per cent of MFN trade into the EC and no more than 17 per cent of total EC banana consumption. That country is among the highest-cost producers in Latin America. Costa Rican industry 'prices,' thus, can in no sense be considered a 'representative wholesale price ruling in the domestic market.'" (Responses by Honduras to Written Questions from the Arbitrators, answer to Question 9)

⁸⁷Colombia, Costa Rica, Ecuador and Guatemala.

⁸⁸First Written Submission of Colombia, Costa Rica, Ecuador and Guatemala paras. 89-92.

⁸⁹First Written Submission of Colombia, Costa Rica, Ecuador and Guatemala, para. 89.

⁹⁰Rebuttal of the EC, para. 151.

VI. CONCLUDING REMARKS

93. This arbitration raises questions of considerable political, economic and social importance to the Members concerned. The Arbitrator must, of course, decide the issues before it on their merits according to the evidence and submissions before it. Nevertheless, the Arbitrator takes note of the high importance of this matter to the WTO Members involved.

VII. DETERMINATION

94. For the reasons stated above, the Arbitrator determines that the European Communities' envisaged rebinding on bananas would not result in at least maintaining total market access for MFN banana suppliers, taking into account all EC WTO market-access commitments relating to bananas.

Signed in Geneva this first day of August 2005.


John Weekes (Chairman)


John Lockhart


Yasuhei Taniguchi

ATTACHMENT 1

**WORLD TRADE
ORGANIZATION**

WT/MIN(01)/15
14 November 2001

(01-5786)

MINISTERIAL CONFERENCE
Fourth Session
Doha, 9 - 14 November 2001

EUROPEAN COMMUNITIES – THE ACP-EC PARTNERSHIP AGREEMENT

Decision of 14 November 2001

The Ministerial Conference,

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

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

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

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

Considering also that the preferential tariff treatment for products originating in ACP States as required by Article 36.3, Annex V and its Protocols of the Agreement is designed to promote the expansion of trade and economic development of beneficiaries in a manner consistent with the objectives of the WTO and with the trade, financial and development needs of the beneficiaries and not to raise undue barriers or to create undue difficulties for the trade of other members;

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

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

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

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

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

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

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

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

Decides as follows:

1. Subject to the terms and conditions set out hereunder, Article I, paragraph 1 of the General Agreement shall be waived, until 31 December 2007, to the extent necessary to permit the European Communities to provide preferential tariff treatment for products originating in ACP States as required by Article 36.3, Annex V and its Protocols of the ACP-EC Partnership Agreement,² without being required to extend the same preferential treatment to like products of any other member.
2. The Parties to the Agreement shall promptly notify the General Council of any changes in the preferential tariff treatment to products originating in ACP States as required by the relevant provisions of the Agreement covered by this waiver.
3. The Parties to the Agreement will, upon request, promptly enter into consultations with any interested member with respect to any difficulty or matter that may arise as a result of the implementation of the preferential tariff treatment for products originating in ACP States as required by Article 36.3, Annex V and its Protocols of the Agreement; where a member considers that any benefit accruing to it under the General Agreement may be or is being impaired unduly as a result of such implementation, such consultations shall examine the possibility of action for a satisfactory adjustment of the matter.

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

- 3bis With respect to bananas, the additional provisions in the Annex shall apply.
4. Any member which considers that the preferential tariff treatment for products originating in ACP States as required by Article 36.3, Annex V and its Protocols of the Agreement is being applied inconsistently with this waiver or that any benefit accruing to it under the General Agreement may be or is being impaired unduly as a result of the implementation of the preferential tariff treatment for products originating in ACP States as required by Article 36.3, Annex V and its Protocols of the Agreement and that consultations have proved unsatisfactory, may bring the matter before the General Council, which will examine it promptly and will formulate any recommendations that they judge appropriate.
 5. The Parties to the Agreement will submit to the General Council an annual report on the implementation of the preferential tariff treatment for products originating in ACP States as required by Article 36.3, Annex V and its Protocols of the Agreement.
 6. This waiver shall not preclude the right of affected members to have recourse to Articles XXII and XXIII of the General Agreement.

ANNEX

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

- The parties to the Cotonou Agreement will initiate consultations with Members exporting to the EU on a MFN basis (interested parties) early enough to finalize the process of consultations under the procedures hereby established at least three months before the entry into force of the new EC tariff only regime.
- No later than 10 days after the conclusion of Article XXVIII negotiations, interested parties will be informed of the EC intentions concerning the rebinding of the EC tariff on bananas. In the course of such consultations, the EC will provide information on the methodology used for such rebinding. In this regard, all EC WTO market-access commitments relating to bananas should be taken into account.
- Within 60 days of such an announcement, any such interested party may request arbitration.
- The arbitrator shall be appointed within 10 days, following the request subject to agreement between the two parties, failing which the arbitrator shall be appointed by the Director-General of the WTO, following consultations with the parties, within 30 days of the arbitration request. The mandate of the arbitrator shall be to determine, within 90 days of his appointment, whether the envisaged rebinding of the EC tariff on bananas would result in at least maintaining total market access for MFN banana suppliers, taking into account the above-mentioned EC commitments.
- If the arbitrator determines that the rebinding would not result in at least maintaining total market access for MFN suppliers, the EC shall rectify the matter. Within 10 days of the notification of the arbitration award to the General Council, the EC will enter into consultations with those interested parties that requested the arbitration. In the absence of a mutually satisfactory solution, the same arbitrator will be asked to determine, within 30 days of the new arbitration request, whether the EC has rectified the matter. The second arbitration award will be notified to the General Council. If the EC has failed to rectify the matter, this waiver shall cease to apply to bananas upon entry into force of the new EC tariff regime. The Article XXVIII negotiations and the arbitration procedures shall be concluded before the entry into force of the new EC tariff only regime on 1 January 2006.

ATTACHMENT 2

TABLE 1
EC-15 IMPORTS OF BANANAS (CN 08030019), 2000-2004
(Metric Tons)

YEAR	ACP SUPPLIERS	MFN SUPPLIERS	TOTAL
2000	755,794.3	2,543,130.2	3,298,924.5
2001	728,775.8	2,474,585.8	3,203,361.6
2002	726,871.5	2,561,065.8	3,287,937.3
2003	786,798.4	2,578,827.0	3,365,625.4

For year 2004, the data is for the twenty five member states of the European Communities (also see footnote 12).

2004	785,583.8	3,084,937.4	3,870,521.2
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Source: Eurostat (data extracted or downloaded on 20 and 22 July 2005).