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EUROPEAN COMMUNITIES - REGIME FOR THE IMPORTATION, SALE AND DISTRIBUTION OF BANANAS - RECOURSE TO ARTICLE 21.5 BY THE EUROPEAN COMMUNITIES -

REPORT OF THE PANEL

The report of the Panel on European Communities - Regime for the Importation, Sale and Distribution of Bananas - Recourse to Article 21.5 by the European Communities - is being circulated to all Members, pursuant to the DSU. The report is being circulated as an unrestricted document from 12 April 1999 pursuant to the Procedures for the Circulation and Derestriction of WTO Documents (WT/L/160/Rev.1). Members are reminded that in accordance with the DSU only parties to the dispute may appeal a panel report. An appeal shall be limited to issues of law covered in the Panel report and legal interpretations developed by the Panel. There shall be no *ex parte* communications with the Panel or Appellate Body concerning matters under consideration by the Panel or Appellate Body.

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I. INTRODUCTION

1.1 On 25 September 1997, the Dispute Settlement Body (DSB) adopted the Appellate Body report on European Communities – Regime for the Importation, Sale and Distribution of Bananas (WT/DS27/AB/R) and the panel reports[1], as modified by the Appellate Body (AB) report, recommending that the European Communities bring the measures found to be inconsistent with the GATT 1994 and the GATS into conformity with the obligations of the European Communities under those agreements. On 7 January 1998, the Arbitrator, appointed in accordance with Article 21.3(c) of the DSU concluded that the reasonable period of time to implement the recommendations and rulings of the DSB in this case would expire on 1 January 1999.

1.2 On 20 July 1998, the Council of the European Union adopted Regulation (EC) No. 1637/98 amending Regulation (EEC) No. 404/93 on the common organization of the market in bananas. On 18 August 1998, Ecuador, Guatemala, Honduras, Mexico and the United States acting jointly and severally, requested consultations (WT/DS27/18) with the European Communities ("EC") in relation to the implementation of the DSB recommendations in this matter. Consultations were held on 17 September 1998. These consultations did not result in a mutually satisfactory solution of the matter.

1.3 On 28 October 1998, the Commission of the European Communities adopted Regulation (EC) No. 2362/98 laying down detailed rules for the implementation of Council Regulation (EEC) No. 404/93 regarding imports of bananas into the Community. Regulation 1637/98 as well as Regulation 2362/98 were implemented as from 1 January 1999. On 13 November 1998, Ecuador requested further consultations in this matter which took place on 23 November 1998 (WT/DS27/30 and Add.1). Mexico also requested consultations and was joined as a co-complainant.

1.4 On 14 December 1998, the European Communities requested the establishment of a panel under Article 21.5 of the DSU with the mandate to find that the implementing measures of the European Communities must be presumed to conform to WTO rules unless their conformity had been duly challenged under the appropriate DSU procedures (WT/DS27/40). The DSB, at its meeting on 12 January 1999, decided, in accordance with Article 21.5 of the DSU, to refer to the original panel the matter raised by the European Communities. Belize, Brazil, Cameroon, Colombia, Costa Rica, Côte d'Ivoire, Dominica, the Dominican Republic, Grenada, Haiti, India, Jamaica, Japan, Mauritius, Nicaragua, Saint Lucia, and Saint Vincent and the Grenadines reserved their third-party rights in accordance with Article 10 of the DSU.

(i) Terms of reference

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

> "To examine, in the light of the relevant provisions of the covered agreements cited by the European Communities in document WT/DS27/40 the matter referred to the DSB by the EC, in that document and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements."

[1] WT/DS27/R/ECU, WT/DS27/R/GTM-WT/DS27/R/HND, WT/DS27/R/MEX, WT/DS27/R/USA.

(ii) *Panel composition*

1.6 The Panel was composed as follows:

Chairman: Mr. Stuart Harbinson

Members: Mr. Kym Anderson
Mr. Christian Häberli

1.7 The Panel submitted its report to the European Communities on 6 April 1999.

II. MAIN ARGUMENTS[2]

A. PROCEDURAL ASPECTS

2.1 The **European Communities** noted that, in accordance with Article 21.6 of the DSU, it had provided the DSB with a status report on its implementation of the recommendations and rulings of the DSB at every regular meeting of the DSB since the 23 July 1998 DSB meeting. From the beginning of the reasonable period of time, the original complainants had not ceased to affirm in the press and in the DSB their conviction that the measures first envisaged, then proposed, then adopted by the Council, then finally adopted by the Commission, did not comply with the recommendations and rulings of the DSB in this case.

2.2 On 18 August 1998, Ecuador, Guatemala, Honduras, Mexico and the United States formally requested consultations within the legal framework of Article 21.5 of the DSU (WT/DS27/18). Consultations were held on 17 September 1998. However, the European Communities formally agreed to those consultations only insofar as they related to measures that had already been formally adopted and published, i.e. Regulation 1637 of 20 July 1998. The European Communities refused to engage in discussions concerning import licensing rules which not only had not yet been adopted at that time but had not even been submitted to the management committee as a preliminary step for their definitive approval by the Commission. On 13 November 1998, Ecuador requested consultations within the legal framework of Article 21.5 of the DSU (WT/DS27/30). It was joined by Mexico. These consultations concerned almost exclusively Regulation 2362.

2.3 Outside these procedures, one of the original complainants, the United States, published three notices in the US Federal Register[3] of proposed determination of action by imposing prohibitive (100 per cent *ad valorem*) duties on selected products from the European Communities. This proposed action was based on the unilateral determination by the United States that "the measures the EC has undertaken to apply as of January 1, 1999 fail to implement the WTO recommendations concerning the EC banana regime". The actions proposed were intended to be in place "beginning as early as February 1, 1999". However, the United States, supported by three other original complainants, expressed repeatedly and publicly its unwillingness to submit its own subjective views on this issue to the objective scrutiny of a panel within the multilateral framework of the WTO, in particular under Article 21.5 of the DSU.

2.4 On 12 January 1999, the DSB established a panel under Article 21.5 of the DSU at the request of Ecuador, on the one hand, and the present Panel at the request of the EC, on the other hand. The other four original complaining parties (i.e. Guatemala, Honduras, Mexico and the United States) refrained from requesting a panel or from joining the procedure initiated by Ecuador. On 19 January 1999 three of the original complainants, Guatemala, Honduras and the United States, expressed their views in a letter sent to the WTO Secretariat "concerning the nature and the terms of reference" of these proceedings. However, they did not deem appropriate, on the one hand, to state their position in a formal submission to the Panel in the framework of the on-going dispute settlement procedure nor, on the other hand, to guarantee their participation in the further proceedings. The European Communities submitted further that in a letter dated 2 February 1999, the Panel considered, in reply to a request by the EC, that there was no need to provide in the Panel's timetable for a submission from the original complainants and that the Panel could not compel the original complaining parties to participate in these proceedings.

[2] If not otherwise stated, footnotes are those of the European Communities.
[3] Vol. 63, page 56687, page 63099 and page 71665.

(i) Preliminary issue concerning the establishment of this Panel

2.5 In document WT/DS27/45, the WTO Secretariat officially announced that on 12 January 1999, the Dispute Settlement Body decided "in accordance with Article 21.5 of the DSU, to refer to the original panel the matter raised by the European Communities in document WT/DS27/40". This communication contained also the terms of reference of the Panel, which were expressly referred to as "standard terms of reference", as follows:

> "To examine, in the light of the relevant provisions of the covered agreements cited by the European Communities in document WT/DS27/40, the matter referred to the DSB by the European Communities in that document and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements".

2.6 In their letter of 19 January 1999 to this Panel, three of the original complainants - Guatemala, Honduras and the United States - took the following position :

> "the panel finding sought by the EC (…) does not constitute recourse to Article 21.5 but rather constitutes an entirely different matter for which the appropriate procedural requirements under DSU Articles 4 and 6 have not been satisfied";
>
> "there is no provision in the DSU for a Member to compel other countries to come forward to serve as complaining parties against its measures at a time determined by that member";
>
> "any conclusion regarding the conformity of the EC measures cannot bind a non-party to the process, despite the EC's attempts to achieve this purpose".

2.7 In a letter to this Panel dated 18 January 1999, another of the original complainants, Ecuador, took the following position:

> "in the current circumstances, the invitation of a Member to participate in a meeting to organize a panel that has only one party does not create or give validity to any legal provisions that are not included in the dispute settlement procedures";
>
> "the initiative, taken by the European Communities, without any legal justification, to find a party with which to dispute this issue should not, in Ecuador's view, be allowed to succeed in that it could seriously undermine the dispute settlement system".

2.8 The European Communities submitted that, as a matter of logic, it was compelled to address as a first point the question of the competence of a panel to determine the scope of its own terms of reference. In this respect, the European Communities referred to a recent AB report which indicated that "… as a panel request is normally not subjected to detailed scrutiny by the DSB, it is incumbent upon a panel to examine the request for the establishment of the panel very carefully to ensure its compliance with both the letter and the spirit of Article 6.2 of the DSU".[4] However, the AB also noted that the aim of dispute settlement was not "to encourage either panels or Appellate Body to 'make law' by clarifying existing provisions of the WTO Agreement outside the context of resolving a particular dispute. A panel need only to address those claims which must be addressed in order to resolve the matter in issue in the dispute".[5] In the present panel proceedings, all four above-

[4] *Banana III* AB report, paragraph 142.

[5] *Blouses and Shirts* AB report, page 19; confirmed by Argentina *Footwear* panel, paragraphs 6.12 to 6.15.

mentioned original complainants have claimed that they were not parties to this dispute. If this were true, their unilateral views expressed in their letters could not be considered as "claims which must be addressed in order to resolve the matter in issue" because a non-party could not address any issue or claim in a panel procedure in which it was not a party.

2.9 Thus, as a preliminary point, the Panel had to decide whether the questions raised by the above-mentioned original complainants were to be considered as claims and to do so, it must consider whether they were presented by a party to the dispute. In case of a negative outcome of this preliminary test, the European Communities continued, the Panel would not be empowered to enter into any issue raised by the four original complainants. Panels were not empowered to determine on their own initiative the scope of the mandate received by the DSB unless and until such an issue was raised as a claim by one of the parties to the dispute. There was no scope for a *proprio motu* examination, because that would grant panels the role of a kind of "public prosecutor" which did not however exist in the WTO dispute settlement system.

2.10 By contrast, in case of a positive outcome of the preliminary test, the European Communities submitted, two out of the three preliminary issues raised by the four original complaining parties could no longer stand, because their argument was based on their (unilateral) view, expressed in their letters to the Panel, that the present dispute was a procedure to which only one WTO Member was a party. As soon as the Panel started considering the objections of the original complainants, this argument would, in the opinion of the European Communities, become moot. Therefore, in case the Panel wished to examine the preliminary objections raised by the original complainants in their letters to the WTO Secretariat, the only remaining objection that really needed to be addressed was the view expressed by these original complainants that "the panel finding sought by the EC does not constitute recourse to Article 21.5 but rather constitutes an entirely different matter for which the appropriate procedural requirements under the DSU Articles 4 and 6 have not been satisfied".

2.11 The European Communities submitted that this position was incorrect in fact and in law. As a matter of *fact*, the European Communities indicated in its request for the establishment of this Panel that the issues raised in the present panel proceedings were already duly considered in consultations under Article 4 of the DSU. The "matter" concerned in particular "the disagreement as to the … consistency with a covered agreement of measures taken [by the EC] to comply with the recommendations and rulings [adopted by the DSB on the basis of the original panel and Appellate Body reports]".[6] As a consequence of the consultations held with the original complainants, acknowledging the persistence of the disagreement, the European Communities requested the establishment of this Panel whose terms of reference covered the "matter" raised in the consultations, i.e. either a challenge was made by the original complainants, and the claims with respect to the consistency of the measures taken by the European Communities to comply with the recommendations and rulings of the DSB were upheld, or the original complainants had to be deemed to be satisfied and they had to be deemed not to maintain their disagreement.

2.12 The European Communities was of the opinion that, as a matter of *law*, a procedure under Article 21.5 of the DSU was part of the dispute settlement procedure which had started with an earlier panel procedure, and such a procedure therefore had to be confined to the original parties to the dispute. This was already evident from the title ("Surveillance of Implementation of Recommendations and Rulings") and the context in which Article 21 was placed. Moreover, Article 21.3(b) explicitly referred to the "parties to the dispute". Article 21.5 provided for resorting to "the original panel". The term "original panel" referred, the European Communities submitted, to the same panel that was originally charged by the DSB with the responsibility to look into a specific dispute within specific terms of reference concerning only some and not each and every WTO Member. However, Article 21.5 did not specify in any way which of the parties to the original

[6] Article 21.5 of the DSU.

dispute was entitled to have recourse to the dispute settlement proceedings. Article 21.5 did, however, identify expressly the prerequisite under which such recourse was allowed, i.e. the existence of a disagreement as to the consistency with a covered agreement of measures taken to comply with the recommendations and rulings of the DSB. Consequently, the European Communities was entitled to have recourse to the procedures under Article 21.5 in presence of a disagreement among the parties to the original dispute; consultations held in accordance with Article 4 of the DSU; and the request for the establishment of a panel submitted in writing in accordance with Articles 6.2 and 7 of the DSU.

2.13 The European Communities submitted that a dispute was solved either by a determination of non-compliance, whether in part or *in toto,* which opened the door to a recourse by some or all of the original complainants to the provisions of Article 22 of the DSU; or by a determination of compliance; or by the acknowledgement that all parties were fully satisfied; or, finally, by a combination of these. All these routes were open and admissible within the realm of Article 21.5. The European Communities was of the view that it had complied fully with all the above-mentioned requirements and there was therefore no reason to cast any doubt on the consistency of its panel request with the letter and the spirit of Article 21.5 of the DSU.

(ii) WTO obligations of Members during the "reasonable period of time"

2.14 Referring to Article 3.7 of the DSU, the European Communities submitted that the primary obligation of the Member whose measures had been found inconsistent with its WTO obligations as the result of a dispute settlement procedure was therefore to withdraw such inconsistent measures. Moreover, referring also to the reasonable period of time and arbitration in Article 21.3 of the DSU and the status report that had to be provided to the DSB in accordance with Article 21.6, the European Communities considered that it had scrupulously respected the above-mentioned obligations by repealing the provisions in Regulation 404/93 which were found inconsistent with some WTO covered agreements, and by entirely repealing Regulations 1442/93 and 478/95.

2.15 In particular, the following issues had been addressed: the so-called B licences had been abolished and replaced by a single licensing system for all origins; allocation of licences according to (a), (b), (c) marketing functions had been abolished and replaced by new rights to licences based on proof of actual imports; tariff rate quota allocations to some WTO Members but not to others, including allocations to individual traditional ACP countries, had been abolished and replaced by an allocation only to all substantial suppliers, while the ACP tariff preference had been capped at the level of the pre-1991 best-ever shipments in accordance with the recommendations and rulings of the DSB; the transferability of country-allocated quotas had been abolished; the allocation of hurricane licences only to EC/ACP operators had been abolished; and the special export certificates available to some exporting countries and not to others had been abolished.

2.16 The European Communities had complied with its obligation to implement the recommendations and rulings of the DSB by withdrawing the measures found inconsistent with certain covered agreements within the reasonable period of time which expired on 1 January 1999. As a result of this process, a new regime for the importation, sale and distribution of bananas was applicable in the European Communities as from 1 January 1999. Referring to the text of Article 21.5, the European Communities noted that Ecuador had expressed its disagreement and had brought this dispute to the DSB under Article 21.5 of the DSU. To different degrees and at different occasions, Guatemala, Honduras, Mexico and the United States had publicly criticized the new EC banana regime and requested consultations on Regulation No. 1637 but these consultations were not followed-up by an Article 21.5 panel request.

2.17 Thus, while a number of political positions had been stated, a panel established under Article 21.5 of the DSU could only acknowledge and consider the present legal situation, i.e. that

Guatemala, Honduras, Mexico and the United States had refrained from making any further use of their procedural rights under Article 21.5 of the DSU. Since these original complainants had refrained from challenging the EC's implementing measures, they had to be deemed and recognized to be satisfied by the explanations received during consultations and otherwise with regard to the present EC banana regime.

2.18 Beyond the requirements resulting from the multilateral nature of the WTO dispute settlement system, there was another fundamental WTO principle involved in the present case. This principle was related to the "security and predictability" of the multilateral trading system which had already been recognized in the second AB report as an essential element of the WTO Agreement.[7] This principle was also reflected in the procedural guarantees of the DSU which excluded in its Article 23 any unilateral determination by individual WTO Members that any other WTO Member was acting inconsistently with its WTO obligations. In the opinion of the European Communities, a presumption of *inconsistency* would gravely affect the security and predictability of the international trading system because of the ensuing uncertainty. For similar reasons, the criminal law of all civilized countries was firmly based on a presumption of innocence, not on a presumption of guilt.

2.19 If it could be unilaterally determined by any Member, outside a procedure under Article 21.5, that another WTO Member had incorrectly implemented the recommendations and rulings of the DSB in an earlier dispute, and if this determination were considered to be legally relevant within the WTO system, the European Communities submitted that this would be paramount to a presumption of inconsistency. Such a presumption would mean in practical terms that an implementing measure that did not satisfy the original complainant could lead to the threat of immediate retaliation through the withdrawal of concessions or other obligations. A trading system based on a presumption of inconsistency would not be based on security and predictability of international trade relations and would thus be the opposite of the multilateral trading system envisaged by the Marrakesh Agreement on the Establishment of the World Trade Organization.

(iii) Legal analysis of Article 23 of the DSU

2.20 According to the European Communities, Article 23 of the DSU was at the core of the dispute settlement mechanism created in Marrakesh in 1994. Its provisions were an expression of the new multilateral legal commitments that the WTO Members had decided to undertake and was based on the fundamental principle of the rejection of any determination or action taken by any Member outside the rules and procedures of the DSU. Referring to the first paragraph of Article 23 as well as to (a) of the second paragraph of Article 23 of the DSU[8], the European Communities submitted that in the present case, the EC measures which were found inconsistent with certain WTO covered agreements under the recommendations and rulings of the DSB, had, as was stated above, been withdrawn in accordance with the primary objective set out in Article 3.7 of the DSU. Consequently, new measures had been adopted and the European Communities had put in place, at the end of the reasonable period of time, a new regime for the importation, sale and distribution of bananas.

2.21 As a consequence of the above, Guatemala, Honduras, Mexico and the United States could not seek redress of an alleged violation by the EC's new measures of its WTO obligations outside the

[7] Quotation is near to footnote 67 in that report.

[8] "When Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements, they shall have recourse to, and abide by, the rules and procedures of this Understanding. … "In such cases Members shall, (a) not make a determination to the effect that a violation has occurred, that benefits have been nullified or impaired or that the attainment of any objective of the covered agreements has been impeded, except through recourse to dispute settlement in accordance with the rules and procedures of this Understanding, and shall make any such determination consistent with the findings contained in the panel or Appellate Body report adopted by the DSB or an arbitration award rendered under this Understanding".

rules and procedures of the DSU, including Article 21.5. Nor could they make any determination to the effect that a violation had occurred, including the alleged failure to bring any measures that were found to be inconsistent with a covered agreement into compliance with the recommendations and rulings of the DSB, or that benefits had been nullified or impaired, without having recourse to dispute settlement procedures in accordance with the rules and procedures of the DSU as foreseen in Article 23.2(a). Finally, irrespective of what was the correct interpretation of the deadlines in Article 22 of the DSU (a matter which was outside the terms of reference of this Panel), that provision did not in any way authorize any departure from the fundamental principle which found its expression in Article 23 of the DSU.

B. CONCLUSIONS

2.22 The European Communities requested the Panel to find that, since Guatemala, Honduras, Mexico and the United States had failed to pursue any recourse to dispute settlement procedures under the rules and procedures of the DSU, the new EC regime for the importation, sale and distribution of bananas adopted in order to comply with the recommendations and rulings of the DSB in the three dispute settlement procedures ("*EC - Regime for Importation, Sale and Distribution of Bananas*" [9]) had to be deemed to satisfy these parties to the original dispute and, in so far as those parties were concerned, to be in conformity with the WTO covered agreements as long as those original parties had not successfully challenged the new EC regime under the relevant dispute settlement procedures of the WTO.

[9] WT/DS27/GTM-WT/DS27/HND, WT/DS27/MEX and WT/DS27/USA.

III. ARGUMENTS BY THIRD PARTIES

A. INDIA

3.1 **India** submitted that although India had only a limited trade interest in the matter before the Panel, the systemic issues involved were of great importance to India. The matter before the Panel went far beyond the dispute at hand; in fact, it touched on the very core of the principles and the functioning of the dispute settlement mechanism, the central principle of which was its multilateral character and which was expected to provide security and predictability to the multilateral trading system.

3.2 In the view of India the crux of the systemic issue was the meaning, the operation and the interpretation of Article 21.5 of the DSU, especially in relation to Article 22 of the DSU and in the light of Article 23.2 of the DSU.

3.3 India noted that Article 21.5 described a situation where there was disagreement between the parties to a dispute as to the existence or the consistency of measures taken by a party to comply with the recommendations of the DSB. The provisions of this Article made it clear that such a dispute should be decided through the DSU procedures, including wherever possible by resort to the original panel. Article 22 of the DSU set out conditions under which a Member could suspend concessions against another Member when that Member had either failed to bring the measure found to be inconsistent with a covered agreement into compliance or had failed to comply with the recommendations of the DSB. Therefore, the right to suspend concessions under Article 22 was a conditional right granted under the DSU.

3.4 Furthermore, India argued that a Member could not invoke Article 22 directly without traversing the route of Article 21.5, except in situations where the losing party itself acknowledged that it had not complied with the recommendations and rulings of the DSB. Article 21.5 preceded Article 22 and was critical in deciding whether or not a Member had complied with the recommendations of the DSB. Such a determination had to be done under Article 21.5 and indeed would seem to be the very purpose of the provisions of that Article. If the determination was not made under Article 21.5, the right under Article 22 became an unfettered right for every winning party to seek suspension of concessions against the losing party. Such unilateral determination of non-compliance ran counter to the basic tenets of the multilateral trading system as well as the central objectives of the dispute settlement system. Indeed, Article 23.2(a) explicitly forbade a party from making a unilateral determination that a violation had occurred or that benefits had been nullified or impaired or that the attainment of any objective of the covered agreements had been impeded, except through recourse to the DSU rules and procedures.

3.5 India submitted further that after the DSB had made its recommendations, the parties were expected to agree on a reasonable period of time for implementation. Once that period had been agreed upon, the party expected to comply with the DSB's recommendations had to be given the entire time agreed upon to make a good faith effort to comply with its obligations under the WTO. At the end of the reasonable period of time for implementation there were two possible scenarios. One, the party expected to comply made no change whatsoever and maintained its inconsistent measure. In this case, Article 21.5 procedures would be confined to confirming the non-existence of the measure taken to comply and thereafter the winning party could proceed to Article 22 and exercise its rights to suspend concessions against the erring party. The second scenario was more complicated where the losing party believed it had taken steps to comply with the DSB's recommendations but the winning party did not agree. In India's view, there was only one way to find out whether or not the losing party had taken steps to comply in good faith, i.e. recourse to Article 21.5. India believed this could be done either by the winning party or even by the losing party. Indeed, the latter must be welcomed as a show of good faith by the losing party which could be eager to prove that it had complied.

3.6 In India's view, it was crucial that the determination of compliance or non-compliance must be made multilaterally under the aegis of the DSB and in accordance with the procedures of the DSU, i.e. Article 21.5. It was true that Article 21.5 was silent on whether there was a possibility of appeal against the panel verdict. It was India's view that there must be a possibility of appeal as well. The reason for this was that the move to suspend concessions was a measure of last resort in the DSU and therefore could not be taken lightly. If the right to suspend concessions was granted without due process, it would spell the end of the security and predictability of the dispute settlement mechanism and indeed of the multilateral trading system as a whole.

3.7 In India's view there was yet another systemic issue at stake. If Article 22 was interpreted as being totally de-linked from Article 21.5, there was a danger that the winning party could allege non-compliance by referring to any matter which was not properly before the Panel or which the Panel had explicitly refused to consider and suspend concessions on the basis of such alleged non-compliance. This would be untenable from both a legal and systemic point of view.

3.8 In conclusion, it was India's view that there was an intrinsic and inevitable link between Article 21.5 and Article 22 of the DSU. India believed that Article 22 should be resorted to only after traversing the entire route from Article 4 consultations onwards. In this process, Article 21.5 was critical and indispensable as a step before rights under Article 22 were exercized. Indeed, recourse to Article 21.5, as the European Communities had done in this case, was a fundamental right available to all Members of the WTO in the dispute settlement system. Denial of Article 21.5 procedures to any Member would therefore be both a procedural and substantive injustice under the DSU.

B. JAMAICA

3.9 **Jamaica** agreed with the EC's analysis of Article 23 of the DSU leading to the conclusion that the new EC regime must be deemed to be in conformity with the WTO covered agreements.[10] With regard to the relationship between Article 21.5 and Article 22, Jamaica submitted that this issue was outside the Panel's terms of reference and that these Articles should only be interpreted by the appropriate WTO bodies. Jamaica concluded that the European Communities had complied with the relevant requirements of the DSU and that there was therefore no reason to cast any doubt on the EC's panel request pursuant to Article 21.5.

C. JAPAN

3.10 **Japan** submitted that there were a number of systemic issues in this dispute that were of critical importance to the dispute settlement mechanism of the WTO. In the view of Japan, some of these issues might be beyond the purview of any panel and were the prerogative of collective decision-making by Members. As a country greatly benefiting from the multilateral trading system under the WTO, Japan was very interested in ensuring that these attributes of the WTO dispute settlement mechanism were not in any way compromised. Japan considered that when there was a disagreement as to whether a party had complied with a panel or AB recommendations and rulings, the parties must resort to Article 21.5 procedures before invoking their rights under Article 22. Retaliatory actions must not be taken based on a unilateral determination by the complaining party of non-conformity of the measures in question without recommendations and rulings of an Article 21.5 panel.

3.11 Implementation of measures in good faith in accordance with the recommendations and rulings of a panel and the AB, Japan continued, was of prime importance, not only for the settlement of disputes but also to enhance the credibility of the dispute settlement mechanism. In order to address the issues raised in this dispute, Japan believed that it was necessary to review them in the

[10] Paragraphs 34 and 42 of the EC's submission.

context of Article 21 as a whole, including the roles and functions of a panel established under Article 21.5.

3.12 In the view of Japan, this Panel proceeding had a number of anomalies. First, the European Communities was the sole party to this Panel while the original complaining parties had remained non-parties. Article 21.5 provided that the role and function of a panel established thereunder was to assist in deciding the dispute over the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings. Article 11 provided that "a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements". Since there was only one party to this Panel, the question arose how this Panel could fulfil the function given to it by the above DSU provisions. If the original parties questioned the conformity of the measures taken by the losing party and subsequently disregarded the panel process under Article 21.5, this was tantamount to a sabotage of the dispute settlement mechanism.

3.13 Japan considered that, if the European Communities requested the Panel to find that the implementation measures taken by it "must be presumed to conform to WTO rules unless their conformity has been duly challenged" under Article 21.5 and did not request the Panel to find that such measures were consistent with the WTO Agreement based on an objective assessment of the facts of the case and the conformity with the relevant WTO agreements, responding to the request for such a simple presumption of "innocence" was not the function of a panel under Article 21.5.

3.14 In a normal panel proceeding, the party asserting a fact or making a legal claim was required to establish a *prima facie* case, and once that *prima facie* case was made, the burden of proof shifted to the other party which was then required to rebut the fact or claim. Without such procedures, Japan was not certain how the present Panel could effectively carry out the tasks assigned to it. In the view of Japan, it was not a responsible attitude of a WTO Member not to participate in panel proceedings under Article 21.5 while at the same time asserting the failure of the other party to bring the measures into conformity with the WTO Agreement. Such behaviour by certain original parties would seriously undermine the credibility of the WTO dispute settlement mechanism. Japan considered that as a matter of general principle for the dispute settlement procedures in the WTO, all the original parties to a dispute, whether or not they had participated in a panel or the AB proceedings under Article 21.5 must, in accordance with Article 23 of the DSU, be bound by the findings and ruling of that panel or the AB.

IV. FINDINGS

A. TERMS OF REFERENCE

4.1 As noted above, we have the following terms of reference:

> "To examine, in the light of the relevant provisions of the covered agreements cited by the European Communities in document WT/DS27/40, the matter referred to the DSB by the European Communities in that document and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements."

4.2 Document WT/DS27/40 reads in the most relevant parts as follows:

> "The EC submits that Article 23 of the DSU confirms that there is a general principle in the WTO agreements that measures taken by WTO Members are in conformity with their rules unless they have been challenged under the appropriate dispute settlement procedures and proven not to conform. Since none of the original complainants has continued to pursue the procedures under Article 21.5, *they must presently be deemed to be satisfied with the way in which the European Communities has brought its measures into conformity* with the recommendations and rulings of the DSB in this case.
>
> Within this legal context, the EC requests the establishment of a panel under Article 21.5 of the DSU *with the mandate to find that the above-mentioned implementing measures of the EC must be presumed to conform to WTO rules unless their conformity has been duly challenged under the appropriate DSU procedures*." (emphasis added).

4.3 In our findings, we deal consecutively with the identity of the parties to this dispute, the relief sought by the European Communities and the relationship of Articles 21, 22 and 23 of the DSU.

B. THE PARTIES TO THIS DISPUTE

4.4 Following the establishment of this Panel, the Secretary on behalf of the Panel informed Ecuador, Guatemala, Honduras, Mexico and the United States that the European Communities had requested the Panel to invite those Members in their capacity as original complaining parties in the *Banana III* panel proceedings, to an organizational meeting for this Panel. The Panel then sought an indication from them as to their response should such an invitation be forthcoming.

4.5 Ecuador responded that:

> "the initiative, taken by the EC without any legal justification, to find a party with which to dispute this issue should not, in Ecuador's view, be allowed to succeed in that it could seriously undermine the dispute settlement system."

4.6 Ecuador emphasized that it considered the panel established by the DSB under Article 21.5 of the DSU on 12 January 1999, in response to its request (WT/DS27/41), as entirely independent from this Panel proceeding, initiated by the European Communities.

4.7 Guatemala, Honduras and the United States expressed their position that the panel finding sought by the European Communities in its panel request:

"does not constitute recourse to Article 21.5 but rather constitutes an entirely different matter, for which the appropriate procedural requirements under Articles 4 and 6 of the DSU have not been satisfied. Contrary to the EC's oral representations to the DSB, the EC's request does not constitute a request for an objective review of the EC measures. Moreover, there is no provision in the DSU for a member to compel other countries to come forward to serve as complaining parties against its measures at a time determined by that Member. Furthermore, any conclusion regarding the conformity of the EC measures cannot bind a non-party to the process, despite the EC's attempts to achieve this purpose. …"

4.8 Mexico made a similar response.

4.9 Thereafter, the European Communities raised certain concerns with the decisions taken by this Panel regarding its timetable and working procedures. In particular, it suggested to amend the timetable under the heading "receipt of written submissions" with an additional item "(a) original complainants … 2 February 1999". In the event the Panel did not agree with that suggestion, the European Communities requested that a ruling *in limine litis* be issued in writing on this issue.

4.10 We responded as follows:

"The Panel acknowledges receipt of your letter … in which you refer to the timetable and working procedures of the above-mentioned Panel. It has taken note of your various points. However, the Panel would like to stress, firstly, that, according to Article 12.1 of the DSU, it has the right to decide on its own working procedures, including the timetable, after consultations with the parties. Such consultations with the EC took place on 20 January 1999.

The Panel notes that, in response to a suggestion by the EC, it had sought, in a letter dated 15 January 1999, a reaction from all the original complaining parties in the original *Bananas III* dispute to an invitation to an informal meeting of the Panel, reconvened under Article 21.5 of the DSU, should such an invitation be forthcoming. As you know, Ecuador in a letter, dated 18 January 1999, indicated that it was not interested in participating in this Panel, reconvened at the initiative of the EC. As concerns Guatemala, Honduras and the United States they indicated at the special DSB meeting on 12 January 1999 and in a letter, dated 19 January 1999, that they did not intend to take part in the present Panel proceedings. Mexico responded in a similar way by telephone and has made a statement in the DSB reserving its right to initiate a separate procedure under Article 21.5 of the DSU. Therefore, the timetable for the Panel's work at this point refers to the EC and third parties only, since as a matter of fact only this party and third parties appear to have the intention to file submissions on the due dates.

The Panel does not believe that the current wording of the timetable is in any way contrary to the provisions of Article 12 of the DSU, nor that this Article would empower the reconvened Panel to compel original complaining parties in the *Bananas III* dispute to participate in this proceeding.

The Panel notes that of course it has the right, pursuant to Article 13 of the DSU, to seek information, at any point of time during this proceeding, from any individual or body from which its deems appropriate, including the original complainants in the *Bananas III* case. …"

4.11 In response to questions by the Panel, the European Communities took the following positions concerning this Panel proceeding:

- the European Communities considers Guatemala, Honduras, Mexico and the United States to be parties to this proceeding under Article 21.5 of the DSU;

- a party that refuses to appear has to bear the consequences of such refusal and must be presumed to have failed to appear;

- this Panel should rule that Guatemala, Honduras, Mexico and the United States have not brought their disagreement to the correct forum and thus they cannot rely on their unsupported allegations in any other legal procedure, since with regard to them the present EC banana import regime must be presumed to be WTO-consistent;

- such rulings by this Panel would become binding upon Guatemala, Honduras, Mexico and the United States after their adoption by the DSB.

4.12 In our view, there is no provision in the DSU that would authorize a panel to compel a Member to participate as a party in a panel proceeding. Accordingly, we do not have the authority to compel the original complainants to participate in this Article 21.5 proceeding. We note that the original complainants have declined to participate in this proceeding, and we therefore find that they are not parties to this proceeding. As a consequence, we do not find it necessary to address the procedural issues mentioned in their letters, e.g. whether the European Communities has failed to comply with Articles 4 and 6 of the DSU in respect of this Panel proceeding.

C. THE RELIEF SOUGHT BY THE EUROPEAN COMMUNITIES

4.13 The European Communities requests us to find that its implementing measures "must be presumed to conform to WTO rules unless their conformity has been duly challenged under the appropriate DSU procedures". We agree with the European Communities that there is normally no presumption of inconsistency attached to a Member's measures in the WTO dispute settlement system. At the same time, we also are of the view that the failure, as of a given point in time, of one Member to challenge another Member's measures cannot be interpreted to create a presumption that the first Member accepts the measures of the other Member as consistent with the WTO Agreement. In this regard, we note the statement by a GATT panel that "it would be erroneous to interpret the fact that a measure has not been subject to Article XXIII over a number of years, as tantamount to its tacit acceptance by contracting parties".[11]

4.14 As noted in our Concluding Remarks, it is not clear from the provisions of Article 21.5 whether the original respondent in a panel proceeding is, or should be, permitted under the DSU to initiate an Article 21.5 proceeding for the purpose of establishing the WTO consistency of measures taken to implement DSB rulings and recommendations. Assuming such an action is permitted, we note that in this proceeding, the European Communities presents in its written submission only one summary paragraph (paragraph 2.15) listing aspects of its prior banana import regime that it has changed in order to comply with the DSB's recommendations and rulings. We do not believe that a finding of WTO consistency could be made on the basis of the submission made by the European Communities in this case, as there is an insufficient discussion of how the previously found WTO inconsistencies have been eliminated in a WTO-consistent manner.

[11] Panel report on *EEC – Quantitative Restrictions Against Imports of Certain Products from Hong Kong*, adopted on 12 July 1983, BISD 30S/129, 138, paragraph 28.

4.15 Finally, we note that immediately prior (on the same date) to the establishment of this Panel, a panel was established by the DSB at the request of Ecuador to consider Ecuador's claim in an Article 21.5 proceeding that the EC's implementing measures are not consistent with its WTO obligations. The same three individuals are the panelists in these two Article 21.5 proceedings. Since we have found in the proceeding initiated by Ecuador that the EC's implementing measures are *not* consistent with its WTO obligations, it is clear that they cannot be presumed to be consistent in this proceeding.

D. THE RELATIONSHIP OF ARTICLES 21, 22 AND 23 OF THE DSU

4.16 A main argument of the European Communities in this proceeding concerns the relationship of Articles 21, 22 and 23 of the DSU. As noted above, the three individuals serving on this Panel have been charged by the DSB in Ecuador's recourse to Article 21.5 of the DSU to consider the WTO consistency of the EC's measures. The three of us have also been charged by the DSB, pursuant to Article 22 of the DSU, to consider as Arbitrators the level of the suspension of concessions proposed by the United States under that Article. At the time of our appointment as Arbitrators, we were entrusted with the following task by the Chairman of the DSB:

> "There remains the problem of how the panel and the arbitrators would coordinate their work, but as they will be the same individuals, the reality is that they will find a logical way forward, in consultation with the parties. In this way, the dispute settlement mechanisms of the DSU can be employed to resolve all of the remaining issues in this dispute, while recognizing the right of both parties and respecting the integrity of the DSU."

In these circumstances, we do not believe it would be appropriate for us to rule in this proceeding, as requested by the European Communities, that there is only one type of proceeding (i.e. pursuant to Article 21.5) in which the consistency of its measures may be considered. Rather, the issue of whether a claim may be made in a particular procedure is best left for determination in that procedure.

4.17 Moreover, in respect of the EC arguments concerning Articles 21, 22 and 23 of the DSU, we are well aware of the controversy in the DSB over the interpretation of these Articles and their relationship, but we view that question as one best resolved by Members in the context of the ongoing DSU review and not in a panel proceeding where there is only one party present and only a few active third parties.

E. CONCLUDING REMARKS

4.18 In fulfilling our terms of reference, we have not considered whether the original respondent in a panel proceeding, such as the European Communities, is authorized to initiate an Article 21.5 proceeding. In this regard, we would note that allowing such a procedure presents certain practical problems or anomalies, as cited by Japan in its arguments as a third party (paragraphs 3.12-3.14). However, we are also sympathetic to the concerns of India, also expressed as a third party, that in an appropriate case a respondent-initiated Article 21.5 proceeding should be allowed (paragraph 3.5). In our view, we would not rule out the possibility of using Article 21.5 in such a manner, particularly when the purpose of such initiation was clearly the examination of the WTO-consistency of implementing measures.

V. CONCLUSION

5.1 In light of the foregoing, we do not make findings as requested by the European Communities.

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