WORLD TRADE ORGANIZATION

RESTRICTED

WT/DSB/M/61
30 June 1999

(99-2703)

Dispute Settlement Body
6 May 1999

MINUTES OF MEETING

Held in Centre William Rappard
on 6 May 1999

Chairman: Mr. Nobutoshi Akao (Japan)

1. European Communities - Regime for the importation, sale and distribution of bananas - Recourse to Article 21.5 of the DSU by Ecuador

(a) Report of the Panel (WT/DS27/RW/ECU)

The Chairman recalled that on 18 December 1998, Ecuador had requested the DSB to reconvene the original Panel in accordance with Article 21.5 of the DSU to examine the implementation of the DSB's recommendations in the matter of the EC's regime for the importation, sale and distribution of bananas. At its meeting on 12 January 1999, the DSB had agreed to refer the matter raised by Ecuador to the original Panel in accordance with Article 21.5 of the DSU. The Report of the Panel had subsequently been circulated on 12 April 1999 in document WT/DS27/RW/ECU, and it was now before the DSB for adoption at the request of Ecuador. He also drew attention to the communication from Ecuador contained in document WT/DS27/50.

The representative of Ecuador said that the present meeting was being held at a time when the credibility of the WTO to resolve disputes was being challenged. Ecuador thanked the members of the original Panel for their work. The panelists had analysed once again the complex and controversial EC banana regime which was discriminatory and unjust. Their task was difficult not only because proceedings under Article 21.5 had been invoked for the first time, but also because within the same short period of time they had to carry out two other proceedings related to the same case. On 18 December 1998 Ecuador had requested that, in accordance with Article 21.5, the DSB reconvene the original Panel to examine the implementation of the DSB recommendations. On 12 January 1999, the DSB had agreed to refer the matter raised by Ecuador to the original Panel. The Panel report cirulated on 12 April 1999 had upheld Ecuador's position that the DSB's recommendations had not been correctly implemented by the EC. The Panel had found that the EC's revised banana import regime nullified and impaired Ecuador's rights. It had also found that the regime was inconsistent with Articles I and XIII of GATT 1994 as well as Articles II and XVII of GATS. At the present meeting, Ecuador, which was a developing country with its economy dependent on banana trade and on fair market access opportunities, was requesting the DSB to adopt the Panel report. The DSB had already adopted a similar report, but this had not prompted the EC to implement the DSB recommendations. Ecuador was committed to a rule-based trading system and believed that Members should exhaust all possible means to resolve disputes in order to ensure that their rights were respected and that obligations were implemented. At the present meeting, Ecuador expected the EC to recognize that its banana import regime, which had caused so much injury to the Ecuadorian banana sector, had to be fundamentally modified without delay. As indicated by Ecuador in document WT/DS27/50, the EC had to identify what specific changes would be made to its banana import regime in order to comply with the WTO rules. He recalled that, more than once, the EC had

stated in the DSB that it would not seek a reasonable period of time in which to modify its regime. This meant that the EC was not entitled to an additional period of time to inform Members of steps that would be taken to comply with its WTO obligations. At the present meeting it was essential that the EC demonstrate that it had already begun to modify its regime. He recognized that the EC might have some difficulties, but such difficulties should not delay prompt and decisive action in order to terminate this protracted dispute. The Panel's finding that the EC's regime nullified and impaired the benefits accruing to Ecuador ensured that Ecuador had the right to seek compensation. Accordingly, Ecuador wished to reserve its rights under Article 22 of the DSU, if the existing discrimination was not adequately remedied.

The representative of the European Communities said that the EC accepted the adoption of the Panel report at the present meeting. However, this did not mean that the EC welcomed the outcome of the report, nor that it shared the Panel's legal reasoning. On the contrary, the EC was rather disappointed that, at the end of such a long procedure, the ruling had not created the legal certainty that could be expected. The EC had nevertheless decided not to exercise its right to appeal the Panel's findings, because it was not appropriate to endlessly prolong legal debates. The EC recognized that, by resorting to the Article 21.5 procedure, Ecuador had followed the only avenue compatible with the EC's understanding of a rule-based system. The EC was prepared and ready to immediately start consultations with Ecuador on the best way to implement the Panel's recommendations in full conformity with the DSU. The contacts recently initiated by the EC with Ecuador would be further pursued.

The representative of the United States said that the two reports of the original Panel in the banana case -- under Article 22 and under Article 21.5 -- had affirmed once again that the EC banana regime was in violation of its WTO obligations. The United States hoped that the EC would finally bring its banana import regime into compliance in order to terminate this long-standing dispute. As stated previously, the United States preferred a solution that was mutually acceptable to all the parties to the dispute and consistent with the covered agreements. Her country was ready and willing to negotiate with the EC a solution to the banana dispute, taking into account the interests of all the countries concerned. The EC had stated that Members should have recourse to Article 21.5 to secure compliance with the WTO rules. It was now for the EC to show its good faith and to comply immediately with the Panel's findings in order to provide a market-opening resolution by withdrawing the elements of its banana regime that had been found to violate the GATT 1994 and the GATS.

The representative of Guatemala reiterated his country's confidence in the dispute settlement mechanism. He regretted that after so many years of work and so many Panel and Appellate Body reports that had confirmed the incompatibility of the EC's banana regime, it had been necessary to invoke additional proceedings to re-examine this incompatibility, which represented a lot of work for Guatemala. However, Guatemala was glad that the Article 21.5 procedure invoked by Ecuador had been concluded in a satisfactory manner, and that the Panel once again had demonstrated the incompatibility of the EC banana regime with the WTO rules. The Panel's suggestions were of interest for Guatemala and their implications were now being examined. He hoped that the implementation process would be without prejudice to the parties involved and that it would be non-discriminatory, in line with the WTO rules and would benefit all the parties. He thanked the Panel for its work and Ecuador for its initiative. His delegation welcomed the statement by the EC that it would implement the Panel's recommendations. His delegation hoped that the EC would shortly meet with interested parties with a view to finding a satisfactory solution.

The representative of Panama thanked the members of the original Panel for their work and Ecuador for its initiative. Panama was currently in the process of examining the results of the Panel which in its view were satisfactory. Any long-term solution to this matter should take into account the interests of all the parties to the dispute. In the past, the EC had stated that it was ready to meet with all the parties in order to consult on the possibility of resolving this dispute. Panama was open to

such consultations. In previous DSB meetings, his delegation had invited the ACP countries to seek an agreement which would take into account the interest of all developing countries, and to make suggestions to the EC to this effect. At the present meeting, he reconfirmed the invitation and hoped that these discussions would begin shortly.

The representative of Costa Rica said that his country, which was a third party in the Panel proceedings, supported the Panel report before the DSB. However, he wished to express some concerns with regard to certain aspects of the report. First, his delegation was disappointed that the Panel had ignored Costa Rica's request to take into account the interests of third parties in accordance with Article 10 of the DSU. It was not enough to have allowed third parties to be present in the proceedings and to include their views in the descriptive part of the report. Their arguments should have been dealt with by the Panel in its conclusions. Costa Rica's arguments had been ignored and this was unjustifiable, in particular since Costa Rica was the second banana exporter to the EC market. Furthermore, substantive matters of interest to third parties were under examination pursuant to Article 22, including the question of distribution of specific quotas for suppliers with substantial interests under the Banana Framework Agreement (BFA) to which Costa Rica was a signatory. His delegation had not had access to full information and had not been given the additional opportunity to present its arguments. Costa Rica believed that the political solution, namely to accept recourse to Article 22 prior to the completion of Article 21.5 proceeding, was legally incorrect and limited the rights of third parties.

With regard to the substantive aspects of the Panel's report, the Panel had condemned, without explanation, the system of distribution of specific quotas. By doing so, it had contradicted its previous report adopted in September 1997 and had limited the right of importing Members under Article XIII:2(d) of GATT 1994. In its previous report the Panel had recognized the validity of the reference period of 1989-1991 which was the basis for distribution agreed under the BFA by the EC and some countries, including Costa Rica and Colombia. The quotas for these two countries had not been condemned and these two countries had been recognized as suppliers having a substantial interest at that time. The present Panel report disregarded the above and substantially undermined the rights under Article XIII:2 (d) of GATT 1994.

The representative of Australia said that his delegation welcomed the procedural approach adopted by Ecuador to resolve its differences with the EC. This approach ensured that any subsequent action required of the EC under the DSU would have an unquestionable legal foundation. Australia looked forward to further discussions in the context of the DSU review on the important systemic issues raised by the banana dispute.

The representative of Brazil said that his delegation had noted the references made to the m.f.n. principle and hoped that this principle would apply with regard to access for Brazilian bananas to the EC's market.

The representative of Colombia said that since the EC had not appealed the Panel report in accordance with the DSU provisions, the report would have to be adopted at the present meeting. The Panel's decisions and recommendations had affected her country's rights as a principal banana supplier to the EC market. However, since the EC had not appealed the Panel report, Colombia, as a third party, could not defend its rights. Her delegation was concerned that the Panel's recommendations contradicted the language of Article XIII:2(d) of GATT 1994. The Panel's interpretation of that Article was incorrect and should have been revised by the Appellate Body. The Panel contradicted its decisions contained in its earlier report without any justification. She underlined Colombia's interest in participating in the consultations aimed at ensuring the implementation of the Panel's recommendations. The only way to implement these recommendations in a manner consistent with the rights and obligations of the EC and other Members was to take into account the rights of all Members and not only those of the complainants.

The representative of Japan said that his delegation welcomed the fact that Ecuador had invoked Article 21.5 procedures and that the DSB was in a position to adopt the report. As stipulated in Article 21.5, Japan believed that when there was disagreement on consistency of implementing measures with the covered agreements, the only legal avenue provided for in the DSU was Article 21.5. Japan, like Australia, believed that if there was any doubt to this interpretation, the issue could be raised in the DSU review.

The representative of Mexico said that as stated by Guatemala and Panama, his country wished to thank the members of the original Panel for their work and Ecuador for its initiative. Mexico was ready to enter into consultations with the EC in order to negotiate a regime that would be beneficial to all parties without prejudice to the ACP countries and the complainants in the original dispute on this matter.

The representative of India said that his country had a systemic interest in the case at hand, and therefore wished to make some comments. First, the Panel report under Article 21.5 was before the DSB for the first time. He welcomed that this important element of the dispute settlement mechanism had been made operational by Ecuador. The fact that Ecuador had invoked Article 21.5 procedures and that the original Panel had completed its work within the 90-day period, demonstrated that Article 21.5 could work and established its utility within the dispute settlement mechanism. He thanked Ecuador for its initiative and the members of the original Panel for their efforts. India considered that Articles 21.5 and 22 were sequential. India had a systemic concern with regard to the terms of reference of the Panel. The Panel had supported Ecuador's view that the matter before the Panel was that referred to the DSB by Ecuador in its panel request (WT/DS27/41). On the other hand, the EC and some third parties had argued that the terms of reference of the Panel should be limited to the matters raised in the original Panel and Appellate Body reports. The EC's view was that the Panel could only examine the consistency of implementing measures and should not consider other claims raised by Ecuador. The EC had noted that it would be to its disadvantage if new claims were allowed to be made, since the shorter period of time under Article 21.5 would affect its case in defending its measures. The EC's arguments were valid because if the prevailing Member had the right to make claims against the implementing Member, this could have unpredictable consequences and could complicate the Article 21.5 panel process. The Panel had noted that the issues raised by Ecuador were similar to those raised in the Bananas III case.[1] However, this might not always be the case. Furthermore, it was incorrect for the Panel to follow the terms of reference applicable to panels established pursuant to Article 6 of the DSU. One should recognize that the terms of reference under Article 21.5 were different. The purpose of a panel under Article 21.5 was to determine the WTO-consistency, or otherwise, of the measures taken by an implementing Member. It would not be correct if a panel under Article 21.5 would have an unlimited mandate to examine all the claims made by the prevailing Member whether or not they had been the subject of rulings by the original panel or the Appellate Body. India was also not convinced by the Panel's argument that the language of Article 21.5 did not place any limits on its terms of reference. One could also argue that there was nothing in Article 21.5 that sanctioned the Panel's approach of considering all claims made by the prevailing Member whether or not they were matters on which the Panel or the Appellate Body had made conclusions. While promptness was an important aspect of the dispute settlement mechanism, it was equally important to ensure due process of law. India believed that the Panel had erred by ignoring the valid arguments made by the EC.

He noted that the Panel report under Article 21.5 pursuant to the EC's request was related to the present discussion although it was not on the agenda of the present meeting. As India had already indicated it was legitimate for an implementing Member to initiate Article 21.5 procedures and to

[1]Panel Reports WT/DS27/R/ECU/GTM/HND/MEX/USA and the Appellate Body Report, WT/DS27/AB/R, adopted on 25 September 1997.

seek a multilateral determination of compliance with the DSB recommendations. This would demonstrate the implementing Member's good faith and *bona fides* of its actions taken during the implementation process. Had such a possibility not been available, the prevailing Member's assessment of compliance or non-compliance would become final. This was not in the spirit of multilateralism. This issue could be addressed in the DSU review in the context of the ongoing work on Articles 21.5 and 22. The case under consideration had made it clear that Article 21.5 could work given the willingness of all parties concerned. It was important that in case there was a disagreement on compliance by an implementing Member, there should be compliance with Article 21.5 both in letter and spirit before a Member was granted any rights under Article 22.

The representative of Hong Kong, China expressed his delegation's gratitude to the members of the original Panel for their work. The results and interpretations contained in the Panel report should not create any precedent with regard to future cases. The issues concerning the interpretation of Article 21.5 and its relationship with Article 22 was now the subject of the DSU review and his delegation looked forward to positive results by the end of July. He noted that the Panel had emphasized that Members remained free to choose how to implement the DSB recommendations. In view of the special circumstances of the banana case, the Panel had made some suggestions pursuant to Article 19.1 of the DSU with a view to promptly terminating this dispute. His delegation welcomed this and hoped that future panels would follow the Panel's approach.

The representative of Jamaica said that her delegation had noted the Panel report and drew attention to the Panel's concluding remarks which read as follows: "We recall that the fundamental principles of the WTO and WTO rules are designed to foster development, not impede it. As illustrated by our suggestions on implementation above, the WTO system is flexible enough to allow, through WTO-consistent trade and non-trade measures, appropriate policy responses in a wide variety of circumstances across countries, including countries that are heavily dependent on the production and commercialization of bananas". Jamaica hoped that in an effort to find a mutually satisfactory solution, these development objectives and the spirit of flexibility referred to in the concluding remarks by the panelists would be recognized. It looked forward to a concrete expression of this flexibility by all parties concerned.

The representative of the United States said that in response to some comments, he wished to thank the members of the Panel for showing a way forward as stated by the Director-General at the 29 January DSB meeting. The Panel had shown that the DSU provided for both processes under Article 22 and Article 21.5. Neither of these two processes was exclusive of the other, nor did it require any particular sequence to be employed. The Panel report and the Arbitrators' report provided valuable guidance to this effect. One could not maintain that either of these processes was the only genuine process and that the other process did not count.

The representative of Côte d'Ivoire noted that some delegations had indicated that there was a possibility for concerted efforts both with the EC and the Latin American countries. Her delegation considered this to be positive because this concentration of effort would make it possible not only to examine but also to ensure that decisions in favour of multinationals would not prejudice the interests of the Members' concerned. The essential element was not that of the interests of multinationals. It was necessary to ensure that all decisions should be formulated so as to avoid creating prejudice for any party concerned. Côte d'Ivoire hoped that the interests of the ACP countries would be taken into consideration.

The representative of Panama said that, as his delegation had stated on a number of occasions, it was oversimplifying to state that the case at hand was about a struggle between the interests of multinationals and developing countries. This case involved the real needs of the Latin American countries as opposed to the EC's regime, and those who benefited from that regime. Panama hoped

that parties would be able to proceed with an open mind, recognizing the interests of both sides in order to be able to identify common interests.

The representative of Turkey said that like many other delegations, his delegation had a systemic interest in the matter at hand. Turkey believed that when there was a discrepancy in interpreting an implementation of a panel or Appellate Body ruling, the parties should invoke Article 21.5 before resorting to Article 22.

The representative of Costa Rica said that his country's position on Articles 21.5 and 22 was that the two Articles were sequential and believed that no precedent had been set with regard to Article 22 by recent Panel Reports.

The DSB took note of the statements and adopted the Panel Report contained in WT/DS27/RW/ECU.