WORLD TRADE ORGANIZATION

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EUROPEAN COMMUNITIES - REGIME FOR THE IMPORTATION, SALE AND DISTRIBUTION OF BANANAS

Communication from Guatemala, Honduras, Panama and the United States

The following communication, dated 11 January 1999, from the Permanent Missions of Guatemala, Honduras, Panama and the United States to the Chairman of the Dispute Settlement Body, is circulated at the request of these delegations.

We are writing to express our objection to the European Community (EC) efforts made in sessions of the Dispute Settlement Body (DSB) on 15 December and 21 December to circumvent the normal DSB rules and procedures. We consider that the DSB actions sought by the European Community at those sessions concerning the bananas dispute went beyond the express and delimited purpose of those sessions, and therefore the DSB cannot conclude that the discussions at those sessions constituted the first meeting at which the EC's purported panel request was considered by the DSB for purposes of Article 6.1 of the DSU. Not only does the EC request (document WT/DS/27/40) not constitute recourse to Article 21.5, but there is no procedural basis for the DSB to treat the forthcoming meeting on 12 January as the second meeting at which DSB action could be taken upon that request.

On 25 November, the DSB decided to extend its meeting to provide for the possibility that the DSB might need to ratify an agreement among the parties to the banana dispute (DS27) to reconvene the original panel to review the banana measures in effect in the EC as of 1 January 1999. At the meeting on 25 November, you recommended to the DSB, and the DSB agreed, both to include an additional item on the agenda of the meeting (entitled "EC -- Regime for the importation, sale and distribution of bananas -- Recourse to Article 21.5") and to adjourn the meeting and "reconvene at a later date in order to consider this matter." You acknowledged the basis for such an extension of the DSB meeting when you properly said, "It is understood that this proposal is made under exceptional circumstances in the light of the importance of the matter and on the basis of the *agreement* reached to this effect among the parties concerned." Thus it was clear at the outset that the extension of the DSB meeting of 25 November was an extraordinary one and based on an understanding that any action to be taken by the DSB would be one to which the parties would agree. Your understanding -- and ours -- of these preconditions was again expressed on 3 December in announcing a possible reconvening of the DSB on 8 December. You stated that it "would be" your intention to reconvene the DSB "*if* a *mutually agreed* approach to this matter can be reached on time."

Despite the precondition you stated for reconvening the DSB -- a mutually-agreed approach -- on 11 December the EC wrote you wholly unilaterally and asked to reconvene the DSB. A few hours

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before the DSB was reconvened on 15 December, our governments received a copy of a purported panel request by the EC, which did not reflect a mutually-agreed approach. As Chairman, you properly told the DSB that no decisions could be taken at that meeting.

Contrary to your suggestion at the 21 December DSB meeting, the question whether, under these circumstances, that meeting could constitute the first meeting for consideration of the EC request is a question for the DSB, not for a panel convened in response to the EC's request. Moreover, the DSB's decision not to adjourn the 25 November meeting pending an agreement between the parties was not a decision to waive the notice and prior documentation requirements in the DSB's rule of procedure.

As much as our governments object to the numerous procedural irregularities, we take even greater exception to the obvious substantive defects of the EC's request. Rather than requesting recourse to Article 21.5 to review the EC banana regime, the EC has requested a panel to interpret Article 21.5. Otherwise put, the EC's request is not seeking a panel to review the consistency of its banana measures, but instead is demanding that the DSB establish a panel to agree with the EC's legal position on Article 21.5. The request further seeks to establish a new presumption in favor of the party that has been found in violation of its WTO obligations. There is no basis whatsoever in the DSU for the creation of an Article 21.5 panel to accomplish such purposes. Nor can we accept the EC's extraordinary attempts to change its panel request *orally*, which can have no legal effect whatsoever in light of DSU Article 6.2, which requires that panel requests must be in writing.

Moreover, if Article 4 of the DSU (Consultations) is applicable to Article 21.5 procedures, as the EC has previously claimed, then the EC has not satisfied its own stipulated precondition for the lodging of such a request. The EC representative itself summed up the substantive deficiency and irregularities of its own request when it noted on 15 December that the EC could not initiate a complaint against itself. Accordingly, its request does not and cannot constitute "Recourse to Article 21.5."

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