

**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.

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 reports¹, 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, 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.

[Parties' arguments in Sections II and III deleted from this version]

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 it 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.

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

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.

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.
