

**UNITED STATES – IMPORT MEASURES ON  
CERTAIN PRODUCTS FROM  
THE EUROPEAN COMMUNITIES**

*Report of the Panel*

The report of the Panel on United States – Import Measures on Certain Products from the European Communities is being circulated to all Members, pursuant to the DSU. The report is being circulated as an unrestricted document from 17 July 2000 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.

Note by the Secretariat: This Panel Report shall be adopted by the Dispute Settlement Body (DSB) within 60 days after the date of its circulation unless a party to the dispute decides to appeal or the DSB decides by consensus not to adopt the report. If the Panel Report is appealed to the Appellate Body, it shall not be considered for adoption by the DSB until after the completion of the appeal. Information on the current status of the Panel Report is available from the WTO Secretariat.

## I. PROCEDURAL BACKGROUND

1.1 This proceeding was initiated by the European Communities, as complaining party against the United States.

1.2 On 4 March 1999, the European Communities requested consultations with the United States under Article XXII:1 of the General Agreement on Tariffs and Trade 1994 ("GATT") and Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Dispute ("DSU") with regard to the US decision, effective as of 3 March 1999, to withhold liquidation on imports from the European Communities of a series of products (listed in the Annex to the document WT/DS165/1), together valued at over \$500 million on an annual basis, and to impose a contingent liability for 100 per cent duties on each individual importation of affected products as of this date. The European Communities claimed that according to information provided by the United States Trade Representative ("USTR"), this measure includes administrative provisions which foresee, among other things, the posting of a bond to cover the full potential liability.

1.3 On 11 May 1999, the European Communities requested the establishment of a panel pursuant to Article 6 of the DSU (WT/DS165/8).

1.4 In its panel request, the European Communities claims that:

"I have the honour to request, on behalf of the European Communities, the establishment of a panel pursuant to Article XXIII of the General Agreement on Tariffs and Trade 1994 (GATT 1994) and Articles 4 and 6 of the Dispute Settlement Understanding (DSU) with respect to the US decision, effective as of 3 March 1999, to withhold liquidation on imports from the EC of a list of products, together valued at \$520 million on an annual basis, and to impose a contingent liability for 100 per cent duties on each individual importation of affected products as of this date (annex 1). This measure includes administrative provisions that foresee, among other things, the posting of a bond to cover the full potential liability.

... When the US received WTO authorization on 19 April 1999 to suspend concessions as of that date on EC imports of products with an annual value of only \$191.4 million, a more limited list of products was selected from the previous list (annex 2). At the same time, the US confirmed, despite the prospective nature of the WTOs, the liability for 100 per cent duty on the products on the list in annex 2 that had entered the US for consumption with effect from 3 March 1999.

The European Communities considers that this US measure is in flagrant breach of the following WTO provisions:

- Articles 3, 21, 22 and 23 of the DSU;
- Articles I, II, VIII and XI of GATT 1994.

Through these violations of fundamental WTO rules, the US measure nullifies or impairs benefits accruing, directly or indirectly, to the European Communities under GATT 1994. This measure also impedes important objectives of GATT 1994 and of the WTO."

1.5 On 16 June 1999, the Dispute Settlement Body ("DSB") established the Panel pursuant to Article 6 of the DSU. In accordance with Article 7.1 of the DSU, the terms of reference of the Panel are:

"To examine, in the light of the relevant provisions of the covered agreements cited by the European Communities in document WT/DS165/8, 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."

1.6 Dominica, Ecuador, India, Jamaica, Japan, and St. Lucia, reserved their rights to participate in the Panel proceedings as third parties.

1.7 On 29 September 1999, the European Communities requested the Director-General, pursuant to Article 8.7 of the DSU, to determine the composition of the Panel. On 8 October 1999, the Director-General announced the composition of the Panel as follows:

Chairman:	Mr. Hugh McPhail
Members:	Ms. Leora Blumberg Mr. Peter Palecka

1.8 The Panel had substantive meetings with the parties on 16 and 17 December 1999, and 9 February 2000.

## II. FACTUAL ASPECTS

### A. FACTUAL BACKGROUND TO THIS CASE

1.1 At its meeting of 25 September 1997, the DSB adopted the Appellate Body report,<sup>1</sup> and the panel reports,<sup>2</sup> as modified by the Appellate Body report, on European Communities – *Regime for the Importation, Sale and Distribution of Bananas*.<sup>3</sup> The Appellate Body report recommended that the [DSB] request the European Communities to bring the measures found in this Report and in the Panel Reports ... to be inconsistent with the GATT 1994 and GATS into conformity with the obligations of the European Communities under those agreements."<sup>4</sup> In this case, Ecuador, Guatemala, Honduras, Mexico and the United States (the "Complainants on *EC - Bananas III*") claimed that the EC regime for the importation, sale and distribution of bananas established by the Council Regulation (EEC) 404/93, and the subsequent EC legislation, regulations and administrative measures, was inconsistent with the WTO Agreement.<sup>5</sup> At the DSB meeting of 16 October 1997, the European Communities confirmed that "the Communities would fully respect their international obligations with regard to this matter."<sup>6</sup>

2.2 On 24 October 1997, the European Communities requested consultations with the Complainants on *EC - Bananas III* in order to reach agreement on a "reasonable period of time" for the implementation of the recommendations and rulings of the DSB adopted on 25 September 1997, but these consultations did not lead to an agreement.<sup>7</sup> Pursuant to the request of the Complainants on *EC - Bananas III*, on 8 December 1997, the Director-General of the WTO appointed

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<sup>1</sup> Appellate Body Report on European Communities – *Regime for the Importation, Sale and Distribution of Bananas* ("*EC - Bananas III*"), adopted on 25 September 1997, WT/DS27/AB/R.

<sup>2</sup> Panel Reports on *EC - Bananas III*, modified by the Appellate Body, and adopted on 25 September 1997, WT/DS27/R/ECU, WT/DS27/R/GTM, WT/DS27/R/HND, WT/DS27/R/MEX, and WT/DS27/R/USA.

<sup>3</sup> WT/DSB/M/37.

<sup>4</sup> Appellate Body Report on *EC - Bananas III*, op. cit., para. 257.

<sup>5</sup> Ibid., para. 1.

<sup>6</sup> WT/DSB/M/38.

<sup>7</sup> Awards of the Arbitrator under Article 21.3(c), *EC - Bananas III*, issued on 7 January 1998, WT/DS27/15, para. 2.

Mr. Said El-Naggar as the arbitrator.<sup>8</sup> On 7 January 1998, the arbitrator decided that the "'reasonable period of time' ... [was] the period from 25 September 1997 to 1 January 1999."<sup>9</sup>

2.3 On 20 July 1998, the Council of the European Union adopted the Regulation (EC) No. 1637/98 amending the Council Regulation (EEC) No. 404/93 on the common organization of the market in bananas. This Regulation entered into force on 31 July 1998, and later became applicable as of 1 January 1999.<sup>10</sup> Further, on 28 October 1998, the Commission of the European Communities adopted the Regulation (EC) No. 2362/98 laying down detailed rules for the implementation of the Council Regulation (EEC) No. 404/93 regarding imports of bananas into the European Communities. This Regulation entered into force on 1 November 1998, and later became applicable as of 1 January 1999 as well.<sup>11</sup>

2.4 On 18 August 1998, the Complainants on *EC - Bananas III* jointly and severally requested consultations with the European Communities in relation to the proposed banana regime.<sup>12</sup> Their request for consultations states as follows:

"At [a] meeting [of 6 August 1998], the EC clarified its view that Article 21.5 requires parties to consult as a prior condition to the resort to the original panel to resolve the disagreement over the WTO-consistency of the EC measures taken to implement the DSB rulings and recommendations. ...

...

We do not agree that consultations are necessary before resorting to the original panel under Article 21.5. The EC's position taken for the purposes of this dispute appears calculated to produce maximum delay and is unsupportable for the effective functioning of the dispute settlement system. ..."<sup>13</sup>

2.5 On 8 September 1998, in their joint communication to the Chairman of the DSB, the Complainants on *EC - Bananas III* claimed that since the proposed banana scheme of the European Communities was inconsistent with the WTO Agreement, and thus, "in order to ensure compliance with the DSB recommendations and ruling by the end of the reasonable period of time on 1 January, 1999, ... this matter should be referred to a panel pursuant to Article 21.5 [of the DSU]."<sup>14</sup> At the DSB meeting of 22 September 1998, such panel was not established.<sup>15</sup> At that meeting, however, the United States, on its own behalf and on behalf of the other Complainants on *EC - Bananas III* and Panama, stated as follows:

"... The EC's insistence on consultations only delayed the process. This delay would only prolong the dispute beyond the reasonable period of time established by the arbitrator. These delaying tactics, if tolerated, would have serious consequences for the DSU and the multilateral trading system. ..."<sup>16</sup>

In response, the European Communities indicated as follows:

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<sup>8</sup> WT/DS27/14. This appointment was made in accordance with footnote 12 to Article 21.3(c) of the DSU.

<sup>9</sup> Awards of the Arbitrator 21.3(c), *EC - Bananas III*, op. cit., para. 20.

<sup>10</sup> Communication, dated 15 December 1998, from the European Communities to the Chairman of the DSB, WT/DS27/40.

<sup>11</sup> Ibid.

<sup>12</sup> Communication, dated 18 August 1998, from Ecuador, Guatemala, Honduras, Mexico, and the United States to the Chairman of the DSB, WT/DS27/18.

<sup>13</sup> Ibid.

<sup>14</sup> Communication, dated 8 September 1998, from Ecuador, Guatemala, Honduras, Mexico, and the United States, WT/DS27/21.

<sup>15</sup> WT/DSB/M/48.

<sup>16</sup> Ibid.

"The Community believed that the dispute which fell under Article 21.5 of the DSU should be resolved in accordance with the normal dispute settlement procedures except as otherwise provided in this Article. ... The normal dispute settlement procedures implied the need to hold consultations and the Community had insisted on this point. ... [T]hese were not delaying tactics but a simple application of the DSU procedures. ..."<sup>17</sup>

2.6 On 13 November 1998, Ecuador requested the reactivation of the 17 September 1998 consultations with the European Communities.<sup>18</sup> As their consultations did not result in a mutually satisfactory solution, on 18 December 1998, Ecuador requested "the WTO Dispute Settlement Body, at today's meeting, to call for the re-establishment of the Panel that originally heard the case in order to resolve the conflict with the European Communities concerning the consistency of its measures to implement the recommendations and rulings of the Dispute Settlement Body of 25 September 1997."<sup>19</sup> At its meeting of 12 January 1999, the DSB agreed "to refer to the original panel, pursuant to Article 21.5, the matter raised by Ecuador in document WT/DS27/41."<sup>20</sup>

2.7 On 14 December 1998, the European Communities requested that the DSB establish "a panel under Article 21.5 of the DSU with the mandate to find that [its new bananas import regime] must be presumed to conform to WTO rules unless [its] conformity has been duly challenged under the appropriate DSU procedures."<sup>21</sup> At its meeting of 12 January 1999, the DSB also agreed "to refer [the matter] to the original panel pursuant to Article 21.5 of the DSU."<sup>22</sup>

2.8 On 14 January 1999, pursuant to Article 22.2 of the DSU, the United States "request[ed] authorization from the Dispute Settlement Body (DSB) to suspend the application to the European Communities (EC), and Member States thereof, of tariff concessions and related obligations under the General Agreement on Tariffs and Trade 1994 (GATT), covering trade in an amount of US\$520 million,"<sup>23</sup> claiming that the European Communities had "fail[ed] to bring its regime for the importation, sale and distribution of bananas (banana regime) into compliance, by 1 January 1999, with the GATT and the General Agreement on Trade in Services (GATS) or to otherwise comply with the recommendations and rulings of the DSB in EC - Regime for the Importation, Sale and Distribution of Bananas."<sup>24</sup>

2.9 On 29 January 1999, the European Communities, "[p]ursuant to Article 22.6 of the DSU, ... object[ed] to the level of suspension proposed by the United States in document WT/DS27/43," and further requested that "the matter ... be submitted to arbitration", claiming "that the Community banana import measures found to be inconsistent with WTO obligations were withdrawn by 1 January 1999 and have therefore ceased to produce their effects since the expiry of the reasonable period of time determined in accordance with Article 21, paragraph 3 [of the DSU] ...".<sup>25</sup>

2.10 At its meeting of 25, 28 and 29 January and 1 February 1999, the Chairman suggested, among others, as follows:

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<sup>17</sup> Ibid.

<sup>18</sup> Communication, dated 13 November 1998, from Ecuador to the Chairman of the DSB and the European Communities, WT/DS27/30 and WT/DS27/30/Add.1.

<sup>19</sup> Communication, dated 18 December 1998, from Ecuador to the Chairman of the DSB, WT/DS27/41.

<sup>20</sup> WT/DSB/M/53.

<sup>21</sup> Communication, dated 14 December 1998, from the European Communities to the Chairman of the DSB, WT/DS27/40.

<sup>22</sup> WT/DSB/M/53.

<sup>23</sup> Communication, dated 14 January 1999, from the United States to the Chairman of the DSB, WT/DS27/43.

<sup>24</sup> Ibid.

<sup>25</sup> Communication, dated 29 January 1999, from the European Communities to the Chairman of the DSB, WT/DS27/46.

"[A]s to bananas the original panel is now engaged in two Article 21.5 proceedings. ... [A]ssuming the EC make a request for arbitration under Article 22.6, the same individuals could be given the task of arbitrating the level of suspension. ... 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."<sup>26</sup>

The DSB then agreed "that the matter be referred to arbitration by the original panel in accordance with Article 22.6 of the DSU."<sup>27</sup>

2.11 On 18 February 1999, the United States,

"[p]ursuant to Article 22.7 of the [DSU], ... request[ed] authorization from the [DSB] to suspend the application to the European Communities (EC), and member States thereof, of tariff concessions and related obligations under the General Agreement on Tariffs and Trade 1994 (GATT), in an amount consistent with DSU Article 22.4, as determined by the arbitrator pursuant to DSU Article 22.7 in 'EC – Regime for the Importation, Sale and Distribution of Bananas'.<sup>28</sup>

The United States further explained that "[a]ccording to Article 22.6 of the DSU and the timetable for the arbitrators' work, the arbitrators' decision is to be issued by 2 March 1999."<sup>29</sup>

2.12 On 2 March 1999, the arbitrators, in their initial decision, requested the parties to supply them with certain additional information.<sup>30</sup> They indicated that "[f]ollowing our receipt and analysis of that information, we expect to be in a position to issue a final decision in this matter soon thereafter."<sup>31</sup>

2.13 On 3 March 1999, the United States took those actions described in Section B below. As described in Section I above, on 4 March 1999, the European Communities requested consultations with the United States on the matter under Article XXII:1 of the GATT and Article 4 of the DSU, and subsequently on 16 June 1999, pursuant to the EC request, the DSB established this Panel pursuant to Article 6 of the DSU.

2.14 On 6 April 1999, the Article 22.6 arbitrators and the Article 21.5 panels issued simultaneously to the parties, both the decision of the arbitrators, and the panel reports on the recourse to Article 21.5 by Ecuador and the European Communities.<sup>32</sup>

2.15 On 7 April 1999, pursuant to Article 22.7 of the DSU, the United States requested that "the DSB authorise it to suspend concessions in an amount up to US\$191.4 million per year...", referring to the arbitrators' decision issued to the parties on 6 April 1999.<sup>33</sup>

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<sup>26</sup> WT/DSB/M/54.

<sup>27</sup> Ibid.

<sup>28</sup> Communication, dated 18 February 1999, from the United States to the Chairman of the DSB, WT/DS27/47.

<sup>29</sup> Ibid.

<sup>30</sup> Decision by the Arbitrators on *EC - Bananas III*, Recourse to Arbitration by the European Communities under Article 22.6 of the DSU, issued on 9 April 1999, WT/DS27/ARB, ("*EC - Bananas III* Arbitration (22.6-7)"), para. 2.10.

<sup>31</sup> WT/DS27/48.

<sup>32</sup> See WT/DSB/M/59.

<sup>33</sup> Communication, dated 9 April 1999, from the United States to the Chairman of the DSB, WT/DS27/49.

2.16 On 9 April 1999, the following decision of the arbitrators was circulated to the Members:

"[T]he Arbitrators determine that the level of nullification or impairment suffered by the United States in the matter European Communities – *Regime for the Importation, Sale and Distribution of Bananas* is US\$191.4 million per year. Accordingly, the Arbitrators decide that the suspension by the United States of the application to the European Communities and its member States of tariff concessions and related obligations under GATT 1994 covering trade in a maximum amount of US\$191.4 million per year would be consistent with Article 22.4 of the DSU."<sup>34</sup>

2.17 In reaching this conclusion, the arbitrators explained as follows:

"[W]e cannot fulfil our task to assess the *equivalence* between the two levels before we have reached a view on whether the revised EC regime is, in light of our and the Appellate Body's findings in the original dispute, fully WTO-consistent. It would be the WTO-inconsistency of the revised EC regime that would be the root cause of any nullification or impairment suffered by the United States. Since the level of the proposed suspension of concessions is to be equivalent to the level of nullification or impairment, logic dictates that our examination as Arbitrators focuses on that latter level before we will be in a position to ascertain its equivalence to the level of the suspension of concessions proposed by the United States."<sup>35</sup>

2.18 On 12 April 1999, the panel which addressed the recourse to Article 21.5 of the DSU by the European Communities circulated a final report to the Members. In its report, the panel concluded that "we do not make findings as requested by the European Communities."<sup>36</sup> In this proceeding, the European Communities claimed as follows:

"[S]ince 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*) had to be deemed ...in so far as [these parties to the original dispute] were concerned, to be in conformity with the WTO covered agreements so long as those original parties had not successfully challenged the new EC regime under the relevant dispute settlement procedures of the WTO."<sup>37</sup>

2.19 On the same day, the panel which addressed the recourse to Article 21.5 of the DSU by Ecuador circulated a final report to the Members. In its report, the panel concluded that "aspects of the EC's import regime for bananas are inconsistent with the EC's obligations under ... GATT 1994 and ... GATS."<sup>38</sup> This report was adopted by the DSB at its meeting of 6 May 1999.<sup>39</sup>

2.20 At its meeting of 19 April 1999, the DSB, "pursuant to the US request under Article 22.7 of the DSU, agree[d] to grant authorization to suspend the application to the European Communities and its member States of tariff concessions and related obligations under GATT 1994, consistent with the decision of the Arbitrators contained in document WT/DS27/ARB."<sup>40</sup>

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<sup>34</sup> Arbitration (22.6-7) *EC - Bananas III*, para. 8.1.

<sup>35</sup> *Ibid.*, para. 4.8 (emphasis original)

<sup>36</sup> Panel Report on *EC – Bananas III*, Recourse to Article 21.5 by the European Communities, circulated on 12 April 1999, WT/DS27/RW/EEC, para. 5.1.

<sup>37</sup> *Ibid.*, para. 2.22.

<sup>38</sup> Panel Report on *EC – Bananas III*, Recourse to Article 21.5 by Ecuador, adopted on 6 May 1999, WT/DS27/RW/EQU, para. 7.1.

<sup>39</sup> WT/DSB/M/61.

<sup>40</sup> WT/DSB/M/59.

B. MEASURE AT ISSUE

2.21 In this case, the European Communities requested that the DSB establish a panel,

"with respect to the US decision, effective as of 3 March 1999, to withhold liquidation on imports from the EC of a list of products, together valued at \$520 million on an annual basis, and to impose a contingent liability for 100 per cent duties on each individual importation of affected products as of this date (annex 1 [to the request]). This measure includes administrative provisions that foresee, among other things, the posting of a bond to cover the full potential liability."<sup>41</sup>

2.22 This request corresponds to the USTR press release of 3 March 1999, which states as follows:

"[E]ffective today, the U.S. Customs Service will begin 'withholding liquidation' on imports valued at over \$500 million of selected products from the European Union (EU), consistent with U.S. rights under the WTO agreements. Withholding liquidation imposes contingent liability for 100 per cent duties on affected products as of March 3, 1999."<sup>42</sup>

2.23 On 3 March 1999, Mr. Peter L. Scher, Special Trade Negotiator of the Trade Representative of the United States ("USTR"), wrote to Mr. Raymond W. Kelly, Commissioner of the US Customs Service, as follows:

"On January 14, 1999, the United States requested authorization from the World Trade Organization (WTO) to suspend the application to the European Communities (EC) of tariff concessions covering trade in an amount of US\$520 million in response to the EC's failure to implement a WTO-consistent regime for the importation, sale, and distribution of bananas. The [USTR] intends to implement this suspension of tariff concessions by directing the Customs Service to impose 100 percent duties, ad valorem, on the products listed in the attachment to this letter. (See also 63 Fed. Reg. 63099 and 63 Fed. Reg. 71665 giving notice of the proposed increase in duties on selected products).

The EC requested that the U.S.-proposed level of suspension be reviewed by WTO arbitrators. The WTO dispute settlement rules require that the arbitration proceedings be completed on March 2. The arbitrators, however, failed to meet this deadline and are not expected to make their final decision until some later date. The USTR now seeks to preserve its right to impose 100 percent duties as of March 3, pending the release of the arbitrators' final decision.

Therefore, I am hereby requesting that until further notice the Customs Service withhold liquidation of entries of all articles identified in the attachment to this letter that are the products of Austria, Belgium, Finland, France, the Federal Republic of Germany, Greece, Ireland, Italy, Luxembourg, Portugal, Spain, Sweden or the United Kingdom and that are entered, or withdrawn from warehouse, for consumption, on or after March 3, 1999. I further request that the Customs Service today instruct port directors to review the sufficiency of bond posted with respect to entries described in the previous sentence, and to take steps to provide adequate or additional security in accordance with 19 C.F.R. §113.13."<sup>43</sup>

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<sup>41</sup> WT/DS165/8.

<sup>42</sup> USTR Press Release, dated 3 March 1999, "United States takes customs action on European imports" (EC Annex VII).

<sup>43</sup> Letter dated 3 March 1999 from Mr. Peter L. Scher, Special Trade Negotiator to Commissioner Raymond W. Kelly, US Customs Service (US Ex. 12).

2.24 In response to the USTR's request, Mr. Philip Metzger, Director of the Trade Compliance Division of the US Customs Service, in a memorandum regarding "European Sanctions",<sup>44</sup> gave the following instructions to the Customs Area and Port Directors:

"RE: European Sanctions

...

Effective for all merchandise classifiable under the Harmonized Tariff Schedule (HTS) subheadings listed below, entered, or withdrawn from warehouse, for consumption, on or after March 3, 1999, and produced in the listed countries, Area and Port Directors must require a Single Transaction Bond (STB) equal to the entered value of the merchandise. The only exception to this requirement is, at the discretion of the Port Director, the importer of record may use a continuous bond equal to 10 per cent of the total of the entered value of the covered merchandise imported by the importer for the preceding year. Ports should process increased continuous bonds immediately.

No entry shall be scheduled to liquidate earlier than the 314th day, thereby ensuring the withholding of liquidation as requested by USTR. ...

Affected countries\*:

Austria  
Belgium  
Finland  
France  
Federal Republic of Germany  
Greece  
Ireland  
Italy  
Luxembourg  
Portugal  
Spain  
Sweden  
United Kingdom

\*Please note that the Netherlands and Denmark are not included on this list. ...

HTS Subheadings

0210.19.00

Meat of swine, salted, in brine, dried or smoked, other than hams, shoulders, and cuts thereof, with bone in, or bellies (streaky) and cuts thereof

0406.90.57

Pecorino cheese, made from sheep's milk, in original loaves, not suitable for grating

1905.30.00

Sweet biscuits; waffles and wafers

3307.30.50

Bath preparation, other than bath salts

3406.00.00

Candles, tapers and the like

3920.20.00

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<sup>44</sup> Memorandum of 4 March 1999 to Customs Area and Port Directors, CMC Directors from Trade Compliance Division, US Customs Service, Regarding European Sanctions (EC Annex VIII).

Other plates, sheets, film, foil and strip, noncellular and not reinforced, laminated, supported or similarly combined with other materials, of polymers of propylene  
4202.22.15

Handbags, whether or not with shoulder strap, including those without handle, with outer surface of sheeting of plastic  
4202.32.10

Articles of a kind normally carried in the pocket or in the handbag, with outer surface of sheeting of plastic, of reinforced or laminated plastic  
4805.50.00

Uncoated felt paper and paperboard in rolls or sheets  
4819.20.00

Folding cartons, boxes and cases, of noncorrugated paper or paperboard  
4911.91.20

Lithographs on paper or paperboard, not over 0.51 mm in thickness, printed not over 20 years at time of importation  
6110.10.10

Sweaters, pullovers, sweatshirts, waistcoats (vests) and similar articles, knitted or crocheted, wholly of cashmere  
6302.21.90

Bed linen, other than knit or crocheted, printed, of cotton, other than containing any embroidery, lace, braid, edging, trimming, piping or applique work, not napped  
8507.20.80

Lead-acid storage batteries, other than of a kind used for starting piston engines or as the primary source of electrical power for electrically powered vehicles of subheading  
8703.90

8516.71.00

Electrothermic coffee or tea makers, of a kind used for domestic purposes<sup>45</sup>

2.25 On the same day, the Customs Area and Port Directors accordingly started requiring that an importer of listed products imported from the listed EC countries lodge, in most cases, an increased continuous bond for the release of the products into the United States prior to the final liquidation in accordance with the instructions referred to in paragraph 2.24 above.

#### C. US ORDINARY LIQUIDATION PROCEDURES, BONDING REQUIREMENTS AND RELEVANT TARIFF RATES

2.26 Under US law, when a shipment reaches the United States, the importer of record (i.e. the owner, purchaser, or licensed customs broker designated by the owner, purchaser, or consignee) will file entry documents for the goods with the port director at the port of entry. Imported goods are not legally entered until after the shipment has arrived within the port of entry, delivery of the merchandise has been authorised by the Customs, and estimated duties have been paid.<sup>46</sup>

2.27 Liability for payment of duties is incurred at the time the goods arrive on a vessel within a Customs port when there is an intent to unload the goods at that port, or, if arrival is otherwise than by vessel, at the time of arrival within the Customs territory of the United States. The applicable rate of duty is the rate for the date the merchandise was entered for consumption or for immediate transportation of goods from one US port to another (so that Customs documentation can be submitted at the latter port).<sup>47</sup>

2.28 At the time of entry, importers are required to pay only estimated duties. Any other duties and fees are to be collected at the time of liquidation, i.e. when the Customs has calculated the final

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<sup>45</sup> Ibid.

<sup>46</sup> Excerpts from Customs Website on Entry Procedures (US Ex. 8), §2.

<sup>47</sup> US Responses to Questions of the Panel and the Parties, dated 13 January 1999, para. 6 (Appendix 2.4 of this Panel Report).

amount of duties on imports based upon confirmation of the correct valuation, classification and origin of the goods. Section 1504, Paragraph (a) of the Tariff Act of 1930 sets forth a time-limit on liquidation, subject to certain exceptions, as follows: "...[A]n entry of merchandise not liquidated within one year from (1) the date of entry ... (4) ... shall be deemed liquidated at the rate of duty, value, quantity, and amount of duties asserted at the time of entry by the importer of record. ..." <sup>48</sup>

2.29 Before liquidation takes place, however, importers can obtain the release of their imports into the United States by submitting a bond and filing proper documentation. Section 142.4(a) of the Code of Federal Regulations ("CFR") Vol. 19, provides:

"...[M]erchandise shall not be released from Customs custody at the time Customs receives the entry documentation or the entry summary documentation which serves as both the entry and the entry summary, as required by §142.3 unless a single entry or continuous bond on Customs Form 301 ... has been filed. ..." <sup>49</sup>

2.30 The amount of a continuous bond on imports is determined in accordance with the "Guidelines for Determining Amounts of Bonds" attached to the Customs Directive, which the Assistant Commissioner of the Office of Commercial Operation issued to, among others, the District/Area Directors and Port Directors on 23 July 1991. <sup>50</sup> The Guidelines set forth:

"The bond limit of liability amount shall be fixed in an amount the district director may deem necessary to accomplish the purpose for which the bond is given. The non-discretionary bond amount minimum is \$50,000. ...[T]he following formula shall be used.

None to \$1,000,000 duties and taxes – the bond limit of liability amount shall be fixed in multiples of \$10,000 nearest to 10 percent of duties, taxes and fees paid by the importer or broker acting as importer of record during the calendar year preceding the date of the application.

Over \$1,000,000 duties and taxes – the bond limit of liability amount shall be fixed in multiples of \$100,000 nearest to 10 percent of duties, taxes and fees paid by the importer or broker acting as importer of record during the calendar year preceding the date of the application." <sup>51</sup>

2.31 The amount of a single transaction bond is determined in accordance with the same Guidelines, which set forth:

"Generally, a single transaction ... bond ... will be executed in an amount not less than the total entered value plus all duties, taxes, and fees which apply, unless the merchandise being imported falls into one of the following categories. In these cases, the bond will be executed in an amount which is not less than three times the total entered value of the merchandise.

1. Merchandise Subject to Other Agency Requirements Where Failure to Redeliver Could Pose a Threat to the Public Health and Safety
  - A) Food and Drug Administration (FDA) – All  
...

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<sup>48</sup> 19 U.S.C. §1504 (US Ex. 11).

<sup>49</sup> 19 C.F.R. §142.4(a) (1999) (US Ex. 11).

<sup>50</sup> The Customs Directive No. 099 3510-004, *Monetary Guidelines for Setting Bond Amounts*, 23 July 1991 (the "Customs Directive") (US Ex. 4).

<sup>51</sup> *Ibid.*, pp. 3-4.

G) Toxic Substances Control Act (TOSCA) – All<sup>52</sup>

2.32 However, Section 113.13(d) of the CFR, Vol. 19 sets forth the authority of the port director to impose additional security requirements as follows:

"(d) Additional security. Notwithstanding the provisions of this section or any other provision of this chapter, if a port director ... believes that acceptance of a transaction secured by a continuous bond would place the revenue in jeopardy or otherwise hamper the enforcement of Customs law or regulations, he shall require additional security."<sup>53</sup>

2.33 Accordingly, the Guidelines provide that the standard formulas mentioned in paragraphs 2.30 and 2.31 above shall not be applied if "any district director is aware that either extraordinary circumstances or a greater risk to the government involved."<sup>54</sup> In such cases, the Guidelines require that:

"the district director with such knowledge shall contact the district where the bond is filed and convey the supporting facts so that appropriate action, if required, can be taken. For example, where the amount of a continuous bond does not cover the duty on a particular shipment and the district director suspects that a greater risk to the government is involved, the district director shall:

1. secure, at the time of release, deposit of the estimated duty due on the shipment, or,
2. request a single entry bond for that shipment, or
3. request that a new continuous bond in a higher amount be filed."<sup>55</sup>

2.34 Based upon the US data for February 1999, continuous bonds were used for approximately 97 per cent of all entries made in that month, versus 3 per cent use of single transaction bonds. For entries from EC countries, approximately 94 per cent of entries in February 1999 were made using continuous bonds, versus 6 per cent use of single transaction bonds.<sup>56</sup>

2.35 As of 3 March 1999, the binding tariff rates and applicable tariff rates of the United States with respect to the listed products were as follows:

<b>Products</b>	<b>HTS Number</b>	<b>Binding /Applied Rate</b>
Pork, dried smoked	0210.19.00	\$0.015/kg
Pecorino cheese	0406.90.57	Free
Sweet biscuit	1905.30.00	Free
Bath preparations	3307.30.50	4.9%
Candles, tapers	3406.00.00	Free

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<sup>52</sup> Ibid., pp. 4-5.

<sup>53</sup> 19 C.F.R. §113.13(d) (1999) (US Ex. 6)

<sup>54</sup> Customs Directive, op. cit., p. 3.

<sup>55</sup> Ibid.

<sup>56</sup> US Responses to Additional Questions of the Panel, dated 10 February 2000 (Appendix 2.10 to this Panel Report), para. 13.

Plates, sheets, film	3920.20.00	4.2%
Handbags, plastic	4202.22.15	18%
Pocketbooks, plastic	4202.32.10	\$0.121/kg + 4.6%
Felt paper and paperboard	4805.50.00	Free
Folding cartons	4819.20.00	1.4%
Lithographs	4911.91.20	\$0.066/kg
Sweaters, cashmere	6110.10.10	5.8%
Bed linen, cotton	6302.21.90	7.2%
Lead-acid storage batteries	8507.20.80	3.5%
Coffee or tea makers	8516.71.00	3.7%

\*US Ex. 7.

#### D. DEVELOPMENTS IN THE UNITED STATES AFTER 3 MARCH 1999

2.36 On 19 April 1999, the USTR determined that "effective April 19, 1999, a 100 per cent *ad valorem* rate of duty shall be applied to [certain] articles that are of the products of certain EC member States",<sup>57</sup> following which the port directors were instructed to assess 100 per cent duties on those products, and accordingly 100 per cent duty deposits were required at the time of entry from 19 April 1999.<sup>58</sup> The selected products were (i) bath preparations, other than bath salts; (ii) handbags, plastic; (iii) pocketbooks, plastic; (iv) felt paper and paperboard; (v) folding cartons; (vi) lithographs, (vii) bed linen, cotton; (viii) lead-acid storage batteries; and (ix) coffee or tea makers (except for those from Italy).<sup>59</sup>

2.37 The following charts indicate the fluctuations (on a monthly basis and on the basis of the average of a preceding 12-month period) in the total value of imports from the European Communities during the period from January 1997 to September 1999, with respect to (i) those products contained in the 3 March list, and subject to the 19 April action (Chart A)<sup>60</sup>, and (ii) those products contained in the 3 March list but not subject to the 19 April action (Chart B)<sup>61</sup>:

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<sup>57</sup> 64 Fed. Reg. 19209 (EC Annex X).

<sup>58</sup> US Responses to Additional Questions of the Panel, dated 8 February 2000, para. 20 (Appendix 2.6 to this Panel Report).

<sup>59</sup> US Ex. 7.

<sup>60</sup> Chart A is derived from the data contained in US Ex. 5.

<sup>61</sup> Chart B is derived from the data contained in US Ex. 10.

CHART A

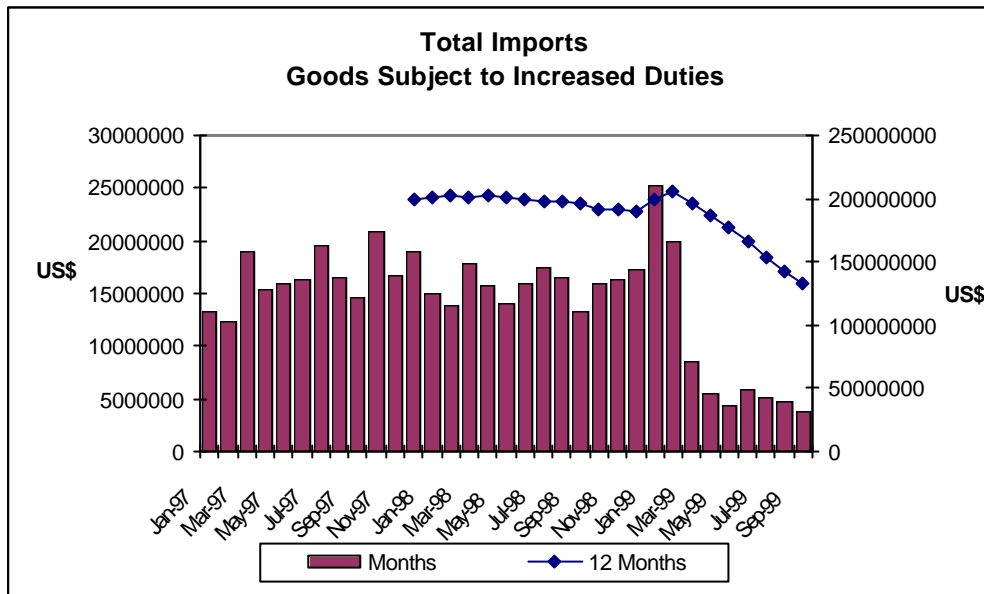
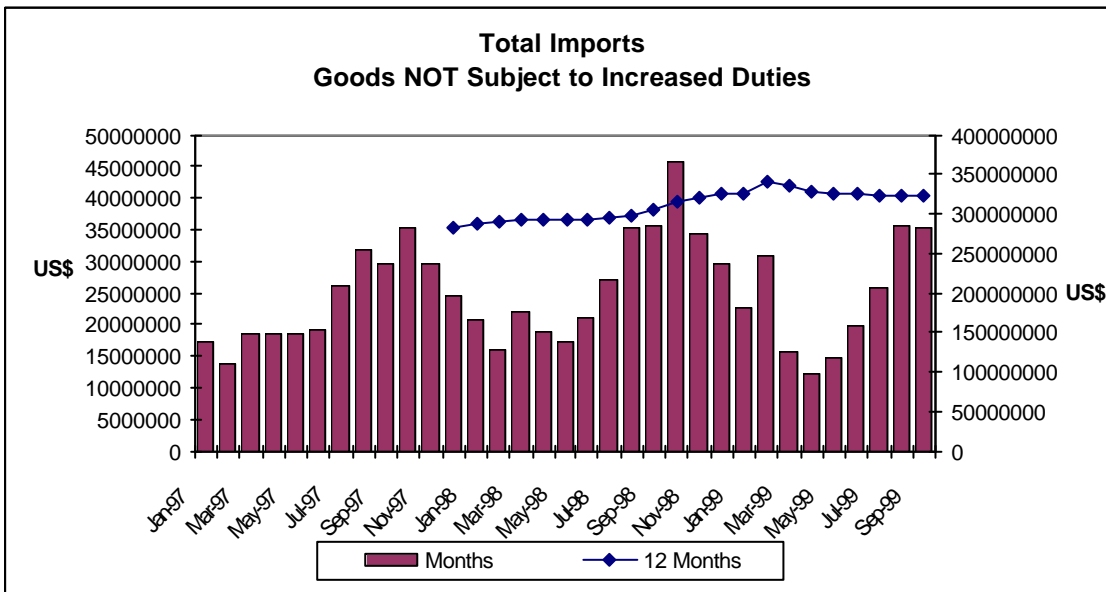


CHART B



**III. ARGUMENTS OF THE PARTIES**

3.1 The arguments of the parties are set out in their submissions to the Panel (see Appendices 1.1 through 1.10 for the European Communities and Appendices 2.1 to 2.10 for the United States, to this Panel Report).

#### IV. ARGUMENTS OF THE THIRD PARTIES

4.1 The arguments of the third parties are set out in their submissions to the Panel (see Appendix 3 for Dominica and St. Lucia, Appendix 4 for Ecuador (original Spanish), Appendix 5 for India, Appendix 6 for Jamaica, and Appendix 7 for Japan, to this Panel Report.

#### V. INTERIM REVIEW

5.1 On 27 March both the United States and the European Communities requested the Panel to review the interim report which had been issued to the parties on 13 March 2000. On 29 March, the European Communities reacted in writing to the US request. On 30 March the United States requested permission from the Panel to respond to the latest EC comments within 5 days. On 31 March the Panel granted this request and invited the United States to send its response to the EC comments by 4 April. On 4 April the United States sent us its last set of comments.

5.2 In its request for review, the United States submitted four main comments and suggested other changes to our description of the facts of this case. The European Communities, in addition to commenting on the US request for review, also requested the Panel to review mainly two aspects of the Panel's findings.

5.3 First, the United States argued that in the interim report the Panel reached conclusions on Articles 3.7 and 23.2(a) of the DSU for which the European Communities has not submitted any claim or any arguments.

5.4 With reference to Article 23.2(a), the European Communities responded that the United States was attempting to redefine the scope of this dispute and re-argue Article 23.2(a). It insisted that in its written and oral submissions it referred to all the discussions and conclusions of the Panel Report on *US - Section 301*. In particular, the European Communities quoted paragraph 20 of its first written submission:

"... This course of events confirms that the USTR implemented the further action (unilaterally) *decided upon only on the basis of its domestic legislation* and thus irrespective of whether that action conformed to the requirements of Article 23; paragraphs 1 and 2, of the DSU."<sup>62</sup> (underlined on the EC original, italics added)

The European Communities reiterated paragraph 14 of its oral presentation at the first substantive meeting to the effect that:

"The guiding principle of Article 23 is contained in paragraph 1 which also governs the more detailed provisions of paragraph 2 since this paragraph starts with the words "In such cases, Members shall" by which paragraph 1 is incorporated into paragraph 2. As the panel on Sections 301-310 has stated, Article 23.1 of the DSU prescribes that 'Members have to have recourse to the DSU dispute settlement system to the exclusion of any other system, in particular a system of unilateral enforcement of WTO rights and obligations'. "<sup>63</sup> (underlined on the EC original)

Finally, the European Communities referred to the various notices published in the Federal Register on this case (EC Annexes I, II and III), which deal expressly with both the unilateral determination of incompatibility and the unilateral implementation of trade sanctions.

5.5 For the United States, the above references are not sufficient for the present Panel to reach the conclusion that the 3 March Measure was "contrary to Articles 23.2(a) and 21.5, first sentence, together with Article 23.1 of the DSU". Inasmuch as it had no notice that Article 23.2(a) would be the

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<sup>62</sup> EC First Submission, para. 20 (Appendix 1.1 to this Panel Report).

<sup>63</sup> EC Oral Presentation at the First Substantive Meeting, para. 14 (Appendix 1.2 to this Panel Report).

subject of Panel findings, the United States claimed that it did not make any arguments on this subject.

5.6 Second, on the substance of the Panel's discussion regarding the scope of Article 23.2(a) of the DSU, the United States argued that statements made by USTR representatives had no legal significance and cannot themselves constitute "determinations". For the United States, the ability to take such a position for the purposes of asserting its rights under Article 22 of the DSU, is an inherent part of the exercise by a Member of its rights under the DSU. The European Communities responded that public statements constitute evidence of the nature of the 3 March Measure but are not measures themselves.

5.7 Third, the United States reiterated that the increased bonding requirements of the 3 March Measure did not create any liability additional to the US tariff bindings. The European Communities agreed with the conclusions reached by the Panel on this matter.

5.8 The Panel notes that in its request for establishment of a panel the European Communities claimed violations of Articles 3, 21, 22 and 23 of the DSU.<sup>64</sup> Section 3.3 of the EC first submission is entitled "The violation of Article 23 and Article 3 of the DSU".<sup>65</sup> For us the ordinary meaning of the last sentence of Article 3.7 of the DSU is clear when it provides that the suspension of concessions or other obligations is to be used as a last resort "subject to authorization by the DSB of such measures". In paragraph 5 of its first submission, the European Communities refers to the three notices in the US Federal Register and states that "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".<sup>66</sup> In its first submission, the European Communities refers to the US measures being in contravention of the requirements of Article 23, paragraphs 1 and 2.<sup>67</sup> In paragraph 86 of its rebuttals, the European Communities argues that "Article 23.1 and 23.2(a) of the DSU specify that such a finding (which in the terminology of Article 23 is called a 'determination') can only be made under the rules and procedures of the DSU".<sup>68</sup> The Panel also notes the arguments made by the European Communities, as quoted above in paragraph 5.4.

5.9 In paragraph 6.17 of our findings, we state that Article 23.1 contains a general obligation that any Member that "seeks the redress" of a WTO violation shall do so within the institutional framework of the WTO. We also reiterate the conclusions of the *US - Section 301* Panel Report that paragraph 2 of Article 23 only provides "examples" of conduct that may contravene the rules of the DSU and which, if they take place when a Member is seeking to redress a WTO violation, constitute a violation of Article 23.1.<sup>69</sup> In other words, as we discuss in our findings, when a measure is taken in the context described in the first paragraph of Article 23 – i.e., when a Member is seeking the redress of a WTO violation – such measure, if taken outside the institutional framework of the WTO or in a manner inconsistent with the DSU, violates Article 23.1 of the DSU.

5.10 In the Panel's view, the main claim of the European Communities is that on 3 March 1999 the United States acted unilaterally, contrary to the fundamental obligation of Article 23 of the DSU. We recall that Article 23.1 provides that when a Member seeks the redress of a WTO violation it shall have recourse to and abide by the DSU. The more specific allegations of DSU inconsistencies only serve to provide examples of how the United States did not "abide by" the rules of the DSU. Since, in our view, the 3 March Measure is inconsistent with Articles 3.7, last sentence, 22.6, 23.2(c), 21.5 and 23.2(a), the United States by introducing the 3 March Measure did not abide by the DSU. Given that

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<sup>64</sup> WT/DS165/8.

<sup>65</sup> EC First Submission (Appendix 1.1 to this Panel Report).

<sup>66</sup> *Ibid.*, para. 5.

<sup>67</sup> *Ibid.*, para. 20.

<sup>68</sup> EC Rebuttal Submission, para. 86 (Appendix 1.5 to this Panel Report).

<sup>69</sup> Panel Report on United States – *Sections 301-310 of the Trade Act of 1974* ("US – Section 301"), adopted on 27 January 2000, WT/DS152/R, para. 7.39.

the 3 March Measure took place while the United States was seeking to redress a WTO violation, the United States violated Article 23.1 of the DSU.

5.11 In addition, as we stated throughout our findings, we consider that the very wording of Article 23.1 covers situations where a Member seeks to redress any WTO violation, whether determined by a WTO adjudicating body or unilaterally. It would be ludicrous if the first paragraph of Article 23, which contains the general prohibition against unilateral actions, condemned only situations where a Member takes unilateral sanctions following a WTO - determined violation, without prohibiting situations where a Member determines unilaterally that a WTO violation has taken place before taking unilateral trade sanctions. For us, therefore, the prohibition against unilateral determination is contained in the first paragraph of Article 23 and the European Communities has clearly made claims under Article 23 paragraphs 1 and 2.

5.12 The United States seems to be arguing that had it known that there was a claim challenging its 3 March unilateral action, it would have been able to defend itself better. We consider, on the contrary that the United States was given ample opportunities to defend itself. In its first submission, the European Communities presented the dispute as one where USTR had "imposed trade sanction by effectively stopping trade. This course of events confirms that the USTR implemented the further action (unilaterally) decided upon only on the basis of its domestic legislation and thus irrespective of whether that action conformed to the requirements of Article 23, paragraphs 1 and 2".<sup>70</sup> In its oral statements to the Panel at the first substantive meeting and in its rebuttals the European Communities refers to various official statements from USTR all of which provide clear evidence of the nature of the EC claims.<sup>71</sup>

5.13 Notwithstanding the serious allegations of violation of Article 23 of the DSU, throughout this panel process the United States concentrates its arguments and discussions on the technicalities of its Customs Service's bonding requirements and the changes it put in place as of 3 March 1999 on listed imports from the European Communities. However, the issues before this Panel are not limited to bonding requirements. The evidence before us demonstrates that the United States was seeking to impose trade sanctions against the European Communities. In this respect, we recall that the ordinary meaning of the terms "*seek* the redress" (the term used in Article 23.1) is "look for, try to obtain or bring about"<sup>72</sup>, implying a desire, an effort (successful or not) to "redress". For us, it is clear from the evidence that the United States was trying to impose trade sanctions - the ultimate remedy under WTO law - against listed imports from the European Communities. The various statements, declarations and other internal memos of USTR and the US Customs Services confirm the context of the 3 March Measure, as a measure whereby the United States was seeking the redress of what it had unilaterally determined to be a WTO violation.

5.14 In addition, even if we were to accept the US argument that the ability to take such a public position (that the EC implementing measure violated the DSU) for the purposes of asserting its rights under Article 22 of the DSU, is an inherent part of the exercise by a Member of its rights under the DSU, we are of the view that the unilateral determination made with the 3 March Measure was not of the nature of what was necessary for the United States to assert and exercise its rights under Article 22. Article 23.2(a) *a contrario* authorises Members to make determinations through recourse to the DSU and consistent with findings of panels, the Appellate Body or arbitration. When, in January 1999, the United States required a DSB authorization pursuant to Article 22, it had to have reached an internal decision that the EC implementing measure was WTO inconsistent. (Since the United States needed to come up with a proposal for sanctions, it means that the United States needed to have decided previously that the implementing measure was, in its view, WTO inconsistent.) This US decision was a form of "determination", but one that is legal since made "through recourse to dispute settlement in accordance with" the DSU, namely, as required under Article 22. However on

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<sup>70</sup> EC First submission, para. 20 (Appendix 1.1 to this Panel Report).

<sup>71</sup> E.g. EC Oral Presentation at the First Substantive Meeting, para. 10 (Appendix 1.2 to this Panel Report), and EC Rebuttal Submission, para. 2 (Appendix 1.5 to this Panel Report).

<sup>72</sup> The New Little Oxford Dictionary.

3 March, when the United States decided to act outside of the DSU process, it made a unilateral determination that the EC implementing measure was WTO inconsistent. In doing so, the United States was not (anymore) making a determination through the recourse of the DSU; in doing so the United States did not abide by the DSU. The 3 March Measure in seeking the redress of a unilaterally determined WTO violation was inconsistent with Articles 23.2(a) and 21.5, and thus necessarily violated Article 23.1.

5.15 We reiterate that on 3 March the United States had no right - no DSB authorization - to collect import duties above its bindings. In putting in place increased bonding requirements to secure, as of 3 March, the payment of tariff duties up to 100 percent on listed imports from the European Communities, the United States unilaterally began enforcing a right that it did not have, as bonding requirements are of the nature of a security and an enforcement mechanism.

5.16 Fourth, the United States also challenges our understanding of the US interpretation of the mandatory nature of the 60 day time-period within which an arbitration pursuant to Article 22.6 is to take place. For us this US interpretation was clear from the public records of the minutes of the DSB and the Article 22.6 DSU Decision of the Arbitrators of 9 April 1999<sup>73</sup> in *EC – Bananas III*. The main point of our findings is that on 3 March, when it put in place the increased bonding requirements, the United States had not requested the retroactive application of the suspension of concessions and should have known that. On 3 March, therefore, it could not claim that it was entitled to secure an eventual retroactive right to collect 100 per cent import tariffs on listed imports from the European Communities.

5.17 The United States also argues that there is no evidence that there were any interest charges, costs or fees. We refer the United States to paragraph 6.42 below where the Panel proceeds to an estimation of the costs of any such 3 March increased bonding requirements based on the evidence submitted by the United States. With regard to the United States' discussion relating to the ordinary US Customs Service practices and what is allowed under Article 13 of the Agreement on Customs Valuation, we reiterate, again, that it is not our mandate to assess the bonding requirements practices of the US Customs Services in general.

5.18 With a view to ensuring the clarity of this Panel Report, and taking into account our discussion on the nature of the first sentence of Article 21.5 prohibiting unilateral determination of the WTO inconsistency of implementing measures, we have revised our findings in line with the above discussion. We have also taken into account other comments made by the United States, including calculation mistakes and improved our findings accordingly.

5.19 The European Communities is asking us to review our description of its claim with reference to the WTO inconsistency of some of the aspects of the Article 22.6 Arbitration Decision of 9 April (WT/DS27/ARB). The European Communities has also asked us to make others changes to our description of some of its arguments. We have carefully reviewed the submissions and oral statements of the European Communities and revised our draft accordingly. We would like, however, to emphasise some points.

5.20 In its rebuttals, the European Communities argues that the US action of 19 April was nothing but a confirmation of the 3 March measure<sup>74</sup>. The European Communities continues and argues that the "United States in the *Bananas* dispute [had] recourse to a request for authorization of the suspension of concessions or other obligations based on a unilateral determination that the EC failed to honour its WTO obligations".<sup>75</sup> For the European Communities this was so because the United States had not in hand an Article 21.5 panel report on the assessment of the WTO compatibility of the EC implementing measure when it requested the DSB authorization to retaliate.

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<sup>73</sup> WT/DS27/ARB.

<sup>74</sup> This was a reiteration of the EC argument developed in its rebuttals. See para. 20 of the EC Rebuttal Submission (Appendix 1.5 to this Panel Report).

<sup>75</sup> EC Oral Presentation at the Second Substantive Meeting, §II (Appendix 1.8 to this Panel Report).

The European Communities then argues that because on 3 March the United States was in violation of Article 21.5, and because the 19 April action is only a confirmation of the 3 March Measure, on 19 April the United States was still in violation of Article 21.5. In other words, the 3 March violation was of a continuing nature. The European Communities claims that a refusal from this Panel to answer its request as to the nature of the 3 March Measure's violation would constitute a denial of justice.<sup>76</sup>

5.21 We recall that the reason why the European Communities considers that the 3 March Measure violates Article 21.5 of the DSU is because the European Communities is of the view that a determination of the WTO compatibility of the EC implementing measure can only be done by an Article 21.5 panel and cannot be performed by the original panel through an arbitration procedure pursuant to Article 22.6 of the DSU. In this respect, the European Communities considers that the determination of the WTO compatibility of the EC implementation measure performed by the Article 22.6 Arbitration Decision of 9 April 1999 is thus invalid. This is why the European Communities takes the position that this Panel did not even need to mention the Article 22.6 Arbitration Decision given that for the European Communities that 9 April Arbitration Decision was concerned exclusively with the level of nullification and impairment of the revised EC Bananas regime.

5.22 We disagree with the European Communities. We rather find that on 3 March there was a valid ongoing WTO adjudicating process on the determination of the WTO compatibility of the EC implementing measure. But on 3 March, contrary to what was the case on 19 April, this adjudicating body (the Arbitration panel acting pursuant to Article 22.6) had not completed its work.

5.23 We have therefore changed the wording of some paragraphs of this panel report to ensure a better understanding of our discussion. We have also taken into account other comments made by the European Communities and revised our findings accordingly.

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<sup>76</sup> The statement of the European Communities to the Panel was: "This aspect of the present case has a bearing not only on the legal basis for the violations about which the EC complains, but also on the question whether the violation is of a continuing nature. As the Panel will easily understand, this aspect of the case is therefore of fundamental importance for the EC. If the Panel finds in favour of the EC on this decisive point, the suspension of concessions is and remains inconsistent with the US obligations both for the initial list of 3 March 1999, which constitutes Annex 1 to the EC's request for the establishment of the Panel, and for the reduced list of 19 April 1999 which constitutes Annex 2 to the EC's request for the establishment of the Panel. The EC believes that it is entitled to receive an answer from the Panel with regard to this important claim on which the parties clearly have a disagreement with very important legal and practical consequences in the present case. A denial of justice on this point would necessarily lead to continuing legal uncertainty and more litigation. The EC has already pointed out in its written submissions that there was no justification to resort to the suspension of concessions or other obligations in the present case, neither on 3 March 1999 nor on 19 April 1999. The WTO-inconsistency of the 3 March measure could not "healed", by the authorization of the DSB of 19 April 1999 simply because it was legally flawed from the outset. The EC repeats that in this context, the DSB authorization of 19 April 1999 was a necessary, but not a sufficient prerequisite for the suspension of concessions or other obligations." EC Final statement 2<sup>nd</sup> meeting. This statement was a reiteration of the EC's arguments contained in its rebuttals. See for instance paras. 78, 81 and 82 of the EC Rebuttal Submission (Appendix 1.5 to this Panel Report): "However, in the case of the US, such a decision by the DSB [speaking of Article 21.5 of the DSU] was missing on 3 March, was also missing on 19 April and is still missing today... In conclusion, the EC reiterates that the contested US measure of 3 March 1999, confirmed on 19 April 1999, is inconsistent with Article 21.5 of the DSU. This inconsistency ... was equally not healed by the authorization... granted by the DSB on 19 April 1999".

## VI. FINDINGS

### A. INTRODUCTION

6.1 This dispute concerns an alleged unilateral retaliation measure<sup>77</sup> taken on 3 March 1999 by the United States against listed imports from the European Communities, contrary to the WTO Agreement.

6.2 On 3 March the USTR press release provided as follows:

"United States Takes Customs Action on European Imports

[E]ffective today, the U.S. Customs Service will begin 'withholding liquidation' on imports valued at over \$500 million of selected products from the European Union (EU), consistent with U.S. rights under the WTO agreements. Withholding liquidation imposes contingent liability for 100 per cent duties on affected products as of March 3, 1999."<sup>78</sup>

6.3 On 4 March 1999, the European Communities requested consultations with the United States with regard to a US decision effective as of 3 March 1999 requiring additional bonding requirements in respect of listed imports from the European Communities upon importation.<sup>79</sup>

6.4 The European Communities requested that the DSB establish a panel:

"with respect to the US decision, effective as of 3 March 1999, to withhold liquidation on imports from the EC of a list of products, together valued at \$520 million on an annual basis, and to impose a contingent liability for 100 per cent duties on each individual importation of affected products as of this date (annex 1 [to the request]). This measure includes administrative provisions that foresee, among other things, the posting of a bond to cover the full potential liability."<sup>80</sup>

The measure at issue is hereinafter referred to as the "3 March Measure" and is described in paragraphs 1.4 and 1.5 of this Panel Report. We note that the 3 March Measure was put in place as of 3 March pending the release of the Arbitrators' final decision.<sup>81</sup> We are also aware that on 19 April the United States took a distinct legal action against a reduced list of imports from the European Communities pursuant to the 19 April DSB authorization<sup>82</sup>.

6.5 On 16 June 1999 the Dispute Settlement Body (DSB) established the present Panel with the mandate to examine the request of the European Communities. The European Communities claims that the 3 March Measure is inconsistent with Articles 23.1 and 23.2 (in particular 23.2(c)), 3.7, 21.5, and 22.6 of the DSU and with Articles I, II, VIII and XI of GATT.

6.6 The 3 March Measure resulted<sup>83</sup>, in most cases, in increased levels of bonding requirements on listed imports (which the United States calls the "retaliation list"<sup>84</sup>) from the

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<sup>77</sup> In its First Submission, para.20 (Appendix 1.1 to this Panel Report), the European Communities makes allegation of "trade sanctions" imposed by the United States. We discuss briefly these various concepts hereinafter.

<sup>78</sup> USTR Press Release, dated 3 March 1999, "United States Takes Customs Action on European Imports" (EC Annex VII).

<sup>79</sup> See WT/DS165/1 and para. 1.2 of this Panel Report.

<sup>80</sup> WT/DS165/8.

<sup>81</sup> See the USTR Press Release, dated 3 March 1999, "United States Takes Customs Action on European Imports" (EC Annex VII).

<sup>82</sup> WT/DSB/M/59.

<sup>83</sup> US First Submission, paras. 33-34 (Appendix 2.1 to this Panel Report), and US Responses to Additional Questions of the Panel, dated 8 February 2000, paras. 3 to 5 (Appendix 2.6 to this Panel Report).

European Communities (hereinafter referred to as "the EC listed imports"). The bonding requirements generally applicable to the EC listed imports and the 3 March increased bonding requirements are described in paragraphs 2.24 to 2.34 of this Panel Report<sup>85</sup>.

**B. EC CLAIMS AND US DEFENSES UNDER THE DSU AND GATT 1994**

**1. The EC claims**

6.7 We understand the EC claims as being three-fold. First, the European Communities argues that on 3 March 1999 the United States "imposed trade sanctions by effectively stopping trade"<sup>86</sup>. In doing so, the United States acted unilaterally, contrary to Articles 23.1 and 23.2, and 3.7 of the DSU and Articles I, II, VIII and XI of GATT 1994. Secondly, the 3 March Measure contravenes the provisions of Article 22.6 in that it constitutes a suspension of concessions or other obligations which was imposed by the United States while the arbitration process pursuant to Article 22.6-22.7 of the DSU was still ongoing. Thirdly, the European Communities submits that the United States also violated Article 21.5 of the DSU because it had not exhausted this procedure when it requested DSB permission to suspend concessions or other obligations in respect of the EC listed imports. For the European Communities such a violation is of a continuing nature. For the European Communities, the 19 April action is only a confirmation of the US Measure of 3 March and it argues that a "[DSB decision adopting an Article 21.5 panel report] was missing on 3 March, was also missing on 19 April and is still missing today"<sup>87</sup>. In the European Communities' view, the WTO inconsistency of the 3 March Measure could not have been healed by the DSB authorization of 19 April because it was flawed from the outset: the DSB authorization of 19 April 1999 was a necessary, but not a sufficient prerequisite for the US suspension of concessions or other obligations.

**2. The US defenses**

6.8 The United States' response is that the 3 March Measure did not constitute a suspension of concessions or other obligations: requiring bonds upon importation is a normal practice of the US Customs Service (and of many other Members including the European Communities), and is explicitly authorised by Article 13 of the Customs Valuation Agreement. For the United States, the 3 March Measure did not violate Articles I, II and VIII or XI of GATT. The United States argues that it did not violate Article 23 of the DSU: it only took action in order "to preserve its rights" to collect duties as of 3 March and duties were neither assessed nor collected on 3 March. The United States adds that it did not violate Article 21.5 because there is a conflict between the time prescriptions of Article 21.5 and those of Article 22 which should be resolved in favour of the US interpretation, since it is clear that the DSB must be requested to authorise suspension within 30 days of the expiry of the reasonable period of time. Otherwise, according to the United States, the reverse consensus rule would no longer apply. For the United States, the US action of 19 April and the 19 April DSB authorization are not matters before this Panel. Finally, the United States submits that the European Communities unduly delayed both the US request for an Article 21.5 WTO compatibility assessment before the expiry of the reasonable period of time and the Article 22.6 arbitration process. For the United States, if the DSU procedural stages had been respected, the arbitration report authorising WTO compatible suspension of concessions or other obligations would have been issued to the parties before 3 March 1999.

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<sup>84</sup> Expression used by Deputy USTR, EC Annex X. See the list of such identified imports from the European Communities at para. 2.24 of this Panel Report.

<sup>85</sup> We further discuss our understanding of the 3 March increased bonding requirements in paras. 6.46 to 6.51 of this Panel Report.

<sup>86</sup> EC First submission, para. 20 (Appendix 1.1 to this Panel Report).

<sup>87</sup> EC Second submission, paras. 77-78 (Appendix 1.5 to this Panel Report).

C. US REQUEST FOR A PRELIMINARY RULING

6.9 On 21 January 2000, in the cover letter of its Rebuttal Submission, the United States requested "the Panel to clarify, prior to the outset of the second substantive meeting, the measures that it considers to be within the Panel's terms of reference...".

6.10 The European Communities responded, in its letter dated 24 January 2000, that the "Panel should not accede to this request at this late stage of the proceedings before it (...) unless the United States was able to show 'good cause' for granting an exception".<sup>88</sup>

6.11 On 9 February 2000 (at the beginning of the second substantive meeting of the Panel), the Panel heard the views of the parties on this matter. On the same day, the Panel ruled that:

"9. Implicit in the US request for this ruling would appear to be a concern that this Panel may be going beyond its terms of reference, namely in examining measures other than that of 3 March 1999.

10. The claims from the European Communities as well as the defense submitted by the United States oblige us to understand what was effectively done on 3 March, if anything, in comparison with what is usually done on those listed imports or what was done on the same listed imports on 19 April 1999. The EC claims also oblige us to be fully informed of the sequence of events that surrounded the 3 March decision, including that of 19 April.

11. Some of the Panel's questions to the parties, and in particular to the United States, relate to the normal US bonding requirements, the bonding requirements imposed as of 3 March on listed imports, and any subsequent US actions that may clarify the nature and effect of the 3 March Measure. The Panel considers that the US replies to these questions are important to the Panel's understanding of the matter at issue.

12. We note that in its report on *Argentine – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items* (WT/DS56/R, para. 6.63) the panel did examine events that took place after the date of the measure at issue for the purpose of understanding the way the Argentinian tariff system worked.

13. Accordingly, we shall continue to limit ourselves to our terms of reference and to the measure therein identified, keeping in mind that events surrounding the 3 March Measure may have to be addressed in order for the Panel to provide an answer to the claims at issue.

14. Finally, we are aware of our duties, pursuant to Article 11 of the DSU, to perform an objective assessment of the facts and the law applicable to the matter at issue."

D. EC CLAIMS THAT THE 3 MARCH MEASURE VIOLATED ARTICLES 23 AND OTHERS OF THE DSU

**1. Claims under Article 23**

(a) Article 23 of the DSU as a whole

6.12 We understand that the core of the EC claims is that the 3 March Measure is a 'trade sanction' that contravenes Article 23, first and second paragraphs.

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<sup>88</sup> EC Letter dated 24 January 2000 (Appendix 1.6 to this Panel Report).

6.13 The Panel believes that the adopted Panel Report on United States – *Sections 301-310 of the Trade Act of 1974* ("US – Section 301")<sup>89</sup> has confirmed the crucial importance that WTO Members place on the dispute settlement system of the WTO, as the exclusive means to redress any violations of any provisions of the WTO Agreement.<sup>90</sup> This fundamental principle is embedded in Article 23 of the DSU:

*"Strengthening of the Multilateral System*

1. 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.
2. 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;
  - (b) follow the procedures set forth in Article 21 to determine the reasonable period of time for the Member concerned to implement the recommendations and rulings; and
  - (c) follow the procedures set forth in Article 22 to determine the level of suspension of concessions or other obligations and obtain DSB authorization in accordance with those procedures before suspending concessions or other obligations under the covered agreements in response to the failure of the Member concerned to implement the recommendations and rulings within that reasonable period of time."

6.14 An important reason why Article 23 of the DSU must be interpreted with a view to prohibiting any form of unilateral action is because such unilateral actions threaten the stability and predictability of the multilateral trade system, a necessary component for "market conditions conducive to individual economic activity in national and global markets"<sup>91</sup> which, in themselves, constitute a fundamental goal of the WTO. Unilateral actions are, therefore, contrary to the essence of the multilateral trade system of the WTO. As stated in the Panel Report on *US – Section 301*:

"7.75 Providing security and predictability to the multilateral trading system is another central object and purpose of the system which could be instrumental to achieving the broad objectives of the Preamble. Of all WTO disciplines, the DSU is one of the most important instruments to protect the security and predictability of the multilateral trading system and through it that of the market-place and its different

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<sup>89</sup> Panel Report on *US – Section 301*.

<sup>90</sup> See the numerous statements of Members at the DSB meeting of 27 January 2000, WT/DSB/M/74 approving the content of that Panel Report.

<sup>91</sup> Panel Report on *US – Section 301*, op. cit., para. 7.71. "The purpose of many of the GATT/WTO disciplines, indeed one of the primary objects of the GATT/WTO as a whole, is to produce certain market conditions which would allow this ... activity to flourish." Ibid., para.7.73.

operators. DSU provisions must, thus, be interpreted in the light of this object and purpose and in a manner which would most effectively enhance it."<sup>92</sup>

6.15 In the *US - Section 301* dispute, the Panel was convinced that the legislation at issue had to be examined both from the perspective of the damage it causes to Member governments and from the perspective of the damages caused to the market-place itself. The following statement regarding the mere existence of a law that would allow for some unilateral actions to be taken, is even more relevant in specific instances of unilateral measures, such as those at issue in the present case:

"...[unilateral actions] may prompt economic operators to change their commercial behaviour in a way that distorts trade. Economic operators may be afraid, say, to continue ongoing trade with, or investment in, the industries or products threatened by unilateral measures. Existing trade may also be distorted because economic operators may feel a need to take out extra insurance to allow for the illegal possibility that the legislation contemplates, thus reducing the relative competitive opportunity of their products on the market. Other operators may be deterred from trading with such a Member altogether, distorting potential trade...."<sup>93</sup>

6.16 The ordinary meaning of the terms used in Article 23.1 is plain and clear:

23.1 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. (emphasis added)

6.17 The structure of Article 23 is that the first paragraph states the general prohibition or general obligation, i.e. when Members seek the redress of a WTO violation<sup>94</sup>, they shall do so only through the DSU. This is a general obligation. Any attempt to seek "redress" can take place only in the institutional framework of the WTO and pursuant to the rules and procedures of the DSU.

6.18 The prohibition against unilateral redress in the WTO sectors is more directly provided for in the second paragraph of Article 23. From the ordinary meaning of the terms used in the chapeau of Article 23.2 ("in such cases, Members shall"), it is also clear that the second paragraph of Article 23 is "explicitly linked to, and has to be read together with and subject to, Article 23.1"<sup>95</sup>. That is to say, the specific prohibitions of paragraph 2 of Article 23 have to be understood in the context of the first paragraph, i.e. when such action is performed by a WTO Member with a view to redressing a WTO violation.

6.19 We also agree with the *US - Section 301* Panel Report that Article 23.2 contains "egregious examples of conduct that contradict the rules of the DSU"<sup>96</sup> and which constitute more specific forms of unilateral actions, otherwise generally prohibited by Article 23.1 of the DSU.

"[t]hese rules and procedures [Article 23.1] clearly cover much more than the ones specifically mentioned in Article 23.2. There is a great deal more State conduct which can violate the general obligation in Article 23.1 to have recourse to, and abide

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<sup>92</sup> Ibid., para. 7.75.

<sup>93</sup> Ibid., para. 7.90.

<sup>94</sup> Article 23.1 of the DSU refers more accurately to "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", i.e. the three causes of actions under WTO. In this Panel Report, the expression "WTO violation(s)" refers to all three causes of actions mentioned in Article 23.1 of the DSU.

<sup>95</sup> Panel Report on *US - Section 301*, op. cit., para 7.44

<sup>96</sup> Ibid., para. 7.45.

by, the rules and procedures of the DSU than the instances especially singled out in Article 23.2. "(Footnotes omitted)"<sup>97</sup>

The same Panel identified a few examples of such instances where the DSU could be violated<sup>98</sup> contrary to the provisions of Article 23. Each time a Member seeking the redress of a WTO violation is not abiding by a rule of the DSU, it thus violates Article 23.1 of the DSU.

6.20 In order to verify whether individual provisions of Article 23.2 have been infringed (keeping in mind that the obligation to also observe other DSU provisions can be brought under the umbrella of Article 23.1), we must first determine whether the measure at issue comes under the coverage of Article 23.1. In other words, we need to determine whether Article 23 is applicable to the dispute before addressing the specific violations envisaged in the second paragraph of Article 23 of the DSU or elsewhere in the DSU.

(b) The application of Article 23 to the present dispute

6.21 Article 23.1 of the DSU provides that the criterion for determining whether Article 23 is applicable is whether the Member that imposed the measure was "seeking the redress of" a WTO violation. The measure in the present dispute is increased bonding requirements as of 3 March on EC listed imports.

6.22 The term "seeking" or "to seek" is defined in the Webster New Encyclopedic Dictionary as: "to resort to, ... to make an attempt, try". This term would therefore cover situations where an effort is made to redress WTO violations (whether perceived or WTO determined violations). The term "to redress" is defined in the New Shorter Oxford English Dictionary as "repair (an action); atone for (a misdeed); remedy or remove; to set right or rectify (injury, a wrong, a grievance etc.); obtaining reparation or compensation". The term "redress" is defined in the New Shorter Oxford English Dictionary as: "reparation of or compensation for a wrong or consequent loss; remedy for or relief from some trouble; correction or reformation of something wrong". The term 'redress' implies, therefore, a reaction by a Member against another Member, because of a perceived (or WTO determined) WTO violation, with a view to remedying the situation.

6.23 Article 23.1 of the DSU prescribes that when a WTO Member wants to take any remedial action in response to what it views as a WTO violation, it is obligated to have recourse to and abide by the DSU rules and procedures. In case of a grievance on a WTO matter, the WTO dispute settlement mechanism is the only means available to WTO Members to obtain relief, and only the remedial actions envisaged in the WTO system can be used by WTO Members.<sup>99</sup> The remedial actions relate to restoring the balance of rights and obligations which form the basis of the WTO Agreement, and include the removal of the inconsistent measure, the possibility of (temporary) compensation and, in last resort, the (temporary) suspension of concessions or other obligations authorised by the DSB (Articles 3.7 and 22.1 of the DSU). The latter remedy is essentially retaliatory in nature.<sup>100</sup>

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<sup>97</sup> Ibid.

<sup>98</sup> See *ibid.*, footnotes 655 and 656 to para. 7.45.

<sup>99</sup> This mechanism allows, of course, for consultations to be held outside the WTO.

<sup>100</sup> We note that the United States often uses the term "to retaliate" or "retaliation". The terms 'retaliation' or 'to retaliate' is defined in the Webster New Encyclopedic Dictionary as "to return like for like, to get even". In the Black Law Dictionary (6<sup>th</sup> Ed.) retaliation refers to *lex talionis* which it self is defined as: "The Law of retaliation; which requires the infliction upon a wrongdoer of the same injury which he has caused to another". Under general international law, retaliation (also referred to as reprisals or counter-measures) has undergone major changes in the course of the XX century, specially, as a result of the prohibition of the use of force (*jus ad bellum*). Under international law, these types of countermeasures are now subject to requirements, such as those identified by the International Law Commission in its work on state responsibility (proportionality etc... see Article 43 of the Draft). However, in WTO, countermeasures, retaliations and reprisals are strictly regulated and can take place only within the framework of the WTO/DSU. Elagab Omer Youssif, "The Legality

(i) Was the 3 March Measure a measure 'seeking the redress of' a WTO violation?

6.24 We consider that there is ample evidence before us which demonstrates that when it took the 3 March Measure, the United States was seeking redress for a perceived WTO violation by the European Communities, within the meaning of Article 23.1 of the DSU.

6.25 The USTR Press Release announcing the 3 March Measure confirms its retaliatory nature, as a measure seeking to redress. The official USTR Press Release of 3 March 1999 reads as follows:

**"United States *Takes Customs Action* on European Imports**

[E]ffective today, the U.S. Customs Service will *begin* 'withholding liquidation' on imports valued at over \$500 million of *selected products from the European Union* (EU), consistent with *U.S. rights* under the WTO agreements. Withholding liquidation imposes *contingent liability for 100 per cent duties* on affected products as of March 3, 1999...

January 1, 1999, was the deadline for the EU to implement a WTO-consistent banana regime. *The EU failed to honor this deadline, thereby entitling the United States to suspend tariff concessions as early as February 1<sup>st</sup> on selected European products with the WTO's blessing.*<sup>101</sup> (emphasis added)

6.26 On its face, this description of the 3 March Measure shows that, because of the US perceived WTO inconsistency of the 1998 Bananas regime put in place by the European Communities as a measure taken to implement the Panel and Appellate Body recommendations<sup>102</sup> (the "EC implementing measure"), the United States imposed an increased contingent liability on EC listed imports only. This 3 March Measure was, therefore, discriminatory and aimed at the European Communities exclusively. The unilateral imposition of a liability for 100 per cent duty as of 3 March (well above the bound rates of tariffs) constitutes the imposition of a debt on such imports, and adds further obligations on such imports, even if the full effect of such liability is suspended until a future liquidation date. This debt, this liability, this additional obligation imposed on listed EC imports<sup>103</sup>, is evidence that the United States wanted to remedy, was 'seeking to redress', what it perceived to be a WTO violation.

6.27 The request from USTR to the US Customs Service is also revealing. On 3 March 1999, Mr. Peter L. Scher, Special Trade Negotiator of the USTR, wrote to Mr. Raymond W. Kelly, Commissioner of the US Customs Service, as follows:

".... The [USTR] intends to implement this suspension of tariff concessions by directing the Customs Service to impose 100 percent duties, *ad valorem*, on the products listed in the attachment to this letter. (See also 63 Fed. Reg. 63099 and 63 Fed. Reg. 71665 giving notice of the proposed increase in duties on selected products).

.... The USTR now *seeks to preserve its right* to impose 100 percent duties as of March 3, pending the release of the arbitrators' final decision.

Therefore, ... I further request that the Customs Service today instruct port directors to review the sufficiency of bond posted with respect to entries described in the previous sentence, and to take steps

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of Non-Forcible Counter-Measures in International Law (1988), Oxford University Press; Boisson de Charzournes Laurence, Les contre-mesures dans les relations économiques internationales, (1992) A Pedone; Henkin L, Pugh R.C., Schacter O. and Smit H., International Law (1993), West Publishing, p.570-571 and Chapter 11.

<sup>101</sup> USTR Press Release, dated 3 March 1999, "United States takes customs action on European imports" (EC Annex VII).

<sup>102</sup> Panel and Appellate Body Reports on *EC – Bananas III*, op. cit.; for a description of the 1998 EC Bananas Regime, see the EC First submission, para. 3 and the US First submission, paras. 15-17 (Appendices 1.1. and 2.1 to this Panel Report).

<sup>103</sup> In paras. 6.46 to 6.51 of this Panel Report, we further discuss our understanding of the actual increased of bonding requirements resulting from the 3 March Measure.

to provide adequate or additional security in accordance with 19 C.F.R. §113.13." <sup>104</sup> (emphasis added)

6.28 It becomes evident that the 3 March increased bonding requirements on EC listed imports was part of the retaliation scheme that the United States had triggered with the Section 301-310 notifications in the Federal Register.<sup>105</sup> Although the United States argues that the 3 March Measure was taken pursuant to Article 13(d) of the Code of Federal Regulation<sup>106</sup>, and not pursuant to the Sections 301-310, it is now clear to us that the United States took the 3 March Measure in the context of the US Section 301 process.<sup>107</sup> This is also evidence that the United States was seeking to "redress a WTO violation". With its 3 March increased bonding requirements, the United States put in place an enforcement remedy, effective as of 3 March.

6.29 In response to the USTR's request, Mr. Philip Metzger, Director of the Trade Compliance Division of the US Customs Service, in a memorandum of 4 March 1999,<sup>108</sup> gave the following instructions to the Customs Area and Port Directors. We note that the subject of this memo is concerned exclusively with the 3 March Measure and is entitled "European Sanctions".<sup>109</sup> This shows that the United States was 'seeking' to redress a WTO violation:

**"RE: European Sanctions...**

Effective for all merchandise classifiable under the Harmonized Tariff Schedule (HTS) subheadings listed below, entered, or withdrawn from warehouse, for consumption, on or after March 3, 1999, and produced in the listed countries, Area and Port Directors must require a Single Transaction Bond (STB) equal to the entered value of the merchandise. The only exception to this requirement is, at the discretion of the Port Director, the importer of record may use a continuous bond equal to 10 per cent of the total of the entered value of the covered merchandise imported by the importer for the preceding year. Ports should process increased continuous bonds immediately.

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<sup>104</sup> Letter dated 3 March 1999 from Mr. Peter L. Scher, Special Trade Negotiator to Commissioner Raymond W. Kelly, US Customs Service (US Ex. 12).

<sup>105</sup> Notification of the USTR, Doc. No. 301-100a, 22 October 1998, 63 Fed. Reg. 56687; Notification of the USTR, Doc. No. 301-100a, 10 November 1998, 63 Fed. Reg. 63099; and Notification of the USTR, Doc. No. 301-100a, 29 December 1998, 63 Fed. Reg. 71665 (EC Annexes I, II and III). We recall the definition of retaliation in paras.6.22 and 6.23 of this Panel Report.

<sup>106</sup> US First Submission, para.33 (Appendix 2.1 of this Panel Report) and US Responses to Questions of the Panel and the Parties, dated 13 January 2000, para. 53 (Appendix 2.4 of this Panel report).

<sup>107</sup> We recall that the Notifications of the USTR in the Federal Register provided that on 3 March some action had to be taken. For example, "The dates on which the USTR intends to implement action – February 1 or not later than March 3 ..." Notification of the USTR, Doc. No. 300-100a, 10 November 1998, 63 Fed. Reg. 63099 (1998). On its face Section 306(b) of the Trade Act requires the USTR to determine what further action it shall take under Section 301(a) if the USTR considers that a foreign country has failed to implement a recommendation made pursuant to dispute settlement proceedings under the WTO. The USTR shall make this determination no later than thirty days after the expiry of the reasonable period of time provided for such implementation under Article 21.3 of the DSU, which is January 31, 1999 in this case. Section 305(a)(I) requires USTR normally to implement such action by no later than thirty days after the date on which that determination is made, or March 2 in this case. See also Bill H.R. 4761, 9 October 1998, "To require the United States Representative to take certain actions *in response to the failure of the European Union to comply with the rulings of the World Trade Organization*" where Section 3 paragraph (F) where the Trade Representative is mandated to suspend liquidation on EC listed imports "in no event later than 2 March 1999. Although a Bill is not binding, it demonstrates that the United States was "seeking to redress a WTO violation". (EC Annex V)

<sup>108</sup> Memorandum of 4 March 1999 to Customs Area and Port Directors, CMC Directors from Trade Compliance Division, US Customs Service, Regarding European Sanctions (EC Annex VIII).

<sup>109</sup> In the New Shorter Oxford English Dictionary, the term "sanction" is defined as "a penalty enacted in order to enforce obedience of a law; later more widely, a punishment or reward for disobedience or obedience of a law." In Webster's New Encyclopedic Dictionary, it is defined as "an economic or military measure adopted usually by several nations against another nation violating international law."

No entry shall be scheduled to liquidate earlier than the 314th day, thereby ensuring the withholding of liquidation as requested by USTR. ... "<sup>110</sup> (emphasis added)

6.30 On 16 March 1999, Mr. Philip Metzger, Director of the Trade Compliance Division issued a memorandum regarding "Clarification of Bond Requirements for *European Sanctions*" (emphasis added) to the port directors.<sup>111</sup> This memorandum indicates that the US authorities considered that the increased bonding requirements had been imposed as a 'sanction' against the European Communities. It reads as follows:

"This memorandum is being issued as result of the large number of questions that we have received regarding bond sufficiency requirements for merchandise *subject to European sanctions*. In an effort to establish uniformity for importers and ports, the following bond sufficiency requirements should be adhered to by all ports:

If the importer of record provides a statement at the time of entry (release) certifying that it has reviewed its continuous bond and has added to it an amount equal to 10 percent of the total of the entered value imported by the importer for the preceding year of the *merchandise presently subject to the sanctions*, the Port Director will accept the continuous bond."<sup>112</sup> (emphasis added)

6.31 The Press Conference given by Deputy USTR P. Scher on 3 March is another piece of evidence that confirms that the 3 March Measure was seeking redress. Below are some relevant excerpts:

"Q. Does the withholding of liquidation fulfill the terms of the Bowles letter which says "If the EU seeks arbitration ... the retaliatory action will go into effect on the date that arbitration is concluded, but in no event later than March 3, 1999?"

A. ... *We retaliated by effectively stopping trade* as of 3 March in *responding to* the harm caused by the *EC's WTO inconsistent* banana regime. That purpose is achieved by withholding liquidation on the products on the *retaliation list* ...

Q. What is the difference between imposing duties and withholding liquidation?

A. *There is little difference.* Withholding will, *we expect, effectively stop imports just as immediately imposing duties would.* Importers are going to be *no more prepared to accept the contingent 100 per cent duty liability, as they would to pay 100 per cent duties. They will wait for certainty.*

Q. Why aren't you keeping the White House commitments?

A. ... *We are effectively stopping trade as of 3 March.* ...

Q. How do you expect the EC to react?

A. ... But our action makes it crystal clear that *there are consequences for failure to comply with WTO rulings.* ...

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<sup>110</sup> Memorandum of 4 March 1999 to Customs Area and Port Directors, CMC Directors from Trade Compliance Division, US Customs Service, Regarding European Sanctions (EC Annex VIII).

<sup>111</sup> Memorandum to Customs Area and Port Directors, CMC Directors from Trade Compliance Division, US Customs Service, Regarding Clarification of Bond Requirements for European Sanctions, dated 16 March 1999 (US Ex. 15).

<sup>112</sup> Ibid.

Q. How is this consistent with the White House letter and the WTO?

A. The White House letter commits the Administration *to retaliate effective March 3; we have done that.*<sup>113</sup> (emphasis added)

6.32 The content of this Press Conference speaks for itself. With the increased bonding requirements, the United States *was expecting to and wanted to stop trade*. The United States wanted to effectively retaliate against the European Communities for its alleged WTO incompatible implementing measure.

6.33 It seems that the United States specifically chose the increased bonding requirements as a retaliation measure, because it considered that it would have an effect similar to that of increased import tariffs and would therefore stop trade. The choice of that particular measure, i.e. the fact that an additional bonding requirements increase costs to exporters/importers but do not bring any fiscal or other advantages to the United States, is another element that confirms the retaliatory nature of the 3 March Measure, i.e. redress, in that its only object is to impose administrative and financial burdens on EC listed imports, so as to effectively stop trade.

6.34 We conclude that with the 3 March Measure, the United States was seeking to redress a perceived WTO violation by the European Communities. The additional burdens imposed by the additional bonding requirements, and the declared purpose and intent of the United States when it effectively began, through the additional bonding requirements, to enforce the imposition of 100 per cent duties on EC listed imports, demonstrate that the 3 March Measure was an action seeking to redress a perceived WTO violation, within the meaning of Article 23.1 of the DSU. Having found that Article 23 applies to the 3 March Measure, we shall now proceed to examine the claims of the European Communities.

## 2. Article 23.1 together with Articles 23.2(c), 3.7 and 22.6 of the DSU

6.35 Articles 23.2(c), 22.6 and 3.7 of the DSU prohibit any unilateral suspension of GATT/WTO concessions or obligations, without a DSB authorization. We recall that violations of Article 23.2 will take place when the measure at issue is taken in the context described in the first paragraph of Article 23<sup>114</sup>, i.e. as a measure seeking to redress a WTO violation. We recall also that there are more violations of the DSU that can be captured by the general prohibition of Article 23.1 than those listed in paragraph 2 of Article 23.

6.36 Since we have already concluded that the 3 March Measure constituted a measure taken to redress a WTO violation (covered by Article 23.1), we proceed to examine whether the same 3 March Measure violated the provisions of the sub-paragraph 2(c) of Article 23 of the DSU, as well as Articles 3.7 and 22.6 of the DSU.

6.37 Article 23.2(c) prohibits any suspensions of concessions or other obligations (taken as measures seeking to redress a WTO violation), prior to a relevant DSB authorization. Article 3.7 provides that suspension of concessions or other obligations should be used as a last resort, and subject to a DSB authorization. In Article 22.6, the suspension of concessions or other obligations is prohibited during the arbitration process which can only take place before the DSB authorization. Articles 3.7, 23.2(c) and 22.6 read as follows:

3.7 "...The last resort which this Understanding provides to the Member invoking the dispute settlement procedures is the possibility of *suspending the application of concessions or other obligations* under the covered agreements on a discriminatory basis vis-à-vis the other Member, subject to authorization by the DSB of such measures." (emphasis added)

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<sup>113</sup> See EC Annex X.

<sup>114</sup> See paras. 6.18 to 6.20 of this Panel Report.

23.2(c) "... Member shall: ... follow the procedures set forth in Article 22 to determine the level of suspension of concessions or other obligations and ***obtain DSB authorization in accordance with those procedures before suspending concessions or other obligations*** under the covered agreements in response to the failure of the Member concerned to implement the recommendations and rulings within that reasonable period of time." (emphasis added)

22.6 " ... Concessions or other obligations shall not be suspended during the course of the arbitration."

6.38 In the context of these provisions, any WTO suspension of concessions or other obligations without prior DSB authorization is explicitly prohibited. On 3 March there was no relevant DSB authorization of any sort. The remaining issue is, therefore, whether the United States, through its 3 March Measure, suspended any concessions or other obligations *vis-à-vis* imports from the European Communities. If so, there would be a violation of the DSU provisions quoted above. Did the 3 March increased bonding requirements on EC listed imports constitute a suspension of GATT/WTO concessions (a violation of Article II) or other obligations (violation of Articles I, VIII and XI)? A response to this question will also provide the answer to the European Communities' claims that the 3 March Measure constituted a violation of Articles I, II, VIII and XI of GATT.

(a) Did the 3 March Measure constitute a suspension of GATT/WTO concessions or other obligations? (EC claims that the 3 March Measure violated Articles I, II, VIII and XI of GATT)

6.39 In this dispute the measure alleged to constitute a suspension of WTO concessions or other obligations is a decision to increase bonding requirements to secure the collection of up to 100 per cent duties on listed imports from the European Communities.

6.40 In this context, we need to understand what the object of bonding requirements is and for what purpose they are used by importing authorities. In addition, the United States focuses its defense on the normal and specific bonding requirements of the US Customs Service in arguing that the 3 March increase in bonding requirements on EC listed imports did not constitute a WTO suspension of concessions or other obligations under the WTO Agreement. We are well aware that it is not in our terms of reference to assess the bonding requirement practices of the US Customs Service in general. We have looked at the US bonding requirement mechanism and the trade effects of the action taken by the United States on 3 March, only to understand the nature of the 3 March Measure. Our assessment of the WTO compatibility of the 3 March increased bonding requirements is based exclusively on the evidence submitted by the United States.

6.41 Bonds are a means of securing and guaranteeing the exercise of certain rights/obligations. Bonds are, therefore, required by the importing Member to guarantee the performance of that importing Member's specific rights (which constitute obligations for other Members). For instance, many Members require bonds upon importation to guarantee the payment of the applicable duties or compliance with some internal regulation.

6.42 Two different aspects of the additional bonding requirements of the 3 March Measure should be assessed. One aspect of the 3 March Measure that has to be examined is the increased bonding requirements as such, in relation to the tariffs they are supposed to guarantee. The other aspect of the 3 March Measure which we will examine is whether it led to increased costs to obtain such additional bonds. The United States suggests that such costs typically would (1) for single bonds purchased for an entry of listed imports valued at \$50,000, be approximately \$175.00, assuming a rate of \$3.50 per thousand dollars of bond value and (2) for continuous bonds calculated based on prior year listed imports of \$50,000, \$50 to \$100 assuming a rate of \$10 to \$20 per thousand dollars of bond value.<sup>115</sup>

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<sup>115</sup> US Responses to Additional Questions of the Panel, dated 10 February 2000, para.5 (Appendix 2.10 to this Panel Report). However, on the basis of the example described in paras. 6.46 to 6.51 of this Panel Report, hereinafter, there would appear to be the potential for a more significant increase in costs, from at least \$500 prior to 3 March to \$10,000 after 3 March for continuous bonds.

These costs are not payable to the United States, but to the institution that provides the bond. We shall, therefore, examine both aspects of the 3 March Measure.

(i) *The increased bonding requirement itself*

6.43 A bonding requirement is essentially an enforcement mechanism accessory to the right that it aims at protecting. As discussed below, GATT jurisprudence also concludes that bonding requirements are enforcement mechanisms and that their GATT compatibility should be assessed together with the principal rights/obligations they aim to guarantee. In other words, a bonding requirement does not have any separate legal *raison d'être* apart from the main right/obligation it guarantees; a bond is therefore part of and included in the right it aims to guarantee. In the present dispute, the United States alleges that the 3 March additional bonding requirements were put in place to secure the payment of 100 per cent duties and, as noted by Deputy USTR P. Scher on 3 March<sup>116</sup>, there is little difference between imposing 100 per cent duties and imposing a contingent liability of 100 per cent of the value of the imports. We should, therefore, assess the WTO compatibility of the specific 3 March bonding requirements in light of the tariff rights (obligations) they seek to securing.

6.44 The GATT jurisprudence confirms our understanding of the legal nature of bonding requirements. In the adopted Panel Report on *EEC – Measures on Animal Feed Proteins*,<sup>117</sup> the Panel concluded that "the security deposit, including any associated cost, was only an enforcement mechanism for the purchase requirement and, as such, should be examined with the purchase obligation" (under Article III of GATT).<sup>118</sup> The adopted Panel Report on *EEC – Programme of Minimum Import Price, Licences and Surety Deposits for Certain Processed Fruits and Vegetables*<sup>119</sup> also concluded that the security system was necessary for the enforcement of the minimum import price and should be assessed together with it. In that case, the Panel concluded that "the minimum import price and associated additional security system did not qualify for the exemptions provided by Article XI:2(c)(i) and (ii) from the provisions of Article XI:1... this system was inconsistent with ...Article XI".<sup>120</sup>

6.45 In the adopted Panel Report on United States - *Section 337 of the Tariff Act of 1930*<sup>121</sup>, the Panel examined the US Section 337, the purpose of which was to enforce the US patent law against imports. The Panel stated that "enforcement procedures cannot be separated from the substantive provisions they serve to enforce", and examined whether such enforcement procedures benefitted from an Article XX(d) exception (as Section 337 together with the patent law it enforced, violated Article III:4). The Panel concluded in the negative. The final conclusion of the Panel Report was that the US Section 337 as such (i.e. the enforcement mechanism), was inconsistent with Article III:4 of GATT.

6.46 We note that on 3 March the bound tariff rates on EC listed imports were those listed in paragraph 2.35 of this Panel Report, all of which are well below 100 per cent *ad valorem*. As of 3 March 1999, the US increased bonding requirements to guarantee payment of 100 per cent duties on \$520 million of EC listed imports. It is helpful to examine, through an example, the actual effect of this 3 March Measure, taking annual imports of \$10,000,000 (all being EC listed imports), subject to, say, 5 per cent bound duties (\$500,000), for both continuous and single bonding requirements and for imports that are covered by the US Food and Drugs Act. From the submissions of the United States

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<sup>116</sup> See para. 6.31 of this Panel Report.

<sup>117</sup> Panel Report on *EEC – Measures on Animal Feed Proteins* ("Animal Feed Proteins"), adopted on 14 March 1978, BISD25S/49.

<sup>118</sup> *Ibid.*, para. 4.4.

<sup>119</sup> Panel Report on *EEC – Programme of Minimum Import Price, Licences and Surety Deposits for Certain Processed Fruits and Vegetables* ("Minimum Import Price"), adopted on 18 October 1978, BISD 25S/68.

<sup>120</sup> *Ibid.*, para. 4.14.

<sup>121</sup> Panel Report on United States - *Section 337 of the Tariff Act of 1930*, adopted on 7 November 1989, BISD 36S/345.

and its responses to our questions, our understanding of the 3 March increased bonding requirements is the following.

6.47 The normal practice of the US Customs, with regard to the bonding requirements, is as follows:

- (i) For most products except those covered by a Food and Drug provision:
  - A continuous bond has to cover 10 per cent of the duties, taxes and fees for all the products during the preceding year and is to be no less than \$50,000.
  - A single transaction bond has to cover the entered value plus any duties, taxes and fees for the entry of the merchandise;
- (ii) For products covered by an additional Food and Drug requirement:
  - A continuous bond has to cover 10 per cent of the duties, taxes and fees for all the products during the preceding year and is to be no less than \$50,000.
  - A single transaction bond has to cover three times the amount of the entered value of the merchandise.

It is our understanding that, as of 3 March 1999, the bonding requirements for the EC listed imports were:

- (iii) For most products, except those covered by a Food and Drug provision:
  - A continuous bond has to cover 10 per cent of the entered value of covered goods in the preceeding year.
  - A single transaction bond has to cover the amount of the entered value of the merchandise.
- (iv) For products covered by an additional US Food and Drug Act requirement:
  - A continuous bond has then to cover 10 per cent of the entered value of covered goods in the preceeding year.
  - A single transaction bond has to cover three times the amount of the entered value of the merchandise.

6.48 Taking imports not subject to the US Food and Drug requirements, before 3 March, for a continuous bond, our example of \$10,000,000 value of imports would have been subject to 10 per cent of the duties of \$500,000 (ignoring taxes and fees for the purposes of this example), so the amount of the bond would have been \$50,000. As of 3 March, the bonding requirement was 10 per cent of the entered value of covered goods in the previous year. In our example the bonding requirement would, therefore, increase from \$50,000 to \$1,000,000. This would appear to be consistent with the Customs Services Memorandum referred to in paragraph 2.24 above.

6.49 Before 3 March, for a single transaction bond, and assuming 50 individual shipments valued at \$200,000 each, the bonding requirement was the entered value, \$200,000 plus any duties (5 per cent - \$10,000), so a total of \$210,000. As of 3 March, the bonding requirement was the amount of the entered value, so that the amount of the bond would have been \$200,000 for each shipment, i.e. a decrease. In those cases where importers were permitted to take out a single transaction bond for a shipment rather than increase the continuous bond, there would be an increase, i.e. to the extent of the full amount of the single transaction bond (in our example, \$200,000), which is less of an increase than the alternative of a continuous bond of \$1,000,000).

6.50 Bonding requirements on imports subject to the US Food and Drug requirements were unchanged for single transaction bonds at three (3) times the entered value. For continuous bonds, the situation would be as described in paragraph 6.48 above.

6.51 We recall that approximately 93 per cent of the EC imports (and assuming therefore approximately 93 per cent of the EC listed imports) were subject to continuous entry bonds.<sup>122</sup> From the evidence before us, we believe that in most cases of EC listed imports the 3 March Measure led to increased bonding requirements. There may, however, be situations where the 3 March additional bonding requirements were negligible or did not increase. We consider, however, that the object of our examination is the mechanism put in place through the 3 March Measure as a whole.

6.52 In this context, we recall the conclusions of the Appellate Body in *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and other Items* ("Argentina – Textiles")<sup>123</sup> that if the possibility remains that Article II be violated, the tariff mechanism in place should be considered to be in violation of Article II:

"53. In the light of this analysis, we may generalize that under the Argentine system, whether the amount of the DIEM is determined by applying 35 per cent, or a rate less than 35 per cent, to the representative international price, **there will remain the possibility** of a price that is sufficiently low to produce an *ad valorem* equivalent of the DIEM that is greater than 35 per cent. In other words, the structure and design of the Argentine system is such that for any DIEM, no matter what *ad valorem* rate is used as the multiplier of the representative international price, the possibility remains that there is a "break-even" price below which the *ad valorem* equivalent of the customs duty collected is in excess of the bound *ad valorem* rate of 35 per cent.

...

62. We recall our finding that the DIEM regime, by its structure and design, results in the application of specific duties with *ad valorem* equivalent exceeding 35 per cent ... We agree with Argentina, therefore, that the application of the DIEM does not result in a breach of Article II for *each and every* import transaction in a given tariff category. At the same time, however, we agree with the Panel that there are sufficient reasons to conclude that the **structure and design** of the DIEM will result, **with respect to a certain range of import prices** within a relevant tariff category, in an infringement of Argentina's obligations under Article II:1 for all tariff categories in Chapters 51 to 63 of the N.C.M..<sup>124</sup> (emphasis added)

6.53 The European Communities claims that the 3 March Measure violated Article I of GATT, as it was applicable only to EC products and not to other like products from other WTO Members.

6.54 We find that the 3 March additional bonding requirements violated the most-favoured-nation clause of Article I<sup>125</sup> of GATT, as it was applicable only to imports from the European Communities, although identical products from other WTO Members were not the subject of such an additional

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<sup>122</sup> US Responses to Additional Questions of the Panel, dated 8 February 2000, para. 13 (Appendix 2.6 to this Panel Report).

<sup>123</sup> Appellate Body Report on *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and other Items* ("Argentina – Textiles"), adopted on 22 April 1998, WT/DS56/AB/R.

<sup>124</sup> *Ibid.*, paras. 53 and 62.

<sup>125</sup> Article I:1 of GATT reads as follows: "With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties."

bonding requirements. The regulatory distinction (whether an additional bonding requirement is needed) was not based on any characteristic of the product but depended exclusively on the origin of the product and targeted exclusively some imports from the European Communities.<sup>126</sup>

6.55 The European Communities also claims that the 3 March Measure violated Article II of GATT which reads as follows:

"1. (a) Each contracting party shall accord to the commerce of the other contracting parties treatment no less favourable than that provided for in the appropriate Part of the appropriate Schedule annexed to this Agreement.

(b) The products described in Part I of the Schedule relating to any contracting party, which are the products of territories of other contracting parties, shall, on their importation into the territory to which the Schedule relates, and subject to the terms, conditions or qualifications set forth in that Schedule, be exempt from ordinary customs duties in excess of those set forth and provided therein. Such products shall also be exempt from all other duties or charges of any kind imposed on or in connection with the importation in excess of those imposed on the date of this Agreement or those directly and mandatorily required to be imposed thereafter by legislation in force in the importing territory on that date."

6.56 We have already discussed the nature of bonding requirements and concluded that their WTO compatibility should be assessed together with the rights or obligations they aim at securing. In particular, when used to guarantee the payment of customs duties, the bonding requirement becomes part of, and is included in, the right to collect customs duties (and the enforcement of this right/obligation). Bonds are required to cover the payment of tariffs, and are nothing but the mechanisms relating to the collection of the customs duties, with no legally autonomous existence. In the present dispute, the additional bonding requirements are said to have been put in place to secure the payment of increased tariffs; their WTO compatibility is, therefore, to be determined with reference to the disciplines of Article II.

6.57 We recall that the fundamental purpose of Article II is to preserve the value of tariff concessions negotiated by a Member with its trading partners, and bound in that Member's Schedule. We agree with the Appellate Body statement in *Argentina – Textiles*:

"47. In accordance with the general rules of treaty interpretation set out in Article 31 of the *Vienna Convention*, Article II:1(b), first sentence, must be read in its context and in light of the object and purpose of the GATT 1994. Article II:1(a) is part of the context of Article II:1(b); it requires that a Member must accord to the commerce of the other Members "treatment no less favourable than that provided for" in its Schedule. ... A basic object and purpose of the GATT 1994, as reflected in Article II, ***is to preserve the value of tariff concessions negotiated by a Member with its trading partners, and bound in that Member's Schedule***.<sup>127</sup> (emphasis added)

6.58 We consider, therefore, that the purpose of Article II is to prohibit any liability for customs duties above the maximum level recorded in a Member's Schedule. The 3 March additional bonding requirements were established at a level which would guarantee the collection of 100 per cent duties.

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<sup>126</sup> Panel Report on *Indonesia – Certain Measures Affecting the Automobile Industry* ("Indonesia – Automobiles"), adopted on 23 July 1998, WT/DS54,55,59, 64/R, para.14.147: "For the reasons discussed above, we consider that the June 1996 car programme which introduced discrimination between imports in the allocation of tax and customs duty benefits based on various conditions and other criteria not related to the imports themselves and the February 1996 car programme which also introduced discrimination between imports in the allocation of customs duty benefits based on various conditions and other criteria not related to the imports themselves, are inconsistent with the provisions of Article I of GATT."

<sup>127</sup> Appellate Body Report on *Argentina – Textiles*, op. cit., para. 47.

We have found that the bonding requirements should be assessed together with the rights/obligations they purport to protect, being in this case, the right to collect tariffs at bound levels. The 3 March Measure imposed additional bonding requirements to guarantee collection of 100 per cent tariff duty. The 3 March additional bonding requirements increased the contingent tariff liability for EC listed products above their bound levels, all of which are much lower than 100 per cent *ad valorem* (the highest is 18 per cent). In fact, on 3 March, with the additional bonding requirements on EC listed imports, the United States began 'enforcing' the imposition of 100 per cent tariff duties on the EC listed imports, contrary to the levels bound in its Schedule.

6.59 We find that the increased bonding requirements of the 3 March Measure, as they provided a treatment less favourable than in the United States' Schedules, violated Article II:1(a) of GATT. The 3 March Measure also violated Article II:1(b), first sentence, as it was guaranteeing and, therefore, enforcing tariffs above their bound levels.

#### One Panelists' view

6.60 One Panelist is of the view that bonding requirements can legitimately be in place to enforce WTO compatible rights and obligations. Such bonding requirements could benefit from the application of Article XX(d), as "measures necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement", assuming they support WTO compatible rights/obligations and they are not inconsistent with the provisions of the chapeau of Article XX). If bonding requirements are used to secure the respect of WTO compatible rights/obligations, they would not appear to be inconsistent with the WTO Agreement. However, if not, they could be viewed as effectively imposing a form of 'restriction' contrary to Article XI of GATT.<sup>128</sup>

6.61 In the present dispute, the increased bonding requirements did not enforce any legitimate WTO tariff rights and therefore could not be considered as "necessary to secure compliance with laws or regulations which are not inconsistent" with GATT. On 3 March, the tariffs were bound at levels below 100 per cent (the highest level is 18 per cent). Any bonding requirements to cover the payment of tariffs above their bound levels cannot be viewed as a mechanism in place to secure compliance with WTO compatible tariffs and constituted, therefore, import restrictions for which there was no justification. The actual trade effects of the 3 March Measure, which are reflected on the charts contained in paragraph 2.37 of this Panel Report, confirm its restrictive nature and effect. One Panelist found, therefore, that the 3 March Measure constituted a "restriction", contrary to Article XI of GATT, rather than a duty or charge under Article II.

#### *(ii) Interest charges, costs and fees in connection with the lodging of the additional bonding requirement*

6.62 The other aspect of the 3 March Measure that we must examine is whether the increased interest charges, costs and fees constituted "other duties and charges" collected by the United States on EC listed imports contrary to Article II:1(b) last sentence, as claimed by the European Communities.<sup>129</sup> The United States submits that the costs of obtaining an additional bonding requirement are not charges, within the meaning of Article II:1(b) last sentence, because they are not paid to the United States but to an independent entity.

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<sup>128</sup> Article XI:1 of GATT reads as follows: "No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any Member on the importation of any product of the territory of any other Member or on the exportation or sale for export of any product destined for the territory of any other Member."

<sup>129</sup> For an evaluation of such costs we refer to our approximations in para. 6.42 above.

6.63 Article II:1(b) of GATT prohibits the imposition of other duties and charges in excess of the customs duties.<sup>130</sup> Article II:1(b), second sentence reads as follows:

"Such products shall also be exempt from all other duties or charges of any kind imposed on or in connection with the importation in excess of those imposed on the date of this Agreement or those directly and mandatorily required to be imposed thereafter by legislation in force in the importing territory on that date."

6.64 We note that nothing in Article II:1(b), second sentence provides that only charges paid to the importing country are to be covered by the terms "charges of any kind imposed on or in connection with the importation". The GATT/WTO jurisprudence has consistently ruled that any governmental "measure" can be challenged before the GATT/WTO. The 3 March Measure was a governmental measure. It would be too easy for Members to avoid the disciplines of Article II:1(b) if any charges required to be paid upon importation were exempted from the application of Article II:1(b) when the payment is to be made to another designated entity.

6.65 We note that a similar issue was discussed in the adopted Panel Report on *EEC – Programme of Minimum Import Price, Licences and Surety Deposits for Certain Processed Fruits and Vegetables*:

"4.15 The Panel next examined the status of *the interest charges and costs in connection with the lodging of the additional security* associated with the minimum import price for tomato concentrates in relation to the obligations of the Community under Article II:1(b). The Panel noted the argument by the representative of the United States that the interest charges and costs associated with the lodging of the additional security were charges on or in connection with importation in excess of those allowed by Article II:1(b). The Panel further noted *that the minimum import price and additional security system* for tomato concentrates had *not* been found to be *consistent with Article XI*, nor had any justification been claimed by the Community under any other provision of the General Agreement. The Panel considered that these interest charges and costs were "other duties or charges of any kind imposed on or in connection with importation" in excess of the bound rate within the meaning of Article II:1(b). Therefore, the Panel concluded that the *interest charges and costs in connection with the lodging of the additional security associated with the minimum import price for tomato concentrates were inconsistent with the obligations of the Community under Article II:1(b)*."<sup>131</sup> (emphasis added)

6.66 The United States has confirmed that the additional bonding requirements did result in increased costs.<sup>132</sup>

6.67 We find, therefore, that any additional interest, charges and costs incurred in connection with the lodging of the additional bonding requirements of the 3 March Measure violated Article II:1(b) of GATT.

6.68 The European Communities also claims that the 3 March Measure violated Article VIII of GATT. We do not see how the costs relating to the bonding requirements upon importation could constitute the "approximate cost of services rendered", in the sense of Article VIII.

6.69 The meaning of Article VIII was examined in the adopted Panel Report on *United States - Customs Users Fee*<sup>133</sup> and in the adopted Appellate Body and Panel Reports on *Argentina – Textiles*. It

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<sup>130</sup> The GATT 1994 Understanding imposes the obligation to record such "other duties and charges" in a Member's Schedule. Such additional charges resulting from the 3 March Measure could not have been recorded in the United States Schedules of GATT 1994.

<sup>131</sup> Panel Report on *Minimum Import Price*, op. cit., para. 4.15.

<sup>132</sup> See para. 6.42 of this Panel Report.

was found that Article VIII's requirement that the charge be "limited in amount to the approximate cost of services rendered" is "actually a dual requirement, because the charge in question must first involve a 'service' rendered, and then the level of the charge must not exceed the approximate cost of that 'service'."<sup>134</sup> The term "services rendered" means "services rendered to the individual importer in question."<sup>135</sup>

6.70 Although very briefly in its rebuttals<sup>136</sup>, the United States argued that bonding requirements could be viewed as a form of fee for services rendered (the services being the "early release of merchandise") and therefore should benefit from the carve-out of Article II:2(c) of GATT, the United States has not submitted any data on the second requirement. There is no evidence that what was required from importers represented any such approximate costs of any service. It is also difficult to understand why the costs of such service would have suddenly increased on 3 March (did the United States provide more services to importers on 3 March?), and then only for listed imports from the European Communities.

6.71 We recall that the European Communities had the burden to convince us that Article VIII was applicable to the present dispute, which we consider it has failed to do. We consider that Article VIII is not relevant to the present dispute and, accordingly, we reject this EC claim.

6.72 We thus find that *prima facie* the increased bonding requirements of the 3 March Measure violated Article II:1(a) and II:1(b), first sentence of GATT. One Panelist was of the view that the increased bonding requirements of the 3 March Measure rather violated Article XI of GATT, in imposing an unjustified restriction on imports. We find that the additional interest charges, costs and fees incurred in connection with the lodging of the additional bonding requirements violated Article II:1(b), second sentence of GATT. We also find that the 3 March Measure violated Article I of GATT.

6.73 We conclude, therefore, that *prima facie* the 3 March Measure constituted a "suspension of concessions or other obligations" for the purpose of Articles 3.7, 22.6 and 23.2(c) of the DSU.

(b) US Defences

6.74 The United States contests the EC claims and argues that the 3 March Measure did not constitute a suspension of GATT/WTO concessions or other obligations. The US defense seems to be two-fold. The United States argues that the 3 March Measure, the (increased) bonding requirements, is explicitly authorised by Article 13 of the Agreement on Implementation of Article VII of GATT ("Customs Valuation Agreement"). The United States seems also to argue that it had the right to take the 3 March Measure because those imports represented an increased "risk", taking into account the (potential) eventual DSB authorization to suspend concessions and other obligations on the EC listed imports. First, we address the US defense based on Article 13 of the Customs Valuation Agreement. Secondly, we examine whether the rules of the DSU would provide the United States with a right, on 3 March 1999, to increase its tariffs on EC listed imports above its bindings, so that such right needed to be guaranteed.

(i) *The US defence based on Article 13 of the CV Agreement*

6.75 As further discussed below, the United States argues that the non-compliance by the European Communities created a risk, which allowed the United States to have concerns over its ability to collect the full amount of duties which might be due. In this respect, the United States went

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<sup>133</sup> Panel Report on United States - *Customs Users Fee* ("US - *Customs Users Fee*"), adopted on 2 February 1988, 35S/245.

<sup>134</sup> *Ibid.*, para. 69.

<sup>135</sup> *Ibid.*, para. 80.

<sup>136</sup> US Rebuttal Submission, paras. 29 and 30 (Appendix 2.5 to this Panel Report).

to great lengths to explain to the Panel that its entry system is consistent with Article 13 of the Customs Valuation Agreement. It is sufficient to note that the Customs Valuation Agreement deals with issues relating to the customs value of imported products (i.e. whether, for example, the customs value of an import is \$150 or \$175), not with how to determine the level of applicable tariffs (whether tariffs are 10 per cent or 25 per cent).

6.76 Article 13 of the Customs Valuation Agreement reads as follows:

*"If, in the course of determining the customs value of imported goods, it becomes necessary to delay the final determination of such customs value, the importer of the goods shall nevertheless be able to withdraw them from customs if, where so required, the importer provides sufficient guarantee in the form of a surety, a deposit or some other appropriate instrument, covering the ultimate payment of customs duties for which the goods may be liable. The legislation of each Member shall make provisions for such circumstances."* (emphasis added)

6.77 In the present dispute the United States is not claiming that, as of 3 March, it required additional guarantees because the customs value of the EC listed imports had increased or changed on 3 March 1999. In the present dispute, there is no disagreement between the parties on the customs value of the EC listed imports. Article 13 of the Customs Valuation Agreement allows for a guarantee system when there is uncertainty regarding the customs value of the imported products, but is not concerned with the level of tariff obligations as such. Article 13 of the Customs Valuation Agreement does not authorise changes in the applicable tariff levels between the moment imports arrive at a US port of entry and a later date once imports have entered the US market. As we discuss further below, the applicable tariff (the applicable WTO obligation, the applicable law for that purpose<sup>137</sup>), must be the one in force on the day of importation, the day the tariff is applied. In other words, Article 13 of the Customs Valuation Agreement is of no relevance to the present dispute. We reject, therefore, this US defense.

(ii) *The US defence based on the increased "risk" that those EC listed imports represented*

6.78 In its first set of answers, the United States confirmed that the date of application of its tariffs is the date on which "goods arrive on a vessel within a Customs port" not a later date if a later event takes place.<sup>138</sup>

6.79 According to the United States, as of 3 March, the applicable tariff duty on EC listed imports could vary depending upon a future event, i.e. a DSB authorization to suspend concessions or other obligations on the same EC listed imports. This variation in the tariff level constituted a 'risk' which, we understand under US law, provided a justification for the Customs Service to change bonding requirements on those EC listed imports.

6.80 We understand that, generally, the customs clearance is based on two different types of factors: (1) factors relating to the assessment of the correct classification, customs valuation and origin of the goods: this depends on the specificities of each individual import operation which must be declared by the importer; and (2) factors determined by the relevant customs legislation applicable on the date on which the customs liability is incurred, i.e. in the case of the United States, the date of entry into the US customs territory. That legislation sets among other things the applicable duty rate.

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<sup>137</sup> Appellate Body Report on European Communities – *Customs Classification of Certain Computer Equipment*, adopted on 22 June 1998, WT/DS62, 67 and 68/AB/R, para. 84: "[T]he concessions provided in that Schedule are part of *the terms of the treaty*. As such, the only rules which may be applied in interpreting the meaning of a concession are the general rules of treaty interpretation set out in the Vienna Convention." (emphasis added)

<sup>138</sup> US Responses to Questions of the Panel and the Parties, dated 15 January 2000, paras. 6 and 7 (Appendix 2.4 to this Panel Report). We note that the Kyoto Convention obliges to "specify the point in time to be taken into consideration for the purpose of determining the rates of import duties and taxes chargeable on goods declared for home use." (Standard 47 of Annex B.1)

6.81 Bonding requirements often serve the purpose of guaranteeing the correctness of the operators' declarations concerning the first set of factors (customs value, classification, origin of the imports). However, the 3 March Measure did not impose increased bonding requirements in order to guarantee payment of increased duties that would result from any uncertainty regarding the customs value, classification or origin of the imports. The change, the risk that is alleged to be the legal basis of the 3 March Measure, is a risk under US law, arising, according to the United States, from a possible future change of the WTO legal situation of the United States and the European Communities. The national law of the United States cannot justify any WTO inconsistency<sup>139</sup>. No provisions of any WTO agreement refer to such risks or allow Members to create or maintain uncertainty with regard to the upper limit of the applicable duty rate. When a WTO agreement allows importers to apply measures to protect themselves against a situation 'threatening to occur' (a concept distinct from that of risk), it does provide so explicitly.<sup>140</sup>

6.82 We note also that the principal object and purpose of DSB authorised suspension of concessions or other obligations is not to obtain monetary compensation for an amount equivalent to the lost trade (caused by the WTO incompatible measure), but rather to restrict trade to an extent equivalent to the trade affected by the incompatible measure. Even in situations of WTO authorised suspensions of concessions, those enterprises that suffer from the consequences of the incompatible measures do not get any form of compensation out of the suspension of concessions. The purpose of such DSB authorised retaliatory measure is not to collect duties to be redistributed to exporters who lost trade opportunities because of the WTO incompatible measure of another Member. The major purpose of the WTO compatible suspension of concessions is to involve other interest groups from the Member at fault in order to induce compliance of that Member. The ultimate object of WTO authorised suspensions of concessions or other obligations is to remove WTO benefits and, therefore, probably to stop some trade. It is difficult to understand how a Member can obtain a retroactive permission to stop trade: either trade has been stopped or it has not. It would be absurd to imagine a situation where a Member would effectively stop trade while waiting for a DSB permission that may never come. What would have initially been a measure to stop trade while waiting for a 'retroactive' DSB permission, would then become a unilateral action, contrary to Article 23. Article 23 of the DSU is categorical: unilateral actions are prohibited at all times. If trade has been stopped before a DSB authorization, there is a violation of Article 23; if trade has not been stopped, the DSB cannot stop trade retroactively, it is physically impossible.

6.83 Finally, how can the United States, on 3 March, claim that there was a risk that the EC listed imports become retroactively subjected to WTO compatible higher duties (100 per cent) as of 3 March when its requests for the DSB authorization to suspend concessions or other obligations (14 January 1999 and 18 February 1999) did not even ask for the retroactive application of suspension of concessions or other obligations? Even if it were possible to obtain such a retroactive authorization, on 3 March the United States had not requested it.<sup>141</sup>

6.84 We thus reject the US defense to the effect that on 3 March it had a right to secure, through an additional bonding requirement, the payment of 100 per cent duties because there was a risk that pursuant to the DSU, the United States would be retroactively authorised to suspend concessions or other obligations against EC listed imports.

(c) Conclusion

6.85 We find that the 3 March Measure violated Articles I, II:1(a) and II:1(b) of the GATT and, therefore, constituted a suspension of concessions or other obligations within the meaning of Articles 23.2(c), 22.6 and 3.7 of the DSU.

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<sup>139</sup> Article 27 of the Vienna Convention on the Law of Treaties (the "Vienna Convention").

<sup>140</sup> See for instance Article 3.7 and footnote 9 of the Agreement on the Implementation of Article VI of GATT 1994, Article 15 and footnote 45 of the Agreement on Subsidies and Countervailing Duties and Article 4.1 of the Agreement on Safeguards.

<sup>141</sup> The Panel recalls the considerations set out in para. 6.106 of this Panel Report and its footnotes.

6.86 To the extent that the 3 March Measure constituted a GATT/WTO suspension of concessions or other obligations, it could take place only pursuant to a DSB authorization. On 3 March 1999, the United States did not have any DSB authorization to suspend any tariff concession or any other obligation in response to the alleged WTO violation by the European Communities. In fact, on 3 March no WTO adjudicating body had yet determined (i) whether the EC implementing measure nullified any WTO benefits, (ii) the level of such nullification, if any, or (iii) the level of suspension that should be authorised, if any. On 3 March, bonding requirements on EC listed imports were increased but there were no related additional tariff rights to justify such an additional enforcement mechanism. On 3 March, the United States had no right to impose 100 per cent duties on the EC listed imports therefore no right to begin enforcing the imposition of 100 per cent duty on EC listed imports. On 3 March, the United States unilaterally suspended concessions or other obligations on EC listed imports, without DSB authorization.

6.87 We find, therefore, that the 3 March Measure constituted a suspension of concessions or other obligations within the meaning of Articles 23.2(c), 3.7 last sentence and 22.6 last sentence, since (i) the increased bonding requirements of the 3 March Measure violated Articles II:1(a) and II:1(b), first sentence (one Panelist is of the view that the 3 March Measure violated rather Article XI of GATT), (ii) the additional interest charges, costs and fees resulting from the 3 March Measure violated the second sentence of Article II:1(b) of GATT and (iii) the 3 March Measure violated Article I of GATT. Having reached the prior conclusion that the 3 March Measure was a measure seeking to redress a WTO violation within the meaning of Article 23.1, we find that when it put in place the 3 March Measure, prior to any DSB authorization and while the *EC - Bananas III* (22.6-7) Arbitration process was still ongoing, the United States did not abide by the rules of the DSU - violating Articles 23.2(c), 3.7 and 22.6 of the DSU - and was therefore in violation of Article 23.1.

### **3. Article 23.1 together with Articles 21.5 and 23.2(a) of the DSU**

6.88 The European Communities claims that the 3 March Measure violated Article 21.5 of the DSU, because on 3 March the United States had not exhausted the procedure of Article 21.5, which, the European Communities argues, should have been completed before the United States requested the DSB permission to suspend concessions or other obligations. For the European Communities, such violation is of a continuing nature: the US suspension of concessions or other obligations of 3 March is and remains inconsistent with the WTO Agreement. In the European Communities' view, the 19 April action is only a confirmation of the US 3 March action and it argues that a "[DSB decision adopting an Article 21.5 panel report] was missing on 3 March, was also missing on 19 April and is still missing today"<sup>142</sup>. For the European Communities, the WTO inconsistency of the 3 March Measure (and the 19 April US action) could not have been healed by the DSB authorization of 19 April because it was flawed from the outset: the DSB authorization of 19 April 1999 was a necessary, but not a sufficient prerequisite for the US suspension of concessions or other obligations.

6.89 We recall that the US action of 19 April is not included in our terms of reference. We consider that the 19 April action is a legally distinct measure and we disagree with the EC argument that the 19 April action is only a confirmation of the 3 March Measure. We may examine the 19 April DSB authorization to the United States to suspend concessions and other obligations only to assess the US defence that the authorization may have cured any prior WTO inconsistency of the 3 March Measure.

6.90 We recall that we have reached the prior conclusion that the 3 March Measure constituted a measure seeking to redress a WTO violation within the meaning of Article 23.1 of the DSU. If we find that Article 21.5 of the DSU contains an obligation, its violation could be viewed as one of those DSU obligations which, although not explicitly listed in Article 23.2, are covered by Article 23.1 (which mandates the respect of rules and procedures of the DSU). We examine therefore the meaning of Article 21.5 of the DSU.

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<sup>142</sup> US Second submission, paras. 77-78 (Appendix 2.5 to this Panel Report).

6.91 The first sentence of Article 21.5 reads as follows:

"Where there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings such dispute *shall* be decided through recourse to *these* dispute settlement procedures, *including* wherever possible resort to the original panel." (emphasis added)

6.92 This sentence confirms that when an assessment of the WTO compatibility of a measure taken to comply with panel and Appellate Body recommendations (an "implementing measure") is necessary (because parties disagree), such determination can only be made through the WTO dispute settlement procedures. Pursuant to Article 23.2(a), Members are obliged to have recourse exclusively to a WTO/DSU dispute settlement mechanism to obtain a 'determination' that a measure is WTO inconsistent. We consider that the obligation to use the WTO multilateral dispute settlement mechanism (i.e. as opposed to unilateral or even regional mechanisms) to obtain any determination of WTO compatibility, is a fundamental obligation that finds application throughout the DSU. For us, the prohibition against unilateral determinations of WTO violation contained in the first sentence of Article 21.5 of the DSU is comparable to that of Article 23.2(a) of the DSU.<sup>143</sup> We consider that the ordinary meaning of the terms of the first sentence of Article 21.5 is that in case of disagreement between the parties, the determination of the WTO compatibility of implementing measures shall be made through recourse to the WTO dispute settlement procedures. Therefore, we do not consider that the first sentence of Article 21.5 is only of a procedural nature but rather contains a substantive obligation similar to that of Article 23.2(a) of the DSU.

6.93 Article 22.8 of the DSU, which forms part of the context of Article 21.5, provides that "the suspension of concessions or other obligations shall be temporary and shall only be applied until such time as the *measure found to be inconsistent* ... has been removed". The term "measure found to be inconsistent" (which in the framework of Article 21.5 relates to the implementing measure) assumes an adjudicating process and must be read together with Article 23.2(a)<sup>144</sup> that also mandates WTO adjudication to determine whether a WTO violation has occurred. Article 23.2(a) also forms part of the context of Article 21.5. For us, the first sentence of Article 21.5 is simply a more specific provision reiterating, in the specific context of implementing measures, the general prohibition against unilateral determination of WTO violations contained in Articles 23.1 and 23.2(a) of the DSU.

6.94 In our view, this interpretation preserves the security and predictability of the WTO dispute settlement mechanism and the multilateral trade system it supports. The determination of whether an implementing measure is WTO inconsistent is a matter for the entire membership, and therefore should be assessed through the WTO institutional framework. Many elements in Article 21 of the DSU, entitled "Surveillance of Implementation of Recommendations and Rulings", confirm that implementation of Panel and the Appellate Body recommendations is a systemic concern and that any WTO Member is directly concerned and interested in the implementation process of any other Member. To ensure effective surveillance, implementation remains on the DSB Agenda as long as the matter is not resolved. The implementing Member is also obliged to report periodically to the DSB and produce reports on the status of its implementation<sup>145</sup>.

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<sup>143</sup> Article 21.5, first sentence is one of those DSU provisions whose violations, although not listed in Article 23.2 that contain egregious examples, may lead to a violation of Article 23.1.

<sup>144</sup> Article 23 is included in the context of Article 22.8 which must be taken into account when interpreting the ordinary meaning of the terms used in Article 22.8 of the DSU, Article 31.1 and 31.2 of the Vienna Convention.

<sup>145</sup> See Article 21.6 of the DSU: "The *DSB shall keep under surveillance the implementation* of adopted recommendations or rulings. The issue of implementation of the recommendations or rulings may be raised at the DSB by *any Member* at any time following their adoption. Unless the DSB decides otherwise, the issue of implementation of the recommendations or rulings shall be placed on the agenda of the DSB meeting after six months following the date of establishment of the reasonable period of time pursuant to paragraph 3 and *shall remain on the DSB's agenda until the issue is resolved*. At least 10 days prior to each such DSB

6.95 Based on the evidence below, we are of the view that on 3 March the United States made a unilateral determination that the EC implementing measure violated the WTO; the United States did not make this determination through the recourse to the rules of the DSU or following the conclusions of a Panel, the Appellate Body or Arbitration report (Article 23.2(a)), or through recourse to any of the dispute settlement procedures of the WTO.

6.96 We recall that Article 23.2(a) reads as follows:

- "2. 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;"

6.97 Article 23.2(a) of the DSU confirms the general obligation of Article 23.1 and prohibits more explicitly any unilateral determination that a WTO violation has occurred in providing that all determinations of whether a WTO violation has occurred can only be made pursuant to the DSU process.<sup>146</sup>

6.98 The term "determination" is defined in the New Shorter Oxford English Dictionary as "The action of coming to a decision; the result of this; a fixed intention. The action of definitely ... establishing the nature of something [under 23.2(a) it would be the nature of a WTO violation]; exact ascertainment." In the context of the WTO, we consider that a 'determination' that a WTO violation has occurred is a decision that a WTO Member has violated the WTO Agreement and which bears consequences in WTO trade relations.

6.99 We note that Article 23.2(a) *a contrario* means that determinations made by Members through recourse to the DSU and following findings by panels, the Appellate Body and arbitration are WTO compatible. For instance, when, in January 1999, the United States requested an Article 22 procedure, it had made an internal 'determination' that the EC implementation measure was WTO incompatible and requested a WTO adjudication on this matter. This US determination was made in the context of a DSU procedure and was obviously not in violation of Article 23. However, on 3 March, as further discussed below, the United States decided to act outside of the DSU process.

6.100 For us there is ample evidence that the 3 March Measure constituted a unilateral determination by the United States that a WTO violation had occurred for which the United States determined that a remedial action was needed. When on 3 March the United States decided to take a

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meeting, the Member concerned shall provide the DSB with a *status report* in writing of its progress in the implementation of the recommendations or rulings." (emphasis added)

<sup>146</sup> The Panel Report on *US – Section 301* suggested that four elements must be satisfied for a specific act in a particular dispute to breach Article 23.2(a) of the DSU: "(a) the act is taken 'in such cases' (*chapeau* of Article 23.2), i.e. in a situation where a Member 'seek[s] 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', as referred to in Article 23.1; (b) the act constitutes a 'determination'; (c) the 'determination' is one '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'; (d) the 'determination' is either *not* made 'through recourse to dispute settlement in accordance with the rules and procedures of [the DSU]' or *not* made 'consistent with the findings contained in the panel or Appellate Body report adopted by the DSB or an arbitration award rendered under [the DSU]'." The two elements of this requirement are cumulative in nature. Determinations are only allowed when made through recourse to the DSU *and* consistent with findings adopted by the DSB or an arbitration award under the DSU." Panel Report on *US – Section 301*, *op. cit.*, footnote 657.

remedial action against EC listed imports, there was no WTO determination (no findings by a panel, Appellate Body or arbitration body) concluding that the EC implementing measure was incompatible with the WTO Agreement. The unilateral action (as we concluded above in paragraph 6.86) taken by the United States implies necessarily a prior US unilateral determination that the EC implementing measure was inconsistent with the WTO. When the United States refers to its "rights" and the need to preserve its rights to collect higher duties, this US determination of its rights was, therefore, unilateral. The USTR official announcement stated:

"United States *Takes Customs Action* on European Imports

[E]ffective today, the U.S. Customs Service will *begin* 'withholding liquidation' on imports valued at over \$500 million of *selected products from the European Union* (EU), consistent with *U.S. rights* under the WTO agreements. Withholding liquidation imposes *contingent liability for 100 per cent duties* on affected products as of March 3, 1999...

January 1, 1999, was the deadline for the EU to implement a WTO-consistent banana regime. *The EU failed to honor this deadline*, thereby entitling the United States to suspend tariff concessions as early as February 1<sup>st</sup> on selected European products with the WTO's blessing."<sup>147</sup> (emphasis added)

6.101 The United States' unilateral determination that the EC implementing measure was WTO inconsistent (and therefore should be redressed) is also evident from the Press Conference given by Deputy USTR P. Scher on 3 March:

"Q. Does the withholding of liquidation fulfill the terms of the Bowles letter which says 'If the EU seeks arbitration ... the retaliatory action will go into effect on the date that arbitration is concluded, but in no event later than March 3, 1999'?"

A. ... *We retaliated by effectively stopping trade* as of 3 March in *responding* to the harm caused by the *EC's WTO inconsistent* banana regime. *That purpose is achieved by* withholding liquidation on the products on the *retaliation list* ...

...

Q. How do you expect the EC to react?"

A. ... But our action makes it crystal clear that *there are consequences for failure to comply with WTO rulings*. ..."<sup>148</sup> (emphasis added)

6.102 The fact that on 3 March the United States was saying that it was responding to a WTO violation when, on 3 March the WTO had not yet determined that there was a violation, confirms that the United States made a unilateral determination that the European Communities had committed a WTO violation.

6.103 The request from USTR to the US Customs Service is also revealing:

"... The [USTR] intends to implement this suspension of tariff concessions by directing the Customs Service to impose 100 percent duties, *ad valorem*, on the products listed in the attachment to this letter. (See also 63 Fed. Reg. 63099 and 63 Fed. Reg. 71665 giving notice of the proposed increase in duties on selected products).

... The USTR now *seeks to preserve its right* to impose 100 per cent duties as of March 3, pending the release of the arbitrators' final decision."<sup>149</sup> (emphasis added)

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<sup>147</sup> USTR Press Release, dated 3 March 1999, "United States Takes Customs Action on European Imports" (EC Annex VII).

<sup>148</sup> See EC Annex X.

<sup>149</sup> Letter dated 3 March 1999 from Mr. Peter L. Scher, Special Trade Negotiator to Commissioner Raymond W. Kelly, US Customs Service (US Ex. 12).

6.104 The United States asserts that it seeks to preserve its right to impose 100 per cent duties (the same reference to the US right exists in the Official USTR Press release). However, on 3 March 1999 the United States did not have any such right against any imports from the European Communities, as the determination of whether the EC implementing measure was WTO compatible was still under consideration by the relevant WTO adjudicating body. On 3 March the United States may have had very strong expectations that its request for suspension of concessions or other obligations would be authorised, but to preserve a right, one must have this right first. When the United States declared that it needed to preserve its rights, such a right (to 100 per cent duties) can only have been determined unilaterally by the United States, contrary to Article 23.2(a) and 21.5 of the DSU. This is evidence that on 3 March the United States took a unilateral action with a view to redressing the EC implementing measure which the United States had unilaterally determined to be in violation of the WTO Agreement.

6.105 In fact, it is only because the United States had unilaterally determined that the European Communities had violated the WTO Agreement that the United States considered that it had the right to put in place additional bonding requirements, the nature of which is to secure compliance with a WTO compatible rights/obligations. The very choice of the measure, additional bonding requirements on EC listed imports, because its purposes are to secure rights, suffices to demonstrate that on 3 March the United States made a unilateral determination that the EC implementing measure violated the WTO Agreement and that it had a right to "take action".<sup>150</sup>

6.106 There is also another very important element that demonstrates that the United States took the 3 March Measure after having unilaterally determined that it had the right to take remedial action as of 3 March. The wording of the 3 March Measure leaves the impression that the United States expected some form of retroactive right to collect increased duties. The remedy chosen on 3 March was part of the remedy that the United States alleged would be authorised by the DSB later on. There are, however, no explicit DSU provisions providing for retroactive application of retaliatory measures; to the contrary, Article 22.6 explicitly prohibits such GATT/WTO sanctions during the arbitration process. Nor are there any DSU provisions allowing for measures to be taken to 'preserve' a right to suspend concessions or other obligations. The US requests for DSB authorization to suspend concessions or other obligations<sup>151</sup> did not contain a claim for retroactive application of the authorization. If, arguably, the United States was entitled, when it made its requests (first, on 14 January 1999 for consideration by the DSB on 25 January 1999, and second, on 18 February 2000), to expect that the arbitration panel would respect general time limits of Article 22.6, it could not assume, on 3 March, that it would benefit eventually from a DSB retroactive

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<sup>150</sup> See the title of the 3 March USTR Press Release: "United States Takes Customs Action on European Imports" (EC Annex VII). We note in this context that the Notification in the Federal Register of 10 November 1998 provided that "The dates on which the USTR intends to implement action – February 1 or not later than March 3 ..." Notification of USTR, Doc. No. 301-100a, 10 November 1998, 63 Fed. Reg. 63099 (1998) (EC Annex II). On its face, Section 306(b) of the Trade Act requires the USTR to determine what further action it shall take under Section 301(a) if the USTR considers that a foreign country has failed to implement a recommendation made pursuant to dispute settlement proceedings under the WTO. The USTR shall make this determination no later than thirty days after the expiry of the reasonable period of time provided for such implementation under Article 21.3 of the DSU, which is January 31, 1999 in this case. Section 305(a)(I) requires USTR to implement such action by no later than thirty days after the date on which that determination is made, or March 2 in this case. We recall that the Panel on *US – Section 301* had reached the conclusion that (irrespective of whether the US or EC approach to Article 21.5 and 22 is followed), Section 306 through which the USTR can make a determination that a Member's implementation has failed within 30 days after the expiry of the reasonable period of time, is *prima facie* inconsistent with Article 23.2(a) of the DSU. We recall also that the Panel concluded that when USTR determines that an action is needed because there is "a 'consideration' that implementation failed, automatically and as a *conditio sine qua non* leading to a decision on action under Section 301, that determination meet the threshold of firmness and immutability required for a 'determination' under Article 23.2(a)". Panel Report on *US – Section 301*, op. cit., paras. 7.142-147.

<sup>151</sup> WT/DS27/43 and WT/DS27/47.

right.<sup>152</sup> The United States did not request retroactivity, and retroactive remedies are alien to the long established GATT/WTO practice where remedies have traditionally been prospective. On 3 March the United States had no WTO compatible 'right' (even potential) to any suspension of concessions or other obligations that could be retroactively confirmed. Therefore, the US assertion that it had such a right could only have been unilaterally determined.

6.107 We conclude, therefore, that the 3 March measure constituted a unilateral determination contrary to Article 23.2(a) and 21.5 of the DSU. As discussed above we consider that Articles 23.2(a) and 21.5 make it clear that the determination of the WTO compatibility of implementing measures can only be made through recourse to the DSU. On 3 March such WTO determination did not exist. The European Communities claim that the United States should be blamed. But who should trigger this WTO determination of the WTO compatibility of an implementing measure?

6.108 The European Communities and the United States disagree as to which party bears the burden of demonstrating compliance or non-compliance of such an implementing measure. We consider that to the extent that there is a measure taken to comply with the Panel and Appellate Body recommendations (an implementing measure), and that the content of such an implementing measure is distinct from the measure that was the object of the Panel and Appellate Body recommendations, Article 21.5 mandates the WTO determination of whether such an implementing measure is WTO compatible. We note that the existence of a measure, i.e. the issue whether a new measure has effectively been adopted to comply with Panel and the Appellate Body recommendations, is a matter that must also be determined by the DSB and not unilaterally.

6.109 It would be, therefore, for the Member challenging the WTO consistency of the implementing measure (or challenging the very existence of an authentic implementing measure) to request that the matter be brought under a WTO/DSU dispute settlement procedure (that Member is obligated to do so pursuant to Articles 21.5 and 23.2(a) of the DSU), in particular before the original panel if available. Traditionally in GATT/WTO, it is for the country that seeks the application of a specific provision or right, to ask for it. We note, in this context, that it is relatively simple (and there is no need for any special legal interest and the 'standing' requirement is only one of 'potential' market interest.<sup>153</sup>) to initiate a dispute settlement procedure pursuant to the DSU. The Member intending to request DSB permission to suspend concessions or other obligations must, therefore, in the event of a disagreement between the parties, challenge the implementing measure and trigger the WTO dispute settlement mechanism to obtain a WTO determination that the implementing measure is WTO inconsistent. As

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<sup>152</sup> On 3 March, the United States had not requested any retroactive DSB permission and the arbitrator had not lost jurisdiction over the matter. We recall the conclusion of the Arbitrators in the Article 22.6 Decision on *EC – Bananas III*: "On the face of it, the 60-day period specified in Article 22.6 does not limit or define the jurisdiction of the Arbitrators *ratione temporis*. It imposes a *procedural* obligation on the Arbitrators in respect of the conduct of their work, not a *substantive* obligation in respect of the validity thereof. In our view, if the time-periods of Article 17.5 and Article 22.6 of the DSU were to cause the lapse of the authority of the Appellate Body or the Arbitrators, the DSU would have explicitly provided so. Such lapse of jurisdiction is explicitly foreseen, e.g. in Article 12.12 of the DSU which provides that "if the work of the panel has been suspended for more than 12 months, the authority for establishment of the panel shall lapse". We recall a similar conclusion reached by the *US – Section 301* Panel Report in para. 7.31. The United States must have known that such 3 March Measure was unilateral and not based on any reasonable expectation of retroactive application.

<sup>153</sup> See for instance the following clear statement of the Appellate Body in *EC – Bananas III*: "132. ... We do not accept that the need for a 'legal interest' is implied in the DSU or in any other provision of the *WTO Agreement*... 135. Accordingly, we believe that a Member has broad discretion in deciding whether to bring a case against another Member under the DSU. The language of Article XXIII:1 of the GATT 1994 and of Article 3.7 of the DSU suggests, furthermore, that a Member is expected to be largely self-regulating in deciding whether any such action would be 'fruitful'. (...) 136. We are satisfied that the United States was justified in bringing its claims under the GATT 1994 in this case. The United States is a producer of bananas, and a potential export interest by the United States cannot be excluded". Appellate Body Report on *EC – Bananas III*, op. cit., paras. 132, 135 and 136.

under general WTO rules<sup>154</sup>, that Member will bear the burden of proving that the new implementing measure violates provisions of the WTO Agreement.

6.110 Our position is confirmed by the following statement of the Appellate Body in *Chile – Taxes on Alcoholic Beverages*,

"74. ... Members of the WTO should not be assumed, in any way, to have **continued** previous protection or discrimination through the adoption of a new measure. This would come close to a presumption of bad faith."<sup>155</sup> (emphasis in original)

and by the following conclusion of the *Hormones* Arbitration Report:

"9. WTO Members, as sovereign entities, can be **presumed** to act in conformity with their WTO obligations. A party claiming that a Member has acted **inconsistently** with WTO rules bears the burden of proving that inconsistency."<sup>156</sup> (emphasis in original)

6.111 Our interpretation of the burden of proof will not favour the adoption of 'scam' implementing measures. To the contrary, we are well aware that immediate implementation of DSB recommendations is the relevant standard, explicitly repeated in Articles 3.7, 21.1 and 21.3 of the DSU. In this context, we refer to the consistent jurisprudence of arbitrators pursuant to Article 21.3(c) of the DSU that "... the first objective is usually the *immediate removal* of the measure judged to be inconsistent ... Only if it is impracticable to do so, is the Member concerned entitled to a reasonable period of time"<sup>157</sup>. It seems therefore clear that implementation shall proceed expeditiously.

6.112 If the implementing Member abuses its right to implement the recommendations of Panels and Appellate Body within the reasonable period of time, such implementing Member will not benefit from the adoption of any scam measure, as it seems clear that it bears the burden of proving that the initial DSB authorised level of suspension of concessions and other obligations should be reduced (pursuant to the adoption of a new WTO compatible measure). This is consistent with the rule that the burden of proof always rests on the Member challenging the WTO compatibility of a measure. Once a Member imposes DSB authorised suspensions of concessions or obligations, that Member's measure is WTO compatible (it was explicitly authorised by the DSB). If the Member affected by that other Member's measure (imposing suspension of concessions or obligations) wants to challenge

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<sup>154</sup> See the well-established principle to that effect in the Appellate Body Report on United States – *Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, adopted on 23 May 1997, WT/DS33/AB/R, p.14: "In addressing this issue, we find it difficult, indeed, to see how any system of judicial settlement could work if it incorporated the proposition that the mere assertion of a claim might amount to proof. It is, thus, hardly surprising that various international tribunals, including the International Court of Justice, have generally and consistently accepted and applied the rule that the party who asserts a fact, whether the claimant or the respondent, is responsible for providing proof thereof. Also, it is a generally-accepted canon of evidence in civil law, common law and, in fact, most jurisdictions, that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence".

<sup>155</sup> Appellate Body Report on *Chile – Taxes on Alcoholic Beverages*, adopted on 12 January 2000, WT/DS87 and 110/AB/R, para. 74.

<sup>156</sup> Decision by the Arbitrators on European Communities – *Measures concerning Meat and Meat Products (Hormones)* ("*EC – Hormones*"), Recourse to Arbitration by the European Communities under Article 22.6 of the DSU, circulated on 12 July 1998, WT/DS26/ARB, para. 9.

<sup>157</sup> Award of the Arbitrator, Arbitration under Article 21.3(c) of the DSU on *Australia - Measure affecting Importation of Salmon* ("*Australia – Salmon*"), circulated on 23 February 1999, WT/DS18/9, paras. 28-30. See also Award of the Arbitrator, Arbitration under Article 21.3(c) of the DSU on *EC - Hormones*, circulated 29 May 1998, WT/DS26/15, WT/DS48/13, para. 26 and Award of the Arbitrator, Arbitration under Article 21.3(c) of the DSU on *Indonesia – Automobiles*, circulated on 7 December 1998, WT/DS54/15, WT/DS55/14, WT/DS59/13, WT/DS64/12.

the WTO compatibility of such measure (e.g. its level is no longer equivalent to the level of nullification), it is for that affected Member to bear the related burden of proof.

6.113 We consider that our interpretation is consistent with the terms of Article 22.8 of the DSU, which is very specific on this matter, and which provides:

"22.8 The suspension of concessions or other obligations shall be temporary and shall only be applied *until such time* as the measure found to be inconsistent with a covered agreement has been removed, or the Member that must implement recommendations or rulings provides a solution to the nullification or impairment of benefits, or a mutually satisfactory solution is reached." (emphasis added)

6.114 It is only logical that the Member, author of the said measure found inconsistent, is in the best position to know whether the situation has changed, i.e. whether the measure (or part of it) was removed and, consequently, whether the measure imposing the suspension should be challenged. That same Member should bear the burden of proving that the suspension measure is not WTO compatible anymore because its level is not equivalent to the level of nullification of WTO benefits. Our interpretation is consistent with the fundamental WTO/DSU rule that Panel and Appellate Body recommendations must be implemented "immediately" (21.3(c) of the DSU) and that, at the latest at the expiry of the reasonable period, the WTO/DSU implementation mechanism can be triggered by an interested Member.

6.115 Having found that the first sentence of Article 21.5 mandates the WTO compatibility assessment of an implementing measure through the exclusive recourse to the WTO dispute settlement mechanism, and that it is for the Member challenging the WTO compatibility of any measure to trigger such process, we must address the issue of which WTO dispute settlement procedures can be used.

6.116 The European Communities claims that the United States violated Article 21.5 because on 3 March it did not have at hand an Article 21.5 panel report. The European Communities goes further and argues that the United States should have had at hand an Article 21.5 panel report when it requested an Article 22 procedure to the DSB, (or at least when on 19 April the DSB authorised suspension of concessions and other obligations by the United States). In the European Communities' view the 3 March violation is of a continuing nature and since the 19 April action is a confirmation of the 3 March measure which it self is inconsistent with the DSU, the 19 April action is a nullity under the DSU.

6.117 First, we examine whether an Article 21.5 determination can be made by an arbitration body through the Article 22.6 procedure. In application of the principle clearly expressed in the first sentence of Article 21.5, the end of the first sentence (and the second sentence) of Article 21.5 refers to the specific 'possibility' of referring the matter to the original Panel, as one of the WTO dispute settlement procedures available to determine such WTO compatibility of implementing measures:

"Where there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and ruling such dispute *shall* be decided through recourse to *these* dispute settlement procedures, *including* wherever possible resort to the original panel.

The panel shall circulate its report within 90 days after the date of referral of the matter to it. When the panel considers that it cannot provide its report within this time frame, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will submit its report." (emphasis added)

6.118 For us, this sentence confirms that if an assessment of the WTO compatibility of an implementing measure is necessary (because parties disagree) such a determination can only be obtained through the WTO dispute settlement procedures. But what do "these dispute settlement

procedures" refer to? There is no other indication on that matter in Article 21.5. We must continue our examination of the ordinary meaning of the terms used in Article 21.5 of the DSU.

6.119 If we examine the context of Article 21.5 (including the provisions of the DSU surrounding Article 21.5) and the object and purpose of the DSU, we note that there are several different types of WTO dispute settlement procedures under the DSU that could be used to assess the WTO compatibility of the new implementing measure. We recall that the first sentence of Article 21.5 refers to "**including** recourse to the original panel". Although the panel (and Appellate Body) process is the most commonly used WTO dispute settlement procedure, Article 25 of the DSU, for example, explicitly provides for arbitration as a means of adjudicating WTO related disputes. Article 25.4 provides for the applicability of Articles 21 and 22 of the DSU to the results of such arbitration. There is no reason why the WTO assessment of the compatibility of an implementing measure could not be determined by an Article 25 arbitration, as one of the WTO dispute settlement procedures.

6.120 We note that the drafting history of Article 21.5 seems to confirm our interpretation based on the ordinary meaning of the terms used in their context. In the Dunkel Draft, what was then Article 19.5 used the words "**involving** resort to the original panel wherever possible"<sup>158</sup>. Earlier, the Swiss delegate had put forward a proposal to introduce arbitration under the DSU<sup>159</sup>. It seems that negotiators may have wanted to reflect this expansion of "WTO dispute settlement procedures" when they favoured the use of the term "**including** recourse to the original panel" instead of "**involving** recourse to the original panel" for the first sentence of Article 21.5 of the DSU.

6.121 We are aware that the arbitration process of Article 25 is distinct from that of Articles 21.3(c) or 22.6 of the DSU. Our point is that 'panel' procedure is not the only dispute settlement procedure under the DSU. We consider that the arbitration process pursuant to Article 22 may constitute a proper WTO dispute settlement procedure to perform the WTO assessment mandated by the first sentence of Article 21.5 of the DSU. We think that the WTO compatibility determination of an implementing measure can be performed through an Article 22.6-22.7 arbitration when assessing the "equivalent level of suspension of concessions"<sup>160</sup>. We believe that the ordinary meaning of the terms "determine whether the level of such suspension is **equivalent** to the level of nullification or impairment" confirms that the equivalence between the two levels cannot be fulfilled before the WTO compatibility of the implementing measure has been assessed.<sup>161</sup> In our view, this provision also confirms that the determination of whether the implementing measure nullifies any WTO benefit, must take place before the level of suspension of concessions or obligations can be assessed (and eventually authorised by the DSB).<sup>162</sup> More importantly, however, this provision gives the arbitration panel the mandate and the authority to assess the WTO compatibility of the implementing measure.

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<sup>158</sup> MTN.TNC/W/FA. Emphasis added by the Panel.

<sup>159</sup> See Arbitration within GATT, Communication from Switzerland, GATT Doc. No. MTN.GNG/NG13/W/33. See also Terrence Stewart, The GATT Uruguay Round: A Negotiating History, Vol. II, (1993), Kluwer Law and Taxation, p. 2772.

<sup>160</sup> Article 22.7 of the DSU reads as follows: "The arbitrator acting pursuant to paragraph 6 shall not examine the nature of the concessions or other obligations to be suspended but shall **determine whether the level of such suspension is equivalent to the level of nullification or impairment**. The arbitrator may also determine if the proposed suspension of concessions or other obligations is allowed under the covered agreement. However, if the matter referred to arbitration includes a claim that the principles and procedures set forth in paragraph 3 have not been followed, the arbitrator shall examine that claim. In the event the arbitrator determines that those principles and procedures have not been followed, the complaining party shall apply them consistent with paragraph 3. The parties shall accept the arbitrator's decision as final and the parties concerned shall not seek a second arbitration. The DSB shall be informed promptly of the decision of the arbitrator and shall upon request, grant authorization to suspend concessions or other obligations where the request is consistent with the decision of the arbitrator, unless the DSB decides by consensus to reject the request." (footnote omitted and emphasis added)

<sup>161</sup> In this context, we agree with the discussions and conclusions of the Arbitrators in *EC – Bananas III*, (22.6-7) Arbitration, op. cit., paras 4.1 to 4.8.

<sup>162</sup> WT/DS27/ARB and WT/DS27/RW/EEC and WT/DS27/RW/ECU.

Since the Article 22.6 arbitration was given the authority to determine "a level of suspension equivalent to the level of nullification", it has the authority to assess both variables of the equation.

6.122 We are well aware that it is not our mandate to assess the DSU compatibility of what was done in the *EC - Bananas III* implementation panel and arbitration reports<sup>163</sup>. We consider, nonetheless, that if, at the time when the Article 22.6 arbitration is requested, no WTO determination of the compatibility of the implementing measure has yet taken place, those acting in arbitration are obliged to assess first whether the implementing measure nullifies or impairs the WTO rights of the Member requesting DSB permission to retaliate. This is a matter of simple legal logic: it is legally impossible to assess the level of suspension based on the level of nullification before assessing whether the implementing measure nullifies or impairs WTO rights. Only after having assessed the WTO compatibility of the implementing measure can a WTO adjudicating body assess the impact of any such WTO incompatibility, which will indicate the "equivalent level of suspension of concessions and other obligations". Since the Article 22.6 arbitration process was given the authority to determine "a level of suspension equivalent to the level of nullification", it has the authority to assess both variables of the equation, including whether the implementing measure nullifies any benefit and the level of such nullified benefits.

6.123 We note also that both Article 22.6 and the first sentence of Article 21.5 refer to the possibility of recourse to the original panel; there is only one original panel for each dispute. It is, therefore, not unreasonable to consider that the same original panel, through its arbitration procedure would, first, assess the WTO compatibility of the new measure, secondly, assess the impact, if any, of such WTO incompatible measure and thirdly determine the equivalent level of suspension of concessions or other obligations. We understand that such is the present practice of the DSB as it has developed under the DSU: the members of the original panel are mandated to act pursuant to Articles 21.5 and/or 22.6-22.7 of the DSU.<sup>164</sup> It is therefore reasonable to interpret the DSU so as to allow a single WTO adjudication body to perform both the WTO compatibility determination of the implementing measure (Articles 21.5 and 23.2(a)) and the assessment of the appropriate level of suspension (pursuant to Article 22.6-22.7).<sup>165</sup>

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<sup>163</sup> Ibid.

<sup>164</sup> In the following cases, the DSB decided that the matter would be referred to the original panel under Article 21.5 of the DSU: (i) *EC - Bananas III*, Recourse to Article 21.5 by Ecuador (Communication dated 18 December 1998, WT/DS27/41), WT/DSB/M/53; (ii) *EC - Bananas III*, Recourse to Article 21.5 by the European Communities, WT/DSB/M/53; (iii) *Australia - Salmons*, Recourse to Article 21.5 by Canada (Communication dated 3 August 1999, WT/DS18/14), WT/DSB/M/66; (iv) *Canada - Measures Affecting the Export of Civilian Aircraft*, Recourse to Article 21.5 by Brazil (Communication dated 26 November 1999, WT/DS46/13), WT/DSB/M/72; (v) *Brazil - Export Financing Programme for Aircraft*, Recourse to Article 21.5 by Canada (Communication dated 23 November 1999, WT/DS70/9), WT/DSB/M/72; and (vi) *Australia - Subsidies Provided to Producers and Exporters of Automotive Leather*, Recourse to Article 21.5 by the United States (Communication dated 4 October 1999, WT/DS126/8), WT/DSB/M/69. In those cases except for (ii) above, the Member invoking the procedure requested specifically that the matter be referred to the original panel. Also, in the following arbitration procedures under Article 22.6, the original panel members were appointed as arbitrators: (i) *EC - Bananas III*, Recourse to Arbitration by the European Communities under Article 22.6 of the DSU, WT/DSB/M/54; (ii) *Australia - Salmons*, Recourse to Arbitration by Australia under Article 22.6 of the DSU, WT/DS18/16; and (iii) Decision by the Arbitrators on *EC - Hormones*, Recourse to Arbitration by the European Communities under Article 22.6 of the DSU, op. cit., para. 2. In the case (i) above, the European Communities specifically requested that the original panel carry out the arbitration. Communication, dated 3 February 1999, from the European Communities to the Chairman of the DSB, WT/DS27/46.

<sup>165</sup> Adjudication of both whether the implementing measure nullifies WTO rights and whether the level of suggested sanctions is equivalent to the level of nullification is very burdensome exercise and may sometimes lead to delay in the issuance of the arbitration report on this matter. We note in this context, as did the Panel in *US - Section 301*, para. 7.180 and footnote 720, as well as the arbitration panel in *Bananas III*, footnote 7 that on its face the 60-day period specified in Article 22.6 does not limit or define the jurisdiction of arbitrators *ratione temporis*. We discuss this point further when we address the US defense that if the

6.124 We do not agree with the European Communities' argument that because arbitration reports are not "adopted" by the DSB, arbitration is not covered by the terms "these dispute settlement procedures" in the first sentence of Article 21.5. Adoption is not the only institutional means of action of the DSB. It is the DSB that refers any matter to arbitration pursuant to Article 22.6. It is the DSB that takes note of the arbitration report under Article 22.6, and the results of such arbitration decision will lead to a level of suspension that institutionally will be authorised by the WTO/DSB. We consider that the arbitration process under Article 22.6 is a form of WTO/DSU approved adjudication mechanism. Nor do we agree with the European Communities' argument that those acting through arbitration pursuant to Article 22.6 do not have the mandate to examine the WTO compatibility of an implementing measure. A determination of the "equivalent level of suspensions" necessitates a prior WTO determination of the level of nullification, if any, and those acting pursuant to Article 22.6 of the DSU have the authority to make such a determination. With the DSU, as it stands now, we consider that a determination whether the implementing measure nullifies or impairs WTO benefits can only be performed by a WTO adjudicating body.<sup>166</sup>

6.125 We are also well aware that WTO Members disagree on the relationship between one of the possible dispute settlement procedures that may be used, i.e. the recourse to the original panel which should issue its report within 90 days, and the timing of the right to request DSB authorization to suspend obligations and concessions. We note the efforts made by Members to solve this issue in the context of the DSU review<sup>167</sup>. We consider that it may be possible to assess the WTO compatibility of an implementing measure before the end of the reasonable period of time. For the WTO compatibility of a measure to be assessed, such measure must have a certain degree of firmness. We consider that as soon as a measure offers a sufficient level of certainty so that adjudication of that measure's feature is legally possible, its WTO compatibility can be assessed.<sup>168</sup>

6.126 We reject, therefore, the EC claim that because the United States had not exhausted the Article 21.5 procedure when it requested DSB permission to suspend concessions or other obligations in respect of EC listed imports, it violated Article 21.5 of the DSU. On the contrary we consider that the WTO compatibility determination mandated by the first sentence of Article 21.5 can be performed by the original panel or other individuals through the Article 22.6-7 arbitration process. We find that an Article 22.6 Arbitration panel is a valid WTO adjudicating body to perform the task mandated by Articles 23.2(a) and 21.5 of the DSU. Consequently, we also reject the European Communities' claim that such a violation of Article 21.5 is of a continuing nature, as we believe that the then ongoing arbitration 'process' and the 9 April Decision was fully WTO/DSU compatible. The reason why the United States violated the first sentence of Article 21.5 (and Article 23.2(a)) is because when it put in place the 3 March Measure there was no WTO adjudicating body that had determined that the EC implementing measure violated the WTO Agreement. We recall again that the US action of 19 April is not part of our terms of reference.

6.127 Notwithstanding the lacunae of the DSU drafting and the solutions suggested in the DSU Review process, we consider that there is no exception to the fundamental prohibition against unilateral determination of WTO inconsistency of any measure, including a measure adopted to

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European Communities has not unduly delayed the procedures, the United States would have been entitled at the expiry of the 60 days (on 3 March) to obtain a DSB authorization to retaliate.

<sup>166</sup> Of course Members may agree to limit or further regulate which procedure should be used to obtain such determination.

<sup>167</sup> US Ex. 3.

<sup>168</sup> As to the US argument that it had to file its Article 22.2-22.6 request within 30 days following the expiry of the reasonable period so as not to lose the benefit of reversed consensus decision making, we note also that Article 2.4 of the DSU is categorical: DSB decision-making shall be done by consensus. We note, however, that even if the United States were correct and that a request under Article 22.2 has to be filed within 30 days, we do not understand how this would justify a unilateral suspension of concessions or other obligations without DSB authorization. We agree with the United States that there is room for more coherence between the various procedural stages envisaged in the DSU. In any case it is not our mandate to provide answers to all issues still open for negotiation in the context of the DSU review exercise.

comply with Panel and Appellate Body recommendations. All such determinations must be made using the DSU as only WTO adjudicating bodies can determine that a measure (or an implementing measure) violates the WTO Agreement, and in such cases, remedial actions taken by a Member in response to such violation can only take place within the institutional framework of the WTO and pursuant to the various requirements of the DSU.

6.128 We consider that nothing in the DSB authorization of 19 April<sup>169</sup> or in the 19 April US action against the EC listed imports has cured the WTO inconsistencies of the 3 March Measure. We recall, however, that it is not in our mandate to assess the WTO compatibility of the legally distinct US action of 19 April imposing DSB authorised suspension of concessions or other obligations against the EC listed imports. Again, for us the 19 April action is not a confirmation of the 3 March action, but a distinct legal measure.

6.129 We conclude, therefore, that Article 21.5, first sentence is another DSU obligation (similar to Article 23.2(a)) which, although not explicitly listed in Article 23.2, is covered by Article 23.1, when the measure at issue was seeking to redress a WTO obligation.

6.130 Having reached the prior conclusion that the 3 March Measure constituted a measure seeking to redress a WTO violation within the meaning of Article 23.1, we find that when the United States put in place the 3 March Measure, no WTO adjudicating body had determined that the EC implementing measure was WTO incompatible. The United States, therefore, when it put in place the 3 March Measure violated Article 21.5 of the DSU and in so doing, it refused to abide by the rules of the DSU, in violation of Article 23.1 of the DSU.

E. EC CLAIMS THAT THE 3 MARCH MEASURE VIOLATED ARTICLES I, II, VIII AND XI OF GATT

6.131 We have already found above that the 3 March Measure constituted a suspension of concessions or other obligations in that (i) the increased bonding requirements of the 3 March Measure violated Articles I, II:1(a) and II:1(b), first sentence of GATT (One Panelist was of the view that such increased bonding requirements led, rather, to violations of Article XI of GATT) and (ii) the additional interest charges, costs and fees resulting from the increased bonding requirements violated the second sentence of Article II:1(b) of GATT. We also found that the 3 March Measure violated Article I of GATT. Finally we rejected the EC claim that the 3 March Measure violated Article VIII of GATT.

F. US DEFENSE BASED ON THE EUROPEAN COMMUNITIES' DELAYING TACTICS

6.132 The United States argues that the European Communities frustrated and delayed all the US efforts to comply with the DSU. The United States seems to be claiming that the European Communities violated rules of the DSU and of the DSB meetings, and this would, somehow, excuse the US (unilateral) action.

6.133 Even if it were true that the European Communities delayed DSB meetings and the arbitration process (and arguably violated the DSU and rules of the DSB meetings), it is clear that a Member cannot find in another Member's violation a justification to set aside the prescriptions of the DSU. The US argument (which implies that it considers itself justified to do what it did because what the European Communities would have done was WTO illegal) is exactly what is prohibited by Article 23 of the DSU: unilateral determination that a WTO violation has occurred and the unilateral imposition of suspensions of concessions or other obligations. In short the regime of counter-measures, reprisals or retaliatory measures has been strictly regulated under the WTO Agreement. It is now only in the institutional framework of the WTO/DSB that the United States could obtain a WTO compatible determination that the European Communities violated the WTO Agreement, and it is only in the

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<sup>169</sup> WT/DSB/M/59.

institutional framework of the WTO/DSB that the United States could obtain the authorization to exercise remedial action.<sup>170</sup>

6.134 The United States also argues that the European Communities unduly delayed the Article 22.6 arbitration panel with the consequence that it was not able to issue its final decision on 3 March. The United States seems to be suggesting that the European Communities should accept the consequence of this delay, and bear the consequences of the US unilateral actions which would not have taken place if the arbitration panel had proceeded expeditiously.

6.135 We will offer only two brief comments on this defense. First, *no* WTO violation can justify a unilateral retaliatory measure by another Member; this is the object of the prohibitions contained in Article 23.1 of the DSU. If Members disagree as to whether a WTO violation has occurred, the only remedy available is to initiate a DSU/WTO dispute process and obtain a WTO determination that such a WTO violation has occurred. Secondly, as noted by the Panel in *US – Section 301*, most of the time-limits in the DSU are either minimum time-limits without ceilings or maximum time-limits that are, nonetheless, indicative only. In *EC - Bananas III*, the arbitration panel explicitly stated that the 60-day period specified in Article 22.6 "does not limit or define the jurisdiction of the Arbitrators' *ratione temporis*. It imposes a procedural obligation on the Arbitrators in respect of the conduct of their work, not a substantive obligation in respect of the validity thereof."<sup>171</sup> Delays in dispute settlement procedures can always happen. The fundamental obligation of Article 23 of the DSU would be a farce if every time there is a delay in a panel or arbitration process, the unsatisfied Member could simply unilaterally determine that a violation has occurred and unilaterally impose any remedy. We reject, therefore, this US defense.

## VII. CONCLUSIONS AND RECOMMENDATIONS

7.1 Although the 3 March Measure is no longer in existence, we conclude that:

- (a) The 3 March Measure was seeking to redress a WTO violation and was thus covered by Article 23.1 of the DSU; when it put in place the 3 March Measure the United States did not abide by the rules of the DSU, in violation of Article 23.1.
- (b) By putting into place the 3 March Measure, the United States made a unilateral determination that the EC implementing measure violated the WTO, contrary to Articles 23.2(a) and 21.5, first sentence. In doing so the United States did not abide by the DSU and thus violated Article 23.1 together with Article 23.2(a) and 21.5 of the DSU;
- (c) The increased bonding requirements of the 3 March Measure as such led to violations of Articles II:1(a) and II:1(b), first sentence; the increased interest charges, costs and fees resulting from the 3 March Measure violated Article II:1(b) last sentence. The 3 March Measure also violated Article I of GATT;
- (d) In view of our conclusions in paragraph (c) above, the 3 March Measure constituted a suspension of concessions or other obligations within the meaning of Articles 3.7, 22.6 and 23.2(c) imposed without any DSB authorization and during the ongoing Article 22.6 arbitration process. In doing so the United States did not abide by the DSU and thus violated Article 23.1 together with Articles 3.7, 22.6 and 23.2(c) of the DSU.

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<sup>170</sup> Therefore, in the WTO context, the provision of Article 60 of the Vienna Convention on the Laws of Treaties (1969) on this matter does not apply since the adoption of the more specific provisions of Article 23 of the DSU.

<sup>171</sup> Arbitration (22.6-7) *EC – Bananas III*, op. cit., footnote 7.

With reference to paragraph (c) above, one Panelist is of the view that such increased bonding requirements of the 3 March Measure rather violated Article XI of GATT.

7.2 Under Article 3.8 of the DSU, in cases where there is infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment of benefits under that agreement. Accordingly, we conclude that, to the extent that the United States has acted inconsistently with the provisions of covered agreements, as described in the preceding paragraphs, it has nullified or impaired the benefits accruing to the complainant under those agreements.

7.3 The Panel recommends that the Dispute Settlement Body request the United States to bring its measure into conformity with its obligations under the WTO Agreement.