

# **WORLD TRADE ORGANIZATION**

**WT/DS165/AB/R**  
11 December 2000

(00-5330)

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

**AB-2000-9**

*Report of the Appellate Body*



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WORLD TRADE ORGANIZATION  
APPELLATE BODY

**United States – Import Measures on Certain  
Products from the European Communities**

European Communities, *Appellant/Appellee*  
United States, *Appellant/Appellee*

Dominica, *Third Participant*  
Ecuador, *Third Participant*  
India, *Third Participant*  
Jamaica, *Third Participant*  
Japan, *Third Participant*  
St. Lucia, *Third Participant*

AB-2000-9

Present:

Bacchus, Presiding Member  
Lacarte-Muró, Member  
Taniguchi, Member

**I. Introduction**

1. The European Communities and the United States appeal from certain issues of law and legal interpretations in the Panel Report, *United States – Import Measures on Certain Products from the European Communities* (the "Panel Report").<sup>1</sup> The Panel was established under the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU") to consider a complaint relating to measures taken by the United States with respect to certain imports from the European Communities.

2. The background to this dispute is set out in detail in the Panel Report.<sup>2</sup> On 25 September 1997, the Dispute Settlement Body (the "DSB") adopted the reports of the panel and the Appellate Body in *European Communities – Regime for the Importation, Sale and Distribution of Bananas* ("*European Communities – Bananas*").<sup>3</sup> The DSB recommended that the European Communities bring its banana import regime into conformity with its obligations under the *Marrakesh Agreement Establishing the World Trade Organization* (the "*WTO Agreement*"). On 1 January 1999, the period of time for implementation, established under Article 21.3(c) of the DSU, expired. At the DSB meeting of 2 February 1999, the United States alleged that the European Communities had failed to bring its banana import regime into compliance with the recommendations and rulings of the DSB in this dispute, and requested authorization to suspend the application of

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<sup>1</sup>WT/DS165/R, 17 July 2000.

<sup>2</sup>Panel Report, paras. 2.1-2.37.

<sup>3</sup>Panel Reports, WT/DS27/R/ECU, WT/DS27/R/GTM, WT/DS27/R/HND, WT/DS27/R/MEX, WT/DS27/R/USA and Appellate Body Report, WT/DS27/AB/R. The complaining parties in the dispute were Ecuador, Guatemala, Honduras, Mexico and the United States.

concessions or other obligations in accordance with Article 22.2 of the DSU. At the same meeting, the European Communities requested that the level of the suspension of concessions or other obligations proposed by the United States be referred to arbitration by the original panelists, in accordance with Article 22.6 of the DSU.

3. In accordance with the 60-day time-frame provided for in Article 22.6 of the DSU, the decision of the arbitrators appointed under Article 22.6 was to be circulated on 2 March 1999. On that date, the arbitrators informed the United States and the European Communities that they were unable to circulate their decision, and requested additional information from the parties.<sup>4</sup> On 4 March 1999, the Director of the Trade Compliance Division of the United States Customs Service issued a memorandum entitled "European Sanctions", in which he instructed Customs Area and Port Directors to take certain action with respect to designated products imported from the European Communities, with effect from 3 March 1999.

4. The Article 22.6 arbitrators circulated their decision on 9 April 1999.<sup>5</sup> On 19 April 1999, the United States requested, and received, authorization from the DSB to suspend the application of concessions or other obligations in the amount determined by the arbitrators. Subsequent to this authorization, the United States imposed 100 per cent customs duties on designated products imported from the European Communities, an action referred to in this dispute as the "19 April action".

5. The Panel identified the measure at issue in this dispute as the "increased bonding requirements" imposed by the United States on a list of products imported from the European Communities as of 3 March 1999, and called this the "3 March Measure". In its Report circulated to Members of the World Trade Organization (the "WTO") on 17 July 2000, the Panel concluded:

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;

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<sup>4</sup>WT/DS27/48, 2 March 1999.

<sup>5</sup>WT/DS27/ARB, 9 April 1999.

- (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; and
- (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.<sup>6</sup>

The Panel recommended that the DSB request the United States to bring its measure into conformity with its obligations under the *WTO Agreement*.<sup>7</sup>

6. On 12 September 2000, the European Communities notified the DSB of its decision to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel, pursuant to Article 16.4 of the DSU<sup>8</sup>, and filed a Notice of Appeal with the Appellate Body, pursuant to Rule 20 of the *Working Procedures for Appellate Review* (the "*Working Procedures*"). On 22 September 2000, the European Communities filed an appellant's submission.<sup>9</sup> The United States filed its own appellant's submission on 27 September 2000.<sup>10</sup> Both the European Communities and the United States filed appellee's submissions on 9 October 2000.<sup>11</sup> On the same day, Ecuador, India, Jamaica, and Japan each filed separate third participant's submissions, while Dominica and St. Lucia filed a joint third participant's submission.<sup>12</sup>

7. The oral hearing in the appeal was held on 18 October 2000.<sup>13</sup> The participants and the third participants presented oral arguments and responded to questions put to them by the Members of the Appellate Body Division hearing the appeal.

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<sup>6</sup>Panel Report, para. 7.1.

<sup>7</sup>*Ibid.*, para. 7.3.

<sup>8</sup>WT/DS165/10, 12 September 2000.

<sup>9</sup>Pursuant to Rule 21 (1) of the *Working Procedures*.

<sup>10</sup>Pursuant to Rule 23 (1) of the *Working Procedures*.

<sup>11</sup>Pursuant to Rules 22 (1) and 23 (3) of the *Working Procedures*.

<sup>12</sup>Pursuant to Rule 24 of the *Working Procedures*.

<sup>13</sup>Pursuant to Rule 27 of the *Working Procedures*.

## II. Arguments of the Participants

### A. *Claims of Error by the European Communities – Appellant*

#### 1. The Measure at Issue

8. The European Communities submits that the measure at issue in this dispute, to which the Panel refers as the 3 March Measure, included not only an increase in bonding requirements imposed on a list of products imported from the European Communities, but also an increase in the duty liability incurred upon the importation of the listed products. The European Communities considers that an increase in bonding requirements is, by necessity, based on an increase in the underlying customs duties, since a bonding requirement is ancillary to, and cannot be legally separated from, the underlying primary obligation.

9. According to the European Communities, there is no difference, in law or in fact, between a "contingent" increase in duty liability that is operated with the uncertain prospect of a return to bound rates at some later occasion, and an unqualified increase in duty liability. The European Communities argues that nothing changed in real terms for the products which remained on the reduced list published on 19 April 1999: their legal situation remained the same as before that date in that they were subject to an increased duty liability, with the only difference being that it was no longer called a "contingent" one.

10. The European Communities disagrees with the Panel's finding that the 19 April action, i.e., the imposition of 100 per cent duties, was not included in the Panel's terms of reference. The European Communities contends that the 19 April action and the 3 March Measure are not legally distinct measures and that, in fact, the 19 April action is a continuation of the 3 March Measure, and, therefore, falls within the terms of reference of the Panel. The European Communities submits that its request for the establishment of a panel referred specifically to the 19 April action.

11. Finally, the European Communities contends that, in addition to the incorrect and artificial distinction the Panel makes between the 3 March Measure, and its confirmation on 19 April 1999, the Panel also erred in finding that "the 3 March Measure is no longer in existence".

#### 2. The Mandate of Arbitrators Appointed Under Article 22.6 of the DSU

12. The European Communities submits that the Panel erroneously considered that the WTO-consistency of an implementing measure can be determined in arbitration proceedings under Article 22.6 of the DSU. In the view of the European Communities, the reasoning of the Panel creates basic systemic problems which severely affect the carefully balanced results of the Uruguay Round.



13. The European Communities submits that the text of Article 22.7 charges the arbitrator with one main task, and two more possible tasks. The main task is to determine whether the level of the suspension of concessions or other obligations is equivalent to the level of nullification or impairment. The arbitrator may also determine whether the proposed suspension of concessions or other obligations is allowed under the covered agreements, and whether the principles and procedures set out in Article 22.3 of the DSU have been followed.

14. The European Communities asserts that the Panel's reading of the relevant procedural provisions of the DSU entirely ignores the fundamental difference between the role of the parties to a dispute in a panel procedure to determine the WTO-consistency of a contested measure, and the role of the parties in an arbitration procedure under Article 22.6 of the DSU. The European Communities also argues that the Member requesting an arbitration procedure under Article 22.6 would have its rights of defence seriously undermined if it had to develop a fully fledged defence of the WTO-consistency of its measure. Further, the European Communities notes that there can be no appeal from an Article 22.6 arbitrator's decision. The European Communities also submits that panel and Appellate Body procedures provide for the active participation of third parties, unlike arbitration proceedings. The European Communities also notes that decisions of arbitrators are not subject to adoption by the DSB. The European Communities, therefore, submits that Article 22.6 arbitration proceedings ensure none of these procedural rights and guarantees, and the Panel's interpretation should be reversed.

15. The European Communities also considers that the interpretation by the Panel of the terms "these dispute settlement procedures, including wherever possible resort to the original panel", in Article 21.5 of the DSU, is incorrect. According to the European Communities, a panel procedure is the ordinary "dispute settlement procedure" in the sense of Article 21.5. In the view of the European Communities, it is apparent that the terms "including wherever possible resort to the original panel" constitute nothing other than an adjustment of the ordinary panel procedure.

3. The Effect of DSB Authorization to Suspend Concessions or Other Obligations

16. The European Communities submits that the Panel incorrectly considered that, as a general rule, once a Member imposes DSB-authorized suspension of concessions or other obligations, that Member's measure is *ipso facto* WTO-compatible because it has received DSB authorization. According to the European Communities, DSB authorization is a necessary, but not sufficient, condition to legally implement the suspension of concessions or other obligations.

B. *Arguments of the United States – Appellee*

1. The Measure at Issue

17. The United States submits that the Panel was correct in finding, as a factual matter, that the 3 March Measure consisted only of increased bonding requirements legally distinct from the 19 April action, which imposed increased customs duties. The United States contends that, while this factual finding is beyond the scope of appellate review, it is amply supported by the evidence of the actual legal status of the 3 March Measure under United States law.

18. The United States asserts that, on 4 March 1999, the European Communities requested consultations with respect to the 3 March Measure. On that date, the United States had not yet taken the 19 April action. According to the United States, the 19 April action could, therefore, not have been the measure identified in either the request for consultations, or in the subsequent request for the establishment of a panel. As a result, the 19 April action could not have been within the terms of reference of the Panel.

19. The United States submits that, in arguing that WTO law does not distinguish between an increase in "contingent" duty liability and an increase in actual duty liability, the European Communities incorrectly assumes, with no evidence in United States law or regulation, that the 3 March Measure increased the actual duties, and that the only changes made on 19 April 1999 were to remove duty liabilities already imposed. Moreover, the European Communities assumes, with no basis in United States law or regulation, that "contingent liability" exists under United States law.

20. Finally, the United States submits that, before the Panel, it explained that the increased bonding requirements of 3 March 1999 were removed for entries of merchandise which were not to be included on the 19 April 1999 list within a few days of the arbitrators' decision of 9 April 1999, and were removed on 19 April 1999 for all remaining products. The United States, therefore, submits that the Panel's statement that the 3 March Measure "is no longer in existence" is correct.

2. The Mandate of Arbitrators Appointed Under Article 22.6 of the DSU

21. The United States contends that the Panel need not, and should not, have reached the issue of the relationship between Articles 21.5 and 22 of the DSU. Firstly, the United States points out that Members of the WTO broadly recognize that this relationship requires clarification. The United States considers that it is for the membership of the WTO to provide such clarification. Secondly, the United States argues that the Panel need not have reached the issue of the relationship because this issue is not implicated by the measure at issue, nor by the Panel's analysis of how a violation of Article 21.5 is established.

22. The United States submits, however, that, while the Panel need not, and should not, have reached the issue of the relationship between Articles 21.5 and 22, it ultimately reached the correct substantive conclusion, namely, that an Article 22.6 arbitrator can determine the WTO-consistency of an implementing measure in determining the equivalent level of suspension of concessions or other obligations.

23. The United States asserts that an analysis of the text of Article 22 supports the Panel's finding. The text of Article 22.2 contains no reference to either Articles 21 or 23 of the DSU. Had the drafters intended to make the suspension of concessions or other obligations conditional upon the completion of another proceeding, they "would not have written the text of Article 22 to refer all deadlines under Article 22 back to the end of the 'reasonable period of time' for implementation" provided for in Article 21.3 of the DSU.<sup>14</sup>

24. The United States submits that Article 21.5 does not qualify the phrase "these dispute procedures", with the exception of providing for resort to the original panelists, wherever possible, and establishing an upper limit of 90 days for proceedings. There is, thus, no basis for excluding any dispute settlement procedure that could be used to determine the WTO-consistency of an implementing measure.

25. The United States argues that, if, as the European Communities suggests, Article 21.5 requires that "ordinary" dispute settlement procedures apply, except as specifically provided in Article 21.5, this would lead to the absurd result that "referral to the panel" under Article 21.5 would have to be preceded by consultations, adding an additional 60 days to the process. Even without consideration of this additional time, the 90-day time-frame provided for in Article 21.5 would render inoperative the negative consensus rule in Articles 22.6 and 22.7 of the DSU, if Article 21.5 were read to require separate proceedings under Article 21.5 before a WTO Member could invoke Article 22.

26. The United States argues that the European Communities' arguments on "procedural rights and guarantees", that is, its arguments relating to burden of proof, notice requirements and third party rights, are policy, and not legal, arguments. In making these arguments, the European Communities objects to the text as it stands, and does not explain how the Panel read that text incorrectly.

3. The Effect of DSB Authorization to Suspend Concessions or Other Obligations

27. The United States submits that the Panel's statement on this point, like other of its statements and conclusions on the mandate of arbitrators appointed under Article 22.6, was not germane to the

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<sup>14</sup>United States' appellee's submission, para. 48.

dispute at hand. Accordingly, the United States submits that it was not necessary for the Panel to reach the issue of the WTO-consistency of DSB-authorized measures suspending the application of concessions or other obligations. The United States argues, however, that the decision to authorize the suspension of concessions or other obligations is within the sole authority of the DSB, and it is, therefore, impossible to draw any conclusion other than that a suspension of concessions or other obligations which has been authorized by the DSB is WTO-consistent.

C. *Claims of Error by the United States – Appellant*

1. Articles II:1(a) and II:1(b), first sentence, of the GATT 1994

28. The United States appeals the Panel's finding that the increased bonding requirements are inconsistent with Articles II:1(a) and II:1(b), first sentence, of the GATT 1994. According to the United States, the Panel made its finding based, not on the conclusion that the bonding requirements themselves breached the obligations in question, but because the duties they might be called upon to enforce, if imposed, would breach those obligations.

29. The United States argues that this approach is inconsistent with the Panel's duty to base its analysis of a measure's WTO-consistency on the measure itself, and not to attribute to that measure the effects or breaches of another measure. Article II:1(a) requires each Member to provide treatment no less favourable than that provided for in its tariff Schedule. Article II:1(b), first sentence, exempts products listed in a Member's Schedule from "ordinary customs duties in excess of those set forth and provided therein," while the second sentence exempts such products from "other duties or charges". The additional bonding requirements in this dispute did not themselves impose additional duties even if, as the Panel concluded, they imposed additional costs.

30. The United States submits that the GATT panel reports cited by the Panel either do not support the Panel's position, or else provide no reasoning to support that position.<sup>15</sup> The United States submits that the Panel quoted a statement by the panel in *United States – Section 337*, but ignored the context of that statement and the nature of the analysis which followed it. In the view of the United States, the analysis in the panel report in *EEC – Minimum Import Prices* cannot be read to support the conclusion that a breach by a measure may be attributed to the measures enforcing it. With respect to the panel report in *EEC – Animal Feed Proteins*, the United States argues that the

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<sup>15</sup>Panel Report, *United States - Section 337 of the Tariff Act of 1930* ("United States - Section 337"), adopted 7 November 1989, BISD, 365/345; Panel Report, *EEC - Measures on Animal Feed Proteins* ("EEC - Animal Feed Proteins"), adopted 14 March 1978, BISD, 255/49; Panel Report, *EEC - Programme of Minimum Import Prices, Licences and Surety Deposits for Certain Processed Fruits and Vegetables* ("EEC - Minimum Import Prices"), adopted 18 October 1978, BISD, 255/68.

panel in that case provides no persuasive reasoning in support of its conclusion, and the Panel in this dispute should not have followed it.

2. Articles 23.2(a), 3.7 and 21.5 of the DSU

(a) Article 23.2(a) of the DSU

31. The United States submits that the Panel erred in finding that the 3 March Measure was inconsistent with Article 23.2(a) of the DSU, both because the European Communities neither requested nor argued for this finding, and failed to meet its burden of establishing a violation of this provision, and because the Panel based its finding on the erroneous conclusion that a "determination", within the meaning of Article 23.2(a), may be inferred from other actions.

32. The United States argues that the European Communities did not refer to Article 23.2(a) "outside of ... passing references".<sup>16</sup> At no point in its statements or submissions did the European Communities ever request the Panel to make a finding with respect to Article 23.2(a). Throughout its submissions, the European Communities argued and presented a case only with respect to Articles 23.1 and 23.2(c).

33. The United States submits that, while the simple fact that the European Communities did not make a claim under Article 23.2(a) is sufficient for the Appellate Body to reverse the Panel's finding because the Panel relieved the European Communities of its burden in this dispute, the Appellate Body also should conclude that the Panel's finding under Article 23.2(a) should be rejected because of the inadequacy of the European Communities' panel request, and the prejudice to the United States which resulted.

34. The United States submits that the Appellate Body should also reverse the Panel's finding because the Panel relied on the erroneous conclusion that a "determination" within the meaning of Article 23.2(a) may be inferred from other actions. The United States considers that the Panel wrongly interpreted the term "determination". The United States submits that a "determination" is a formal decision that is made explicitly, as a result of a domestic legal process, and one which has some legal status.

(b) Article 3.7 of the DSU

35. The United States submits that the Panel erred in finding that the 3 March Measure was inconsistent with Article 3.7 of the DSU. The Panel improperly relieved the European Communities

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<sup>16</sup>United States' appellant's submission, para. 38.

of its burden of establishing a violation of Article 3.7, because the European Communities neither requested nor argued for this finding. Furthermore, the United States argues that, even if the European Communities *had* argued that the 3 March Measure was inconsistent with Article 3.7, it is not clear how it could have demonstrated a violation, since the last sentence of Article 3.7 contains no obligation which might be breached. The United States considers that the last sentence of Article 3.7 is merely descriptive and does not contain an obligation, in the sense of providing that a Member "shall" or "shall not" undertake any action.

(c) Article 21.5 of the DSU

36. The United States submits that the Appellate Body should reverse the Panel's finding that the 3 March Measure is inconsistent with Article 21.5 because this finding is based on argumentation not presented by the European Communities, and on the Panel's erroneous conclusion that the 3 March Measure is inconsistent with Article 23.2(a) of the DSU.

D. *Arguments of the European Communities – Appellee*

1. Articles II:1(a) and II:1(b), first sentence, of the GATT 1994

37. The European Communities agrees with the United States that the Panel erred when it found that the increased bonding requirements are inconsistent with Article II:1(a) and (b), first sentence, simply because they enforce a measure which is inconsistent with those provisions. The European Communities submits that it did not claim that the bonding requirements "as such" are inconsistent with those provisions on that ground.

38. The European Communities submits that the error appealed by the United States stems from the Panel's mischaracterization of the 3 March Measure as consisting merely of an increase in the generally applicable bonding requirements. The Panel failed to recognize that such increase was only an ancillary measure to enforce the main decision taken by the United States on 3 March 1999, that is, the "contingent" increase of customs duties on listed products to 100 per cent *ad valorem*.

39. The European Communities asserts that, had the Panel properly characterized the 3 March Measure as also including that duty increase, it would necessarily have come to the conclusion that, as claimed by the European Communities, the duty increase is in breach of Article II:1 (a) and (b), first sentence, whereas the increased bonding requirements "as such" are inconsistent with Article II:1 (b), second sentence of the GATT 1994.

2. Articles 23.2(a), 3.7 and 21.5 of the DSU

(a) Article 23.2(a) of the DSU

40. The European Communities submits that in its request for the establishment of a panel, it cited Articles 3, 21, 22 and 23 of the DSU as being those provisions in respect of which the European Communities claimed violations.

41. The European Communities submits that the United States does not contest, and could not contest, that the European Communities' claim of violation of Article 21.5 of the DSU was raised sufficiently clearly in the present case. According to the European Communities, there is a very close link that flows from Article 23.2(a) of the DSU between the obligation to resort to Article 21.5 procedures in the circumstances of the present case, and the prohibition on making unilateral determinations concerning the WTO-consistency of a trade measure taken in order to implement an earlier DSB recommendation.

42. The European Communities submits that the Panel did not err in finding that a determination could be "implied" from the actions taken by the United States. The European Communities submits that, as determined by the panel in *United States – Sections 301-310 of the Trade Act of 1974*, a "determination" only constitutes a violation under Article 23.2(a) of the DSU when it is made in the context of seeking redress of a perceived WTO-inconsistency committed by another WTO Member.<sup>17</sup> An action seeking to impose trade retaliation must therefore be considered relevant when determining whether a breach of the obligations under Article 23.2(a) has been committed. The European Communities submits that, where a WTO Member concludes that another WTO Member has acted inconsistently with its WTO obligations, and this conclusion forms the basis of a measure seeking redress of the perceived WTO-inconsistency without following the dispute settlement procedures, such conclusion is a prohibited "determination", within the meaning of Article 23.2(a), in conjunction with Article 23.1 of the DSU.

(b) Article 3.7 of the DSU

43. The European Communities submits that Article 3.7, last sentence, of the DSU contains an obligation not to resort to the suspension of concessions or other obligations without authorization by the DSB. This provision is in line with Article 23.2(c) of the DSU, and the United States cannot argue that the European Communities did not make a claim of violation of the latter provision. A breach of the prohibition contained in Article 23.2(c) of the DSU entails by necessity a breach of the provision contained in Article 3.7, last sentence, of the DSU.

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<sup>17</sup>WT/DS152/R, adopted 27 January 2000.

(c) Article 21.5 of the DSU

44. The European Communities submits that in its written submissions and oral statements before the Panel, the European Communities presented a claim and arguments according to which the United States violated Article 21.5 of the DSU when it applied the disputed measure, and requested the authorization of suspension of concessions in the absence of a finding that the European Communities' implementing measures were inconsistent with its WTO obligations.

**III. Arguments of the Third Participants**

A. *Dominica and St. Lucia*

1. The Measure at Issue

45. Dominica and St. Lucia submit that the European Communities' request for the establishment of a panel appears to cover sufficiently all the measures which gave effect to the United States' decision to impose 100 per cent retroactive duty liability, as of 3 March 1999, on selected products imported from the European Communities.

46. Dominica and St. Lucia argue that subsequent actions which modify the legal form, but confirm the substance of a previous measure identified in a panel request, may fall within a panel's terms of reference. According to Dominica and St. Lucia, the fundamental test is one of due process, that is, whether all parties received adequate notice of the claims raised. As such, subsequent actions merely modifying the legal form of an original measure that remains in force *in substance*, and that is the subject of a complaint, may fall within a panel's terms of reference.

2. The Mandate of Arbitrators Appointed Under Article 22.6 of the DSU

47. Dominica and St. Lucia submit that the Panel erred in its conclusion that the arbitration procedure under Article 22.6 of the DSU constitutes a proper WTO dispute settlement procedure to determine the WTO-consistency of implementing measures, as mandated by the first sentence of Article 21.5 of the DSU.

48. According to Dominica and St. Lucia, an Article 22.6 arbitrator has authority to determine the "level of suspension equivalent to the level of nullification", while an Article 21.5 panel has authority to determine the WTO-consistency of an implementing measure. Their mandates are distinct, irrespective of the possibility that the members of the original panel may serve both on the Article 21.5 panel and as Article 22.6 arbitrators. Dominica and St. Lucia further submit that the conclusions of the Panel raise serious systemic concerns.



B. *Ecuador*

49. Ecuador fully shares the Panel's opinion that Members of the WTO should not take unilateral action in the resolution of WTO disputes. Should a situation arise in which Members of the WTO disagree as to whether a WTO violation has occurred, the only remedy available is to initiate dispute settlement procedures under the DSU.

50. In Ecuador's view, the possible conflict between the time frames of Article 21.5 and those of Article 22 cannot be used as an excuse to take unilateral action, just as this conflict cannot serve as a basis for any Member's "losing its fundamental rights", such as the right to suspend the application of concessions or other obligations.<sup>18</sup>

C. *India*

51. India strongly disagrees with the Panel's finding that the WTO-consistency of measures taken by the implementing Member can be determined through an Article 22.6 arbitration procedure. India submits that the panel procedures which were designed to address and rule on the merits of disputes, involving substantive obligations of Members of the WTO, are fundamentally different from the arbitration procedures provided under Articles 21.3 and 22.6 of the DSU. These arbitration procedures are given the limited task of determining, in the case of Article 21.3, the "reasonable period of time" for implementation and, in the case of Article 22.6, the level of suspension of concessions and whether the procedures and principles of Article 22.3 were followed.

52. India submits that, if an arbitration procedure under Article 22.6 could be used to determine the consistency of implementing measures, Article 21.5 of the DSU would lose its relevance and effect. India argues that, if the Panel's interpretation of Articles 21.5 and 22.6 of the DSU is allowed to stand, the use and relevance of Article 21.5 would be minimal, and Members of the WTO could conveniently bypass the procedures under Article 21.5, and proceed directly to Article 22.6.

D. *Jamaica*

53. Jamaica disagrees with the Panel's interpretation of the relationship between Articles 21.5 and 22 of the DSU, and supports the European Communities' grounds of appeal on this issue. Jamaica submits that the function of an Article 22.6 arbitrator is restricted to a specific role in a particular circumstance, namely to determine the appropriateness of the level of suspension of concessions or other obligations.

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<sup>18</sup>Ecuador's third participant's submission, para. 3.

54. Jamaica submits that a new dispute over the WTO-consistency of implementing measures is to be resolved through "these dispute settlement procedures", as provided in Article 21.5 of the DSU. Jamaica submits that "these dispute settlement procedures" are the good offices, conciliation and mediation procedures in Article 5 of the DSU. Jamaica contends that "these dispute settlement procedures" are also the ordinary panel procedures, with the possibility of appeal to the Appellate Body. Jamaica requests that the Appellate Body find that arbitration under Article 22.6 of the DSU serves a specific and limited role which does not include any authority to determine the WTO-consistency of measures taken to comply with the recommendations and rulings of the DSB.

E. *Japan*

1. The Mandate of Arbitrators Appointed Under Article 22.6 of the DSU

55. Japan supports the European Communities' appeal of the Panel's finding that the WTO-consistency of implementing measures can be determined in the course of arbitration proceedings under Article 22.6 of the DSU. Japan submits that Article 21.5 and Article 22.6 proceedings serve entirely different functions and are governed by separate procedural requirements. In the view of Japan, the Panel did not take into account the distinction between proceedings under Article 21.5 and those under Article 22.6, and thus disregarded the intended structure of the dispute settlement process.

2. Articles II:1(a) and II:1(b), first sentence, of the GATT 1994

56. Japan does not support the United States' appeal of the Panel's finding that the bonding requirements imposed by the United States on 3 March 1999 violated Articles II:1(a) and II:1(b) of the GATT 1994. Japan considers that a bonding requirement is an integral part of the tariff collection process, and, therefore, should not be considered separate and apart from the imposition of the tariff itself. Japan, therefore, agrees with the Panel's finding that the imposition by the United States of the increased bonding requirements violated Articles II:1(a) and II:1(b), first sentence, of the GATT 1994.

3. Articles 23.2(a), 3.7 and 21.5 of the DSU

57. Japan does not support the United States' contention that the Panel erred in finding that the 3 March Measure was inconsistent with Article 3.7 of the DSU because that provision does not set forth an obligation which can be breached. Japan considers that like Article 23.2(c), Article 3.7 indicates that Members of the WTO only have the right to suspend concessions on a discriminatory basis subject to authorization by the DSB. Japan submits that, as the 3 March Measure constituted a suspension of concessions or other obligations without DSB authorization, the United States acted inconsistently with Article 3.7.

#### IV. Issues Raised in this Appeal

58. The Panel found that, by adopting the 3 March Measure, the United States acted inconsistently with its obligations under Articles I and II:1(a) and (b) of the GATT 1994 as well as Articles 3.7, 21.5, 22.6, 23.1, 23.2(a) and 23.2(c) of the DSU.<sup>19</sup> The United States appeals the Panel's findings of inconsistency with Articles II:1(a) and II:1(b), first sentence, of the GATT 1994, and Articles 3.7, 21.5 and 23.2(a) of the DSU. The United States does not appeal the Panel's findings of inconsistency with Articles I and II:1(b), second sentence, of the GATT 1994, and Articles 22.6, 23.1 and 23.2(c) of the DSU. In our view, therefore, the United States has accepted the conclusions of the Panel that, by adopting the 3 March Measure, the United States acted inconsistently with its obligations under Articles I and II:1(b), second sentence, of the GATT 1994, and with the obligation in Article 23 of the DSU not to take unilateral action in redressing perceived breaches of WTO obligations by other WTO Members. To us, the most significant aspect of this case may well be the Panel's conclusions, which were not appealed, about the failure of the United States to comply with the legal imperative found in Article 23.1 of the DSU<sup>20</sup>, which states:

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.

59. The following issues are raised in this appeal:

- (a) Whether the Panel erred in finding that the measure at issue in this dispute is the 3 March Measure, which is the "increased bonding requirements as of 3 March on EC listed products", that this measure is no longer in existence, that the 19 April action is legally distinct from the 3 March Measure and that the 19 April action is not within the terms of reference of the Panel;
- (b) Whether the Panel erred by stating that the WTO-consistency of a measure taken by a Member to comply with recommendations and rulings of the DSB can be determined by arbitrators appointed under Article 22.6 of the DSU;

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<sup>19</sup>Panel Report, para. 7.1.

<sup>20</sup>*Ibid.*, paras. 6.34, 6.87 and 7.1(a) and (d).

- (c) Whether the Panel erred by stating that "[o]nce a Member imposes DSB authorised suspensions of concessions or obligations, that Member's measure is WTO-consistent (it was explicitly authorised by the DSB)"<sup>21</sup>;
- (d) Whether the Panel erred in finding that the increased bonding requirements of the 3 March Measure are inconsistent with Articles II:1(a) and II:1(b), first sentence, of the GATT 1994; and
- (e) Whether the Panel erred in finding that, by adopting the 3 March Measure, the United States acted inconsistently with its obligations under Articles 23.2(a), 3.7 and 21.5 of the DSU.

## V. The Measure at Issue

60. The Panel found that the measure at issue in this dispute is the "increased bonding requirements as of 3 March on EC listed products"<sup>22</sup>, and called this the 3 March Measure. The Panel found that this measure is "no longer in existence".<sup>23</sup> The Panel also found that the 19 April action, i.e., the imposition of 100 per cent duties on certain designated products imported from the European Communities, is a measure that is legally distinct from the 3 March Measure, and that the 19 April action, therefore, does not fall within the terms of reference of the Panel.<sup>24</sup> The European Communities appeals these findings of the Panel.

61. The Panel was established by the DSB on 16 June 1999.<sup>25</sup> In accordance with Article 7.1 of the DSU, the Panel had the following standard terms of reference:

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.<sup>26</sup>

62. With respect to the measure at issue in this dispute, we note that the request for the establishment of a panel submitted by the European Communities refers to:

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<sup>21</sup>Panel Report, para. 6.112.

<sup>22</sup>*Ibid.*, para. 6.21.

<sup>23</sup>*Ibid.*, para. 7.1.

<sup>24</sup>*Ibid.*, para. 6.89 and 6.128.

<sup>25</sup>WT/DS165/9, 18 October 1999 and WT/DS165/9/Corr.1, 5 November 1999.

<sup>26</sup>*Ibid.*

*... 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% 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.*

This measure has deprived EC imports into the US of the products in question of the right to a duty not in excess of the rate bound in the US Schedule. Moreover, by requiring the deposit of a bond, US Customs effectively already imposed 100% duties on each individual importation as of 3 March 1999, the return of which was uncertain, depending on future US decisions. ...<sup>27</sup> (emphasis added)

63. With respect to these "future US decisions", the European Communities stated in the panel request:

When the US received WTO authorisation 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 WTO authorisation, the liability for 100% duty on the products on the list in annex 2 that had entered the US for consumption with effect from 3 March 1999.<sup>28</sup>

64. The "US decision, effective as of 3 March 1999", to which the panel request refers, is contained in a memorandum, dated 4 March 1999, from Mr. Philip Metzger, Director, Trade Compliance Division, United States Customs Service, to the Customs Area and Port Directors and CMC Directors, regarding "European Sanctions" (the "Metzger Memorandum")<sup>29</sup>, as clarified by a memorandum dated 16 March 1999.<sup>30</sup> The Metzger Memorandum provided:

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<sup>27</sup>WT/DS165/8, 11 May 1999.

<sup>28</sup>*Ibid.*

<sup>29</sup>Panel Report, para. 6.29.

<sup>30</sup>*Ibid.*, para. 6.30. This memorandum, entitled "Clarification of Bond Requirements for European Sanctions", was also sent to Customs Area and Port Directors and CMC Directors by Mr. Philip Metzger.

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. ...<sup>31</sup>

65. It follows from the Metzger Memorandum that the "US decision, effective as of 3 March 1999", to which the panel request refers, concerned a change in bonding requirements and the withholding of liquidation on imports of certain products from the European Communities.

66. With respect to the withholding of liquidation, the Metzger Memorandum instructed United States customs authorities to withhold liquidation until at least the 314<sup>th</sup> day after entry of the designated products. The United States argued before the Panel that this was, in fact, already the usual practice of the Customs Service and, therefore, did not constitute a change in treatment.<sup>32</sup> The Panel did not view the withholding of liquidation as part of the measure at issue in this dispute.<sup>33</sup>

67. With respect to the change in bonding requirements, the Metzger Memorandum, as clarified by the memorandum dated 16 March 1999, instructed the United States customs authorities to change the bonding requirements with respect to certain designated products imported from the European Communities. The customs authorities were instructed to demand a *single transaction bond* equal to the entered value of the designated imports, or to add to the *continuous bond* an amount equal to 10 per cent of the entered value of the designated products imported by an importer during the previous year.<sup>34</sup> The Panel found that the change relating to continuous bonds led to *increased*

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<sup>31</sup>The memorandum dated 16 March 1999, which clarified the Metzger Memorandum, stated:

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>32</sup>See first written submission of the United States, para. 34, and the United States' responses to questions of the Panel and parties (13 January 2000), para. 11. The European Communities did not challenge this assertion.

<sup>33</sup>Panel Report, para. 6.21.

<sup>34</sup>*Ibid.*, paras. 2.24-2.25 and 6.29-6.30.

bonding requirements.<sup>35</sup> It is this aspect of the "US decision, effective as of 3 March 1999" that is in contention in this dispute. The Panel, therefore, found that "[t]he measure in the present dispute is increased bonding requirements as of 3 March on EC listed imports."<sup>36</sup>

68. As the request for the establishment of a panel by the European Communities refers to the "US decision, effective as of 3 March 1999" as the measure in dispute, and, as the contentious aspect of this decision is the increase in bonding requirements, we agree with the Panel's finding that the measure at issue in this dispute is the 3 March Measure, which is the "increased bonding requirements" that were imposed as a result of the Metzger Memorandum on designated products imported from the European Communities.

69. We note that, in its request for the establishment of a panel, the European Communities, after describing the "US decision, effective as of 3 March 1999" with respect to which the establishment of a panel was requested, refers to the fact that, after this "US decision" was taken, the United States received WTO authorization on 19 April 1999 to suspend concessions and, at the same time, "confirmed ... the liability for 100% duty on the products on the list in annex 2 that had entered the US for consumption with effect from 3 March 1999."<sup>37</sup> Undeniably, the panel request by the European Communities does refer to the 19 April action. Yet it is not possible for us to conclude on the basis of this *reference* alone that the measure at issue in this dispute is not only the 3 March Measure, but also the 19 April action. Therefore, it is not possible for us to conclude, on this basis *alone*, that the 19 April action is within the Panel's terms of reference.

70. Furthermore, we note that, in our Report in *Brazil – Export Financing Programme for Aircraft*, we stated that:

Articles 4 and 6 of the DSU ... set forth a process by which a complaining party must request consultations, and consultations must be held, before a matter may be referred to the DSB for the establishment of a panel.<sup>38</sup>

The European Communities' request for consultations of 4 March 1999 did not, of course, refer to the action taken by the United States on 19 April 1999, because that action had not yet been taken at the time. At the oral hearing in this appeal, in response to questioning by the Division, the European Communities acknowledged that the 19 April action, *as such*, was not *formally* the subject of the

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<sup>35</sup>Panel Report, para. 6.51. With respect to single transaction bonds, the Panel noted that the change in the bonding requirements did not lead to an increase in bonding requirements.

<sup>36</sup>*Ibid.*, para. 6.21.

<sup>37</sup>WT/DS165/8, 11 May 1999.

<sup>38</sup>WT/DS46/AB/R, adopted 20 August 1999, para. 131.

consultations held on 21 April 1999. We, therefore, consider that the 19 April action is also, for that reason, not a measure at issue in this dispute and does not fall within the Panel's terms of reference.

71. We note the European Communities' contention, before the Panel as well as before us, that the 3 March Measure, in fact, includes not only an increase in bonding requirements, but also the imposition of a "contingent" liability for duties of 100 per cent on a specific list of products imported from the European Communities.<sup>39</sup> The European Communities argues that the 19 April action, which provides for the imposition of 100 per cent duties on a reduced list of products imported from the European Communities, is not legally distinct from the 3 March Measure, but rather is a "confirmation" of the 3 March Measure.<sup>40</sup> The European Communities sees the increase in bonding requirements effected on 3 March 1999 as inextricably linked with the imposition of 100 per cent duties on 19 April 1999. According to the European Communities, the 3 March Measure "is the basic measure by which the United States imposed sanctions on EC imports ... while the 19 April action is merely partly the confirmation, partly a withdrawal of a pre-existing measure."<sup>41</sup> According to the European Communities, "[t]he legal situation did not change" for products from the European Communities that were maintained on the second list "by the *19 April 1999 confirmation* of the increase in duty liability for those items".<sup>42</sup> (emphasis added)

72. The action taken by the United States customs authorities as of 3 March 1999 is set out in the Metzger Memorandum.<sup>43</sup> The action taken by the United States on 19 April 1999 is described in the notice of the United States Trade Representative on "United States suspension of tariff concessions", dated 19 April 1999 and published in the Federal Register (the "USTR Notice").<sup>44</sup> The USTR Notice stated that:

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<sup>39</sup>European Communities' appellant's submission, para. 17. This list of products is contained in the Metzger Memorandum.

<sup>40</sup>The 19 April 1999 list of products is contained in the USTR Notice, dated 19 April 1999. The reduced coverage of the list was the result of the Decision of the Arbitrators, circulated 9 April 1999, that the appropriate level of suspension of concessions or other obligations was \$191.4 million, rather than \$520 million, the level proposed by the United States.

<sup>41</sup>European Communities' appellant's submission, para. 38.

<sup>42</sup>*Ibid.*, para. 26.

<sup>43</sup>See *supra*, paras. 64-65.

<sup>44</sup>64 Fed. Reg. 19,209 (1999).



The United States Trade Representative (USTR) has decided to suspend the application of tariff concessions and to impose a 100% *ad valorem* rate of duty on the articles described in the Annex to this notice ...

The USTR has determined that, effective April 19, 1999, a 100% *ad valorem* rate of duty shall be applied to the articles described in the Annex to this notice ... and that are entered ... on or after March 3, 1999.

73. It cannot be disputed that the 3 March Measure and the 19 April action are related actions of the government of the United States, in as much as both measures were taken by the United States to redress what it saw as the failure of the European Communities to implement the recommendations and rulings of the DSB in the *European Communities – Bananas* dispute. We note that the official USTR press release of 3 March 1999 announcing the 3 March Measure and the letter from Mr. Peter Scher, Special Trade Negotiator of the USTR for Agriculture, to Mr. Raymond W. Kelly, Commissioner of the United States Customs Service, dated 3 March 1999, stated, respectively, that the 3 March Measure "imposes contingent liability for 100 per cent duties" and that the 3 March Measure was intended "to preserve [the United States'] right to impose 100 percent duties as of March 3, pending the release of the arbitrators' final decision".<sup>45</sup> However, these and other statements made by USTR officials do not, in and of themselves, allow us to conclude that the 3 March Measure and the 19 April action are not legally distinct measures. In order to determine the legal relationship between these two measures, we must examine, on the basis of factual findings of the Panel, what the United States actually *did* on 3 March 1999 and 19 April 1999, irrespective of how the United States described its actions publicly at the time.

74. As noted above, what the United States *did* on 3 March 1999 is set forth in the Metzger Memorandum; what it *did* on 19 April 1999 is described in the USTR Notice on "United States suspension of tariff concessions". On the basis of the Metzger Memorandum and the USTR Notice, it is clear that there are a number of differences between the 3 March Measure and the 19 April action. The most important of these differences is that the 3 March Measure provides for *increased bonding requirements* for certain designated products imported from the European Communities, while the 19 April action provides for the *imposition of 100 per cent duties* on some, but not all, of the designated products that were previously subject to the increased bonding requirements.<sup>46</sup>

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<sup>45</sup>Panel Report, para. 2.23.

<sup>46</sup>For the difference in product coverage between the 3 March Measure and the 19 April action, see *supra*, footnotes 39 and 40 of this Report.

75. Moreover, the 3 March Measure was a measure taken by the United States Customs Service and, as explicitly stated in the Metzger Memorandum, a measure taken on the basis of Section 113.13 of the Code of Federal Regulations (the "CFR"), Volume 19. The authority granted to the United States Customs Service under this provision of the CFR does not include the authority to increase customs duties. In contrast, the decision on 19 April 1999 to impose 100 per cent duties on certain designated products imported from the European Communities was an action by the USTR and, as explicitly stated in the USTR Notice dated 19 April 1999<sup>47</sup>, an action taken pursuant to the authority granted to the USTR under Section 301 of the Trade Act of 1974.<sup>48</sup> This alone need not necessarily make the 3 March Measure and the 19 April action separate and legally distinct measures. It is perfectly possible for more than one governmental agency to be involved in taking a single measure. However, in our view, in this case, the fact that two separate agencies of the United States government acted separately on two separate occasions, and pursuant to two distinctly separate legal authorities, tends to reinforce the notion that the 3 March Measure and the 19 April action were two separate and legally distinct measures.

76. Furthermore, and more significantly, we note that nothing in the 3 March Measure in any way required the United States to impose 100 per cent duties on 19 April 1999. This measure was taken pursuant to Section 113.13 of the CFR. We note that there is nothing in this particular regulation that requires that increased bonding be accompanied by increased customs duties. Nor does Section 113.13 permit customs authorities to increase customs duties, irrespective of whether bonding requirements are increased or not.

77. We also note that the 3 March Measure was not in any way a prerequisite for the imposition of 100 per cent duties on 19 April 1999. The 19 April action was taken by the USTR under authority found in Section 301 of the Trade Act of 1974. We note that there is nothing in Section 301 that in any way requires an increase in customs duties to be preceded or accompanied by any change in bonding requirements. Moreover, we think it significant that there is no perceptible correlation between the amount of the increase in bonding requirements implemented on 3 March 1999 and the 100 per cent customs duties provided for by the 19 April action. The increase in bonding requirements implemented on 3 March 1999 was not calculated on the basis of the imposition of 100 per cent duties, but was fixed at an amount equal to 10 per cent of the entered value of the designated products in the preceding year.<sup>49</sup> All this, in our view, reinforces the legal distinctiveness of what the United States did on 3 March and what it did on 19 April 1999.

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<sup>47</sup>64 Fed. Reg. 19,210 (1999).

<sup>48</sup>19 U.S.C. § 2411.

<sup>49</sup>Panel Report, para. 6.47.

78. The European Communities has stressed, and we are mindful that, when the United States decided on 19 April 1999 to impose 100 per cent duties on certain designated products from the European Communities, that decision applied *retroactively* to those designated products imported on or after 3 March 1999. However, this retroactive application of duties as of 3 March 1999 does not mean that the United States had already decided, as a matter of law, on 3 March 1999, to impose 100 per cent duties. As we have just explained, under Section 301 of the Trade Act of 1974, the United States could just as easily have imposed the increased duties retroactively to 3 March 1999 without having increased the bonding requirements on 3 March 1999. Thus, unlike the European Communities, we do not see this element of retroactivity as necessarily leading to the conclusion that the 3 March Measure and the 19 April action are one and the same.

79. Reinforcing this view is the fact that, as the United States explained to the Panel:

... the increased 3 March bonding requirements were removed for entries of merchandise not to be included on the April 19 list within a few days of the Article 22.6 Arbitrator's April 6 report, and were removed on April 19 for all remaining products.<sup>50</sup>

Thus, as of 19 April 1999, imports of the products from the European Communities on which 100 per cent duties are imposed were subject once again to the normal United States bonding requirements.

80. In the "Conclusions and Recommendations" section of the Panel Report, the Panel, on the one hand, found that "the 3 March Measure is no longer in existence"<sup>51</sup> and, on the other hand, recommended "that the Dispute Settlement Body request the United States to bring its measure into conformity with its obligations under the WTO Agreement."<sup>52</sup> We note that the European Communities appeals the Panel's finding that "the 3 March Measure is no longer in existence". As we have discussed, the European Communities contends that the 3 March Measure includes the imposition of the 100 per cent duties currently applied to certain designated products imported from the European Communities. For the reasons we have stated, we disagree.

81. We note, though, that there is an obvious inconsistency between the finding of the Panel that "the 3 March Measure is no longer in existence" and the subsequent recommendation of the Panel that the DSB request that the United States bring its 3 March Measure into conformity with its WTO

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<sup>50</sup>United States' appellee's submission, para. 23, referring to United States' second written submission, para. 11 and the United States' responses to questions by the Panel (8 February 2000), para. 21.

<sup>51</sup>Panel Report, para. 7.1.

<sup>52</sup>*Ibid.*, para. 7.3.

obligations. The Panel erred in recommending that the DSB request the United States to bring into conformity with its WTO obligations a measure which the Panel has found no longer exists.

82. For all these reasons, we conclude that the Panel correctly found that the measure at issue in this dispute is the 3 March Measure, which is the "increased bonding requirements as of 3 March on EC listed products"<sup>53</sup>, that this measure is no longer in existence, that the 19 April action is a legally distinct measure from the 3 March Measure and that the 19 April action is not within the terms of reference of the Panel.

## **VI. The Mandate of Arbitrators Appointed Under Article 22.6 of the DSU**

83. In paragraphs 6.121 to 6.126 of the Panel Report, the Panel stated, *inter alia*:

... 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. ... [Article 22.7 of the DSU] gives the arbitration panel the mandate and the authority to assess the WTO compatibility of the implementing measure. 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.<sup>54</sup>

... 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.<sup>55</sup>

...

... 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. ...<sup>56</sup>

84. The European Communities appeals these statements of the Panel. According to the European Communities, the WTO-consistency of a measure taken by a Member to comply with recommendations and rulings of the DSB cannot be determined by arbitrators appointed under Article 22.6 of the DSU.

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<sup>53</sup>Panel Report, para. 6.21

<sup>54</sup>*Ibid.*, para. 6.121.

<sup>55</sup>*Ibid.*, para. 6.122.

<sup>56</sup>*Ibid.*, para. 6.126.

85. In our view, the question that arises with respect to the Panel's statements on the mandate of Article 22.6 arbitrators is the following: was the issue of the mandate of arbitrators appointed under Article 22.6 of the DSU in any way pertinent to the Panel's determination of the claims relating to the measure at issue in this dispute?

86. The sequence of events that provides the background to this dispute is relevant to resolving this issue. On 2 February 1999, in the dispute in *European Communities – Bananas*, the United States requested authorization from the DSB to suspend the application of concessions or other obligations with respect to the European Communities pursuant to Article 22.2 of the DSU. On the same day, the European Communities requested, pursuant to Article 22.6 of the DSU, arbitration on the level of suspension of concessions or other obligations proposed by the United States. The arbitrators were unable to issue their decision on 2 March 1999, which was the deadline for the circulation of their decision, in accordance with the 60-day time-frame provided for in Article 22.6 of the DSU. On the following day, the United States took the 3 March Measure "as a retaliation measure", with the aim of redressing "a perceived WTO violation by the European Communities".<sup>57</sup> The arbitrators circulated their decision on 9 April 1999. On 19 April 1999, the United States requested, and received, authorization from the DSB to suspend the application of concessions or other obligations in the amount determined by the arbitrators. Subsequent to this authorization, the United States took the 19 April action.

87. This sequence of events is not contested by the parties. In particular, it is not contested that the United States took the 3 March Measure *before* the Article 22.6 arbitrators had issued their decision. Thus, the issue of whether it is within the mandate of arbitrators appointed under Article 22.6 to determine the WTO-consistency of implementing measures was not, and could not have been, relevant to the Panel's determination of the claims relating to the 3 March Measure. This issue could only be relevant with respect to claims relating to the 19 April action, a measure taken *after* the decision of the Article 22.6 arbitrators and the subsequent authorization of the DSB based on that decision.

88. However, as we have already concluded, the Panel correctly found that the measure at issue in this dispute is the 3 March Measure and that the 19 April action is not within the terms of reference of the Panel.

89. Having found that the 3 March Measure is the measure at issue in this dispute, and that the 19 April action is outside its terms of reference, the Panel should have limited its reasoning to issues that were relevant and pertinent to the 3 March Measure. By making statements on an issue that is

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<sup>57</sup>Panel Report, paras. 6.33-6.34.

only relevant to the 19 April action, the Panel failed to follow the logic of, and thus acted inconsistently with, its *own* finding on the measure at issue in this dispute. The Panel, therefore, erroneously made statements that relate to a measure which it had *itself* previously determined to be outside its terms of reference.

90. For these reasons, we conclude that the Panel erred by making the statements in paragraphs 6.121 to 6.126 of the Panel Report on the mandate of arbitrators appointed under Article 22.6 of the DSU. Therefore, these statements by the Panel have no legal effect.

91. In coming to this conclusion, we are cognizant of the important systemic issue of the relationship between Articles 21.5 and 22 of the DSU. As the United States correctly points out in its appellee's submission, the terms of Articles 21.5 and 22 are not a "model of clarity" and the relationship between these two provisions of the DSU has been the subject of intensive and extensive discussion among Members of the WTO.<sup>58</sup> We note that, on 10 October 2000, eleven Members of the WTO presented a proposal in the General Council to amend, *inter alia*, Articles 21 and 22 of the DSU.<sup>59</sup>

92. In so noting, we observe that it is certainly not the task of either panels or the Appellate Body to amend the DSU or to adopt interpretations within the meaning of Article IX:2 of the *WTO Agreement*. Only WTO Members have the authority to amend the DSU or to adopt such interpretations. Pursuant to Article 3.2 of the DSU, the task of panels and the Appellate Body in the dispute settlement system of the WTO is "to preserve the rights and obligations of Members under the covered agreements, and to *clarify the existing provisions* of those agreements in accordance with customary rules of interpretation of public international law." (emphasis added) Determining what the rules and procedures of the DSU ought to be is not our responsibility nor the responsibility of panels; it is clearly the responsibility solely of the Members of the WTO.

## **VII. The Effect of DSB Authorization to Suspend Concessions or Other Obligations**

93. The European Communities appeals the following statement of the Panel:

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).<sup>60</sup>

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<sup>58</sup>United States' appellee's submission, para. 39 and footnote 85.

<sup>59</sup>WT/GC/W/410.

<sup>60</sup>Panel Report, para. 6.112.

94. The European Communities argues that this statement is incorrect and should be reversed. According to the European Communities, DSB authorization to suspend concessions or other obligations does not have the automatic and un rebuttable effect of rendering a measure suspending the application of concessions or other obligations WTO-consistent. The European Communities argues that DSB authorization is a necessary, but not a sufficient, condition in order to implement legally a suspension of concessions or other obligations.

95. We note that the claims before the Panel, as they related to the 3 March Measure, were that the United States had suspended the application of concessions or other obligations *without* DSB authorization. Thus, the issue before the Panel was that of the *absence* of DSB authorization.

96. The statement of the Panel relates to the effect of DSB authorization, *once granted*. In the context of this dispute, the issue of the effect of DSB authorization, *once granted*, could only arise with respect to the 19 April action, which is a measure taken to suspend concessions *after* the United States had *received* DSB authorization. However, as we have already established, the Panel correctly found that the measure at issue in this dispute is the 3 March Measure, and that the 19 April action is not within its terms of reference. Having found that the 3 March Measure is the measure at issue in this dispute, and that the 19 April action is outside its terms of reference, the Panel should have limited itself to issues that were relevant and pertinent to the 3 March Measure. By making a statement on an issue that is only relevant to the 19 April action, the Panel acted inconsistently with its *own* finding on the measure at issue in this dispute. The Panel erroneously made a statement that relates to a measure which it had *itself* previously determined to be outside its terms of reference.

97. For these reasons, we consider that the Panel erred by stating that "[o]nce a Member imposes DSB authorised suspensions of concessions or obligations, that Member's measure is WTO compatible (it was explicitly authorised by the DSB)".<sup>61</sup> Therefore, this statement by the Panel has no legal effect.

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<sup>61</sup>Panel Report, para. 6.112.

**VIII. Articles II:1(a) and II:1(b), first sentence, of the GATT 1994**

98. The Panel found 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.<sup>62</sup>

99. The Panel also found 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.<sup>63</sup>

100. The United States does not appeal the Panel's finding of inconsistency with Article II:1(b), second sentence, of the GATT 1994. During the oral hearing in this appeal, the United States conceded that it follows from this finding of the Panel that the increased bonding requirements are inconsistent with Article II:1 (b), second sentence. We agree.

101. The United States appeals only the Panel's findings that the increased bonding requirements of the 3 March Measure were inconsistent with Article II:1(a) and the first sentence of Article II:1(b) of the GATT 1994. In support of its appeal, the United States submits that:

[t]he Panel ... made its finding[s] based not on the conclusion that the bonding requirements themselves breached the obligations in question, but because the duties they might be called upon to enforce (if imposed) would breach those obligations.<sup>64</sup>

102. The Panel's findings on the inconsistency of the increased bonding requirements with Article II:1(a) and the first sentence of Article II:1(b) are based on the reasoning that the increased bonding requirements were linked to the collection of 100 per cent duties, insofar as the increased bonding requirements were imposed at a level that would guarantee the collection of these duties. Thus, the Panel reasoned that:

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<sup>62</sup>Panel Report, para. 6.59. See also Panel Report, para. 6.72. We note that one panelist disagreed with this majority view, see Panel Report, paras. 6.60-6.61.

<sup>63</sup>Panel Report, para. 6.67. See also Panel Report, para. 6.72.

<sup>64</sup>United States' appellant's submission, para. 5.



The 3 March additional bonding requirements were established at a level which would guarantee the collection of 100 per cent duties. 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.<sup>65</sup>

The Panel, thus, found that the increased bonding requirements of the 3 March Measure are inconsistent with Article II:1(a) and also with the first sentence of Article II:1(b) of the GATT 1994 *because* the 100 per cent duties to which they were linked, would, if imposed, be duties above bound levels, and thus, inconsistent with these provisions.

103. We have previously upheld the findings of the Panel that the measure at issue in this dispute is the increased bonding requirements imposed by the 3 March Measure and that the 19 April action, which imposes 100 per cent duties, is not within the terms of reference of the Panel.<sup>66</sup> The task of the Panel, as the Panel had itself defined it in its finding on the terms of reference, was, therefore, to examine the GATT 1994-consistency of the increased bonding requirements; the Panel's task was not to examine the GATT 1994-consistency of the imposition of 100 per cent duties.

104. Nevertheless, the Panel examined the GATT 1994-consistency of the increased bonding requirements *in the light of* the GATT 1994-consistency of the imposition of 100 per cent duties, and concluded, on the basis of this examination, that the increased bonding requirements are inconsistent with Articles II:1(a) and II:1(b), first sentence, of the GATT 1994. As the Panel had previously concluded that the imposition of 100 per cent duties and the increased bonding requirements were legally distinct measures, and that the imposition of 100 per cent duties was not in the Panel's terms of reference, the Panel could not, based on this reasoning, have come to the conclusion that the increased bonding requirements are inconsistent with Articles II:1(a) and II:1(b), first sentence, of the GATT 1994.

105. We, therefore, conclude that the Panel erred in finding that the increased bonding requirements are inconsistent with Article II:1(a) and Article II:1(b), first sentence, of the GATT 1994, and we reverse these findings of the Panel.

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<sup>65</sup>Panel Report, para. 6.58.

<sup>66</sup>See *supra*, para. 82.

**IX. Articles 23.2(a), 3.7 and 21.5 of the DSU**

106. The Panel found that, by adopting the 3 March Measure, the United States acted inconsistently with its obligations under Articles 3.7, 21.5, 22.6, 23.1, 23.2(a) and 23.2(c) of the DSU. The United States appeals the Panel's findings of inconsistency with Articles 23.2(a), 3.7 and 21.5 of the DSU.

(a) Article 23.2(a) of the DSU

107. We first examine the appeal of the United States relating to Article 23.2(a) of the DSU. The Panel found that:

... the 3 March Measure constituted a unilateral determination contrary to Article 23.2(a) ...<sup>67</sup>

108. The United States contends that the European Communities' request for the establishment of a panel referred only to Article 23 of the DSU, and that the Appellate Body should reverse the Panel's finding of inconsistency with Article 23.2(a) on the basis that the panel request of the European Communities was insufficient to "present the problem clearly" as required by Article 6.2 of the DSU. The United States also argues that the European Communities "never requested or argued for" findings under Article 23.2(a), and that the European Communities failed to meet its burden of establishing a *prima facie* case of inconsistency with Article 23.2(a) of the DSU. The United States further submits that the Panel incorrectly found that a "determination as to the effect that a violation has occurred", within the meaning of Article 23.2(a) of the DSU, could be "implied" from the actions taken by the United States.

109. The request for the establishment of a panel of the European Communities stated:

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.<sup>68</sup>

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<sup>67</sup>Panel Report, para. 6.107.

<sup>68</sup>WT/DS165/8, 11 May 1999.

110. Article 23 of the DSU states, in relevant part:

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; ...

111. Article 23.1 of the DSU imposes a general obligation of Members to redress a violation of obligations or other nullification or impairment of benefits under the covered agreements only by recourse to the rules and procedures of the DSU, and not through unilateral action. Subparagraphs (a), (b) and (c) of Article 23.2 articulate specific and clearly-defined forms of prohibited unilateral action contrary to Article 23.1 of the DSU. There is a close relationship between the obligations set out in paragraphs 1 and 2 of Article 23. They *all* concern the obligation of Members of the WTO not to have recourse to unilateral action. We therefore consider that, as the request for the establishment of a panel of the European Communities included a claim of inconsistency with Article 23, a claim of inconsistency with Article 23.2(a) is within the Panel's terms of reference.

112. However, the fact that a claim of inconsistency with Article 23.2(a) of the DSU can be considered to be within the Panel's terms of reference does not mean that the European Communities actually made such a claim. An analysis of the Panel record shows that, with the exception of two instances during the Panel proceedings<sup>69</sup>, the European Communities did not refer *specifically* to Article 23.2(a) of the DSU. Furthermore, in response to a request from the United States to clarify the scope of its claim under Article 23, the European Communities asserted only claims of violation

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<sup>69</sup>In paragraph 42 of its oral statement at the second Panel meeting, the European Communities cites Article 23.2(a) in support of its argument in paragraph 43 that "the revised EC banana regime ... was never determined to be incompatible with the EC's WTO obligations in a dispute settlement procedure initiated by the US". In paragraph 86 of its second written submission, the European Communities argues that Articles 23.1 and Article 23.2(a) "specify that such a [determination] can only be made under the rules and procedures of the DSU".

of Articles 23.1 and 23.2(c) of the DSU; no mention was made of Article 23.2(a).<sup>70</sup> Our reading of the Panel record shows us that, throughout the Panel proceedings in this case, the European Communities made arguments relating only to its claims that the United States acted inconsistently with Article 23.1 and Article 23.2(c) of the DSU.<sup>71</sup>

113. The Panel record does show that the European Communities made several references to what it termed the "unilateral determination" of the United States.<sup>72</sup> However, in those references, the European Communities did not specifically link the alleged "unilateral determination" to a claim of violation of Article 23.2(a) *per se*. The European Communities' arguments relating to the alleged "unilateral determination" of the United States were made with reference to the alleged failure on the part of the United States to redress a perceived WTO violation through recourse to the DSU as required by Article 23.1 of the DSU. At no point did the European Communities link the notion of a "unilateral determination" on the part of the United States with a violation of Article 23.2(a).

114. On the basis of our review of the European Communities' submissions and statements to the Panel, we conclude that the European Communities did not specifically claim before the Panel that, by adopting the 3 March Measure, the United States acted inconsistently with Article 23.2(a) of the DSU. As the European Communities did not make a specific claim of inconsistency with Article 23.2(a), it did not adduce any evidence or arguments to demonstrate that the United States made a "determination as to the effect that a violation has occurred" in breach of Article 23.2(a) of the

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<sup>70</sup>In its response to the United States' request for clarification, the European Communities explained as follows:

As we have already explained in detail in our first written submission, the US measures that are the subject matter of the present complaint by the European Communities were taken in flagrant violation of the obligations of all WTO Members to respect the provisions of Article 23 of the DSU. . .

The guiding principle of Article 23 is contained in its paragraph 1 which also governs the more detailed provisions of paragraph 2 . . .

The European Communities then quoted Article 23.2(c) of the DSU in full and argued:

The EC submits that the measures complained of in the present case are obviously in breach of this explicit provision concerning the sequence between the procedures under Article 22 of the DSU and the recourse to the suspension of concessions or other obligations.

See paragraphs 13-15 of the European Communities' oral statement at the first Panel meeting.

<sup>71</sup>The two specific references to Article 23.2(a) of the DSU, in paragraph 42 of the European Communities' oral statement at the second Panel meeting and in paragraph 86 of the European Communities' second written submission (see *supra*, footnote 70), were made in the context of the European Communities' arguments on its claim of violation of the general obligation in Article 23.1 of the DSU.

<sup>72</sup>European Communities' first written submission, paras. 5, 10, 20, and 28; European Communities' second written submission, para. 30; and European Communities' oral statement at second Panel meeting, Addendum to the Panel Report, p. 44.

DSU.<sup>73</sup> And, as the European Communities did not adduce any evidence or arguments in support of a claim of violation of Article 23.2(a) of the DSU, the European Communities could not have established, and did not establish, a *prima facie* case of violation of Article 23.2(a) of the DSU.<sup>74</sup>

115. For these reasons, we conclude that the Panel erred in finding that the United States acted inconsistently with Article 23.2(a) of the DSU. Therefore, we reverse this finding of the Panel.

(b) Article 3.7 of the DSU

116. We next examine the appeal of the United States relating to Article 3.7 of the DSU. In paragraph 6.87 of the Panel Report, the Panel found 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, ... 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 ... 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 ...

117. We recall that the United States does not appeal the Panel's findings of inconsistency with Articles 22.6 and 23.2(c) of the DSU. Instead, the United States appeals the Panel's finding of inconsistency with Article 3.7 of the DSU. The United States argues that the European Communities "never requested or argued for" findings under Article 3.7 of the DSU.<sup>75</sup> Furthermore, the United States submits that the Panel erred in concluding that Article 3.7, last sentence, contains a specific obligation which can be the subject of a dispute under the DSU.

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<sup>73</sup>We note that in addition to the 3 March Measure, the European Communities referred in its submissions and statements to the Panel, to various public notices published in the United States' Federal Register (first written submission, para. 18, and oral statement at first Panel meeting, paras.10-11), as well as to statements made by the Deputy USTR at a press conference held on 3 March 1999 (first written submission, para. 15). However, the European Communities has not argued, let alone demonstrated, that any of these notices or statements constitute a "determination as to the effect that a violation has occurred" within the meaning of Article 23.2(a).

<sup>74</sup>We recall that in our Report in *EC Measures Concerning Meat and Meat Products (Hormones)* ("*European Communities - Hormones*"), we held that:

... a *prima facie* case is one which, in the absence of effective refutation by the defending party, requires a panel, as a matter of law, to rule in favour of the complaining party presenting the *prima facie* case.

See WT/DS26/AB/R, WT/DS44/AB/R, adopted 13 February 1998, para. 104.

<sup>75</sup>United States' appellant's submission, para. 56.

118. Article 3.7, last sentence, of the DSU states:

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)

119. Article 3.7 is part of Article 3 of the DSU, which is entitled "General Provisions" and sets out the basic principles and characteristics of the WTO dispute settlement system. Article 3.7 itself lists and describes the possible temporary and definitive outcomes of a dispute, one of which is the suspension of concessions or other obligations to which the last sentence of Article 3.7 refers. The last sentence of Article 3.7 provides that the suspension of concessions or other obligations is a "last resort" that is subject to DSB authorization.

120. The *obligation* of WTO Members not to suspend concessions or other obligations *without* prior DSB authorization is explicitly set out in Articles 22.6 and 23.2(c), not in Article 3.7 of the DSU. It is, therefore, not surprising that the European Communities did not explicitly claim, or advance arguments in support of, a violation of Article 3.7, last sentence. The European Communities argued that the 3 March Measure is inconsistent with Articles 22.6 and 23.2(c) of the DSU. We consider, however, that if a Member has acted in breach of Articles 22.6 and 23.2(c) of the DSU, that Member has also, in view of the nature and content of Article 3.7, last sentence, necessarily acted contrary to the latter provision.

121. Although we do not believe that it was necessary or incumbent upon the Panel to find that the United States violated Article 3.7 of the DSU, we find no reason to disturb the Panel's finding that, by adopting the 3 March Measure, the United States acted inconsistently with "Articles 23.2(c), 3.7 and 22.6 of the DSU".<sup>76</sup>

(c) Article 21.5 of the DSU

122. Finally, the United States appeals the Panel's finding of inconsistency with Article 21.5 of the DSU. The United States argues that this finding was based on "argumentation" that was not presented by the European Communities and on the "Panel's erroneous conclusion" that the 3 March Measure is inconsistent with Article 23.2(a) of the DSU.<sup>77</sup>

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<sup>76</sup>Panel Report, para. 6.87.

<sup>77</sup>United States' appellant's submission, para. 64.

123. This appeal by the United States raises the question whether a panel is entitled to develop its own legal reasoning in reaching its findings and conclusions on the matter under its consideration. In our Report in *European Communities - Hormones*, we held:

Panels are inhibited from addressing legal claims falling outside their terms of reference. However, nothing in the DSU limits the faculty of a panel freely to use arguments submitted by any of the parties - or to develop its own legal reasoning - to support its own findings and conclusions on the matter under its consideration.<sup>78</sup>

The Panel in this case exercised its discretion to develop its own legal reasoning. Contrary to what the United States argues, the Panel was not obliged to limit its legal reasoning in reaching a finding to arguments presented by the European Communities. We, therefore, do not consider that the Panel committed a reversible error by developing its own legal reasoning.

124. The United States further argues that the Panel's finding under Article 21.5 should be reversed because, in making this finding, the Panel relied on its "erroneous Article 23.2(a) finding".<sup>79</sup> According to the United States, the Panel did not undertake any analysis separate from that under Article 23.2(a) in finding a violation of Article 21.5. The United States submits that the Panel:

... simply quoted the language of Article 23.2(a), stated that this provision prohibits "unilateral determinations" and that the 3 March Measure "necessarily implies" such a unilateral determination, and concluded that this unilateral determination was "contrary to Article 23.2(a) and 21.5 of the DSU".<sup>80</sup>

125. The Panel stated in relevant part:

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>81</sup>

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<sup>78</sup>Appellate Body Report, *supra*, footnote 74, para. 156.

<sup>79</sup>United States' appellant's submission, para. 66.

<sup>80</sup>*Ibid.*

<sup>81</sup>Panel Report, para. 6.92.

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.<sup>82</sup>

... 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 ...<sup>83</sup>

126. Our reading of the Panel Report does not lead us to conclude that the Panel based its finding of the inconsistency of the 3 March Measure with Article 21.5 on its conclusion that the measure was inconsistent with Article 23.2(a). Although the Panel considered that the obligation under Article 21.5 was "comparable" and "similar" to the obligation under Article 23.2(a), it explicitly stated that "Article 21.5, first sentence is another DSU obligation ... which, although not explicitly listed in Article 23.2, is covered by Article 23.1 ...".<sup>84</sup> The Panel's references to Article 23.2(a) cannot be construed as the basis upon which the Panel reached its conclusions under Article 21.5. On the contrary, the Panel based its finding of inconsistency on the uncontested fact that, when the United States put in place the 3 March Measure, the WTO-consistency of the European Communities' implementing measure had not been determined through recourse to the WTO dispute settlement procedures as required by Article 21.5 of the DSU.<sup>85</sup>

127. We, therefore, uphold the Panel's finding that, by adopting the 3 March Measure, the United States acted inconsistently with its obligations under Article 21.5 of the DSU.

## **X. Findings and Conclusions**

128. For the reasons set out in this Report, the Appellate Body:

- (a) upholds the Panel's findings that the measure at issue in this dispute is the 3 March Measure, which is the "increased bonding requirements as of 3 March on EC listed products", that this measure is no longer in existence, that the 3 March Measure is legally distinct from the 19 April action and that the 19 April action is not within the terms of reference of the Panel;

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<sup>82</sup>Panel Report, para. 6.129.

<sup>83</sup>*Ibid.*, para. 6.130.

<sup>84</sup>*Ibid.*, para. 6.129.

<sup>85</sup>*Ibid.*, para. 6.130.



- (b) concludes, for the reasons stated in paragraph 89 of this Report, that the Panel erred by stating that the WTO-consistency of a measure taken by a Member to comply with recommendations and rulings of the DSB can be determined by arbitrators appointed under Article 22.6 of the DSU, and, thus, concludes that the Panel's statements on this issue have no legal effect;
- (c) concludes, for the reasons stated in paragraph 96 of this Report, that the Panel erred by stating that "[o]nce a Member imposes DSB authorised suspensions of concessions or obligations, that Member's measure is WTO compatible (it was explicitly authorised by the DSB)", and, thus, concludes that this statement has no legal effect;
- (d) reverses the Panel's findings that the increased bonding requirements are inconsistent with Articles II:1(a) and II:2(b), first sentence, of the GATT 1994; and
- (e) reverses the Panel's finding that, by adopting the 3 March Measure, the United States acted inconsistently with Article 23.2(a) of the DSU, finds no reason to disturb the Panel's finding that the United States acted inconsistently with "Articles 23.2(c), 3.7 and 22.6 of the DSU", and upholds the Panel's finding of inconsistency of the 3 March Measure with Article 21.5 of the DSU.

129. As we have upheld the Panel's finding that the 3 March Measure, the measure at issue in this dispute, is no longer in existence, we do not make any recommendation to the DSB pursuant to Article 19.1 of the DSU.

Signed in the original at Geneva this 10th day of November 2000 by:

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James Bacchus  
Presiding Member

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Julio Lacarte-Muró  
Member

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Yasuhei Taniguchi  
Member