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

AB-2000-9

Report of the Appellate Body

WORLD TRADE ORGANIZATION
APPELLATE BODY

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

European Communities, *Appellant/*

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.[4] 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.[5] 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;

[4]WT/DS27/48, 2 March 1999.

[5]WT/DS27/ARB, 9 April 1999.

(c) The increased bonding requirements of the 3

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.[14]

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 timek to l0 -19.5ce the Wsf8-frthaed for iniroperatvne

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".[16] 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 2.

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.[17] 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,

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.[18]

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.

[18]Ecuador's third participant's submission, para. 3.

IV.

(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)"[21];

(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"[22], and called this the 3 March Measure. The Panel found that this measure is "no longer in existence".[23] 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.[24] The European Communities appeals these findings of the Panel.

61. The Panel was established by the DSB on 16 June 1999.[25] 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.[26]

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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[21]Panel Report, para. 6.112.

[22]*Ibid*., para. 6.21.

[23]*Ibid*., para. 7.1.

[24]*Ibid*., para. 6.89 and 6.128.

[25]WT/DS165/9, 18 October 1999 and WT/DS165/9/Corr.1, 5 November 1999.

[26]*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 3March 1999, the return of which was uncertain, depending on future US decisions. …[27] (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.[28]

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")[29], as clarified by a memorandum dated 16 March 1999.[30] The Metzger Memorandum provided:

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[27]WT/DS165/8, 11 May 1999.

[28]*Ibid.*

[29]Panel Report, para. 6.29.

[30]*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.

bonding requirements.[35] 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."[36]

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 on de96 was requ tsnmeectsumpspute whic 3 Marean Coith respect .25 TD25 0.175 Tf 0.375 Tc 0 Tw

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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.[39] 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.[40] 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."[41] 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".[42] (emphasis added)

72. The action taken by the United States customs authorities as of 3 March 1999 is set out in the Metzger Memorandum.[43]

> 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".[45] 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.[46]

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[45]Panel Report, para. 2.23.

[46]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[47], an action taken pursuant to the authority granted to the USTR under Section 301 of the Trade Act of 1974.[48] This alone need not necessarily make the 3 March Measure and the 19

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 3March 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

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"[53], 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.[54]
>
> … 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.[55]
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> . . .
>
> … 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. …[56]

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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[53]Panel Report, para. 6.21

[54]*Ibid*., para. 6.121.

[55]*Ibid*., para. 6.122.

[56]*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

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.[58] 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.[59]

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.

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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 unrebuttable 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)".[61] Therefore, this statement by the Panel has no legal effect.

[61]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

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.[65]

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

106.

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[69], 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

[69]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).[70] 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.[71]

113. The Panel record does show that the European Communities made several references to what it termed the "unilateral determination" of the United States.[72] However, in those references, the

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 Articles 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".[76]

(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 conclus.2121 Tw .pstemunities and on the "Panea 81 n and 22.670.114.lalthougRe, or, para.* -87reason-70.11 0 Tj 0 on "A0113rroneous2m3rrona83 unaso70.114.l

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

> 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.[82]
>
> … 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 …[83]

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 …".[84] 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

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(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:

_____

James _____