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

Report of the Panel

Addendum

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Appendix 1.1

First Submission of the European Communities
(10 November 1999)**I. THE SCOPE OF THIS PROCEDURE AND THE OBJECTIVE PURSUED BY THE EC**

1. The European Communities have requested the DSB to establish the present Panel against the United States with a view to arrive at a ruling recommending the US to withdraw the illegal trade measure taken on 3 March 1999 and confirmed on 19 April 1999 (hereinafter: the "Measure"), limiting the importation of selected products originating in the European Communities. The EC considers that the facts of the case are straightforward and do not need, therefore, lengthy debates. The EC accordingly requests the Panel to proceed expeditiously within the shortest possible time-frame with the examination of the matter under its terms of reference. In this respect, the EC would like to draw the Panel's attention to the fact that the illegal US measures continue to deploy their detrimental effects on the EC economic operators.

II. THE FACTS AT ISSUE

2. On 7 January 1998, the Arbitrator Dr. El-Naggar ruled that

"...pursuant to Article 21.3 (c) [of the DSU], the 'reasonable period of time' for the European Communities to implement the recommendations and rulings of the DSB adopted on 25 September 1997 in European Communities - Regime for Importation, Sale and Distribution of Bananas, shall be the period from 25 September 1997 to 1 January 1999"¹.

3. The Council of the European Union adopted Regulation (EC) No. 1637/98 of July 20, 1998 amending Regulation (EEC) 404/93 on the common organisation of the market in bananas (OJ L 210 of July 27, 1998). Regulation 1637/98 entered into force on July 31, 1998 and was applicable as from January 1, 1999. Making use of the delegated powers attributed to it by the Council, the European Commission adopted Commission Regulation (EC) No. 2362/98 of October 28, 1998 laying down detailed rules for the implementation of Council Regulation (EEC) No. 404/93 regarding the imports of bananas into the Community (OJ L 293 of October 31, 1998). It entered into force on 1 November 1998 and was applicable in its entirety as from 1 January 1999.

4. The modifications introduced by these Regulations created a completely new set of rules addressing specifically those elements of the previous banana regime which were found to be incompatible with WTO rules both with respect to GATT and to GATS.

5. Well before the conclusion of the reasonable period of time granted by the Arbitrator to the EC, and at a time when the EC had not yet adopted the entirety of the envisaged measures in order to comply with the recommendations and rulings of the DSB adopted on 27 September 1997, the United States published three notices in the US Federal Register respectively on 22 October, 10 November and 29 December 1998² (EC Annex I, II and III) of proposed determination of action by imposing prohibitive (100 per cent *ad valorem*) duties on selected products from the European Communities. This proposed action was based on the unilateral determination by the United States that «the measures the EC has undertaken to apply as of January 1, 1999 fail to implement the WTO

¹ WT/DS27/15, paragraph 20.

² Vol. 63, page 56687, page 63099 and page 71665.

recommendations concerning the EC banana regime». The actions proposed are intended to be in place «beginning as early as February 1, 1999».

6. The publication of the above-mentioned notices was the enactment of a political commitment taken by the US president vis-à-vis the US congress (EC Annex IV), which explicitly refers to a bill which was discussed at that time in the US congress. The commitment made in the letter was thus clearly aimed at preventing the US legislator to adopt legislation imposing immediate economic sanctions against the EC (EC Annex V and VI).

7. On 14 January 1999, without having requested a dispute settlement procedure as it was required to do under Article 21.5 of the DSU, the US nevertheless requested authorisation from the DSB under Article 22 of the DSU to suspend the application to the EC of tariff concessions and related obligations under the GATT.

8. After thorough debates in the DSB and in the General Council that underlined the extraordinary nature of the US request and the danger that such action was creating for the WTO dispute settlement system³, in order to limit as much as possible the damage for its economic operators, on 29 January 1999 the EC objected to the level of suspension proposed by the United States and the matter was referred to arbitration pursuant to article 22.6 of the DSU.

9. On 2 March 1999, the Arbitrator issued an "initial" decision⁴. The cover letter sent to the parties to the procedure stated the following

"I write to inform you that the Arbitrators have today issued an initial decision to the parties in which we rule on matters related to the scope of our work and to certain aspects of the methodology and calculations of the United States for determining the level of suspension of concessions. In addition, we have requested the parties to supply us with additional information. This information should enable us to take a final view on the level of nullification or impairment based on the WTO inconsistency, if any, of the revised EC banana regime, and, if relevant, to determine the level of suspension of concessions or other obligations equivalent to the level of such nullification or impairment. Following our receipt and analysis of that information, we expect to be in a position to issue a final decision in this matter soon thereafter."

10. Notwithstanding this very clear statement by the Arbitrator, on the basis of its unilateral determination that the European Communities had failed to implement the DSB's recommendations on this regime, the USTR announced on the following day (3 March 1999) that the U.S. Customs Service would begin as of that date withholding liquidation and reviewing the sufficiency of bonds on imports of selected European products covering trade in an amount of \$520 million (EC Annex VII).

Normally, a customs debt is incurred upon importation of goods liable to import duties and is established on the basis of the duty applicable to the product that is currently imported. The level of the duty is the one determined in the US tariff nomenclature and its level should not exceed the level set out in the US WTO Schedule of commitments.

In practice, the US measure suspended the liquidation of a customs debt on importation according to the normal rules, rendering thus impossible the payment of duties as they appeared in the US customs nomenclature. In addition to this action, the US measure imposed the deposit of a bond (or security), which could not be released until such time as the customs debt in respect of which it was given was extinguished or could no longer arise. The level of the security was calculated not on a level derived

³ See WTO doc. WT/DSB/M/54, in particular page 30 *et sequitur*.

⁴ WT/DS27/48.

from but not exceeding the US bound duties (i.e. the ordinary customs debt), but to a level far higher, in fact at 100% *ad valorem* (i.e. the arbitrary level of retaliation unilaterally set by the US) (EC Annex VIII).

In addition, the decision to withhold customs liquidation on 3 March 1999 imposed upon importers of selected European products a contingent duty liability of 100 percent *ad valorem*, discriminated against European products and importers since importers of like products of other origins were only exposed to a duty liability corresponding to the bound customs tariff.

11. On 9 April 1999, the Arbitrator issued a decision determining the level of nullification or impairment of the US at US \$191.4 million⁵. On the same day (9 April 1999), the United States requested the DSB authorisation to suspend concessions or other obligations to the EC for that amount. The authorisation was granted on 19 April 1999⁶.

12. Effective as from 19 April 1999, the USTR confirmed (EC Annex IX and X) that a 100% *ad valorem* rate of duty is applied retroactively to the EC products listed in the notice that had entered, or withdrawn from warehouse, for consumption on or after 3 March 1999.

III. THE VIOLATION OF US WTO OBLIGATIONS

A. THE VIOLATION OF ARTICLE 22 OF THE DSU

13. According to Article 22.6, last sentence, of the DSU

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

14. By implementing its 3 March measure, the US has breached this rule. In fact, while the arbitration procedure was still on-going, the US imposed a requirement exclusively on products imported from the EC of a contingent duty liability of 100 percent, while importers of like products of other origins were subject to a duty liability corresponding to the bound customs tariff. The bonds on imports from the EC corresponded (or were committed as to correspond) to that higher contingent duty liability covering trade in an amount of \$520 million.

15. The real purpose and effect of the measure was to deter imports altogether, as importers would logically be very reluctant to accept a risk of having to pay 100% *ad valorem* duties retroactively. As the Deputy USTR P. Scher indicated at a press conference held on 3 March 1999 (EC Annex XI),

"we retaliated by effectively stopping trade as of March 3 in response to the harm caused by the EC's WTO-inconsistent banana regime".

Moreover, as is demonstrated by the Arbitrator's final decision, the amount of US\$ 520 millions of the value of EC imports subject to suspension of concessions or other obligations, unilaterally determined by the US authorities, has no basis under WTO law.

B. THE VIOLATION OF ARTICLES I, II, XI AND VIII OF THE GATT 1994

16. In addition, it is evident from the facts mentioned above that the Measure at issue is inconsistent with:

⁵ WT/DS27/ARB.

⁶ WT/DSB/M/59, at page 11.

- (a) Article I of the GATT 1994 since it discriminates between products originating in the EC and the products originating in all other countries. On 3 March 1999 only selected products originating in the EC were burdened by the US measure while other Members' like products were not;
- (b) Article II of the GATT 1994 insofar as it denies as from 3 March 1999 the unconditional right to import the selected EC products at a tariff not in excess of that set forth and provided in the US Schedule. The US measure meant that every EC operator importing one of the products unilaterally targeted by the US measure was liable to pay a tariff incomparably higher than the duty bound in the US Schedule;
- (c) Article XI of the GATT 1994, insofar as the consequence of the "retaliatory" measure was, in the Deputy USTR's own language, to "effectively stopping trade as of March 3";
- (d) Articles II.2(a) and VIII.1 of the GATT 1994, insofar as the requirement to submit or commit bonds beyond the bound rate duty upon importation of selected EC products results in increased costs for importers that constitute "other charges" imposed in connection with importation that are prohibited. It is undeniable that the deposit of a security (or posting of a bond) necessarily imposes a financial burden since each and every operator (or its customs agent) subject to such a measure is obliged:
 - either to deposit a lump sum (which entails necessarily one of the following situations: either the sum is ready and available for the operator, in which case it suffers a loss of interests and thus a cost; or must borrow the money, in which case it is liable for the payment of the interests for the loan)
 - or to deposit a financial guarantee, which the financial institutions deliver only at a cost related to the guaranteed amount.
 - or, finally, to commit part of a general security (or continuous bond). If the general security is not sufficient, an additional security is required or an increase of the general security must be provided.

17. The Measure in fact obliged the operators or their customs agents to follow the second or third option described in paragraph 16 (d) above (EC Annex VIII and X). Both options entailed a burden additional to what was required by the US customs authorities in application of ordinary customs duties.

C. THE VIOLATION OF ARTICLE 23 AND ARTICLE 3 OF THE DSU.

18. The USTR made clear in a public notice requesting comments on the planned 3 March 1999 action that it was required under Sections 301-310 to implement that action on that date:

Given that the reasonable period of time for the EC's implementation of the WTO recommendations concerning the EC banana regime expires on January 1, 1999, the USTR must make the determination required by section 306(b) no later than January 31, 1999, and, in the event of an affirmative determination, must implement further action no later than 30 days thereafter.⁷

⁷ Federal Register, Vol.63. No.204, Thursday, October 22, 1998, pages 56688 and 56689.

19. The USTR thus considered itself bound to take retaliatory action 60 days after the expiry of the implementation period in response to a perceived failure to implement rulings or recommendations of the DSB. The USTR added

"these time frames permit the USTR to seek recourse to the procedures for compensation and suspension of concessions provided in Article 22 of the DSU"⁸.

20. However, when it turned out that the Article 22 procedures were not completed on 3 March 1999 and that the United States could therefore not obtain the necessary DSB authorisation at the time required by its domestic legislation, the USTR nevertheless imposed trade sanctions by "effectively stopping trade". This course of events confirms that the USTR implemented the further action (unilaterally) decided upon only on the basis of its domestic legislation and thus irrespective of whether that action conformed to the requirements of Article 23; paragraphs 1 and 2, of the DSU.

21. Under Article 23 of the DSU, the United States has accepted an unconditional and unqualified obligation to impose suspension of concessions or other obligations only with DSB approval but has applied its domestic legislation in breach of such fundamental obligation under the WTO Agreements.

Moreover, the US measure is at odds with WTO law with regard to its timing, its amount and the total disregard of WTO procedures, thus fundamentally undermining the authority of the WTO bodies dealing with dispute settlement. It also undermines the expectation that WTO Members would ensure the conformity of their domestic administrative procedures with WTO law, in particular with the requirement of the DSU.

As the Panel on "*US-Sections 301-310*"⁹ has indicated:

"Article 23.1 (...) prescribes a general duty of a dual nature. First, it imposes on all Members to "have recourse to" the multilateral process set out in the DSU when they seek the redress of a WTO inconsistency. In these circumstances, Members have to have recourse to the DSU dispute settlement system to the exclusion of any other system, in particular a system of unilateral enforcement of WTO rights and obligations. This, what one could call "exclusive dispute resolution clause", is an important new element of Members' rights and obligations under the DSU. Second, Article 23.1 also prescribes that Members, when they have recourse to the dispute settlement system in the DSU, have to "abide by" the rules and procedures set out in the DSU. This second obligation under Article 23.1 is of a confirmatory nature: when having recourse to the DSU Members must abide by all DSU rules and procedures.

Turning to the second paragraph under Article 23, Article 23.2 – which, on its face, addresses conduct in specific disputes – starts with the words "[i]n such cases". It is, thus, explicitly linked to, and has to be read together with and subject to, Article 23.1.

Indeed, two of the three prohibitions mentioned in Article 23.2 – Article 23.2(b) and (c) – are but egregious examples of conduct that contradicts the rules and procedures of the DSU which, under the obligation in Article 23.1 to "abide by the rules and procedures" of the DSU, Members are obligated to follow.¹⁰ These rules and procedures clearly cover much more than the ones specifically mentioned in Article 23.2.¹¹ There is a great deal more State conduct

⁸ Id., page 56689.

⁹ Cf. paras. 7.43-7.45 of the panel report, WT/DS 152/R.

¹⁰ [original footnote] Article 23.2(a), in contrast, prohibiting Members from making certain determinations, is not covered elsewhere in the DSU.

¹¹ [original footnote] One could refer, for example, to the requirement to request consultations pursuant to Article 4 of the DSU before requesting a panel under Article 6.

which can violate the general obligation in Article 23.1 to have recourse to, and abide by, the rules and procedures of the DSU than the instances especially singled out in Article 23.2.¹²

22. It finally undermines the achievement of the fundamental objectives under Article 3 of the DSU. Article 3 of the DSU describes the dispute settlement system of the DSU as "a central element in providing security and predictability to the multilateral trading system". As the Appellate Body has indicated in the "LAN" report¹³, the objective of the "security and predictability of the multilateral trading system" is also an object and purpose of the substantive WTO Agreements themselves. It is the reflection of the general principle of public international law "*pacta sunt servanda*" (Article 26 of the Vienna Convention of the Law of Treaties), which requires that international agreements be performed in good faith.

D. THE VIOLATION OF ARTICLE 21.5 OF THE DSU.

23. Article 21.5 of the DSU provides that

"where there is a disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings such dispute shall be decided through recourse to these dispute settlement procedures, including whenever possible resort to the original Panel. The Panel shall circulate its report within 90 days after the date of referral of the matter to it"

24. This provision, and in particular the terms "shall", "Panel" and "these dispute settlement procedures" must be interpreted in accordance with the principles of the Vienna Convention on the Law of Treaties, i.e. it must be interpreted

"in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose" (Article 31.1).

25. It is the EC's view that the ordinary meaning of the term "shall" is "expressing a command or duty"¹⁴. In the WTO context, the term "Panel" is defined in Articles 6, 7 and 8 of the DSU. The terms "these dispute settlement procedures" interpreted in "good faith" in the context of Article 21.5 mean nothing else than a dispute settlement procedure under the DSU, which includes a Panel as defined in Articles 6, 7 and 8 (and thus not just an arbitration procedure whose legal nature, scope of action, procedural and substantial guarantees with respect to the right of defense, access to the Appellate Body, access for third parties is incomparable to a panel procedure).

26. As the Appellate Body stated in the "*India - Mailbox*" case¹⁵, paragraph 45,

"The duty of a treaty interpreter is to examine the words of the treaty to determine the intentions of the parties. This should be done in accordance with the principles of treaty interpretation set out in Article 31 of the *Vienna Convention*. But these principles of interpretation neither require nor condone the imputation into a treaty of words that are not there or the importation into a treaty of concepts that were not intended."

¹² [original footnote] Not notifying mutually agreed solutions to the DSB as required in Article 3.6 of the DSU or not abiding by the requirements for a request for consultations or a panel as elaborated in Articles 4 and 6 are some other examples of conduct that would be contrary to DSU rules and procedures but is not mentioned specifically in Article 23.2.

¹³ WT/DS62/AB/R - WT/DS67/AB/R - WT/DS68/AB/R.

¹⁴ Oxford English Reference Dictionary, 1995.

¹⁵ WT/DS50/AB/R.

27. Thus, "where there is a disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings" there is an obligation ("shall") to have recourse to a Panel procedure under Article 21.5 of the DSU (unless the complainant decides not to proceed as it is allowed under Article 3.7, first sentence, of the DSU).

28. The US did nothing of the sort. Well before the conclusion of the 'reasonable period of time' and at a time when not all the EC measures necessary to implement recommendations and rulings of the DSB had yet been adopted by the competent EC Institutions, the US had already unilaterally determined that the EC measures violated the EC's WTO obligations. On the basis of a unilateral determination, driven exclusively by a domestic political agenda prone to intensive lobbying by industry interests, the US has unilaterally suspended tariff concessions to the EC for selected products as from 3 March 1999 up to a level that was both legally unjustified and economically unjustifiable.

29. As the Panel report on "*US - Sections 301 - 310*"¹⁶ pointed out at paragraph 7.75:

"Providing security and predictability to the multilateral trading system is another central object and purpose of the system which could be instrumental to achieving the broad objectives of the Preamble. Of all WTO disciplines, the DSU is one of the most important instruments to protect the security and predictability of the multilateral trading system and through it that of the market-place and its different operators. DSU provisions must, thus, be interpreted in the light of this object and purpose and in a manner which would most effectively enhance it".

Notwithstanding, the US measure ignored completely such fundamental reason for the existence, under the WTO Agreements, of a multilateral system for settling disputes and for authorising measures aimed at re-balancing the concessions between Members in case of violation of a WTO obligation.

Conclusions

The EC requests the Panel to find that the US measure under its scrutiny has breached Articles 3, 21.5, 22 and 23 of the DSU and Articles I, II, XI and VIII of the GATT 1994. The US should be urged to take all the necessary measures to comply with such findings.

¹⁶ WT/DS152/R.

Appendix 1.2
The EC oral presentation at the First Substantive Meeting
(16 December 1999)

Mr. Chairman, distinguished Members of the Panel,

1. The European Communities have initiated this procedure with the aim to make the DSB re-affirm, and rule on, some principles of fundamental importance for every system whose functioning is based on law and not on sheer force: nobody can be judge and jury on the same issue, nobody can take justice in their own hands without a prior review by an independent and neutral judge, nobody can disregard the procedures set forth in that legal system, which are aimed at assuring the correct and orderly functioning of that system and, most importantly, the rights of defence.

2. In sum, we are before you to have the principles of a rules based dispute settlement system affirmed against a system of power based bullying.

3. What you, Mr. Chairman and Members of the Panel, are required to do by the terms of reference of this panel is thus to examine and make recommendations on a US measure taken on 3 March 1999 and confirmed on 19 April 1999 which limits the importation of selected products originating in the European Communities. You are not required, because this is in fact completely irrelevant for the resolution of the present dispute, to review the work of other bodies established by the DSB in the context of another dispute settlement procedure or to redraw history, as the US would wish you to do, by qualifying events in a way which simply does not match the reality.

4. In this respect, while the EC is fully prepared at any time - right now, tomorrow or in the next few weeks - to clarify any issue you may deem appropriate, the EC will refrain from analysing in detail all the incorrect presentations concerning the facts which were at the basis of earlier disputes that the US has made in 17 out of 28 pages of its first written submission. The EC believes that such an exercise would amount to a waste of everybody's time.

5. The European Communities considered in its first written submission that the facts of this case were straightforward and did not need much elaboration from our part. The US first written submission confirms the EC's understanding.

6. It may be worth while to recapitulate briefly where we stand on the assessment of the facts as a result of the first exchange of written submissions:

(a) The United States does not contest that the US Measure of 3 March 1999 has an effect on the duties to be paid. At page 16 of its submission, the US affirms that

1. "Entry procedures in the United States permit timely or immediate release of goods into the United States. Since liquidation of an entry usually is performed after the goods are in the stream of commerce, bonding is required in order to guarantee the payment of these additional duties or fees."¹⁷ (emphasis added)

Thus, according to the US itself, as soon as the goods were cleared through the US customs on or after 3 March 1999 and a bond amounting to a 100% *ad valorem* duty was submitted or committed, the importer was bound to pay the (prohibitive) increased duty at the time of liquidation of the customs debt. The US confirms moreover that the bonding requirement was essential in order to ensure the collection

¹⁷ Paragraph 32, *in fine*.

of the (unauthorised) 100% *ad valorem* duties as from 3 March 1999. It is also confirmed that the bonding requirement was imposed upon a list of products amounting to a trade value of over half a billion US\$, while, as we all know, the Arbitrator eventually set the level of nullification or impairment of US benefits, and the corresponding equivalent level of suspension of concessions, at 191.4 million US\$, a third of the initial amount.

- (b) The United States does not contest, and cannot contest, the declaration made by the Deputy USTR attached as Annex X to the EC's first written submission, according to which

2. "we retaliated by effectively stopping trade as of March 3 in response to the harm caused by the EC's WTO-inconsistent banana regime".

Thus, it is confirmed that as a result of the imposition by the US customs of the bonding requirements under (1) above, a unilateral disproportionate and unauthorised US retaliatory measure was put in place effective as from 3 March 1999, even though the arbitration procedure was still on-going.

- (c) In its first written submission, the US attempts to confuse the issue by affirming in paragraph 31, *in fine*, that

3. "Th[e requirement of a single transaction bond equal to the entered value of the merchandise, corresponding to 100% *ad valorem*] did not actually assess duties, nor did it prejudice the amount of the total value of the products which would be assessed higher duties."

However, the US is unable to contest not only the affirmation of the Deputy USTR under (2) above, but also that it was not possible for any importer as from 3 March 1999 to import a product included in the unilaterally established retaliation list just by paying a duty not exceeding the tariff bound in the US Schedule of tariff concessions for that product (i.e. without application of the 100% *ad valorem* duty). Apart from the stopping of the trade, this is the other main consequence in practice of the 3 March US measure of "withholding liquidation", which literally prevents the immediate liquidation of any customs debt.

- (d) While insisting on subjective (and, as a matter of fact, incorrect) descriptions of what happened before and during the arbitration procedure which was concluded on 19 April 1999, the US does not seriously contest, and cannot contest, two important statements of the Arbitrator in the initial decision¹⁸ and in the final decision¹⁹ respectively:

4. "(...) we have requested the parties to supply us with additional information. This information should enable us to take a final view on the level of nullification or impairment based on the WTO inconsistency, if any, of the revised EC banana regime, and, if relevant, to determine the level of suspension of concessions or other obligations equivalent to the level of such nullification or impairment."

¹⁸ WT/DS27/48.

¹⁹ WT/DS27/ARB, at paragraph 4.7.

5. (...) [W]e could resort to the option of measuring the level of nullification or impairment on the basis of our findings in the original dispute, as modified by the Appellate Body and adopted by the DSB. To do that would mean to ignore altogether the undisputed fact that the European Communities has taken measures to revise its banana import regime".

Thus, it may well be that an excess of polemics got the US lawyers carried away when they affirmed in the first US submission that

6. (...) the arbitrators thus concluded that what the EC now characterizes as a completely new set of rules for its bananas regime was in great part a repackaging of those very same elements which the panel and Appellate Body originally found inconsistent with the EC's WTO obligations (...)"

Polemics or not, the fact remains that the Arbitrator on 2 March 1999 had not yet taken any decision on the level of nullification or impairment, "if any", concerning the "revised" banana import regime that had been "undisputed[ly]" adopted by the EC before the end of the reasonable period of time. This is all the more confirmed when considering the following statement of the Arbitrator²⁰:

7. "We also note that both parties accept that it is the consistency or inconsistency with WTO rules of the new EC regime - and not of the previous regime - that has to be the basis for the assessment of the equivalence between the level of nullification suffered and the level of the proposed suspension."

- (e) The United States does not contest, finally, that the requirement to submit or commit bonds beyond the bound rate duty upon importation of selected EC products resulted in increased costs for importers that constitute "other charges" imposed in connection with importation.

7. In the EC's view, therefore, the undisputed facts of this case are confirmed as follows:

The United States did not pursue any prior dispute settlement procedure under Article 21.5 of the DSU, as it should have done, with respect to the revised banana regime that the EC had adopted undisputedly before the end of the reasonable period of time. It undertook on 3 March 1999 to unilaterally impose retaliatory measures on selected products originating from the EC for an amount of over half a billion US\$. This action was put in place notwithstanding the fact that an arbitration procedure was still under way and was not concluded before 19 April 1999 when a level of nullification or impairment was set at one third of the level unilaterally determined and imposed by the US. The practical effect of this imposition was (1) to effectively stop the trade on the selected products as from 3 March 1999 and (2) in any case, to deprive as from 3 March 1999 the importers of their right of importing those products subject to a duty not exceeding the tariff bound under the US Schedule of tariff concessions. Moreover, it triggered additional costs for importers that constitute "other charges" imposed in connection with importation.

8. If we now turn to the legal consequences that should be drawn from the facts as they have just been summarised, the EC considers that the task of the panel has been considerably eased by the presentation made by the United States in its first written submission.

²⁰ Ibid., at paragraph 4.5.

The EC is firmly of the view that the authorisation of suspension of concessions or other obligations by the DSB under Article 22.2 or 22.7 of the DSU can in no case be granted retroactively. The United States claims in its first written submission that the DSU is silent on this question²¹, but this is incorrect. In fact, Article 22.6, last sentence, contains the following rule that limits the right of the complainant to apply the suspension of concessions or other obligations:

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

This provision would become meaningless if the suspension of concessions or other obligations could be applied retrospectively after having been authorised by the DSB. As the present case illustrates, it is in fact impossible in practice to apply the suspension of concessions or other obligations retrospectively unless some kind of contingency measure has already been taken which clearly announces the future definitive measure and ensures its enforceability. This contingency measure by itself is however inconsistent with the clear and unqualified obligation not to resort to the suspension of concessions or other obligations during the course of the arbitration procedure, because – as is again illustrated by the present case – such contingency measure will have exactly the same trade effect as the suspension of concessions or other obligations itself. This is because no importer will be prepared to take the risk of being subject to a prohibitive duty after the event, since the importation as such cannot be undone once the product has been put on the market of the importing country.

9. Thus, there is no way in which the US measures in this case could be justified by the alleged silence of the DSU or by referring to a "liability" of the EC as from the end of the reasonable period of time. Any such "liability" presupposes that, before there can be a question about what measures may or may not be justified as a response to an alleged violation of WTO obligations, that this allegation has been confirmed by the appropriate WTO body under the appropriate procedures provided for under the multilateral dispute settlement system. Such "liability" can thus in no case be invoked by any WTO Member before the relevant procedures under the DSU have been completed.

10. We would also like to observe, in this context, that the date chosen by the United States for the retroactive application of the suspension of concessions or other obligations, i.e. 3 March 1999, finds its basis in sections 306(b)(2) and 305(a)(1) of the US Trade Act of 1974 (as amended), because under those provisions the US Trade Representative is required to take action at the latest two times 30 days after the end of the reasonable period of time²². This also follows very clearly, in spite of the US denial in its first written submission, from the notices published in the Federal Register on the subject. One of these notices contains the following official statement by the US authorities:

"Given that the reasonable period of time for the EC's implementation of the WTO recommendations concerning the EC banana regime expires on January 1, 1999, the USTR must make the determination required by section 306(b) no later than

²¹ Cf. para. 39 of the first written submission of the United States.

²² Section 306(b)(2): "If the measure [...] concerns the implementation of a recommendation made pursuant to dispute settlement proceedings under the World Trade Organization, and the Trade Representative considers that the foreign country has failed to implement it, the Trade Representative shall make the determination [what further action the Trade Representative shall take under section 301(a)] no later than 30 days after the expiration of the reasonable period of time provided for in such implementation under paragraph [sic!] 21 of the Understanding on Rules and Procedures Governing the Settlement of Disputes [...]."

Section 305(a)(1): "Except as provided in paragraph (2), the Trade Representative shall implement the action the Trade Representative determines [...] to take under section 301, subject to specific direction, if any, by the President regarding such action, by no later than 30 days after the date on which such determination is made."

January 31, 1999, and, in the event of an affirmative determination, must implement further action no later than 30 days thereafter"²³ (emphasis added).

The EC would note in this context that it is certainly no coincidence that the time limit of 30 days after 31 January 1999 expired precisely on 2 March 1999 (given that in 1999, February had 28 days).

11. This is confirmed by another Federal Register notice which reads in relevant part as follows:

"The dates on which the USTR intends to implement action – February 1 or no later than March 3, 1999 – correspond to the dates contemplated by sections 306(b) and 305(a) of the Trade Act as well as Article 22 of the DSU"²⁴ (emphasis added).

Thus, the statement that no action was taken by the USTR under section 301 *et seq.* on 3 March 1999 contained in the first written submission of the United States in the present procedure²⁵ is in open contradiction with contemporaneous official notices published in the Federal Register which is nothing less than the official gazette of the US government.

12. The legal construction submitted by the US in the present dispute according to which the action taken on 3 March 1999 was based on a so-called "potential liability" of the EC²⁶ resulting from its alleged failure to implement the recommendations of the DSB in the *Bananas* dispute is thus nothing else than an *ex post facto* attempt to provide a justification to a measure which was taken for reasons related exclusively to domestic political developments in the United States.²⁷ The EC would like to draw the attention of the Panel to the flagrant contradiction between this action and the explicit, official, repeated and unconditional commitment which the US representatives gave when they appeared before the panel on "*United States - Sections 301-310 of the Trade Act of 1974*" according to which the US Trade Representative would "base any section 301 determination that there has been a violation or denial of US rights under the relevant agreement on the panel or Appellate Body findings adopted by the DSB"²⁸.

13. 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 which is entitled "*Strengthening of the Multilateral System*". The US claims in its first written submission that "[i]t is difficult to respond to the EC's vague arguments with respect to Article 23 inasmuch as the EC never identifies the precise obligations in question"²⁹.

14. If the United States has difficulties with the identification of the rules contained in Article 23 of the DSU to which the EC refers in the present case, this only confirms the fundamental disregard of those rules by the United States, since these rules were analysed in great detail in the recent panel report on "*United States – Sections 301-310 of the Trade Act of 1974*". The guiding principle of Article 23 is contained in its paragraph 1 which also governs the more detailed provisions of paragraph 2 since this paragraph starts with the words "In such cases, Members shall" by which paragraph 1 is incorporated into paragraph 2. As the panel on sections 301-310 has stated, Article 23.1 of the DSU prescribes that

²³ Cf. Federal Register, Thursday October 22, 1998, page 56689/90 (EC Annex I).

²⁴ Cf. Federal Register, Tuesday November 10, 1998, page 63099 (EC Annex II)

²⁵ Cf. para. 49 of the first written submission of the United States.

²⁶ Cf. para. 41 of the first written submission by the United States.

²⁷ Cf. the Bill for a "Uruguay Round Agreements Compliance Act of 1998" (H.R. 4761 dated 9 October 1998, EC Annex V to the its first written submission) pending in the US Congress at the relevant time.

²⁸ Cf. para. 7.115 of the report of the panel on *United States – Sections 301-310 of the Trade Act of 1974*, doc. WT/DS152/R.

²⁹ Cf. para. 46 of the first written submission of the United States.

"Members have to have recourse to the DSU dispute settlement system to the exclusion of any other system, in particular a system of unilateral enforcement of WTO rights and obligations"³⁰ (emphasis added).

15. Moreover, Article 23.2(c) clearly requires that Members shall

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

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.

16. Moreover, in the present case the United States has not followed the correct procedures under the DSU before resorting to a request for authorisation of the suspension of concessions or other obligations under Article 22.2 and 22.7 of the DSU.

17. While the United States claims in its first written submission that there are no rules governing the sequence between the procedures under these two provisions, the EC would like to recall the mandatory terms of the first sentence of Article 21.5 of the DSU which read as follows

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

18. The letter of the US Trade Representative Charlene Barshefsky of 13 July 1999, which is contained in Exhibit 1 to the first written submission of the US in the present case, recognises the existence of a disagreement between the parties to the *Bananas* dispute about the measures taken by the EC in order to implement the recommendations and rulings of the DSB of 27 September 1997. The letter further recognises the applicability of Article 21.5 of the DSU to this situation. Thus, it is not even in dispute that the correct multilateral procedure available in this situation is recourse to the procedures under Article 21.5 of the DSU. The US arguments regarding their decision to "economise" the procedures under Article 21.5 in order to be able to have recourse immediately to Article 22.2 of the DSU are simply specious.

19. The request for the EC's "agreement to help ensure that an Article 21.5 procedure [...] will be completed before January 1, 1999"³¹ is just another example of bullying tactics by the United States. As is apparent from the description of the sequence of events given in the first written submission of the United States, the real objective of the United States was to ensure that the schedule of the dispute settlement procedure would conform to the domestic deadlines under sections 306(b) and 305(a) of the US Trade Act of 1974. In fact, this request by the United States to waive the time frames provided for under the DSU demonstrates once again that the United States could not accept a multilateral procedure that was not fully in line with the timetable established under US domestic law.

³⁰ WT/DS152/R, particularly para. 7.4.

³¹ Cf. the second paragraph of Ms. Barshefsky's letter of 13 July 1999, Exhibit 1 to the first written submission of the United States.

20. As the evolving practice has meanwhile clearly shown, it is perfectly possible to safeguard the complainants' rights with regard to the suspension of concessions or other obligations in cases where the complainant first requests the establishment of a panel under Article 21.5. There are as of today five cases where the correct sequence between Article 21.5 and 22 has been respected: In the *Bananas* dispute, this has happened in the complaint submitted by Ecuador³²; in the dispute on *Australia – Measures Affecting Importation of Salmon*, the arbitration procedure under Article 22.6 was suspended³³ until such time as the procedure under Article 21.5 will be completed³⁴; in the two *Aircraft* disputes between Canada and Brazil, procedures under Article 21.5 were requested³⁵ before resorting to suspension of concessions; and last, but not least, the United States itself has resorted to Article 21.5 procedures in the *Automotive Leather* dispute³⁶ with Australia before having recourse to the suspension of concessions. Thus, the mandatory language of Article 21.5 has been respected in all other cases except the dispute between the EC and the US on *Bananas*.

21. As is well known to the Panel, in the aftermath of the EC/US dispute on *Bananas*, an attempt has been made to resolve the diverging positions on the sequence between Article 21.5 and Article 22 procedures by negotiations on an amendment of the DSU. However, the perspective for a negotiated solution is presently anything but certain, given the failure of the Ministerial Conference in Seattle to come to a conclusion on the DSU review. These negotiations can thus not serve as an excuse for the United States to oppose a finding by this panel on the present obligations under the DSU as it stands today and as it stood at the time of the relevant facts.

22. The EC therefore maintains its position that the measures taken by the United States that are the subject matter of the present dispute were taken in violation of the procedural obligations of the United States under Article 21.5 of the DSU.

23. Finally, the EC would like to repeat that the application of the measures under dispute also constitutes a violation of the relevant GATT provisions, namely Articles I, II, XI and VIII of GATT 1994. The EC will not elaborate further on this aspect of its complaint unless the panel has questions in this regard.

Mr. Chairman, members of the Panel,

With this I would like to conclude. Thank you for your attention.

³² Cf. doc. WT/DS27/41 dated 18 December 1998.

³³ Cf. Canada's request for authorisation of the suspension of concessions or other obligations under Article 22.2 of the DSU, doc. WT/DS18/12 dated 15 July 1999, Australia's request for arbitration under Article 22.6 of the DSU, doc. WT/DS18/13 dated 3 August 1999, and the debate on this subject in the DSB meeting of 28 July 1999, doc. WT/DSB/M/66, page 4 *et seq.*

³⁴ Cf. Canada's request for the establishment of a panel under Article 21.5 of the DSU, doc. WT/DS18/14 dated 3 August 1999

³⁵ Cf. doc. WT/DS70/9 dated 23 November 1999 (recourse by Brazil to Article 21.5 of the DSU) and doc. WT/DS46/13 dated 26 November 1999 (recourse by Canada to Article 21.5 of the DSU).

³⁶ Cf. doc. WT/DS126/8 dated 4 October 1999.

Appendix 1.3
The EC final statement at the First Substantive Meeting
(17 December 1999)

Mr. Chairman, distinguished Member of the Panel,

As we have explained at the outset of this meeting, the European Communities have initiated this procedure with the aim to make the DSB re-affirm, and rule on, some principles of fundamental importance for every system whose functioning is based on law and not on sheer force. This position is shared by a large majority of WTO Members and the intervening third Parties in this procedure.

The US position is different: it wants to be judge and jury on the question of implementation and take justice in its own hands without a prior review by an independent and neutral Panel.

In order to defend the indefensible, the US tries to hold the EC responsible for its own disregard of the multilateral procedures by alleging inexistent attempts by the EC to prevent, or delay, a 21.5 procedure in the Bananas dispute.

Mr. Chairman, it is still our firm conviction that what was decided by other Bodies of the WTO during the Bananas dispute is not directly relevant for the present case. This case is not limited to a specific trade dispute, it concerns fundamental systemic issues created by the US interpretation of fundamental rules concerning the multilateral functioning of the dispute settlement system, which could arise in other cases. Thus we simply do not wish to follow the US in sterile polemics whose only purpose is to try to re-write history and distract the attention of the Panel.

However, the EC takes note that the Panel has requested some clarification on the EC's position during the Bananas dispute, in particular with regards to the reasonable period of time and the 21.5 procedure. We will obviously answer these questions in detail but we can announce as of today that the US allegations in this context are entirely incorrect.

The United States has raised during this meeting for the first time a question concerning the terms of reference of this Panel. It claims that these terms of reference are limited to what they call the 3 March "action".

As is apparent from EC's request for the establishment of this Panel in document WT/DS165/8 and the 2 annexes thereto, the EC considers that the matter before the Panel pursuant to Article 7 of the DSU is the US measure effective on 3 March 1999 on a list of products, contained in Annex 1, and confirmed for "a subset of the products" in a "reduced list" adopted on 19 April 1999, contained in Annex 2.

Appendix 1.4
The EC Responses to Questions of Panel and Parties
(13 January 2000)

Questions from the Panel to Both Parties

1. Is the withholding of the suspension of liquidation (including the bond requirement) a suspension of concessions or other obligations under the DSU?

Reply

The EC reads this question as referring to the withholding or suspension of liquidation in the alternative.

In general, to the extent that it prevents the importation of a product against payment of a customs duty not in excess of the bound tariff rate, such a measure is in breach of the tariff binding and therefore of the GATT 1994.

In this particular case, the US measure under dispute was taken without any WTO justification or DSB authorisation and thus without respecting the relevant multilateral procedures. It corresponds therefore to an unauthorised suspension (breach of Articles 3, 21, 22 and 23 of the DSU) of concessions (breach of Article II GATT 1994) and other obligations (breach of Articles I, XI and VIII GATT 1994).

2. What is the impact on trade and traders involved in a suspension of liquidation (including the bond requirement)?

Reply

In general, the effect on the trade would depend on the contingent liability imposed on the economic operator by the bonding requirement. For technical reasons, a bonding requirement must identify the precise amount to be guaranteed. Moreover, in order to respect WTO law this amount must be justified by a cost or charge approximate to the cost of services rendered and/or a duty not exceeding the rate bound in the Member's Schedule of tariff concessions.

3. What is the legal link between the date of assessment of the nullification caused by the EC's non-implementation of the Bananas III recommendations and the need to be able to suspend concessions as of 3 March 1999?

Reply

Given that the DSB has found on 6 May 1999 that the revised EC banana regime was inconsistent with certain WTO obligations of the EC, the only legal link that can be established between the revised EC banana regime and the US measure effective on 3 March 1999 is the US domestic legislation under Sections 301-310 of the US Trade Act of 1974, as amended³⁷.

³⁷ See evidence provided by the EC in its first written submission (Annexes I and II) and the references provided in paragraphs 10 and 11 of the EC's oral statement at the first substantive meeting with the panel on 16 December 1999.

4. Is a new measure (an implementing measure) presumed to be compatible or incompatible with WTO obligations after the reasonable period of time? Which party bears the burden of proof after the reasonable period of time to prove consistency (or lack thereof) with WTO provisions? Is it correct to state that the losing party becomes liable as of the expiry of the reasonable period of time? And liable for what?

Reply

The EC fails to see how the legal status under the WTO of a new measure could be influenced or determined by the status of a measure which was previously in place and that has been withdrawn in accordance with Article 3.7 of the DSU and the recommendations and rulings of the DSB.

For that reason, no presumption of inconsistency is expressly provided for in the DSU. On the contrary, as was confirmed recently by the Appellate Body report on *"Chile – Taxes on Alcoholic Beverages"*³⁸ at paragraph 74: "Members of the WTO should not be assumed, in any way, to have *continued* previous protection or discrimination through the adoption of a new measure. This would come close to a presumption of bad faith" (emphasis in the original).

Consequently, the burden of proof follows the normal rules as indicated by the Appellate Body in its report on *"United States – Measures Affecting Imports of Woven Wool Shirts and Blouses from India"*³⁹ and remains with the Member alleging the inconsistency of a measure of another Member.

The very notions of "losing" party and "liability at the end of the reasonable period of time" suggested by the US is entirely inaccurate in this context. On the one hand, if a new measure is adopted by the end of the reasonable period of time, the obligation on the respondent in the previous dispute settlement procedure to withdraw its original inconsistent measure has been fulfilled. Thus, even referring to the "losing" party in such a case is inappropriate. On the other hand, the notion of "liability" is simply out of context in a procedure covered by the DSU, where the notions of WTO-consistency of a given measure and of the equivalent level of reciprocal concessions provide the appropriate reference.

5. Who has the responsibility to raise an Article 21.5 case? When should such a request under Article 21.5 take place?

Reply

Article 21.5 does not specifically address the issue of whose responsibility it is to raise a procedure under that provision but declares "these dispute settlement procedures" applicable. Except in the case of the recourse of the EC to Article 21.5 in the Bananas dispute (that will be discussed in response to question 7), all other cases mentioned in the EC's oral statement on 16 December 1999 at paragraph 20 were submitted by the Member alleging the inconsistency.

In case of disagreement as to the consistency with a covered agreement of measures taken to comply with recommendations and rulings of the DSB, an Article 21.5 procedure cannot be requested before the time of the adoption of the implementing measure. Of course, in case of a disagreement on the existence of measures taken to comply with recommendations and rulings of the DSB it is not possible to start a 21.5 procedure before the end of the reasonable period of time.

The DSU does not provide for any statute of limitation or other outer time limit with regard to requests for a procedure under Article 21.5.

³⁸ WT/DS87/AB/R and WT/DS110/AB/R.

³⁹ Cf. doc. WT/DS33/AB/R, p. 14.

6. What is the consequence of failing to raise an Article 21.5 claim before the end of the reasonable period? If it is not done during this period does the right to an Article 21.5 assessment lapse?

Reply

None.

No. See the EC's response to the previous question.

7. Assuming the US is correct in stating that an Article 21.5 panel should be triggered (by either party) within the reasonable period of time, what is the consequence if this 21.5 panel is never requested or not established? Does the absence of an Article 21.5 assessment result in a presumption that the new measure is compatible or that it is incompatible with WTO obligations? Does the absence of an Article 21.5 panel exclude recourse to Articles 22.6-7?

Reply

The EC considers the US assumption to be entirely incorrect and thus does not wish to elaborate further on what it considers an incorrect interpretation of the DSU.

Consistently with the reply to question 4 the EC submits that in the absence of a decision by the DSB declaring the inconsistency of an implementing measure with a covered agreement, the measure at issue must indeed be presumed compatible. As the EC explained during the procedures before the panel on *European Communities - Regime for the Importation, Sale and Distribution of Bananas - Recourse to Article 21.5 by the European Communities*, "a presumption of *inconsistency* would gravely affect the security and predictability of the international trading system because of the ensuing uncertainty".⁴⁰

The absence of an Article 21.5 ruling or recommendation by the DSB excludes recourse to Article 22.6 and 22.7 of the DSU in all cases except where there is no disagreement as to the existence or the consistency of measures taken to comply with recommendations and rulings of the DSB. This latter situation occurred in the *Hormones* dispute between the US, Canada and the EC.

8. Who determines whether a new measure nullifies WTO benefits?

Reply

In case of disagreement as to the consistency with a covered agreement of measures taken to comply with recommendations and rulings of the DSB, the DSB determines as a result of a procedure under Article 21.5 of the DSU whether there is nullification or impairment of the complainant's benefits under the WTO agreement resulting from the new measure.

In the absence of such disagreement, as is illustrated by the *Hormones* case, it is possible to have recourse to Arbitration that will determine the level of the nullification or impairment.

⁴⁰ Cf. doc. WT/DS27/RW/EEC, para. 2.18 (emphasis in the original).

9. Is there an implicit assessment of compatibility of any measure that is the object of an Article 22.6-7 Arbitration in view of the Arbitrator mandate to assess whether the level of suspension is equivalent to the level of nullification of benefits?

Reply

The terms of reference of the arbitrator are laid down in Article 22.6 and 22.7 of the DSU. These terms of reference do not extend to findings with regard to the consistency or otherwise of an implementing measure with a covered agreement. In case of disagreement on the consistency of an implementing measure, Article 21.5 of the DSU requires that "such dispute shall be decided through recourse to these dispute settlement procedures, including wherever possible resort to the original panel". An implicit assessment by the arbitrator under Article 22.6 of the compatibility of a measure with a covered agreement would usurp the task of a panel under Article 21.5 of the DSU and thus, if an arbitrator were to make such an assessment, the arbitrator would act *ultra vires*.

10. Please discuss the practice of WTO Members in their use of Articles 21.5 and 22 procedures

Reply

The EC discussed the practice of WTO Members when having recourse to Articles 21.5 and 22 already in para. 20 of its oral statement during the first substantive meeting of the parties with the Panel on 16 December 1999.

Questions from the Panel to the EC

11. Please comment on the US allegations that the EC blocked an Article 21.5 action before the end of the reasonable period of time.

12. If the EC was of the opinion that an Article 21.5 procedure must precede an Article 22 authorization, why did the EC repeatedly refuse to participate in the US Article 21.5 requested before the reasonable period of time?

Common reply to questions 11 and 12

It is incorrect that the EC "blocked an Article 21.5 action before the end of the reasonable period of time" and that it "repeatedly refuse[d] to participate in the US Article 21.5 requested before the reasonable period of time" as alleged by the United States. In fact, under Article 21.5 of the DSU, "[w]here there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings such dispute shall be decided through recourse to these dispute settlement procedures" (emphasis added). Thus, Article 6.1 of the DSU is applicable with regard to the procedure to be followed for the establishment of a panel under Article 21.5 of the DSU. That means that the party complained against is not in a position to "block" the establishment of a panel because the decision is taken by the DSB under the "reversed consensus" rule nor can the party complained against refuse to participate without seriously jeopardising its legal position.

The reference to "these dispute settlement procedures" is of course also relevant with regard to other elements of the procedure to be followed, including consultations under Article 4 of the DSU. The EC therefore expressed the view that such consultations must precede the establishment of a panel under Article 21.5 of the DSU.⁴¹ It is surprising to note in this context that, on the one hand, the

⁴¹ Cf. the statement made by the EC representative at the DSB meeting on 22 September 1998, DSB/M/48, p. 7 *et seq.*

United States claimed that the EC's position on the need to hold consultations in the framework of an Article 21.5 procedure leads to "unnecessary, hollow procedural steps"⁴², while the United States is complaining in the present dispute, on the other hand, that the EC was unwilling to enter into consultations during the reasonable period of time⁴³. This latter complaint is factually simply incorrect, as demonstrated by the statements made by its representatives in the DSB meetings at the relevant time⁴⁴.

The EC believes that these statements clearly demonstrate that the EC did not "block" the establishment of a panel under Article 21.5 of the DSU, nor did the EC claim that such a panel could not be established during the reasonable period of time. Rather, the arguments turned around the need to hold consultations under Article 4 of the DSU before resorting to the establishment of a panel under Article 21.5 of the DSU and were also related to the question whether the dispute settlement procedures under Article 21.5 of the DSU could be initiated before the relevant implementing measures had been adopted (*quod non*).

As the events at the end of 1998 and at the beginning of 1999 have shown, the EC tried everything it could in order to convince the United States to engage in Article 21.5 procedures, going as far as taking the unprecedented step of requesting a panel under Art. 21.5 of the DSU at its own initiative⁴⁵. Thus, the record shows that it was not the EC that "blocked" an Article 21.5 panel procedure nor that it refused to participate in such a procedure. Quite on the contrary, it was the United States that had decided to "skip" the procedure under Article 21.5 of the DSU, because the United States wanted to invoke Article 22 of the DSU as soon as the reasonable period of time had ended in order to be able to live up to the requirements of the schedule foreseen under its domestic legislation under sections 306(b) and 305(a) of the Trade Act of 1974, as amended.

Question from the US to the EC

In paragraph 16(d) of the EC's first written submission and paragraph 6(e) of its oral statement, the EC raises several arguments with respect to its claim that the March 3rd action imposed an "other charge" inconsistent with Articles II:2(a) and VIII:1 of the GATT 1994.

- a) **Is it the EC's position that this "other charge" arises only in connection with the March 3rd action?**
- b) **Could the EC confirm that it does not consider surety systems in general, which are contemplated in Article 13 of the Customs Valuation Agreement and maintained by numerous Members (including the EC), as imposing an "other charge"?**
- c) **If so, how does the EC differentiate the "other charge" it claims is associate with the March 3rd surety requirements from these surety requirements in general?**

Reply to the general question by the United States

The question refers to paragraph 16(d) of the EC's first written submission which reads in relevant part:

⁴² Cf. doc. WT/DS27/18 of 31 August 1998.

⁴³ Cf. first written submission of the United States of 6 December 1999, para. 3.

⁴⁴ Cf. doc. WT/DSB/M/48, p. 7 *et seq.* (DSB meeting of 22 September 1998); doc. WT/DSB/M/49, p. 4 (DSB meeting of 21 October 1998); doc. WT/DSB/M/51, p. 3 (DSB meeting of 25 November 1998) and doc. WT/DSB/M/51/Add.1, p. 2 (DSB meeting of 21 December 1998).

⁴⁵ Cf. doc. WT/DS27/40 of 15 December 1998.

"Articles II.2(a) and VIII.1 of the GATT 1994, insofar as the requirement to submit or commit bonds beyond the bound rate duty upon importation of selected EC products results in increased costs for importers that constitute 'other charges' imposed in connection with importation that are prohibited."

As is evident from the context, the reference to Article II.2(a) should in fact read II.2(c).

It is undisputed that the increased charges and costs for importers, because they are calculated on the basis of a duty in excess of the bound rate without any multilateral authorisation or justification, are not limited in amount to the approximate costs in administration in accordance with Article VIII.1(a) and II.2(c) and thus also violate Article II.1(b) of the GATT 1994⁴⁶.

Reply to sub-question (a)

It appears that this question is based on an artificial distinction between different "actions", with which the EC does not agree. The EC has demonstrated that the increased costs and charges resulting from the US measure are in violation of Articles II and VIII of the GATT.

Reply to sub-questions (b) and (c)

The EC does not see how the issue of customs valuation is at all relevant in the context of the present case. The EC does not believe that Article 13 of the Customs Valuation Agreement is applicable to the measures under dispute in the present procedure.

Moreover, as the Panel on *'EEC – Programme of Minimum Import Prices, Licences and Surety Deposits for Certain Processed Fruits and Vegetables'* (referred to in footnote 9 to this document) clearly indicated, the increased costs and charges resulting from the imposition of a security imposed in addition to the ordinary customs duties exceed the bound rate and are therefore not covered by the requirements of Article II.1(b) GATT, but by Article II.2(c) GATT to the extent that the amount of the increased charge or cost is limited to the approximate costs of administration in accordance with Article VIII.1(a) GATT.

See therefore what is already mentioned in the reply to the general question.

⁴⁶ Cf. panel report on *EEC – Programme of Minimum Import Prices, Licences and Surety Deposits for Certain Processed Fruits and Vegetables*, BISD 25S/68, paragraph 4.6.

Appendix 1.5
Rebuttal Submission of the European Communities
(21 January 2000)

I. INTRODUCTION

1. The European Communities believe that this second submission serves mainly two functions:
 - to recall the main claims and arguments of the EC in this case and
 - to rebut certain statements and affirmations by the US which were expressed during the first substantive meeting with the Panel and the US replies to the questions from the Panel and the EC.

Of course, the other points of law and procedure which were advanced by the EC during the first stages of this dispute settlement procedure (including the answers to the questions from the Panel and from the United States) should also be considered entirely confirmed here. This is true in particular for the EC's claims and arguments concerning the violation of Article I and XI of the GATT 1994 and Articles 3 and 23 of the DSU by the US measure.

2. As a brief preliminary point, the EC also submits that the statistical data provided by the US in its Exhibit 5 do not refute Deputy USTR P. Scher's affirmation⁴⁷ that "we retaliated by effectively stopping trade as of March 3 in response to the harm caused by the EC's WTO-inconsistent banana regime".

On the one hand, statistical data concerning March 1999 and April 1999 cover periods that precede and follow the entry into force of the 3 March measure and of its 19 April confirmation on a reduced list.

On the other hand, these statistics show for many products a dramatic decrease in imports as from March 1999. This provides confirmation of the point made by the EC that discriminatory suspensions of concessions and other obligations were in force as from 3 March 1999.

Finally, the intention of the US authorities on 3 March 1999 was explicit and is irrefutably demonstrated by their public statements, and the measure made effective as of 3 March 1999 violates in itself the US obligations under the WTO regardless of whether the facts of the trade eventually correspond to the US authorities' initial expectations.

II. THE SCOPE OF THE PRESENT DISPUTE

3. The US has raised in its answers to the questions from the Panel and from the EC three objections concerning the scope of the present panel procedure. They will be examined in the following sub-chapters.

B. THE US MEASURE EFFECTIVE ON 3 MARCH 1999 AND ITS CONFIRMATION ON 19 APRIL 1999.

4. As the EC pointed out in its request for the establishment of this Panel, the measure under dispute "impose[s] a contingent liability for 100% duties" and "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". This request also contains, in the Annex, the product lists published by the United States on 3 March

⁴⁷ The US tries to mislead the Panel when it pretends in its reply to question 21 of the Panel that such assertion comes from the EC.

and on 19 April 1999, which shows that the EC considers these as being part of one and the same measure. The United States never raised any objection against this request, neither during the DSB meeting where the request was adopted nor at any other time.

5. The issue of the potential duty liability is intimately linked to the question of the scope of the present dispute.

6. Contrary to the position expressed by the United States before the Panel, the EC is of the view that the measure at issue in the present dispute is not limited to an increase in surety deposit requirements, but also includes by necessity an increase of duty liability for imports of the products listed in the instructions addressed to US customs services on 3 March 1999 under the revealing title of "European Sanctions"⁴⁸.

In the view of the EC, the increased duty liability was operated on that date and not only on a later date, as the United States would have it now. In the view of the EC, all that happened on 19 April was that the increased duty liability was simply confirmed for most of the listed products, while some products were de-listed at that time⁴⁹. Thus, the "contingent" duty liability was changed into a "final" one (admittedly with some exceptions)⁵⁰.

7. There is no difference, neither in economic terms nor under WTO law, whether a duty beyond the bound rate is called a "potential" or "contingent" duty or a "final" or "definitive" one. What counts is the expected trade effect of the measure. That trade effect is exactly the same, whether the duty is "potential" or "final", not least because the customs procedures of the United States do not allow importers to obtain immediate confirmation of the precise amount of the duty at the time of physical entry of the product.

Moreover, there is no difference, neither in economic terms nor under US domestic law, whether a surety deposit in excess of the approximate costs of the services rendered is "contingent" or "potential" or "final" or "definitive". As the US recognises in its answers to questions 22 and 23 from the Panel, the US customs does not reimburse "any fees which private sureties may have charged US importers" (or, for that matter, EC exporters) or do not pay any interest on an "additional bond requirement or an increased bond amount".

8. The technicalities of how the United States enforced the increased duty liability on or after 3 March 1999 are of limited relevance for the present dispute. The issues concerned with the ancillary nature of the surety deposit and with the date on which a customs debt is incurred are of much greater importance in the context of the present dispute.

1. The ancillary nature of the surety deposit

9. It is clear that customs surety deposits serve to ensure the payment of the duties and fees owed by the importer. In that sense, customs surety deposits are ancillary to the (anticipated) amounts

⁴⁸ Cf. Annex VIII to the first written submission of the EC dated 10 November 1999.

⁴⁹ The EC believes that this understanding of the product lists published on 3 March and 19 April 1999 is corroborated by the United States in para. 35 of its first written submission dated 6 December 1999 where it states that the United States "assess[ed] 100% duties on a subset of the products previously indicated on March 3, 1999" and where the list published on 19 April 1999 is called a "reduced list". This choice of words indicates that the 19 April publication is a confirmation of the earlier 3 March publication, to the extent that the list contains the same products, and a withdrawal for the remainder of the products which are no longer mentioned in the reduced list.

⁵⁰ For obvious reasons, the EC does not complain about the de-listing, but it complains about the increase in duty liability effective as from 3 March and introduced by instructions to customs services on that date. It also complains about the additional costs of the increased surety deposit requirements, which are inconsistent with Article VIII of the GATT 1994.

of customs duties and fees the payments of which they serve to guarantee. The amount of any surety deposit is determined by the anticipated duty liability and entirely depends on it.

10. Thus, a self-standing surety deposit could not be justified under WTO law. In fact, it would amount to "a duty or charge of any kind imposed on or in connection with the importation in excess of" the bound rates, which is inconsistent with Articles II and VIII of the GATT 1994⁵¹.

11. The United States accepts this fundamental point of principle. As the US pointed out in its oral statement at the first substantive hearing of the Panel (paragraph 4):

"the United States Customs Service allows [...] release of merchandise into the United States so long as the importer has provided [...] assurances in the form of a cash deposit or bond that it will pay the potential duties and fees owed" (emphasis added).

2. The date on which a customs debt is incurred

12. Under WTO law, the obligation not to subject imported products to duties and other charges in excess of the bound rates under the relevant Schedule of tariff concessions relates to the time of importation⁵².

That means that, in a situation where the duty liability varies over time, the relevant date on which the amount of the duty liability depends is the date of importation of the product in the customs territory of the importing WTO Member, not any other date (in EC customs terminology, this is the date on which the "customs debt is incurred").

13. Thus, assuming that the customs duty for a given product decreases on 1 January of a given year as the result, for example, of a commitment contained in the Schedule of the importing WTO Member, the duty liability for a like product imported on 30 December of the preceding year would not be affected by this decrease. The same is true where the customs duty increases over time⁵³.

14. There can thus not be a duty which is at the level of X at the time of entry of the product into the customs territory of a WTO Member that decreases to X-1 or that increases to X+1 for the already imported product at some later time.

The argument that the duty liability may change after the entry of the product into the customs territory to which the Schedule relates is simply not in line with existing WTO law (nor would it be in line with current United States customs law and practice, as the US has recognised before this Panel).

It is obvious that, were the customs law of a WTO Member different on this point, this would justify a complaint based on the violation by that WTO Member of Article II of the GATT 1994.

3. The application of the above-mentioned principles to the US measure

15. It follows that the surety deposit increase for selected products on 3 March 1999 could not have any justification other than the increase of the duty liability that was operated also on 3 March 1999 with immediate effect, and not at any later time. Only in this way could the

⁵¹ Panel report on EEC – Programme of Minimum Import Prices, Licences and Surety Deposits for Certain Processed Fruits and Vegetables, adopted on 18 October 1978, BISD 25S/68, para. 4.15.

⁵² Cf. the wording of Article II.1 (b) and II.1 (c) of GATT 1994 which uses the terminology "on [...] importation into the territory to which the Schedule relates" (Art. II.1 (b)) or "upon importation into the territory to which the Schedule relates" (Art. II.1 (c)). This language clearly refers to the time of importation, not to any other date.

⁵³ The United States has confirmed, in response to a question from the EC, that this general rule is also applicable in the United States (cf. US answer to question 3, at paras. 6 and 7).

United States require increased surety deposits from importers and justify the confirmation of the increase in duty liability on 19 April to be effective as of 3 March. Only in this way could the US collect increased 100% duties on imports of listed products as from 3 March 1999.

For the reasons already explained, a duty increase operated on 19 April could not have had any effect on products imported into the customs territory of the United States at any earlier date.

16. The EC reiterates that both the increase in duty liability, whether potential or definitive, and the corresponding increase in the requirements concerning surety deposits with US customs are inconsistent with the United States' obligations under Articles II.1 (b), II.2 (c) and VIII.1 (a) of the GATT 1994. This is corroborated, in the view of the EC, by the adopted panel report on *EEC – Programme of Minimum Import Prices, Licences and Surety Deposits for Certain Processed Fruits and Vegetables*⁵⁴.

17. These claims are explicitly part of the "matter" subject to the scrutiny of this Panel pursuant to Article 7 of the DSU as per the request for the establishment of this Panel⁵⁵.

The measure taken by the US on 3 March 1999 contained already both these elements and was merely confirmed on 19 April 1999 (apart from the partial withdrawal, which was operated on that date). There is thus no question of two different measures taken at different dates (except with regard to the partial withdrawal of the 3 March measure on 19 April, which is not under dispute).

18. The EC therefore fundamentally disagrees with the mischaracterization of the measure under dispute contained in the US submissions to date. It also opposes any attempt by the US to the effect of reducing the scope of the present dispute.

B. THE TERMS OF REFERENCE OF THIS PANEL EXPLICITLY COVER THE MATTER THAT A MEMBER IS OBLIGED TO PURSUE A PANEL PROCEDURE UNDER ARTICLE 21.5 OF THE DSU BEFORE RESORTING TO THE SUSPENSION OF CONCESSIONS OR OTHER OBLIGATIONS UNDER ARTICLE 22 OF THE DSU IN CASE OF DISAGREEMENT ON THE CONSISTENCY WITH A COVERED AGREEMENT OF MEASURES TAKEN TO IMPLEMENT A RECOMMENDATION OR RULING OF THE DSB

19. The US measure was adopted in the context of an on-going arbitration procedure under Article 22 of the DSU. The EC will summarise below the compelling reasons that justify its claim that the US measure breached Article 22 of the DSU.

However, the EC claims also that the US measure breached Article 21.5 of the DSU.

This claim is explicitly part of the EC's request for the establishment of this Panel contained in the WTO doc. WT/DS165/8 of 11 May 1999. The latter claim is different from the former, since it has more far-reaching implications, as the EC will show below.

20. In the context of the present dispute, the core of the EC's claims is the fact that the US took justice in its own hands and unilaterally decided that the revised EC Banana regime that entered into force on 1 January 1999 breached the EC's WTO obligations.

It must be recalled here that the revised Banana regime repealed and replaced the previous EC regime that had been declared inconsistent with the EC's obligations under the WTO in an adopted panel and Appellate Body report.

⁵⁴ Report of the Panel adopted on 18 October 1978, BISD 25S/68, paragraphs 4.6 and 4.15.

⁵⁵ Cf. WTO doc. WT/DS165/8.

The US request for suspension of concessions or other obligations pursuant to Article 22 of the DSU was based on a unilateral determination that the revised EC Banana regime was inconsistent with the EC's WTO obligations⁵⁶. The US measure on 3 March 1999, as confirmed on 19 April 1999, was directly dependent upon this US unilateral determination of non-compliance which was made by the US without an objective verification by a Panel, in application of the provisions of Article 21.5 of the DSU.

21. The EC will discuss further (see chapter No. 4 below) the substantive legal reasons on which its claims on this issue are founded.

However, as a preliminary matter concerning the terms of reference of this Panel, the EC would like to repeat that the issue of the relationship between an arbitration procedure under Article 22 of the DSU and the necessary prior findings of inconsistency under Article 21.5 of the DSU is central in order to correctly resolve the dispute at issue and thus cannot be avoided.

22. Not only should the US not have adopted its 3 March 1999 measure: there was also no justification to confirm it with a reduced list on 19 April 1999. As will be shown below, the WTO-inconsistency of the 3 March measure was not "healed", or in any other way "undone", by the authorisation of the DSB of 19 April 1999 and even less so by the US confirmation of its 3 March measure on that same date.

In the EC's view, the US measure is still inconsistent with the United States' obligations under Articles 21.5, 22 and 23 of the DSU (and several substantive GATT 1994 obligations) and must be withdrawn.

23. The US claims now that "[L]ike the *Section 301* panel, this Panel need not reach the issue of the relationship between Articles 21.5 and 22"⁵⁷.

24. The EC responds that, in our view, the Panel has no choice: in order to correctly perform its tasks as described in Article 11 of the DSU, the relationship between Articles 21.5 and 22 - in the light of Article 23 of the DSU, as interpreted by the *Section 301* panel report - has to be addressed.

25. The panel report on *Section 301* circulated on 22 December 1999 states the following:

"Whatever the outcome of other pending panel proceedings, on which we have no view, the fact that the USTR did make a determination of non-implementation before the completion of Article 21.5 procedures in Bananas III, even if it turns out eventually that this was illegal, is not, in our view, an act of bad faith."

26. As is apparent from this quotation, the panel on *Section 301* was convinced that this issue was *sub judice* at the time it took its final decision. The EC does not believe it appropriate or necessary to debate here the correctness of this appreciation of the *Section 301* panel on an issue on which it has itself acknowledged it has "no views". The important point here is that the EC, as a WTO Member, has a right under the covered agreements to have this fundamental issue of law resolved as it stands within the only correct WTO procedure, i.e. the dispute settlement procedures.

27. A debate *de lege ferenda* cannot and must not have any influence on the duties to be performed by a Panel under Articles 7 and 11 of the DSU in a specific DS procedure. Rather, a consistent practice by the WTO membership can have an influence on the interpretation of existing

⁵⁶ Cf. the US answer to question 10 by the Panel, at paragraph 25: "Following the conclusion of the reasonable period of time, the complaining Member is entitled to request DSB-authorization for the suspension of concessions pursuant to Article 22.2 if it believes the implementing Member has failed to comply".

⁵⁷ US answer to question 9 from the Panel, at para. 23.

and applicable WTO provisions such as Articles 21.5 and 22 of the DSU (see, again, chapter No. 4 below).

28. The EC can understand that a panel, such as the *Section 301* panel, may decide that another on-going panel is a better forum to deal with the interpretation of certain WTO provisions, even if those provisions were part of its terms of reference. But it is not ready to accept the line of action suggested by the US according to which, notwithstanding the explicit terms of reference of a panel established by the DSB, no panel procedure is the correct forum where existing and fully applicable rules of the DSU can be interpreted and applied.

29. The EC urges therefore the Panel to reject this unjustified request by the US that, if granted, would amount to a denial of justice.

C. THIS PANEL'S TERMS OF REFERENCE INCLUDE THE QUESTION AS TO WHICH MEMBER HAS TO BEAR THE BURDEN OF PROOF THAT A MEASURE TAKEN BY A MEMBER IN ORDER TO COMPLY WITH EARLIER RECOMMENDATIONS AND RULINGS OF THE DSB IS INCOMPATIBLE WITH THE WTO OBLIGATIONS OF THAT MEMBER

30. As was mentioned in the preceding sub-chapter, the core of the EC's claims is the fact that the US took justice in its own hands and unilaterally decided that the revised EC Banana regime that entered into force on 1 January 1999 breached the EC's WTO obligations (after having repealed and replaced the previous EC regime that a Panel report adopted by the DSB had found inconsistent with the EC's obligations under the WTO).

The US request for suspension of concessions or other obligations pursuant to Article 22 of the DSU was based on such unilateral determination⁵⁸. The US measure on 3 March 1999, as confirmed on 19 April 1999, was directly dependent upon the US unilateral determination of non-compliance taken by the US without an objective verification by a Panel, in application of the provisions of Article 21.5 of the DSU.

31. In the EC's view, when dealing with the issue of the interpretation and correct application of Articles 21.5 and 22 of the DSU, the Panel will also have to address another issue which is equally important (and logically and legally connected), namely the question as to which Member has to bear the burden of proof that a new measure adopted by a Member in order to comply with earlier recommendations and rulings of the DSB is incompatible with WTO obligations of that Member.

32. As the EC has already indicated in its reply to the Panel's question No 4 and as will be discussed further in chapter No. 5 of this submission, the burden of proof follows the normal rules as indicated by the Appellate Body in its report on *United States – Measures Affecting Imports of Woven Wool Shirts and Blouses from India*⁵⁹ and remains with the Member alleging the inconsistency of a measure of another Member. The US has never brought such evidence before a Panel with respect to the revised EC banana regime.

33. The EC therefore urges the Panel to reject the unjustified attempt by the US to reduce the scope of the present procedure by suggesting that "it is not necessary or appropriate to reach in the context of this dispute a conclusion concerning the burden of proof following the reasonable period"⁶⁰.

⁵⁸ Cf. the quotation from the US answer to question 10 from the Panel reproduced in footnote 9.

⁵⁹ Cf. doc. WT/DS33/AB/R, p. 14.

⁶⁰ US answer to question 10 from the Panel, at paragraph 26.

III. THE VIOLATION OF THE PROCEDURAL REQUIREMENTS UNDER ARTICLES 22 AND 23 OF THE DSU

A. UNDER NO CIRCUMSTANCE IS A WTO MEMBER ALLOWED TO ADOPT AND/OR IMPLEMENT SUSPENSION OF CONCESSIONS OR OTHER OBLIGATIONS AGAINST ANOTHER MEMBER BEFORE THE COMPLETION OF AN ON-GOING ARBITRATION PROCEDURE AND ITS AUTHORISATION BY THE DSB

34. The increase in (potential) duty liability and in surety deposit requirements for the listed products as of 3 March 1999 is clearly in breach of the United States' obligation under Article 22.6, last sentence, of the DSU not to resort to the suspension of concessions or other obligations before the completion of the arbitration procedure and the obligation pursuant to Article 23.2(c) of the DSU to await the authorisation by the DSB before taking such action.

35. On the basis of the panel report on *EEC – Programme of Minimum Import Prices, Licences and Surety Deposits for Certain Processed Fruits and Vegetables*, the increase in surety deposit requirements for duties exceeding the bound duty rates alone is already in breach of Articles II.1 (b), II.2 (c) and VIII.1 of the GATT 1994.

36. The increase in duty liability is even more clearly in breach of Article II.1 (b) of the GATT 1994.

37. Actions of this kind, when taken on a discriminatory basis, fall under the definition of "suspension of concessions or other obligations" as contained in Articles 22.6, last sentence, and 23.2(c) of the DSU. This is a broad concept encompassing discriminatory actions taken as a reaction to the breach of WTO obligations by another Member.

38. That the element of discrimination is an integral part of the concept of suspension of concessions and other obligations clearly appears in Article 3.7, last sentence, of the DSU which reads as follows:

"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).

39. The US measure on 3 March 1999 corresponds perfectly to the definition of a discriminatory suspension of concessions or other obligations⁶¹. It was adopted against selected imports from the EC before the arbitration procedure had been completed and obviously when no DSB authorisation had been granted. The disregard by the US of its WTO obligations went as far as adopting the suspension of concessions and other obligations the day after the Arbitrator had issued the following "initial decision"⁶²:

"On 2 March 1999, the Chairman of the Arbitrators informed the Chairman of the DSB as follows (WT/DS27/48):

"I write to inform you that the Arbitrators have today issued an initial decision to the parties in which we rule on matters related to the scope

⁶¹ This is not a surprising conclusion in light of the Deputy USTR's public declaration made on 3 March 1999: "we retaliated by effectively stopping trade as of March 3 in response to the harm caused by the EC's WTO inconsistent banana regime".

⁶² Arbitration decision on "*Bananas*" (doc. WT/DS27/ARB), at paragraph 2.10.

of our work and to certain aspects of the methodology and calculations of the United States for determining the level of suspension of concessions. In addition, we have requested the parties to supply us with additional information. This information should enable us to take a final view on the level of nullification or impairment based on the WTO inconsistency, if any, of the revised EC banana regime, and, if relevant, to determine the level of suspension of concessions or other obligations equivalent to the level of such nullification or impairment. Following our receipt and analysis of that information, we expect to be in a position to issue a final decision in this matter soon thereafter."

40. The EC reiterates that the US 3 March 1999 measure breached Articles 22.6, last sentence, and 23.2(c) of the DSU. There can be no excuse or justification under the covered agreements for such a breach. The only (self-admitted⁶³) reason for pursuing such WTO-inconsistent route was that the US decided to grant priority to its domestic law over its WTO obligations, in particular the requirements of Sections 301-310.

B. IN ANY CASE, ARTICLE 22.6 DOES NOT WARRANT THE WTO-COMPATIBILITY OF THE ADOPTION OF A SUSPENSION OF CONCESSIONS OR OTHER OBLIGATIONS IN PRESENCE OF PROCEDURAL DEFICIENCIES

41. As was indicated in the previous sub-chapter, actions such as the US measure of suspension of concessions and other obligations, when taken on a discriminatory basis, fall under the definition of "suspension of concessions or other obligations" as contained in Articles 22.6, last sentence, and 23.2(c) of the DSU.

The EC submits that these actions can be adopted and implemented only on the ground of a breach of WTO obligations by another WTO Member positively established by the findings contained in a panel or Appellate Body report adopted by the DSB.

42. Article 22.6 begins with the following words:

"When the situation described in paragraph 2 occurs, (...)"

Article 22.2 illustrates the "situation" as follows:

"If the Member concerned fails to bring the measure found to be inconsistent with a covered agreement into compliance therewith or otherwise comply with the recommendations and rulings within the reasonable period of time determined pursuant to paragraph 3 of Article 21 (...)."

In addition, Article 23 of the DSU clarifies that:

"When Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements (...)

⁶³ See the notice published in the US federal register, vol. 63, No. 204 of Thursday, 22 October 1998 (EC Annex I): "Section 306(b) [of the Trade Act of 1974, as amended] requires the USTR to determine what further action it shall take under section 301(a) of the Trade Act if the USTR considers that a foreign country has failed to implement a recommendation made pursuant to dispute settlement proceedings under WTO. The USTR shall make this determination no later than thirty days after the expiration of the reasonable period of time provided for such implementation under Article 21.3 of the DSU. Section 305(a)(1) requires the USTR to implement such action by no later than 30 days after the date on which that determination is made."

[I]n such cases, Members shall

(a) not make a determination to the effect that a violation has occurred, that benefits have been nullified or impaired (...) except through recourse to dispute settlement in accordance with the rules and procedures of this Understanding (...).

Finally, Article 21.5 of the DSU provides that:

"Where there is disagreement as to (...) the conformity with a covered agreement of measures taken to comply with the recommendations and rulings such dispute shall be decided through recourse to these dispute settlement procedures, including wherever possible resort to the original panel. The panel shall circulate its report within 90 days after the date of referral of the matter to it (...).

43. In the present case, the revised EC banana regime that entered into force on 1 January 1999 was never determined to be incompatible with the EC's WTO obligations in a dispute settlement procedure initiated by the US.

44. The United States attempts to justify its measure effective on 3 March 1999 and confirmed on 19 April 1999 with the claim that the "liability" of a WTO Member for its non-compliance with recommendations and rulings of the DSB "accrues"⁶⁴ on the day which follows the end of the "reasonable period of time" referred to in Article 21.3 of the DSU.

45. The EC does not dispute the fact that the end of the reasonable period of time is relevant when examining whether the WTO Member to whom the recommendations and rulings are addressed has implemented them. The EC challenges however the empty notion of "liability" that, it submits, makes no sense in the WTO context. Rather, the examination of the DSU shows a radically different picture.

46. According to Article 3.7 of the DSU, an initial alternative is open:

- either a Member withdraws the measure which was found to be inconsistent with its WTO obligations or
- it does not.

47. In the case of non-withdrawal, at the latest at the end of the reasonable period of time, the Member concerned will not have implemented the recommendations and rulings of the DSB at the required time. It will thus have to accept to offer compensation or face the prospect of an authorisation by the DSB for a suspension of concessions or other obligations by the complaining Member(s).

This situation occurred in the "*EC-Hormones*" dispute, where the EC decided for public health reasons not to withdraw the measures that had been found inconsistent with its WTO obligations⁶⁵. It consequently offered compensation. The US rejected the offer and thus the EC faced suspension of concessions or other obligations, after an arbitrator had determined the level of such suspension with respect to the nullification and impairment caused by the EC's inconsistent measure, which was still in place.

48. In case of withdrawal of the measure, as was the case for the EC banana regime, according to Article 3.7 of the DSU, the Member concerned has achieved the "first objective of the dispute

⁶⁴ US answer to question No. 9, paragraph 17

⁶⁵ The mention of this case in the US reply to question 16 from the Panel is therefore irrelevant.

settlement mechanism [that] is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements".

49. However, if the measure that was withdrawn is replaced by another measure, as was also the case for the revised EC banana regime, then the issue can be raised as to whether this new measure is compatible with the adopting Member's WTO obligations as spelled out in the earlier recommendations and rulings of the DSB. In case of disagreement and to that effect, the DSU provides for an accelerated procedure under Article 21.5.

50. In no case can the authorisation for the suspension of concessions or other obligations be granted immediately at the end of the reasonable period of time because the DSU clearly foresees some additional procedural steps after the end of the reasonable period of time before the authorisation for the suspension of concessions or other obligations may be granted.

51. In the above legal context, WTO law is thus concerned with a proper procedure to be followed before concessions or other obligations may be suspended.

If the new measure replacing the measure that was withdrawn is found to be inconsistent with the earlier recommendations and rulings of the DSB, and no agreement on compensation can be reached within the schedule foreseen in Article 22.2 of the DSU, the complainant may request authorisation for the suspension of concessions or other obligations.

52. It is however not specified anywhere in the DSU that compensation or the suspension of concessions or other obligations must be effective as of the day immediately following the end of the reasonable period of time. Compensation is a negotiated solution of the dispute, and there is no legal obligation to grant such compensation as from a particular point in time.

53. The level of suspension of concessions or other obligations may be assessed in the course of an arbitration procedure which may be requested by the Member to whom such suspension would be applied.

As already mentioned, such arbitration implies some further procedural steps which can only be taken after the end of the reasonable period of time and will be completed only at some later time. Since Article 22.6 of the DSU specifically provides that concessions or other obligations may not be suspended during the course of the arbitration procedure, such suspension will necessarily only be available some time after the end of the reasonable period of time.

54. In the present case, apart from the issue of the application of Article 21.5 of the DSU, that will be discussed in the following chapter, the arbitration procedure concerning the US request for authorisation to suspend concessions or other obligations was still ongoing at the time the US adopted and applied its 3 March 1999 measure.

55. Moreover, WTO law is concerned with the concept of equivalence between the level of nullification or impairment suffered by the complaining Member and the level of suspension of concessions or other obligations that may be authorised by the DSB (cf. in particular Article 22.4 and 22.7, first sentence, of the DSU).

Again, at the time the US adopted and applied its 3 March 1999 measure, the Arbitrator had taken no decision concerning that equivalence and the US had implemented a measure that was almost three times greater than the level that was eventually set by the Arbitrator.

56. Consequently, the concept of immediate "liability for non-compliance" as advocated by the United States in the present dispute has no basis in WTO law. In the EC's view, there can be no doubt that the US measure has breached the provisions of Article 22 of the DSU.

IV. THE OBLIGATION TO RESORT TO THE PROCEDURES UNDER ARTICLE 21.5 OF THE DSU IN CASE OF DISAGREEMENT ABOUT THE CONSISTENCY WITH A COVERED AGREEMENT OF AN IMPLEMENTING MEASURE

57. The United States continues to claim that there is no obligation to have recourse to the procedure under Article 21.5 of the DSU in case of a disagreement about the existence or consistency with a covered agreement of an implementing measure before resorting to a request for the authorisation of the suspension of concessions or other obligations under Article 22.2 of the DSU.

58. This position is not only in flagrant contradiction with the wording of Article 21.5 of the DSU, which contains the auxiliary "shall" by which this procedure is made mandatory. It is also contradicted by the practice of WTO Members as it has developed in the meantime, not least in cases involving the United States itself.

59. The United States omits to mention in its replies to questions by the Panel submitted on 13 January 2000 that it has concluded, in the context of the dispute on *United States - Import Prohibition of Certain Shrimp and Shrimp Products* (WT/DS58), an understanding with Malaysia on 22 December 1999⁶⁶. This understanding contains the following elements (cf. paragraph 2 of the exchange of letters):

"If Malaysia [...] decides that it may wish to initiate proceedings under Articles 21.5 and 22 of the DSU, Malaysia will initiate proceedings under Article 21.5 prior to any proceedings under Article 22. [...] Malaysia will not request authorization to suspend concessions or other obligations under Article 22 until the adoption of the Article 21.5 panel report. If on the basis of the proceedings under Article 21.5 Malaysia decides to initiate proceedings under Article 22: the United States will not assert that Malaysia is precluded from obtaining DSB authorization because Malaysia's request was made outside the 30-day time period specified in the first sentence of Article 22.6."

60. This is exactly what the EC explained in 1998 and 1999 to be its reading of the relation between Article 21.5 and 22 of the DSU.

61. The EC is not convinced that it is necessary to have this kind of bilateral agreement in order to apply Articles 21.5 and 22 of the DSU correctly. In fact, the EC does not believe that the legal right accruing to any WTO Member, which was a successful complainant in a DS procedure, under the DSU to request and obtain authorisation to suspend concessions or other obligations could be put at risk by the attitude of the defending party in that individual dispute.

The only determinant element in this issue is that the successful complaining party must follow correctly all the procedures set out in the DSU.

62. The EC would like to draw the attention of the Panel to the following fact.

Assuming *arguendo* that the interpretation on the sequence between Article 21.5 and 22 of the DSU, suggested by the EC, would reduce the "negative consensus rule to a nullity in those cases in which the implementing party does not implement until the completion of the reasonable period"⁶⁷, *quod non*, then a bilateral understanding such as the US/Malaysia agreement would be totally insufficient to avoid that risk.

⁶⁶ Cf. WTO doc. WT/DS58/16 dated 12 January 2000.

⁶⁷ See US answer to question No. 12 from the Panel, at paragraph 33.

Any Member would in fact be able to prevent the authorisation to suspend concessions or other obligations from being granted by opposing the consensus in the DSB.

63. Under the interpretation suggested by the US, the signature of an understanding (i.e. a bilateral agreement such as the one between the US and Malaysia) would be devoid of any real effect in case of opposition of another WTO Member which might even act in the DSB as an ally of the defending Member.

64. The Panel should not condone this scenario, inspired by the US, of tailor-made dispute settlement procedures on a bilateral basis.

There is simply no compelling reason in law why Articles 21.5 and 22 of the DSU should not be implemented in their logical sequence as their terms command (the EC refers the Panel again in particular to text of Articles 21.5 and 22.2, first sentence, of the DSU), thus avoiding useless confusion and unnecessary prolongation of this debate.

A good faith interpretation⁶⁸ of Articles 21.5 and 22 in their logical sequence and in the light of the requirements of Article 23 of the DSU does not result in any change in (or loss of) the "reversed consensus" voting rules in the DSB.

Under these Articles, the "reversed consensus" rule is fully justified where the Member concerned follows the dispute settlement procedures correctly. Where these procedures are not followed, the application of the "reversed consensus" rule becomes a tool for imposing unilateral determinations under a multilateral disguise, which conflicts with the fundamental objective of these provisions.

65. The fact that the reading of the above-mentioned provisions of the DSU that was always suggested by the EC has been accepted by both the complainants and the respondents in all dispute settlement procedures having reached the implementation stage after the entry into force of the WTO Agreement, with the only exception of the US in the *Bananas* dispute, shows that the DSU procedures are perfectly viable and can be applied correctly as they stand in the interest of all Members concerned.

As the five years experience of the WTO Agreement shows, a good faith performance of the existing rules under the DSU is thus the obvious and sufficient recipe to achieve a correct and satisfactory conclusion of the implementation stage of any DS procedure.

66. As was already mentioned in our oral statement at the first substantive meeting with the Panel on 16 December 1999 (paragraph 20), the United States has been able to accept this kind of proceeding in the *Automotive Leather* case against Australia, i.e. even in a situation where it acted as the complainant.

In any case, an agreement of this nature was acceptable to the EC in the context of the *Bananas* dispute, and the EC has reiterated its readiness to follow a similar line throughout the debate with the United States in the second half of 1998 and the beginning of 1999⁶⁹.

67. The United States claims that Canada shares its earlier uncompromising position, but this is not borne out by the facts. In the two relevant dispute settlement procedures in which Canada was involved as a complainant, *Australia Salmon* and *Brazil Aircraft*, Canada has allowed the procedure

⁶⁸ In line with Articles 26 and 31 of the Vienna Convention on the Law of Treaties, applicable as per Article 3.2 of the DSU.

⁶⁹ The references to the relevant statements of the EC representatives in the DSB are contained in footnote 8 to the replies of the European Communities to questions from the Panel and the United States dated 13 January 2000.

under Article 21.5 of the DSU to be completed before resorting to the suspension of concessions or other obligations.

68. In one case (*Australia Salmon*) this was achieved by suspending the procedure under Article 22 of the DSU in order to allow Article 21.5 procedures to follow their course. In the other case, Canada did not yet resort to procedures under Article 22 of the DSU but simply requested Article 21.5 procedures first.

69. In any case, as explained in the opening chapter of this submission, whatever the position of different WTO Members, according to Article 11 of the DSU the Panel must make an objective assessment of the issues before it, without giving too much weight to the tactical positions of individual WTO Members.

70. For the same reason, the discussions on the DSU review are of limited relevance for the present dispute, which is subject to the existing provisions of the DSU. Improvements by negotiation are of course always possible and may lead to an amendment of the present rules and procedures. That does not mean that panels are not called upon, as Article 3.2 of the DSU specifically provides, to clarify the rights and obligations of WTO Members under the dispute settlement rules and procedures as they presently stand.

71. A denial of justice is no solution and will not help WTO Members to come to grips with the diverging positions that were at the basis of the *Bananas* dispute, which even the United States does not appear to defend anywhere else than in the present proceedings.

72. Finally, the EC believes it appropriate to rebut some statements made by the US while answering question 14 from the Panel. However, it wishes to make clear that it does not accept or share all the other affirmations by the US with respect to the interpretation of Article 21.5 of the DSU as expressed in these panel proceedings.

73. In answering the Panel's question No 14 on "Who determines whether a new measure nullifies WTO benefits", the US stated⁷⁰ that

"As defined in DSU Article 22.7, the Article 22.6 arbitrator's task is to determine 'whether the level of suspension is equivalent to the level of nullification or impairment.' As the *Bananas* arbitrator pointed out, the concept of equivalence between the proposed suspension and the level of nullification or impairment would be 'devoid of meaning' if either of these variables were unknown.⁷¹ Consequently, the Article 22.6 arbitrator must examine the new measure to determine the level of nullification or impairment before it can determine whether that level is equivalent to the level of suspension proposed by the complaining party.⁷²"

74. The decision by the Arbitrator in the *Bananas* dispute between the US and the EC quoted above, as any other decision adopted in an Arbitration procedure, was not adopted by the DSB. Thus, an arbitration decision cannot have the effects that are reserved to adopted panel or Appellate Body reports in accordance with Articles 3.7, 16, 19 and 23 of the DSU.

It is barely necessary to repeat here the obvious: in the WTO DS system, panels and the Appellate Body reports are the basis for the recommendations and rulings of the DSB. The power to adopt and to make recommendations and rulings in an individual DS procedure binding upon the WTO Members concerned pertains exclusively to the DSB, i.e. the WTO Members collectively.

⁷⁰ At paragraph 37.

⁷¹ [Original footnote] "Article 22.6 Arbitration, para. 4.7."

⁷² [Original footnote] "Id., paras. 4.7-4.8."

75. As to the Arbitrator's tasks, they are confined to those set out in Article 22.6 and 22.7 that do not include any of the tasks that are listed in Article 11 of the DSU (whose title is, not surprisingly, "Function of Panels") and are not subject to the provisions of Article 6.2 and 7 of the DSU nor to an appeal under Article 17 of the DSU.

76. Thus, regardless of how the Arbitrator quoted by the US decided to justify its decision concerning the level of suspension or other obligations requested by the US, which is irrelevant in this context⁷³, its decision is not binding and cannot be binding on any WTO Member outside the scope of its mandate under Article 22.6 and 22.7 of the DSU.

77. The decision as to the consistency with a covered agreement of measures taken by a Member, *in casu* the EC, to comply with earlier recommendations and rulings of the DSB only pertains to the DSB when adopting a report of a panel or the Appellate Body at the conclusion of a procedure under Article 21.5 of the DSU.

78. However, in the case of the US, such a decision by the DSB was missing on 3 March 1999, was also missing on 19 April 1999 and is still missing today.

79. The US cannot rely on the decision taken by the DSB when it adopted on 6 May 1999 the report in the separate panel procedure on "*Bananas - Recourse to Article 21.5 of the DSU by Ecuador*". According to the Appellate Body report on "*Japan - Alcoholic Beverages*"⁷⁴,

"Adopted panel reports are an important part of the GATT *acquis*. They are often considered by subsequent panels. (...) However, they are not binding, except with respect to resolving the particular dispute between the parties to that dispute."⁷⁵

⁷³ The EC draws the attention of the Panel to the evident *non sequitur* in the US answer to question No. 14. The US affirms, following the Arbitrator, that "the concept of equivalence would be 'devoid of meaning' if either of these variables (i.e. the level of suspension and the level of nullification or impairment) were unknown". It then concludes that "Consequently, the Article 22.6 arbitrator must examine the new measure to determine the level of nullification or impairment before it can determine whether the level is equivalent to the level of suspension proposed by the complaining party".

The conclusion suggested by the US is inconsistent with the arbitrator's tasks under Article 22.6 and 22.7 of the DSU. In the EC's view, there are only two alternative consequences that can be drawn under the DSU from the fact that one of the two "variables" is unknown:

(1) either the nullification or impairment is not determined "consistent with the findings contained in a panel or Appellate Body report adopted by the DSB" due to the failure of the complaining Member to challenge the compliance with earlier recommendations and rulings of the DSB of the new measures taken by the defending Member. A claim of nullification or impairment in this case is thus not compatible with Article 23 of the DSU. In such a case, since that "variable" is missing, the Arbitrators must set the level at zero.

(2) Or, a claim that the new measures violate a covered agreement is "consistent with the findings contained in a panel or Appellate Body report adopted by the DSB" (and thus with Article 23 DSU) but the complaining Member has failed to indicate correctly the level of the concessions or other obligations which it proposes to be suspended. Here again, since the other "variable" is missing, the level must be set at zero by the Arbitrator, if requested.

The US assertion quoted above refers to the first alternative only. The EC fails to see how it could be justified under the DSU that an arbitrator usurps the task of an Article 21.5 panel.

⁷⁴ WT/DS8, 10, 11/AB/R, at page 13. In the very recent report on "*Turkey-Textiles*" (WT/DS34/R, at paragraph 9.11), that panel stated that "we recall in this context that Panel and Appellate Body reports are binding on the parties only".

⁷⁵ [Original footnote] "It is worth noting that the Statute of the International Court of Justice has an explicit provision, Article 59, to the same effect. This has not inhibited the development by that Court (and its predecessor) of a body of case law in which considerable reliance on the value of previous decisions is readily discernible."

80. Moreover, as the Panel on *"India - Patent Protection - Complaint by the European Communities and their Member States"*⁷⁶ stated in paragraph 7.30:

"[I]t can thus be concluded that panels are not bound by previous decisions of panels or the Appellate Body even if the subject-matter is the same."

81. In conclusion, the EC reiterates that the contested US measure of 3 March 1999, confirmed on 19 April 1999, is inconsistent with Article 21.5 of the DSU.

82. This inconsistency was not healed by the adoption by the DSB of a panel report in the context of a separate panel procedure pursued by another WTO Member in accordance with Article 21.5 of the DSU.

It was equally not healed by the authorisation to suspend concessions or other obligations benefiting the EC granted by the DSB on 19 April 1999 up to an equivalent of 191.4 million US\$. That authorisation is a necessary condition but not a sufficient condition to warrant the WTO-consistency of a measure of suspension of concessions or other obligations, which was taken by the US in disregard of procedural and substantial rules under the DSU.

V. THE PRESUMPTION OF GOOD FAITH

83. The United States claims in its replies to questions from the Panel⁷⁷ that the concept of a "presumption" of compatibility or non-compatibility of a Member's implementation is not provided for in the DSU.

84. This statement is in open contradiction to the recent Appellate Body report on *"Chile – Taxes on Alcoholic Beverages"*⁷⁸ which contains the following statement at paragraph 74:

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

85. It is also contradicted by the language of the DSU, particularly Articles 3.7 and 23.

Article 3.7, fourth sentence, of the DSU contains the following guiding principle

"In the absence of a mutually agreed solution, the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements" (emphasis added).

86. Article 23.1 and 23.2(a) of the DSU specify that such a finding (which in the terminology of Article 23 is called a "determination") can only be made under the rules and procedures of the DSU.

87. The only presumption to which the DSU refers is the presumption mentioned in Article 3.8 according to which

"there is normally a presumption that a breach of the rules has an adverse impact on other Members parties to th[e] covered agreement, and in such case, it shall be up to the Member against which the complaint has been brought to rebut the charge".

⁷⁶ WT/DS79.

⁷⁷ Cf. US answer to question 10 from the Panel, at paragraph 24.

⁷⁸ WT/DS87/AB/R and WT/DS110/AB/R.

88. For the rest, the burden of proof follows the normal rules as indicated by the Appellate Body in its report on "*United States – Measures Affecting Imports of Woven Wool Shirts and Blouses from India*"⁷⁹ and remains with the Member alleging the inconsistency of a measure of another Member. There is no basis for any other approach in the DSU.

VI. CONCLUSIONS

89. The EC reiterates that the US measure taken on 3 March 1999 and confirmed on 19 April 1999 is inconsistent with Articles 3, 21, 22 and 23 of the DSU and Articles I, II, VIII and XI of the GATT 1994. It respectfully requests the Panel that it recommends the DSB that the US bring the measure under dispute into conformity with its WTO obligations.

⁷⁹ Cf. doc. WT/DS33/AB/R, p. 14.

Appendix 1.6

The EC letter dated 25 January 2000 concerning the scope of the Panel's terms of reference
(25 January 2000)

Dear Chairman,

The European Communities note with some surprise the request by the United States, contained in the accompanying letter to its second written submission of 21 January 2000, that the Panel clarify "prior to the outset of the second substantive meeting, the measures that it considers to be within the Panel's terms of reference". The Panel should not accede to this request at this late stage of the proceedings before it.

According to paragraph 11 of the working procedures, a request for a preliminary ruling cannot be made at this stage of the proceedings, unless the United States were able to show "good cause" for granting an exception. The United States does not even attempt to show such good cause.

The Panel's terms of reference are contained in document WT/DS165/8 which refers in its main body and in the Annexes to product lists published by the United States on 3 March 1999 and 19 April 1999. There is thus no surprise in the EC's reliance, as from its first written submission, on both these documents, which were the basis of the establishment of the Panel by the DSB. The United States never raised any objection against this request, neither at the DSB meeting where the Panel was established nor at an early stage of the panel procedure. In fact, only in the closing remarks made on 17 December 1999, the US raised a doubt for the first time and stated: "we may need to return to the Panel for a preliminary ruling".

Now that the second written submissions have already been exchanged and more than a month has passed since the US raised a doubt for the first time, the EC cannot see "good cause" to depart from the working procedures for the Panel.

As the EC pointed out in its second written submission of 21 January 2000, the Panel will have to consider the scope of the complaint as a matter of substance. There is no separate procedural matter involved in the United States' request for "clarification of the terms of reference" that the Panel needs to address at this late stage.

Yours sincerely,

Appendix 1.7
The EC Responses to Additional Questions of Panel
(8 February 2000)

Question 48

The United States argues in paragraph 35 of its Rebuttal Submission that 'assum[ing] for the sake of argument that ... the March 3 bonding requirements impose a 'charge' under Article II or VIII, these bonding requirements cannot, by definition, be subject to Article XI....' Please further elaborate the distinction between the scope of Article II and VIII, and that of Article XI, keeping in mind the bonding requirements in question.

Reply

1. The legal qualification of the increased bonding requirements in this case depends in the view of the EC on the (self-standing or ancillary) nature of these bonding requirements. As Deputy USTR Peter Scher pointed out in a press conference on 3 March 1999, it was the intention of the United States to „stop all trade" in the listed products from the E⁸⁰ 1. To the extent that the increased bonding requirement is of a self-standing nature, as the United States claims in the present dispute, it is in the view of the EC a trade restriction „other than duties, taxes or charges" in the sense of Article XI.1 of the GATT 1994.

2. The EC is aware that the GATT 1994 does not contain a provision dealing with measures "equivalent to quantitative restrictions" that take the form of a duty, tax or charge. The legal qualification of the increased bonding requirement thus depends on the question whether a trade restrictive measure that may be „bought off" by the payment of an amount of money could, for this purely formal reason alone, be considered as a duty, charge or tax.

3. Assuming *arguendo* that in a given WTO Member, customs clearance could only be achieved by paying a bribe to the customs officials, and that the WTO Member in question would tolerate this practice, would that practice qualify as a duty, tax or charge or, in the alternative, as a trade restriction other than a duty, tax or charge? If the former alternative were correct (*quod non* in the view of the EC), any trade restriction the non-observance of which could lead to the imposition of a fine would presumably also qualify as a „duty, tax or charge". The EC therefore considers that it is more appropriate to base the legal qualification on the substance, rather than on the form, of the measure at issue.

4. It follows from these considerations that a trade restriction the prevailing purpose of which is to „stop trade" and that does not provide any revenue for the treasury of the importing WTO Member does not qualify as a „duty, tax or charge", but as a trade restriction of a different nature.

5. However, as the Panel is aware, the EC has qualified the bonding requirements in this case as being ancillary to a simultaneous increase in the (contingent) duty liability for the listed products. The EC's main argument therefore is that the increased bonding requirements should be legally qualified as a charge in close connection with the (increased) customs duty, the payment of which it serves to guarantee, and for which there is no justification under Articles II and VIII of the GATT 1994. Only

⁸⁰ Cf. also the quotation in a recent article in the "Time" magazine of 7 February 2000 on "How to Become a Top Banana" (EC Annex XI), according to which an official of the office of the USTR expressed "amazement" about the fact that a US importer was still doing business in one of the listed products because the US authorities were under the impression that the increased tariff had "cut off the industry – shut it down" (at p. 38, top of left column).

in the alternative that the Panel considers it established that the United States in the present case introduced an increased bonding requirement without having made the relevant customs tariffs effective at the same time, the line of argument developed in the preceding paragraphs becomes relevant and would lead to the conclusion that the increased bonding requirements constitute a violation of Article XI.1 of the GATT 1994.

6. In any event, both legal qualifications under consideration are meant to complement each other in a seamless manner and would therefore always lead to the finding of a violation of the US obligations under the WTO Agreement.

Question 49

In claiming that the increase in the amount of a required security was to cover 100% tariff which might eventually be due (after the arbitration panel has completed its work), the US appears to assume that the applicable obligation, in the form of tariffs, can change after the entry of a listed product into the customs territory of a WTO Member. Is this retroactive change of the applicable law and applicable obligation, acceptable in international law?

Reply

7. As explained in the EC's second written submission of 21 January 2000, the EC is not convinced by the US arguments that the increased customs duties in this case were imposed on 19 April 1999 with retroactive effect as from 3 March 1999. Rather, the EC considers that the duty liability for listed products was in fact increased as from 3 March 1999 and only confirmed on 19 April 1999 on the basis of a reduced list. As the EC has pointed out, the retroactive imposition of increased import duties is at odds with the requirements under US customs law as the US itself has explained them throughout the present dispute, particularly in response to the EC's written questions.

The EC would like to recall that under customs law principles, a bonding requirement may only be justified by a doubt concerning a specific imported product (e.g. correct classification, valuation, origin), but never by a contingency on future changes in law or a doubt on the law itself.

8. Thus, in the view of the EC, the question of the legal restrictions regarding the retroactive imposition of taxes or other financial burdens does not arise in the circumstances of the present case. However, the EC is of course ready to provide its views in the unlikely event that the Panel were to take a different position on this preliminary issue.

9. The restrictions regarding the retroactivity of legal instruments which impose legal obligations or financial burdens on the parties to whom they are applicable are based on the problems created in respect of legal certainty and, where relevant, the legal protection of acquired rights.

10. The achievement of legal certainty is also one of the basic objectives of the WTO and of its dispute settlement system. According to Article 3.2 of the DSU, „the dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system". As the Appellate Body has found: „the security and predictability of 'the reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade' is an object and purpose of the *WTO Agreement*, generally, as well as of the GATT 1994⁸¹.

⁸¹ Cf. Appellate Body report on „*European Communities - Customs Classification of Certain Computer Equipment*" dated 5 June 1998, doc. WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, at para. 82. Cf. also the recent panel report on „*United States - Sections 301-310 of the Trade Act of 1974*" adopted on 27 January 2000, doc. WT/DS152/R, according to which „[p]roviding security and predictability to the multilateral trading system is another central object and purpose of the system" (at para. 7.75).

11. Legal certainty requires that import charges not be increased retroactively after an item has been lawfully imported into the customs territory of a WTO Member. Such retroactive increase is in open contradiction with the purpose of the WTO to allow international trade to take place on a predictable legal and economic basis. While the imposition of tariffs on imported products is in principle a permissible policy instrument at the disposal of WTO Members, provided that the tariff bindings under the relevant GATT schedule of tariff concessions and the MFN rule are respected, the retroactive increase of a tariff, even in situations where the tariff binding is not breached by such action, is clearly in violation of one of the most basic WTO obligations, namely to permit international trade to take place on a secure and predictable basis.

12. For similar reasons, Article 28 of the Vienna Convention on the Law of Treaties provides for a presumption of non-retroactivity of international treaties. This means that, unless a different intention can be established, an international treaty does not apply to acts or facts that took place or situations that ceased to exist before the entry into force of the treaty. On this basis, it has been ruled that under the European Convention on Human Rights, a claim of violation is not admissible *ratione temporis* with regard to acts that took place before the Convention entered into force for the contracting party concerned, even where the consequences of the act complained about remain in place after the entry into force of the Convention (e.g., in case of an expropriation without adequate compensation)⁸².

13. Against this legal background, particularly with regard to the requirement to ensure legal certainty, it can be excluded that the suspension of concessions or other obligations could be authorised by the DSB under Article 22.2 or 22.7 of the DSU with retroactive effect. Nor can the suspension of concessions or other obligations be applied retroactively once authorised by the DSB under these provisions. Such retroactive effect of the authorisation is not only without any basis in the relevant provisions of Article 22 of the DSU, it would also be in open conflict with fundamental principles of international law and with the object and purpose of the WTO Agreement in general and the dispute settlement system in particular, as witnessed by Article 3.2 of the DSU and the Appellate Body report in the (already quoted) case on *European Communities - Customs Classification of Certain Computer Equipment*⁸³.

14. In the present case, there can thus not be the shadow of a doubt that a retroactive increase of tariffs by the United States on listed items imported from the EC would be both in breach of existing tariff bindings and thus in breach of US obligations under GATT, and in breach of the fundamental rule that tariffs may not be increased retroactively for any item once it has been cleared through customs for home use in the importing Member. The United States cannot rely on the DSB decision of 19 April 1999 to justify the retroactive imposition of the customs duties either.

⁸² The expropriations were considered as instantaneous acts and not as continuing violations, see, e.g., joined applications No. 18890/91, 19048/91, 19342/92 and 19549/92, *Mayer et al v. Germany*, decision of 4 March 1996.

⁸³ Cf. footnote 2 above.

Appendix 1.8
The EC oral presentation at the Second Substantive Meeting
(9 February 2000)

I. RESPONSE OF THE EC TO THE US STATEMENT ON "MATTERS RELATING TO THE SCOPE OF THIS DISPUTE"

The EC considers the US request for a preliminary ruling for matters relating to the scope of the dispute as untimely. The EC has referred in its request for the establishment of the Panel to two lists of selected products originating in the EC, i.e. a larger list published on 3 March and a reduced list containing a "subset" of products published on 19 April 1999.

It was thus obvious to the United States from the outset that the EC intended to address violations of the WTO provisions identified in the request by making use of both lists.

Moreover, the consultations requested on 4 March 1999 referred to the larger list of products which covered all the products contained in the 19 April list. We cannot see then how the US could claim now that the reference to a reduced list, which contained no addition of products, could enlarge the scope of the present dispute and thus affect its rights of defence.

Finally, the legal qualification of the 3 March 1999 instruction is part of the substance of the present dispute. It cannot be addressed or decided in the context of a preliminary ruling concerning exclusively procedural matters.

II. THE FAILURE BY THE US TO HAVE RECOURSE TO THE MULTILATERAL DISPUTE SETTLEMENT PROCEDURES UNDER ARTICLES 23, 21 AND 22 OF THE DSU BEFORE RESORTING TO SUSPENSION OF CONCESSIONS

After the debate on the procedural issues that we have had at the beginning of today's meeting, we would now like to go into the substance of our case. The substance is of course to a large extent also dependent on the scope of the present dispute, and that is the first matter that we would like to address in our oral statement today.

Mr. Chairman,

Members of the Panel,

You are meanwhile familiar with the basic plea of the EC, namely that the US measures are inconsistent with the fundamental WTO rule according to which no Member can take justice in its own hands. It has to follow the rules and procedures governing the settlement of disputes consigned in the DSU before being able to seek redress for any perceived breach of WTO obligations by another WTO Member. As the Appellate Body has found in the recent report in the case on *Chile – Taxes on Alcoholic Beverages*, there is moreover a presumption of good faith performance of WTO obligations by WTO Members, which is equivalent to the presumption of innocence recognised under criminal law as one of the principles of law recognised by all civilised nations.

It is the breach of this basic prescript of the WTO in general and the DSU in particular that has led the United States in the *Bananas* dispute to have recourse to a request for authorisation of the suspension of concessions or other obligations based on a unilateral determination that the EC failed to honour its WTO obligations.

Thus, it refrained from following the procedures that are foreseen in Article 21.5 of the DSU in case of disagreement about the consistency with a covered agreement of a measure taken to implement the recommendations and rulings of the DSB on the basis of an earlier panel or Appellate Body report.

This has led to the present situation in which the US applies increased tariffs to a number of items imported from the EC without having followed the correct procedures under the DSU.

In this context, the United States cannot invoke the fact that, on 19 April 1999, the DSB authorised it to suspend concessions or other obligations in the amount established by arbitration under Article 22.6 of the DSU. The DSB authorisation is a necessary, but not a sufficient prerequisite for the lawfulness of the suspension of concessions or other obligations. The United States was also under an obligation to respect the dispute settlement procedures with regard to the disagreement on the consistency with a covered agreement of the implementing measures taken by the EC.

As the Panel is aware, the breach of Articles 21 and 23 of the DSU is specifically mentioned in the EC's request for the establishment of this Panel and is thus part of its terms of reference.

This aspect of the present case has a bearing not only on the legal basis for the violations about which the EC complains, but also on the question whether the violation is of a continuing nature. As the Panel will easily understand, this aspect of the case is therefore of fundamental importance for the EC. If the Panel finds in favour of the EC on this decisive point, the suspension of concessions is and remains inconsistent with the US obligations both for the initial list of 3 March 1999, which constitutes Annex 1 to the EC's request for the establishment of the Panel, and for the reduced list of 19 April 1999 which constitutes Annex 2 to the EC's request for the establishment of the Panel. The EC believes that it is entitled to receive an answer from the Panel with regard to this important claim on which the parties clearly have a disagreement with very important legal and practical consequences in the present case. A denial of justice on this point would necessarily lead to continuing legal uncertainty and more litigation.

The EC has already pointed out in its written submissions that there was no justification to resort to the suspension of concessions or other obligations in the present case, neither on 3 March 1999 nor on 19 April 1999. The WTO-inconsistency of the 3 March measure could not "healed", by the authorisation of the DSB of 19 April 1999 simply because it was legally flawed from the outset. The EC repeats that in this context, the DSB authorisation of 19 April 1999 was a necessary, but not a sufficient prerequisite for the suspension of concessions or other obligations.

III. EXAMINATION OF THE LEGAL CHARACTERISTICS OF THE US MEASURE AND OTHER COMMENTS

Mr. Chairman, Distinguished Members of the Panel

The EC suggests that we start from the beginning, i.e. that we examine once more the US measure at issue. Thanks to your request, the EC is now able to examine the text of the unpublished instructions that the USTR addressed to the US Customs service on 3 March 1999 (US Exhibit 12).

The text is very revealing:

- (a) the USTR describes the aim of the instruction as follows: "The USTR now seeks to preserve its right to impose 100 percent duties as of March 3, pending the release of the arbitrators' final decision" (emphasis added);
- (b) as a consequence the following instruction was given: "Therefore, I am hereby requesting that until further notice the Customs Service withhold liquidation of entries of all articles identified in the attachment to this letter (...)" (emphasis added);

- (c) moreover, as further consequence, the following additional instruction was given: "I further request that the Customs Service today instruct port directors to review the sufficiency of bonds posted with respect to entries described in the previous sentence, and to take steps to provide adequate additional security (...) (emphasis added);
- (d) finally, it should be noted that the instruction refers explicitly to "(...) 63 Fed. Reg. 63099 and 63 Fed. Reg. 71665 giving notice of the proposed increase in duties on selected products".

The above confirms therefore that:

- a) On 3 March 1999, the US authorities considered to have the right to impose 100 percent duties on selected products of a total value of 520 million US\$ as from that date. However, the US does not indicate, once more, from where it derives this alleged "right". The EC reiterates that this determination of a self-attributed "right" is in open conflict with central provisions of the DSU such as Article 23, 21 and 22.
- b) The US determined that it had the right to the 100 percent increased duties as from 3 March even pending the arbitrators' decision. This proves the EC's point that the US measure violates Article 22.6, last sentence, of the DSU which reads as follows: "Concessions or other obligations shall not be suspended during the course of the arbitration".
- c) The text instructs customs to "withhold liquidation". The EC would recall in passing that the US has so far asserted that this expression has no legal meaning and was just for the press release. The EC also notes that this measure is unqualified and gives instruction not to allow customs clearance at the bound MFN rate. What matters for the resolution of this case is the content and the effects of a specific instruction given by the USTR to "withhold liquidation", i.e. not to proceed with the liquidation of customs duties. The effect of this instruction was to prevent as from 3 March 1999 any importer of selected products originating in the EC from clearing those products through customs at a tariff rate not exceeding the rate bound in the US Schedule of tariff concessions as they were entitled under the WTO.
- d) The "withholding" of liquidation was made effective "until further notice", i.e. in a totally open-ended manner. The instruction thus undermines "the security and predictability of 'the reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade' [which] is an object and purpose of the *WTO Agreement*, generally, as well as of the GATT 1994" as the Appellate Body report on "*European Communities - Customs Classification of Certain Computer Equipment*" indicated (paragraph 82).
- e) The USTR instruction contains also an ancillary order to "review the sufficiency of bonds" and to provide "adequate additional security" in order to ensure the implementation of the suspension of tariff concessions as from 3 March 1999.
- f) The USTR instruction cross references to the text of a notice published in the Federal Register of 10 November 1998, at page 63099, which reads as follows: "(...) [T]he dates on which the USTR intends to implement action – February 1 or no later than March 3, 1999 – correspond to the dates contemplated by sections 306(b) and 305(a) of the Trade Act as well as Article 22 of the DSU".

As is apparent from the above, the US instruction on 19 April 1999 did not add any further burden upon importation of selected products from the EC. Rather, while confirming the 3 March instruction, it reduced the list of products. The EC does not complain against such reduction.

Mr. Chairman, Members of the Panel,

The US explanations in response to the additional questions of the Panel are simply not credible.

For example, the intention of the US authorities stated in the 3rd March instruction was to make the suspension of concessions effective immediately ("now") on 3 March without pursuing the multilateral dispute settlement procedures under Article 21.5 and 23 of the DSU. This is a clear breach of fundamental principles of the WTO that still persists today.

In addition, the US did not bother to await the determination of the level of nullification or impairment, if any, before resorting to the application of suspension of concessions, in clear breach of Article 22.6, last sentence, of the DSU. Therefore, any reference to a "particular risk" or any other "risk" evoked by the US in its answers to the Panel's questions amounts to an attempt to mislead the Panel on the reality of the situation.

Moreover, no elaborate explanation concerning the 19 April instruction is capable to dissimulate the events of 3 March.

The sentence in paragraph 18 of the 8 February US document is revealing:

"[I]n the absence of the April 19 action, each and every entry subject to changed bonding requirements would be liquidated at the entered, MFN rate – precisely because no liability was imposed on March 3".

This flies in the face of the stated purpose of the 3 March instructions:

"the USTR seeks to preserve its right to impose 100 percent duties as of March 3".

The text of the 3 March instruction simply does not permit to assert, as the US does in its 8 February document at paragraph 20, that

"[T]here was no legal relationship between the March 3 action (changed bonding requirements) and the April 19 action (increasing the duty rate for certain products)".

No more credible is the attempt by the US to rewrite the GATT 1947 adopted panel report on "Minimum Import Prices".

Contrary to the allegations in paragraph 30 of the 8 February document, that panel accepted the US argument that

"these interest charges and costs [in connection with the lodging of the security] were in excess of the bound rate(...)".

The US recognises that there are interest charges and costs associated with the increased bonding requirements at a level that the US has identified up to 20 US\$ per thousand dollars of bond value (paragraph 12 of the 8 February document).

The cumulative effect of such measure applied to the aggregate value of the selected products worth 520 million US\$ reaches approximately 10 million US \$, which cannot be reasonably considered as negligible.

According to the 3 March instruction, the increased bonding requirements are a necessary pre-requisite in order to be able to collect (increased) customs duties, the payment of which it serves to guarantee. Such increase should be qualified as a charge in connection with importation in excess of the US bound rate for which there is no justification under Articles II and VIII of the GATT 1994.

As was the case for the "Minimum Import Prices" panel report, in this case surety deposits usually take the form of a bank guarantee. Without providing such guarantee, no import would take place. There again, that panel report is relevant for the solution of the present dispute.

As the Panel will recall, the US stated in paragraph 6 of its 13 January document that

"[I]iability for payment of duties is incurred at the time the goods arrive on a vessel within a Customs port when there is an intent to unlade (sic) the goods at that port or, if arrival is otherwise than by vessel, at the time of arrival within the Customs territory of the United States".

Thus, according to the US, the liability cannot change after the arrival of the imported good in the customs territory of the United States.

The EC agrees with this explanation. As a matter of fact, the EC applies the same rule.

How can the US claim at the same time that "the April 19 action changed this rate for certain products" (paragraph 23 of the 8 February document) although the products had entered the customs territory before that date?

As the Panel is aware the reality is that the duty liability was assessed on the basis of 100 percent ad valorem duty as of 3 March 1999, subject to confirmation at a later date, i.e. 19 April of the same year.

As a matter of principle, upon importing a product into the US, the customs clearance is based on two different types of factors:

- a factor which is related to the assessment of the correct classification, customs valuation and origin of the goods. This depends on the specificities of each individual import operation which must be declared by the importer; and
- a factor which is determined by the relevant customs legislation applicable on the date on which the customs liability is incurred, i.e., in the case of the US, the date of entry into the US customs territory. That legislation sets among other things the applicable duty rate.

A bonding requirement serves the purpose of guaranteeing the correctness of the operators' declarations concerning the first factor. However, the US 3 March instruction explicitly imposed a bonding requirement in order to cover the collection of increased duties as a result of a change of the second factor. However, WTO law does not allow Members to create or maintain uncertainty with regards to the upper limit of the applicable duty rate, which cannot exceed the bound rate.

The US can point to no other legal basis for its WTO-inconsistent action. The fact that the WTO Agreement on Anti-dumping measures allows retroactive imposition of AD duties under strictly defined circumstances does not prove the US point in this case. On the contrary, it is clearly a limited

exception to the fundamental principle under Article II of the GATT 1994 and thus applicable only where specifically provided for (General Interpretative Note to Annex 1A of the WTO Agreement).

Moreover, the Kyoto Convention obliges to ("shall")

"specify the point in time to be taken into consideration for the purpose of determining the rates of import duties and taxes chargeable on goods declared for home use" (Standard 47 of Annex B.1).

As was just mentioned, the US has indeed chosen such a point in time, namely the date of entry of imported goods into the US customs territory. In this context and as a matter of pure logic, a measure of "withholding" of liquidation of a customs debt is not relevant for the determination of the point in time in which that customs debt is incurred.

Consequently, there was no additional "risk" associated with the action of importation of selected products from the EC that could justify the increase of the bonding requirements. No other "risk" could justify "withholding" of liquidation or an increase in duty liability.

The US explanations are thus no more than a smokescreen intended to dissimulate the increase of the duty liability as of 3 March 1999 which was adopted on that date in violation of Articles I, II, VIII and/or XI of GATT and 3, 21, 22 and 23 of the DSU.

This concludes the presentation of the European Communities. Mr Chairman, Distinguished Members of the Panel, thank you for your attention.

Appendix 1.9
The EC Final Statement at the Second Substantive meeting
(9 February 2000)

Mr. Chairman,
Distinguished Members of the Panel

the United States appears to have difficulty with the perception of the reality of this case.

The US seems to forget that the Deputy USTR, Mr. P. Scher, has declared on 3 March 1999 to the press that “we retaliated by effectively stopping trade as of March 3 in response to the harm caused by the EC’s WTO-inconsistent banana regime”. It also disregards quotations from the USTR officials made after 3 March when the affected US industry complained about the effects of the measure. Those USTR officials are quoted in recent US publications as stating that they thought that “the tariff would cut off industry – shut it down”.

We now discover that the US representatives in the present procedure are not fully aware of these realities which are part of the unrebutted evidence before this Panel. They have stated this morning that the EC asserts that “the bonding requirements effectively stopped trade. They did not”.

The EC has looked once more at Exhibits 5, 7 and 10 submitted by the United States in the present procedure. It has converted the figures submitted by the US into a graph.

Mr. Chairman and Members of the Panel: if the United States’ assertions of this morning were correct, i.e. that there was no instruction to customs authorities, no withholding of liquidation, no increase in duty liability, how could these trade effects have occurred?

The EC submits that the text of the USTR notices published in the Federal Register in 1998 and of the USTR 3 March instruction are utterly clear: these trade effects were the direct, intended and unequivocal result of the US measure, by which the duty liability was increased to 100 percent ad valorem as from 3 March in order to stop trade as from that date.

The US described its customs liquidation cycle as allowing immediate release of the imported goods after the provisional assessment of the relevant duty elements. After that provisional assessment, the financial obligations resulting from the importation are liquidated between 314 days and one year after the entry of the imported goods.

The EC operates a similar system, although the periods of financial liquidation are much shorter.

However, as already stated and as a matter of logic, any bond requirement in this context must be related to secure the deferred payment, or to cover possible mistakes in the initial assessment of the duty elements (misclassification, under-valuation, invalid origin claims). All these elements “relate either to credit worthiness of the importer, or to the nature of the merchandise being imported” (US second submission, paragraph 29).

When we compare these principles with the situation in the present case we discover that the financial obligations, for which duty payment was deferred on or after 3 March 1999 for the listed products, were rather based on government action increasing the US duty rates to 100 percent ad valorem, in breach of the US GATT bindings.

Moreover, the Kyoto Convention provides no justification to allow increased sureties to cover changes to the applicable rates of duty after the point in time in which the duty liability is incurred. The EC draws the attention of the Panel also to the purpose of the Kyoto Convention which is to

facilitate and simplify customs procedures. No good faith interpretation of such Convention could justify measures, such as the US measure, which undermine the security and predictability of the international trading system.

A further point of clarification concerns the scope of the Panel’s review of the US measure. The US representative has this morning repeatedly asserted that the EC “is asking the Panel to violate several WTO provisions in order to find that the Article 22.6 arbitral panel in Bananas somehow violated other DSU provisions” (paragraph 12 of US 9 February statement).

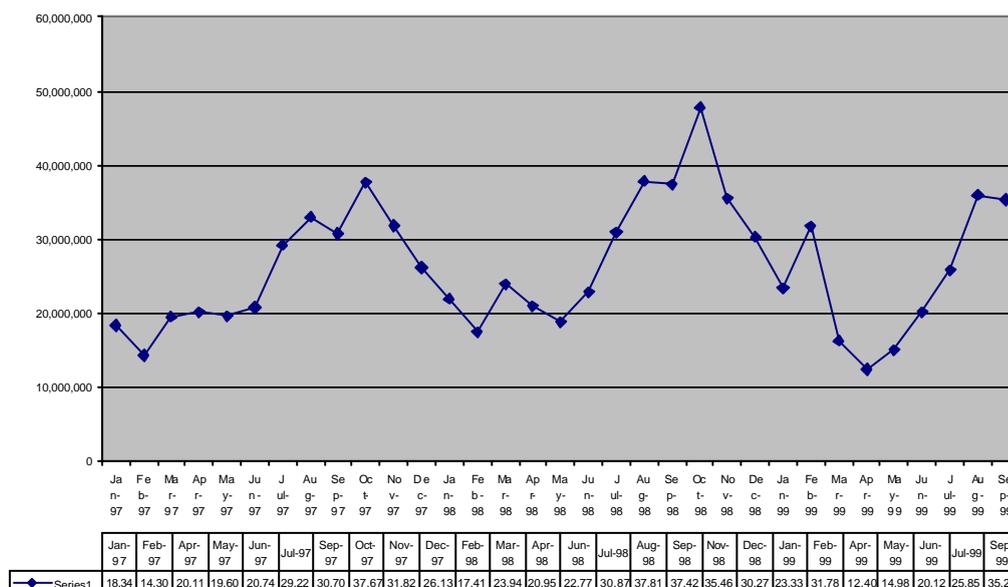
The EC submits that it is the US that is confusing procedures here. We confirm that this Panel does not need to even mention the Arbitrators’ decision under Article 22.6, since the EC does not request this Panel to review the level of nullification or impairment determined under that procedure, regardless of how it was justified.

The EC insists, however, on the fact that no panel or Appellate Body report adopted by the DSB and involving the United States has ever determined that the EC “fail[ed] to bring the measure found to be inconsistent with the covered agreement into compliance therewith or otherwise comply with the recommendations and rulings within the reasonable period of time determined pursuant to paragraph 3 of Article 21 (...)” (Article 22.2 of the DSU).

Thus, the EC repeats that while the authorisation by the DSB under Article 22 of the DSU is a necessary pre-requisite in order to implement a suspension of concessions or other obligations, it is not a sufficient condition where there is a disagreement on the “consistency with a covered agreement of measures taken to comply with the recommendations and rulings” of the DSB (Article 21.5 of the DSU). That necessary condition is only fulfilled once a Panel or Appellate Body report under Article 21.5 of the DSU has been adopted by the DSB.

If the US were to prevail on this central point, this would amount to accepting that a WTO Member can take the law in its own hands. This would undermine the multilateral character of the dispute settlement system and, consequently, of the WTO system as a whole.

US imports of EU products NOT included on final list* - January 1997 until September 1999



* (Prosciutto, pecorino, cookies, candles, plastic film, sweaters, coffee makers).

Source: US exhibits 5, 7 and 10

Appendix 1.10
The EC Responses to Additional Questions of Panel
(10 February 2000)

Question 50

Do parties consider that there is an opportunity cost arising from the bonding requirement, in particular if cash is deposited in lieu of a bond?

Reply

The EC would like to repeat that the financial liquidation process associated with deferred payment of duties is much shorter in the EC system than in the US system.

Under the US system, a cash deposit in lieu of a bond would remain available to the US government until the conclusion of the financial liquidation process in relation to the importation, i.e. not earlier than 314 days. This sum of money, the EC understands, is additional to the amount equivalent to the duties due (possibly already deposited in view of final liquidation) for that particular consignment.

Therefore, the US government would benefit from positive interests for almost one year for that additional amount of money and, correspondingly, the importer would lose money equivalent to negative interests on that sum, increased by the ratio of inflation. Moreover, the importer is restricted in its financial opportunities that the availability of that amount of money would entail since it restricts or makes more expensive its access to credit.

In the case at hand, most of the EC originated products listed in the US measure were subject to 'zero' or marginal duty liability until 2 March 1999. On 3 March 1999, the unilateral US measure increased the duty liability for these products to 100 percent *ad valorem*.

Any operator wishing to utilise the cash deposit in lieu of a bond on or after that date would have been subject to a disproportionate deposit requirement as compared to the negligible or non-existent pre-3 March deposit. This is within a situation where the increase in cash deposit was imposed in order to cover unilaterally increased duties, a governmental measure that has no relation with the purpose of a cash deposit, i.e. to cover uncertainties related to a specific consignment.

In any case, in the scenario described by the Panel's question, the US measure produced a significant increase in "opportunity costs", which finds no justification under the WTO agreements or any other legal instrument.

Appendix 2.1
The First Submission of the United States
(6 December 1999)

I. INTRODUCTION

1. On March 3, 1999, the United States Customs Service began to require that bonds posted on certain imports from the European Communities (EC) cover the potential liability due if the DSB were to authorize the suspension of concessions for the EC's continued non-compliance in the *Bananas* dispute. The sole issue in this dispute is whether, in the specific context of efforts by the European Communities to avoid at all costs complying with its WTO obligations in the *Bananas* dispute, that U.S. response was proper. The EC does not contest that it failed to bring its banana import regime into compliance with its WTO obligations by January 1, 1999, the end of its "reasonable period of time" for doing so. Nor does the EC contest that WTO arbitrators reached this conclusion on April 6, 1999. Nor does the EC contest that the Dispute Settlement Body (DSB) approved a U.S. request for the suspension of concessions in full accordance with the terms of Article 22 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) on April 19, 1999. Rather, the EC argues that despite confirmation by the arbitrators that the EC has been violating its WTO obligations since January 1, 1999, the United States did not have the right to increase bonding requirements on March 3, 1999 in order to preserve its ability to redress such violations as of that date following DSB approval of the amount of nullification or impairment. As shown in this submission, the March 3 bonding requirements were consistent with the letter and purpose of the DSU.

2. Under the DSU, the EU was liable for its nullification or impairment as of January 2, 1999, one day after the end of the reasonable period of time. The date eventually chosen, March 3, was one day after the date by which Article 22.6 required the WTO arbitrators in the *Bananas* case to have determined the level of nullification or impairment of U.S. benefits resulting from the EC's violation of its WTO obligations.

3. That the arbitral panel was unable to complete its work by March 2, 1999 was in large part due to the efforts of the EC to delay referral of the matter to the panel and to delay the panel's subsequent work. These efforts were but the latest by the EC to delay compliance with its international obligations in connection with its banana import regime. The EC's efforts extended back even to before the 1995 creation of the WTO, to the EC's refusal to bring itself into compliance with two adverse GATT panel rulings on bananas. These efforts continued after the EC's banana import regime was again found in violation of its international obligations by a WTO dispute settlement panel and the WTO Appellate Body. The EC refused to consult with the complaining parties during the reasonable period of time on the EC's revisions to its banana import regime, instead making changes that would again be found inconsistent with EC obligations. Moreover, during the reasonable period, the EC first repeatedly obstructed the establishment of an Article 21.5 panel on the question of the EC's non-compliance, and then sought to delay until after January 31, 1999 any U.S. request to suspend concessions – which would have denied the United States the benefit of the negative consensus rule under paragraphs 6 or 7 of DSU Article 22. While the EC failed in its effort to prevent the United States from presenting to the DSB its rightful request to suspend concessions, it succeeded in delaying the work of the Article 22.6 arbitrators beyond the DSU-mandated time frame for completion of their work on March 2, 1999. Thus, in the year leading up to March 3, 1999, the EC repeatedly and without exception obstructed the mechanisms provided for in the DSU to address its failure to comply.

4. When the WTO replaced the GATT in 1995, the DSU was expected to be one of the major improvements, in that it was structured so as to ensure prompt settlement of disputes, in particular

prompt compliance.⁸⁴ The WTO record for the settlement of disputes from 1995 to 1998 was a good one, but the EC's failure to comply in the banana case threatened to change the pattern. The *Bananas* dispute involved the first time a defending party used the reasonable period to make changes that would clearly not involve full compliance by the end of it, and then obstructed DSU procedures for addressing the situation. These actions leading up to March 3, 1999 seriously threatened the credibility of the new dispute settlement system.

5. The U.S. action of March 3, 1999 addressed the threat posed to the credibility of the WTO dispute settlement system by the EC's concerted strategy of delay, and it did so in a manner consistent with U.S. WTO obligations. By requiring importers to post bonds sufficient to cover any duties which the DSB might ultimately authorize as a result of the EC's continued non-compliance with its WTO obligations, the United States preserved its ability to impose DSB-authorized duties and at the same time demonstrated to the EC that it could not hope to benefit from its efforts to undermine DSU rules through delay. This action was consistent with U.S. WTO obligations, and the Panel should reject the EC's claims to the contrary.

II. PROCEDURAL BACKGROUND

6. By letter dated 4 March 1999, the EC requested consultations with the United States regarding the U.S. decision of March 3 to require that bonds posted on certain EC imports to cover the potential liability due if the DSB were to authorize the suspension of concessions with respect to EC imports for the EC's continued non-compliance in the *Bananas* dispute (WT/DS165/1). Consultations were held on 21 April 1999, but failed to resolve the dispute.

7. By letter dated 11 May 1999, the EC requested establishment of a panel with standard terms of reference pursuant to Article 7 of the DSU (WT/DS165/8). On 16 June 1999, the Dispute Settlement Body ("DSB") established a panel pursuant to the EC request (WT/DS165/9).

8. The following terms of reference apply to this proceeding:

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.

9. On 29 September 1999, the EC requested the Director-General to determine the composition of the Panel pursuant to Article 8.7 of the DSU. On 8 October 1999, the Director-General composed the Panel.

10. Ecuador, India, Jamaica, Japan, St. Lucia and Dominica reserved their rights as third parties to the dispute. (WT/DS165/9, WT/DS165/9/Corr.1).

III. FACTUAL BACKGROUND

11. A full recounting of the EC's actions in the year and a half preceding March 3, 1999 illustrates the threat these actions posed to the DSU's credibility and provides the necessary perspective on U.S. action on that date to address this threat and to preserve its rights under the DSU.

12. On September 25, 1997, the Dispute Settlement Body adopted panel and Appellate Body rulings against the EC in *European Communities - Regime for the Importation, Sale and Distribution*

⁸⁴ See DSU Arts. 3.3, 21.1.

of Bananas, a dispute addressing the complaints of Ecuador, Guatemala, Honduras, Mexico and the United States.⁸⁵ These findings were broad and comprehensive, and included findings that the EC's banana import regime (1) wrongly allocated its market as between the access opportunities afforded to Latin American and African, Caribbean and Pacific (ACP) countries, respectively and (2) discriminated in favor of EC banana distribution service suppliers and against U.S. and Latin American service suppliers under the General Agreement on Trade in Services (GATS).

13. At the DSB meeting at which the EC was required to state its intentions concerning implementation, and in subsequent negotiations with the complaining parties under Article 21.3 concerning the "reasonable period of time" for compliance, the EC refused to commit to implement "all" of the DSB recommendations and rulings. The EC spoke only vaguely about meeting its "international obligations" and refused to commit to implement all the rulings and recommendations of the DSB in the reasonable period of time.⁸⁶ It eventually recognized its obligations during questioning by the arbitrator appointed pursuant to Article 21.3 of the DSU on the reasonable period of time.⁸⁷

14. As a result of that arbitration, the EC was given a fifteen-month "reasonable period of time" to bring its banana import regime into compliance with the EC's WTO obligations, ending on January 1, 1999.⁸⁸ Despite the extent of the WTO findings and the complexity of the EC's measures, however, European Commission officials refused to consult with the United States following the WTO rulings in the fall of 1997. Instead, the Commission began to develop proposed changes to the EC banana regime that ignored the concerns that the complaining parties had expressed.

15. On January 14, 1998 the Commission submitted a proposal to its member States. The inconsistencies of that proposal with the DSB's recommendations were readily apparent. The Commission proposal made only token changes in its allocation of the market, and left open the possibility of maintaining the discrimination against U.S. service suppliers under the GATS. Commission officials simply asserted that their proposal was fully WTO-consistent. During meetings with U.S. officials in early 1998, Commission representatives stressed that they now had no latitude to make any substantive changes to this proposal.

16. Beginning in January 1998, the United States, the four Latin American countries who were complaining parties in the original case, and Panama, a more recent WTO member, also began raising the banana issue on a monthly basis before the DSB.⁸⁹ The complaining parties explained to the EC and other WTO Members in great detail the WTO-inconsistencies of the EC proposal and requested negotiations based on a new approach. In response, the EC suggested only that the complaining parties were subverting the DSB process, and it declined to engage in substantive negotiations.

17. During subsequent months, the EC position became even more entrenched, despite U.S. efforts to press for a negotiated resolution. In June 1998, the EC Agriculture Council agreed to the Commission's proposal, on the basis of an agreement, recorded in public minutes, that the licensing regime would be based on the reference period 1994-96, which would have the effect of perpetuating the discriminatory treatment applied to favor European distribution companies receiving licenses.⁹⁰

⁸⁵ WT/DSB/M/37.

⁸⁶ See WT/DSB/M/38.

⁸⁷ See WT/DS27/15, para. 12.

⁸⁸ WT/DS27/15, para. 20.

⁸⁹ See WT/DSB/M/41 (DSB meeting of 22 January); WT/DSB/M/42 (13 February meeting); WT/DSB/M/44 (25 March meeting); WT/DSB/M/45 (22 April meeting); WT/DSB/M/46 (22 June meeting); WT/DSB/M/47 (23 July meeting); WT/DSB/M/48 (22 September meeting); WT/DSB/M/49 (21 October meeting); WT/DSB/M/51 (25 November meeting).

⁹⁰ See report of 2110th Council meeting -Agriculture- Luxembourg, 22/23/24/25 June 1998, 9558/9 (Presse 214-G), page 18 ("The Commission confirms that in managing import licenses in accordance with the method of "traditionals/newcomers", it will use the years 1994-96 as the initial reference period for determining

The EC Council adopted the proposal in Regulation (EC) 1637/98 of July 20, 1998, which, as the EC explains in its First Submission,⁹¹ entered into force on July 31, 1998 and was applicable from January 1, 1999. The EC provided further implementing rules for licensing -- on the basis of the Council-approved 1994-1996 reference period -- on October 28, 1998. These entered into force on November 1, 1998 and were applicable in their entirety from January 1, 1999.

18. Beginning in early July 1998, the United States and its co-complainants repeatedly asked the EC to submit to a DSU Article 21.5 panel its claim that its newly adopted measures were, in fact, WTO-consistent. On July 8, U.S. Trade Representative Charlene Barshefsky asked European Commission Vice President Sir Leon Brittan to agree to reconvene the original panel pursuant to DSU Article 21.5 to review the EC measures before the end of the "reasonable period."⁹² She indicated that if the EC was not in compliance by the end of the year, the United States would invoke its right to withdraw trade concessions under Article 22 of the DSU. The EC responded at the end of July that it saw "no reason" to reconvene the panel, and stated that "normal procedures" beginning with a request for consultations should be followed.⁹³ The complaining parties asked the same of the EC at a July 23 meeting of the DSB; the EC representative replied that he was not in a position to respond.⁹⁴

19. In August 1998, the EC insisted on holding formal consultations under DSU Article 4 before it would agree to reconvene the original panel.⁹⁵ In response, the complaining parties requested consultations with the EC, while reserving their legal positions that this step was not required. However, the EC's insistence on formal 60-day consultations turned out to be just another tactic for delaying the reconvening of the panel. During the consultations, the EC merely reiterated again its position that the revisions to its banana regime were WTO consistent and declined to agree to re-establish a panel at the next DSB meeting.

20. In September, 1998, the complaining parties requested the intervention of the Chairman of the DSB to help persuade the EC to agree to procedures to reconvene the panel by early November. The EC said that it was only willing to reconvene the panel if its review were limited to violations of the GATT. The EC insisted that any panel review under the GATS of its services measures must occur separately at some later unspecified date. The complaining parties could not agree to such a split in the case, which would have been contrary to the manner in which the panel originally considered it. As the original panel noted, the GATT and GATS violations in the case were related. Moreover, there is no basis in the DSU for a defending party to condition its participation in dispute settlement proceedings on the limitation of a complaining party's right to assert any WTO claim. The EC's demand for split proceedings would merely have achieved its goal of delaying panel proceedings.

21. The EC first devoted serious attention to the complaining parties only in November 1998 after the United States began contingency preparations for suspension of concessions. The U.S. preparations were based on the schedule provided for in DSU Article 22. Under Article 22.6, the DSB is required to authorize a request to suspend concessions within 30 days of the end of the reasonable period of time unless there is a consensus not to do so, or unless the Member concerned objects to the level of suspension proposed. In that case, the matter is to be referred to an arbitral panel to determine whether the level of suspension of concessions is equivalent to the level of

operators.") The 1994-96 reference period agreed upon was one in which the GATS-inconsistent regime had been in place, and could accordingly be predicted to perpetuate the inconsistencies previously found by the DSB, as the arbitrators eventually concluded.

⁹¹ First Written Submission of the European Communities, para. 3.

⁹² Letter from Charlene Barshefsky to the Honorable Sir Leon Brittan, July 13, 1998 (U.S. Exhibit 1).

⁹³ Letter from Sir Leon Brittan to Ms. Charlene Barshefsky, 30 July 1998 (U.S. Exhibit 1).

⁹⁴ See WT/DSB/M/47.

⁹⁵ The EC argued that, with the exception of the 90 day time frame for circulating the report and resort to the original panel, Article 21.5 procedures involved "normal dispute settlement procedures," such as consultations and, presumably, another reasonable period of time for compliance. See WT/DSB/M/48 (minutes of DSB meeting of 22 September 1998).

nullification or impairment. Pursuant to Article 22.6, the arbitrators must complete their work within 60 days of the conclusion of the reasonable period of time, following which the DSB must, under Article 22.7, authorize suspension in the amount found by the arbitrators absent a negative consensus. In order to be placed on the agenda of a DSB meeting to be held on January 31, 1999 – within 30 days of the end of the "reasonable period" – the United States had to request suspension by January 21, 1999.

22. Unfortunately, by the end of November -- five months after the original U.S. request -- the prospects for completing Article 21.5 panel proceedings by January 21 were becoming increasingly slim. Nonetheless, on November 19, 1998, in meetings with the Chairman of the DSB, the United States made a third proposal to reconvene the panel pursuant to Article 21.5, under an accelerated timetable that would permit a panel report to be issued before January 21.

23. From November 30 to December 3, 1998, the United States and the EC engaged in intensive discussions concerning an expedited panel procedure. These talks did not resolve the outstanding procedural issues for three principal reasons. First, the EC required as a precondition to reconvening the panel that the United States waive its right under the DSU to suspend trade concessions, i.e., forego submitting its request to the DSB between January 21 and 31, the narrow window provided for under Article 22. Second, the EC was unwilling to permit the Latin American co-complainants in the original case -- Ecuador, Guatemala, Honduras and Mexico -- to participate in the expedited proceeding. Third, the EC's proposed schedule extended into June of 1999, with no date certain or provisions for the United States to obtain DSB authorization to suspend concessions.⁹⁶

24. On January 14, 1999, the United States requested authorization to suspend concessions in the amount of \$520 million under DSU Article 22.2, and placed this request on the agenda of the DSB meeting scheduled to take place on January 25, 1999.⁹⁷ Again, Article 22.6 requires that the DSB, upon request, grant authorization to suspend concessions or other obligations within 30 days of the end of the "reasonable period," unless there is a consensus not to do so.

25. Faced with this prospect, the EC responded through the unprecedented step of attempting to block the adoption of the agenda of a meeting of the Dispute Settlement Body.⁹⁸ Having delayed and obstructed the establishment of an Article 21.5 panel, the EC now insisted that such a panel process precede any request to suspend concessions under Article 22. The EC therefore demanded that the U.S. Article 22 request be stricken from the agenda before the agenda could be adopted by consensus. In the debate which took place on January 25, 1999 on adoption of the agenda, the Chairman noted,

"In accordance with past practice and the spirit of the WTO, the consensus rule [for adopting the agenda] had never prevented the right of a government to include issues on the agenda."⁹⁹ In arguing for the adjournment of that day's meeting, the Director-General stated that several delegations including Turkey and Mexico had rightly underlined the fundamental systemic issues in the discussion, which not only concerned bananas but the entire system and its functioning. The proposal to adjourn the meeting [rather than close the meeting, the consequence of a failure to adopt the agenda] ... was the best way to oppose the idea that a few delegations could block one item on the agenda or adoption of the agenda. It was correct to oppose this by suspending the meeting ...".¹⁰⁰

⁹⁶ While the United States and the EC were also far apart on the estimated number of days it would take to complete a proceeding, it was these three EC demands that foreclosed an agreement.

⁹⁷ WT/DS27/43.

⁹⁸ See WT/DSB/M/54, at 3-10.

⁹⁹ *Id.* at 5.

¹⁰⁰ *Id.* at 8.

Upon reconvening on January 28, 1999, the DSB adopted the agenda, and, after lengthy debate and further procedural objections by the EC spanning two days, accepted the EC's request submitted on January 29, 1999 for arbitration of the level of suspension and nullification or impairment pursuant to Article 22.¹⁰¹

26. Under Article 22.6, the arbitration panel on the level of suspension was required to complete its work within 60 days of the end of the reasonable period of time, or March 2, 1999.¹⁰² Because of the EC delaying tactics, the arbitrators were unable to do so. The EC hampered the arbitrators' work in several ways. First, the blocking of the DSB agenda delayed referral of the matter to the Article 22.6 arbitrators and the setting of the schedule by a full week in an already tight time frame. Second, in the arbitral proceeding, the EC insisted that the arbitrators accept its compliance as presumed, declared that the arbitrators could not enter into an inquiry on compliance, and refused until the hearing to enter into a comprehensive discussion of the merits of its regime.

27. Accordingly, on March 2, 1999, the arbitrators issued only an initial decision on matters relating to the scope of the arbitration and aspects of the methodology for determining the level of suspension of concessions.¹⁰³ The arbitrators rejected EC arguments on the relationship of DSU Articles 21.5 and 22. It also rejected the EC's claim that the Article 22 proceedings must, as a legal matter, be suspended pending completion of Article 21.5 proceedings.¹⁰⁴ The arbitrators stated that contrary to the EC's arguments, they were bound by Article 22 to examine whether the EC's revised regime was consistent with its WTO obligations. However, since the EC had failed to address US arguments on this issue, they stated that they were not in a position at that time to make that determination, and that they required further information from the parties to assist them before they could issue a report.¹⁰⁵

28. After considering additional information submitted by the parties, the arbitrators issued their final decision on April 6, 1999, determining that the level of nullification or impairment suffered by the United States as a result of the continued EC violations is \$191.4 million dollars per year.¹⁰⁶ The arbitrators concluded that the EC's 1998 revisions to its banana import regime continued to violate the General Agreement on Tariffs and Trade 1994 and the General Agreement on Trade in Services.¹⁰⁷ In particular, the arbitrators concluded that the EC's separate tariff rate quota for 857,000 tons of banana imports from ACP States is inconsistent with paragraphs 1 and 2 of GATT 1994 Article XIII, just as had the original combined allocations amounting to 857,000 tons which the revised regime replaced.¹⁰⁸ The arbitrators similarly found that the revised regime's licensing provisions had the effect of carrying over the previous discrimination against U.S. service suppliers originally found to

¹⁰¹ *Id.* at 10-34.

¹⁰² Article 22.6 provides that arbitration "*shall* be completed within 60 days after the date of expiry of the reasonable period of time." (Emphasis added.)

¹⁰³ See WT/DS27/48 (March 2, 1999); Arbitration under Article 22.6 of the DSU in *European Communities – Regime for the Importation, Sale and Distribution of Bananas (Article 22.6 Arbitration)*, WT/DS27/ARB, paras. 2.10 - 2.13, Parts III, IV and VI (April 6, 1999).

¹⁰⁴ *Article 22.6 Arbitration*, paras. 2.9, 4.11-4.15.

¹⁰⁵ See Article 22.6 Arbitration, paras. 2.11, 5.1.

¹⁰⁶ *Article 22.6 Arbitration*, para. 8.1. The reports in the two Article 21.5 proceedings were also issued to the parties on April 6, 1999. Report of the Panel, *European Communities -Regime for the Importation, Sale and Distribution of Bananas -Recourse to Article 21.5 by Ecuador* (WT/DS27/RW/ECU); *European Communities -Regime for the Importation, Sale and Distribution of Bananas -Recourse to Article 21.5 by the European Communities* (WT/DS27/RW/EEC).

¹⁰⁷ The arbitrators concluded that the EC's regime violated paragraphs 1 and 2 of GATT 1994 Article XIII, and GATS Articles II and XVII. Arbitration under Article 22.6 of the DSU in *European Communities – Regime for the Importation, Sale and Distribution of Bananas (Article 22.6 Arbitration)*, WT/DS27/ARB, paras. 5.17, 5.33, 5.97 (9 April 1999).

¹⁰⁸ *Article 22.6 Arbitration*, WT/DS27/ARB, paras. 5.33, 5.97.

violate the GATS.¹⁰⁹ Thus, U.S. benefits had continued to be nullified and impaired, without interruption.

29. The arbitrators thus concluded that what the EC now characterizes as a "completely new set of rules"¹¹⁰ for its bananas regime was in great part a repackaging of those very same elements which the panel and Appellate Body originally found inconsistent with the EC's WTO obligations, and which the EC had eventually committed to bring into compliance by the end of the reasonable period of time. In fact, comments by senior EC officials after both the initial and final decisions made clear that the EC had long understood that its revisions to the banana import regime continued to violate its WTO obligations. For example, External Relations Commissioner Sir Leon Brittan stated following the March 2 initial decision that the arbitrators' request to the United States for a new damage estimate meant that the WTO arbitrators would likely find that damages amounted to between \$200 and \$300 million – an apparent acknowledgement that the EC's violation continued.¹¹¹ More blunt were the comments of Industry Commissioner Bangemann, who admitted that while he had been forced to defend the EC's position, it was groundless.¹¹²

30. In light of the schedule provided for in DSU Article 22.6, the United States undertook contingency plans to suspend concessions in early March in accordance with the arbitrators' award and DSU rules. As a legal matter, the DSU envisages redress as of the end of the reasonable period of time.¹¹³ This meant that as of the expiration of the reasonable period of time on January 1, 1999, the EC was no longer permitted to deny U.S. benefits with impunity. U.S. plans were based on this assumption. Nevertheless, the United States intended to apply any authorized suspension only after the date on which the DSU required the arbitrators to complete their work, March 2, 1999.

31. Because EC delaying tactics prevented the arbitrators from completing their work by the March 2, 1999 date called for under the DSU time frame, the United States took steps to preserve its ability to suspend concessions as from that date. Accordingly, the United States announced on March 3, 1999 that the U.S. Customs Service would review the sufficiency of bonds on certain EC merchandise entered on or after March 3, 1999 to ensure that any duties ultimately authorized by the arbitrators could be assessed on those entries. Since any duties which might be assessed would be equal to 100% of the appraised value of the merchandise, the U.S. Customs Service began requiring a single transaction bond equal to the entered value of the merchandise, or a "continuous bond" covering multiple entries equal to 10% of the total entered value of the covered merchandise imported by a particular importer over the previous year.¹¹⁴ This requirement did not actually assess duties, nor did it prejudge the amount of the total value of the products which would be assessed higher duties.

32. U.S. importers are required to deposit estimated duties at the time of entry; in the event that additional duties or fees are due, Customs is required to collect these on liquidation, that is, when

¹⁰⁹ In addition, the Panel concluded that the EC's country-specific quota allocations to substantial suppliers is inconsistent with GATT 1994 Article XIII:2, and that the criteria for acquiring "newcomer" status under the EC's revised licensing procedures accord U.S. service suppliers *de facto* less favorable treatment than is accorded to EC service suppliers in violation of Article XVII of GATS. *Article 22.6 Arbitration*, WT/DS27/ARB, paras. 5.33, 5.95, 5.97. The arbitrators reached the same conclusions in their capacity as Article 21.5 panelists. Article 21.5 Panel Report on *European Communities – Regime for the Importation, Sale and Distribution of Bananas - Recourse to Article 21.5 by Ecuador (Article 21.5 Ecuador Report)*, WT/DS27/RW/EU, paras. 6.160 - 6.163 (12 April 1999).

¹¹⁰ First Written Submission of the European Communities, para. 4.

¹¹¹ See *Inside U.S. Trade*, March 12, 1999, at 3.

¹¹² A newspaper report indicated that Commissioner Bangemann welcomed the arbitrators' decision against the EC, and quoted him as stating, "As a commissioner, I've had to defend our position. But I can tell you it's bullshit." *The Wall Street Journal Europe*, 22 April 1999, at 1.

¹¹³ This legal issue is discussed further in Section IV.A *infra*.

¹¹⁴ Memorandum to Customs Area and Port Directors, CMC Directors From Director, Trade Compliance Division, U.S. Customs Service, Regarding European Sanctions (March 3, 1999).

Customs makes the final determination of the rate and amount of duty.¹¹⁵ Entry procedures in the United States permit timely or immediate release of goods into the United States. Since liquidation of an entry usually is performed after the goods are in the stream of commerce, bonding is required in order to guarantee the payment of these additional duties or fees.

33. The Customs Service requires single transaction bonds or continuous bonds for entries of merchandise as a matter of course. As a rule, all entries must be accompanied by evidence that a bond is posted with Customs to cover any potential duties, taxes, and charges that may accrue. Pursuant to its regulatory authority,¹¹⁶ a port director may require additional bonding or additional security in order to ensure that the acceptance of an entry will be adequately protected against any duties or other liabilities imposed by law. In this case it was necessary to impose additional bonding requirements to ensure that 100% ad valorem duties would be paid if assessed as a result of DSB authorization. Thus, Customs on March 3 required an increase in the amount of the bond required for the goods that could possibly be subject to the imposition of the 100% tariff rate.

34. The increased bonding requirement constituted the only legal action taken by the United States on March 3, 1999. While press announcements referred to "withholding liquidation," no special legal significance can be attributed to this term. Entries of merchandise are deemed liquidated by law one year from the date of entry unless liquidation is either extended or suspended as required by statute or court order.¹¹⁷ Customs may liquidate an entry at any time within that year. However, in order to preserve administrative flexibility and to allow sufficient time for review of entries before the final determination of duties upon liquidation, Customs does not normally initiate the liquidation of an entry until the 314th day after the date of entry.¹¹⁸ The reference to "withholding liquidation" merely indicated that Customs would not take action outside of its normal administrative procedure, i.e., would not initiate liquidation prior to the 314th day. In fact, no changes were made in Customs procedures as a result of the announced intention to "withhold liquidation."

35. On April 19, 1999, following DSB authorization to suspend concessions in accordance with the Article 22.6 arbitrators award, the United States published notice that it would actually assess 100% duties on a subset of the products previously indicated on March 3, 1999. The reduced list conformed with the level of nullification and impairment which the arbitrators determined, \$191.4 million. Duties on the other products on the March 3 list are to be assessed in accordance with the usual, MFN rates set forth in the Harmonized Tariff Schedule of the United States.

IV. LEGAL ARGUMENT

A. THE MARCH 3 REVIEW OF BONDING REQUIREMENTS WAS NOT INCONSISTENT WITH DSU ARTICLE 22.6 AND GATT ARTICLES I, II, XI AND VIII.

36. The EC asserts that the action taken on March 3, 1999 constitutes a suspension of concessions or other obligations during the pendency of a proceeding under Article 22.6, in violation of that article.¹¹⁹ The EC also claims that the U.S. action taken on March 3, 1999 is inconsistent with Articles I, II, XI and VIII of the General Agreement on Tariffs and Trade 1994.¹²⁰

37. The Panel should reject these claims because the EC was liable for its nullification or impairment of U.S. benefits immediately after the conclusion of the "reasonable period of time," that is, after January 1, 1999. Because the EC objected to the level of suspension proposed, that level

¹¹⁵ 19 U.S.C. § 1505.

¹¹⁶ 19 Code of Federal Regulations § 113.13.

¹¹⁷ 19 U.S.C. § 1504(a).

¹¹⁸ See Memorandum dated May 26, 1997, file number ENT-1 FO:TC:C:E AD to all interested parties, <http://www.cebbs.customs.treas.gov/public/cgi/cebbs.exe?mode=fi&area=13&name=T-ENTRY5.TXT>

¹¹⁹ EC First Written Submission, paras. 13-15.

¹²⁰ EC First Written Submission, paras. 16-17.

required confirmation by an Article 22.6 arbitral panel. Nevertheless, the liability itself, once confirmed by the DSB, extended from the end of the reasonable period. As a matter of policy, the United States chose to apply duties on entries from March 3, 1999, 60 days later, as this was the date by which the DSU required the Article 22.6 arbitrators to complete their work. In reviewing the sufficiency of bonds posted for entries from March 3, 1999, the Customs Service did no more than preserve the U.S. ability to assess duties in accordance with the determination of the Article 22.6 arbitrators upon authorization of the DSB.

38. That authorization was granted on April 19, 1999. The DSB agreed to grant authorization to suspend the application of concessions to the European Communities and its member States of tariff concessions and related obligations under GATT 1994, consistent with the decision of the arbitrators contained in document WT/DS27/ARB.¹²¹ As the United States noted at the April 19 DSB meeting,¹²² the arbitrators were silent with regard to the specific date for the suspension of concessions, referring only to the maximum amount of \$191.4 million per year.

39. The provisions of the DSU also are silent on the specific date for the application of the suspension of concessions. DSU Article 22.7 states only that the request for suspension must be consistent with the arbitrators' decision.¹²³ While the DSU itself is silent on the date on which DSB-authorized suspension may be applied, the context and purpose of the provisions on suspension of concessions make clear that this date may fall at any time after the expiration of the reasonable period.

40. A violation of WTO rules upsets the balance of rights and obligations agreed to by WTO Members. While this effect on the balance of rights and obligations is immediate, WTO dispute settlement procedures permit the resulting nullification or impairment of a Member's benefits to continue until the adoption of DSB rulings and recommendations. Even then, DSU Article 21.3 provides a non-complying party with a further "reasonable period of time" to bring its measure into compliance, *if* immediate compliance is not practicable. Inasmuch as the complaining Member's rights continue to be violated and benefits impaired during the pendency of the "reasonable period," that period is to be the shortest period possible within the non-complying Member's domestic legal system to bring its measure into compliance.¹²⁴

41. Recognizing that governments may in some cases need time to complete domestic processes, the DSU tolerates continued nullification and impairment during the pendency of dispute settlement proceedings and the reasonable period of time which follows. However, that tolerance ends upon the completion of the reasonable period. DSU Article 22.1 explains that the suspension of concessions or other obligations is available "in the event that the recommendations and rulings [of the DSB] are not implemented within a reasonable period of time." A reasonable period of time is available only to Members which commit to implement DSB rulings and recommendations, and a failure to fulfill this commitment compounds the continued impairment of the other Member's benefits inherent in the original violation. At that point, a Member must bear the consequences of its failure to comply, and it becomes potentially liable for its continued impairment, subject only to DSB authorization and the confirmation of the Article 22.6 arbitral panel, if any, to which the matter may have been referred.

42. DSU Article 3.2 provides that the WTO dispute settlement system "serves to preserve the rights and obligations of Members under the covered agreements." The system achieves this purpose in part by ensuring that there are consequences for violations of another Member's rights, in the form

¹²¹ WT/DSB/M/59.

¹²² *Id.*

¹²³ Article 22.7 provides, in relevant part, "The DSB shall be informed promptly of the decision of the arbitrator and shall upon request, grant authorization to suspend concessions or other obligations where the request is consistent with the decision of the arbitrator, unless the DSB decides by consensus to reject the request."

¹²⁴ Arbitration Award under Article 21.3(c) in *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/15 & WT/DS48/13, para. 26 (29 May 1998).

of compensation or suspension of concessions. This purpose would be undermined were a non-complying Member not subject to the consequences of non-compliance at the end of the reasonable period, but instead only from completion of proceedings confirming that it has continued to nullify or impair another Member's benefits. Indeed, the latter interpretation would create a perverse incentive for a non-complying Member to seek to delay completion of those proceedings.

43. This, in fact, is precisely what occurred in the Article 22.6 arbitration in *Bananas*. Beyond delaying the referral of the matter to the arbitral panel,¹²⁵ the EC initially refused to address the arguments raised by the United States in its submissions concerning the consistency of the EC's revised regime with the WTO Agreements. This forced the Panel to accompany its initial decision of March 2, 1999 with a request to the EC to respond to the U.S. arguments by March 15, 1999, since this was "necessary for [the panel] to complete [its] task."¹²⁶ In its final report, the arbitrators explained, "At our request, the European Communities responded to the US arguments."¹²⁷ Thus, the EC sought to exploit for delaying purposes precisely the interpretation it advocates in this case, that any suspension of concessions be applied only following completion of Article 22.6 proceedings.

44. While DSU rules subjected the EC to potential liability for nullification or impairment of U.S. benefits from January 2, 1999, the end of the reasonable period of time, the United States chose as a matter of policy to apply any DSB-authorized duties only from March 3, 1999, one day after the date provided for in DSU rules for the Article 22.6 panel to complete its calculation of the level of nullification or impairment (sixty days following the end of the reasonable period of time). Any further delay in applying duties after March 2 would reward the EC for its efforts to delay the arbitrators' work. It would also contribute to the perception that the WTO dispute settlement system would be plagued by the very same deficiency which ruined the credibility of GATT dispute settlement -- namely, that non-complying parties could obstruct multilateral action to impose consequences for non-compliance.

45. When, ultimately, the EC succeeded in delaying the work of the Article 22.6 panel, the U.S. acted only to preserve its ability to apply any duties ultimately authorized by the DSB from March 3, 1999. Again, by increasing bonding requirements for entries on or after March 3, the Customs Service merely placed itself in a position to suspend concessions on these entries upon DSB authorization. It did not actually assess those duties.

B. THE EC HAS NOT DEMONSTRATED THAT THE MARCH 3 REVIEW IS INCONSISTENT WITH DSU ARTICLE 23, AND HAS NOT ASSERTED A VIOLATION OF DSU ARTICLE 3.

46. The EC asserts at paragraphs 18-22 of its First Written Submission that the March 3 review of bonding requirements was inconsistent with paragraphs 1 and 2 of Article 23 of the DSU, as well as DSU Article 3. It is difficult to respond to the EC's vague arguments with respect to Article 23 inasmuch as the EC never identifies either the precise obligations in question or how the March 3 review was inconsistent with those obligations.

47. The EC refers to the "timing," "amount" and "total disregard of WTO procedures" which the U.S. measure allegedly involved, but, as explained above, the March 3 review did no more than preserve the ability of the United States to assess duties from that date if, as ultimately occurred, the Article 22.6 arbitrators were to confirm that the EC was continuing to nullify or impair U.S. WTO benefits. As described above, the EC was potentially liable for this continued nullification or impairment from the conclusion of the reasonable period of time on January 1, 1999. The March 3 review of bonding requirements did not actually assess duties, nor did it prejudge the total value of the

¹²⁵ See WT/DSB/M/54, at 3-10; *supra* paras. 24-25.

¹²⁶ Article 22.6 Arbitration, para. 2.11.

¹²⁷ *Id.*, para. 5.1.

products which would be assessed duties. These decisions were made in April as a result of, and in accordance with, WTO procedures authorizing the suspension of concessions.

48. Likewise, the EC presents only the vaguest outline of an argument with respect to DSU Article 3. It asserts no violation, but only that the March 3 review undermines the "objectives under Article 3," namely "providing security and predictability." Indeed, no violation of this provision is possible, since it is descriptive, not prescriptive. Inasmuch as the EC asserts no violation, the United States notes only that the U.S. decision on March 3 to preserve its ability to assess duties from that date came in response to an extended series of EC actions which posed a genuine and serious threat to the authority and credibility of the WTO dispute settlement system. In its very first WTO dispute settlement loss, the EC not only refused to comply, but refused to state clearly at the outset that this was in fact the course of action it intended to pursue, as it was required to under DSU Article 21.3. Even now it continues to represent the cosmetic changes it made to its banana import regime as "a completely new set of rules."¹²⁸ Moreover, the EC repeatedly thwarted U.S. efforts to resort to DSU procedures under DSU Articles 21.5 and 22 to address the EC's failure to comply, going so far as to block the adoption of the agenda of the January 25, 1999 DSB meeting in order to avoid the automatic authorization for suspension of concessions which DSU Article 22 guarantees.¹²⁹ Far from undermining the authority of the WTO dispute settlement system, as the EC charges, the U.S. response to the EC provided assurances that WTO dispute settlement would not, like the GATT, be hamstrung by the efforts of non-complying parties to avoid the consequences of their non-compliance.

49. Finally, the EC makes the inaccurate and irrelevant claim that the United States was required under Sections 301-310 to implement action on March 3, 1999. The March 3 review of bonding requirements was not made pursuant to Section 301, nor was the United States required under U.S. law to take this step. Rather, as explained above, the U.S. decision to review bonding requirements was undertaken as a matter of policy to preserve the ability of the United States to assess duties from that date if, as ultimately occurred, the Article 22.6 arbitrators were to confirm that the EC's liability for continuing to nullify and impair U.S. WTO benefits.

C. THE EC HAS FAILED TO DEMONSTRATE THAT THE MARCH 3 REVIEW VIOLATES DSU ARTICLE 21.5.

50. The EC resurrects its argument that DSU Article 21.5 required the United States to first seek a panel under that provision before requesting authorization to suspend concessions pursuant to Article.¹³⁰ The Panel should reject the EC's argument for the same reasons that the arbitrators conducting the Article 22.6 proceeding and the Article 21.5 panels brought by Ecuador and the EC rejected the same argument.¹³¹

51. Article 22 does not by its terms, context or purpose require that a Member first resort to Article 21.5 proceedings. All time frames in Article 22 are measured against the end of the reasonable period of time, and Article 21.5 is not even mentioned once. Likewise, Article 21.5 is not mentioned at all in Article 23.2(c), which only requires that Article 22 proceedings be pursued before suspension of concessions may be undertaken. Article 22 represents a central element in the credibility and effectiveness of WTO dispute settlement, since it provides that non-complying Members may no longer block suspension of concessions against them. However, the EC's claim that Article 21.5 proceedings must first be completed would deprive prevailing parties of this right to suspend concessions since Article 22 only applies the negative consensus rule to requests to suspend concessions if such requests are made within 30 days of the conclusion of the reasonable period.

¹²⁸ EC First Written Submission, para. 4.

¹²⁹ See *supra* paras. 24-25.

¹³⁰ See EC First Written Submission, paras. 23-29.

¹³¹ The United States notes that the EC made the same arguments before the panel in *United States -- Sections 301-310 of the Trade Act of 1974*.

Members whose rights have already been found to have been violated, and who have already lived with these violations through the year-and-a-half panel process and additional year of implementation, would find themselves, as they were under the GATT 1947, again at the mercy of the very party that had denied their rights and impaired their trade. The EC argument on "sequencing" was rejected in January 1999 for these reasons and must be rejected again by this Panel.¹³²

52. Moreover, in response to the concern that there must first be a multilateral determination of violation, we note that, as the Article 22 arbitrators found, Article 22 proceedings cannot result in suspension of concessions where a Member has in fact brought its measure into compliance, because the level of nullification and impairment in that case would be zero.¹³³

53. The EC asserts in paragraph 28 of its submission that the United States had already "unilaterally determined" that the EC violated WTO rules "well before the conclusion of the 'reasonable period of time' and at a time when not all the EC measures necessary to implement recommendations and rulings of the DSB had yet been adopted by the competent EC institutions."¹³⁴

54. These EC arguments ring particularly hollow in light of its efforts to thwart the establishment of an Article 21.5 panel to address its July 1998 revisions to its banana regime. The EC impeded every attempt by the United States and other complaining parties to have the EC's revised regime reviewed by a multilateral Article 21.5 panel. The United States asked the EC on a monthly basis between July and November 1998 to reconvene the original panel; each time the EC either refused or insisted on conditions that would have required the United States to waive its WTO rights.¹³⁵

55. In response to the EC claim that it had not yet completed implementation, we note that the July 1998 regulation provided for a separate tariff rate quota for 857,000 tons of banana imports from African, Caribbean and Pacific States, a provision which the Article 22 Arbitrators and Article 21.5 panel ultimately concluded is inconsistent with paragraphs 1 and 2 of GATT 1994 Article XIII.¹³⁶ As the EC explains,¹³⁷ the EC regulation providing for this TRQ "entered into force on July 31, 1998 and was applicable from January 1, 1999." Likewise, the EC's July decision to adopt a reference period of 1994 -1996 was the central element in the arbitrators' conclusion that the revised banana regime continued to violate the GATS.¹³⁸ Under well-established GATT and WTO panel precedent, a panel may find a measure inconsistent with GATT or WTO rules if the measure mandates such a violation at some point in the future.¹³⁹ An early Article 21.5 review of the July TRQ and choice of reference period would thus have been fully consistent with GATT and WTO jurisprudence, and would also have made clear to the EC that its implementation was deficient before the time to make further adjustments had expired. Instead, the EC sought to delay and to characterize as "unilateral determinations" attempts by the U.S. to resolve this matter through DSU proceedings.

¹³² In addition, the Panel should not reach this issue because doing so would preempt the ongoing DSU review negotiations and encroach upon the rights of all WTO Members (not just parties to a single dispute) to negotiate the balance of rights and obligations under the WTO Agreement. Only the Members may amend or adopt interpretations of the DSU (WTO Agreement Arts. IX:2 and X), and Panels cannot add to or diminish the rights and obligations provided in the covered agreements (DSU Arts. 3.2 and 19.2). The results of the Third Ministerial Conference action on the DSU review are likely to lead to amendment of DSU provisions including Article 21.5.

¹³³ See *Article 22.6 Arbitration*, WT/DS27/ARB, para. 4.11.

¹³⁴ EC First Written Submission, para. 28.

¹³⁵ See *supra* paras. 18-23.

¹³⁶ Article 22.6 Arbitration, paras. 5.17, 5.96; Article 21.5 Ecuador Report, para. 6.160.

¹³⁷ First Written Submission of the European Communities, para. 3.

¹³⁸ Article 22.6 Arbitration, para. 5.78.

¹³⁹ Panel Report on United States -- Taxes on Petroleum and Certain Imported Substances, adopted 17 June 1987, BISD 34S/136, 159-60, para. 5.2.2 ("U.S. -- Superfund")

56. The March 3 review of the sufficiency of bonds in no way violates Article 21.5, and the Panel should reject this claim.

V. CONCLUSION

57. For the above reasons, the United States respectfully requests that the Panel reject the EC's claims in their entirety, and find that the action taken by the United States on March 3 is not inconsistent with DSU Articles 3, 21.5, 22.6 or 23, nor with GATT 1994 Articles I, II, XI or VIII. Beyond failing to meet its burden of demonstrating any actual violations, the EC is seeking a result that would reward it for its efforts to deny the United States the possibility of prompt resort to Article 22 procedures, and would inequitably permit the EC to postpone liability for its failure to use the reasonable period of time to come into compliance.

Appendix 2.2
The US oral presentation at the First Substantive Meeting
(16 December 1999)

Introduction

1. Mr. Chairman, members of the Panel, it is my honor to represent the United States before you today. I will keep my remarks brief. Let me start by responding to two gross factual errors by the EC in their statement today. The EC is correct in saying that the facts in this dispute are simple, but they have the wrong so-called "facts." First, contrary to what we just heard, no duties were raised on March 3. The EC has provided no evidence to support their claim, nor can they. Second, the March 3rd action was not based on, and had nothing to do with, Section 306. Again, the EC has provided no evidence to show this. I will come back to this briefly at the end of my statement.

2. Mr. Chairman, members of the Panel, we are here now because the European Communities ("EC") found itself in the embarrassing position of failing to comply with its WTO obligations in the *Bananas* dispute, the first WTO Member to do so (a dubious accomplishment which the EC has since repeated in another dispute). The EC's embarrassment was compounded by its very vocal protestations of having complied, and of being the victim of improper accusations of non-compliance, protestations found baseless by the Article 22 arbitrator and Article 21.5 panel in *Bananas*. The EC's response to this situation has been to bring this case in order to continue to portray itself as a victim, and as the defender of dispute settlement procedures. This position is remarkable, in that it was the EC's refusal to abide by those DSU procedures and their attempt to "game" them for the purpose of delay which created the crisis that confronted WTO Members earlier this year. And now the EC has invoked those same dispute settlement procedures to challenge the United States March 3rd action in an effort to seek approval of the EC's own delaying tactics.

3. The U.S. March 3rd action consisted of reviewing the sufficiency of importer bonds for certain EC imports. The review was intended to ensure that the United States would be in a position to collect duties which might be authorized by the DSB, in accordance with DSU rules and time frames. The U.S. March 3rd action was consistent with U.S. rights and obligations, and enhanced, rather than undermined, the credibility of WTO dispute settlement procedures in light of the EC's obligation to have brought its measures into compliance as of January 1, 1999, and in light of the U.S. right under the DSU to a decision by the Article 22 arbitrator no later than March 2, 1999.

The Entry System of the United States and the Risk Created by the EC's Non-Compliance

4. I would first like to review the operation of the U.S. system for entering merchandise. It is our understanding that the EC is not challenging this system. As contemplated by Article 13 of the *Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994* – the "Customs Valuation Agreement" – the United States has long employed a surety system which allows for the early release of merchandise into the United States. Rather than holding merchandise for the days, weeks or months which might be required to confirm a product's proper valuation or classification, or an importer's compliance with all administrative formalities, the United States Customs Service allows virtually immediate release of merchandise into the United States – often in a matter of hours – so long as the importer has provided minimal information on the entry, as well as assurances in the form of a cash deposit or bond that it will pay the potential duties and fees owed. Those assurances are necessary to address the risks assumed by Customs, which no longer controls the merchandise and thus has no recourse against it, that the full amount of duties and fees owed might not ultimately be paid.

5. The EC's persistent breach of its WTO obligations in the *Bananas* dispute and its failure to provide adequate compensation meant that EC imports would, upon DSB authorization, be subject to

suspension of tariff concessions in the amount of the nullification or impairment of U.S. benefits, and existing bonds therefore might not prove adequate. The EC thus created a new risk for the United States concerning its ability to collect the full amount of duties which might be due.

6. The March 3 review of bond sufficiency addressed this risk. In increasing the bonding levels, the United States did not suspend any concessions – it did not assess duties, nor did it pre-judge the total value of imports which might be assessed higher duties as a result of DSB authorization. The United States did not decide to assess higher duties, and did not decide which imports would be assessed these duties, until DSB authorization on April 19, 1999. We note that these April 19 decisions are not within the terms of reference of this Panel, however. The Panel's terms of reference examine the action taken on one day, March 3, 1999.

The EC's Liability for Its Non-Compliance

7. The United States decision to increase bonding levels on March 3 reflected its attempt to preserve its ability to apply any DSB-authorized suspension of concessions from that date. The choice of that date was made based on the schedule provided for in the DSU. March 3 fell 61 days after the EC's "reasonable period of time" for compliance expired, and is the day after an Article 22.6 arbitral panel was required under that provision to complete its work on whether the proposed level of suspension was equivalent to the level of nullification or impairment to U.S. benefits.

8. While the United States had decided not to apply any DSB-authorized suspension prior to March 3, the EC's liability for its continued nullification or impairment of U.S. benefits in fact accrued from January 2, the day after the reasonable period of time expired. As explained in the U.S. submission, the DSU tolerates the ongoing nullification or impairment by one Member of another Member's benefits through the initial panel proceedings and adoption of DSB rulings and recommendations, as well as through a "reasonable period of time" for compliance when a Member is unable to comply immediately. However, this tolerance ends at the conclusion of the reasonable period of time. As Article 22.1 explains, suspension of concessions is then available. Indeed, there would be little logic to designating a "reasonable period of time" for compliance – and little meaning to the requirement that the Member be in compliance by the end of the period – if a Member were entitled to continue its breach well beyond the reasonable period without consequences. The absence of such consequences would invite the very delaying tactics the EC employed to such effect in the *Bananas* dispute.

9. As outlined in detail in the U.S. submission, the EC record of non-compliance and delay in connection with its banana import regime extends back for years, and continued through the reasonable period (and in fact persists even now, almost 8 months after the arbitrator's conclusions). The EC refused to consult with the United States and other complaining parties before deciding on revisions to its banana regime, ignored explanations from the complaining parties as to how the revisions would remain inconsistent with EC obligations and prevented the early formation of an Article 21.5 panel to confirm this non-compliance. The EC next took the extraordinary step of seeking to block adoption of the agenda of the January 1999 DSB meeting at which the U.S. request to suspend concessions was to be considered. After delaying adoption of the agenda and referral of the question of the level of suspension to an Article 22.6 arbitrator, it then refused to engage U.S. arguments on its continued nullification and impairment of U.S. benefits. As a result, the panel was unable to complete its work by its DSU-mandated March 2 deadline.

10. The EC's concerted effort at delay demonstrated its lack of respect for DSU procedures and the DSU admonition to seek mutually satisfactory solutions, and threatened to undermine the very authority and credibility of the DSU itself. The EC's actions recalled its efforts under the GATT 1947 to obstruct adverse panel proceedings, and raised doubts among many that WTO dispute settlement procedures would live up to their initial promise. The United States action of March 3 was a measured response intended to make clear that the EC's efforts at delay would not be rewarded. By

ensuring that the U.S. Customs Service would be in a position to collect DSB-authorized duties from March 3, it reaffirmed that the new WTO dispute settlement system, unlike the old GATT system, could not be gamed to avoid compliance or the consequences of non-compliance.

11. I would now like to further address several errors in the EC's oral statement. First, as discussed earlier, the March 3rd action did not increase duties on EC products. The EC states at paragraph 6(a) of its oral statement that, as a result of the March 3rd action, "the importer was bound to pay the (prohibitive) increased duty at the time of liquidation of the customs debt." This is simply incorrect. The United States did not require additional duties on any entries until April 19, following DSB authorization. Likewise, in paragraph 6(c), the EC incorrectly states that the March 3rd action prevented the immediate liquidation of any customs debt. The March 3rd action had no impact on the timing of liquidation. Under U.S. law, there is no right to immediate liquidation. Customs' normal liquidation cycle is 314 days, and importers would not have received liquidation before then.

12. The EC also at various points in its statement raises arguments with respect to the relationship between Articles 21.5 and 22 of the DSU. I ask that this Panel decline, as have all prior panels and arbitrators and the General Council, to endorse the EC's erroneous view of the relationship between DSU Articles 21.5 and 22. I would be happy to address any questions the Panel may have with respect to the specific examples cited in the EC submission. Finally, with respect to Section 301, I would like to reiterate the point made earlier that neither this provision nor others in the related legislation served as the basis for the March 3rd action. I am surprised that the EC appears to be saying that it knows better than the United States the legal basis for U.S. domestic legal action. Further, the EC persists in several misunderstandings concerning the Section 301 statute, which is surprising in light of the fact that we have just completed a lengthy panel process in which the details of the operation of this statute were addressed at length. The report of that panel will be issued shortly.

Conclusion

13. The EC is correct in asserting that this dispute involves the authority and credibility of the WTO dispute settlement system, and the actions of one Member which undermined that authority. That Member is the EC. The Panel should reject the EC's attempt to seek approval through this proceeding for its efforts to delay and obstruct the operations of the DSU.

Appendix 2.3
The US closing remarks at the First Substantive Meeting
(17 December 1999)

1. Mr. Chairman, members of the Panel, I will not recount here again the long series of actions by the EC which have shown their disrespect for WTO dispute settlement procedures, except to note that it is at odds with their current claims to be the defender of the DSU.
2. Having said that, I would like to clarify again the precise nature of the action taken on March 3, 1999. That action consisted solely of reviewing the bonding requirements on certain EC imports. Nothing more. That action did not itself assess duties on these entries. No action was taken in that regard until April 19.
3. We note that the EC in its closing statement just now has for the first time raised this matter relating to the terms of reference of this Panel. I am reading the EC's panel request and that request indicated that the measure was the decision, effective March 3, concerning withholding liquidation, contingent liabilities and bonding. In other words, this is what it understood to be the actions taken on March 3, 1999. Given that the EC is raising this issue relating to the terms of reference at this late stage in the proceeding, we may need to return to the Panel for a preliminary ruling.
4. Thank you very much.

Appendix 2.4
The US Responses to Questions of Panel and Parties
(13 January 2000)

Q1: Assuming that an importer wished to clear through the US customs on 4 March 1999 a tonne of "Uncoated felt paper and paperboard in rolls or sheets" (US HTS 4805 50 00) originating in Switzerland, what would have been the duty liability for such import on that date? What would be the answer if such a product originated in the EC?

1. The duty liability would have been based on a "free" rate of duty, regardless of whether the product originated in Switzerland or an EC Member State.

Q2: Assuming that an importer wished to clear through the US customs on 4 March 1999 a tonne of "Sweet biscuits, waffles and wafers" (US HTS 1905 30 00) originating in Switzerland, what would have been the requirements on that date (in particular with regard to the amount to be guaranteed) with regard to the posting of a security (bond) for an individual importation or concerning the commitment of a general security (continuous bond)? What would be the answer had this situation occurred concerning such a product originating in the EC?

2. Assuming a commercial formal entry was filed, a bond would have been required. The bond could have been guaranteed by a surety or by a deposit of cash in lieu of a surety. The bond could have been a continuous entry bond or a single entry bond.

3. An importer of the Swiss-origin product would have been required to post either:

- (a) a single transaction bond in the amount of three times the entered value of the merchandise, or
- (b) a continuous bond in the amount of 10% of the duties, taxes and fees paid by the importer of record for all products during the calendar year preceding the date of the bond application, but in no case less than \$50,000.

4. An importer of such goods originating in a Member State of the European Communities not listed in the Customs instruction¹⁴⁰ would have been subject to the requirements listed above. An importer of such listed goods would have been required to post either:

- (a) a single transaction bond in the amount of three times the entered value of the merchandise; or
- (b) a continuous bond in the amount of 10% of the entered value of the covered merchandise which the importer imported during the previous year.

5. The amount of the single transaction bond for the above product was three times the entered value because it was subject to additional requirements of the U.S. Food and Drug Administration relating to public health or safety. Merchandise not subject to such other agency requirements would have been subject to the following single transaction bond requirements:

Product not on list: a single transaction bond in the amount of the entered value of the merchandise plus any duties, taxes and fees for the entry;

Product on list: a single transaction bond in the amount of the entered value of the merchandise.

¹⁴⁰ See U.S. Exhibit 7 and EC Annex VIII.

Q3: What is the relevant date under US customs law on which the customs debt is incurred (in order to determine the duty applicable to imports of a product):

- the date of physical importation or
- the date of the final liquidation of the customs debt or
- any other date?

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

Q4: What is the US customs practice in this regard in case of a duty decreasing over time as a result, for example, of the US obligations under a WTO Agreement? Does the US customs practice differ in case of a duty increasing over time as a result, for example, of a US action in application of a trade defence instrument?

7. As indicated in the previous paragraph, the duty ultimately paid is that applicable for the date of entry. Hence, it would not be relevant that a duty might decrease at some point after that date -- unless the decrease were made effective from that date or earlier. The practice would not differ for a duty increase.

Q5: In the light of the answers to the previous questions, can the US explain what is the meaning of its statement made in the oral submission of 16 December 1999 (paragraphs 3, 4 and 5) where it refers initially to "potential duties ... owed" as a result of the "risk created by the EC's non-compliance" and then that "the March 3 review of bond sufficiency addressed this risk"? What was this "potential risk" on 3 March 1999?

8. As explained in the U.S. First Submission at paragraphs 37-42 and the U.S. Oral Statement at paragraphs 7-8, the EC's liability for its failure to bring its measure into compliance by the conclusion of the reasonable period of time extended from that date. The EC's failure to comply with the DSB's rulings and recommendations meant that EC Members' imports into the United States after that date would potentially be subject to the application of duties in excess of bound rates, subject to confirmation by the Article 22 arbitrator and authorization by the DSB. There was a risk that the arbitrator would, as turned out to be the case, confirm that the level of nullification or impairment was above zero (that the EC was failing to comply) and that the DSB would accordingly authorize the suspension of concessions. From the perspective of the United States Customs Service, the resulting risk was that bonds on entries from March 3 would not be sufficient to cover the higher duties (100% *ad valorem*) which would be due if the suspension were authorized, in the event that the importers would not pay the additional duties at liquidation. The United States increased bonding levels to ensure that such duties, if any, could be collected.

Q6: Assuming *arguendo* the existence of such a risk, what was the basis for the US to take action as from 3 March 1999 in the absence of a multilateral determination on the EC revised banana regime?

9. The basis for action was the need to ensure that all duties could be collected on entries of goods released into the United States, and thus beyond Customs' control. The EC presumably would not have had Customs hold the merchandise until completion of the Article 22 proceedings it was working to delay.

10. As noted previously,¹⁴¹ the revised bonding requirements did not actually impose higher duties. The U.S. action imposing higher duties came on April 19, 1999, following the arbitrator's multilateral determination and the DSB's multilateral authorization. In the absence of the arbitrator's determination, DSB authorization and the U.S. April 19 action, the duties payable on each and every entry subject to the revised bonding requirements would have been at the applied, MFN rate. Thus, the EC incorrectly asserts that the March 3 action deprived importers of the right to import products at bound rates.¹⁴²

Q7: Is the withholding of the suspension of liquidation (including the bond requirement) a suspension of concessions or other obligations under the DSU?

11. We wish to emphasize again that the only action taken on March 3 was the change of bonding requirements on certain entries. As we noted at paragraph 34 of the U.S. First Submission, no action was taken with respect to "withholding" or "suspending" liquidation, notwithstanding press statements on this point. Entries on and after March 3 were subject to precisely the same liquidation cycle as those prior to March 3, that is, they were scheduled for liquidation between 314 days and one year following entry.¹⁴³ The normal 314-day liquidation cycle allows adequate time for all information relating to entries (testing analysis and results, submission by importers of corrected or supplemental information, verification of information) to be collected and to allow the proper ascertainment of the value and classification of entered merchandise. The normal 314-day liquidation cycle employed in the United States is not within the terms of reference of this dispute.¹⁴⁴

12. Likewise the ordinary bonding requirements associated with surety systems are not within the terms of reference of this dispute. Such bonding requirements applied to entries both before and after March 3, 1999. They were, and continue to be, applicable to every commercial formal entry of merchandise into the United States, regardless of origin. Article 13 of the *Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994* -- the "Customs Valuation Agreement" -- specifically contemplates the use of surety systems which allow for the early release of merchandise.¹⁴⁵ The alternative to the U.S. surety system would be the far more trade-restrictive approach of holding the merchandise for the days, weeks or months necessary to confirm a product's proper valuation or classification, or an importer's compliance with all administrative formalities.

13. At the first substantive meeting of the Panel, the EC for the first time raised questions about the scope of the Panel's terms of reference. The United States noted this, and noted that the only action within the terms of reference of this dispute is that taken on March 3, 1999¹⁴⁶: the change in

¹⁴¹ See U.S. First Submission, paras. 31, 45; U.S. Oral Statement, paras. 6.

¹⁴² See EC Oral Statement, para. 7.

¹⁴³ See Memorandum dated May 26, 1997, file number ENT-1 FO:TC:C:E AD to all interested parties, <http://www.cebb.customs.treas.gov/public/cgi/cebb.exe?mode=fi&area=13&name=T-ENTRY5.TXT> (U.S. Exhibit 2).

¹⁴⁴ While "withholding liquidation" has no legal significance under U.S. law, "suspension of liquidation" is a statutory term of art referring to delaying liquidation beyond one year based on a statute or court order. U.S. law also provides for "extension of liquidation" beyond one year, by Customs on its own initiative or in response to a request by the importer, in order to obtain missing information on appraisal or classification or to ensure the importer's compliance with applicable law. The U.S. March 3 action involved neither "extension" or "suspension."

¹⁴⁵ Likewise, the Kyoto Convention on the Simplification and Harmonization of Customs Procedures provides that Customs authorities may require importers to furnish security to ensure compliance with undertakings to Customs, and may condition release on condition that security is furnished to ensure collection of any additional import duties and taxes that might become chargeable. Kyoto Convention on the Simplification and Harmonization of Customs Procedures, (done at Kyoto on 18 May 1973 and entered into force on 25 September 1974), Annex B.1, 59-61 (on the release of goods).

¹⁴⁶ Customs made this action effective as of March 4, 1999.

bonding requirements for certain products originating in EC Member States. As described in the U.S. First Submission and the U.S. Oral Statement, the EC has failed to meet its burden of demonstrating that this action represents a suspension of concessions or other obligations under the DSU.

Q8: What is the impact on trade and traders involved in a suspension of liquidation (including the bond requirement)?

14. Again, no "suspension of liquidation" took place on March 3, 1999. In further clarification of the U.S. system, entries are normally liquidated no earlier than 314 days after entry, but are required by law to be liquidated within one year of entry, unless liquidation is "extended" or "suspended." A suspension of liquidation would occur, for example, if an antidumping proceeding were under way in which final antidumping duties could not be calculated and assessed within one year of entry. An extension would occur, for example, to obtain necessary information on classification or appraisal.

15. Accordingly, since there was no "suspension of liquidation," there was no impact on trade and traders from such a suspension. However, the United States would note that, for the claims at issue in this dispute, the impact on trade and traders is not a consideration in determining whether there has been a violation. The United States would further note that, as described in response to the previous question, the use of a surety and bonding system is trade-facilitating, inasmuch as it allows for the early release of merchandise into the United States.

Q9: What is the legal link between the date of assessment of the nullification caused by the EC's non-implementation of the Bananas III recommendations and the need to be able to suspend concessions as of 3 March 1999?

16. As explained at paragraphs 39-42 of the U.S. First Submission, a Member's liability for failing to comply with DSB rulings and recommendations within the "reasonable period of time" accrues from that date. DSU Article 22.1 is clear. It makes the suspension of concessions or other obligations available "in the event that the recommendations and rulings [of the DSB] are not implemented within a reasonable period of time." The purpose of the reasonable period of time -- to provide a grace period for a Member to bring itself into compliance without consequences -- in its very enunciation implies that the consequences of non-compliance accrue from the conclusion of that period. To deny a Member recourse once another Member has failed to come into compliance by the end of the reasonable period of time would be to alter the balance of rights and obligations under the WTO. Further, the requirement that a Member bring its measure into compliance by the conclusion of the reasonable period would be drained of meaning if, in fact, a Member were entitled to continue its breach without consequences. Such an interpretation of DSU requirements would be at odds with the purpose of the DSU itself, "to preserve the rights and obligations of Members under the covered agreements,"¹⁴⁷ since Members would be encouraged to follow the lead of the EC in delaying DSU procedures for DSB authorization of suspension of concessions.¹⁴⁸

17. A further contextual element supporting the conclusion that a Member's liability for non-compliance accrues from the end of the reasonable period is the fact that compensation under Article 22.2 is available immediately upon expiration of the reasonable period. Article 22.2 provides that compensation negotiations must begin *no later than* the conclusion of the reasonable period. There would be little logic to providing for immediate liability for non-compliance in the case of compensation but not suspension of concessions. Moreover, such a distinction in the timing of the liability would create a strong disincentive for pursuing the mutually agreed remedy of compensation - and another incentive for delay.

¹⁴⁷ DSU Art. 3.2.

¹⁴⁸ See U.S. First Submission at paras. 24-27, 43; WT/DSB/M/54, at 3-10.

18. The United States' intention to apply any DSB-authorized suspension of concessions from March 3, 1999 must be understood in light of the EC's legal liability for its non-compliance in *Bananas* which accrued as from January 2, 1999. Notwithstanding this legal liability, the United States intended to apply the suspension only after the date by which the DSU required the Article 22 arbitrator to complete its work, March 2, 1999.¹⁴⁹ The March 3 action of reviewing bonding levels was a response to the EC's long record of delay, including delay of the Article 22 proceedings, and enabled the United States to suspend concessions from that date in accordance with its rights upon DSB authorization.

General response to Questions 10 - 16:

19. Questions 10-16 deal generally with procedures applicable in the context of DSU Articles 21.5 and 22. These issues are not directly relevant to this dispute, since it has already been determined pursuant to these provisions that the EC did, in fact, fail to comply with the DSB's rulings and recommendations, just as it has already been decided by the arbitrator whether the level of suspension proposed by the United States in response was equivalent to the level of nullification or impairment. Put in these terms, the EC's goal with respect to its Article 21.5 claim is apparent: to relitigate an issue it lost before other panels; namely, whether those panels had jurisdiction under the DSU to consider issues relating to the level of suspension of concessions without the convening of an Article 21.5 panel.

20. The Panel must recognize that the consequence of accepting the EC argument that an Article 21.5 panel is a prerequisite to a request for suspension of concessions under Article 22 would be to find that the Article 22.6 proceeding conducted in *Bananas*, and the suspension of concessions authorized by the DSB in that case, was illegitimate and illegal, a violation of DSU rules. The EC in its oral statement expresses the view that the Panel is not required "to review the work of other bodies established by the DSB in the context of another dispute settlement procedure."¹⁵⁰ The EC is thus encouraging the Panel to ignore the reasoning and conclusions of the *Bananas* arbitrator/panelists, and to unnecessarily and incorrectly make findings at odds with those panelists. In other words, the EC is asking the Panel to join it in expressing the EC's lack of respect for the *Bananas* arbitral panel and its decisions, and for the DSB-approved suspension of concessions based on those decisions. This attitude exemplifies the EC's disregard for the impact of its actions and positions on the integrity of the dispute settlement system throughout proceedings relating to *Bananas*, an attitude reflected in the EC's refusal to consult the complaining parties, its refusal to reconvene an Article 21.5 panel and its efforts to block the agenda of a DSB meeting.¹⁵¹

21. The extreme sensitivity of the relationship between DSU Articles 21.5 and 22 is apparent both from record of DSB discussions on this issue over the course of the reasonable period and in the context of the DSU review.¹⁵² The confusion arising from the impossibility of conducting a 90-day

¹⁴⁹ See U.S. First Submission at paras. 37, 44. The United States is of course entitled to delay the application of the suspension of concessions to a later date better suited, for example, to providing advance notification to its importers of the potential change.

¹⁵⁰ EC Oral Statement, para. 3.

¹⁵¹ See U.S. First Submission, paras. 18-27.

¹⁵² The relationship between Articles 21.5 and 22 has been the subject of extensive discussion among WTO Members. The Members broadly recognize that the relationship between Articles 21 and 22 requires additional clarification. See, e.g., DSU Review, Discussion Paper from the European Communities (30 June 1999), Document No. 3864 (acknowledging that "some other Members have interpreted" Articles 21, 22 and 23 differently than the EC, and proposing principles to clarify and elaborate these Articles); Review of the DSU, Note by the Secretariat, Compilation of Comments Submitted by Members – Rev. 3 (12 December 1998) (Para. 296 – Australia noting that implementation procedures lack clarity; Para. 298 – Guatemala suggesting that Article 21.5 proceedings should include authorization to apply countermeasures, to make clear that two proceedings are unnecessary; Paras. 306-316 – expressing various views on Article 22; Para. 316 – Singapore notes that Article 21.5 does not include a moratorium on suspension of concessions pending conclusion of the

Article 21.5 proceeding¹⁵³ within the time frames for requesting suspension (30 days from the end of the reasonable period) and for arbitration on the level of suspension (60 days from the end of the reasonable period), has led the Members to conclude that Article 21.5 itself should be deleted and completely rewritten.¹⁵⁴

22. As the United States noted at footnote 49 of its First Submission, the Panel may not reach the issue of the relationship between Articles 21.5 and 22 because doing so would preempt the ongoing DSU review negotiations and encroach upon the rights of all WTO Members (not just parties to a single dispute) to negotiate the balance of rights and obligations under the WTO Agreement. Only the Members may amend or adopt interpretations of the DSU (WTO Agreement Arts. IX:2 and X), and Panels cannot add to or diminish the rights and obligations provided in the covered agreements (DSU Arts. 3.2 and 19.2). To adopt the EC position in this dispute would effectively amend DSU Article 22 by reading out the application of the negative consensus rule to requests for suspension of concessions, and would diminish the Members' rights under the current text of DSU Article 22 both to receive the benefit of the negative consensus rule and to receive a decision on the level of suspension as early as 60 days following the expiry of the reasonable period of time. The Members may yet agree to extend the time frames for arbitral decisions on the level of suspension and for the authorization of suspension, but that must take place through amendment of the DSU by all Members, and not through a panel proceeding brought by one.

23. Not only the *Bananas* arbitrator and Article 21.5 panels, but the panel in *Sections 301-310*, recognized that the DSU review is addressing the issue of the relationship of Articles 21.5 and 22.¹⁵⁵ Like the *Section 301* panel, this Panel need not reach the issue of the relationship between Articles 21.5 and 22. The EC is claiming that the March 3 action is inconsistent with Article 21.5. It has failed to explain, however, how changing bonding requirements can be inconsistent with a provision relating to dispute settlement procedures available when there is a disagreement on implementation. The EC has not shown, nor can it show, that the measure at issue (changed bonding requirements) is inconsistent with an obligation provided for in Article 21.5. There is simply no tenable link to be drawn.

proceedings like that found in Article 22.6, and suggesting that such a moratorium be included); Review of the DSU, Chairman's Summary of Informal Meeting of 16 March 1999 (22 March 1999), Doc. No. 1660 (summarizing discussion of issues relating to Articles 21, 22 and presumptions in Article 21.5 and 22 proceedings, including statements by Members that Article 22 should be amended to refer to the end of Article 21.5 proceedings instead of the reasonable period of time (para. 19)); Review of the DSU, Chairman's Summary of Informal Meeting of 19 May 1999 (25 May 1999), Doc. No. 2957 (noting that "[s]ome Members were of the view that recent difficulties in regard to implementation and suspension of concessions were due in part to lack of clarity of current DSU language", and that proposals had been made to delete Article 21.5 and replace it); Review of the DSU, Draft Proposal on Implementation (June 8, 1999), Doc. No. 3276 (compilation of formal and informal proposals related to implementation provisions). *See, also*, Minutes of the General Counsel Meeting Held on 8 March 1999 (WT/GC/M/37)(the Director-General stated that "there were different interpretations of the assumptions which had to be taken into account in applying compensatory measures - the question of Articles 21.5 and 22...").

¹⁵³ The EC would add to this 90 days a further 60 days for consultations.

¹⁵⁴ *See* Proposed Amendment of the Dispute Settlement Understanding, WT/MIN(99)/8 (22 November 1999) (U.S. Exhibit 3).

¹⁵⁵ *See* Panel Report on European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 by the European Communities, WT/DS27/RW/EEC, para. 4.17 (12 April 1999) (the Panel stated, "in respect of the EC arguments concerning Articles 21, 22 and 23 of the DSU, we are well aware of the controversy in the DSB over the interpretation of these Articles and their relationship, but we view that question as one best resolved by Members in the context of the on-going DSU review . . ."); Arbitration under Article 22.6 of the DSU in European Communities – Regime for the Importation, Sale and Distribution of Bananas (Article 22.6 Arbitration), WT/DS27/ARB, para. 4.11, note 11 (April 6, 1999); Panel Report on Sections 301-310 of the Trade Act of 1974, WT/DS152/R, para. 7.154 (22 December 1999).

Q10: Is a new measure (an implementing measure) presumed to be compatible or incompatible with WTO obligations after the reasonable period of time? Which party bears the burden of proof after the reasonable period of time to prove consistency (or lack thereof) with WTO provisions? Is it correct to state that the losing party becomes liable as of the expiry of the reasonable period of time? And liable for what?

24. For the reasons described in response to question 9 and in the U.S. First Submission, it is correct to state that the losing party is liable at the conclusion of the reasonable period of time if it has failed to comply with the rulings and recommendations of the DSB. It is liable for its continued nullification or impairment of the benefits of the complaining party under the covered agreements. Article 22 provides for compensation or suspension of concessions in the amount of this liability.

25. The concept of a "presumption" of compatibility or non-compatibility of a Member's implementation is not provided for in the DSU, and is unnecessary to the resolution of questions relating to the suspension of concessions following the reasonable period. Following the conclusion of the reasonable period of time, the complaining Member is entitled to request DSB-authorization for the suspension of concessions pursuant to Article 22.2 if it believes the implementing Member has failed to comply. If the implementing Member chooses not to contest the level of the suspension, it has effectively assented to the conclusion that it has failed to comply. On the other hand, if the implementing Member believes it has complied, it is likewise entitled under Article 22.6 to request arbitration of the level of the suspension, and argue that the level is zero because of its compliance. This in fact occurred in the *Bananas* dispute. (By contrast, in *Hormones*, the EC only contested the level of suspension, and did not claim it had complied.) As the Article 22.6 arbitrator in *Bananas* noted, "any assessment of the level of nullification or impairment presupposes an evaluation of consistency or inconsistency with WTO rules of the implementation measures taken by the European Communities."¹⁵⁶

26. Just as it is not necessary or appropriate for this Panel to address whether there is a presumption of compliance or non-compliance, it is not necessary or appropriate to reach in the context of this dispute a conclusion concerning the burden of proof following the reasonable period. In the Article 22.6 proceeding in *Bananas*, the arbitrator did not make an explicit ruling on this issue. On the other hand, in *Hormones*, the arbitrator concluded that the burden of proving that a proposed level of suspension is inconsistent with the Article 22.4 requirement that this level be equivalent to the level of nullification or impairment lies with the party challenging the proposed level of suspension, namely, the implementing party.¹⁵⁷

27. Regardless of where presumptions or burdens may or may not lie in a proceeding dealing with the issue of compliance, any conclusion resulting from that proceeding that the implementing Member has failed to comply necessarily means that the Member has not been complying -- and has nullified and impaired the complaining Member's benefits -- since the adoption of the DSB recommendations and rulings, *and since the end of the reasonable period of time*. For the reasons set forth in response to question 9, the non-complying Member is liable for that nullification or impairment from the end of the reasonable period.

Q11: Who has the responsibility to raise an Article 21.5 case? When should such a request under Article 21.5 take place?

28. The complaining party may (but need not) request an Article 21.5 review of the implementing party's measures. The DSU does not provide a time limitation on when an Article 21.5 review may be

¹⁵⁶ Article 22.6 Arbitration, para. 4.3.

¹⁵⁷ See Article 22.6 Arbitration, para. 4.13; Arbitration under Article 22.6 of the DSU in European Communities -- Measures Concerning Meat and Meat Products (*Hormones*), WT/DS26/ARB, para. 9 (12 July 1999).

requested. The Article 22.6 arbitrator in *Bananas* observed, "The express wording of Article 21.5 of the DSU does not exclude the possibility of initiating such a proceeding *before* or *after* the expiry of the reasonable period of time."¹⁵⁸

29. The United States sought to undertake an Article 21.5 proceeding prior to the conclusion of the reasonable period of time in *Bananas* because it was apparent that the implementation measures that the EC had already taken failed to comply with the EC's WTO obligations. By requesting an early Article 21.5 panel ruling prior to the conclusion of the reasonable period, the United States hoped to avoid the need to suspend concessions by making clear to the EC *before* its reasonable period for compliance expired that its violations had not been corrected, and that other measures would therefore be necessary, and thus permit the EC to promptly adopt those other measures. The EC chose instead to delay.

30. Thus, the United States request for an Article 21.5 panel was not, as the EC would have it,¹⁵⁹ an admission that a complaining party must resort to Article 21.5 proceedings before proceeding to Article 22. The United States strongly disputes the EC assertion that this or other points are "not even in dispute."¹⁶⁰

31. Further, as noted in the U.S. First Submission,¹⁶¹ the Article 22.6 arbitrator rejected the EC position that a complaining party must resort to Article 21.5 proceedings before making an Article 22 request to suspend concessions.¹⁶² The EC has failed to address the logic of either the arbitrator or the United States on this point.

Q12: What is the consequence of failing to raise an Article 21.5 claim before the end of the reasonable period? If it is not done during this period does the right to an Article 21.5 assessment lapse?

32. As noted in response to question 11, the Article 22.6 arbitrator in *Bananas* explained, "The express wording of Article 21.5 of the DSU does not exclude the possibility of initiating such a proceeding *before* or *after* the expiry of the reasonable period of time."¹⁶³ Thus, the right to pursue an Article 21.5 panel would not lapse if no request were made during the reasonable period, and there are no consequences for failing to raise an Article 21.5 claim before the end of the reasonable period.

33. The Article 22.6 arbitrator emphasized the importance of giving effect to both Article 21.5 and Article 22. While Article 21.5 proceedings may be requested at any time, including after the reasonable period of time, an Article 22 request for suspension may only occur within the terms specified in that article – within 30 days of the end of the reasonable period of time – if the negative consensus rule is to be given effect.¹⁶⁴ Because an Article 21.5 proceeding by its terms requires 90

¹⁵⁸ Article 22.6 Arbitration, n.11.

¹⁵⁹ EC Oral Statement, para. 18.

¹⁶⁰ *See id.*, para. 18; *see, also, id.*, para. 6 (the United States contests each and every point the EC argues is uncontested).

¹⁶¹ *See* U.S. First Submission, para. 50.

¹⁶² *See* Article 22.6 Arbitration, paras. 4.10-4.15.

¹⁶³ Article 22.6 Arbitration, n.11.

¹⁶⁴ *Article 22.6 Arbitration*, para. 4.11. The arbitrator explained,

For those Members that for whatever reasons do not wish to suspend concessions, Article 21.5 will remain the prime vehicle for challenging implementation measures. However, if we accepted the EC's argument, we would in fact read the time-limit foreseen in Article 22.6 out of the DSU since an Article 21.5 proceeding, which in the EC view includes consultations and an appeal, would seldom, if ever, be completed before the end of the time-limit specified within Article 22.6 (i.e., thirty days of the expiry of the reasonable period of time).

days, the conclusion that an Article 21.5 proceeding must precede an Article 22 request would thus render the Article 22 right to DSB authorization with the negative consensus rule a nullity in those cases in which the implementing party does not implement until the completion of the reasonable period. On the other hand, concluding that an Article 22 request need not be preceded by an Article 21.5 proceeding would not deny effect to Article 21.5, since that proceeding would still remain available to complaining parties not wishing to suspend concessions, and to those willing to have the DSB decide by positive consensus whether to authorize the suspension of concessions.¹⁶⁵

34. Further, as explained in the U.S. First Submission at paragraph 51, neither Articles 22.2 and 22.6 nor Article 23.2(c) make any reference to Article 21.5 proceedings as a prerequisite to a request for, DSB authorization of, or implementation of, a suspension of concessions. Rather, Article 22 provides time frames measured from the end of the reasonable period, and Article 23.2(c) requires that Article 22 procedures be followed before suspending concessions. The EC is thus incorrect in suggesting that there is an obligation to pursue Article 21.5 proceedings before pursuing a suspension of concessions under Article 22.

Q13: Assuming the US is correct in stating that an Article 21.5 panel should be triggered (by either party) within the reasonable period of time, what is the consequence if this 21.5 panel is never requested or not established? Does the absence of an Article 21.5 assessment result in a presumption that the new measure is compatible or that it is incompatible with WTO obligations? Does the absence of an Article 21.5 panel exclude recourse to Articles 22.6-7?

35. The United States does not take the position that an Article 21.5 panel *should* be requested during the reasonable period. As described in response to question 11, the United States attempted to avail itself of Article 21.5 procedures during the reasonable period in *Bananas* in order to demonstrate to the EC, while the EC still had time to revise its measure, that this measure would have to be changed in order to comply with the DSB's rulings and recommendations. The possibility of requesting an Article 21.5 panel before the end of the reasonable period presented itself in *Bananas* because the EC did, in fact, put into effect changes to its regime well before the end of the reasonable period, even if these changes were not to be applied before the end of the reasonable period.¹⁶⁶ Had the EC not taken steps until the expiry of the reasonable period, this option would not have been available.¹⁶⁷

36. As noted in response to questions 10 and 12, there are no consequences if an Article 21.5 panel has not been requested or constituted, and there is no need to consider whether there is a presumption of compliance or non-compliance at the conclusion of the reasonable period. Further, as noted in response to question 11, the absence of an Article 21.5 panel does not preclude resort to Article 22.6-22.7, as the Article 22.6 arbitrator concluded in *Bananas*.

Q14: Who determines whether a new measure nullifies WTO benefits?

37. As defined in DSU Article 22.7, the Article 22.6 arbitrator's task is to determine "whether the level of suspension is equivalent to the level of nullification or impairment." As the *Bananas* arbitrator pointed out, the concept of equivalence between the proposed suspension and the level of nullification or impairment would be "devoid of meaning" if either of these variables were

¹⁶⁵ See *id.*

¹⁶⁶ See U.S. First Submission, para. 55.

¹⁶⁷ Thus, in *Australia Salmon*, Canada could not attempt to request an Article 21.5 panel before the expiry of the reasonable period because Australia had not implemented any measure. Canada therefore had to request suspension under Article 22 within 30 days of the expiry of the reasonable period to preserve its right to DSB authorization with the benefit of the negative-consensus rule. See WT/DSB/M/66, at 5-6; *supra* response to Question 16.

unknown.¹⁶⁸ Consequently, the Article 22.6 arbitrator must examine the new measure to determine the level of nullification or impairment before it can determine whether that level is equivalent to the level of suspension proposed by the complaining party.¹⁶⁹

38. As described in response to question 10, following the conclusion of the reasonable period of time, the complaining Member is entitled to request DSB-authorization for the suspension of concessions pursuant to Article 22.2 if it believes the implementing Member's measure nullifies its agreement benefits. If the implementing Member chooses not to contest the level of the suspension, it has effectively assented to the conclusion that its new measure nullifies WTO benefits. On the other hand, if the implementing Member believes its measure does not nullify benefits, it is likewise entitled under Article 22.6 to request arbitration of the level of the suspension, and argue that the level is zero because its measure does not nullify WTO benefits. This in fact occurred in the *Bananas* dispute. (By contrast, in *Hormones*, the EC only contested the level of suspension, and did not claim the level of nullification was zero.)

Q15: Is there an implicit assessment of compatibility of any measure that is the object of an Article 22.6-7 Arbitration in view of the Arbitrator mandate to assess whether the level of suspension is equivalent to the level of nullification of benefits?

39. This is indeed the conclusion of the Article 22.6 arbitrator in *Bananas*, a conclusion with which the United States concurs. As the arbitrator noted, "we cannot fulfill our task to assess the *equivalence* between the two levels before we have reached a view on whether the revised EC regime is . . . fully WTO consistent."¹⁷⁰ The arbitrator also noted, "any assessment of the level of nullification or impairment presupposes an evaluation of consistency or inconsistency with WTO rules of the implementation measures taken by the European Communities."¹⁷¹

Q16: Please discuss the practice of WTO Members in their use of Articles 21.5 and 22 procedures.

40. The practice of WTO Members supports the interpretation of the United States and the *Bananas* arbitrator that Article 21.5 proceedings need not be undertaken as a condition for suspending concessions under Article 22. The EC description of this practice at paragraph 20 of its oral statement is highly misleading in this regard.

41. For example, the EC fails to point out with respect to the *Automotive Leather* dispute that the United States and Australia agreed to extend DSU Article 22.6 deadlines in that case pursuant to specific authority to do so in the Agreement on Subsidies and Countervailing Measures.¹⁷² Footnote 6 to the SCM Agreement explicitly authorizes parties to a dispute under the SCM agreement to agree to extend the deadlines provided for in SCM Agreement Article 4, which include those in DSU Article 22.6. It was only because of footnote 6 that this procedure was possible, as reflected in the points made by the United States at the DSB meeting of October 14, 1999. At that meeting, the United States said:

- "I know, Mr. Chairman, that many delegations may be somewhat surprised to see that the United States has agreed with Australia to pursue Article 21.5 now and only later pursue DSU Article 22 and/or SCM Article 4.10 proceedings.

¹⁶⁸ Article 22.6 Arbitration, para. 4.7.

¹⁶⁹ *Id.*, paras. 4.7-4.8.

¹⁷⁰ Article 22.6 Arbitration, para. 4.8.

¹⁷¹ Article 22.6 Arbitration, para. 4.3.

¹⁷² See WT/DS126/8, p.2, point 6.

- "This is not a fundamental change in the U.S. position on the applicability of those articles. This dispute, since it is under Article 4 of the SCM Agreement, presents special circumstances and unique opportunities. In particular, unlike in normal dispute settlement proceedings, here the parties may agree to extend the deadline for exercising the right to request Article 22 procedures. We and Australia have so agreed. This permits the parties additional time to resort to Article 21.5 proceedings, and we have been willing to accommodate the other party's desires in this respect.
- "The approach we have agreed to follow here is not required under the DSU. It is a special agreement for this dispute only. But it does reflect a process which many Members are supporting in the current discussions on the DSU, and we hope that it will demonstrate that such a process – and timetable – is workable, efficient and prompt."¹⁷³

42. As in the *Leather* dispute, the two *Aircraft* disputes between Brazil and Canada involved the SCM Agreement. As did the parties in the *Leather* dispute, Brazil and Canada explicitly relied on Article 4 and footnote 6 of the SCM Agreement in agreeing to extend the Article 22.6 deadlines to permit prior completion of Article 21.5 panels without waiving the benefit of the negative-consensus rule in the DSB's authorization of suspension of concessions.¹⁷⁴

43. With respect to *Australia Salmon*, Canada did not first resort to Article 21.5 procedures before requesting suspension under Article 22. It first preserved its rights under Article 22 by requesting suspension within 30 days of the expiry of the reasonable period, without any request for an Article 21.5 panel.¹⁷⁵ At the DSB meeting held on July 27-28, 1999, Canada did, ultimately, agree to pursue an Article 21.5 proceeding, but it insisted on the need to also form an Article 22 panel (since Australia disagreed with the proposed level of suspension), which it would agree to suspend pending the outcome of the Article 21.5 panel. Canada noted that while it had tabled a proposal at the DSU Review requiring an Article 21.5 panel before a suspension request could be made under Article 22, no agreement had yet been reached on the proposal. Absent such an agreement,

Canada had to pursue its rights in accordance with the *existing provisions* of the DSU. At this stage, it was not possible for Canada to proceed with the Article 21.5 panel proceedings only, because such proceedings would be concluded after the expiry of the 30-day period provided for in Article 22, within which Canada had the right to request suspension of concessions by negative consensus. Canada could have initiated such proceedings during the compliance period, if Australia had put in place its implementing measures, which it had not done.¹⁷⁶

44. Canada thus concurred with the U.S. interpretation that Article 22 requires a request for suspension within 30 days of the expiry of the reasonable period, regardless of whether Article 21.5 proceedings have been conducted, and that Article 21.5 proceedings can be conducted during the reasonable period only if a measure has been implemented during that period. Canada did choose to accommodate Australia's desire for an Article 21.5 panel by consenting to waive its right under Article 22 to have the arbitrator complete its work within 60 days of the end of the reasonable period of time. However, Canada's decision to waive this Article 22 right cannot be read to mean that these rights do not exist.

¹⁷³ Statement of the United States at DSB Meeting of 14 October 1999; see WT/DSB/M/69.

¹⁷⁴ See WT/DS70/9, dated 23 November 1999, Annex at point 5; WT/DS46/13, dated 26 November 1999, Annex at point 5.

¹⁷⁵ Canada requested a special meeting of the DSB to seek authorization to suspend concessions in a communication dated 15 July 1999. The communication made no mention of Article 21.5. See WT/DS18/12, dated 15 July 1999.

¹⁷⁶ WT/DSB/M/66, at 4-5 (emphasis added).

45. Likewise, in pursuing an Article 21.5 panel in *Bananas* without requesting suspension within 30 days of the expiry of the reasonable period, Ecuador waived its right to receive DSB authorization to suspend concessions with the benefit of the negative consensus rule. Although the EC has purportedly agreed not to oppose Ecuador's request for suspension, Ecuador cannot be assured that a third party will not. Ecuador's decision to waive its rights in its case cannot be read as waiving the rights of other Members in other disputes. Further, Ecuador's pursuit of an Article 21.5 panel merely confirms the point made by the *Bananas* arbitrator that Article 21.5 is always available to parties not wishing to suspend concessions with the benefit of the negative consensus rule, and that pursuit of suspension pursuant to Article 22 without an Article 21.5 panel would not deny effect to Article 21.¹⁷⁷

46. Finally, the EC neglects to mention its own decision in the *EC -- Hormones* dispute to participate in Article 22.6 proceedings on the level of suspension proposed by the United States, and *without* insisting on Article 21.5 proceedings to confirm its non-compliance.

47. Thus, the *Aircraft* and *Leather* examples are inapplicable because the SCM Agreement provided authority to extend deadlines, while the *Salmon* and *Ecuador Bananas* examples merely stand for the proposition that Members may waive their rights in a particular dispute. As noted, Canada's actions in *Salmon* in fact support the U.S. position that Article 21.5 is not a prerequisite to a request for suspension, and that such a request must be made within 30 days of the expiry of the reasonable period in order to preserve one's rights to suspend concessions with the benefit of the negative consensus rule.

Q19: What exactly is involved from an administrative perspective in the withholding of liquidation and the related requirements for bonds? What alternative types of instruments does Customs accept for the posting of bonds?

48. Again, the term "withholding liquidation" has no legal significance under U.S. law, and no such action was taken in this regard on, or effective on, March 3, 1999. The normal liquidation cycle for the U.S. Customs Service is between 314 days and one year. This merely means that Customs makes its final determination of duties and other fees during that period, and bills or refunds importers (or liquidates their entries as entered) accordingly. The alternatives to surety bonds are set forth in 19 CFR § 113.40. Essentially, in lieu of surety bonds, the port director may accept U.S. money, U.S. bonds (other than U.S. savings bonds), U.S. certificates of indebtedness, Treasury notes or Treasury bills, in an amount equal to the amount of the bond.

Q20: How many of such bonds (and for how much and for which products) were posted during the period between 3 March and 19 April 1999?

49. As previously described, such bonds were required for 100% of formal entries of all goods from commercial sources, regardless of country of origin, both before, during and after the period 3 March to 19 April 1999. Normal bonding levels are set forth in the 1991 Customs Directive provided at U.S. Exhibit 4, and are described in response to question 2. The requirements applicable for most of the EC products listed in the Customs instructions (see U.S. Exhibit 7) announcement were as follows: a single transaction bond in the amount of the entered value of the merchandise,¹⁷⁸ or a continuous entry bond in the amount of 10% of the entered value of the merchandise which the importer imported during the previous year. The value of imports of all listed products for the months of March and April (including March 1-2 and April 20-30) was approximately 42 million dollars. The

¹⁷⁷ See Article 22.6 Arbitration, para. 4.11; discussion *supra* at paras. 30-31.

¹⁷⁸ described in response to Question 2, certain products are subject to single transaction bond levels of three times the entered value of the merchandise because they are subject to requirements of other agencies, such as the public health and safety requirements of the Food and Drug Administration. For such products, the March 3 action did not change single transaction bond levels.

value of the products subject to the changed bonding requirements was the fraction of those imports entered between March 3 and April 19.

Q21: Please provide statistics on the level of trade between the EC and US by each listed product in 1997, 1998 and 1999 on a monthly and calendar year basis.

50. Please see U.S. Exhibit 5. As is clear from those figures, the additional bonding requirements did not, as the EC asserts, "effectively stop the trade in the affected products as from 3 March 1999."¹⁷⁹

Q22: If a bond is required and then duties are never assessed or assessed at a lower level, what level of interest does the Customs Service pay to the importer?

51. Customs is authorized and required to pay interest on excess duties, fees and taxes deposited by an importer. No interest would be paid on an additional bond requirement or an increased bond amount.

Q23: Following the reduction in the authorized level of suspension of concessions on 19 April 1999, were the EC importers reimbursed for any additional costs? If so, how? How, if at all, did you compensate importers/exporters that were inhibited from trading prior to 19 April?

52. There was no government reimbursement for any fees which private sureties may have charged U.S. importers of the listed products as a result of the additional bonding requirements. The additional bonding requirements did not result in additional payments to the government.

Q24: What is the average period of delay for liquidation for these types of products?

53. Liquidation of these products was based on the normal liquidation schedule applicable to all commercial goods entering the United States, between 314 days and one year.

Q25: What are the exact differences in US internal law between the ordinary and standard customs practice for imports and what was decided on 3 March 1999 with regard to those listed imports? Please elaborate on every single difference.

54. As described in response to question 2, for entries of the listed goods entered or withdrawn from warehouse for consumption on or after March 3, U.S. Customs reviewed the sufficiency of the bond and required a single transaction bond in the amount of the entered value of the merchandise,¹⁸⁰ or a continuous entry bond in the amount of 10% of the entered value of the merchandise which the importer imported during the previous year. These amounts differed slightly from the bonding levels applicable to other entries, a typical example of which is provided in response to question 2. All bonding levels are set forth in the Customs Directive provided in U.S. Exhibit 4.

55. Apart from this change in the bonding levels, no other changes were made in the ordinary procedures applied to imported goods. All goods were subject to the normal liquidation period (i.e., between 314 days and one year).

¹⁷⁹ *E.g.*, EC Oral Statement, para. 7.

¹⁸⁰ As described in response to Question 2, certain products are subject to single transaction bond levels of three times the entered value of the merchandise because they are subject to requirements of other agencies, such as the public health and safety requirements of the Food and Drug Administration. For such products, the March 3 action did not change single transaction bond levels.

Q26: On what domestic legal authority did the USTR rely to require the Customs Service to begin the suspension of liquidation? Was this an administrative action that could be done at any time?

56. As described earlier, no suspension of liquidation was required or occurred as a result of the March 3 action. With respect to the revision of bonding levels, as described at paragraph 33 and note 33 of the U.S. First Submission, 19 CFR § 113.13 provides port directors with authority to require additional bonding or additional security to ensure that the acceptance of an entry will be adequately protected against any duties or other liabilities imposed by law. This discretionary authority may be exercised at any time when Customs becomes aware of a risk that normal bonding requirements will be inadequate.¹⁸¹ The March 3 bonding review was implemented by Customs in response to the fact that the goods in question might, upon DSB authorization, be subject to a substantially higher rate of duty. USTR had informed Customs of this risk.

Q27: Please provide copies of the legislative authority and related regulations upon which USTR and the Customs Service relied.

57. 19 CFR § 113.13 is provided at U.S. Exhibit 6.

Q28: Did the US really need to be able to calculate the level of duties between 3 March and 19 April in order to preserve its rights to eventually impose suspension of concessions or other obligations? How exactly was the ability of the US to suspend concessions or other obligations impaired by not withholding liquidation on 3 March?

58. Again, the United States did not take action on March 3 to "withhold" or "suspend" liquidation. The only action taken was to revise bonding levels for certain imports. In the absence of these changes in bonding levels on entries between March 3 and April 19, this merchandise would have been released into the United States with bonds inadequate to cover the full amount of duties that might ultimately be authorized by the DSB. Because of this, and because estimated duty payments during the period March 3 to April 19 were made at the MFN rates normally in effect, Customs would not have had adequate recourse against either the surety or the merchandise in the event that the importer failed to pay the difference between the estimated duties and the duties ultimately authorized by the DSB.

Q29: On what products did the US begin suspension of liquidation as of 3 March 1999? On what principles were the listed products selected? Which were the products that were dropped after 19 April 1999 and on what basis?

59. The United States did not "suspend" or "withhold" liquidation on any products as of March 3, 1999. The United States revised bonding requirements. The list of products subject to the revised bonding requirements is set forth at U.S. Exhibit 7. The products were selected based on the principles set forth in DSU Article 22.3. Products were dropped from the final list in order to ensure that duties would be assessed at a level equivalent to the level of nullification or impairment calculated by the Article 22.6 arbitrator and authorized by the DSB. The items dropped from the final list are indicated in U.S. Exhibit 7.

¹⁸¹ The 1991 Customs Directive provided in U.S. Exhibit 4 also discusses the role of risk evaluation in setting bonding levels.

Q30: What is the total annual level of EC exports to the US for 1997, 1998 and 1999 calendar years?

60. The total annual level of U.S. imports from EC member States was as follows:

1997: 157.5 billion dollars

1998: 176.4 billion dollars

1999 (first ten months): 159.8 billion dollars.

Q31: What were/are the tariff bindings and the applied rates on the listed imports in the absence of the 3 March decision?

61. The applied rates on the listed imports (which are also the bound rates) are provided in U.S. Exhibit 7. These rates were not changed by the March 3 decision. Had no further action been taken on April 19, 1999, each and every entry of a product subject to the revised bonding requirements would have been liquidated at these rates.

Appendix 2.5
Rebuttal Submission of the United States (including its cover letter)
(21 January 2000)

Dear Chairman:

Attached is the second submission of the United States in the dispute United States - Import Measures on Certain Products from the European Communities.

Part II of this submission addresses the issue of the scope of the Panel's term of reference. This issue, which was only identified at the first substantive meeting of the Panel, is of great significance. Accordingly, the United States respectfully requests the Panel to clarify, prior to the outset of the second substantive meeting, the measures that it considers to be within the Panel's terms of reference so that the United States may, in accordance with basic due process concerns, have full knowledge of the measures at issue and an adequate opportunity to respond to all of the claims made against all U.S. measures that may be the subject of the Panel's report. Had this issue been identified at the outset, the United States would have requested a preliminary ruling pursuant to paragraph 11 of the Panel's working procedures. It is no less important now that this issue be clarified promptly.

A copy of this submission and request for a preliminary ruling has been provided directly to the European Communities.

Sincerely,

Rebuttal Submission of the United States

I. INTRODUCTION

1. While the EC is correct that the facts of this case are straightforward, it is incorrect as to the facts. On March 3, 1999, the day after the Article 22.6 arbitrator in *Bananas* was required by the DSU to complete its work, the United States decided to modify bonding requirements on certain EC entries. The United States took this step to preserve its ability to collect any duties which might ultimately be authorized by the DSB as a result of the EC's failure to comply with the DSB's rulings and recommendations in *Bananas*. The bonding requirements did not increase the duty liability on those entries. The EC on March 4 requested consultations on the March 3 decision, and ultimately requested the establishment of this Panel based on those consultations, thereby limiting the measure under dispute to the March 3 bonding requirements. The Panel's task in this proceeding is to make findings on whether the EC has met its burden of demonstrating that the March 3 bonding requirements are inconsistent with GATT 1994 Articles I, II, VIII and XI. Because the EC has failed to meet this burden, the Panel must find that the March 3 bonding requirements are not inconsistent with these articles, nor with DSU Articles 22.6 and 23.2(c).

2. The Panel should also reject the EC's DSU Article 3 and 21.5 claims. In this dispute, the EC seeks to have the Panel declare *ultra vires* the work of the Article 22.6 arbitrator in *Bananas* based on arguments on the relationship between DSU Articles 21.5 and 22 it has presented in four prior proceedings. Time after time, panels and arbitrators have turned down or rejected these EC arguments. This Panel should as well.

II. THE ONLY MEASURE WITHIN THE TERMS OF REFERENCE IS THE U.S. DECISION TO INCREASE BONDING REQUIREMENTS.

3. The EC has attempted throughout this proceeding to avoid identification of the specific U.S. measure it is challenging. Its reasons are easily understood: it has based its arguments on an

erroneous understanding of what actions the United States actually took on March 3, and any recognition of this on its part would undermine its claims. Further, the EC hopes to obtain Panel findings on measures which are not part of the terms of reference of this dispute. The Panel must reject these EC efforts at obfuscation, confirm that the only measure within the terms of reference of this dispute is the U.S. modification to bonding requirements, and base its findings on a determination of whether the EC has met its burden of demonstrating that this measure is inconsistent with the WTO provisions identified in the EC's panel request.

4. The terms of reference provide for this Panel to examine "the matter referred to the DSB by the European Communities in" document WT/DS165/8.¹⁸² That document is the EC's 11 May 1999 request for the establishment of this Panel. There, the EC identified the measure as

the U.S. 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 This measure includes administrative provisions that foresee, among other things, the posting of a bond to cover the full potential liability.¹⁸³

5. The EC panel request followed its request for consultations of 4 March 1999, which described the measure using similar language:

the U.S. decision, effective as of 3 March 1999, to withhold liquidation on imports from the EC of a series of products ..., together valued at over \$500 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 According to information provided by the United States Trade Representative (USTR), this measure includes administrative provisions which foresee, among other things, the posting of a bond to cover the full potential liability.¹⁸⁴

6. As described in the U.S. First Submission, Oral Statement and Responses to Panel and EC Questions,¹⁸⁵ the EC's reference to "withhold[ing] liquidation" does not describe any U.S. "decision, effective as of 3 March 1999." The term "withhold liquidation" has no legal significance in U.S. law, and the United States neither "suspended" nor "extended" liquidation with respect to entries of any of the listed products referenced in the EC's panel request.¹⁸⁶ The United States continued to apply its normal 314-day liquidation cycle with respect to these products. Inasmuch as that 314-day liquidation cycle is not a "decision, effective 3 March 1999,"¹⁸⁷ it cannot, under any interpretation, be considered to fall within the terms of reference of this dispute.

7. Likewise, the bonding requirements normally imposed by the U.S. Customs Service cannot be considered part of the measure subject to this dispute. The requirement that importers post bonds has been part of Customs practice for decades, and the specific bonding requirements now in force were

¹⁸² WT/DS165/9.

¹⁸³ See WT/DS165/8.

¹⁸⁴ See WT/DS165/1.

¹⁸⁵ See U.S. First Submission, para. 34; U.S. Oral Statement, para. 11; U.S. Responses to Panel and EC Questions, responses to questions 7, 8, 19, 25, 28, 29.

¹⁸⁶ The terms "extend liquidation" or "suspend liquidation" are explained in paragraph 14 and note 5 of the U.S. Responses to Panel and EC Questions.

¹⁸⁷ The 314-day liquidation cycle was instituted on May 26, 1997. See Memorandum dated May 26, 1997, file number ENT-1 FO:TC:C:E AD to all interested parties, <http://www.cebb.customs.treas.gov/public/cgi/cebb.exe?mode=fi&area=13&name=T-ENTRY5.TXT>(U.S. Exhibit 2).

established in 1991.¹⁸⁸ They did not result from any "decision, effective 3 March 1999." In its submissions, the EC appears to recognize that the normal bonding requirements of the United States are not part of this dispute, and at times does not appear to be challenging them. For example, the EC at paragraph 16(d) of its first written submission purports to set forth the bonding requirements imposed by the measure at issue, then states in paragraph 17 that these requirements "entailed a burden *additional* to what was required by the US customs authorities in application of ordinary customs duties."¹⁸⁹ Likewise, in its replies to Panel and US questions, the EC in its clarification of paragraph 16(d) refers to the "*increased* charges and costs for importers ... calculated on the basis of a duty in excess of the bound rate,"¹⁹⁰ suggesting that it is not challenging any charges and costs it claims might exist with respect to bonding requirements normally in effect. For the reasons described below in Section III.B, the United States denies that there are charges or costs within the meaning of GATT 1994 Articles II:2(c) and VIII:1 associated with either normal bonding requirements or those additional requirements nominally imposed on March.¹⁹¹ Nevertheless, the distinction the EC appears to be drawing is evidence that it does not consider the normal bonding requirements of the United States to be part of the measure in dispute.

8. On the other hand, the EC has refused to respond to the invitation in the U.S. question to the EC to draw a tenable distinction between the changed bonding requirements of March 3 and the normal bonding requirements in the United States, since its arguments would implicate both.¹⁹² The U.S. question was directed at the fact that the EC's argument that bonding requirements are a prohibited "other charge" would, if accepted, render all such bonding systems, in the United States and elsewhere (including the EC), a WTO violation. Instead of addressing this issue, the EC vaguely responded, "this question is based on an artificial distinction between different 'actions', with which the EC does not agree." Given the possible implication that the EC believes that the normal bonding requirements of the United States are subject to this dispute, the Panel should clarify that this is not the case, and base its analysis on the fact that only the additional bonding requirements imposed on March 3 are within the terms of reference.

9. The Panel should also reject the EC's attempt to ascribe to the March 3 bonding requirements legal or practical impacts they simply did not have. Thus, the Panel must reject the EC's unsupported assertions that the measure "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"¹⁹³ or that the effect of the measure was "to deprive as from 3 March 1999 the importers of their right of importing those products subject to a duty not exceeding the tariff bound under the US Schedule of tariff concessions."¹⁹⁴ As the United States has explained from the outset of this dispute,¹⁹⁵ the March 3 bonding requirements did not create any additional duty liability. Had the United States taken no further action on April 19 following DSB authorization, each and every entry subject to the changed bonding requirements would have been liquidated at the MFN, entered rate.

¹⁸⁸ See Customs Directive Regarding Monetary Guidelines for Setting Bond Amounts (U.S. Exhibit 4).

¹⁸⁹ EC First Submission, para. 16(d), 17 (emphasis added).

¹⁹⁰ EC Replies to Panel and US Questions, at 6-7 (reply to U.S. question) (emphasis added).

¹⁹¹ By way of clarification, while the United States announced the increased bonding requirements on March 3, the Customs instructions to increase bonding requirements were actually issued on March 4, and were effective for entries from that date.

¹⁹² See U.S. Question to the EC; EC Responses to Panel and US Questions, at 6-7.

¹⁹³ WT/DS165/8.

¹⁹⁴ EC Oral Statement, para. 7. Similarly, and equally incorrectly, the EC asserts that as a result of the March 3 bonding requirements, "the importer was bound to pay the (prohibitive) increased duty at the time of liquidation of the customs debt." EC Oral Statement, para. 6(a).

¹⁹⁵ U.S. First Submission, paras. 31, 45; U.S. Oral Statement, para. 6; U.S. Responses to Panel Questions, paras. 10, 60.

10. An important element of the entry process is the deposit of estimated duties, which must occur at the time of entry or shortly thereafter.¹⁹⁶ A bond provides assurances to U.S. authorities that, upon liquidation, any duty not covered by those estimated duties can be collected if the importer fails to pay. This is necessary precisely because the bonding requirement itself does not impose any additional liability. Had any such additional liability existed at the time of entry, Customs would have required higher deposits of *estimated duties*.

11. Estimated duty deposits on entries from March 3 to April 19 were only in the amount of the MFN duties, because this was the only duty liability these entries were subject to. However, it was known that, as a result of DSB authorization, the duties on these entries might ultimately be higher. As a consequence, in the absence of increased bonding requirements, Customs could not have been assured that importers would pay the difference between the MFN duty deposits and any higher duties which might ultimately be authorized by the DSB. When that authorization came on April 19, the duty liability increased to 100%, and Customs began to require higher deposits of estimated duties. With such higher deposits in hand, there was no longer a gap between the estimated duty deposits and the known potential duty liability. The risk that Customs would not be able to collect the full amount of duties owed returned to normal levels,¹⁹⁷ and normal bonding requirements applied.

12. The EC confuses the effect of the U.S. March 3 action with that of action taken on April 19. However the April 19 action is not at issue in this proceeding because that measure could not have been the subject of a consultation request made on March 4. A Member may request the establishment of a Panel with respect to a measure only if it has first requested consultations on that measure.¹⁹⁸ On March 4, the measures taken on April 19 did not exist. The EC was free, after April 19, to request consultations on the April 19 measures, but chose not to. It must not now be permitted to circumvent the rules of the DSU by mischaracterizing the March 3 measures to encompass those on April 19.

13. The EC itself has long recognized and relied on the principle that dispute settlement proceedings cannot be undertaken before the measure in question has been taken. For example, the EC was insistent over the course of U.S. efforts to form an Article 21.5 panel that such a panel could not be formed because one point of its implementation, the licensing regime, had allegedly not been undertaken until late October 1998. The EC stated at the September 22, 1998 DSB meeting,

The Community was therefore not in a position to accept this point since no measures had yet been taken. Although this issue had also been subject to consultations, the Community could not accept the position of the complaining parties since legally the measures had not been taken and there was no decision on the import licensing regime.¹⁹⁹

14. The EC went so far as to threaten to block the agenda of the September 1998 DSB meeting until it received assurances that the DSB would not act on the request of the *Bananas* complaining

¹⁹⁶ Details on this and other aspects of the entry process are described at the web-site of the U.S. Customs Service at <http://www.customs.ustreas.gov/imp-exp2/pubform/import/index.htm> Excerpts from this site are provided in U.S. Exhibit 8.

¹⁹⁷ The risk under normal circumstances, after deposit of estimated duties, would be covered by the normal bonding requirements for such goods and relates to the possibility, for example, that the merchandise is misclassified or misvalued, or that the goods are found to be inadmissible because they fail to comply with U.S. health or safety requirements.

¹⁹⁸ See DSU Arts. 4.2-4.5, 4.7. Article 4.2 provides for consultations on "measures ... taken within the territory" of a Member. The EC's consultation request thus could not have been made for a measure which had not been "taken" as of March 4, namely, the April 19 actions.

¹⁹⁹ WT/DSB/M/48 (Minutes of DSB Meeting of 22 September 1999).

parties for the establishment of an Article 21.5 panel.²⁰⁰ This is how the EC managed to circumvent the DSU rule that the DSB must establish a panel in the absence of a negative consensus, a rule the EC cites in denying that it could have "blocked" the establishment of an Article 21.5 panel.²⁰¹ The EC is technically correct: it did not block panel establishment; instead, it threatened to block *all* work at the September DSB meeting, *including* panel establishment. (Its willingness to carry out such a threat was confirmed by the events of the January 27, 1999 DSB meeting.²⁰²)

15. Unlike the EC, the United States would not have claimed any right to block the formation of this Panel had it believed the EC would attempt to litigate measures not subject to a consultation request. A ruling on such issues is the responsibility of the Panel formed under multilateral rules, and not the unilateral decision of one party. Leaving aside the accuracy of the EC's claims as to whether part of its implementation measure was ripe for Article 21.5 review, or its position that the party complained against, rather than a panel, should decide that question, the EC's explanation of when a measure is ripe for panel review is accurate: if a measure has not yet been taken, it cannot be the subject of dispute settlement proceedings, including the consultations which are a prerequisite to panel establishment. The EC six years earlier also enunciated this principle, when it explained that a December 1992 meeting of the EC Council

did not in fact result in a formal decision on [its banana import] regime: the result of the debate was limited to a political orientation about some of the features of the future common market organization for bananas which still need to be formalized in the internal decision-making process of the Community institutions. The present preparatory works cannot therefore be considered as a measure under Article XXII:1 or XXIII:1 of the General Agreement allowing for formal consultations under one of these provisions."²⁰³

The April 19 measures increasing duty liability had not been taken as of the EC's March 4 consultation request, and therefore could neither have been the measure provided for in that request or in the panel establishment request which subsequently followed.

16. In its closing statement at the first substantive meeting of the Panel, the EC attempted to recast its description of its measure in the hope of drawing into this proceeding the actions taken on April 19. It stated that the matter before the Panel is "the US measure effective on 3 March 1999 on a list of products, contained in Annex 1, and confirmed for 'a subset of the products' in a 'reduced list' adopted on 19 April 1999, contained in Annex 2."²⁰⁴ This reformulation of the measure does not correspond to that in the EC's Panel or consultation requests. The EC's consultation request obviously does not reference the April 19 action, both because it had not yet been taken, and because it was not then clear how much longer the EC would succeed in delaying the Article 22 panel. Furthermore, while the EC panel request does reference the April 19 action, it describes it only as having "confirmed" the liability imposed by the March 3 decision. None of these formulations would permit

²⁰⁰ *See id.* at 1-2 ("Prior to the adoption of the agenda, the representative of the European Communities ... inquired whether ... item [4 of the agenda entitled "Recourse to Article 21.5 of the DSU by Ecuador, Guatemala, Honduras, Mexico and the United States"] had been included on the agenda for information only. *Depending on the answer he would indicate whether he could accept item 4 to remain on the agenda.*" (Emphasis added)).

²⁰¹ In its response to the Panel's question concerning the EC's repeated refusal to participate in an Article 21.5 proceeding, the EC stated that it was incorrect to assert that it blocked an Article 21.5 action. The EC explained: "the party complained against is not in a position to 'block' establishment of a panel because the decision is taken by the DSB under the 'reversed consensus' rule." EC Responses to Panel and US Questions, at 5-6 (Replies 11, 12).

²⁰² *See* WT/DSB/M/54, at 3-10; U.S. First Submission, para. 25.

²⁰³ DS38/4, cited in Analytical Index (6th ed.), at 570.

²⁰⁴ EC Closing Statement at the First Substantive Meeting of the Panel (17 December 1999).

the April 19 actions to be drawn into this dispute. The April 19 actions were not part of the EC's consultation request, and the March 3 action created no duty liability that could be "confirmed" on April 19. The Panel must reject the EC's attempt to redefine the terms of reference in this dispute.

17. The Appellate Body in *Shirts and Blouses* stated with respect to the burden of proof, "we find it difficult, indeed, to see how any system of judicial settlement could work if it incorporated the proposition that the mere assertion of a claim might amount to proof ... [T]he party who asserts a fact ... is responsible for providing proof thereof."²⁰⁵ In this proceeding, the EC has attempted, through mere assertions, to argue that the United States on March 3 took action it did not take. The United States has responded to the EC with *facts* concerning what action it did, and did not, take on March 3. The only measure at issue in this dispute is the March 3 modification to bonding requirements on certain products from the EC. The Panel should consider arguments with respect to that action only. For the reasons set forth in the U.S. First Submission and the following sections of this submission, the EC has failed to demonstrate that the March 3 bonding requirements are inconsistent with U.S. WTO obligations.

III. THE EC HAS FAILED TO MEET ITS BURDEN OF DEMONSTRATING THAT THE MARCH 3 ACTION WAS INCONSISTENT WITH GATT 1994 ARTICLES I, II, VIII AND XI

18. The burden is on the EC, as the complaining party in this dispute, to present arguments and evidence sufficient to establish a *prima facie* case in respect of the various elements of its claims. The Panel's task is to balance all evidence on the record and decide whether the EC, as the party bearing the original burden of proof, has convinced the Panel of the validity of its claims. In cases of uncertainty, i.e., when the evidence and arguments remain in equipoise, the Panel must give the benefit of the doubt to the United States as the defending party.²⁰⁶ The EC has failed to meet its burden in this dispute with respect to any of its claims.

A. THE EC HAS FAILED TO DEMONSTRATE THAT THE MARCH 3 ACTION WAS INCONSISTENT WITH GATT 1994 ARTICLE I

19. The EC has asserted that the March 3 bonding requirements are inconsistent with Article I because they allegedly discriminate between products originating in the EC and products originating in other countries.²⁰⁷ This assertion is incorrect, because the U.S. action of increasing bonding requirements merely addressed the particular risks associated with these entries, risks not present with respect to entries of other products from other countries.

20. The particular risks associated with these EC entries were the result of the EC's failure to bring its banana import regime into compliance with the DSB's rulings and recommendations by the end of the reasonable period. As a result, upon confirmation by the Article 22.6 arbitrator of the nullification of U.S. benefits and DSB authorization to suspend concessions, these EC entries would be subject to higher duties. In the absence of higher deposits of estimated duties (which Customs did

²⁰⁵ Appellate Body Report on United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India (*Shirts and Blouses*), adopted 25 April 1997, WT/DS33/AB/R, at 14.

²⁰⁶ Appellate Body Report on *EC – Measures Affecting Meat and Meat Products (Hormones)*, adopted 16 January 1998, WT/DS26/AB/R, WT/DS48/AB/R, para. 109; *see, also, Shirts and Blouses*, WT/DS33/AB/R, at 16 ("a party claiming a violation of a provision of the WTO Agreement by another Member must assert and prove its claim"); and Appellate Body Report on *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, adopted 16 January 1998, WT/DS50/AB/R, para. 74 (noting that the Panel had "properly requir[ed] the [complaining party] to establish a *prima facie* case" before proceeding to the next step of its evaluation of the claim at issue); Panel Report on *Sections 301-310 of the Trade Act of 1974*, WT/DS152/R, para. 7.14 (22 December 1999).

²⁰⁷ EC First Submission, para. 16(a).

not collect because the liability on these entries remained at MFN rates), Customs faced the risk that existing bonds would not provide sufficient recourse if importers refused to pay the difference between estimated duties and the higher duties which might ultimately be assessed. Thus, in imposing different bonding requirements on these entries, the United States did no more than respond to the special risks associated with these entries.

21. Finally, the United States notes that, even if the Panel were to consider the March 3 bonding requirements to provide different treatment to entries of certain products from the EC than those of other Members, notwithstanding the particular risks associated with these EC entries, only the requirements applied to continuous entry bonds could even arguably be viewed as less favorable. As described in response to EC question 2 and panel question 20, the single transaction bond requirements applied to the listed products were actually lower than those applied to normal entries for most of the products, and the same for others.²⁰⁸

22. However, the Panel should, together with the EC's other claims, reject the EC's argument that the March 3 bonding requirements provided EC entries with treatment different and less favorable than that accorded product of other Members. The March 3 bonding requirements were consistent with GATT 1994 Article I.

B. THE EC HAS FAILED TO DEMONSTRATE THAT THE MARCH 3 ACTION WAS INCONSISTENT WITH GATT 1994 ARTICLES II AND VIII

23. The March 3 bonding requirements either do not impose an "other charge" within the meaning of GATT 1994 Articles II:1(b) and VIII:1, or, if they do, these charges are "commensurate with the cost of services rendered," and thereby permitted under Articles II:2(c) and VIII:1. Under either interpretation, the March 3 bonding requirements are not inconsistent with these provisions.

24. As described above, the only measure within the terms of reference of this dispute is the March 3 change in bonding requirements. The normal bonding requirements of the United States are neither within the terms of reference of this dispute, nor does it appear that the EC is challenging these requirements.²⁰⁹ Nevertheless, the EC has failed to draw a tenable distinction between the changed bonding requirements of March 3 and the normal bonding requirements in the United States and numerous WTO Members, including several EC member States.²¹⁰ In simply arguing that such bonding systems impose "other charges" inconsistent with Articles II and VIII because there may be costs associated with obtaining the bonds,²¹¹ the EC would, presumably unintentionally, implicate all bonding systems.

²⁰⁸ As described in response to questions 2 and 20, products subject to requirements of agencies such as the Food and Drug Administration were subject to a single transaction bond rate of three times the entered value of the merchandise, regardless of whether it was a listed product. Products not subject to such other agency requirements are normally subject to a single transaction bond requirement of the entered value of the merchandise plus any duties, taxes and fees for the entry, while single transaction bonds for listed products from the EC had only to be in the amount of the entered value of the merchandise.

²⁰⁹ See discussion in Section II at paras. 7-8 regarding the terms of reference, and the EC's argument that it is challenging the "additional" burden allegedly created by the March 3 action and the "increased" charges allegedly imposed by that action.

²¹⁰ It is our understanding that at least several EC member State customs administrations (e.g., those of the United Kingdom and Germany) provide for a surety system allowing the early release of goods without final payment of duties. It is also our understanding that such systems can differ among member States (e.g., for some, a surety may only be required for goods considered to be "high risk" for compliance purposes, such as liquor and cigarettes), and that not every member State (e.g., Italy) provides for a surety system.

²¹¹ EC First Submission, para. 16(d).

25. The problem is highlighted by the U.S. question to the EC, and the EC's failure to respond. The U.S. explicitly asked the EC whether surety systems in general impose "other charges" within the meaning of Articles II and VIII, and, if so, how the EC would distinguish these from any "other charges" associated with the March 3 action. The EC refused to answer the question, merely reiterating its argument that the March 3 action imposed an "other charge" not limited to the approximate costs of administration.²¹²

26. The U.S. question pointed out that surety systems are explicitly contemplated in Article 13 of the Customs Valuation Agreement, to which the EC responded that valuation issues are not relevant to this dispute.²¹³ The EC response misses the point: the EC cannot propose a definition of "other charges" under Article II which would lead to the conclusion that surety systems in general violate Article II, since such systems are explicitly contemplated in Article 13 of the Customs Valuation Agreement. An agreement provision must not be interpreted so as to create a conflict with another provision.²¹⁴ If, merely because there may be costs associated with bonding requirements, all surety systems would impose prohibited "other charges," then the EC's interpretation of "other charges" is creating precisely such a conflict.

27. In addition to Article 13 of the Customs Valuation Agreement, surety systems are explicitly provided for in the Kyoto Convention on the Simplification and Harmonization of Customs Procedures.²¹⁵ The Convention, like the Customs Valuation Agreement, encourages the early release of merchandise, and permits the adoption of surety systems to ensure compliance with regulatory undertakings, as well as to ensure collection of any *additional* import duties and taxes that might become chargeable.²¹⁶ Thus, the Convention explicitly contemplates that, as a necessary consequence of the early release of merchandise, it might become necessary to impose bonding requirements to ensure collection of duties beyond those for which an importer might be liable based on information at the time of entry, and which might become due as a result of events subsequent to entry.²¹⁷

28. In light of the specific provision for surety systems both in the Customs Valuation Agreement and the Kyoto Convention, this Panel should find that surety systems used by customs authorities to ensure collection of duties, taxes and fees and compliance with other importer undertakings following the release of merchandise are not "other charges" within the meaning of GATT Articles II and VIII. The facts concerning the full range of surety systems employed by Members in connection with the early release of goods is not before the Panel, and the Panel should avoid findings which could have

²¹² EC First Submission, para. 16(d); EC Response to Panel and US Questions, at 6-7 (Reply to U.S. question).

²¹³ EC Responses to Panel and US Questions, at 6-7.

²¹⁴ See, e.g., Panel Report on *Indonesia – Certain Measures Affecting the Automotive Industry*, adopted 23 July 1998, WT/DS54/R, WT/DS55/R, WT/DS64/R, WT/DS69/R, para. 14.28 (the panel stated, "we recall first that in public international law there is a presumption against conflict.[footnote omitted] This presumption is especially relevant in the WTO context [footnote omitted] since all WTO agreements, including GATT 1994 which was modified by Understandings when judged necessary, were negotiated at the same time, by the same Members and in the same forum.").

²¹⁵ Kyoto Convention on the Simplification and Harmonization of Customs Procedures, (done at Kyoto on 18 May 1973 and entered into force on 25 September 1974), Annex B.1, 59-61 (on the release of goods) (*Kyoto Convention*) (U.S. Exhibit 9). The Convention Members include [virtually all] WTO Members. The Convention is a relevant rule of international law applicable in the relations between the Members, and is therefore relevant to the interpretation of a WTO Agreement provision, such as the meaning of "other charges" under GATT 1994 Articles II and VIII. Vienna Convention on the Law of Treaties, Art. 31.3(c).

²¹⁶ *Kyoto Convention*, Annex B.1, 59-61.

²¹⁷ Similarly, the International Chamber of Commerce International Customs Guidelines provide in Guideline 19 that a modern, efficient and effective customs administration: "19. operates a corporate surety bonding system, or other appropriate means, such as a duty- and tax-deferral system, to protect the revenue and ensure compliance with customs laws without unnecessarily delaying the release of goods." ICC International Customs Guidelines, www.iccwbo.org/home/statements_rules/rules/1997/customsdoc.asp (10 July 1997).

unintended consequences on these trade-enhancing measures. The Customs Valuation Agreement and Kyoto Convention provide for surety systems precisely because these are acknowledged to be a necessary component of customs systems which allow release of merchandise in the shortest possible time.

29. The bonding requirements imposed by the United States do not entail any payments to the United States Government. Rather, importers must provide evidence that they have obtained either single transaction bonds or continuous entry bonds (or cash in lieu of surety on a bond) for the entry or entries in question. These bonds are obtained from private surety companies, who charge the importers based on the risk involved with the transaction. That risk can relate either to the credit-worthiness of the importer, or to the nature of the merchandise being imported. While the actual costs charged by surety companies will vary for these and other commercial reasons, the typical cost for a single transaction bond would be \$3.50 per thousand dollars of bond value (0.35%), while the typical cost for a continuous entry bond would be \$10-20 per thousand dollars of bond value.²¹⁸

30. If, on the other hand, the Panel concludes that surety systems providing for the early release of merchandise impose an "other charge," the Panel must also conclude that costs associated with the March 3 bonding requirements are "commensurate with the cost of services rendered" and "limited in amount to the approximate cost of services rendered,"²¹⁹ and thus justified under Article II:2(c) and Article VIII:1.²²⁰ Again, the Panel must not make findings which would render Article II violations the surety systems contemplated in the Valuation Agreement and the Kyoto Convention.

²¹⁸ These costs are only approximate values based on informal inquiries and could vary widely depending on the parties to the transaction.

²¹⁹ The panel in *Customs User Fee* concluded that differences in wording between Article II:2(c) and VIII:1 were not intended to have a different meaning, but merely resulted from the different paths by which the provisions entered the GATT 1947. Panel Report on *United States – Customs User Fee*, adopted 2 February 1988, BISD 35S/245, 275, para. 75.

²²⁰ The service in question is the early release of merchandise into the United States. As indicated in the U.S. First Submission, such early release of the merchandise can come within hours of its arrival, whereas estimated duties are not routinely deposited until 10 working days (or two weeks) later. Prior to the widespread use of early release, U.S. importers frequently paid dock storage charges, had higher administrative costs for obtaining release of their goods and other increased costs associated with their inability to use "just-in-time" inventorying.

The cost to Customs of early release is the risk that duties, taxes and fees will not be paid, or that the entries violate quota or other regulatory requirements. In part, this risk relates to the total value of the potential liability in the transaction (e.g., duties, other fees, or liquidated damages.) It also relates to the credit-worthiness of the importer. For example, continuous entry bonds will, by definition, be used by importers with a history of importations establishing a credit history. By tying bonding requirements to the level of risk associated with the entries, Customs is "charging" importers based on the cost of early release.

The March 3 action responded to the higher level of risk associated with imports of listed products from the EC. The particular risks associated with these EC entries, were, as described in earlier submissions (*See* U.S. Responses to Panel and EC Questions, para. 8; U.S. Oral Statement, paras. 4-6), the result of the EC's failure to bring its banana import regime into compliance with the DSB's rulings and recommendations by the end of the reasonable period. As a result, upon confirmation by the Article 22.6 arbitrator of the nullification of U.S. benefits and DSB authorization to suspend concessions, these EC entries would be subject to higher duties. In the absence of higher deposits of estimated duties (which Customs did not collect because the liability on these entries remained at MFN rates), Customs faced the risk that existing bonds would not provide sufficient recourse if importers refused to pay the difference between estimated duties and the higher duties which might ultimately be assessed. Thus, in imposing different bonding requirements on these entries, the United States did no more than respond to the special risks associated with these entries, and the additional bonding requirements were an appropriate "charge" commensurate with this cost to Customs.

31. Nevertheless, as the United States has demonstrated, the Panel should find that surety systems used in connection with the early release of merchandise are not "other charges" within the meaning of Articles II and VIII, or should decline to make findings with respect to these claims if not necessary to resolve this dispute.

C. THE EC HAS FAILED TO DEMONSTRATE THAT THE MARCH 3 ACTION WAS INCONSISTENT WITH GATT 1994 ARTICLE XI

32. The EC merely asserts that the effect of the March 3 bonding requirements was to "effectively stop trade in the affected products as from 3 March 1999,"²²¹ and on this basis asks the Panel to find that the requirements are inconsistent with Article XI.²²² The EC argument with respect to GATT Article XI constitutes "mere assertion,"²²³ and falls woefully short of meeting the EC's burden with respect to this claim.

33. Even were the Panel to conclude that the March 3 action is not an "other charge," the EC has failed to meet its burden of demonstrating that the action is inconsistent with Article XI. The EC's sole argument in this connection is its assertion that the March 3 action "effectively stopped trade." As a factual matter, this is simply incorrect, as the United States explained in response to question.²²⁴ U.S. Exhibit 5 demonstrates that a substantial trade in listed products continued after March 3. In particular, if the impact of the March 3 action is segregated from that of the April 19 action, the figures indicate there was little if any impact from the March 3 action. This is clear from an examination of the nine-month import values for products not included on the final list (see U.S. Exhibit 10). The 1998 total imports of these products totaled \$213,991,343, while the 1999 figure was \$212,574,917.

34. The EC's argument with respect to Article XI thus consists of a single, inaccurate assertion. For this reason, the Panel should find that the EC has failed to meet its burden with respect to this claim, if the Panel concludes that the March 3 action falls within the scope of Article XI and is not excluded because it is an "other charge."

35. As a technical matter, if one were to assume for the sake of argument that the EC were correct that the March 3 bonding requirements impose a "charge" under Article II or VIII, then these bonding requirements cannot, by definition, be subject to Article XI, which explicitly only covers prohibitions or restrictions "other than duties, taxes or other charges." To the extent this Panel were to find that the March 3 action constitutes an "other charge" -- whether or not within the meaning of Articles II and VIII, and whether or not meeting the requirements of Article II:2(c) -- the March 3 action cannot fall within the scope of Article XI.

IV. THE EC HAS FAILED TO MEET ITS BURDEN OF DEMONSTRATING THAT THE MARCH 3 ACTION WAS INCONSISTENT WITH DSU ARTICLES 23.2(C) AND 22.6

36. In its oral statement at the first panel meeting, the EC for the first time identifies the provision of DSU Article 23 it claims the U.S. has violated, Article 23.2(c).²²⁵ DSU Article 23.2(c) requires that

²²¹ EC Oral Statement, para. 7.

²²² *E.g.*, EC First Submission, para. 16(c); EC Oral Statement, para. 23.

²²³ The Appellate Body in *Shirts and Blouses* stated with respect to the burden of proof, "we find it difficult, indeed, to see how any system of judicial settlement could work if it incorporated the proposition that the mere assertion of a claim might amount to proof ... [T]he party who asserts a fact ... is responsible for providing proof thereof." Appellate Body Report on *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India (Shirts and Blouses)*, adopted 25 April 1997, WT/DS33/AB/R, at 14.

²²⁴ See U.S. Responses to Panel and EC Questions, para. 50.

²²⁵ EC Oral Statement, para. 15.

a complaining party follow Article 22 procedures and obtain DSB authorization before suspending concessions or other obligations. Similarly, DSU Article 22.6, last sentence, requires that concessions or other obligations not be suspended during the course of the arbitration. Inasmuch as the EC has failed to demonstrate that the March 3 bonding requirements are inconsistent with GATT 1994 Articles I, II, VIII or XI, it has failed to demonstrate that these requirements involved a U.S. suspension of concessions or other obligations. Thus, the EC has failed to meet its burden of demonstrating that the March 3 bonding requirements were inconsistent with either DSU Article 23.2(c) or DSU Article 22.6, last sentence.

V. THE EC HAS FAILED TO MEET ITS BURDEN OF DEMONSTRATING THAT THE MARCH 3 ACTION WAS INCONSISTENT WITH DSU ARTICLE 21.5

37. The EC is asking this Panel to make findings it should not and need not make: that Article 21.5 proceedings must precede an Article 22 request for suspension of concessions. This is now the fifth time the EC is seeking to have a panel legislate on this point, to "add to" and "diminish" the rights and obligations of Members in violation of DSU Article 3.2. No previous panel has accepted the EC's invitation to legislate, and this Panel must decline to do so as well.

38. The EC in its January 13 answers makes explicit that, as the United States pointed out in its January 13 submission,²²⁶ the EC's goal is to have this Panel declare the work of the *Bananas* Article 22.6 arbitrator, and the DSB-authorized suspension of concessions which followed, illegitimate and illegal, a violation of DSU rules. According to the EC,

An implicit assessment by the arbitrator under Article 22.6 of the compatibility of a measure with a covered agreement would usurp the task of a panel under Article 21.5 of the DSU and thus, if an arbitrator were to make such an assessment, the arbitrator would act *ultra vires*.²²⁷

Yet the Article 22.6 arbitrator in *Bananas* concluded that such an implicit assessment of compatibility was, necessarily, part of its task, and undertook such an assessment.²²⁸

39. The aim of the dispute settlement mechanism is "to secure a positive solution" to a dispute;²²⁹ it is not to seek repeated justification for a Member's efforts to delay and obstruct the consequences of its non-compliance with DSB rulings and recommendations, nor to seek the condemnation by one panel for the work of another for the political benefits this might offer. Having failed before the two *Bananas* Article 21.5 panels, the *Bananas* Article 22.6 arbitral panel, and the *Section 301* panel to justify its position on the relationship between Article 21.5 and 22, the EC now comes before this Panel. Presumably, if this Panel as well does not accept the EC's reasoning, the EC will ask yet another panel to ignore or reject *this* Panel's work. One hopes for early agreement on appropriate amendments to the DSU considered in the DSU Review last year, which would completely rewrite Article 21.5 procedures, so that the Members can formally declare this issue moot and put behind them once and for all the EC's seemingly unending attempts to justify its delaying tactics in *Bananas*.

40. The United States will not repeat in full its arguments on why this Panel must not make findings with respect to Article 21.5 which would preempt the DSU Review negotiations, amend or adopt an interpretation (functions which may be performed only by the Members), or add to or

²²⁶ U.S. Responses to Panel and EC Questions, paras. 19-20.

²²⁷ EC Replies to Panel and US Questions, at 4 (Reply 9).

²²⁸ The arbitrator stated: "we cannot fulfill our task to assess the *equivalence* between the two levels [of nullification or impairment and of the proposed suspension] before we have reached a view on whether the revised EC regime is ... fully WTO consistent." *Article 22.6 Arbitration*, para.4.8.

²²⁹ DSU Art. 3.7.

diminish the rights and obligations of Members. Instead it refers the Panel to note 49 of the U.S. First Submission and paragraphs 19-23 of the U.S. Responses to Panel and EC Questions.

41. Nor will the United States fully recount again the reasoning of the Article 22.6 arbitrator on this relationship, with which the United States concurs. This reasoning can be found at paragraphs 4.10-4.15 of the *Article 22.6 Arbitration*, and is discussed at paragraphs 51-52 of the U.S. First Submission and paragraphs 32-34 and 37-39 of the U.S. Responses to Panel and EC Questions. In summary: (1) neither Article 22 nor Article 23.2(c) reference Article 21.5 proceedings at all, let alone as a prerequisite for request for, DSB authorization of, or implementation of, a suspension of concessions; (2) the EC interpretation would deny effect to the Article 22.6 right to DSB-authorization to suspend concessions with the benefit of the negative consensus rule, while the Article 22.6 arbitrator's interpretation would give effect to both Articles 21.5 and 22; and (3) the goal of multilateral determination of non-compliance is met through an examination of this question by an Article 22.6 arbitrator of whether the level of nullification or impairment is above zero.

42. Further, as discussed in response to Panel questions 9, 10 and 14, it is not necessary or appropriate in this proceeding to address the existence or non-existence of presumptions or burdens in Article 21.5 or Article 22.6 proceedings, since this proceeding is neither. The panel in the EC's Article 21.5 proceeding in *Bananas* noted, "the issue of whether a claim may be made in a particular dispute is best left for determination in that procedure."²³⁰ Likewise, the issue of burdens or presumptions in Article 21.5 and Article 22 proceedings should be left to those proceedings (or to the Members acting in the DSU Review). Moreover, as described in response to Question 10, DSU procedures are adequate to resolve questions relating to suspension of concessions following the reasonable period, without need for the concept of a "presumption" of compatibility or incompatibility.

43. For the above reasons, the Panel should not make findings on the relationship between Articles 21.5 and Article 22, nor accept the EC's interpretation of that relationship. Beyond that, however, there is no need for this Panel to make such a ruling because the EC has done no more than assert that there has been a violation of Article 21.5, without drawing any tenable link between the measure -- increased bonding requirements -- and any obligation allegedly found in Article 21.5 to resort (exclusively) to Article 21.5 proceedings in the event of a disagreement. Even under the EC's reading of Article 21.5, the measure that would presumably implicate Article 21.5 would be a decision not to resort to Article 21.5 proceedings in the event of a disagreement on compliance. However, the measure in this dispute is increased bonding requirements relating to a customs-related risk, not a decision not to pursue Article 21.5 proceedings. The EC appears to suggest that *anything* a complaining Member does while an implementation issue is pending violates Article 21.5 if that Member has not requested and completed Article 21.5 proceedings. However, the purpose of Article 21.5 is not to provide a club to a non-complying Member to distract attention from its non-compliance, it is to provide procedures to help resolve disputes.

44. The self-serving manner in which the EC has attempted to wield Article 21.5 is further highlighted by its response to the Panel's question regarding when an Article 21.5 proceeding should be requested. The EC states,

an Article 21.5 procedure cannot be requested before the time of the adoption of the implementing measure. Of course, in case of a disagreement on the existence of measures taken to comply with recommendations and rulings of the DSB it is not possible to start a 21.5 procedure before the end of the reasonable period of time.²³¹

²³⁰ Panel Report on European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 by the European Communities, WT/DS27/RW/EEC, para. 4.16 (12 April 1999).

²³¹ EC Replies to Panel and US Questions, at 3 (Reply 5).

45. Thus, according to the EC, the complaining party must resort to Article 21.5 procedures if there is a disagreement over implementation, and can be found in violation of Article 21.5 (at the discretion of the (non-)implementing Member if it desires to assert this claim), *unless* the (non-)implementing Member unilaterally determines that the measure does not exist, in which case it may veto the Article 21.5 procedure. Hence, the EC considered itself entitled to threaten to block the adoption of the agenda at the September 1999 DSB meeting at which a request by the complaining parties for an Article 21.5 panel was to be considered, because the EC considered it appropriate for it, and not the Article 21.5 panel, to decide whether the EC's implementation was ripe for review.²³² Article 21.5 makes the procedure under that article available "when there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and ruling."²³³ The EC would have the Panel create a one-sided obligation applicable only to challenging parties and not implementing parties.

46. The Panel should decline to create any such obligation, applicable to either party. It is simply not relevant to this dispute given that the measure in question is a decision to increase bonding requirements, and nothing in Article 21.5 relates to this. The EC argues that the March 3 action suspended concessions or other obligations. Issues relating to the conditions for suspension of concessions or other obligations are found in Article 23.2(c), and not in Article 21.5. The Panel must reject the EC's attempt to have this Panel condemn the work of the Article 22.6 arbitrator in *Bananas*.

VI. THE PANEL SHOULD REJECT THE EC'S UNSUPPORTED ASSERTIONS THAT THE MARCH 3 ACTION WAS UNDERTAKEN PURSUANT TO SECTIONS 305 OR 306 OF THE TRADE ACT OF 1974

47. Just as the EC is attempting to relitigate issues it lost in connection with the *Bananas* panels and arbitration, it is also seeking to relitigate issues it lost in the panel on *Sections 301-310 of the Trade Act of 1974*. The EC attempts to attribute to Section 305 and 306 responsibility for the March 3 bonding requirements, in disregard for the conclusions of the *Section 301* panel. The Panel must reject the EC's groundless assertions, which only serve to further highlight the EC's political goals in this case.

48. As described in paragraph 33 and note 33 of the U.S. First Submission and in paragraph 55 of the U.S. Responses to Panel and EC Questions, the authority for the March 3 modification to bonding requirements is found in 19 CFR § 113.13. This provision provides Customs with authority to increase bonding requirements to address risks associated with particular entries. The EC provides no evidence of any U.S. determination or action indicating that the March 3 bonding requirements were based on or compelled by Sections 305 and 306.

49. The EC argues that October and November 1998 Federal Register notices indicate that Sections 305-306 somehow forced the United States to adopt the March 3, 1999 bonding requirements, or that these provisions provided the authority for the requirements.²³⁴ However, the EC raised the very same arguments concerning the 1998 Federal Register notices in the *Section 301* panel proceeding, and the panel rejected them.²³⁵ The *Section 301* panel concluded as a factual matter that Sections 305 and 306 provide the U.S. government with discretion to await the completion

²³² See WT/DSB/M/48 (Minutes of DSB Meeting of 22 September 1999), at 1-2 ("Prior to adoption of the agenda, the representative of the European Communities ... inquired whether ... item [4 of the agenda entitled "Recourse to Article 21.5 of the DSU by Ecuador, Guatemala, Honduras, Mexico and the United States"] had been included on the agenda for information only. *Depending on the answer he would indicate whether he could accept item 4 to remain on the agenda.*" (Emphasis added)).

²³³ DSU Art. 21.5 (emphasis added).

²³⁴ E.g., EC Oral Statement, para. 10.

²³⁵ See *Section 301*, paras. 4.949-4.950.

of WTO proceedings on implementation, even if these proceedings extend well beyond 60 days after the expiry of the reasonable period.²³⁶ In other words, Sections 305 and 306 did not force the United States to adopt the March 3 bonding requirements, and even this indirect a connection between Sections 305 and 306 and those requirements cannot be drawn. The *Section 301* panel examined the factual issues in that dispute in great detail before reaching its conclusions, and this Panel should reject the EC's attempt to have this Panel summarily reject those conclusions for the purpose of advancing the EC's political goals for this dispute. The March 3 action was not taken pursuant to Sections 305 and 306, nor was it compelled by these provisions.

VII. CONCLUSION

50. For the above reasons, the United States respectfully requests that the Panel reject the EC's claims in their entirety, and find that the action taken by the United States on March 3 is not inconsistent with DSU Articles 3, 21.5, 22.6 or 23, nor with GATT 1994 Articles I, II, XI or VIII.

²³⁶ *Section 301*, paras. 7.147, 7.175, 7.181, nn.721, 722, 724. Among other conclusions, the *Section 301* panel noted its agreement with the United States that the U.S. government had discretion to delay any action decided upon for a total of 240 days following the expiry of the reasonable period, and that this "should be sufficient for the USTR to await in all cases the completion of both Article 21.5 and Article 22.6 procedures as well as DSB authorization to suspend concessions." *Id.*, n.724.

Appendix 2.6
The US Responses to Additional Questions of Panel
(8 February 2000)

Q32. The following five legal documents seem to be relevant to the Panel's examination:

- **relevant statutory provisions providing for the normal procedures for the early release of merchandise into the US, including those authorizing the director of the customs office to release merchandise into the United States in advance of liquidation, on the condition of the lodging of a bond;**
 - **the federal regulation concerning the amount of bonds (US Exhibit 6);**
 - **the Directive Concerning Monetary Guidelines for Setting Bond Amounts (the "Directive") (US Exhibit 4);**
 - **the Memorandum to Customs Area and Port Directors, CMC Directors from Director, Trade Compliance Division, US Customs Service, Regarding European Sanction, dated 3 March 1999 (the "Memorandum") (EC Exhibit VIII); and**
 - **the USTR's notification and request, as referred to in the Memorandum.**
- (a) **Please provide the text of the relevant statutory provisions, and the USTR's notification and request.**
- (b) **Please explain the relationship between the legal documents enumerated above. For example, please explain the legal basis on which the Director of the Trade Compliance Division issued the Memorandum to the customs area and port directors, and the Memorandum overrode the Directive in respect of the amount of bonds required for EC products on list, thus binding on the customs area and port directors.**
- (c) **Please briefly explain the ordinary bonding mechanism to help the Panel better understand what happened as of 3 March 1999.**

1. The relevant statutory and regulatory sections are provided in U.S. Exhibit 11, and the USTR letter to Customs in U.S. Exhibit 12. The statutory provisions include 19 U.S.C. §§ 1484, 1504 and 1623. The regulatory sections include 19 CFR §§ 142.4 and 142.12.

2. The statute and regulations do not refer to "early release" as such. Rather, they provide for release of merchandise upon filing of a bond and proper documentation, and for liquidation within a year of entry for consumption (19 CFR § 142.4(a) & 19 U.S.C. § 1504). Thus, the importer can obtain early release by Customs merely by submitting a bond and filing proper documentation. By way of comparison, a system not providing for "early release" would condition release upon final determination and payment of all duties, taxes and charges. This can take weeks or months, which is why obtaining the release of imported goods in many countries which do not have a surety system or similar type of procedure can often be a lengthy process.

3. The legal basis on which the Memorandum was issued was 19 CFR § 113.13. This regulation provides port directors with authority to require additional bonding or additional security to ensure that the acceptance of an entry will be adequately protected against any duties or other liabilities imposed by law. This discretionary authority may be exercised at any time when Customs becomes

aware of a risk that normal bonding requirements will be inadequate. USTR had informed Customs of this risk, and the Memorandum then conveyed this information to the port directors.

4. It is not accurate to describe the Memorandum as "overriding" the Directive in U.S. Exhibit 4 in respect to the amount of bonds. To the contrary, the Directive itself explains on page 3 that standard bonding amounts are to apply to entries,

unless any district director is aware that either extraordinary circumstances *or a greater risk to the government* is involved. When such extenuating circumstances are involved, the district director with such knowledge shall contact the district where the bond is filed and convey the supporting facts so that appropriate action, if required, can be taken. For example: when the amount of a continuous bond does not cover the duty on a particular shipment and the district director suspects that *a greater risk to the government is involved*, the district director shall:

1. secure, at the time of release, deposit of the estimated duty due on the shipment, or,
2. request a single entry bond for that shipment, or
3. request that a new continuous bond in a higher amount be filed.²³⁷

5. The Directive thus makes clear that, in the ordinary course of Customs operations, and in the exercise of its regulatory authority under 19 CFR § 113.13,²³⁸ it may be necessary for Customs to adjust the bonding requirements for particular entries because of particular risks associated with those entries. The particular risk associated with the entries affected by the Memorandum was that the DSB might authorize higher duties with respect to those entries, and Customs might be unable to collect such duties from importers. The letter from USTR and the Memorandum respectively informed Customs and its port directors of the risk, and indicated that the appropriate response would be changed bonding requirements (options 2 and 3 above).

6. With respect to the operation of the ordinary bonding mechanism, as discussed in previous submissions, importers obtain bonds from private surety companies. The importer presents the bond at the time of formal entry for consumption in order to obtain Customs' release of the merchandise. Importers using a continuous bond which has already been filed with Customs merely refer to the bond in their Customs documentation. On March 4, as a result of the modified bonding requirements, importers wishing to use their continuous bonds had to provide a statement to the port director that these continuous bonds were sufficient to meet the modified requirements. Some importers chose to provide the statement. Others chose to employ single transaction bonds for entries of listed products, rather than reviewing the adequacy of their continuous bonds. Customs did not undertake an entry-by-entry review of continuous bonds to ensure that they met the new requirements.

Q33. The Directive indicates that "[t]he purpose of the bond is to protect the revenue and ensure compliance". (para. 3.B) The "Guidelines for Determining Amounts of Bonds" (the "Guidelines") attached to the Directive indicates that the amount of a continuous bond shall be determined on the basis of not only applicable tariffs, but also "taxes and fees". (Section "Activity 1 – Importer or Broker - Continuous," paragraph a, page 4)

(a) Please explain whether it is possible to legally distinguish part of a continuous bond that is to guarantee the payment of tariffs, from the remaining part which is to cover "taxes and fees" and to "ensure compliance" with applicable laws and regulations. For

²³⁷ U.S. Exhibit 4, page 3 (emphasis added).

²³⁸ See U.S. Exhibit 4, page 1, 3.A ("The amount of the bond shall be set by utilizing information on the bond application prescribed in Section 113.12, Customs Regulations (CR), in conjunction with the criteria set forth in Section 113.13 CR, and the guidelines attached to this Directive.").

example, can the whole amount of a bond required for the early release of a given import be forfeited in order to cover fees (if the actual amount of fees exceeds its amount estimated at the time of determination of the amount of the bond) or any penalty or financial obligations arising from a violation of relevant laws or regulations? If not distinguishable, please explain whether such covered fees (or any other financial obligations than tariffs and taxes) are to be collected in return for "services rendered to imports" within the meaning of GATT Article VIII (assuming for the sake of argument that the bonding requirements are deemed to impose "charges" on imports within the meaning of Articles II and VIII).

7. It is not possible to legally distinguish part of a continuous bond that is to guarantee payment of tariffs from that covering taxes and fees and ensuring compliance with applicable laws and regulations. In the event of non-payment of either duties, taxes or fees, or in the event of non-compliance with laws and regulations giving rise to liquidated damages, Customs would have recourse against the bond up to the amount owed for the non-payment or non-compliance, or the full amount of the bond, whichever is less. Recourse would not be limited to some percentage of the bond amount.

8. While we do not agree that bonding requirements are charges, if, for the sake of argument, they were, they would be commensurate with the cost of services rendered, regardless of the fact that they are intended to cover financial obligations other than tariffs and taxes. As explained in the U.S. Second Submission,²³⁹ the service rendered to the importer is the early release of the merchandise, without delaying release until the amount of duties, taxes or fees are finally determined and paid, and until it has been definitively determined that other obligations have been met. The cost to Customs is the risk that it will be unable to collect any amounts owed by importers if they do not deposit estimated duties, taxes and fees, if finally assessed duties, taxes and fees differ from those deposited, or if the imported goods do not meet other agency requirements. This risk is present because the merchandise will already have been released before estimated duties, taxes and fees have been deposited, and before the full amounts owed are finally determined; there is thus no recourse against the merchandise if the importer refuses to pay. The amount of the risk (the cost to Customs) relates to the full amount which might be due, which includes more than just duties. Thus, the EC is incorrect when it asserts, "The amount of any surety deposit is determined by the anticipated duty liability and entirely depends on it."²⁴⁰ The amount of the surety deposit is in fact determined by the level of risk, which depends not only on the anticipated duty liability but on the full amount of all liabilities (taxes, fees, liquidated damages) which might accrue.²⁴¹

9. The question asks whether "covered fees" or other financial obligations are collected in return for "services rendered to imports." This would depend on the fees in question, and cannot be answered in the abstract. With respect to financial obligations in connection with other agency obligations, this too would depend on the specific obligation. Such fees and other obligations are not themselves at issue in this dispute. Nor are the normal bonding requirements which ensure payment of these fees and other obligations.²⁴² The measure in question only includes the changes to bonding requirements made on March 3 in connection with the possibility that higher duties might be assessed on certain products from EC countries. The Panel's findings on Articles II and VIII should be limited

²³⁹ U.S. Second Submission, n.39.

²⁴⁰ EC Second Submission, para. 9 (emphasis added).

²⁴¹ Likewise, as described in note 29 of the U.S. Second Submission, it is our understanding that the United Kingdom employs a surety system with respect to "high risk" merchandise such as tobacco and alcohol. This provides a good example of the fact that the risk extends beyond the mere duty owed.

²⁴² While not at issue in this dispute, we note that the Kyoto Convention provides that the importer may be required to furnish security to ensure compliance with undertakings to Customs. See U.S. Exhibit 9, Kyoto Convention, Annex B.1, 59-62.

to this measure, and made only if necessary to resolve this dispute. Our view, again, is that bonding requirements are not "other charges."

- (b) **Can the same apply to a single transaction bond, in particular, that in case where the bond in the amount of three times the entered value of imports, for example, because they are subject to any administrative requirements imposed by the Food and Drug Administration?**

10. Again, neither the penalties imposed for failure to comply with health and safety laws nor the bonding requirements normally in place to ensure compliance are within the terms of reference of this dispute. Only the changes to bonding requirements made on March 3 are within the terms of reference. Single transaction bond requirements applicable to products subject to other agency requirements, such as those of the FDA, did not change as a result of the March 3 action. Having said that, we note that the Kyoto Convention provides for customs authorities to require security to ensure compliance with undertakings and the payment of penalties for non-compliance, in order that merchandise may be released early.²⁴³

Q34. Can importers normally choose between a continuous bond and a single transaction bond for a given entry, at their discretion? Please provide your statistics or estimate on the percentage of imports (those from the EC and all imports) which were covered by continuous bonds rather than single transaction bonds before 3 March 1999.

11. Importers may normally choose between continuous bonds and single transaction bonds, at their discretion. It has not been possible in the time provided to collect data on the percentage of imports covered by continuous and single transaction bonds. We hope to have this data shortly.

Q35. Paragraphs 3 and 4 of the US Responses to Panel and EC Question, dated 13 January 2000 indicates that the amount of a continuous bond for non-EC products on list was "10% of the duties, taxes and fees paid by the importer of record for all products during the calendar year preceding the date of the bond application," while that for EC products on list was "10% of the entered value of the covered merchandise which the importer imported during the previous year." Please confirm whether the total amount of "the duties, taxes and fees paid by the importer ¼ for all products ¼" is smaller than "the entered value of the covered merchandise".

12. This would depend on the circumstances of the particular importer. For example, if the covered merchandise represented only a small proportion of the products imported during the previous year, it is possible that the duties, taxes and fees on all products might exceed the entered value of the covered merchandise included among those products. To clarify further, with respect to continuous bonds Customs gave importers of the covered merchandise the option of providing a statement that their existing continuous bonds met the new requirements, or employing single transaction bonds for the covered merchandise. Importers choosing to supplement their existing bonds to meet the new requirements did so by increasing the bond value by an amount equal to 10% of the entered value of covered merchandise included in the merchandise for which the bond was originally calculated. In other words, if the continuous bond had been calculated based on entries during the previous year valued at \$1,000,000, and \$50,000 of this was covered merchandise, the continuous bond would be supplemented by \$5,000 (10% of \$50,000). A typical amount which a private surety might charge for this additional coverage would be approximately \$50 - \$100 (based on a rate of \$10-20 per thousand dollars of bond value, as described in paragraph 29 of the U.S. Second Submission).

²⁴³ U.S. Exhibit 9, Kyoto Convention, Annex B.1, 60, n.2, 62.

Q36. Please provide the Panel with the bindings (you provided the Panel with only the applied tariffs) of all listed products on 3 March.

13. The rates provided in U.S. Exhibit 7 are the bound, as well as applied, rates.

Q37. To the EC's question "Assuming that an importer wished to clear through the US customs on 4 March 1999 a tonne of 'Uncoated felt paper and paperboard in rolls or sheets' (US HTS 4805 50 00) originating in Switzerland, what would have been the duty liability for such import on that date? What would be the answer if such a product originated in the EC?," the US answer was that the duty liability would have been based on a "free" rate of duty. Please provide the Panel with an intelligent explanation of the consequences of the 3 March decision on EC imports of listed products, such as the "Uncoated felt paper and paperboard in rolls or sheets" in comparison with a situation where the same imported products would come from Switzerland.

14. The duty liability as of March 3 would have been zero, regardless of whether the product originated in Switzerland or an EC member State. The March 3 decision had absolutely no consequences for the duty liability; it only affected the bonding requirements. As noted in the U.S. Answers to Panel and EC Questions,²⁴⁴ with respect to all products listed on March 3, in the absence of further action on April 19, each and every product would have been liquidated at the MFN, applied (and bound) rate. Because the April 19 action specified that duties were to increase for "uncoated felt paper and paperboard in rolls or sheets," entries of this product from EC countries are being liquidated at the rate of 100%.

Q38. In paragraph 5 to the US Responses, the US seems to conclude that products on the list could be imported into the US only upon the submission of a "single transaction bond" in the amount of "the entered value of the merchandises", while the products not on the list could be imported subject to more requirements, i.e. upon the submission of a single transaction bond in the amount of "the entered value of the merchandise plus any duties, taxes and fees for the entry". Is the US stating that as of 3 March 1999 the EC listed products benefitted from positive discrimination *vis-à-vis* other imports of like products from other WTO Members?

15. The single transaction bond amount for listed products was, in fact, less than that for non-listed products. This was intended to minimize the burden on importers wishing to employ single transaction bonds rather than amending their continuous bonds. Importers which normally would have employed single transaction bonds were, in fact, subject to lower bonding requirements, except for importers of listed products subject to other agency requirements, for whom the bonding requirement was three times the entered value. This requirement was unchanged by the March 3 action.

Q39. The official USTR notification (EC Annex VII) entitled "UNITED STATES TAKES CUSTOMS ACTION ON EUROPEAN IMPORTS" provides that "effective today, the US Customs Service will begin 'withholding liquidation' on imports valued at over \$500 million of selected products from the European Union (EU), consistent with US rights under the WTO Agreements. Withholding liquidation imposes contingent liability for 100% duties on affected products as of March 3, 1999"

²⁴⁴ See U.S. Answers to Panel and EC Questions, paras. 10, 60; *see, also*, U.S. Second Submission, para. 9.

Throughout its answers to the Panel's questions the US repeated that on 3 March 1999, no action with regard to "withholding or suspension of liquidation" took place. Does the US imply that as of 3 March duties on imports of listed products were indeed "liquidated" and that duties were effectively collected as of 3 March?

16. The United States wishes to clarify that Exhibit 7 is a press release, with no legal status under U.S. law. The press release's reference to "withholding liquidation" in fact is a non-technical or colloquial reference to the understanding that these entries would not be liquidated outside the normal 314-day liquidation cycle. This does not mean that duties were either "liquidated" or "effectively collected" on March 3. As explained in prior submissions, liquidation (the final determination of duties, taxes and fees) takes place between 314 days and one year after entry. At the time of liquidation, Customs has completed the process of confirming the correct amount of the duties, taxes and fees due for a given entry (including analysis of matters relating to this such as classification and valuation). If there is a difference between the estimated duties, taxes and fees deposited at entry and the finally determined duties, taxes and fees, the difference is either collected or refunded.

17. For entries between March 3 and April 19, Customs would, at liquidation, review the entries of the listed products. For products not listed on April 19, liquidation has and will occur at the entered (MFN) rate, and no further collections or refunds are necessary to supplement the MFN duty deposits provided at entry. For products listed on April 19, the correct duty rate for the entry would have been 100% of the entered value, based on the DSB authorization and the April 19 action, and the difference between estimated duty deposits at the MFN rate and the higher duty amount would be collected. Customs would have recourse against bonds for those importers not paying the difference.

18. The March 3 bonding requirements imposed no liability, effective or otherwise. They merely reduced the risk that Customs would not be able to collect additional duties if any such duties were imposed as a result of – and after – DSB authorization. In the absence of the April 19 action, each and every entry subject to changed bonding requirements would be liquidated at the entered, MFN rate – precisely because no liability was imposed on March 3.

Q40. USTR official notification of its 3 March decision anticipates a future event, the arbitrators decision, that would then lead to the US collecting 100% duties on selected EC products: "The United States will refrain from collecting higher duties until the release of the arbitrators' final decision. When the arbitration is complete, the US will assess 100% duties on selected products imported as of 3 March as necessary to offset the harm to the US interests as determined by the arbitrators". How does the US assess the legal relationship between the 3 March decision and the eventual decision of the arbitrators?

19. As explained in response to question 39, EC Annex VII is a press release with no legal status under U.S. law. It is not an "official notification." Its statement that the United States would assess 100% duties as determined by the arbitrators was merely descriptive of the arbitral process and the intentions of the United States in response to that process. If the arbitrators had determined that the appropriate level of suspension was zero, the United States would have taken no action on April 19 to assess 100% duties on any entries. In the absence of such action, each and every entry between March 3 and April 19 would have been liquidated at the entered, MFN rate. In the actual event, the arbitrators determined a level of suspension which the United States implemented through the April 19 action. As described in response to previous questions, the March 3 action did not assess any additional duty liability, nor did it result in the collection of higher duty deposits. It only changed the bonding requirements on certain entries in response to the risk that DSB-authorized higher duties might not be paid for these entries.

Q41. In paragraph 60 the US Responses, the US states "Had no further action been taken on 19 April 1999, each and every entry of a product subject to the revised bonding requirements would have been liquidated at these rates" (see also paragraph 9 of the US Rebuttal Submission). What action exactly was taken on 19 April and what is the legal relationship, if any, between the 3 March decision and the 19 April action referred to by the US and what are the legal consequences of the 19 April 1999 decision?

20. On April 19, following DSB authorization to suspend concessions, the port directors were instructed to assess 100% duties on products included in a list issued on that date. As a result, for entries from April 19, 100% duty deposits were required at the time of entry. At liquidation, such duties would be assessed. For entries between March 3 and April 19 of products listed on April 19, Customs would, at liquidation, collect the difference between MFN duty deposits and the 100% duties assessed. Entries between March 3 and April 19 of products not listed on April 19 were unaffected by the April 19 action. They would be liquidated at the entered, MFN rate. There was no legal relationship between the March 3 action (changed bonding requirements) and the April 19 action (increasing the duty rate for certain products).

Q42. If the 19 April action had not taken place, or if for the sake of arguments, the decision of the arbitrator had been that the EC new Bananas measure did not nullify nor impair the US rights, when would the importer of listed products get their bonding requirements reduced? When did the importers of products included on the 3 March list but not on the 19 April list, get their bonding requirement reduced? were they offered any compensation for the increased bonding requirement?

21. In fact, the United States restored bonding requirements to normal levels for products not included on the final list on April 14, shortly after the arbitrators completed their work and a revised list was prepared. The arbitrator's decision eliminated the additional risk that higher duties would be applicable to these particular products (and that importers might not pay). From April 19, the bonding requirements returned to normal levels for the remaining products, since entries of these products from that date were subject to 100% duty deposits, thereby reducing to normal levels the risk that these deposits would be inadequate.²⁴⁵ Thus, regardless of the decision which the arbitrators might have reached, bonding requirements would have changed to normal levels following that decision. Inasmuch as importers made no additional payments to the government in connection with the changed bonding requirements, there were no refunds to be made. We are unaware of what arrangements might have been made between the importers and the private surety companies.

Q43. What happened exactly to the importers of cookies (EU 13 HS 34060000) as of 3 March 1999 and as of 20 April 1999 with regard to all entry requirements into the United States? Have duties on imports of cookies in March been liquidated? And if so how much duty was collected on such items?

22. Importers of cookies, HS19053000, (and candles, HS3406000) were, from March 4, subject to the bonding requirements described in response to question 2.²⁴⁶ For cookies, the single transaction bonding requirement was unaffected by the March 3 action since this product was subject to health and safety requirements. The bonding requirement remained unchanged at three times the entered value of the product. (For candles, the single entry bonding requirement changed from the entered value plus duties, taxes and fees, to the entered value.) On April 14, the bonding levels for cookies (and candles) returned to normal levels. No other entry requirements changed for these products as a result of either the March 3 or April 19 actions.

²⁴⁵ See U.S. Second Submission, para. 11.

²⁴⁶ See U.S. Responses to Panel and EC Questions, paras. 3-5.

23. Attached at U.S. Exhibit 13 is a copy of Customs form 7501, the entry summary. This document is completed by importers and submitted with the estimated duties at, or shortly after, the time of entry. The importer indicates in column 34 the applicable duty rate. An importer of cookies or candles, regardless of source, would have indicated "zero" in this column. Customs would have accepted this document as accurate, and, because the rate of duty was zero, would not have required the deposit of estimated duties. Further, Customs would have liquidated the entries of these products at the entered rate of zero because nothing would have occurred between the time of entry and liquidation to indicate that this rate should be other than zero. The April 19 action changed this rate for certain products -- but not for cookies or candles and the other products omitted from the April 19 list.

24. Data on liquidated duties collected for products on the March 3 list is provided in Exhibit 14. Some liquidations have occurred. An explanation of Exhibit 14 is provided in response to question 45. For cookies and candles, any such liquidations would have been, and will be, at the MFN, entered rate – zero.

Q44. Have the tariffs on "Hand Bags (HS 42023210)" imported into the US in March 1999 been liquidated? And if so what is the value of the duties so far collected on these items? Is the collection of duties for these product dating back to 3 March?

25. Data on liquidated duties collected for products on the March 3 list is provided in Exhibit 14. Some liquidations have occurred. An explanation of Exhibit 14 is provided in response to question 45. The duties assessed would be 100% for this product, including entries dating back to March 3, as a result of the actions taken on April 19.

Q45. Could the US provide the Panel with the product-by-product data on the amount of duties collected on all listed imports as of 3 March for which duties have been liquidated?

26. Data on duties collected is provided in U.S. Exhibit 14. Customs records data for liquidated duties for entries, rather than products included on those entries. An entry may have included one or more listed products; it may also have included one or more non-listed products. As a result, it is not possible to provide the precise amount of liquidated duties collected for the products in question. Rather, Exhibit 14 provides information on the estimated duties collected for each product at, or shortly after, the time of entry. These estimated duties were at the MFN rate for all products on the March 3 list, since the March 3 action did not affect duty liability. Exhibit 14 also includes the total estimated duties collected for entries which included the listed products. Because these entries included other products, the total estimated duties collected for the entries which included the listed products is higher than the estimated duties collected for the listed product. Finally, Exhibit 14 includes the liquidated duties collected for entries which included the listed products. Where the liquidated duties for the entry precisely equals the estimated duties collected for the entry, this confirms that the liquidation occurred at the entered, MFN rates. Where these amounts are different, this may be attributable either to the fact that the entry included other products for which the duty changed as a result of the April 19 action, or it may, for example, be attributable to the fact that other products included in the entry were misclassified or misvalued. Thus, for the products omitted from the April 19 list, the total liquidated duties for the entries equaled the total estimated duty deposits for entries including pork and cheese, were slightly higher or lower for entries including plates and sweaters, and were higher by varying degrees for entries including sweet biscuits and candles. Products included on the final list indicate liquidated duties by entry higher than the estimated duties by entry in all cases.

Q46. Why was the "risk" - to which the US refers as a justification for its 3 March increased bonding requirement and which relates to the possibility of an arbitration award that would conclude that the new EC measure still nullifies and impairs the US WTO, different on 2 March than on 3 or 4 March?

27. In fact, the risk that existing bonds would be inadequate to ensure payment of DSB-authorized higher duties existed from the conclusion of the reasonable period of time, since the EC would be liable from that point for its failure to comply with its WTO obligations, subject to DSB authorization. This risk heightened from March 3 because the Article 22.6 arbitrator in *Bananas* rejected the EC's argument that the arbitrator lacked jurisdiction to proceed with its examination of the level of nullification or impairment, reached decisions on certain methodological issues, and indicated that it would focus more intensively on determining the level of nullification or impairment (once the EC provided information it had previously refused to submit).²⁴⁷ Moreover, the EC's own statements confirm that it anticipated that this level would be above zero, i.e., that it knew its allegedly "new" measure would continue to violate the EC's WTO obligations. As described at paragraph 29 of the U.S. First Submission, External Relations Commissioner Sir Leon Brittan stated following the March 2 initial decision that the arbitrators' request to the United States for a new damage estimate meant that the WTO arbitrators would likely find that damages amounted to between \$200 and \$300 million.²⁴⁸ More blunt were the comments of Industry Commissioner Bangemann, who admitted that while he had been forced to defend the EC's position, it was groundless.²⁴⁹ These factors, in combination, indicated an increased risk that the DSB would, ultimately, authorize higher duties.

Q47. In paragraph 55 of the US Rebuttal Submission, the US wrote that "USTR informed Customs of this risk". Can the US provide the Panel with a copy of such communication between USTR and Customs identifying and defining such risk and any other relevant instruction.

28. Please see U.S. Exhibit 12.

Q48. The United States argues in paragraph 35 of its Rebuttal Submission that 'assum[ing] for the sake of argument that ¼ the March 3 bonding requirements impose a 'charge' under Article II or VIII, these bonding requirements cannot, by definition, be subject to Article XI¼.' Please further elaborate the distinction between the scope of Article II and VIII, and that of Article XI, keeping in mind the bonding requirements in question.

29. Beyond the explanation provided in paragraph 35 of the U.S. Second Submission, the United States notes again that the March 3 bonding requirements did not involve any payments to or charges by the United States government. Importers were required to provide evidence that they obtained either single transaction bonds or continuous entry bonds (or provide a guarantee through a cash deposit in lieu of surety on a bond) for the entry or entries in question. Such bonds are obtained from private surety companies. Customs authorities typically impose several documentation and other requirements. Such requirements do not become "charges" merely because there may be costs associated with them.

30. The EC has cited the GATT dispute on *Minimum Import Prices (MIPs)*²⁵⁰ as supporting its view that the March 3 changes to bonding requirements should be considered "other charges."²⁵¹ The *MIPs* dispute involved the lodging of two separate securities which guaranteed that importations

²⁴⁷ See *Article 22.6 Arbitration*, paras. 2.11, 3.1-4.15, 6.27.

²⁴⁸ See *Inside U.S. Trade*, March 12, 1999, at 3.

²⁴⁹ See U.S. First Submission, para. 29 & n.29.

²⁵⁰ GATT Panel Report on EEC – Programme of Minimum Import Prices. Licenses and Surety Deposits for Certain Processed Fruits and Vegetables (MIPs), adopted 18 October 1978, BISD 25S/68.

²⁵¹ E.g., EC Second Written Submission, para. 16.

would be made in accordance with importer undertakings and that importations of tomato concentrate would be made at, or above, a minimum import price. The securities would be forfeit if the importations were not effected or if the prices for tomato concentrate were below the minimum import price.²⁵² The EC fails to mention the *MIPs* panel's conclusion that the provisions providing for forfeiture of these securities were not considered other charges subject to Articles II and VIII, since they were either a penalty for not fulfilling obligations or a mechanism for enforcing the minimum import price system.²⁵³ The sureties at issue in this dispute are enforcing the importer's obligation to pay duties, and thus should not be considered "other charges" under Articles II and VIII. In addition, the *MIPs* panel examined interest charges and costs in connection with the securities at issue in that dispute. It is not clear from the *MIPs* report whether these charges were collected by governmental authorities. If so, the *MIPs* conclusions would not be applicable here, since the U.S. government charges nothing for the bonds it requires. Moreover, the EC fails to mention the *MIPs* panel's findings that even though these interest charges and costs were "other charges," for one of the securities they were quite small, and "commensurate with the cost of services rendered."²⁵⁴ To the extent that the Panel considers that charges by private sureties would be "other charges," they too are quite small, and should be considered commensurate with the cost of services rendered. As described in paragraph 29 of the U.S. Second Submission, a typical charge by a private surety would be \$3.50 per thousand dollars of bond value for single transaction bonds and \$10-20 dollars per thousand dollars of bond value for continuous bonds. However, it would be troubling precedent for a panel to review the price charged by private entities for the services rendered by those entities.

Q49. In claiming that the increase in the amount of a required security was to cover 100% tariff which might eventually be due (after the arbitration panel has completed its work), the US appears to assume that the applicable obligation, in the form of tariffs, can change after the entry of a listed product into the customs territory of a WTO Member. Is this retroactive change of the applicable law and applicable obligation, acceptable in international law?

31. As an initial matter, we note that the March 3 action did not itself change the duty rate applicable to entries from March 3. It merely changed bonding requirements for these entries.

32. As the EC observes in its second submission, the duty liability for a given product is that on the date of importation.²⁵⁵ However, it is not always the case that the duty applicable *for* the date of importation is that anticipated *on* that date. For example, if an importer misclassifies a product on importation, it may be some time after importation that customs authorities or the importer recognize the misclassification, and change the duty rate accordingly.²⁵⁶ Likewise, an error in valuation of a product could result in a higher duty liability than that anticipated at the time of entry, and this might not be discovered, and changed, until sometime after entry. An importer is thus not always entitled to pay the duties it thought were due at the time of entry.

33. Likewise, in antidumping investigations, there may be instances in which duties might be applied to past entries based on a decision made some time after entry. Article 10 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the Antidumping Agreement) provides for the imposition of duties from the date of imposition of provisional measures following final determinations of dumping and injury (Article 10.2). Further, antidumping duties may be imposed on entries made even prior to the application of provisional measures (that is, before even preliminary determinations of dumping and injury have been made) under specified circumstances (Article 10.6).

²⁵² *MIPs*, para. 2.6.

²⁵³ *MIPs*, paras. 4.7 and 4.16.

²⁵⁴ *MIPs*, paras. 4.2, 4.6.

²⁵⁵ EC Second Submission, para. 12.

²⁵⁶ In fact, it is our understanding that customs authorities of EC member States can reclassify and thereby apply higher duty rates to goods for up to three years after such goods have been entered.

34. As discussed at paragraph 38-42 of the U.S. First Submission and paragraphs 16-18 of the U.S. Answers to Panel and EC Questions, the context and purpose of the provisions on suspension of concessions make clear that this date may fall at any time after the expiration of the reasonable period. DSU Article 22.7 states only that the request for suspension must be consistent with the arbitrators' decision.²⁵⁷ Article 22.1 is clear that the suspension of concessions or other obligations is available "in the event that the recommendations and rulings [of the DSB] are not implemented within a reasonable period of time." The purpose of the reasonable period of time -- to provide a grace period for a Member to bring itself into compliance without consequences -- in its very enunciation implies that the consequences of non-compliance accrue from the conclusion of that period. Likewise, compensation under Article 22.2 is available from the end of the reasonable period, and it would only encourage delay, and discourage agreements on compensation, if liability for suspension of concessions were delayed after that point.

35. Thus, WTO rules provide both in the context of suspension of concessions and otherwise that the duty applicable on the date of entry may not be that anticipated on that date. Looking beyond WTO rules, as noted in paragraph 27 of the U.S. Second Submission, the Kyoto Convention, like the WTO Customs Valuation Agreement, encourages the early release of merchandise, and permits the adoption of surety systems to ensure compliance with regulatory undertakings, as well as to ensure collection of any *additional* import duties and taxes that might become chargeable.²⁵⁸ Thus, the Convention explicitly contemplates that, as a necessary consequence of the early release of merchandise, it might become necessary to impose bonding requirements to ensure collection of duties beyond those for which an importer might be liable based on information at the time of entry, and which might become due as a result of events subsequent to entry. In this way, the Kyoto Convention as well makes clear that the duties ultimately assessed may exceed those anticipated at the time of entry.

²⁵⁷ Article 22.7 provides, in relevant part, "The DSB shall be informed promptly of the decision of the arbitrator and shall upon request, grant authorization to suspend concessions or other obligations where the request is consistent with the decision of the arbitrator, unless the DSB decides by consensus to reject the request."

²⁵⁸ *Kyoto Convention*, Annex B.1, 59-61.

Appendix 2.7
The US oral presentation on matters relating to the scope of this dispute
at the Second Substantive Meeting
(9 February 2000)

1. Mr. Chairman, Members of the Panel, the United States appreciates this opportunity to address the EC's attempt to mischaracterize the measure in question and the terms of reference of this dispute. Mr. Chairman, the United States has asked the Panel for a preliminary ruling on this issue. A preliminary ruling is important for the United States – as well as the EC – to know what measures are at issue in this Panel proceeding so that the parties can direct their evidence and arguments to claims within the Panel's terms of reference, and not burden the Panel with material that goes to claims outside those terms of reference. We are now at the second meeting of the Panel. The written submissions have all been filed, the oral statements all prepared. This is the last opportunity to respond to arguments. If the United States does not know at this meeting which measures the Panel considers to be before it in this proceeding, how can the United States be expected to have an opportunity to respond?

2. In its January 24 letter, the EC asserts that the U.S. request for a preliminary ruling on the measure at issue is untimely. However, the timing of the U.S. request has been a function of the timing of the EC's own attempt to expand the terms of reference. Recognizing that the actions taken on March 3 were limited to bonding, the EC for the first time in its statement at the first substantive meeting attempted to recast the scope of this proceeding. It would be unfair and a denial of due process to preclude the United States from responding and seeking clarification as to the measures at issue. Beyond this, questions concerning the terms of reference can, and should, be raised at any time in the dispute settlement process, since they are jurisdictional in nature and relate to a Panel's competence to consider a measure. In *India - Patent Protection for Pharmaceutical and Agricultural Chemical Products* (19 December 1997, WT/DS50/AB/R, para. 92), the Appellate Body found that the parties could not agree to jurisdiction over a claim that was not in the panel request. The Appellate Body stated:

The jurisdiction of a panel is established by that panel's terms of reference, which are governed by Article 7 of the DSU. A panel may consider only those claims that it has the authority to consider under its terms of reference. A panel cannot assume jurisdiction that it does not have.

3. Mr. Chairman, DSU Article 4.2 provides for consultations on "measures . . . taken," while DSU Article 4.7 provides that a complaining party may request the establishment of a panel if the consultations on that measure fail to resolve the dispute. The basic principle that a measure must have been taken before it may be subject to a consultation request and subsequent panel proceedings is fundamental to the WTO dispute settlement process. We do not think the EC disputes this, particularly in light of the vehemence with which it refused the request by the complaining parties in *Bananas* to convene an Article 21.5 panel on this basis. As we have noted elsewhere, the EC went so far as to threaten to block the agenda of the September 1998 DSB meeting rather than see the DSB authorize the formation of a panel on what the EC considered a measure not yet taken.

4. The EC submitted its consultation request on March 4, 1999, the day following the U.S. announcement of its decision to change bonding requirements. Obviously, the consultation request could not, and so did not, include any measures taken on April 19. Moreover, at the consultations the United States made clear that the April 19 actions were not within the scope of the consultations, and there were no consultations on them. We assume that the EC officials at the consultations informed their counterparts responsible for this Panel proceeding as to what transpired at the consultations. As the U.S. actions taken on April 19 following DSB authorization to suspend concessions were not subject to a consultation request or consultations, the EC's panel request could not have covered them.

Nevertheless, the EC is attempting to draw the actions of April 19 into the scope of this proceeding, based on its late appreciation that the March 3 action involved nothing more than changes to U.S. bonding requirements.

5. The March 3 action in no way affected duty liabilities. Any duty deposits for products imported from March 3 to April 19 were made at the MFN, bound rates. The only change in the entry procedures for these importers was the modified bonding requirements. As with normal bonding requirements, the changed bonding requirements did not entail any payment to the government. Nor did these bonding requirements alter in any way the ultimate duty liability, notwithstanding the mere assertions to the contrary by the EC. In the absence of the April 19 action, each and every entry subject to increased bonding requirements would have been liquidated at the entered, MFN rate.

6. The EC asserts in paragraph 7 of yesterday's responses to questions that it "is not convinced" that the March 3 action did not increase any duty liability. However, as explained by the Appellate Body in *Shirts and Blouses*, the burden of demonstrating a fact lies with the party asserting it. Mere assertions do not suffice. The EC has merely asserted that the bonding requirements increased duty liability, with no explanation of how this would be the case under U.S. law. The United States is confident that it has a better grasp than does the EC regarding the operation of U.S. law, and the EC is simply wrong.

7. The EC incorrectly theorizes that it could draw into the scope of this dispute actions of April 19, even though they could not have been subject to a March 4 consultation request, by claiming that its panel request refers to the April 19 action as confirming the duty liability imposed on March 3. Again, however, there was no duty liability imposed on March 3, and so it could not have been "confirmed." Even this theory fails.

8. In its January 24 letter, the EC also argues that because it included the list issued on April 19 as an attachment to its panel request, the April 19 actions are within the terms of reference. However, the inclusion of this list cannot cure the fact that the EC's March 4 consultation request could not have included measures not yet taken. Moreover, the inclusion of this list cannot cure the fact that in the EC's panel request, the only reference to the April 19 action is that just mentioned – namely, that this action allegedly confirmed a non-existent liability said to have been imposed on March 3. The list included with the panel request can be viewed as no more than informational.

9. The terms of reference of this dispute do not provide jurisdiction to address the actions taken on April 19, and we urge the Panel to reject the EC's attempts to draw these actions into the scope of this dispute. We look forward to your decision.

Appendix 2.8
The US oral presentation at the Second Substantive Meeting
(9 February 2000)

Introduction

1. Mr. Chairman, thank you for your preliminary ruling that the April 19 actions are not within the scope of this proceeding. At the same time, we appreciate the panel's recognition that it is important that we understand these actions. This importance will become clearer in a few moments.

2. Mr. Chairman, distinguished members of the Panel, it is again my honor to represent the United States before you today. It is now the second meeting of this Panel, and the issues in this dispute have become clearer. For example, it is now clear that the only measure taken on March 3 was the modification of bonding requirements with respect to certain merchandise from EC countries, and that this change in bonding requirements did not impose any duty liability beyond the MFN, bound rates applicable to all imports from all sources. It is also clear that this action came in the context of EC efforts to delay the completion of Article 22.6 proceedings required, under DSU rules, to finish by March 2. Further, it is clear that the EC's efforts at delay were but the most recent of its attempts to undermine the operation of the WTO dispute settlement system in order to escape the consequences of its failure to comply with DSB rulings and recommendations in *Bananas*.

3. Unfortunately, the EC's argumentation in this dispute has shown its continued desire to obfuscate the issues and its lack of regard for the consequences of its actions on the dispute settlement and international trading system. The EC has explicitly asked this Panel to find the work of another panel *ultra vires*, and has implicitly asked this Panel to violate WTO rules which reserve to the Members the right to amend WTO provisions. Moreover, the EC has conveniently put aside its insistence during the reasonable period that only a measure actually taken may be subject to dispute settlement procedures, and instead has sought to have this Panel consider actions not taken on March 3 which are not within the Panel's terms of reference. Further, the EC has shown itself willing to make overly broad arguments which would undermine trade-enhancing early-release bonding systems in its single-minded effort to receive Panel sanction for its delaying tactics in *Bananas*.

4. Mr. Chairman, this Panel must focus not on what the EC asserts to have occurred on March 3, but on the actions actually taken on that date. Moreover, this Panel should analyze those actions for their consistency with U.S. WTO obligations with a sober eye, making only those findings necessary to complete its task. It should refuse the EC's invitation to legislate, to exceed the terms of reference, and to make sweeping pronouncements of law with uncertain consequences for international trade. When the actions actually taken on March 3 are examined against applicable U.S. obligations, it is clear that they were consistent with those obligations.

The Measure

5. I would first like to briefly address some of the points which the EC raised today. Regarding the USTR letter to the U.S. Customs Service, it is important to recognize that, as is clear from the language used in the letter, this was a request, not an "instruction." The only authority for action cited in the letter is that which Customs employed to undertake the changed bonding requirements, 19 CFR § 113.13. The letter resulted from an interagency process, and reflected that process, but the only legal authority under which action was taken was that of Customs. With respect to "withholding liquidation," it must be recognized that there is no right to immediate liquidation. Customs procedures already called for a 314-day to one-year liquidation period. Thus, the first request in the USTR letter regarding "withholding liquidation" could not be honored, since Customs was already employing a 314 liquidation cycle, and this was not changed.

6. Regarding the April 19 actions, notwithstanding the EC's arguments, these actions did make duties retroactive to entries from March 3. All that the United States did on March 3 was to change bonding requirements so that Customs would have a better chance of collecting duties if the DSB authorized suspension of concessions and if the United States acted to increase duties. That action came on April 19.

7. I would like to review again how the U.S. system works for imports. When an import arrives in the United States, the importer provides cursory documentation regarding the import, along with evidence of a bond. Upon presentation of this documentation and evidence of a bond, the merchandise is immediately released. At or shortly after release, the importer deposits estimated duties. Yesterday we submitted Exhibit 14, which provided data on duties for listed products. That exhibit includes a column for estimated duties paid. For every item on that list the estimated duties paid were at the MFN rate. Customs accepted the deposits as accurate because this was the only duty liability at that time. There was no instruction to port directors to increase duties, and therefore the ports did not collect higher duty deposits. At liquidation, Customs finalizes its determination of the duty liability. It looks at the classification and valuation, for example, to confirm that they are correct. Once it has confirmed the liability, it sends a notice to the importer. If there is a difference between the duty deposits and the actual duty liability, the difference is either collected or refunded. A short time after liquidation has occurred, the door is closed for Customs to review the duty liability. Customs can't go back, except in cases of fraud, and reliquidate the entry. It is our understanding that the U.S. system is different from others in this regard. In other systems, the statute of limitations permits customs authorities to go back and correct duty liabilities up to the statute of limitations of around three years. In the United States this is capped at one year. Customs must liquidate between 314 days and one year.

8. I would like to reiterate that the only measure within the terms of reference of this dispute is the March 3 change in bonding requirements on certain products from EC countries. The March 3 press release is not itself a measure, nor is the USTR letter to Customs. The EC requested consultations on March 4 with reference to actions taken on March 3, and only those actions may properly be the subject of these dispute settlement proceedings. Nothing the United States did on March 3 affected duty liabilities, nor did it delay liquidation. Any deposits for products imported from March 3 to April 19 were made at the MFN, bound rates. The only change in the entry procedures for these importers was the modified bonding requirements. As with normal bonding requirements, the changed bonding requirements did not entail any payment to the government. Nor did these bonding requirements alter in any way the ultimate duty liability, notwithstanding mere assertions to the contrary by the EC. In the absence of the April 19 action, each and every entry subject to increased bonding requirements would have been liquidated at the entered, MFN rate.

GATT Articles, and DSU Articles 22.6 and 23.2(c)

9. The EC added little new in its answers to panel questions or second submission on issues relating to GATT Articles I, II, VIII or XI. As described in the U.S. submissions, the EC has failed to meet its burden of demonstrating that the March 3 action is inconsistent with any of these provisions. In particular, the United States wishes to draw attention to the EC's arguments concerning Articles II and VIII. The EC appears to argue that only the changes to bonding requirements instituted on March 3 should be considered prohibited other charges, but its arguments would implicate all bonding systems. In its determination to obtain findings against the March 3 action, the EC would have the Panel undermine a trade-facilitating mechanism which speeds the early release of goods by customs authorities, and which is contemplated – and encouraged – by the WTO Customs Valuation Agreement and the Kyoto Convention. Many WTO Members employ surety systems to guarantee the collection of customs duties and to address risks relating to specific imports of merchandise.

10. When customs authorities release goods into their territories before duties and other fees have been deposited or finally determined, and before it has been possible to definitively confirm

compliance with all relevant importer undertakings, this obviously involves an assumption of risk by those customs authorities. The risk directly relates to the total liabilities which might be due, including not only duties, but also other taxes and fees, as well as liquidated damages for failure to comply with other undertakings to Customs. Should importers choose not to pay their customs debts, customs authorities could find themselves without the ability to collect these debts. Faced with this risk, customs authorities may choose to hold the merchandise until the importer's total liabilities have been finally determined and paid, and until it has been definitively determined that the importer has met other requirements. However, as contemplated in the Customs Valuation Agreement and the Kyoto Convention (as well as the International Chamber of Commerce International Customs Guidelines), early release of merchandise is still possible, and should be undertaken, if customs authorities employ surety systems to address the risks inherent in that practice.

11. The EC's arguments on Articles II and VIII would implicate all bonding systems, and create conflicts both with the Customs Valuation Agreement and the Kyoto Convention. Such interpretations are unnecessary, and should be avoided. The U.S. bonding requirements in connection with early release of goods do not require a payment to the government, and do not impose an "other charge" within the meaning of Articles II and VIII. This includes the revised bonding requirements of March 3. The government collected no fees in connection with the bonds for entries subject to the revised bonding requirements. Obviously, this case is not about the fee structure of private banks for providing sureties, a normal financial service. We want to note that the EC on page 4 of its statement today suggests that the fees charged by these private sureties would total \$10 million dollars on \$520 million in trade. This figure is pure fantasy. The EC ignores the fact that the continuous bond amount is only 10% of the entered value, and that these bonding requirements were in place for only about a month. We believe private sureties typically charge about \$10-20 per thousand dollars of bond amount for continuous bonds, so the numbers these private sureties would charge bear no resemblance to the EC figure.

12. The EC in paragraph 4 of yesterday's answers appears to acknowledge that a measure which "does not provide any revenue for the treasury of the importing WTO Member does not qualify as a 'duty, tax or other charge.'" The EC made this statement in the context of its discussion of Article XI, regarding which the EC has failed to demonstrate a violation. Nevertheless, the EC cannot argue that if the bonding requirements do not qualify as a "charge" for purposes of Article XI, they may still be a "charge" purposes of Article II. There is no basis for drawing this distinction. Beyond the fact that the government received no payment or revenue in connection with the bonding requirement, the bonding requirement is not an "other charge" because the bonds are merely enforcing the obligation to pay duties, and such sureties as enforcement mechanisms are not an other charge under the *MIPs* precedent, which we note was followed in the *Bananas II* GATT panel (DS38/R, 11 February 1994).

13. However, even if the Panel were to conclude that the bonding requirements were an "other charge" covered by Articles II and VIII, any such "charges" must be considered commensurate with the cost of services rendered, namely, the risk that importers may not pay their duty and other liabilities. Should the Panel consider it necessary to reach the question of whether any "charges" specifically associated with the March 3 bonding requirements are consistent with Articles II and VIII, it should find that such "charges" are commensurate with the additional "cost" associated with early release of the affected entries, that is, the risk that additional duties authorized by the DSB would be imposed on these entries, and that importers might choose not to pay them.

14. With regard to Article XI, and its relationship to Articles II and VIII, we would like to note that the EC yesterday stated in paragraph 5 that its Article XI arguments would only be relevant if the bonding requirements did not also increase the customs tariffs. Since the bonding requirements did not, the EC is admitting that Articles II and VIII are not implicated. However, the EC argument with respect to Article XI fails on its own. As noted in our submissions, the EC's Article XI argument has rested solely on the incorrect assertion that the bonding requirements effectively stopped trade. They did not. Further, in yesterday's submission, the EC suggests at paragraph 4 that the "purpose" to stop

trade also creates an Article XI violation. However, the purpose of a measure is not relevant to whether it violates Article XI. In *Bananas II*, the Panel considered the argument of the complaining parties that a high over-quota rate was inconsistent with Article XI:1 because it adversely affected trade. At paragraph 139 of its report the panel agreed with the *EEC Oilseeds* and *Japan Leather* panels that the actual impact of a measure is irrelevant to an Article XI analysis, and noted that commercial impact is nowhere mentioned in Article XI. Likewise, allegations concerning the "purpose" of a measure are nowhere mentioned in Article XI, and are irrelevant to that analysis.

15. For this reason, and for the reasons discussed in our submissions, the EC has failed to demonstrate that the March 3 bonding requirements were inconsistent with GATT Articles I, II, VIII and XI. In light of this, the EC has also failed to demonstrate that the March 3 action involved a suspension of concessions or other obligations. Therefore, the EC has also failed to demonstrate that the March 3 actions were inconsistent with Articles 22.6 or 23.2(c), which set forth conditions for the suspension of concessions or other obligations.

Article 21.5

16. I would now like to address the EC's arguments with respect to Article 21.5. I would like to begin by quoting DSU Article 22.7: "The parties shall accept the arbitrator's decision as final and the parties concerned shall not seek a second arbitration." This is a firm obligation. And yet this seems very much at odds with the EC's request to find the Article 22.6 arbitrator's decision *ultra vires*, as well as with the statement made this morning by the EC that if the Panel agrees with the EC on Article 21.5, the suspension of concessions determined by the arbitrators and authorized by the DSB "is and remains" inconsistent with U.S. obligations -- and that includes both after March 3 and after April 19. This is anything but acceptance, and by its very asking calls into question the EC's compliance with Article 22.7

17. It is now clear that the EC's arguments on Article 21.5 have nothing to do with the measure at issue in this dispute, increased bonding requirements. The EC itself has been unable to draw any connection between the bonding requirements and Article 21.5 beyond the tenuous and unsustainable argument that the March 3 measure "was directly dependent upon" actions which allegedly violate Article 21.5 (actions not within the terms of reference of this dispute), rather than that the March 3 measure itself violates Article 21.5 (see EC Second Written Submission, para. 20).

18. The EC is asking this Panel to violate several WTO provisions in order to find that the Article 22.6 arbitral panel in *Bananas* somehow violated other DSU provisions. This transparently political exercise has nothing to do with resolving the issues in this dispute concerning increased bonding requirements, but is instead merely an attempt to circumvent the DSU review process and violate the exclusive right of all WTO Members to amend the DSU. Moreover, we do not see how the EC reconciles asking this Panel to declare the work of the *Bananas* arbitrator *ultra vires* with the EC's obligation under DSU Article 22.7 to "accept the arbitrator's decision as final." We are particularly troubled by the EC's implication that the arbitrator's report is "not binding" or can otherwise be disregarded with respect to the right of the United States to suspend concessions (EC Second Submission, paragraphs 74-76). The EC's direct challenge to the validity of the Article 22.6 arbitrator's decision represents anything but the acceptance of the arbitrator's report required by Article 22.7.

19. The simple consideration that bonding requirements have nothing to do with a DSU article providing for a mechanism to settle disputes on implementation exposes the utter lack of foundation of the EC's Article 21.5 claim. The EC purports to find in Article 21.5 a firm obligation on the part of complaining parties (but, of course, not the party accused of non-implementation) to resort to Article 21.5 procedures, to the exclusion of Article 22 procedures explicitly provided for in the DSU and which, by their terms, do not so much as reference Article 21.5. Neither the *Bananas* arbitrators nor the *Section 301* panel found such an obligation to exist, and we agree that it does not. However, even

if there were such an obligation, the EC has offered no credible explanation of how increased bonding requirements violate such an obligation. Instead, the EC believes it may infer actions which violate Article 21.5, just as it believes it may, through mere assertion, include within the scope of this dispute actions not taken on March 3, or actions not within the terms of reference. According to the EC, if a non-implementing party believes it has implemented DSB rulings and recommendations, and a complaining party has not requested Article 21.5 proceedings, then anything the complaining party does violates Article 21.5. Requesting multilateral proceedings under Article 22 violates Article 21.5, providing evidence to an Article 22 arbitrator violates Article 21.5, increasing bonding requirements violates Article 21.5 – virtually anything that highlights the EC's non-compliance in *Bananas* violates Article 21.5. This is simply not a tenable interpretation.

20. Let us step back for a second and recall that the purpose of Article 21.5 is to provide a multilateral, expedited mechanism to resolve disputes on implementation. It is not intended to serve as a justification for delaying multilateral consequences for non-compliance. Nor is it intended to nullify multilateral rights to have the DSB authorize suspension of concessions under the negative consensus rule within 30 days of the end of the reasonable period, or to have an Article 22 arbitrator complete its work within 60 days. And Article 21.5 is not intended to provide non-implementing parties with a club to deter complaining parties from pursuing their WTO rights to request DSB-authorized suspension. The EC's reading of Article 21.5 would turn the purpose of Article 21.5 on its head and make it a tool to undermine WTO provisions central to ensuring that Members comply with their WTO obligations.

21. The EC argues that it is entitled to a ruling from this Panel on the relationship between Article 21.5 and Article 22, that failure to make such a ruling would be a denial of "justice." However, the Panel may rule on the EC's Article 21.5 claim without implicating or nullifying Article 22 by simply rejecting the Article 21.5 claim on the grounds that the bonding requirements do not implicate any conceivable obligation under Article 21.5. Should the Panel reach this conclusion, or choose not to reach the EC's Article 21.5 claim, justice would indeed be well-served. There would be no justice in findings that another WTO panel has acted *ultra vires*, that rights under Article 22 on the negative consensus rule and on the timing of Article 22.6 proceedings should be nullified, that the DSU Article 3.2 requirement that Panels neither add to or diminish rights should be ignored, or that Panels may exercise the right to amend the DSU granted exclusively to Members under WTO Agreement Article X. Such findings might serve the EC's political goals, but they would not serve justice.

22. I would like to briefly respond to several matters relating to the EC's Article 21.5 arguments from its second submission. The first is the EC's claim that its implementation was a "new" measure. As we have explained, the novelty of a member's implementation actions is irrelevant to this dispute. However, we do not wish the Panel to be left with a misleading impression concerning the EC's changes to its bananas import regime. The elements of the so-called "new" banana import regime which violated the EC's obligations were virtually identical to the old regime, and violated it for the same reasons – it provided for separate, discriminatory banana regimes in violation of GATT 1994 Article XIII and assigned licenses based on a reference period which guaranteed discriminatory results in violation of GATS Articles II and XVII. The *Bananas* complaining parties pointed this out to the EC from as early as January 1998, but the EC ignored them, considering that it had the right to continue to nullify and impair the WTO benefits of the complaining parties through the expedient of repackaging its old regime. This has been the EC's practice throughout the nearly ten years of the *Bananas* dispute. In part this has made the various panels' work easier – when the WTO *Bananas* panel examined an earlier example of the EC's repackaging efforts, the panel was able to complete its analysis by merely quoting several pages from the report of its GATT predecessor, and add "we agree." (*Bananas* Panel Report, paras. 7.179-7.180.) Just as the continued violation of the EC's repackaged regime was apparent to the complaining parties and to the *Bananas* arbitrator/panelists, it was apparent to EC officials. I refer the Panel to paragraph 29 of the U.S. First Submission, which quotes EC officials acknowledging that the EC's claim to have instituted a WTO-consistent "new" regime were groundless.

23. Another point from the EC's second submission which the United States would like to address relates to U.S. actions with respect to Article 21.5 in *Shrimp Turtle*. The U.S. agreement with Malaysia only reinforces the fact that DSU rules as they now stand compel parties to undertake such agreements if they wish to delay Article 22 proceedings without opening the door to the possibility of a defending party blocking authorization to suspend concessions. The EC at paragraphs 62-63 of its Second Submission points out that such agreements do not prevent third parties from still blocking consensus, and this is true. However, the EC does not explain how its interpretation of Articles 21.5 or Article 22 would overcome this deficiency. In fact it would heighten it. As these provisions are currently drafted, if Article 21.5 proceedings were required prior to Article 22 proceedings, then not only third parties, but also non-implementing parties, could deny complaining parties the benefit of the negative consensus rule under Article 22, and complaining parties would also be denied the right under Article 22 to have the arbitrators complete their work within 60 days of the end of the reasonable period. In other words, entire provisions of Article 22 would be denied legal effect. Avoiding such a result is the "compelling reason in law" not to adopt the EC interpretation, notwithstanding the EC's difficulty in understanding this (EC Second Submission, paragraph 64).

24. However much the WTO Members may or may not agree that procedures similar to Article 21.5 should or should not precede a request for suspension, DSU rules as they now stand do not provide for this. The Members of the WTO have been working on amendments to the DSU that would provide for this, and would cure the problems relating to the negative consensus rule which exist in the current DSU text. However, only the Members can amend the DSU. A single member cannot ask a single panel to legislate such changes by fiat, in violation of DSU Article 3.2 and in the exercise of the Member's exclusive rights under WTO Agreement Article X.

25. That the EC is asking the Panel to do just this is even clearer in the EC's demand that the Panel legislate the creation of burdens and presumptions applicable in Article 21.5 and Article 22 proceedings. There is no possible basis for the EC to demand that this Panel dictate to other panels how they must conduct their proceedings, on the basis of new rights and obligations pulled out of thin air. As the EC notes at paragraph 87 of its second submission, the only presumption referred to in the DSU is that in DSU Article 3.8, that a breach of the rules is presumed to have an adverse effect. The EC refers to the statement of the Appellate Body in *Chile Liquors* that there is no presumption of bad faith - not that there is a presumption of good faith, as the EC asserted this morning - but this only reinforces the point that panels should not engage in the wholesale creation of presumptions not found in the WTO Agreements. The issue of burdens and presumptions in Article 21.5 proceedings is irrelevant to this dispute, and there is no need to make findings on this topic to resolve it.

26. The March 3 bonding requirements simply do not relate to Article 21.5. We urge the Panel to reject the EC's flexible and self-serving approach to defining the measure in this dispute so as to achieve improper legislative pronouncements, just as we urged the Panel to reject the EC's flexible interpretation of the terms of reference to cover measures outside the scope of the EC's consultation request.

Conclusion

27. As the complaining party in this dispute, the EC has the burden of demonstrating that the March 3 bonding requirements were inconsistent with U.S. WTO obligations. It has failed to meet this burden, and the Panel should reject the EC's claims in their entirety. Thank you very much.

Appendix 2.9
The US closing statement at the Second Substantive Meeting
(9 February 2000)

1. Mr. Chairman, members of the Panel, I want to begin this statement by thanking you both for your efforts to date in sifting through the various arguments of the parties, and for the efforts you will now undertake in reaching your decision. As the parties are now concluding their arguments both on what happened on March 3 and on whether this complied with U.S. WTO obligations, I think it is important to step back and ask how we got here today, and to summarize where we are. Simply put, we are here because, at the same time that the EC continues to deny the United States over \$191 million per year in negotiated and agreed WTO benefits, the EC is complaining about less than seven weeks of changed bonding requirements.

2. Since the beginning of the WTO, the EC has maintained a banana regime in breach of its WTO obligations. It is now firmly established that this regime nullifies and impairs U.S. benefits under the WTO in an amount of \$191.4 million per year. This multimillion dollar nullification and impairment persisted, without any compensation for the United States, through consultations, over a year of panel proceedings, then Appellate Body proceedings, then a reasonable period of time of over 15 months. Finally, when all other avenues of redress failed, the United States sought and was granted authorization by the DSB to suspend concessions. Even that authorization was delayed beyond the date promised the United States under the DSU by the failure of the EC to provide the arbitrator with the necessary information.

3. No sooner did it become apparent that the United States was going to be provided some redress than the EC immediately challenged the small step the United States took to try to preserve its ability to put the DSB authorized suspension of concessions into effect. The EC is complaining about less than seven weeks of changed bonding requirements, even though it has not yet seen fit to remedy years of multimillion dollar nullification and impairment.

4. Which brings us to exactly what did and did not happen on March 3. The EC relies on press statements and requests – not instructions – from USTR to argue that Customs began to withhold liquidation. We have provided and referenced official Customs statutes, notices and regulations concerning their pre-existing policy of liquidating entries between 314 days and one year. We have pointed out that the March 3 actions had no effect on the implementation of this policy, and that there is no such measure under U.S. law as "withholding liquidation." The EC argues that the United States revised bonding requirements, and we did – continuous bonds were increased by 10% (not 100%) of the value of covered merchandise previously imported. This entailed no payment to the government. Further, as the example in our response to question 35 makes clear, there were at most negligible payments to private sureties associated with the bonds.

5. Which brings us to the heart of the matter. The bonding requirements – the only action taken on March 3 and the only measure in existence at the time this dispute was commenced – did not impose any duty liability. The EC's argument that the United States "effectively increased" duty liability is made without reference to a single U.S. law allegedly imposing such a liability. There is no such thing as an "effectively increased" duty liability. There is either a duty liability or there is not. Had there been a duty liability the instructions to port directors on March 3 would have indicated that they should collect such duties, and these port directors would have required deposits of estimated duties to match such higher liability. This did not happen on March 3. Only on April 19 was a higher duty assessed, and higher duty deposits collected. The EC claims that the U.S. could not under U.S. law retroactively increase duties on April 19. This is simply not true. Our response to question 4 makes clear that duty increases or decreases may be made effective retroactively under U.S. law. Without such authority, there would be no way to implement, for example, antidumping duties under the circumstances specified in Article 10.6 of the Antidumping Agreement, or, for that

matter, duty decreases made retroactively in accordance with the Generalized System of Preferences. And such authority is necessary when implementing DSB-authorized suspension of concessions. However, while the April 19 action applied duties to entries commencing from March 3, that action is not within the terms of reference of this dispute. It could not have been, since it had not taken place on March 4, the date of the EC's consultation request.

6. All that a bond provides is assurances that if a duty liability is later found to be higher than at importation, the risk that Customs will not be paid is reduced. The United States made changes to its bonding requirements to ensure that if the DSB authorized concessions, the U.S. would be in a better position to collect them from March 3. It must be remembered that the *Bananas* arbitrator/panel's decisions made clear that the measure the EC had in place from January 2 was inconsistent with WTO obligations, and continued the nullification or impairment of U.S. benefits from that date. For the reasons described in the U.S. submissions, the U.S. had the right, upon DSB authorization, to suspend concessions from January 2. The March 3 bonding requirements helped to preserve this right.

7. But since the March 3 measure consisted only of revised bonding requirements, which imposed no duty liability, where does this leave the EC's claims? As an initial matter, it is clear that bonding requirements have nothing to do with Article 21.5, and that claim can be dismissed, without undertaking the condemnation of the work of another WTO dispute proceeding requested by the EC. With respect to GATT 1994 Article I, the March 3 bonding requirements, like all bonding requirements, were addressed to risks associated with particular entries. Numerous WTO Members provide their customs authorities with the ability to address specific risks through changed bonding requirements. With regard to Articles II and VIII, the March 3 bonding requirements imposed no additional duty liability, and provided no additional revenue to the U.S. Treasury. Under the EC's own construction, the bonding requirements are therefore not subject to Article II and VIII, as they are not a "charge." This is not a dispute about whether private banks' fees for sureties are set too high. Moreover, the EC has failed to make any substantive case that the changed bonding requirements were inconsistent with Article XI.

8. Mr. Chairman, let me now turn briefly to the chart just distributed. I would first like to point out that it indicates that trade was not stopped. There was a big surge in imports before March 1999, so it should be no surprise that there was no need to import as much after that, since there was so much inventory on hand. Furthermore, imports continued even after April 19. This suggests that the United States has not, in fact, suspended the full amount of concessions authorized by the DSB.

9. Mr. Chairman, members of the Panel, we ask you now to address your findings to what actually happened on March 3 – a change in bonding requirements – and to find that these bonding requirements did not violate the U.S. WTO obligations asserted by the EC. I want to thank you again for your work to date, and from now until the end of this case.

Appendix 2.10
The US Responses to Additional Questions of Panel
(10 February 2000)

Q50. Do parties consider that there is an opportunity cost arising from the bonding requirement, in particular if cash is deposited in lieu of a bond?

1. "Opportunity cost" is not a WTO legal term, and is found nowhere in the text of the WTO Agreement.²⁵⁹ As an economic concept, it is irrelevant to a consideration of the claims in this dispute. Moreover, as a factual matter, the opportunity costs associated with delayed release of goods until duties have been paid (inventory carrying expenses, delayed sales, dock storage charges, higher administrative costs) far exceed any opportunity costs associated with bonding systems allowing for early release of goods. This is why such systems are encouraged. We reiterate that the U.S. government receives no revenue from its bonding requirement, and is not a "charge" within the meaning of Articles II and VIII.

Q51. Please provide copies of any Customs' advisory notices concerning the 3 March measure.

2. Apart from the March 4 instructions, the only Customs advisory notice in connection with the March 3 measure was a March 16 document clarifying the bonding requirements set forth in the March 4 instructions. It is provided in U.S. Exhibit 15.

Q52. Please provide the data contained in US Exhibits 5 and 10, in an Excel format.

3. Excel file copies of U.S. Exhibits 5 and 10 are attached to the electronic version of this response.

Q53. Please inform us whether any importer of listed products chose to deposit money in lieu of a bond, as permitted under Section 1623(e) of the Tariff Act of 1930 (US Exhibit 11), during the period from 3 March 1999 to 19 April. Further, in general, in what circumstances do importers choose to deposit money in lieu of a bond?

4. It is our understanding based on a review of relevant import records that no importer chose to deposit cash in lieu of a bond for entries of the listed products during the period from March 3 to April 19, 1999. It is also our understanding that, in general, it is rare for importers to avail themselves of this option. While we do not have information on the situations in which an importer would choose to deposit cash, it is conceivable that this might occur if the credit history of an importer were to lead surety companies to refuse to provide a bond to the importer.

Q54. What is the basis for the US statement that the costs incurred on a bonding requirement are small? To what extent, if any, did the costs change following the 3 March measure?

5. This statement is based on our understanding of typical fees charged by private sureties, as described in paragraph 29 of the U.S. Second Submission.²⁶⁰ It is our understanding that a typical amount charged for a single transaction bond is \$3.50 for thousand dollars of bond value (0.35%). It is our understanding that the fees for continuous bonds are typically between \$10 - 20 per thousand dollars of bond value (1-2%). The typical continuous bond requirement is 10% of the duties, taxes

²⁵⁹ *Cf.*, the Appellate Body's caution against reliance on terms not found in the WTO Agreement. Appellate Body Report on *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, para. 181.

²⁶⁰ Also as described in paragraph 29, these can vary.

and fees incurred by the importer in the previous year. As a rough estimate, duties, taxes and fees are typically around 5% of the entered value for imports into the United States. Thus, the typical continuous bond amount would be 10% of 5% of the entered value, or 0.5% of entered value, and the amount paid for the bond would be 1-2% of this, or 0.005-0.01% of entered value. This is subject to the caveat that the minimum continuous bond amount is \$50,000, which would cost between \$500 - \$1000, assuming a rate of \$10-20 per thousand dollars of bond value.

6. The March 3 bonding requirements increased the continuous bond requirements for listed products to 10% of the entered value of these products in the previous year. Thus, the amount paid for the bond would be 1-2% of 10% of the entered value, or 0.1-0.2% of entered value. Our response to question 35 illustrates the impact on an importer. To repeat that example, if the normal continuous bond had been calculated based on entries during the previous year valued at \$1,000,000, and \$50,000 of this was covered merchandise, the continuous bond would be supplemented by \$5,000 (10% of \$50,000) to meet the revised bonding requirements. A typical amount which a private surety might charge for this additional coverage would be approximately \$50 - \$100, based on a rate of \$10-20 per thousand dollars of bond value.

Q55. In what respects did the duty deposit requirements for the listed products imported between 3 March 1999 and 19 April change after 19 April 1999?

7. Duty deposit requirements for listed products imported between March 3 and April 19, and for which duty deposits were made before April 19, 1999, did not change after April 19, 1999. If the duty deposits were not made until on or after April 19,²⁶¹ and the product was on the April 19 list, a 100% duty deposit would have been required.

Q56. To what extent did the US Customs have to have recourse against the bond for those importers not paying the difference between the estimated duty deposit at the MFN rate and the higher duty amount following the 19 April action?

8. It is not possible to make this determination at this time. To the extent estimated duties are not sufficient to cover a duty liability, importers have six months following liquidation to pay the difference before Customs would make a claim against the bond. Thus, it is not yet clear how often it will be necessary to make claims against bonds.

Q57. What happens, if anything, to the bond when the estimated duty deposits are paid? Is it reduced by the amount paid? If the bond is not reduced by such payments, why would the importer choose to pay the increased estimated duty deposits rather than allow Customs to have recourse against the bond?

9. It is important to recall that a bond is nothing more than a guarantee, backed by a private surety company. The importer pays a minimal fee for the bond, as described in response to question 54.

10. Nothing happens to the bond itself once estimated duties are deposited. Most fundamentally, the deposit of estimated duties is only one of the conditions which must be satisfied under a bond. The bond guarantees that duties, taxes and fees will be paid, and that the laws and regulations relating to the merchandise will be satisfied. Therefore, the bond amount is not modified or reduced when one of the conditions, deposit of estimated duties, has been satisfied. Of course, Customs would not have recourse against the bond to cover any liabilities accounted for by the duty deposit.

²⁶¹ As described in the U.S. Second Submission at footnote 39 and in yesterday's oral statement, the importer may deposit estimated duties up to ten working days (two weeks) after entry. Thus, for example, an importer which entered merchandise on April 18 could have deposited estimated duties on that date, or could have chosen to wait for up to ten working days to do so.

11. Again, the bond is nothing more than a guarantee that if the importer refuses to pay any liability relating to the merchandise, Customs can collect from the third-party surety providing the bond. The importer purchases the bond for a fixed amount from the private surety. Even were it theoretically possible to reduce the bonding amount upon satisfaction of one bond condition, it would not make economic sense for an importer to obtain a separate bond at a lower level. An importer would not want to return to a surety to obtain another bond in the lower amount, since this would typically entail an additional cost, however small. The existing bond would be sufficient to meet even a lower bonding level. The Customs bond may be analogized to an insurance policy. If a consumer purchases auto insurance on January 1 for a non-refundable fee of \$200 covering accidents in that year for up to \$500,000, he or she would not purchase for \$100 a second policy on July 1 to cover \$250,000 in accidents for the remainder of the year, even if the risk were reduced to that level.

12. With regard to payments of estimated duty deposits, as described in response to question 55, importers were not required after April 19 to deposit increased estimated duties if they had already deposited estimated duties at the MFN rate prior to that date. With respect to estimated duty deposits made from April 19, an importer would likely choose to pay the higher duty deposits rather than allowing Customs to have recourse against the bond in order to maintain its credit rating. Moreover, failure to pay the estimated duty deposits at all could expose the importer to liquidated damages. Given that the private surety would have to pay the liability, it is quite possible the surety would not be willing to provide bonds in the future to that importer, or would raise its premiums for the bond. It is worth recalling that the surety is typically only being paid well under 1% of the entered value of the goods for the bond (see response 54), as opposed to the duty deposits of 100% being collected after April 19. If the importer were unable to obtain a bond because it had failed to fulfill an earlier obligation, it would have to provide a cash deposit in lieu of surety.

Supplemental Responses to Earlier Questions

Question 34, use of single transaction and continuous bonds

13. Based on data for February 1999, continuous bonds were used for approximately 97% of all entries made in that month, versus 3% use of single transaction bonds. For entries from EC countries, approximately 94% of entries in February 1999 were made using continuous bonds, versus 6% use of single transaction.

Question 45, data on duties for listed products

14. In our response to this question, we explained that, with respect to the data in U.S. Exhibit 14, where liquidated duties for an entry differ from the estimated duties for the entry, this could be because the entry included products on the April 19 list, or because products on the entry were misclassified or misvalued. We also noted that the liquidated duties for entries which included candles (a product not on the April 19 list) were higher than the estimated duties for these entries. Upon further investigation, we determined that several entries which included candles also included bath preparations, folding cartons or both. Both bath preparations and folding cartons were on the April 19 list, and were thus subject to 100% duties, thus explaining the difference between estimated and liquidated duties for entries which included candles.

Appendix 3
Oral presentation of Dominica and St. Lucia at Third Party session
(17 December 1999)

The interest of the Commonwealth of Dominica and St Lucia in this case derives from the continuing effect of the illegal trade measure imposed by the US on March 3, 1999. These measures were so excessive as to have frightened economic actors and the public so as to influence and pressure governments to conform to a US vision of WTO compatibility without the sanction of the multilateral trading system. This was its tactical and strategic purpose - to secure a wrongful trade advantage with continuing legal, political and psychological impact.

The issue in this case is whether the measures taken by the US on March 3, 1999 limiting the importation of selected EC products is WTO incompatible. We are not going to recap the events surrounding the legitimate exercise of DSU rights by the EC in the year and a half preceding March 3rd. Suffice it to say that the account provided in the Respondent's First Written Submission does not address the issue the way African, Caribbean & Pacific (ACP) countries see it. Our intervention is focussed on the matter before this Panel.

The US measure of March 3,1999 is a violation of basic GATT norms

The mere US announcement of its intention of withholding liquidation on \$520 million worth of targeted EC products subject to a contingent duty liability of 100% directly impacted trade flows. To appropriate the words of Deputy USTR Peter Scher, the US "retaliated by effectively stopping trade as of March 3".²⁶²

The illegal March 3rd measure resulted in severe competitive disadvantages for the selected list of EC products. The equal treatment principle was not applied to targeted EC exports. These products faced discriminatory duties in excess of US tariff bindings. Importation of targeted EC goods entailed increased risks, costs, fees and other charges. We submit that the *de jure* and *de facto* discrimination against EC products in this regard constitutes a breach of GATT rules as advanced in the First Written Submission of the Complainant. We further support the assertion of the Complainant that the US measure is a restriction "other than duties, taxes or other charges" within the meaning of Article XI:1 of the GATT 1994.

We ask - would an importer of targeted EC products, aware of the risk of having to pay 100% *ad valorem* duties, continue to purchase such goods? He is placed in a quandary - If he puts the goods up for sale he might attempt to pass on the contingent liability - though 100% duties might make the product unsaleable. But if he does not pass on the duty once the goods have already been sold he will not be able to recoup the duty if it subsequently becomes payable. So why would he handle the goods at all given the significant losses he could face? He won't. *Peter Scher was right.*

GATT Article XI, "General Elimination of Quantitative Restrictions", provides that

XI.1 No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party ...

²⁶² Press conference held on March 3rd 1999; see First Written Submission of the European Communities, EC Annex XI.

This wording indicates clearly that any measure instituted or maintained by a Member which restricts the importation of products is covered by this provision, irrespective of the legal status of the measure. The language used is comprehensive.²⁶³

The March 3rd measure is a fundamental violation of the DSU

The abuse of process demonstrated in the March 3^d illegal measure undermines the strengthened multilateral system and the rule of law. It subjects the international rule of law to power-oriented theories of 'justified unilateralism'.

On 19 April 1999, the US confirmed the retroactive imposition of 100% duties on a reduced category of EC products under the ostensible cover of the arbitrators' ruling. The initial figure of \$520 million was scaled back to \$191.4 million. This underscoring the maxim, *nemo debet esse judex in propria causa* - no man ought to be a judge in his own cause. A Member cannot be relied upon to objectively determine the level of concessions to be suspended in such circumstances.

The Respondent in its submission states: "Because EC delaying tactics prevented the arbitrators from completing their work by the March 2, 1999 date called for under the DSU time frame, the United States took steps to preserve its ability to suspend concessions as from that date."²⁶⁴ The Respondent further states "The EC hampered the arbitrators' work in several ways. First, the blocking of the DSB agenda delayed referral of the matter to the Article 22.6 arbitrators and the setting of the schedule by a full week in an already tight time frame."²⁶⁵

The importance of a rules-based system is that everyone has a voice. What the record actually shows is that it was two small Member states, Dominica and St Lucia, which objected to the adoption of the DSB agenda. DSB proceedings were thereby temporarily delayed out of respect for the rule of law - there was no attempt to obstruct due process. Our concern was that the US request was untimely. What we sought to uphold concerned fundamental rules of procedural justice.²⁶⁶

The DSU provides that a Member may request authorization to suspend concessions or other obligations in certain limited circumstances, that is, where another Member has failed to bring the measure found to be inconsistent with a covered agreement into compliance therewith or otherwise comply with the recommendations and rulings of the DSB within a reasonable period of time.²⁶⁷ No Member shall make a determination to the effect that a violation has occurred except through recourse to dispute settlement in accordance with the rules and procedures of the DSU.²⁶⁸ Moreover, Members shall obtain DSB authorization in accordance with the rules of the DSU before suspending concessions or other obligations under the covered agreements in response to the failure of the Member concerned to implement the recommendations and rulings within that reasonable period of time.²⁶⁹

The language of the DSU is prospective. The suggestion that a Member is entitled to suspend concessions from the end of the reasonable period is counter to basic principles of interpretation. There is a presumption in international law that treaties do not permit retroactive measures where these measures limit or deprive Members of their rights or privileges and effectively confiscate the property of economic actors.²⁷⁰ To suggest otherwise, to permit the retroactive withdrawal of

²⁶³ See Report of panel on *Japan - trade in semi-conductors*, BISD 35S/116 (1989), paras 106 *et seq.*

²⁶⁴ First Written Submission of the United States, para. 31.

²⁶⁵ *Ibid.*, para. 26.

²⁶⁶ See WT/DSB/M/54, esp pp 3-6.

²⁶⁷ DSU, Article 22.2.

²⁶⁸ DSU, Article 23.2(a).

²⁶⁹ DSU, Article 23.2(c).

²⁷⁰ E.g. Report of Appellate Body on US - restrictions on imports of cotton and man-made fibre underwear, WT/DS24/AB/R, 1997, sec. IV.1.

concessions or other obligations would bring about an unacceptable level of uncertainty in trade. It would undermine the predictability and security of the multilateral trading system.

An Effective Remedy

Article 3.7 of the DSU provides that "the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provision of any of the covered agreements." However, situations arise where mere withdrawal is inadequate. International obligations do not come to an end simply because they are infringed. Some wrongs have a continuing character. In such cases the process of recommencing compliance with a continuing obligation may be little different from that of providing a remedy for having broken it, i.e. reparation. Some violations of the DSU, for example, as instanced in this case, undermine the fundamental basis of the rules-based system which poses a continuing threat to us all. The mere withdrawal of such measure without further action would leave the dispute settlement system fundamentally impaired.

The only legal option open to the US with respect to the measures imposed on March 3^d was, in relation to the targeted EC exports, to terminate the bonding requirement, release any bonds, refund any cash deposits and terminate the suspension of liquidation of entries made during the period of application of the inconsistent measures. Instead, on April 19th the US confirmed the retroactive application of 100% duties on a subset of these products. The duties levied on these products retroactively to March 3^d should have been reimbursed. These duties should not have been levied at all.

Some who now argue for the right to retroactively impose duties, have in the past denied the right of panels to suggest retroactive remedies.²⁷¹ Thus it is said that "no GATT 1947 or WTO panel ever has awarded monetary compensation to an exporting country for lost trade, even when blatantly-illegal quantitative restrictions had been imposed."²⁷² The issue here is not merely blatantly illegal trade measures but unbridled unilateralism that undercuts the very foundation of the rules-based system.

An effective remedy is one which preserves the stability and predictability of the multilateral trading system. It must provide assurance to all Members, including the poorest and most vulnerable - those without the capacity to effectively retaliate.

If a Member can unilaterally withdraw concessions without prior DSB authorization, and flout the explicit provision that "[c]oncessions or other obligations shall not be suspended during the course of the arbitration"²⁷³, without facing effective multilateral sanctions, we will witness the increasing use of unilateral reprisals. The WTO will simply be a cloak for "power politics in disguise". Power-oriented theories of "justified disobedience" and unilateralism have no place in the strengthened rules-based system which provides protection for all Members and the transnational exercise of rights.

Let me Chairman take this opportunity to make a comment of a general nature.

We commend the advances made within recent months both in recognising the serious constraints facing small vulnerable developing countries and the commitment to adopting tangible measures to address them. Also, worthy of acknowledgement are the initiatives such as the recent "Geneva week" which sought to enhance and facilitate the functioning of the non-Geneva based missions such as my own.

²⁷¹ E.g. US in Report of panel on Guatemala - anti-dumping investigation regarding portland cement from Mexico, WT/DS60/R, 1998, paras 5.61 et seq.

²⁷² *Ibid.*, para 5.64.

²⁷³ DSU, Article 22.6.

I must assure you that it is not due to any lack of vital trading interests to be protected that we are not resident in Geneva. We want to contribute in whatever modest way we can to the regulation of the global trading system. We do not have a resident mission here simply because we cannot afford one. But this should not negate our rights as a WTO Member.

With this in mind I thought it necessary to draw to your attention the additional impediments which we faced in preparing for this meeting. Although we are third parties, we did not receive the submission of the US until the afternoon of Tuesday this week leaving us precious little time to analyse it and prepare our intervention, effectively precluding any prospect of a written submission. I expect that the US would have made its submission on schedule which means that, unlike ourselves, parties resident in Geneva would have had sufficient time for study.

It is regrettable that, often our constraints are not taken into account but we are obliged to operate under more demanding conditions than others who are already better endowed.

In closing, Dominica and St Lucia insist that this Panel establish the rules on this matter so as to ensure that the US measure of March 3, 1999 is no more than an aberration in WTO practice and does not establish a precedent for the conduct of future trading relations and will not be emulated.

Appendix 4
Oral presentation of Ecuador at Third Party session
(17 December 1999)
(Spanish original)

Ecuador is closely following this case as an interested third party. The delegation of Ecuador would like to take this opportunity to make the following two remarks, bearing in mind that its interest in the case is based on systemic considerations and on the fact that it involves the subject of bananas:

- Almost a year after the events which gave rise to this dispute, the European Communities has still not fulfilled its obligation to implement the recommendations adopted by the Dispute Settlement Body in the banana case.
- In the banana case, Ecuador has shown that the multilateral procedures can indeed move forward in spite of any contradictions or gaps in the interpretation of Articles 21 and 22 of the Dispute Settlement Understanding. However, as regards the multilateral implementation of these procedures, Ecuador has had to show considerable good faith. And it is probably the absence of good faith they can give rise to situations such as the one which has arisen in this dispute.

Ecuador repeats its interest in this case and has decided to continue to seek a rapid solution to this dispute.

Thank you.

Appendix 5
Third Party Submission of India
(10 December 1999)

Introduction

India has a strong systemic interest in this dispute. The fundamental question is whether a prevailing Member in a dispute can unilaterally determine the compliance or non-compliance of the measures taken by the implementing Member pursuant to the recommendations and rulings of the Dispute Settlement Body (DSB) and based on this determination take unilateral measures suspending the concession of the implementing Member without formal authorization for such suspension of concessions by the DSB. At the heart of this matter are issues such as sequencing of multilateral determination of compliance and suspension of concessions or the relationship between Article 21 and 22 of the DSU.

Facts of the Dispute

In the EC – Banana dispute, the reasonable period of time (RPT) for compliance with the DSB rulings by the EC was to expire on 1.1.99 as per the arbitration held under Article 21.5 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). Pursuant to these DSB rulings, EC claimed to have amended or revised in July and November 1998 its banana importation regime, which was to be applicable from 1.1.99 onwards i.e., at the end of RPT.

In the period between October – December 1998, i.e., before the expiry of RPT, the US had published three notices in its Federal Registry proposing to impose 100% ad valorem duties on imports of certain products of EC from 3.3.99 onwards. Accordingly, the US Customs Service had required importers of the EC products to post bonds to cover the contingent duty liability, which could be realized if the DSB authorized suspension of concessions.

The US did not request the DSB to refer to the original panel under Article 21.5 for determination on the compliance of EC measures with the DSB rulings. Instead it sought on 14.1.99 the DSB authorisation to suspend the tariff concessions and related GATT obligations under the DSU Article 22. When EC objected to the level of concessions sought to be suspended by the US and requested for arbitration, the DSB referred the matter to arbitration under the DSU Article 22.6 on 29.1.99. The arbitrator issued his final decision on 9.4.99 and the DSB authorised US for suspension of concessions at a reduced level of US \$ 191.4 million (from \$ 520 million) on 19.4.99. On the same date the US confirmed the application of 100% ad valorem duty on the EC products retroactively from 3.3.99 onwards.

Aggrieved by the US Customs Service decision requiring importers of EC products to post 100% duty bonds, the EC requested consultations with the US on that decision. The consultations were held on 21.4.99, but failed to resolve the dispute. By a letter dated 11.5.99 EC requested for a panel, which was established by the DSB on 16.6.99 with standard terms of reference.

LEGAL ARGUMENT

In the light of the above factual background, the main issue of systemic concern to India in this dispute is: whether the US decision, made on a unilateral basis, that the EC's measures were not in conformity with the DSB rulings is permissible under the DSU. Further, pending a decision by Article 22.6 arbitrator on the level of suspension of concessions and formal authorization by the DSB for such suspension of concession under Article 22.7, can the US proceed with its so-called contingency measures of requiring bonds from the importers of the EC products.

Articles 3, 21.5 and 23 of the DSU

Article 3 is a general provision. It states that the dispute settlement system as provided in the WTO "is a central element in providing security and predictability to the multilateral trading system". Article 23 obligates the Members of the WTO to ("shall") "have recourse to, and abide by, the rules and procedures" of the DSU in resolving their disputes. By doing so and by not resorting to unilateral measures, the Members, as indicated by the title of the Article, are expected to 'strengthen the multilateral system' as established by the DSU/WTO.

US argued in its first written submission that EC had failed to show that its March 3 review of bonding requirements were violation of its obligations under Article 23. Further it dismissed Article 3 as only a "descriptive, not prescriptive" provision (at para 48 of the submission. However, it cited the same Article 3.2 at para 42 in support of its action violating the DSU Article 22.6. It asserted there that the purpose of the WTO dispute settlement system – i.e., to preserve the rights and obligations of Members – would be undermined if suspension of concessions was to await completion of arbitral proceedings under Article 22.6).

It may, however, be noted that these two articles stress the importance of multilateral decision making and dispute settlement system in the international trading system. And they are part of an international treaty, to which the US, as an important trading State, has subscribed and become a party. One of the general principles of International Law is that treaty provisions shall be observed in good faith by the parties. This is codified in the Article 26 of the Vienna Convention on the Law of Treaties.

The March 3 decision by US regarding bonding requirements was clearly without the DSB authorisation; furthermore, the requirement was imposed, pending the completion of Article 22.6 arbitration. Also, this requirement was not based on any multilateral decision of the DSB but based on a unilateral decision by the US that the EC measures were not in conformity with the DSB recommendations and rulings. Thus US actions, which were clearly unilateral in nature, were contrary to the letter and spirit of Articles 3 and 23 of the DSU.

Further, if there is any disagreement on the conformity of measures of a Member with the DSB rulings, the Members are required by the DSU Article 21.5 to follow dispute settlement procedures, including resorting to the original panel to decide upon compliance or otherwise of those measures. However, as outlined above, the US chose not to invoke this provision; rather, it unilaterally decided that EC measures were not in compliance with the DSB rulings and recommendations.

India strongly rejects the US assertion that the DSU allows a Member to proceed to Article 22 without first traversing Article 21.5. It is India's view that the only possible interpretation of the DSU procedures is that it is obligatory to go through Article 21.5 before resorting to Article 22.

Article 22.6 of the DSU

The last sentence of Article 22.6 lays down that "Concessions and other obligations shall not be suspended during the course of arbitration". Despite this clear provision, the US decided to take so-called contingency measures on 3.3.99, before the decision by the arbitrator on 9.4.99. This was in clear violation of Article 22.6 of the DSU.

We do not agree with the US assertion that the DSU is silent as to the date of the suspension of concessions. We believe that any measures suspending the concessions of a Member can be taken only after completion of dispute settlement proceedings under the DSU. Otherwise it would undermine the multilateral system of dispute settlement, as established by the DSU and would set a bad precedent of far reaching consequences for the whole WTO system. If a Member is free to

determine and suspend unilaterally the trade concessions to another Member, there is nothing in DSU requiring it to adhere to any maximum level of suspension of concessions. Members would normally tend to resort to suspension at a higher level than their actual loss. This could result in enormous loss to the traders.

In the present case, while the arbitrator had decided the level of nullification/impairment of benefits to the US due to non-compliance of DSB rulings by the EC at \$191.4 million, the US had in advance determined that level at \$520 million, and went ahead of enforcing it by requiring the importers of the EC products to deposit the enhanced duty-bonds. This unilateral action of US had done enough damage by imposing additional financial burden on the trade operators as explained by EC at paras 16(d) & 17 of its first submission.

Conclusion

In conclusion, it is India's view that the US violated key provisions of the DSU such as Articles 3, 21, 22 and 23 by taking arbitrary and unilateral measures with regard to imports of certain products from the European Communities.

Appendix 6
Third Party Submission of Jamaica
(8 December 1999)

Jamaica has sought third party participation in the present dispute hearing between the European Communities and the United States of America as it believes that the action taken by the United States of America on the 3rd March 1999, which is the subject of the present dispute, was contrary to the WTO rules and if not determined to be illegal by way of a Panel's ruling, will have a fundamental impact on the future of the Dispute Settlement Mechanism (DSM).

The multilateral trading system as defined by the WTO agreements creates rights and obligations for all participating members countries. The maintenance of the balance between these rights and obligations is crucial to the success of this global trading system. The Dispute Settlement Mechanism with its accompanying rules and procedures, plays a fundamental role in the maintenance of the balance within the WTO and therefore is "*a central element in providing security and predictability to the multilateral trading system*" (Article 3:1 , Dispute Settlement Understanding [DSU]).

In this respect, Jamaica , as a developing country member of the WTO is concerned about any threat to the functioning of the DSM and has thus chosen to exercise its right to participate in this dispute as a means of seeking to preserve the integrity of the DSM .

The Dispute Settlement Understanding (DSU) requires parties to "*seek the redress of a violation of obligations [by way of] the rules and procedures of [the DSU]*" (Article 23:1)

Furthermore, parties are not to make a "*determination to the effect that a violation has occurred... except through recourse to dispute settlement in accordance with the rules and procedures of this Understanding*" (Article 23:2(a))

According to Jamaica's understanding of the rules in this present matter, where a party is seeking to enforce sanctions such as suspension of concessions against another Member, Article 21:2 requires firstly that authorisation must be sought from the Dispute Settlement Body (DSB) to suspend concessions. Additionally, where the level of suspension is being determined by way of arbitration, Article 21:6 states that *concessions or other obligations shall **not** be suspended during the course of arbitration* .

The United States of America , like members of the European Communities and any other WTO Member, has agreed to be bound by the rules and procedures of the DSU. As such, the United States like every other WTO Member has the right to seek judicial determination of, and remedy for, an alleged injury by another WTO Member. However, the United States, and every other WTO Member must exercise this right within the prescribed boundaries of the DSU.

The voluntary disregard of DSU provisions, in favour of a unilateral determination of injury and subsequent enforcement of remedial action unauthorized by the DSB, such as those put into effect by the United States of America, is clearly a breach of the multilaterally agreed rules and procedures; rules and procedures which the United States of America itself helped to design and adopt in 1994.

This breach by the United States of America sets a dangerous precedent. If the illegality of this measure is not determined through the available avenues under the WTO such as this Panel process and is subsequently relied upon by other WTO members, it would have the effect of undermining the whole purpose of the WTO , that of providing a reliable rules-based global trading system.

Jamaica, therefore, calls on the Panel to uphold the WTO rules by finding that the United States of America acted contrary to its obligations under the DSU.

Appendix 7
Oral presentation of Japan at Third Party session
(17 December 1999)

Mr. Chairman,

(SUPREMACY OF A MULTILATERAL DECISION OVER A UNILATERAL DECISION)

1. At the DSB meeting in April of this year, Japan, as a third party to the EC-Banana case, registered its view on the importance of multilateral determination over unilateral determination. We emphasised that the maintenance of a sequence between Articles 21.5, and 22.6 or 22.7, is one of the key elements in safeguarding the multilateral character of the Dispute Settlement Mechanism, and more broadly of the organisation of the WTO.

2. While the EC deserves condemnation for the fact that it failed to fully implement the rulings and recommendations of the Panel and Appellate Body within the reasonable period of time, Japan cannot but register its concern at the actions taken by the United States on 3 March, 1999.

(ARTICLE 22.6 OF THE DSU)

3. No matter how the United States characterises its action taken on 3 March, be it "contingency plans" or "preservation of its ability to suspend concessions", the fact remains that the action "effectively stopped trade" and thus had an effect equivalent to the suspension of concessions. This constitutes a violation of Article 22.6. We therefore fully support the EC's argument in paragraph 14 of its submission.

4. The counter-argument presented in the US submission in this regard, that the "*withholding of liquidation*" was undertaken to "*preserve administrative flexibility*" and has no special legal significance, runs counter to the basic tenet of WTO law, i.e., ensuring predictability and stability in trade. The US argument should therefore be rejected.

(ARTICLES 23 AND 3.7 OF THE DSU)

5. We cannot but also register our grave concern at the argument of the United States that it may start suspending the concessions anytime after the end of RPT regardless of the whether the DSB has authorised the suspension. Such an argument is inconsistent with the objectives of Articles 23 and 3.7 of the DSU and has no basis in any of the DSU provisions.

6. The United States also argues that the EC has not demonstrated that the action of 3 March is inconsistent with DSU Article 23 and has not asserted a violation of DSU Article 3, and that the US did no more than preserve the ability of the United States to assess duties from 3 March. This argument of the US does not stand the test of scrutiny against the specific provisions of Article 23. Article 23.2(a) clearly states that "Members shall not make a determination to the effect that a violation has occurred, that benefits have been nullified or impaired". The US action on 3 March to "preserve the ability to assess duties from 3 March", directly contradicts the provision of Article 23.2, because the US action was indeed based on the determination to the effect that the violation has occurred.

7. The Arbitrators also noted in paragraph 4.14 of its report that "the DSB has the ability to reject its decision on the level of suspension as it does to reject panel and Appellate Body reports". The language contained in Article 23.2(c) of the DSU is unequivocal to the effect that a DSB authorisation is a prerequisite for suspending concessions or other obligations. Thus, the justification

advanced by the US in its submission for the US action taken on March 3, 1999 falls short of fulfilling the provision of Article 23.2.

(ARTICLES I, II, XI, AND VIII OF THE GATT 1994)

8. In addition to the observation above, we also support the EC's argument that the measure taken by the United States violates Articles I, II, XI, and VIII of the GATT 1994 as is established in the First Submission of the EC.

(ARTICLE 21.5 OF THE DSU)

9. As the EC clearly demonstrates in paragraphs 23, 24 and 27 of their First Submission, it is the obligation of the parties to have recourse to a Panel established under Article 21.5, where there is a disagreement as to the consistency with a covered agreement of measures taken to comply with the recommendations and rulings. This provision of Article 21.5 is an expression of supremacy of multilateral decision over unilateral decision, and is the bedrock of the multilateral trading system upon which the WTO was founded.

10. We hereby request that the Panel conduct its analysis in a way that preserves such foundation of the multilateral trading system and declare that the US measure has breached Articles 3, 21.5, 22 and 23 of the DSU and Articles I, II, XI and VIII of the GATT 1994.

Thank you.
