# WORLD TRADE ORGANIZATION

RESTRICTED

**WT/DSB/M/53**
18 March 1999

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**Dispute Settlement Body**
**12 January 1999**

## MINUTES OF MEETING

Held in the Centre William Rappard
on 12 January 1999

*Chairman: Mr. Kamel Morjane (Tunisia)*

### 1. European Communities - Regime for the importation, sale and distribution of bananas

(a) Recourse to Article 21.5 of the DSU by the European Communities (WT/DS27/40)

(b) Recourse to Article 21.5 of the DSU by Ecuador (WT/DS27/41)

The Chairman said that the DSB had before it two items for consideration: (i) recourse to Article 21.5 of the DSU by the EC; and (ii) recourse to Article 21.5 of the DSU by Ecuador.

The representative of Ecuador proposed that the DSB consider Ecuador's request as the first item on the agenda.

The Chairman said that it was his understanding there was an agreement on this course of action among the parties concerned, including the EC. He proposed that the DSB agree that Ecuador's request be considered as the first item on the agenda.

The DSB so agreed.

The Chairman recalled that the DSB had agreed to place this item on the agenda of the 25 November meeting and had agreed to adjourn that meeting with a view to revert to this matter at a later date. At the request of the EC, the DSB had reconvened on 15 December 1998 to take up this matter. No decision had been taken at that meeting and the DSB had agreed to adjourn its proceedings until further notice. On 21 December the DSB had reconvened in order to consider separate requests by the EC and Ecuador to reconvene the original panel. Therefore, at the present meeting the DSB would consider the two requests for the second time. He then drew attention to the communication from Ecuador contained in document WT/DS27/41.

The representative of Ecuador said that the DSB had considered his country's request at its meeting on 21 December. At that meeting many delegations had expressed their views but no substantive objections had been raised with regard to Ecuador's request. He hoped that at the present meeting the DSB would agree to this request which was under consideration for the second time.

The representative of the European Communities recalled that at the 21 December meeting, the EC had supported Ecuador's request and this position remained unchanged. Certain controversial points contained in the request such as reference to Article 19 of the DSU could be raised before the panel.

The representative of Mexico recalled that at the 21 December meeting his delegation had reserved its right to request a panel under Article 21.5, if necessary.

The Chairman proposed that the DSB take note of the statements and agree to refer to the original panel, pursuant to Article 21.5, the matter raised by Ecuador in document WT/DS27/41. The panel would have standard terms of reference.

The DSB so agreed.

The representatives of Colombia, Costa Rica, Côte d'Ivoire, Dominica, Dominican Republic, Jamaica, Mauritius, Nicaragua, Saint Lucia and Saint Vincent and the Grenadines reserved their third-party rights to participate in the Panel's proceedings.

The representative of Japan asked whether the other parties to the dispute, namely Honduras, Guatemala, Panama and the United States would also be parties to the panel. He believed that even if they were not, they would still be bound by the outcome of the panel report.

The Chairman recalled that Mexico had reserved its rights to request a panel on the same matter, if it deemed necessary. This implied that the other parties to the dispute were not committed by Ecuador's request. He proposed that the question raised by Japan could be taken up before the Panel.

The representative of Mexico said that the panel should not decide on the question raised by Japan in the DSB. This matter was not part of the terms of reference for the panel, and he did not wish the panel to rule on this matter.

The Chairman said that only Ecuador had requested the establishment of a panel. However, if this question were to be raised before the panel, the panel would have to rule on it. He then proposed turning to the next item and drew attention to the communication from the EC contained in document WT/DS27/40.

The representative of the European Communities said that at the 15 December meeting of the DSB the EC had requested a panel under Article 21.5. The text of the request outlined the regulations issued by the EC to implement the DSB's recommendations. The EC sought standard terms of reference similar to those contained in Ecuador's request. The present meeting was the second time that the EC was requesting a panel on this matter.

The representative of the United States said that since the DSB had agreed to refer the matter raised by Ecuador to the original panel, it was no longer necessary to move forward with the EC's request. In the last paragraph of its request, the EC had indicated that the mandate of the panel would be to make a presumption of conformity with WTO rules "unless their conformity has been duly challenged under appropriate DSU procedures". Ecuador had duly challenged, under appropriate DSU procedures, the conformity of the EC's banana regime with WTO rules. Therefore there was no basis for the EC to maintain its request. The EC had stated that the purpose of its request was to induce a challenge to its banana regime. Although Ecuador had made such a request, the EC continued to confuse Members. It was not clear what was the EC's position: that contained in its written communications or found in its statements in the DSB meetings or other announcements made by the Commission.

In December 1998, the EC had surprisingly claimed that it would have accepted a request for a panel by the complaining parties, if such a request had been made. However, since the complaining parties had not made such a request, the EC had been obliged to make its panel request. It was not clear what the EC was requesting as it could not request a panel to rule against its own measures. The

EC had continued to confuse Members by its oral clarification to the request. At the 21 December meeting the EC had stated that the terms of reference could be clarified by the panel after it had been established. She noted that the same delegation had insisted that normal procedures under Article 21.5 required that consultations should precede a panel. Furthermore, in the proceedings of the panel and the Appellate Body, the EC had claimed that the banana dispute had to start again because the complaining parties had not made a panel request that was sufficiently specific.

A number of questions related to the EC's request had been raised by Guatemala, Honduras, Panama and the United States in their letter of 11 January to the DSB Chairman (WT/DS27/42). The EC's efforts aimed at reconvening the original panel had gone beyond the specific purpose of the November and December meetings. The purpose of these meetings had been to determine whether the parties could arrive at a mutually-agreed approach to this matter. However, no such an agreement had been reached. Therefore, there had been no legitimate basis for the DSB to consider the EC's request at the extended 25 November meeting. The issue of whether the EC's request had been considered for the first time by the DSB at its meeting on 21 December would have to be decided by the DSB and not by the panel. In the view of the United States, that meeting was not the first consideration by the DSB of the EC's request. Furthermore, the DSB's decision to adjourn its 25 November meeting was not a decision to waive "the notice and prior documentation requirements" with regard to circulation of documents. The EC's request had not complied with these requirements and the United States could not accept the EC's attempt to modify orally its panel request. In the letter of 11 January the parties concerned had pointed to obvious substantial defects in the EC's request. The EC had sought recourse to Article 21.5 in order not to review the consistency of its measures but to consider its legal position on Article 21.5. There was no legal basis under the DSU for such a request. It was not clear what measures the EC wished the original panel to review. If, as the EC had claimed, the procedures of Article 6 of the DSU were applicable in this case, the following points should be clarified: (i) whether the EC would be both the complainant and the defendant; (ii) whether the EC had identified the specific measures to be reviewed by the panel; and (iii) whether the EC had provided a brief summary of the legal basis of its complaint. Furthermore, if consultations were required under Article 21.5 as the EC had insisted in the past, then the EC had not met this requirement. This implied that the EC would need to hold consultations before making a panel request.

The representative of Panama supported the statement by the United States. He drew attention to document WT/DS27/42 outlining the concerns with regard to the EC's request. At the 21 December meeting his delegation had expressed its concerns with regard to the EC's request, which had been described orally by the EC as a request to reconvene the original panel to examine the consistency of its new banana regime with the WTO Agreement. At that meeting, Panama had pointed out that the text of the request stated that the EC was seeking an interpretation of the WTO Agreement. He noted that Article IX:2 of the WTO Agreement stipulated that the Ministerial Conference and the General Council had the exclusive authority to decide on any interpretation of the WTO Agreement. Neither the DSB nor a panel could be granted such authority. Panama had made it clear that the 21 December meeting could not be the first meeting at which the EC's Article 21.5 request had been considered by the DSB because that request was not a request under Article 21.5. Since no modifications had been made to the request, Panama continued to believe that the EC's request submitted at the present meeting was not a request under Article 21.5. The negative consensus rule could not apply to the EC's request. The EC had claimed that the operative language of its request had only defined the terms of reference for a panel. However, this argument was not convincing. The only objective of the EC's request was for a panel to find that the EC's banana regime was in conformity with WTO rules since its conformity had not been challenged under the DSU procedures. This was beyond defining terms of reference since it would determine the nature of the request. He was concerned that the establishment of a panel on the basis of the EC's request would raise some procedural questions such as who would be the opposing party. The EC did not seek a determination on measures adopted. It was not clear whether the EC was the complainant, the

respondent or both. This request, which would have multilateral implications, was far too similar to an *ex parte* procedure for the comfort of any Member. Since there was no opposing party to the EC and participation of third parties was limited, it was not clear who would submit rebuttals to the Panel. The request was also inconsistent with the EC's interpretation of the procedural requirements under Article 21.5. The EC had argued that under Article 21.5 consultations should be held before a panel request could be made. The EC had not followed this procedure as it was not possible to establish with whom such consultations could be held. Under the EC's own arguments, the DSB should reject the request as the EC had not complied with Article 4 of the DSU.

The EC's position on the procedure of Article 21.5 was inconsistent. If the EC wished its position to be taken seriously, it would have to withdraw this request as unacceptable. This request should be submitted either as a request under Article IX:2 of the WTO Agreement, or it should be reformulated to reflect the clarification made orally by the EC. The DSB should not consider a request without any legal or formal justification. Instead of making new procedural obstacles, the EC should modify its banana regime without delay in order to bring it into conformity with the DSB's recommendations. The steps taken by the EC would only delay this process and undermine the principles and the integrity of the dispute settlement system.

The representative of Guatemala reiterated her country's disagreement with the procedural and substantive aspects of the EC's request. There was no legal basis under the DSU for the establishment of a panel with the terms of reference proposed by the EC. All modifications or clarifications made orally by the EC did not have any legal standing. The only relevant document was the EC's written request which had not been properly submitted to the DSB. The text of Article 21.5 was clear. The panel should not be reconvened to agree with the requesting party's interpretation of Article 21.5, nor with a request for a panel to make a presumption not provided for in the DSU provisions. If the DSB were to take such a decision, this would lead to an amendment of the DSU in relation to one isolated case and would create a precedent in terms of dispute settlement differences for all Members. Guatemala had demonstrated its confidence in the dispute settlement system as the only means of resolving trade disputes. Developing countries, in particular those with small economies did not have any alternative other than the strict observance of the WTO Agreements and procedures. The legal certainty of any dispute settlement system, especially one that regulated world trade, required parties to act in a responsible manner and in conformity with the multilateral rules. The DSB should not reconvene the original panel with terms of reference other than those provided for in Article 21.5.

The representative of Honduras expressed his delegation's concern with regard to the EC's request. Honduras considered that there were no legal grounds for the EC to introduce a new request after the 25 November meeting had been suspended. Therefore, at the 21 December meeting the DSB had not been authorized to consider the EC's request. The present meeting should not be considered the second meeting at which the EC's request was being considered by the DSB. It was not the intention of the drafters of Article 21.5 to permit a Member to request the DSB to reconvene a panel to examine a matter not relevant to this Article. The EC had not requested the panel to examine the conformity of its measures taken to comply with the DSB's recommendations. The request was in violation of the letter and spirit of Article 21.5 and was inconsistent with the WTO Agreement. To request the original panel to deal with a matter outside its competence would be a waste of time and resources. In accordance with its interpretation of Article 21.5, the EC had requested the inclusion in the terms of reference for a panel a presumption of consistency which was not provided for under the DSU. The EC's request was aimed at modifying not only the functions and powers of the DSB but also the wording of the DSU. He expressed his country's disappointment that it had not been possible to end the EC's delaying tactics. It was unacceptable that the DSU provisions which had been designed to provide security and predictability had been misused in this case. The system should be able to meet these expectations. Since it was the Members' obligation to safeguard the objectives of the dispute settlement system, the EC's request should not be accepted.

The representative of Saint Lucia expressed his delegation's concern with Ecuador's request and in particular the reference contained therein to the effect that the EC Regulation 1637/98 "discriminates in favour of traditional and non-traditional ACP bananas". This Regulation was in line with the Lomé Convention for which the EC had obtained a waiver. His delegation could accept the establishment of a panel at the present meeting. With regard to the argument that the EC's request was superfluous, he noted that the panel established at the request of Ecuador would not terminate the dispute. It would only deal with one element thereof. The other complainants might decide to initiate new panel proceedings or could take a unilateral action. This uncertainty was damaging to the banana trade. The DSB had the responsibility to uphold the principles of dispute resolution and to ensure a secure and predictable framework for the banana trade. For these reasons, his delegation supported the establishment of a panel as requested by the EC.

The representative of the European Communities recalled that the letter of 11 January (WT/DS27/42) had stated that the DSB's decision to adjourn its 25 November meeting, pending an agreement between the parties, was not "to waive the notice and prior documentation requirements" with regard to the 10-day rule. Therefore, if some delegations believed that the EC's request was in breach of the rules of procedure the same would apply to Ecuador's request and yet that request had been accepted without any objections.

He recalled that the EC was seeking standard terms of reference to guide the panel. Article 21.5 referred to a disagreement with regard to consistency of measures taken to comply with a covered agreement. In case of such a disagreement any dispute should be decided through recourse to dispute settlement procedures, including wherever possible resort to the original panel. Therefore, the original panel had to examine whether the EC's implementing measures were in compliance with the DSB's recommendations. This was clear in Article 21.5 and therefore questions about the formulation of the EC's request were not appropriate. At the 25 November meeting no party had made a request under Article 21.5. The United States had correctly stated that the purpose of the EC's request was to induce a challenge since the EC could not be both the complainant and the defendant in the same case. When the panel would take up Ecuador's request the roles of the parties would be conventional: i.e., Ecuador would present its case against the EC's compliance and the EC would present its case in defence of its compliance.

The letter of 11 January had stated that the EC was not requesting the panel to review the consistency of its banana measures but to agree with the EC's legal position on Article 21.5. This was not contained in the EC's request. The EC was asking the panel to establish a presumption of consistency, unless the conformity of the EC's implementing measures was challenged and now this was the case. That point was no longer relevant. That letter had also stated that the EC had requested, as was now the case, a panel to interpret Article 21.5 but this was not in the text of the request. Therefore, the request should be maintained, the EC would accept standard terms of reference and the panel in terms of Article 21.5 would examine the disagreement about the consistency of the EC's measures.

Ecuador was one of the five original complainants and the other four had not joined its request. Therefore, it was possible that the other parties would also make similar requests. He hoped that if two panels were established, which was the normal procedure, one could be sure that a proper examination would take place under Article 21.5 to determine whether the EC was in compliance or not. In order to ensure such an examination and a firm ruling, the EC wished to maintain its request. The EC was not certain as to the intentions of the United States and the other parties. In July, August and September 1998, the parties had asked for a review under Article 21.5. In November the United States had indicated that it wanted a review under Article 21.5 that would be carried out in a very short period of time which was not practical. In December the United States had blocked the EC's efforts to place this item on the agenda and had not joined Ecuador's initiative. Finally, it was now blocking the proceedings from moving forward.

The representative of the United States said that her delegation did not agree with the Chairman's statement that at the present meeting the EC's request was being considered for the second time. In the letter of 11 January, the United States had indicated that the EC would be making its purported Article 21.5 request for the first time at the present meeting. No consensus had been reached in the DSB to establish a panel on the basis of the first request and there was no basis for the DSB to decide to establish a panel at the present meeting. This would have to be done at the next DSB meeting, if the EC would pursue its request. The present meeting was also the first time that Ecuador's request was before the DSB for consideration. Under the DSU provisions, the DSB could establish a panel at the first meeting and the United States supported the establishment of the panel requested by Ecuador. If a panel were to be established as requested by the EC it was not clear who would be the parties to the panel's proceedings. The United States was not a party to the panel established at the request of Ecuador and no Member would be a party to the panel requested by the EC, if such panel were to be established. She recalled that Panama had asked about the identity of the party *vis-à-vis* the EC pursuant to its request. This issue raised some confusion.

With regard to further steps to be taken, the United States would make a timely request to suspend concessions in accordance with the time-frame under Article 22 of the DSU. The United States expected that the DSB would act on such a request in the manner specified in Article 22. The United States would also renew its request to the EC to negotiate a substantive solution to this dispute. The EC had stated that the United States had requested that a panel review under Article 21.5 be completed on an accelerated basis. This issue had been discussed on many occasions and Members were aware of the conclusions of these discussions. The EC had indicated that the United States was mistaken and the United States had claimed that the EC was not prepared to negotiate a WTO consistent solution to this matter. The United States had always been prepared to meet at any venue and time with the EC. The United States was now trying to convince the EC that it would be in the interest of both parties to negotiate the substance of this dispute. If such a solution were to be found there would be no need for further WTO litigation and for the United States to exercise its right to suspend concessions. However, the United States would reserve its rights and would exercise them, if necessary. The EC had stated that the United States had not challenged its banana regime. However, in July, September, October and November 1998, the United States had asked the EC to refer the matter to the original panel. Each time the EC had either rejected the US request or had imposed unacceptable conditions. It was the right of the complaining party to determine when to request a panel. The United States had not ruled out any of its rights under the WTO. However, in order to avoid additional litigation in the WTO, it continued to believe that the substance of the dispute had to be resolved. This dispute had been under consideration for more than six years and had been examined by two panels under the GATT 1994, one panel and the Appellate Body under the WTO, as well as arbitration over a reasonable period of time. The objective of the WTO was to resolve disputes not to prolong them through litigation. The United States called upon the EC to negotiate a WTO-consistent solution.

The representative of the European Communities regretted that the United States considered that the normal DSU procedures with regard to a disagreement between the parties about compliance, constituted additional litigation. In the course of 1998, the United States and other delegations had made statements to the effect that the EC would not be able to comply with the DSB's recommendations. This argument had been made before the EC had made its first proposal on implementation. The only way for the EC to defend itself was to have recourse to the DSU procedures. He reiterated that this was not additional litigation but procedures provided for under the DSU.

The United States had underlined that it was still open to discussions on a substantive solution to this matter. So was the EC. However, this involved two problems. The first was that the United States, under its own legislation, had drafted a list of products for retaliation to be submitted for

authorization to the DSB and the EC was not keen to negotiate under a threat. If the United States wished to negotiate a solution with the EC it should not threaten to retaliate. Another problem related to the issue of consistency. Before negotiating a solution it was necessary to establish the nature of the problem.

The EC considered that the present meeting was the second meeting at which the EC's request had appeared on the agenda. With regard to the question of the identity of parties to the panel, if the two requests were accepted, the panel would discuss with Ecuador and the EC how to proceed. Ecuador would make its submission to the effect that the EC's measures were not consistent and the EC would make its submission that its measures were consistent. This problem had been triggered at the 25 November meeting since no party had invoked the Article 21.5 procedure, which was obligatory. Therefore, the EC which had no option and was faced with a possible retaliation, had launched the procedure under Article 21.5 in order to induce the other parties to take action.

The Chairman said that he wished to refer to one point raised by Guatemala, Honduras, Panama and the United States in their letter of 11 January as well as to the points raised by them at the present meeting. He understood and respected their view but his sole objective was to bring this matter back to the system in the interest of the WTO and its dispute settlement system. He had previously indicated his position with regard to the procedural question of whether this was the first or the second consideration of the EC's request. At the 25 November meeting, he had stated that the item concerning Article 21.5 had been placed on the agenda on the understanding that it would not be considered at that meeting but in order to make it possible for the DSB to meet on short notice when the matter would be ready for consideration. The phrase "ready for consideration" did not imply that the parties or all the parties had to reach an agreement before a DSB meeting could be reconvened. For his part, he had made efforts aimed at reaching such an agreement but unfortunately this had not been possible. Therefore, in response to the point of order raised at that meeting, he had ruled that the 21 December meeting, reconvened at the request of the EC to consider its panel request under Article 21.5, had been duly reconvened. Therefore, the present meeting was the second meeting at which the EC's request was being considered by the DSB. With regard to the question of the identity of parties it would be up to the panel to deal with this matter. At its first meeting the panel would draw up a time-table for written submissions and would determine the parties and the third parties thereto.

The representative of the Philippines said that his delegation had systemic concerns with regard to the Chairman's statement. The Chairman had ruled that the present meeting was the second meeting at which the EC's request was being considered by the DSB. The item on the agenda of the present meeting was "European Communities - Regime for the Importation, Sale and Distribution of Bananas: Recourse to Article 21.5". Members could have recourse to Article 21.5 "when there is a disagreement as to the conformity of a specific measure". The EC's request was not a proper request under Article 21.5 since the EC was requesting a panel to establish a presumption. If a panel were to be established to make a legal interpretation this would be another matter. However, if for the sake of automaticity of the DSU procedures with regard to the establishment of panels, the Chairman had sought to justify that the present meeting was the second meeting at which the DSB was considering the EC's request, his delegation could not agree with the Chairman's statement. The present meeting should be the first meeting since at the previous meeting the item on the Agenda had referred to recourse to Article 21.5, but in fact had not been made in accordance with the provisions of Article 21.5. Therefore, this should be the first meeting at which the EC's request was being considered by the DSB.

The representative of Mexico said that his delegation had a systemic concern with regard to standard terms of reference. It was not up to a panel to determine its terms of reference. In accordance with the DSU procedures, the DSB was requested to establish panels on the basis of terms of reference specified in panel requests. Therefore, in order for the terms of reference to cover the

issue referred to by the Chairman, namely the determination of parties and third parties to the dispute, the issue would have had to be outlined in the panel request. Another possibility was for the parties to the dispute to agree to the terms of reference other than standard terms of reference. However, the identity of parties was not clear in this case. He recalled that in an anti-dumping case which involved Mexico and Guatemala, the terms of Mexico's written request had been given strict consideration. The Appellate Body had examined Mexico's first written document without considering its subsequent communications to the panel referring to any type of measure. His delegation wished to ensure that decisions by the DSB, panels and the Appellate Body would be taken in a consistent manner. If not, the credibility of the system would be seriously undermined.

The representative of Honduras supported the statement by the Philippines.

The representative of the United States reiterated that, in light of the procedural defects in reconvening the 25 November meeting and the manner in which the EC's request had been placed on the agenda as well as the lack of compliance with regard to the notification requirements, there was no basis for the DSB's decision at the present meeting. The statement by the EC that the panel would meet with Ecuador and the EC had only proved that the EC's request was redundant. She said that the panel could not decide on the question of the identity of the parties thereto.

The representative of Ecuador said that in accordance with Article 6.2 of the DSU, a Member requesting a panel had the obligation to comply with certain procedural requirements concerning the format for such a request. If, in future, a Member decided to make a request similar to that of the EC at the present meeting and the DSB proceeded as suggested, then the DSB would have an obligation to approve any request which did not comply with the basic requirements established through practice. He asked whether Ecuador's request, which had been accepted by the DSB, would have been accepted if it had been submitted without the necessary specificity. He believed that if Ecuador's request had not met the necessary criteria it would not have been accepted by the DSB.

Ecuador did not wish the two panels to be merged. The terms of reference requested by Ecuador were different from the terms of reference requested by the EC. The 25 November meeting had been suspended and had then been reconvened which did not constitute two meetings but one meeting which had first been held on 25 November and had continued on 15 and 21 December. Therefore, the requests by the EC and Ecuador had been submitted for the first time at the present meeting, and Ecuador's request had been accepted by the DSB at the first meeting.

The Chairman confirmed that the 15 and 21 December meetings were the continuation of the 25 November meeting. With regard to the terms of reference for the panel he had stated that the panel could examine certain issues, including the identity of parties. This was not because the panel had decision-making power but because the DSB could not refuse the request for a panel. It was the first time that a defendant was requesting a panel to examine the consistency of its measures. He did not wish to make any evaluation of the EC's request and therefore the panel would have to decide on this matter. The last paragraph of the EC's request stated that "…the above-mentioned implementing measures of the European Communities must be presumed to conform to WTO rules unless their conformity has been duly challenged under the DSU procedures". This question would have to be decided by the panel.

He confirmed that the two requests would not be merged although the original panel would examine both matters. The DSB had, on a separate basis, taken a decision with regard to Ecuador's request. In accordance with the DSB's decision at its 21 December meeting, the present meeting was the second consideration of the EC's request. Both requests would be considered in the same manner: i.e., the DSB would take note of the statements and agree to refer these matters to the original Panel in accordance with Article 21.5. He proposed that the DSB take note of the statements and agree to refer

to the original panel the matter raised by the EC in document WT/DS27/40 in accordance to Article 21.5 of the DSU. The Panel would have standard terms of reference.

The representatives of the Philippines wished to know how standard terms of reference under Article 7.1 of the DSU would read in relation to the EC's request.

The Chairman said that as provided for in Article 7.1 of the DSU, the panel would have the following terms of reference: " To examine in the light of the relevant provisions (the name of the covered agreement(s) cited by the European Communities) the matter referred to the DSB by the European Communities in document WT/DS27/40 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreement(s)"

The representative of the Philippines said that in accordance with Article 6.2, a party could specify the terms of reference, if it so wished. On the basis of the EC's request it seemed that the EC was not seeking standard terms of reference but other terms of reference in order to determine that its implementing measures had to be presumed to conform to WTO rules unless their conformity had been challenged. The EC did not wish to test its measures against the WTO Agreement. Therefore the Chairman should take into account that the EC was not requesting standard terms of reference.

The Chairman recalled that the EC had insisted, on many occasions, that it was seeking standard terms of reference.

The representative of the Philippines said that, in order to amend its request for a panel, a party had to submit an amendment in writing not later than 24 hours prior to the meeting. However, the EC had only provided an oral explanation concerning the interpretation of its request.

The Chairman said that the parties to the dispute could decide within 20 days on terms of reference other than standard terms of reference.

The representative of the United States said that, like the Philippines, her delegation had similar concerns with regard to the identity of parties and third parties to this dispute. Therefore the point made by the Philippines was important. She wished to know which covered agreements would be relevant in this case and requested the EC to provide some explanation.

The representative of the European Communities said that the Chairman had already answered many points which his delegation supported. Some delegations had stated that the EC was trying to amend this request and he clarified that he had not tried to amend the EC's request. The Chairman had indicated that the panel would have standard terms of reference. With regard to the identity of parties, in his view there were two parties to this dispute. The question was rather who was not a party to this dispute. It was not clear whether the other parties involved in the banana case would join Ecuador's request or whether Ecuador was acting alone. On the basis of the letter of 11 January it was clear that Guatemala, Honduras, Panama and the United States were not parties to this review. Mexico had reserved its right to request the establishment of a panel. After consultations, the panel would invite the parties and third parties to participate in the proceedings. With regard to the US question concerning the covered agreements, under Article 21.5 the panel would examine the consistency of the measures taken by the EC with the rulings and recommendations of the DSB. This procedure was different to the procedure concerning violation complaints.

The representative of Mexico said that as stated by the EC, his country would not be a party to this panel. Mexico could become a third party in the panel within the next ten days.

The representative of the United States asked Ecuador whether it considered to be a party to the EC's request.

The representative of Panama said that the DSU was clear that a panel request had to be submitted in writing. Although the EC had made an oral clarification its written request was different. If a panel were to be established such a panel should be established on the basis of the written request. The EC considered that there were two parties in this case. He believed that this argument was based on the fact that Ecuador had also made its request and there was some confusion as to whether or not these two requests were the same. As Ecuador had stated these two requests were separate. Therefore, the question remained who would be the other party *vis-à-vis* the EC. If one delegation decided unilaterally on this issue this would set a dangerous precedent.

The representative of India said that his delegation was ready to accept any decision to be taken by the DSB at the present meeting. The dispute before the DSB raised some broad and sensitive issues. The provisions of Article 21.5 should not be considered to be the same as the provisions with regard to violation complaints. It was important for these issues to be analyzed separately from the banana case. One could analyze this issue as a dispute between two parties A and B in which party B had lost. Subsequently, party B would state that it had brought its measure into compliance as recommended by the DSB. However party A challenged this and requested to have recourse to Article 22. Due to the negative consensus rule a request for retaliation would be authorized the DSB. Therefore, a party seeking a review by the multilateral forum should not be denied this option on the ground that it did not refer to any other party as a respondent. In India's legal system any criminal act was considered to be a crime against the state. The other party would be India's Government. In this case, one party was seeking a review of its measure by the original panel. The question of who was the other party because no other party had challenged this, could be examined by legal experts. The panel should inform the DSB members that the EC had made its request and that it had claimed that it was in compliance with the DSB's recommendations. Any Member interested in the matter could make its submission to the panel. This could lead to a situation where there would be only two parties. If the party that had won did not seek a panel under Article 21.5 but requested recourse to Article 22, then the party that had lost would be at a disadvantage. It should be able to seek a ruling from the original panel. If not, the purpose of the WTO Agreement would have no meaning.

The Chairman proposed that the DSB take note of the statements and agree to refer to the original panel pursuant to Article 21.5 of the DSU the matter raised by the European Communities in document WT/DS27/40. The panel would have standard terms of reference.

The DSB so agreed.

The representatives of Colombia, Costa Rica, Côte d'Ivoire, Dominica, Dominican Republic, India, Jamaica, Mauritius, Nicaragua, Saint Lucia and Saint Vincent and the Grenadines reserved their third-party rights to participate in the Panel's proceedings.