I. INTRODUCTION

1.1 On 5 February 1996, Ecuador, Guatemala, Honduras, Mexico and the United States acting jointly and severally, requested consultations with the European Communities ("the Community" or the "EC") pursuant to Article 4 of the Understanding on Rules and Procedures governing the Settlement of Disputes ("DSU"), Article XXIII of the General Agreement on Tariffs and Trade 1994 ("GATT"), Article 6 of the Agreement on Import Licensing Procedures (to the extent that it related to Article XXIII of GATT), Article XXIII of the General Agreement on Trade in Services, Article 19 of the Agreement on Agriculture (to the extent that it related to Article XXIII of GATT), and Article 8 of the Agreement on Trade-Related Investment Measures (to the extent that it related to Article XXIII of GATT) regarding the EC regime for the importation, sale and distribution of bananas established by Council Regulation (EEC) 404/93[1], and the subsequent EC legislation, regulations and administrative measures, including those reflecting the provisions of the Framework Agreement on Bananas, which implemented, supplemented and amended that regime (WT/DS27/1).

1.2 Consultations were held on 14 and 15 March 1996. As they did not result in a mutually satisfactory solution of the matter, Ecuador, Guatemala, Honduras, Mexico and the United States, in a communication dated 11 April 1996, requested the establishment of a panel to examine this matter in light of the GATT, the Agreement on Import Licensing Procedures, the Agreement on Agriculture, the General Agreement on Trade in Services ("GATS") and the Agreement on Trade-Related Investment Measures (WT/DS27/6).

1.3 The Dispute Settlement Body ("DSB"), at its meeting on 8 May 1996, established a panel with standard terms of reference in accordance with Article 6 of the DSU (WT/DS27/7). Belize, Canada, Cameroon, Colombia, Costa Rica, Côte d'Ivoire, Dominica, Dominican Republic, Ghana, Grenada, India, Jamaica, Japan, Nicaragua, the Philippines, Saint Vincent and the Grenadines, Saint Lucia, Senegal, Suriname, Thailand and Venezuela reserved their third party rights to make a submission and to be heard by the Panel in accordance with Article 10 of the DSU. Several of these countries also requested additional rights (see paragraph 7.4). Thailand subsequently renounced its third party rights.

Terms of Reference

1.4 The following standard terms of reference applied to the work of the Panel:

> "To examine, in the light of the relevant provisions of the covered agreements cited by Ecuador, Guatemala, Honduras, Mexico and the United States in document WT/DS27/6, the matter referred to

[1] Official Journal of the European Communities No. L 47 of 25 February 1993, pp.1-11.

the DSB by Ecuador, Guatemala, Honduras, Mexico and the United States 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."

Panel Composition

1.5 On 29 May 1996, the Director-General was requested by Ecuador, Guatemala, Honduras, Mexico and the United States to compose the Panel by virtue of paragraph 7 of Article 8 of the DSU.

1.6 On 7 June 1996 the Director-General announced the composition of the Panel as follows:

Chairman: Mr. Stuart Harbinson
Members: Mr. Kym Anderson
Mr. Christian Häberli

1.7 The Panel submitted its interim report to the parties to the dispute on 18 March 1997 and the final report on 29 April 1997.

II. PROCEDURAL ISSUES[2]

2.1 In this section, the parties' arguments are set out with respect to three procedural issues: (i) the adequacy of the consultations and the specificity of the request for panel establishment; (ii) the requirement of legal interest; and (iii) multiple panel reports. The organizational matter with respect to the participation of third parties in these proceedings and presence of private lawyers in meetings of the Panel is addressed in the "Findings" section of this report. Arguments presented by third parties on their participation in these proceedings are summarized in Section V.

(a) Adequacy of the Consultations and Specificity of the Request for Panel Establishment

2.2 The **EC** noted that consultations on the EC banana regime were held in the autumn of 1995 between the EC, a number of banana producing countries, parties to the Lomé Convention, Guatemala, Honduras, Mexico and the United States. These consultations were inconclusive and were terminated when a new round of consultations started. After Ecuador had become a WTO Member on 26 January 1996, Ecuador as well as Guatemala, Honduras, Mexico and the United States requested consultations with the EC on its banana regime by letter dated 5 February 1996 and circulated to Members as document WT/DS27/1 on 12 February 1996. It contained, in the view of the EC, only the barest outline of

[2] Note: When not otherwise indicated, the footnotes in this section are those of the parties.

the complaints against the EC banana regime. Bilateral consultations were held with each of the Complaining parties on 14 and 15 March 1996 in Geneva.

2.3 The EC, being of the view that consultations were intended not only to "give sympathetic consideration" to the considerations and the questions of the Complaining parties, but also to enable the responding party to obtain a clear view of the case held against it, prepared a large number of questions in an attempt to better understand the complaints of Ecuador, Guatemala, Honduras, Mexico and the United States. These questions were transmitted on 3 April 1996. In the meantime, the EC was preparing its answers to the numerous questions posed by the Complaining parties. On 11 April 1996, however, Ecuador, Guatemala, Honduras, Mexico and the United States submitted a request for the establishment of a panel to the Chairman of the DSB (WT/DS27/6). Under these circumstances, the EC, concluding that the Complaining parties were of the view that the consultation phase was over, decided not to submit its answers to these questions nor received any answers to its own questions.

2.4 The EC considered that, although the parties to the earlier consultations did exchange questions and answers in writing, these documents could not, in the opinion of the EC, be relied upon in the present procedure. During the consultations both sides agreed that the parties would re-exchange these questions and answers from the earlier consultation so as to include them in the record of the present consultations. This would also have enabled Ecuador to obtain this material since, as a non-participant in the earlier consultations, it had no access to it. Such re-exchange of questions and answers did not take place, however, and hence these questions and answers were not part of the consultation and did not form a basis for the present dispute settlement procedure.

2.5 In the opinion of the EC, the consultation stage preceding a possible panel procedure should serve to afford the possibility to come to a mutually satisfactory solution as foreseen in Article 4.3 of the DSU. The obligation to seek such a solution could not be fulfilled unless the individual claims, of which a matter or a problem brought to dispute settlement was composed, were set out in the consultation phase of the procedure.[3] The EC noted that the parties had exchanged a considerable number of questions and answers and that the oral consultations within two half-days could not possibly cover all questions and in reality were highly perfunctory, the largest part of the consultations being spent by the Complaining parties reading out identical statements. It was evident, therefore, in the view of the EC, that these consultations had not fulfilled their minimum function of affording a possibility for arriving at a mutually satisfactory solution and for a clear setting out of the different claims of which the dispute consisted.

2.6 In the view of the EC, the request for the establishment of a panel was intended to be the culmination of the preparatory stage of the dispute settlement

[3] "United States - Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway", ADP/87 para. 335. Confirmed by the (unadopted) panel report on "Japan-Audiocassettes", ADP/136, para. 295 ff.

procedure. This was not the case in this dispute. The request for the establishment of a panel was in several respects a step backward from the somewhat greater clarity provided during the consultations (a point illustrated by the EC with examples). The EC asserted that, in the case of several claims, it was not in a position to know whether the claims advanced during the consultations were maintained, altered, refined or dropped.

2.7 The EC noted that, after the request for a panel had been discussed for the second time by the DSB at its meeting on 8 May 1996, the DSB decided to establish the Panel under standard terms of reference (WT/DS27/7) which implied that the matter at issue was entirely defined in the document requesting the establishment of a panel (WT/DS27/6).

2.8 The EC claimed that this request was unacceptably vague in the light of Article 6.2 of the DSU and past practice from earlier panels. Article 6.2 of the DSU prescribed, *inter alia*, that the request for the establishment of a panel:

> "shall ... identify the specific measures at issue and provide a summary of the legal basis of the complaint sufficient to present the problem clearly."

In the opinion of the EC, these two functions could be properly fulfilled only if the request for the establishment of a panel did not merely restate the matter at issue in its broadest terms, as did the request by the Complaining parties, but contained a list of concrete claims, i.e. brief statements which linked a specific measure (and not the whole banana regime) with the infringement of a specific rule or obligation under the WTO (and not just a whole list of provisions).

2.9 The request for the establishment of a panel thus clearly infringed, in the opinion of the EC, the terms of Article 6.2 of the DSU. It did not identify specific measures at issue - it merely cited "the regime". And it did not relate the specific measures to the alleged infringement of a specific obligation - it merely cited a list of Articles. It was therefore impossible to know which Article might be related to which specific measure and, thus, which claim was being made against the EC. The EC was of the view that the consultations in the present case had not been able to fulfil their function because the Complaining parties were not prepared to wait for a further exchange of questions and answers as agreed during the oral consultations on 14 and 15 March 1996. Hence the request was a nullity and, at the very least, the consultations should be restarted and lead to a proper request for a panel responding to the requirements of Article 6.2. The EC therefore requested the Panel to decide this issue prior to any examination of the substance of the case and prescribe any remedial action deemed necessary *in limine litis*. The EC argued that at the stage of the first submission procedural illegalities could still be "healed" without much damage. If, at the last stage of the proceeding before this Panel, or before the Appellate Body, the request for the establishment of a panel were ruled to be contrary to Article 6.2 of the DSU, in the view of the EC, the complications would be considerable.

2.10 The EC considered that it was time to impose discipline where it concerned the formulation of the request for the establishment of a panel. Although there were large variations in practice, such requests sometimes clearly fell below

the minimum standard necessary to inform both the defending party and possibly interested third parties of the scope of the case. In the present case, Complaining parties had clearly not met the minimum requirements of Article 6.2 of the DSU and of the *Salmon Panel*.[4]

2.11 The **Complaining parties** responded that the EC's claims were without basis in the DSU. Referring to the text of Article 4.2 of the DSU, the Complaining parties argued that the EC was obliged to accord the Complaining parties sympathetic consideration and afford adequate opportunity for consultation regarding representations made by the Complainants. This obligation was not reciprocal. Article 4.5 of the DSU stated that Members "should attempt" to obtain a satisfactory adjustment of the matter in consultations, but it referred to "attempt" and did not require that Members succeed in settling matters bilaterally. Article 4.7 of the DSU was unconditional in providing for the establishment of a panel upon request of the Complaining party or parties after the expiration of the 60-day consultation period.[5]

2.12 The Complaining parties considered that they had provided the EC with ample notice and explanation of their concerns during the consultation phase going beyond any DSU requirement by providing a detailed seven-page joint statement and a hundred questions detailing the many aspects of the EC banana regime about which they had concerns. The statement and the appended "Non-Exhaustive List of Questions" identified specific measures at issue and various legal bases for concern with a degree of specificity well beyond what was normally provided in any stage before the panel procedure. The EC's current insistence that the consultations had to permit the EC to identify each and every legal argument that would be presented in the panel proceeding was, in the view of the Complaining parties, without basis in the DSU. The banana regime in the EC had in any event been the subject of exhaustive and repeated consultations, negotiations, and GATT dispute settlement procedures even before 1991. There was nowhere in the WTO agreements any requirement that the consultations be a dress rehearsal for a panel proceeding.

2.13 With reference to the EC's arguments concerning the nullity of the request for establishment of a panel, the Complaining parties argued that Article 6.2 of the DSU required all panel requests to contain two elements. First, the request should "identify the specific measures at issue". Second, it should "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly". Contrary to the EC claim, the primary qualifying emphasis of this

[4] "US-Norway Salmon Panel" ("United States - Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway") ADP/87, paras. 335-336; see also the panel report on "Japan-Audiocassettes", ADP/136, para. 295 ff.

[5] The Complaining parties noted that even under earlier GATT practice, it was clear that it was not necessary for both parties to agree before a panel could be established; such a condition would mean that one party could indefinitely block the procedures simply by saying that bilateral consultations had not yet been terminated. See Statement of Legal Adviser to the Director-General in relation to Japan's attempt in 1986 to block establishment of a panel on Japan's taxes on alcoholic beverages, C/M/205 p.10, cited in WTO "Analytical Index" (1995 ed.), p.673.

provision was, in the opinion of the Complaining parties, brevity, continuing the prior GATT emphasis on brevity enunciated in the Montreal Rules.[6] Nowhere did Article 6.2 require a detailed exposition tying each specific measure to each provision of law to be claimed by the Complaining parties. This was what submissions to the panel had to do to enable the panel to perform the task of examining particular measures in the light of the covered agreements. The Complaining parties considered that their request of 11 April 1996 complied fully with the requirement of Article 6.2. The request identified the specific measures at issue by citation to the "basic" enabling regulation and all laws, regulations and administrative measures that implemented, supplemented or amended that regulation (which numbered in the hundreds), including specifically those reflecting the BFA. The request then provided a "brief summary of the legal basis of the complaint", with a listing of the specific agreements and particular Articles implicated by the regime. All of the claims made by the Complaining parties in this dispute were covered by this request. None of the claims related to aspects of the regime that were not identified as problems in the consultations.

2.14 The Complaining parties submitted several examples of panel requests filed since 1 January 1995 that in their view reflected a level of "specificity" comparable to the request in this dispute. If any requests for establishment of a panel filed since 1 January 1995 did provide more detail, it was, in the opinion of the Complaining parties, not detail compelled by Article 6.2. If some Members saw fit to provide a more detailed exposition of the problems than that contained in the Complaining parties' request, they were free to do so, but their providing such detail did not amount to "practice" under the DSU that would dictate how Article 6.2 should be interpreted. The arguments with respect to the panel report on *United States - Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway* (*Salmon Panel*), adopted on 30 November 1992 (ADP/87), were misplaced in the view of the Complaining parties. To the extent the *Salmon Panel* declined to examine claims raised in that action, it did so for two reasons that were inapplicable in the current case. The first was that certain claims were outside the panel's terms of reference. The other was that various claims were not the subject of consultations and conciliation in accordance with Article 15.3 of the Agreement on Implementation of Article VI of GATT. Neither finding had any bearing on the claim that "a lack of specificity" in the request failed to meet the requirements of an entirely different agreement, the DSU.

2.15 The Complaining parties had requested the establishment of a panel at two meetings of the DSB: on 24 April and on 8 May 1996. At neither one of those meetings did the EC or any other Member complain that the request was too vague to "present the problem clearly". On these occasions, the EC representative

[6] "Improvements to the GATT Dispute Settlement Rules and Procedures", Decision of 12 April 1989, BISD 36S/61, para. F(a) ("The request for a panel ... shall indicate whether consultations were held, and provide a brief summary of the factual and legal basis of the complaint sufficient to present the problem clearly.").

mentioned numerous other issues, including its reservation of rights under Article 9.2 of the DSU, but did not request any further explanation of the request. The number of third parties participating in this proceeding further illustrated that other Members certainly understood the "problem" sufficiently to gauge their respective national interests in this proceeding.

2.16 The Complaining parties further argued that, as a legal matter, the EC was asking the Panel to take an action outside its terms of reference. The Panel was bound to complete its task of examining the EC measures in light of the covered agreements, as specified in those terms of reference. Those terms of reference did not permit the Panel to "dissolve itself": the DSU was not one of the agreements covered by the Panel's terms of reference. The EC argument that it needed an early decision on this issue to avoid "prejudice" was, in the Complaining parties' view, without basis. The EC had had more than adequate notice of the aspects of the regime that were of concern to the Complaining parties. If anything, the Complaining parties had only narrowed their focus since the consultations which amounted to a windfall, not prejudice, to the EC. The further contention that participating in the second meeting with the Panel and further proceedings constituted prejudice was equally misguided. Indeed, it misapprehended entirely the nature of dispute settlement proceedings under the DSU. Article 3.10 reflected the Members' understanding that:

> "the use of dispute settlement procedures should not be intended or considered as contentious acts and that, if a dispute arises, all Members will engage in these procedures in good faith in an effort to resolve the dispute."

The DSU thus considered participation in dispute settlement proceedings an obligation of membership that improved trade relations, not a prejudicial process in itself. The remedy sought by the EC - additional time to defend itself - was only further proof of the opportunistic nature of this "procedural" claim. It was not likely that additional time would have changed the EC's presentation of its defence, as the first meeting of the Panel confirmed. The EC's claim of harm resulting from alleged lack of specificity should therefore be rejected.

2.17 The **EC** responded that the Complaining parties mischaracterized its position on this point. The EC's position was very simple: the request for the establishment did not satisfy the requirements of Article 6.2 of the DSU because of (i) lack of identification of specific measures at issue (i.e. the regime); and (ii) lack of a brief summary of the legal basis of the complaint sufficient to present the problem clearly (i.e. a list of Articles). Therefore, the request for the establishment of the Panel was null and void.

2.18 On 21 January 1996, the EC continued, Ecuador became a Member of the WTO; by 5 February 1996, the other Complaining parties had convinced Ecuador to join them and start new consultations which they requested on that day. Because of problems concerning the modalities of consultations and scheduling problems, these consultations took place only on 14-15 March 1996. Mutual promises were made to reply to long questionnaires, but before the process had run its course a request for a panel was filed. In the view of the EC, undue haste

had resulted in the panel request being too brief a summary to present the problem clearly, in particular in a case where a new agreement, i.e. the GATS, was brought up for the first time in a panel procedure. As a separate identification was not made and the list of relevant Articles was so long, it was not even possible for the reader of the request to create his own link between the specific issues and the alleged infringement of a specific provision. This was at least possible in some earlier requests for establishment of panels which were at the border line of what could be deemed acceptable under Article 6.2 of the DSU.

2.19 The EC explained that in not mentioning the issue of the too summarized character of the request at the DSB meeting, the EC followed the by then well-established line that the respect for the basic procedural rules of the dispute settlement system was a task for the panels. Given that this was a well-established practice, raising the matter in the DSB and trying to prevent the DSB from establishing the panel for that reason would have been seen as a stalling tactic and onslaught on the "right to a panel" recently confirmed in the Marrakesh Agreement. Seen in this light, the argument advanced by the Complaining parties that the Panel, by ruling on Article 6.2, would be transgressing its terms of reference, was somewhat disturbing. This amounted to saying that the terms of reference prevailed over the DSU. If the Panel were not bound by what was in effect the constitution of the dispute settlement system and would not be held to apply the rules of the DSU, Members might just as well not have negotiated the DSU in the Uruguay Round. The Complaining parties had finally asserted that Article 6.2 should not be upheld because the EC had suffered no prejudice as a consequence. This position was misconceived in fact and in law. In fact, the EC had suffered a prejudice, i.e. the lack of minimal clarity handicapped the EC in the preparation of its defence, which was not unimportant given that the respondent normally had less time than the complaining Member to make its written submission. In law, procedural rules, and in particular the rule that the respondent must have a clear view of the case held against it, had a certain value in themselves. And that value should be defended by the Panel. As the "healing" measures suggested at the stage of the EC's first submission were no longer feasible at the stage of the rebuttal submissions, there was no alternative for the Panel but to draw the consequences of the serious defects inherent in this important document: nullity of this procedure.

2.20 In response to a question by the Panel, the EC analyzed, in light of Article 6.2 of the DSU, eight panel requests that were brought to the WTO (some of which with multiple Complaining parties). As a preliminary matter, the EC noted that it was puzzled as to how the WTO practice with respect to Article 6.2 could already have changed the interpretation to be given to this Article as it appeared from the (adopted) *Salmon Panel* report. Time had been too short and practice had been too inconsistent. In the view of the EC, several of the eight analyzed panel reports did not meet or barely met the requirements of Article 6.2 in the sense that there was a clear indication of the specific measure at issue, of the provision of the agreements allegedly infringed, and a link between the two. A considerable number of these requests, however, posed lesser problems in the light of Article 6.2 than the present panel request since they were concerned with one

specific measure only or with a limited number of clearly defined measures which made it easier to link the measures to an alleged infringement if the number of provisions cited in the panel request was limited. In the present case, however, there was a total lack of specificity in the description of the measures, on the one hand, and an extremely long and unspecified list of the allegedly infringed WTO provisions, on the other hand. According to the EC, this was clearly contrary to Article 6.2 and did not fulfil the function of properly giving notice to the EC of the case held against it.

(b) The Requirement of Legal Interest

2.21 The **EC** argued that in any system of law, including international law[7], a claimant must have a legal right or interest in the claim he was pursuing. The rationale behind this rule was that courts existed to decide cases and not to reply to abstract legal questions; the court system (in the WTO context, the panel system) should not be burdened needlessly by cases without legal or practical consequences. Likewise, the respondent should not be forced to bear the costs and inconvenience of conducting a panel case, when the complaining Member had no legal right, or no legal or material interest in the outcome of the case. The EC submitted that in the present case the United States had no legal right or no legal or material interest in the case that it had brought under the GATT and the other Agreements contained in Annex 1A to the WTO Agreement since none of the remedies it could obtain would be of any avail to it: compensation or retaliation would not be due, since the United States had only a token production of bananas and had not traded in bananas with the EC, not even with those geographical sectors which under the old regime had maintained virtually free access or only a low tariff. Furthermore, the EC considered that a declaratory judgement would be of no interest since there was no serious indication that banana production in the United States could make exports feasible within the foreseeable future. The EC referred to the Working party report on *Brazilian Internal Taxes* (first report) which had made it clear, in the view of the EC, that a country must at least have potentialities as an exporter in order to be able to file a claim against another Member.[8] Moreover, under the GATT/WTO system the United States could not set itself up as private attorney-general and sue in the public interest and there were no indications that the GATT/WTO system accepted an *actio popularis* by all Members against any alleged infringement by any other Member. There were no indications so far in the GATT/WTO system that panels were willing to give declaratory rulings at the request of Members which had no legal right or interest in such a ruling, either in the form of a potential trading interest or in the form of a right to compensation or retaliation under Article XXIII of GATT (Article 22 of the DSU). The EC concluded that, on the issues raised under the GATT and

[7] See the South-West Africa cases, 1966 ICJ Reports, pp.4 *et seq*.

[8] BISD Vol. II/181, para. 16. According to the EC, the panel's interpretation of GATT Article III:2 that it made no difference "whether imports from other contracting parties were substantial, small or non-existent" should be read in this light.

other instruments of Annex 1A, the United States had no legal right or interest in obtaining a ruling from the Panel. Therefore, the EC requested that the Panel should decide, *in limine litis*, that it would not rule on the issues with respect to the United States.

2.22 It was obvious to the EC that the interest of companies, such as Chiquita and Dole Foods, was not the same as a legal interest of the United States in bringing a case under the GATT. The GATT was concerned with the treatment of products, not companies or their subsidiaries. In so far as the United States had a systemic interest in the case, where it professed to be concerned about the general law-abidingness of the EC, it advanced an interest as intervenor with a general interest in the interpretation of the GATT. If the Panel were to take position on the issue of the United States' legal interest in this matter, the United States might perhaps be admitted as intervenor, i.e. third party, in the GATT-related part of the case.

2.23 The **United States** responded that it had a significant commercial interest in seeing the EC comply with its GATT and other WTO obligations with respect to its banana regime. Two US fruit companies, Chiquita and Dole Foods, had played a major role over many decades in developing the European market for bananas. Although these bananas were mainly grown in Latin America, US companies were seriously affected by the manner in which the EC was distributing market share opportunities on a basis that was unrelated to past imports of third-country bananas or ability to import third-country bananas. The EC's measures had the effect of constraining US companies' import, delivery, and distribution flexibility and required them to expand substantial capital just to try to restore their former business. A regime violating GATT rules could be expected to adversely affect such major participants in the market. Both companies expressed concerns about the discrimination in the EC banana regime and sought an end to it.

2.24 The United States further argued that the EC was well aware of the interests and concerns of the United States since they had been explained to the EC by diplomatic efforts that had begun over five years ago and that had intensified after two GATT panel proceedings had only resulted in additional GATT violations by the EC. The United States had reiterated its concerns during efforts to more formally negotiate a solution to these problems with the EC Commission. The EC's arguments with respect to US banana production had no bearing on this proceeding. However, the United States did produce bananas in both the state of Hawaii and in Puerto Rico, which was within the US customs territory. The Hawaiian producers had expressed their concerns that the EC banana regime was lowering the price of bananas in the free market, adversely affecting their ability to continue to produce and potentially export bananas. The United States considered that it was not for the EC to decide which producers in the world had an interest or potential to export.

2.25 As far as legal rights or interests were concerned, the United States was a Member of the WTO and a founding contracting party of the GATT. Article XXIII of GATT, as amplified in the DSU, permitted the initiation of dispute settlement proceedings when any Member was concerned about the inconsistency of