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DECISION BY THE ARBITRATORS

WT/DS27/ARB/ECU

Circulated to the Members on 24 March 2000

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I. PROCEDURAL BACKGROUND

A. Ecuador's Request for Authorization of Suspension of Concessions or Other Obligations Pursuant to Article 22.2 of the DSU

1. On 8 November 1999, Ecuador requested authorization by the DSB to suspend concessions or other obligations under the TRIPS Agreement, the GATS and GATT 1994 in an amount of US$450 million.[1]

2. With respect to the withdrawal of concessions in the goods sector, Ecuador submitted that such suspension is at present not practicable or effective, and that the circumstances are serious enough to request authorization to suspend concessions and other obligations under the GATS and the TRIPS Agreement.

3. As regards trade in services, Ecuador proposed to suspend the following subsector in its GATS Schedule of specific commitments:

[1] WTO document WT/DS27/52, dated 9 November 1999.

B. Wholesale Trade Services (CPC 622)

4. As regards intellectual property rights, Ecuador specified that its request concerned the following categories set out in Part II of the TRIPS Agreement:

Section 1: Copyright and related rights, Article 14 on "Protection of performers, producers of phonograms (sound recordings) and broadcasting organizations";

Section 3: Geographical indications;

Section 4: Industrial designs.

5. At the same time, Ecuador noted in its request under Article 22.2 that it reserved the right to suspend tariff concessions or other tariff obligations granted in the framework of the GATT 1994 in the event that these may be applied in a practicable and effective manner.

6. Ecuador intends to apply the suspension of concessions or other obligations, if authorized by the DSB, against 13 of the EC member States.[2]

B. The European Communities' Request for Arbitration Pursuant to Article 22.6 of the DSU

7. On 19 November 1999, the European Communities requested arbitration pursuant to Article 22.6 of the DSU.[3] The relevant part of that provision reads:

> "… However, if the Member concerned objects to the level of suspension proposed, or claims that the principles and procedures set forth in paragraph 3 have not been followed where a complaining party has requested authorization to suspend concessions or other obligations pursuant to paragraph 3(b) or (c), the matter shall be referred to arbitration. …"

8. The European Communities considered (i) that the amount of suspension of concessions or other obligations requested by Ecuador is excessive since it has

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[2] According to Ecuador's request, the Netherlands and Denmark would be exempted.

[3] The relevant parts of the EC Request under Article 22.6 of the DSU read:

> "Pursuant to Article 22.6 of the Dispute Settlement Understanding, the European Communities object to the level of suspension of concessions or other obligations requested by Ecuador on 9 November 1999 in document WT/DS27/52. The European Communities consider that the request by Ecuador does not correspond, and by far, to the level of nullification and impairment of benefits presently suffered by Ecuador as a result of the failure of the European Communities to implement the recommendations and rulings of the Dispute Settlement Body in the procedure "European Communities - Regime for the Importation, Sale and Distribution of Bananas - Recourse to Article 21.5 by Ecuador". In accordance with the provisions of Article 22.7 of the Dispute Settlement Understanding, the European Communities request, therefore, that this matter be submitted to arbitration.
> Moreover, the European Communities considered that Ecuador has not complied at all with the provisions under Article 22.3 of the Dispute Settlement Understanding. Therefore, the European Communities further request that this matter be also submitted to arbitration."

suffered by far less nullification or impairment than alleged; and (ii) that Ecuador has not followed the principles and procedures set forth in Article 22.3 of the DSU in suspending concessions or other obligation across sectors and agreements.

9. At its meeting on 19 November 1999, the DSB referred the matters to arbitration in accordance with Article 22.6 of the DSU.

10. The Arbitrators are the members of the original panel:

Chairman: Stuart Harbinson

Members: Kym Anderson

Christian Häberli

II. THE JURISDICTION OF ARBITRATORS UNDER ARTICLE 22 OF THE DSU

11. Before addressing the procedural and substantive issues raised by the parties, we recall the powers of Arbitrators under paragraphs 6 and 7 of Article 22 of the DSU. The relevant parts of these provisions read:

> "The arbitrator[s] acting pursuant to paragraph 6 shall not examine the nature of the concessions or other obligations to be suspended but shall determine whether the level of such suspension is equivalent to the level of nullification or impairment. … However, if the matter referred to arbitration includes a claim that the principles and procedures set forth in paragraph 3 have not been followed, the arbitrator[s] shall examine that claim. In the event that the arbitrator[s] determine that those principles and procedures have not been followed, the complaining party shall apply them consistent with paragraph 3. …"

Accordingly, the jurisdiction of the Arbitrators includes the power to determine (i) whether the level of suspension of concessions or other obligations requested is *equivalent* to the level of nullification or impairment; and (ii) whether the principles or procedures concerning the suspension of concessions or other obligations across sectors and/or agreements pursuant to Article 22.3 of the DSU have been followed.

12. In this respect, we note that, if we were to find the proposed amount of US$450 million not to be equivalent, we would have to estimate the level of suspension we consider to be equivalent to the nullification or impairment suffered by Ecuador. This approach is consistent with Article 22.7 of the DSU which emphasizes the finality of the arbitrators' decision:

> "… The parties shall accept the arbitrator's decision as final and the parties concerned shall not seek a second arbitration. 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."

13. We recall that this approach was followed in the US/EC arbitration proceeding in *EC - Bananas III*[4] and the arbitration proceedings in *EC - Hormones*,[5] where the arbitrators did not consider the proposed amount of suspension as equivalent to the nullification or impairment suffered and recalculated that amount in order to be able to render a final decision.

14. Regarding the question which "measures" and "DSB rulings" are relevant for assessing the level of nullification or impairment in this case, we note that both parties agree that the basis for the assessment of the level of nullification or impairment is the revised EC banana regime as contained in EC Regulations 1637/98 and 2362/98 which entered into force on 1 January 1999. According to the report of the original panel reconvened, pursuant to Article 21.5 of the DSU, upon request by Ecuador,[6] and adopted by the DSB on 6 May 1999, the revised EC banana regime was found to be inconsistent with Articles I and XIII of GATT and Articles II and XVII of GATS.

III. PROCEDURAL ISSUES

A. Ecuador's Request under Article 22.2 of the DSU and its Document on the Methodology Used for Calculating the Level of Nullification and Impairment

15. The European Communities alleged that Ecuador's request under Article 22.2 of the DSU and the document of 6 January 2000 describing its methodology for calculating the amount of retaliation requested were not detailed enough, especially when compared to the US methodology paper in the previous arbitration proceeding. Ecuador stated, however, explicitly in the methodology document that a more detailed explanation would follow in its first submission.

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[4] Decision by the Arbitrators in *European Communities - Regime for the Importation, Sale and Distribution of Bananas - Recourse to Arbitration by the European Communities under Article 22.6 of the DSU* ("EC – Bananas III (US) (Article 22.6 – EC)"), (WT/DS27/ARB, dated 9 April 1999), DSR 1999:II, 725, paras. 2.10 ff.

[5] Decision by the Arbitrators in *European Communities - Measures Concerning Meat and Meat Products (Hormones) - Original Complaint by the United States - Recourse to Arbitration by the European Communities under Article 22.6 of the DSU* ("EC – Hormones (US) (Article 22.6 – EC)"), (WT/DS26/ARB, dated 12 July 1999), DSR 1999:III, 1105, para. 12. Decision by the Arbitrators in *European Communities - Measures Concerning Meat and Meat Products (Hormones) - Original Complaint by Canada - Recourse to Arbitration by the European Communities under Article 22.6 of the DSU* (WT/DS48/ARB, dated 12 July 1999), DSR 1999:III, 1135, para. 12.

[6] Panel Report by the Reconvened Panel on *European Communities - Regime for the Importation, Sale and Distribution of Bananas - Recourse to Article 21.5 of the DSU by Ecuador* (WT/DS27/RW/ECU dated 12 April 1999), DSR 1999:II, 803, adopted on 6 May 1999.

16. Upon receipt of Ecuador's first submission, the European Communities protested in a letter, dated 14 January 2000, that Ecuador had withheld substantial factual elements from the document on methodology and requested the Arbitrators to discard the additional information contained therein.

17. Ecuador contended, in a letter dated 17 January 2000, that it had met several times with the European Communities to discuss the nature of its claims and the methodology used to estimate the harm caused to it by the EC banana regime. It emphasized that it had not had access to the methodology document submitted by the United States in the US/EC *Bananas III* arbitration proceeding and that this document could not in any case represent a recognized standard for such a methodology document which is not provided for in the DSU. Ecuador also pointed out that the European Communities criticised the methodology document only eight days after its filing. Furthermore, the data contained in Ecuador's first submission derives from publicly available sources.

18. On 19 January 2000, the Arbitrators communicated the following letter to the parties:

> "With reference to your letter dated 14 January 2000, in which you request that the Arbitrators make a preliminary ruling, deciding that all the information concerning the methodology (i.e. paras. 17-28 of Ecuador's submission and Exhibits F and G) submitted after 6 January 2000, be considered inadmissible and, therefore, discarded by the Arbitrators.
>
> The Arbitrators, noting that Article 22.7 of the DSU provides that "the parties shall accept the arbitrator's decision as final and shall not seek a second arbitration", are of the opinion that it is inappropriate to give a ruling on the admissibility or relevance of certain information at this early stage of the proceeding. It may also be noted that in past arbitration cases, arbitrators have developed their own methodology for calculating the level of nullification or impairment as appropriate and have requested additional information from the parties until they were in a position to make a final ruling.
>
> However, the Arbitrators have decided, in light of the concerns regarding due process, to extend the deadline for the submission of rebuttals for both parties to Tuesday, 25 January, 5 p.m. This should give both parties adequate time to respond to the factual information and legal arguments submitted by the other party."

19. We wish to supplement our reasoning for the approach taken in that letter with the considerations set out in the following paragraphs 20-36.

20. The DSU does not explicitly provide that the specificity requirements, which are stipulated in Article 6.2 for panel requests,[7] apply *mutatis mutandis* to arbitration proceedings under Article 22. However, we believe that requests for suspension under Article 22.2, as well as requests for a referral to arbitration under Article 22.6, serve similar due process objectives as requests under Article 6.2.[8] First, they give notice to the other party and enable it to respond to the request for suspension or the request for arbitration, respectively. Second, a request under Article 22.2 by a complaining party defines the jurisdiction of the DSB in authorizing suspension by the complaining party. Likewise, a request for arbitration under Article 22.6 defines the terms of reference of the Arbitrators. Accordingly, we consider that the specificity standards, which are well-established in WTO jurisprudence under Article 6.2, are relevant for requests for authorization of suspension under Article 22.2, and for requests for referral of such matter to arbitration under Article 22.6, as the case may be. They do, however, not apply to the document submitted during an arbitration proceeding, setting out the methodology used for the calculation of the level of nullification or impairment.

21. In respect of a request under Article 22.2, we share the view of the arbitrators in the *Hormones* arbitration proceedings who described the minimum requirements attached to a request for the suspension of concessions or other obligations in the following way:

> "(1) the request must set out a specific level of suspension, i.e. a level equivalent to the nullification and impairment caused by the WTO-inconsistent measure, pursuant to Article 22.4; and (2) the request must specify the agreement and sector(s) under which concessions or other obligations would be suspended, pursuant to Article 22.3.[9]"

22. As to the first minimum requirement, Ecuador's request for suspension under Article 22.2 of the DSU, dated 8 November 1999,[10] sets out the specific

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[7] The relevant part of Article 6.2 of the DSU reads: "The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly. …".

[8] "A panel's terms of reference are important for two reasons. First, terms of reference fulfil an important due process objective - they give the parties and third parties sufficient information concerning the claims at issue in the dispute in order to allow them an opportunity to respond to the complainant's case. Second, they establish the jurisdiction of the panel by defining the precise claims at issue in the dispute." Appellate Body Report on *Brazil - Measures Affecting Desiccated Coconut*, adopted on 20 March 1997 (WT/DS22/AB/R), p. 22.

[9] "The more precise a request for suspension is in terms of product coverage, type and degree of suspension, etc…., the better. Such precision can only be encouraged in pursuit of the DSU objectives of 'providing security and predictability to the multilateral trading system' (Article 3.2) and seeking prompt and positive solutions to disputes (Articles 3.3 and 3.7). It would also be welcome in light of the statement in Article 3.10 that 'all Members will engage in DSU procedures in good faith and in an effort to resolve the dispute'".

[10] WT/DS27/52.

amount of US$450 million as the level of proposed suspension of concessions or other obligations.

23. In the methodology paper and submissions, Ecuador submitted that the direct and indirect harm and macro-economic repercussions for its entire economy amount to altogether US$ 1 billion. While Ecuador stated that it does not intend to increase its initial request for suspension, it argued that the total economic impact of the EC banana regime should be taken into account by the Arbitrators by applying a multiplier when calculating the level of nullification and impairment suffered by Ecuador. In this respect, Ecuador makes reference to Article 21.8 of the DSU.[11]

24. In the light of our considerations above concerning specificity requirements that apply with respect to Article 22, we believe that the level of suspension specified in Ecuador's request under Article 22.2 is the relevant one and defines the amount of requested suspension for purposes of this arbitration proceeding. Additional estimates advanced by Ecuador in its methodology document and submissions were not addressed to the DSB and thus cannot form part of the DSB's referral of the matter to arbitration. Belated supplementary requests and arguments concerning additional amounts of alleged nullification or impairment are, in our view, not compatible with the minimum specificity requirements for such a request[12] because they were not included in Ecuador's request for suspension under Article 22.2 of the DSB.

25. As to the second minimum requirement referred to above, we recall which sectors and agreements Ecuador lists in its request under Article 22.2 as those under which it intends to suspend concessions or other obligations. Under the GATS, it specifies the service subsector of "wholesale trade services (CPC 622)". Under the TRIPS Agreement, Ecuador requests suspension, pursuant to Article 22.3(c), of Article 14 on "Protection of performers, producers of phonograms (sound recordings) and broadcasting organizations" in Section 1 (Copyright and related rights), Section 3 (Geographical indications) and Section 4 (Industrial designs).

26. We determine that these requests by Ecuador under the GATS and the TRIPS Agreement fulfil the minimum requirement to specify the agreement(s) and sector(s) with respect to which it requests authorization to suspend concessions or other obligations.

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[11] Article 21.8 of the DSU: "If the case is one brought by a developing country Member, in considering what appropriate action might be taken, the DSB shall take into account not only the trade coverage of measures complained of, but also their impact on the economy of developing country Members concerned."

[12] We also note that it may well be that a Member chooses to request suspension only for a part of the nullification or impairment suffered from WTO-inconsistent measures taken by another Member. We will address below the question of total economic impact as opposed to nullification and impairment of trade in goods and services in our discussion concerning subparagraph (d) of Article 22.3.

27. In its request under Article 22.2, Ecuador notes in addition that it "reserves the right to suspend tariff concession or other tariff obligations granted in the framework of the GATT 1994 in the event that these may be applied in a practicable and effective manner."

28. Regarding this last statement we would like to make the following remarks. We recall our considerations that the specificity requirements of Article 6.2 are relevant for requests under Article 22.2. According to well-established dispute settlement practice under Article 6.2 of the DSU,[13] panels and the Appellate Body have consistently ruled that a measure challenged by a complaining party cannot be regarded to be within the terms of reference of a panel unless it is clearly identified in the request for the establishment of a panel. In past disputes concerning Article 6.2, where a complaining party intended to leave the possibility open to supplement at a later point in time the initial list of measures contained in its panel request (e.g. with the words "including, but not limited to measures listed" specifically in the panel request), the terms of reference of the panel were found to be limited to the measures specifically identified.

29. Based on an application of these specificity standards to requests under Article 22.2, we consider that the terms of reference of arbitrators, acting pursuant to Article 22.6, are limited to those sector(s) and/or agreement(s) with respect to which suspension is specifically being requested from the DSB. We thus consider Ecuador's statement that it "reserves the right" to suspend concessions under the GATT as not compatible with the minimum requirements for requests under Article 22.2. Therefore, we conclude that our terms of reference in this arbitration proceeding include only Ecuador's requests for authorization of suspension of concessions or other obligations with respect to those specific sectors under the GATS and the TRIPS Agreement that were unconditionally listed in its request under Article 22.2.

30. Even if Ecuador's "reservation" of a request for suspension under the GATT were permissible, there would be a certain degree of inconsistency between making a request under Article 22.3(c) - implying that suspension is not practicable or effective within the same sector under the same agreement or under another agreement - and simultaneously making a request under Article 22.3(a) - which implies that suspension is practicable and effective under the same sector. In this respect, we note that, although Ecuador did not in fact make both requests

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[13] Appellate Body Report on *European Communities - Customs Classification on Certain Computer Equipment*, adopted on 26 June 1998 (WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R), DSR 1998:V, 1851, paras. 64-73. Appellate Body Report on *EC - Bananas III*, adopted on 25 September 1997 (WT/DS27/AB/R), DSR 1997:II, 591, paras. 141-143. Appellate Body Report on *Korea - Definitive Safeguard Measure on Imports of Certain Dairy Products*, adopted on 12 January 2000 (WT/DS98/AB/R), DSR 2000:I, 3, paras. 114-131, citing previous reports concerning the interpretation of Article 6.2. Panel Report on *Japan- Measures Affecting Consumer Photographic Film and Paper*, adopted on 22 April 1998, DSR 1998:IV, 1179, (WT/DS44/R), paras. 10.8-10.10, 10.15-10.19. Appellate Body Report on *Australia - Measures Affecting Importation of Salmon*, adopted on 6 November 1998 (WT/DS18/AB/R), DSR 1998:VIII, 3327, paras. 90-105.

at the very same point in time, if it were likely that the suspension of concessions under the GATT could be applied in a practicable and effective manner, doubt would be cast on Ecuador's assertion that at present only suspension of obligations under other sectors and/or other agreements within the meaning of Article 22.3(b-c) is practicable or effective in the case before us.

31. In other words, we fail to see how it could be possible to suspend concessions or other obligations for a particular amount of nullification or impairment under the same sector as that where a violation was found (which implies that this *is* practicable and effective) and simultaneously for the same amount in another sector or under a different agreement (which implies that suspension under the same sector[14] - or under a different sector under the same agreement - is *not* practicable or effective). But we do not exclude the possibility that, once a certain amount of nullification or impairment has been determined by the Arbitrators, suspension may be practicable and effective under the same sector(s) where a violation has been found only for part of that amount and that for the rest of this amount of suspension is practicable or effective only in (an)other sector(s) under the same agreement or even only under another agreement.

32. However, we do not exclude the possibility that the circumstances which are relevant for purposes of considering the principles and procedures set forth in Article 22.3 may change over time, especially if the WTO-inconsistencies of the revised EC banana regime are not removed and the suspension of concessions or other obligations should, as a result, remain in force for a longer period. But we do not believe that changes with respect to trade sectors or agreements affected by such suspension could be implemented consistently with Article 22 of the DSU in the absence of a specific authorization by the DSB and, if challenged, a further review by arbitrators acting pursuant to Article 22.6.

33. In this context, we further recall the general principle set forth in Article 22.3(a) that suspension of concessions or other obligations should be sought first with respect to the same sector(s) as that in which the panel or Appellate Body has found a violation or other nullification or impairment. Given this principle, it remains the preferred option under Article 22.3 for Ecuador to request suspension of concessions under the GATT as one of the same agreements where a violation was found, if it considers that such suspension could be applied in a practicable and effective manner. At any rate, if we were to find in our review of Ecuador's considerations that it did not (entirely) follow the principles and procedures of Article 22.3 in making its request under Article 22.2, or that the requested level of suspension exceeds the level of nullification or impairment suffered, Ecuador would be required to make another request for authorization by the DSB for suspension of concessions or other obligations under Article 22.7. This new request could include, *inter alia*, suspension of concessions under the

[14] We note that within a sector, suspension may be possible with respect to certain types of products, while it is not practicable or effective with respect to other categories of products.

GATT for all or part of the nullification and impairment actually found, if this should turn out to be necessary to ensure that such a request be consistent with the Arbitrators' decision within the meaning of Article 22.7.

34. We further recall that in our letter, dated 19 January 2000, responding to the EC objections to Ecuador's methodology document and the additional information contained in its first submission, we also stated that Article 22.7 of the DSU foresees that the Arbitrator(s) decision is final, that there is no appeal, and that the entire proceeding normally has to be completed within a certain time-frame.[15] We also confirm that, similarly to the approach chosen by us in the US/EC *Bananas III* arbitration and by the Arbitrators in the *Hormones* arbitration proceedings, we requested the parties to provide additional information until we felt we were in a position to render our final decision.

35. We now turn specifically to the EC's request that the Arbitrators disregard certain information concerning the methodology used by Ecuador for calculating nullification or impairment because it was submitted only in Ecuador's first submission, but not in the methodology document submitted by Ecuador on 6 January 2000. We recall that we introduced the procedural step of submitting a methodology document in the US/EC *Bananas III* arbitration proceeding because we reckoned that certain information about the methodology used by the party for calculating the level of nullification or impairment would logically only be in the possession of that Member and that it would not be possible for the Member requesting arbitration pursuant to Article 22 of the DSU to challenge this information unless it was disclosed. Obviously, if such information were to be disclosed by the Member suffering impairment only in its first submission, the Member requesting arbitration could only rebut that information in its rebuttal submission, while its first submission would become necessarily less meaningful and due process concerns could arise. It was out of these concerns that the United States was requested to submit a document explaining the methodology used for calculating impairment before the filing of the first submission by both parties. Unlike in panel proceedings, where parties do not file their first submissions simultaneously, it has been the practice in past arbitration proceedings under Article 22 that both rounds of submissions take place before a single oral hearing of the parties by the Arbitrators and that in both these rounds parties file their submissions simultaneously.

36. However, we agree with Ecuador that such a methodology document is nowhere mentioned in the DSU. Nor do we believe, as explained in detail above, that the specificity requirements of Article 6.2 relate to that methodology document rather than to requests for suspension pursuant to Article 22.2, and to requests for the referral of such matters to arbitration pursuant to Article 22.6. For

[15] We note that in this arbitration proceeding the parties agreed to postpone the beginning of the proceeding and to extend the time-frame foreseen in Article 22.6 of the DSU. The Arbitrators agreed to these arrangements.

these reasons, we reject the idea that the specificity requirements of Article 6.2 apply *mutatis mutandis* to the methodology document. In our view, questions concerning the amount, usefulness and relevance of information contained in a methodology document are more closely related to the questions of who is required at what point in time to present evidence and in which form, or in other words, the issue of the burden of proof in an arbitration proceeding under Article 22.6.

B. Burden of Proof in Arbitration Proceedings Pursuant to Article 22.6 of the DSU

37. On the point of who bears the burden of proof in an arbitration proceeding under Article 22 of the DSU, we find the considerations of the Arbitrators in the *Hormones* arbitration proceedings persuasive:

> "9. WTO Members, as sovereign entities, can be *presumed* to act in conformity with their WTO obligations. A party claiming that a Member has acted *inconsistently* with WTO rules bears the burden of proving that inconsistency. The act at issue here is the US proposal to suspend concessions. The WTO rule in question is Article 22.4 prescribing that the level of suspension be equivalent to the level of nullification and impairment. The EC challenges the conformity of the US proposal with the said WTO rule. It is thus for the EC to prove that the US proposal is inconsistent with Article 22.4. Following well-established WTO jurisprudence, this means that it is for the EC to submit arguments and evidence sufficient to establish a *prima facie* case or presumption that the level of suspension proposed by the US is not equivalent to the level of nullification and impairment caused by the EC hormone ban. Once the EC has done so, however, it is for the US to submit arguments and evidence sufficient to rebut that presumption. Should all arguments and evidence remain in equipoise, the EC, as the party bearing the original burden of proof, would lose.
>
> 10. The same rules apply where the existence of a specific *fact* is alleged; … it is for the party alleging the fact to prove its existence.
>
> 11. The duty that rests on all parties to produce evidence and to collaborate in presenting evidence to the arbitrators - an issue to be distinguished from the question of who bears the burden of proof - is crucial in Article 22 arbitration proceedings. The EC is required to submit evidence showing that the proposal is *not* equivalent. However, at the same time and as soon as it can, the US is required to come forward with evidence explaining how it arrived at its proposal and showing why its proposal *is* equivalent to the trade impairment it has suffered. Some of the evidence - such as data on trade with third countries, export capabilities and affected export-

> ers - may, indeed, be in the sole possession of the US, being the party that suffered the trade impairment. This explains why we requested the US to submit a so-called methodology paper."[16]

38. We agree with the Arbitrators in the *EC - Hormones* arbitration proceedings that the ultimate burden of proof in an arbitration proceeding is on the party challenging the conformity of the request for retaliation with Article 22. However, we also share the view that some evidence may be in the sole possession of the party suffering nullification or impairment. This explains why we requested Ecuador to submit a methodology document in this case.

39. The methodology documents submitted by the United States and Canada in the *EC - Bananas III* and *EC - Hormone*s arbitration proceedings are not available to Ecuador and hence cannot be seen as setting a standard as to the minimum content of such documents. Ecuador's methodology document explained counterfactuals and the basic approach to measuring nullification and impairment. Even though it did not contain all the data necessary to reconstruct Ecuador's calculations,[17] it stated that "an accurate application of the conceptual methodology here presented based on empirical data" would be provided in Ecuador's first submission.

40. In this respect, we wish to remark that the concept of an "arbitration" has an important adversarial component in the sense that Arbitrators weigh and decide the matter on the basis of the evidence and arguments presented by each party and rebutted by the other party. We note that the later in a proceeding one party submits relevant evidence, the more difficult it becomes for the other party to address and rebut this evidence. In this sense, the submission of an informative methodology document is not only in the EC's interest, but also in Ecuador's own interest because it enables Ecuador to rebut the EC's response to that document already in its second submission, while the EC's response to information contained in Ecuador's first submission cannot be rebutted by Ecuador before the oral statement at the meeting of the Arbitrators with the parties.

41. We note that Ecuador could have submitted more of its evidence at earlier stages of this arbitration proceeding. Nonetheless, we are satisfied that Ecuador has ultimately provided us with all the evidence which is in its sole possession and that in this proceeding the European Communities was given sufficient opportunity and time to address and rebut this evidence in its written submissions, oral statements, answers to questions by the Arbitrators and responses to the other party's answers.[18]

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[16] Decision by the Arbitrators in *EC – Hormones (US) (Article 22.6 – EC)*, *supra*, footnote 5, paras. 9-11.

[17] We recall that the US methodology document in the US/EC *Bananas III* arbitration did set out the counterfactuals and contained a formula for calculating nullification and impairment. But that document did not provide statistics and data necessary to reconstruct the calculation.

[18] Ecuador submitted a methodology document on 6 January 2000; both parties filed their first submissions on 13 January 2000; the rebuttal submissions were filed on 25 January 2000; the parties

IV. PRINCIPLES AND PROCEDURES SET FORTH IN ARTICLE 22.3 OF THE DSU

42. The European Communities claims that Ecuador has not followed the principles and procedures set forth in Article 22.3 of the DSU. In particular, it alleges that Ecuador has not shown why it is not practicable or effective for it to suspend, to the extent it has suffered any nullification or impairment, concessions or other obligations in the same sector(s) as those in which the revised EC banana regime was found to be WTO-inconsistent. The European Communities, therefore, requests that Ecuador should not be given authorization to suspend concessions or other obligations across sectors and agreements.

43. Ecuador contends that it has followed the principles and procedures set forth in Article 22.3 and that it has demonstrated why it is not practicable or effective for Ecuador to suspend concessions or other obligations under the same sector(s) or agreement(s) as those in which WTO-inconsistencies were found. Ecuador argues, given the wording of subparagraphs (b) and (c) of Article 22.3 of the DSU, that it is essentially the prerogative of the Member suffering nullification or impairment to decide whether it is "practicable or effective" to choose the same sector, another sector or another agreement for purposes of suspending concessions or other obligations.

44. Before we address these arguments, we recall the relevant parts of Article 22.3 of the DSU:

> "In considering what concessions or other obligations to suspend, the complaining party shall apply the following principles and procedures:
>
> (a) the general principle is that the complaining party should first seek to suspend concessions or other obligations with respect to the *same sector(s)* as that in which the panel or Appellate Body has found a violation or other nullification or impairment;
>
> (b) if that party considers that it is *not practicable or effective* to suspend concessions or other obligations with respect to the same sector(s), it may seek to suspend concessions or other obligations *in other sectors under the same agreement*;
>
> (c) if that party considers that it is *not practicable or effective* to suspend concessions or other obligations with respect to other sectors under the same agreement, and that the *circumstances are serious*

made oral statements at the meeting of the Arbitrators with the parties on 7 February 2000; the parties replied to the Arbitrators' first set of questions on 11 February; the European Communities reacted to Ecuador's answers to the Arbitrators' first set of questions on 16 February 2000; Ecuador reacted to the EC's reaction on 17 February 2000; both parties replied to the Arbitrators' second set of questions on 22 February 2000; the European Communities reacted to Ecuador's answers to the second set of questions on 24 February 2000.

enough, it may seek to suspend concessions or other obligations under *another covered agreement*;

(d) in applying the above principles, that party shall take into account:

(i) the *trade in the sector under the agreement* under which the panel or Appellate Body has found a violation or other nullification or impairment, and the *importance of such trade to that party*;

(ii) the *broader economic elements* related to the nullification or impairment and *the broader economic consequences* of the suspension of the concessions or other obligations; …" (emphasis added).

(e) if that party decides to request authorization to suspend concessions or other obligations pursuant to *subparagraphs (b) or (c)*, it *shall state the reasons therefore* in its request. At the same time as the request is forwarded to the DSB, it also shall be forwarded to the relevant Councils and also, in the case of a request pursuant to subparagraph (b) the relevant sectoral bodies;

(f) for purposes of this paragraph, "*sector"* means:

(i) with respect to goods, *all goods*;

(ii) with respect to services, a *principal sector* as identified in the current "Services Sectoral Classification List" which identifies such sectors.

(iii) with respect to trade-related *intellectual property rights*, each of the *categories* of intellectual property rights covered in Section 1, or Section 2, or Section 3, or Section 4, or Section 5, or Section 6, or Section 7 of Part II, or the obligations under Part III, or Part IV of the Agreement on TRIPS;

(g) for purposes of this paragraph, "*agreement*" means:

(i) with respect to *goods*, the agreements listed in *Annex 1A* of the WTO Agreement, taken as a whole as well as the Plurilateral Trade Agreements in so far as the relevant parties to the dispute are parties to these agreements;

(ii) with respect to *services*, the *GATS*;

(iii) with respect to *intellectual property rights*, the *Agreement on TRIPS*. (emphasis added, footnotes omitted).

A. The Scope of Review by Arbitrators under Article 22.3

45. In view of Ecuador's interpretation of the discretion of Members in selecting the sectors and/or agreements in which to suspend concessions or other obligations, we recall the considerations from the US/EC *Bananas III* arbitration

proceeding[19] regarding the scope of review of Arbitrators with respect to Article 22.3 of the DSU:

> "3.5. Article 22.7 of the DSU empowers the Arbitrators to examine claims concerning the principles and procedures set forth in Article 22.3 of the DSU in its entirety, whereas Article 22.6 of the DSU seems to limit the competence of Arbitrators to such examination to cases where a request for authorization to suspend concessions is made under subparagraphs (b) or (c) of Article 22.3 of the DSU. However, we believe that there is no contradiction between paragraphs 6 and 7 of Article 22 of the DSU, and that these provisions can be read together in a harmonious way.
>
> 3.6 If a panel or Appellate Body report contains findings of WTO-inconsistencies only with respect to one and the same sector in the meaning of Article 22.3(f) of the DSU, there is little need for a multilateral review of the choice with respect to goods or services or intellectual property rights, as the case may be, which a Member has selected for the suspension of concessions subject to the DSB's authorization. However, if a Member decides to seek authorization to suspend concessions under another sector, or under another agreement, outside of the scope of the sectors or agreements to which a Panel's findings relate, paragraphs (b)-(d) of Article 22.3 of the DSU provide for a certain degree of discipline such as the requirement to state reasons why that Member considered the suspension of concessions within the same sector(s) as that where violations of WTO law were found as not practicable or effective.
>
> 3.7 We believe that the basic rationale of these disciplines is to ensure that the suspension of concessions or other obligations across sectors or across agreements (beyond those sectors or agreements under which a panel or the Appellate Body has found violations) remains the exception and does not become the rule. In our view, if Article 22.3 of the DSU is to be given full effect, the authority of Arbitrators to review upon request whether the principles and procedures of sub-paragraphs (b) or (c) of that Article have been followed must imply the Arbitrators' competence to examine whether a request made under subparagraph (a) should have been made - in full or in part - under subparagraphs (b) or (c). If the Arbitrators were deprived of such an implied authority, the principles and procedures of Article 22.3 of the DSU could easily be circumvented. If there were no review whatsoever with respect to requests for authorization to suspend concessions made under subparagraph (a), Members might be tempted to always invoke that subparagraph in order to escape multilateral surveillance of cross-sectoral suspension of concessions or other obligations, and

[19] Decision of the Arbitrators in *EC - Bananas III (US) (Article 22.6 – EC)*, *supra*, footnote 4, paras. 3.4.-3.7.

> the disciplines of the other subparagraphs of Article 22.3 of the DSU might fall into disuse altogether."

46. Having established the authority of Arbitrators to review whether a request for authorization of suspension made under subparagraph (a) of Article 22.3 should have been made - in full or in part - under subparagraphs (b) and/or (c) of that Article, we next address the question of the scope of review by the Arbitrators in cases where authorization to suspend concessions or other obligations across sectors and/or across agreements is sought.

47. We recall Ecuador's argument that the wording of Article 22.3(b)-(d) suggests that it is essentially the prerogative of the Member suffering nullification or impairment to decide whether it is "practicable or effective" to choose the same sector, another sector or another agreement for purposes of suspending concessions or other obligations. Ecuador bases its interpretation especially on the terms "*if that party considers* that it is not practicable or effective to suspend …" (emphasis added) (… "with respect to the same sector(s)" in subparagraph (b); … "in other sectors under the same agreement" in subparagraph (c), respectively)" and on the terms "shall take into account" in subparagraph (d) of Article 22.3. In Ecuador's view, these words connote no substantive conditions and thus it remains at the discretion of the Member seeking authorization to request suspension across sectors and/or agreements to do so or not. Arbitrators, acting pursuant to Article 22.6, may verify only whether the procedural requirements of Article 22.3 have been followed.

48. The European Communities advocates a different interpretation. First, Ecuador would have to show, based on objective and reviewable evidence, that it is not practicable or effective for it to suspend concessions or other obligations in the same sector(s) as that where a violation was found by the panel or Appellate Body. In this case that would mean under the GATT or in the distribution service sector under the GATS. Second, Ecuador would have to show why it is not practicable or effective to suspend commitments under the same agreement in the ten service sectors other than distribution services covered by the GATS. Third, Ecuador would have to demonstrate that circumstances are serious enough to seek suspension under another agreement. Fourth, Ecuador would have to establish that it has taken into account trade in sectors or under agreements where violations have been found and the importance of such trade to it. Fifth, it would have to show that it took account of broader economic elements related to the nullification or impairment and the broader economic consequences of the suspension of the concessions or other obligations. In the EC's view, Ecuador has not done so with respect to any of those steps.

49. We note that the relevant parts of paragraphs 6 and 7 of Article 22 of the DSU provide:

> "… if the Member concerned … claims that the principles and procedures set forth in paragraph 3 have not been followed where a complaining party has requested authorization to suspend concessions or other obligations

> pursuant to paragraph 3(b) or (c), the matter shall be referred to arbitration. …"
>
> "… If the matter referred to arbitration includes a claim that the principles and procedures set forth in paragraph 3 have not been followed, the arbitrator shall examine that claim. In the event the arbitrator determines that those principles and procedures have not been followed, the complaining party shall apply them consistent with paragraph 3. …"

50. The US/EC *Bananas III* arbitration decision quoted above expounds that the authority of Arbitrators under Article 22.3(b)-(c) implicitly includes the power to review whether a request made under subparagraph (a) should have been made (in part) under subparagraphs (b) or (c). In our view, the fact that the powers of Arbitrators under subparagraphs (b)-(c) are explicitly provided for in Article 22.6, implies *a fortiori* that the authority of Arbitrators includes the power to review whether the principles and procedures set forth in these subparagraphs have been followed by the Member seeking authorization for suspension.

51. A close examination of the ordinary meaning of the terms of the subparagraphs of Article 22.3 makes clear that the scope of the review of the request for suspension varies slightly with the nature of the obligations contained in the different subparagraphs. The introductory clause of Article 22.3 provides that the complaining party shall apply the following principles and procedures in considering what concession or other obligations to suspend:

(a) Subparagraph (a) imposes the principle that suspension is sought first in the same sector as that in which there was a violation.

(b) Subparagraph (b) requires a consideration of whether it is not practicable or effective to seek suspension in the same sector(s) where a violation has been found by the panel or the Appellate Body.

(c) Subparagraph (c) requires a consideration of whether it is not practicable or effective to seek suspension in the same agreement and that the circumstances are serious enough to seek suspension under another agreement.

(d) Subparagraph (d) requires that certain factors shall be taken into account when applying the principles of subparagraphs (a), (b) and (c).

(e) Subparagraph (e) requires a complaining party that makes a request under subparagraphs (b) or (c) to state the reasons therefore.

52. It follows from the choice of the words "if that party *considers"* in subparagraphs (b) and (c) that these subparagraphs leave a certain margin of appreciation to the complaining party concerned in arriving at its conclusions in respect of an evaluation of certain factual elements, i.e. of the practicability and effectiveness of suspension within the same sector or under the same agreement and of the seriousness of circumstances. However, it equally follows from the choice of the words "in considering what concessions or other obligations to sus-

pend, the complaining party *shall* apply the following principles and procedures" in the chapeau of Article 22.3 that such margin of appreciation by the complaining party concerned is subject to review by the Arbitrators. In our view, the margin of review by the Arbitrators implies the authority to broadly judge whether the complaining party in question has considered the necessary facts objectively and whether, on the basis of these facts, it could plausibly arrive at the conclusion that it was not practicable or effective to seek suspension within the same sector under the same agreements, or only under another agreement provided that the circumstances were serious enough.[20]

53. The choice of the words "that party shall take into account" in subparagraph (d) makes clear that the Arbitrators have the authority to fully review whether the factors listed in subparagraphs (i)-(ii) of Article 22.3(d) have been taken into account by the complaining party in applying all the principles and procedures set forth in subparagraphs (a)-(c). By the same token, the choice of the words "it shall state the reasons therefore" in subparagraph (e) implies that the Arbitrators are to review the reasons stated therefore by a complaining party in making a request under subparagraphs (b) or (c).

54. Consequently, our margin of review of the complaining party's considerations under subparagraphs (b) and (c) will be slightly different from our review of whether account has been taken of the factors listed in subparagraph (d) and whether reasons have been stated pursuant to subparagraph (e). It bears pointing out, however, that our margin of review of the complaining party's considerations under subparagraphs (b) and (c) will inevitably be coloured by our review of the question whether the factors listed in subparagraphs (i)-(ii) of Article 22.3(d) have been taken into account when applying the principles of (b) and (c).

55. A systematic interpretation of the subparagraphs of Article 22.3 also reveals that these provisions read in their context imply a sequence of steps towards WTO-consistent suspension of concessions or other obligations which respects both a margin of appreciation for the complaining party in question as well as a margin of review by Arbitrators, if a request for suspension under Article 22.2 is challenged pursuant to Article 22.6. The final phrases of subparagraphs (b) and (c) provide that a complaining party "may *seek* to suspend concessions or other obligations", they do not provide that the complaining party "may suspend" concessions or other obligations without any other condition. Furthermore, subparagraph (e) provides that if a party decides to request authorization for such suspension, "it shall state the reasons therefore". Thus the apparent right of the complaining party to consider itself the practicability and effectiveness of suspension under a particular sector and/or agreement is only an initial or temporary right.

[20] Article 11 of the DSU provides in relevant part: "[A] panel should make an objective assessment of the matter before it, including an *objective assessment* of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements."

Subsequently, this initial assessment by the party requesting authorization from the DSB, if challenged by the other party through the initiation of an arbitration proceeding, has to withstand scrutiny by the Arbitrators in respect of the conditions and factors under the different subparagraphs as described above. This sequence of procedural steps under Article 22 is similar to the sequence of procedural steps in dispute settlement proceedings before panels and the Appellate Body.[21] The multilateral nature of the WTO dispute settlement system implies the possibility of a multilateral assessment of the WTO-consistency of a measure or action by one party, if challenged by another party.

56. We believe that this interpretation is consistent with the purpose of an arbitration proceeding under Article 22, as far as it concerns an examination of a claim that the principles and procedures of Article 22.3 have not been followed. Article 22.7 stipulates that in the event the Arbitrators determine that those principles have not been followed, the complaining party shall apply them consistent with paragraph 3 and also that the DSB can only authorise a request for suspension if it is consistent with this paragraph. These objectives could not be accomplished if the authority of the Arbitrators would not include the right to review the initial consideration by the complaining party within its margin of appreciation of the principles and procedures set forth in subparagraphs (b)-(c), whether the factors in subparagraph (d) have been taken into account in the particular circumstances of a case, and whether the complaining party has stated the reasons in accordance with subparagraph (e) of Article 22.3.

57. In our view, such a scope of review by the Arbitrators does not and need not question the "nature of the concessions or other obligations to be suspended" within the meaning of Article 22.7. But we also note that Article 22.3(a) leaves discretion to the complaining party concerned first to select concessions or other obligations to be suspended up to the level of nullification or impairment allegedly suffered within the same sector(s) where a violation has been found, while the discretion to seek suspension across sectors and/or agreements remains limited by the requirements of Article 22.3(b)-(e) and, if challenged by the other party, is subject to review by the Arbitrators as described above.

58. For all these reasons, we reject Ecuador's interpretation of the scope and degree of review by the Arbitrators, acting pursuant to Article 22.6, of whether a complaining party, in seeking authorization for suspension under subparagraphs (b)-(c), considered the principles and procedures set forth in Article 22.3.

59. But we also reject the EC's argument that Ecuador bears the burden of establishing that it has respected the principles and procedures set forth in Article

[21] This situation is similar to the right of a Member under Article 3.3 of the DSU to decide whether or not to initiate a dispute settlement proceeding by requesting consultations and the establishment of a panel. This is a decision entirely within the discretion of a Member while the decision whether a measure complained of is in fact WTO-inconsistent is left to the panel, the Appellate Body and the DSB.

22.3. Given our considerations concerning the burden of proof in arbitration proceedings under Article 22 above, we believe that it is for the European Communities to challenge Ecuador's considerations of the principles and procedures set forth in Article 22.3(b)-(d). Once the European Communities has shown *prima facie* that these principles and procedures have not been followed, and that the factors listed in subparagraph (d) were not taken into account, however, it is for Ecuador to rebut such a presumption.

60. In view of our considerations concerning the burden of proof above, we also believe that certain information as to how Ecuador considered the principles and procedures set forth in Article 22.3(b)-(c), and took into account the factors listed in Article 22.3(d) may indeed be in the sole possession of Ecuador. Also given the requirement in subparagraph (e) that the party requesting authorization for suspension "shall state the reasons therefore", it is our position that Ecuador had to come forward and submit information giving reasons and plausible explanations for its initial consideration of the principles and procedures set forth in Article 22.3 that caused it to request authorization under another sector and agreement than those where violations were found.

61. In the light of this general interpretation of Article 22.3, we address in the following sections first Ecuador's request to suspend commitments in respect of the "wholesale trade services" sector under GATS as one of the same sectors with respect to which the EC was found to have taken WTO-inconsistent measures by the panel, reconvened upon request by Ecuador pursuant to Article 21.5. Second, we address Ecuador's request, pursuant to Article 22.3(c), for suspension of concessions or other obligations across sectors and agreements.

B. Ecuador's Request for Suspension of Concessions or Other Obligations in the Same Sector Where Violations Were Found

62. In its request under Article 22.2, Ecuador lists as a sector with respect to which it seeks to suspend commitments under the GATS the subsector of "wholesale trade services" (CPC 622). We recall that the report of the reconvened panel in the proceeding between Ecuador and the European Communities under Article 21.5 of the DSU[22] found the revised banana regime to be in violation of Articles I and XIII of GATT as well as Articles II and XVII of GATS with respect to the EC's commitments on wholesale trade services within the sector of distribution services.

63. Therefore, we believe that Ecuador's request to suspend commitments on "wholesale trade services" falls within the scope of Article 22.3(a) as it concerns one of the same sectors as those where the reconvened panel found a violation. We note that subparagraph (a) provides that a complaining party should first seek suspension in such sectors. In this respect, we recall the considerations concern-

[22] WT/DS27/RW/ECU, *supra*, footnote 6.