

**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 -**

**DECISION BY THE ARBITRATORS**

The Decision of the Arbitrators on 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 - is being circulated to all Members, pursuant to the DSU. The report is being circulated as an unrestricted document from 24 March 2000 pursuant to the Procedures for the Circulation and Derestriction of WTO Documents (WT/L/160/Rev.1).

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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.<sup>1</sup>

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:

#### 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.<sup>2</sup>

### 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.<sup>3</sup> The relevant part of that provision reads:

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<sup>1</sup> WTO document WT/DS27/52, dated 9 November 1999.

<sup>2</sup> According to Ecuador's request, the Netherlands and Denmark would be exempted.

<sup>3</sup> 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

"... 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 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

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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."

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*<sup>4</sup> and the arbitration proceedings in *EC – Hormones*,<sup>5</sup> 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,<sup>6</sup> 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.

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

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<sup>4</sup> 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* (WT/DS27/ARB, dated 9 April 1999), paras. 2.10 ff.

<sup>5</sup> 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* (WT/DS26/ARB, dated 12 July 1999), 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), para. 12.

<sup>6</sup> 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) of 12 April 1999, adopted on 6 May 1999.

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,<sup>7</sup> 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.<sup>8</sup> 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.

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<sup>7</sup> 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. ...".

<sup>8</sup> "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.

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."<sup>9</sup>

22. As to the first minimum requirement, Ecuador's request for suspension under Article 22.2 of the DSU, dated 8 November 1999,<sup>10</sup> sets out the specific 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.<sup>11</sup>

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<sup>12</sup> 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).

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<sup>9</sup> "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'".

<sup>10</sup> WT/DS27/52.

<sup>11</sup> 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."

<sup>12</sup> 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.

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.

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,<sup>13</sup> 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 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

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<sup>13</sup> Appellate Body Report on *European Communities - Customs Classification on Certain Computer Equipment*, adopted on 26 June 1998 (WT/DS62/AB/R), paras. 64-73. Appellate Body Report on *EC - Bananas III*, adopted on 25 September 1997 (WT/DS27/AB/R), paras. 141-143. Appellate Body Report on *Korea - Definitive Safeguard Measure on Imports of Certain Dairy Products*, adopted on 11 February 2000 (WT/DS98/AB/R), 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 (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), paras. 90-105.

the same sector<sup>14</sup> – 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 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.<sup>15</sup> 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

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<sup>14</sup> 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.

<sup>15</sup> 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.

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 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 exporters – 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."<sup>16</sup>

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 - Hormones* 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,<sup>17</sup> 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.<sup>18</sup>

#### **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

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<sup>16</sup> Decision by the Arbitrators in *EC - Hormones* (Original Complaint by the United States) Recourse to Arbitration by the EC under Article 22.6 of the DSU (WT/DS26/ARB) of 12 July 1999, paras. 9-11.

<sup>17</sup> 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.

<sup>18</sup> 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 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.

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 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 IA* 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<sup>19</sup> 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

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<sup>19</sup> Decision of the Arbitrators in the US/EC *Bananas III* arbitration, paras. 3.4.-3.7.

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 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 suspend, 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.<sup>20</sup>

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

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<sup>20</sup> 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."

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. 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.<sup>21</sup> 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

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<sup>21</sup> 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.

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 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<sup>22</sup> 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 concerning the interpretation of Article 22.3(a) in the US/EC *Bananas III* arbitration decision:

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<sup>22</sup> WT/DS27/RW/ECU (dated 12 April 1999, adopted on 6 May 1999).

"3.9 ... However, the obligations of subparagraphs (b) or (c) to substantiate why suspensions of concessions under the same sector or under the same agreement were not practicable or effective would only be relevant if the suspension of concessions proposed by the United States would be outside the scope of the panel or Appellate Body findings, e.g. if the proposed suspension would concern other service sectors than distribution services, or trade-related intellectual property rights.

3.10 We recall that subparagraph (a) of Article 22.3 of the DSU refers to the suspension of "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." We note that the words "same sector(s)" include both the singular and the plural. The concept of "sector(s)" is defined in subparagraph (f)(i) with respect to goods as *all goods*, and in subparagraph (f)(ii) with respect to services as a *principal sector* identified in the "Services Sectoral Classification List". We, therefore, conclude that the United States has the right to request the suspension of concessions in either of these two sectors, or in both, up to the overall level of nullification or impairment suffered, if the inconsistencies with the EC's obligations under the GATT and the GATS found in the original dispute have not been removed fully in the EC's revision of its regime. In this case the "same sector(s)" would be "all goods" and the sector of "distribution services", respectively. Our conclusion, based on the ordinary meaning of Article 22.3(a), is also consistent with the fact that the findings of violations under the GATT and the GATS in the original dispute were closely related and all concerned a single import regime in respect of one product, i.e. bananas."

64. In view of these considerations, and given that Ecuador's request to suspend commitments on "wholesale trade services" falls under subparagraph (a) of Article 22.3, there is obviously no need for us to examine whether the principles and procedures set forth in subparagraph (b-d) of Article 22.3 have been followed.<sup>23</sup> We conclude that Ecuador may obtain authorization by the DSB to suspend commitments on "wholesale trade services" because this subsector is within the same (distribution service) sector as that in which the reconvened panel found violations of Articles II and XVII of GATS.

C. ECUADOR'S REQUEST FOR SUSPENSION OF CONCESSIONS OR OTHER OBLIGATIONS UNDER ANOTHER SECTOR OR AGREEMENT THAN THAT WHERE VIOLATIONS WERE FOUND

65. Ecuador specifies in its request for suspension of other obligations under the TRIPS Agreement, pursuant to subparagraph (c) of Article 22.3, as obligations which it intends to suspend across sectors and agreements:<sup>24</sup>

- (i) Article 14 on "Protection of performers and producers of phonograms (sound recordings) and broadcasting organisations" under Section 1 (Copyrights and related rights) of the TRIPS Agreement;

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<sup>23</sup> We note that the principles and procedures set forth in subparagraphs (a) and (b)-(c) and thus the standard of our review are different in these subparagraphs. Under subparagraph (a) no consideration or review of whether or not suspension of commitments with respect to "wholesale trade services" as one of the same sectors where violations were found is practicable or effective for Ecuador. Consequently, our conclusions in this section do not detract from our conclusions below that suspension under the GATS of commitments in other subsectors of the distribution service sector as well as suspension of commitments under principal service sectors other than distribution services is not practicable or effective for Ecuador in view of the country-specific and case-specific circumstances.

<sup>24</sup> See above subparagraphs (f)(i)-(iii) and (g)(i)-(iii) of Article 22:3 of the DSU.

- (ii) Section 3 (Geographical Indications); and
- (iii) Section 4 (Industrial Designs).

66. We recall that there were no findings of violations under the TRIPS Agreement in the report of the reconvened panel in the proceeding between Ecuador and the European Communities under Article 21.5 of the DSU.<sup>25</sup>

67. The European Communities alleges that in making these request for suspension of TRIPS obligations Ecuador has not followed the principles and procedures set forth in subparagraphs (b) and (c). In the EC's view, Ecuador has in particular not demonstrated why it is not practicable or effective for it to suspend concessions under the GATT or commitments under the GATS in service sectors other than distribution services; nor that circumstances are serious enough for requesting suspension under another agreement; nor that it has taken into account the parameters in subparagraphs (i) and (ii) of Article 22.3(d).

68. Ecuador contends that it did not request suspension entirely under the GATT and/or in service sectors under the GATS other than distribution services because it considered that it would not be practicable or effective in the meaning of Article 22.3(b) and (c) of the DSU, that circumstances in Ecuador's bananas trade sector and the economy on the whole are serious enough to justify suspension under another agreement, and that the parameters in Article 22.3(d)(i)-(ii) corroborate this conclusion.

### **1. General Interpretation of the Principles and Procedures Set Forth in Article 22.3**

69. In addressing these issues, we recall our interpretations above of the jurisdiction and the scope of review of the Arbitrators, acting pursuant to paragraphs 6 and 7 of Article 22. In this case, our examination of the EC's claim that Ecuador has not followed the principles and procedures set forth in subparagraphs (a-e) of Article 22.3 requires us to analyze the following issues:<sup>26</sup>

- (a) First, whether suspension of concessions under the GATT as one of the same sectors as those where violations were found by the reconvened panel is "not practicable or effective";
- (b) Second, whether suspension of commitments under the GATS in another subsector than wholesale trade services within the sector of distribution services is "not practicable or effective";
- (c) Third, whether suspension of commitments under the GATS in another service sector than distribution services is "not practicable or effective";
- (d) Fourth, whether "circumstances are serious enough" to seek suspension under another agreement than those where violations were found;
- (e) Fifth, whether the trade in the sector(s) under the agreement(s) under which violations were found and the "importance of such trade to the party" suffering nullification or impairment were taken into account; and

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<sup>25</sup> WT/DS27/RW/ECU (dated 12 April 1999, adopted on 6 May 1999).

<sup>26</sup> We have already dealt with Ecuador's request to suspend commitments on "wholesale trade services" which falls under subparagraph (a) of Article 22.3 as a request for suspension with respect to the same sector(s) as that in which a violation was found.

- (f) Sixth, whether "broader economic elements" related to nullification or impairment and the "broader economic consequences" of the requested suspension were taken into account.

70. Several of these issues require the party seeking suspension to consider whether an alternative suspension with respect to the same sectors or agreements under which a violation was found is "not practicable or effective". In this regard, we note that the ordinary meaning of "practicable" is "available or useful in practice; able to be used" or "inclined or suited to action as opposed to speculation etc."<sup>27</sup> In other words, an examination of the "practicability" of an alternative suspension concerns the question whether such an alternative is available for application in practice as well as suited for being used in a particular case.

71. To give an obvious example, suspension of commitments in service sub-sectors or in respect of modes of service supply which a particular complaining party has not bound in its GATS Schedule is not available for application in practice and thus cannot be considered as practicable. But also other case-specific and country-specific situations may exist where suspension of concessions or other obligations in a particular trade sector or area of WTO law may not be "practicable".

72. In contrast, the term "effective" connotes "powerful in effect", "making a strong impression", "having an effect or result".<sup>28</sup> Therefore, the thrust of this criterion empowers the party seeking suspension to ensure that the impact of that suspension is strong and has the desired result, namely to induce compliance by the Member which fails to bring WTO-inconsistent measures into compliance with DSB rulings within a reasonable period of time.

73. One may ask whether this objective may ever be achieved in a situation where a great imbalance in terms of trade volume and economic power exists between the complaining party seeking suspension and the other party which has failed to bring WTO-inconsistent measures into compliance with WTO law. In such a case, and in situations where the complaining party is highly dependent on imports from the other party, it may happen that the suspension of certain concessions or certain other obligations entails more harmful effects for the party seeking suspension than for the other party.<sup>29</sup> In these circumstances, a consideration by the complaining party in which sector or under which agreement suspension may be expected to be least harmful to itself would seem sufficient for us to find a consideration by the complaining party of the effectiveness criterion to be consistent with the requirement to follow the principles and procedures set forth in Article 22.3.

74. A consideration by the complaining party of the practicability and the effectiveness of an alternative suspension within the same sector or under the same agreement does not need to lead to the conclusion that such an alternative suspension is both not practicable and not effective in order to meet the requirements of Article 22.3. This is so because in no instance do subparagraphs of Article 22.3 require that an alternative suspension within the same sector or under the same agreement be neither practicable nor effective. Thus a consideration by the complaining party that an alternative suspension which does not concern other sectors or other agreements is either not practicable or not effective is sufficient for that party to move on to seek suspension under another sector or agreement.

75. In this context, we recall our considerations above concerning the allocation of the burden of proof in arbitration proceedings under Article 22 that in the light of the requirement in Article 22.3(e), the complaining party requesting suspension has to come forward and submit information giving reasons and explanations for its initial consideration of the principles and procedures set forth in

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<sup>27</sup> The New Shorter Oxford English Dictionary ("Oxford English Dictionary"), Oxford (1993), p. 2317.

<sup>28</sup> Oxford English Dictionary, p. 786.

<sup>29</sup> Of course, suspension of concessions or other obligations is always likely to be harmful to a certain, limited extent also for the complaining party requesting authorization by the DSB.

Article 22.3 which led it to request authorization under another sector or another agreement than those where a violation was found. However, by the same token, it would then be for the other party to bear the ultimate burden of showing that suspension within the same sector or under the same agreement is both practicable and effective for the party requesting suspension. This implies for the case before us that once Ecuador has laid out its considerations under Article 22.3, it is ultimately for the European Communities to establish that suspension of concessions on goods under the GATT or suspension of commitments in service sectors other than distribution services under the GATS are both practicable as well as effective for Ecuador given the case-specific and country-specific circumstances.

76. Our interpretation of the "practicability" and "effectiveness" criteria is consistent with the object and purpose of Article 22 which is to induce compliance. If a complaining party seeking the DSB's authorization to suspend certain concessions or certain other obligations were required to select the concessions or other obligations to be suspended in sectors or under agreements where such suspension would be either not available in practice or would not be powerful in effect, the objective of inducing compliance could not be accomplished and the enforcement mechanism of the WTO dispute settlement system could not function properly.

77. In our view, it is important to point out that Article 22.3 sets out the criteria of practicability and effectiveness in the negative. On the one hand, establishing that something does not exist is often deemed more difficult than proving that it does exist. On the other hand, subparagraph (b) implies that Ecuador's considerations need to show that suspension is not practicable or effective with respect to the same sector(s) as those where a violation was found. That provision does not imply establishing that suspension is practicable and effective in other sectors under the same agreement. Likewise, subparagraph (c) implies showing that suspension is not practicable or effective with respect to other sectors under the same agreement(s) as those where a violation was found, it does not imply establishing that suspension is practicable and effective under another agreement.

78. This has important consequences for the examination of the case before us. They imply that our review of the effectiveness and practicability criteria focuses, in the light of the legal and factual arguments submitted by both parties, on Ecuador's considerations why it is not practicable or effective for it (i) to suspend concessions under the GATT or (ii) commitments under the GATS with respect to the distribution service sector for purposes of subparagraph (b), or (iii) to suspend commitments under the GATS with respect to service sectors other than distribution services for purposes of subparagraph (c). We emphasize that Article 22.3(b) and (c) does not require Ecuador, nor us, to establish that suspension of concessions or other obligations is practicable and/or effective under another agreement (i.e. the TRIPS Agreement) than those under which violations have been found (i.e. the GATT and the GATS). The burden is on the European Communities to establish that suspension within the same sector(s) and/or the same agreement(s) is effective and practicable. However, according to subparagraph (c) of Article 22.3, it is our task to review Ecuador's consideration that the "circumstances are serious enough" to warrant suspension across agreements.

79. From a contextual perspective, it should be stressed that the criteria of practicability and effectiveness are not set forth in subparagraphs (b) and (c) in isolation from the other subparagraphs of Article 22.3. These criteria have to be read in combination especially with the factors set out in subparagraphs (i) and (ii) of Article 22.3(d) which, as the introductory clause of subparagraph (d) stipulates, the complaining party seeking authorization for suspension shall take into account in applying the above principles, i.e. those provided for in subparagraphs (a)-(c).

80. We also note that the threshold for considering a request for suspension in another sector under the same agreement (e.g. service sectors other than distribution services) pursuant to subparagraph (b) is lower than the threshold for considering a request for suspension under another agreement pursuant to subparagraph (c) of Article 22.3. Suspension across sectors under the same agreement is permitted if suspension within the same sector is "not practicable or effective".

However, an additional condition applies when the complaining party considers a request for suspension across agreements. Such suspension under another agreement is not justified unless "circumstances are serious enough".

81. The concepts of "circumstances" and the degree of "seriousness" that are relevant for the analysis of this condition remain undefined in subparagraph (c). The provision specifies no threshold as to which circumstances are deemed "serious" enough so as to justify suspension under another agreement. We find useful guidance in the ordinary meaning of the term "serious" which connotes "important, grave, having (potentially) important, especially undesired, consequences; giving cause for concern; of significant degree or amount worthy of consideration".<sup>30</sup> Arguably, the factors listed in subparagraph (d) provide at least part of the context for further defining these meanings.

82. More specifically, subparagraphs (i) of Article 22.3(d) provide that, in applying the principles set forth in subparagraph (a-c), the complaining party seeking authorization shall take into account, inter alia, the trade in the sector or under the agreement under which WTO-inconsistencies were found, as well as the "importance of ... trade" to that party.

83. The European Communities argues that this criterion concerns the trade in the sector(s) and/or the agreement(s) in question in their entirety, i.e. all trade in goods under the GATT, all trade in distribution services and/or all trade in services under the GATS. In contrast, Ecuador implies that in this case the "importance of such trade" refers to trade in goods and services in the bananas sector because the findings of the reconvened panel concern the revised EC regime for the importation, sale and distribution of bananas.

84. We do not exclude the possibility that trade in the relevant sector(s) and/or agreement(s) in their entirety may be relevant under subparagraph (d)(i). In particular, we deem it appropriate to consider the proportion of the trade area(s) affected by WTO-inconsistent measure(s) covered by the terms of reference of the reconvened panel in relation to the entire trade under the sector(s) and/or agreement(s) in question. However, we believe that the criteria of "such trade" and the "importance of such trade" to the complaining party relate primarily to trade nullified or impaired by the WTO-inconsistent measure at issue. In the light of this interpretation, we attribute particular significance to the factors listed in subparagraph (i) in the case before us, where the party seeking suspension is a developing country Member, where trade in bananas and wholesale service supply with respect to bananas are much more important for that developing country Member than for the Member with respect to which the requested suspension would apply.<sup>31</sup>

85. In contrast, subparagraph (ii) of Article 22.3(d) requires the complaining party to take into account in addition "broader economic elements" related to the nullification or impairment as well as "broader economic consequences" of the suspension of concessions or other obligations. The fact that the former criterion relates to "nullification or impairment" indicates in our view that this factor primarily concerns "broader economic elements" relating to the Member suffering such nullification or impairment, i.e. in this case Ecuador.

86. We believe, however, that the fact that the latter criterion relates to the suspension of concessions or other obligations is not necessarily an indication that "broader economic consequences" relate exclusively to the party which was found not to be in compliance with WTO law, i.e. in this case the European Communities. As noted above, the suspension of concessions may not only affect the party retaliated against, it may also entail, at least to some extent, adverse effects

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<sup>30</sup> Oxford English Dictionary, p. 2785.

<sup>31</sup> Moreover, the proportion of trade in bananas and related services in relation to trade in goods and services overall is comparably high for Ecuador, and certainly higher than the proportion of banana imports relative to total imports to the European Communities.

for the complaining party seeking suspension, especially where a great imbalance in terms of trade volumes and economic power exists between the two parties such as in this case where the differences between Ecuador and the European Communities in regard to the size of their economies and the level of socio-economic development are substantial.

**2. Review of Ecuador's Request for Suspension Pursuant to Subparagraph (c) in the Light of the Principles and Procedures Set Forth in Article 22.3**

87. In the light of the arguments presented by both parties, we review in the following subsections (a)-(f) the issues arising under subparagraphs (b)-(d) of Article 22.3 as laid out in the introductory enumeration in paragraph 69 above.

(a) Whether suspension of concessions under the GATT is "not practicable or effective"

88. First, we discuss Ecuador's consideration that suspension of concessions under the GATT is not practicable or effective for Ecuador in this case. We note that Ecuador's argumentation distinguishes between "primary" and "investment" goods, on the one hand, and "consumer" goods, on the other. While emphasising that these product categories do not correspond to any internationally agreed product classification system, the EC's rebuttal arguments nonetheless differentiate between the same product categories as introduced by Ecuador. In these circumstances, we consider it appropriate for purposes of our review of Ecuador's and EC's argumentation to follow the same pattern in this case.

89. Ecuador submits that it imports mostly primary goods and investment goods from the European Communities. According to data submitted by Ecuador, imports of goods other than consumer goods amount to approximately 85 per cent of total imports from the European Communities in recent years. Ecuador argues that suspension of concessions with respect to these goods is not practicable and effective because they are used as inputs in the domestic manufacturing process and imposing prohibitive tariffs on EC imports of such goods would harm Ecuador more than the European Communities.

90. The European Communities notes that the notions of investment or capital goods, inputs or consumer goods are not internationally defined and that the Harmonised System or the UN System of International Trade Classification make only a basic distinction between primary goods and manufactured goods. According to EC statistics, Ecuador's imports of goods from the European Communities that are used in Ecuador's manufacturing and processing industry amount to US\$260.5 million or less than 30 per cent of total imports by Ecuador from the European Communities.

91. We first discuss the parties' arguments concerning primary goods and investment goods. As a starting-point of our analysis, we presume that the suspension of concessions on imports by Ecuador from the European Communities of those types of goods and the imposition of additional tariffs would increase the cost of domestic production in the absence of alternative sources of supply at similar prices.

92. The European Communities contends that alternative sources of supply exist in respect of the primary goods and investment goods that are being imported by Ecuador from the European Communities. In this respect, the European Communities submits information concerning world exports for five product groups<sup>32</sup> and argues that alternative sources of supply in respect of these products are either located closer to Ecuador or available at lower prices than those of EC origin.

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<sup>32</sup> In response to a question by the Arbitrators, the European Communities submitted statistics on world exports concerning five product groups, i.e. machinery ... for the industrial preparation or manufacture of food

93. We believe that statistics on world exports in five selected product groups are insufficient proof for the EC's proposition that alternative sources exist for virtually hundreds of different product groups which are being imported by Ecuador from the European Communities. More importantly, we have not been provided with information about whether the price levels of alternative sources of supply for these products, if any, are similar to those of imports from the European Communities. In our view, if supplies at lower prices than EC supplies were available, presumably Ecuadorian importers would have already chosen to procure from these sources.

94. In any event, even if supplies from other than EC sources at similar prices were to exist, the European Communities has not succeeded in rebutting Ecuador's arguments that switching to other than EC sources of supply would involve transitional costs of adjusting to those sources of supply, costs which Ecuador claims are relatively significant in view of its developing country status.

95. Moreover, given the fact that Ecuador, as a small developing country, only accounts for a negligible proportion of the EC's exports of these products, the suspension of concessions by Ecuador vis-à-vis the European Communities is unlikely to have any significant effect on demand for these EC exports.<sup>33</sup>

96. In the light of these considerations, we therefore conclude that the European Communities has not shown that suspension of concessions under the GATT with respect to primary goods and investment goods is both practicable and effective for Ecuador.

97. We next turn to the parties' arguments concerning consumer goods. Ecuador submits that approximately 10 per cent of total imports are non-durable consumer goods and, in addition, approximately 5 per cent are durable consumer goods. In absolute figures, Ecuador's imports from the European Communities of non-durable consumer goods amount to approximately US\$43.9 million and imports of durable consumer goods are approximately US\$16.9 in 1999, totalling US\$60.8 million for consumer goods.

98. In contrast, the European Communities submits different data on Ecuador's imports of consumer goods from the European Communities in 1998, indicating that these imports amount to US\$194 million. The European Communities argues that these consumer goods are not essential for Ecuador's manufacturing and processing industries and that alternative sources of supply are readily available at similar price levels. As a result, suspension of such trade is feasible and practicable for Ecuador in the EC's view.

99. We believe that the discrepancy between the statistics submitted by the parties concerning Ecuadorian imports of consumer goods of EC origin results, at least in part, from the different ways in which the parties categorise products into, e.g. consumer goods, primary goods or investment goods. We note that, according to Ecuador's own statistics, imports of consumer goods from the European Communities amount to at least US\$60.8 million.

100. Suspension of concessions with respect to consumer goods cannot cause any direct adverse effects on Ecuador's domestic manufacturing and processing industries. Thus Ecuador's main argument with respect to investment goods and primary goods referred to above cannot apply with respect to consumer goods. It is also true that resulting price increases from the suspension of concessions on consumer goods could cause welfare losses to end-consumers in the country suspending concessions. However, lacking further argumentation by Ecuador on this point, we

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or drink; fishing vessels; dish-washing machines etc.; parts suitable for use solely or principally with electric motors and generators, electric generating sets and rotary converters; antibiotics.

<sup>33</sup> The EC's exports to Ecuador are less than 0.1 per cent of the EC's total merchandise exports (excluding intra EC exports).

conclude that, on the basis of the facts and considerations presented, Ecuador could not plausibly arrive at the conclusion that suspension of concessions on consumer goods is not practicable and effective for Ecuador in this case.

101. In the light of the foregoing considerations, it is our view that the degree of practicability and effectiveness of suspension of concessions under the GATT may vary between different categories of products imported from the European Communities to Ecuador. We conclude that the European Communities has not established that suspension of concessions with respect to primary goods and investment goods is both practicable and effective for Ecuador in this case. However, with respect to consumer goods, we conclude that Ecuador has not followed the principles and procedures of Article 22.3 in considering that suspension of concessions on consumer goods is not practicable or effective for it in this case.

102. In this context, we recall that our mandate under Article 22.6 is to review whether Ecuador has followed the principles and procedures set forth in Article 22.3 with respect to "sectors" and/or "agreements" as defined in subparagraphs (f) and (g) of that Article. If we were to make detailed, product-specific determinations as to whether suspension of concessions should have been deemed not practicable or effective by Ecuador, we would run the risk of contravening the requirement that Arbitrators "shall not examine the nature of concessions or other obligations to be suspended" explicitly set out in Article 22.7.

(b) Whether suspension of commitments under the GATS in subsectors other than wholesale trade services within the sector of distribution services is "not practicable or effective"

103. We next review Ecuador's consideration that suspension of commitments or other obligations under the GATS in respect of service subsectors other than "wholesale trade services" within the principal sector of distribution services is not practicable or effective for Ecuador in this case. We note that, according to the Services Sectoral Classification List<sup>34</sup> cited in Article 22.3(f)(ii), the principal sector of distribution services comprises the sub-sectors of "commission agents' services", "wholesale trade services", "retailing services", "franchising" and "others". Ecuador has not entered into specific commitments on market access or national treatment in any of those sub-sectors with the exception of "wholesale trade services".<sup>35</sup> It is, therefore, evident for us that Ecuador cannot suspend commitments or other obligations in sub-sectors of the distribution service sector in respect of which it has not entered into specific commitments in the first place.<sup>36</sup>

104. Therefore, we conclude that Ecuador has followed the principles and procedures of Article 22.3 in considering that it is not practicable or effective for it to suspend commitments or other obligations under the GATS with respect to subsectors other than "wholesale trade services" within the principal sector of "distribution services".

(c) Whether suspension of commitments under the GATS in another sector than distribution services is "not practicable or effective"

105. We now turn to examining Ecuador's considerations that suspension of commitments or other obligations under the GATS in principal service sectors other than distribution services is not practicable or effective for Ecuador in this case.

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<sup>34</sup> Document MTN.GNS/W/120.

<sup>35</sup> Ecuador's Schedule of Specific Commitments under the GATS (Document GATS/SC/98 of 24 April 1996).

<sup>36</sup> The same conclusion would apply if Ecuador had scheduled exemptions from MFN treatment under the GATS with respect to a particular service sector or sub-sector.

106. We recall that such suspension of commitments is possible only with respect to those service sectors and those modes of supply which Ecuador has bound in its country-specific Schedule of specific commitments. Ecuador has made commitments on market access and/or national treatment, e.g. in business services, communications, construction and engineering, financial services, health and social services, different types of transport services, tourism, travel, recreational and cultural services.<sup>37</sup> However, in most of the service sectors or sub-sectors covered by its commitments, Ecuador did not bind all four modes of service supply within the meaning of Article I:2 of GATS. In fact, many of Ecuador's specific commitments exclude supply mode one (cross-border supply) and are limited to delivery modes two and/or three (consumption abroad and commercial presence).

107. We note that Ecuador's argumentation varies between different modes of service supply. It distinguishes in particular between service supply across borders (mode one) and supply through commercial presence (mode three).

108. Given this particular structure of its Schedule of specific commitments, Ecuador submits that suspension of its specific commitments under the GATS could largely not concern cross-border service supply from the European Communities to Ecuador. We agree that for the predominant part, such suspension of commitments would invariably concern the third mode of service supply through commercial presence of EC service suppliers in Ecuador, or in other words, foreign direct investment.

109. As regards the suspension of commitments concerning commercial presence, Ecuador argued that the suspension of such commitments would distort the investment climate in Ecuador for actual and potential investors from the European Communities. Therefore, Ecuador considered that such suspension would be ineffective because it would harm Ecuador more than the European Communities.

110. We believe that the effects of the suspension of commitments concerning commercial presence could be particularly detrimental to a developing country Member such as Ecuador because it is highly dependent on foreign direct investment. We arrive at this conclusion for the following reasons.

111. EC service suppliers which are currently commercially present in Ecuador (i.e. in the post-establishment stage) would be adversely affected by the impact of such suspension until they transfer their investment to another country which would entail additional cost to them. The withdrawal of commitments on commercial presence would of course not require the immediate closure of a commercial presence owned or controlled by EC nationals, but EC service suppliers would immediately lose the legal protection, predictability and certainty which the GATS standards provide. If such suspension of commitments causes EC service suppliers who are currently commercially present in Ecuador to transfer investments, significant harm would be caused to Ecuador's economy.

112. EC service suppliers who are potential investors in Ecuador (i.e. in the pre-establishment stage) could easily turn to other host countries than Ecuador with a view to avoiding the impact of the suspension of commitments on commercial presence. Again, significant harm would be caused to Ecuador's economy.

113. Furthermore, Ecuador submitted that suspension of commitments on commercial presence would not be practicable. It argued that a party could, if authorized by the DSB, e.g. order a commercially present service supplier to stop its activities or impose a supplementary tax on each unit of its service output. Such actions against service suppliers of a particular foreign origin could lead in many jurisdictions to conflicts with rights to, e.g. equal treatment embodied in national legislation or international treaties and would entail substantial administrative difficulties.

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<sup>37</sup> Ecuador has listed MFN exemptions in the audio-visual sector.

114. In our view, it does not seem difficult to prevent EC service suppliers (in the pre-establishment stage) from establishing themselves in Ecuador. However, it may be possible in theory, but difficult to implement in practice, to prevent already locally established service suppliers of EC origin (in the post-establishment stage) from supplying services within Ecuador's territory. For example, it may cause administrative difficulties to close or limit the service output of a commercial presence in the form of a branch or representative office.<sup>38</sup> Additional legal and administrative difficulties may arise when closing or limiting the output of a commercial presence in the form of an establishment enjoying legal personality in its own right due to the legal protection granted to juridical persons by national or international law.

115. Next, we address Ecuador's considerations concerning cross-border service supply. Ecuador submitted that the suspension of such commitments would create practical difficulties and remain ineffective in certain service sectors. For example, it would be technically difficult to cut certain service trade across borders such as telecommunications flows.

116. With respect to a limited range of service sectors or sub-sectors, Ecuador has entered not only into commitments on cross-border supply (first mode of service supply), but also into commitments on other modes of supply such as consumption abroad (second mode) and/or commercial presence (third mode). This is the case, e.g. for construction and engineering; environmental services; health-related and social services; tourism and travel; recreational, cultural and sporting services.

117. We believe that for many of these service transactions commitments on different modes of supply provide alternative channels for supplying services. This means that it is technically feasible in practice to provide such services either through cross-border supply or consumption abroad or commercial presence. To the extent that this is the case, it becomes difficult for Ecuador to implement the suspension of such commitments with respect to one of those bound supply modes only. Moreover, if Ecuador were to suspend commitments concerning cross-border supply in service sectors where it has also bound supply through commercial presence and where these supply modes may serve as alternative channels of service supply, our considerations above concerning the ineffectiveness and practical difficulties Ecuador would face when suspending commitments on commercial presence would again apply.

118. We emphasize that our considerations concerning commitments on several supply modes which provide alternative channels for supplying certain service transactions are essentially based on the particular, country-specific structure in terms of service sectors and modes of supply bound in Ecuador's Schedule on specific commitments. It is evident that no country-specific GATS schedule of any other Member is entirely identical to the particular configuration and structure of the bindings contained in Ecuador's GATS schedule.

119. We also consider the EC's submission that in 1998 trade in services between the European Communities and Ecuador is estimated to be equivalent to US\$197.54 million. However, the parties have not provided us with information on which proportion of this trade in services is covered by Ecuador's commitments under the GATS. We therefore cannot ascertain to what extent such trade concerns modes of supply which Ecuador has bound in service sectors covered in its GATS Schedule. Accordingly, we believe that these statistics do not undermine our analysis of the effectiveness and practicability of suspending Ecuador's commitments on services with respect to different modes of supply.

120. Therefore, we conclude that Ecuador has followed the principles and procedures of Article 22.3 in considering that it is not practicable or effective for it in this case to suspend

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<sup>38</sup> See Article XXVIII(d) of GATS.

commitments or other obligations under the GATS with respect to principal sectors other than "distribution services".

(d) Whether "circumstances are serious enough" to seek suspension under another agreement

121. Having concluded that suspension is not practicable or effective under the same sectors (i.e. under the GATT and the distribution service sector under the GATS), nor in other sectors under the same agreement (i.e. under the GATS in bound sectors other than distribution services), as those where violations were found, we next review Ecuador's consideration that "circumstances are serious enough" within the meaning of Article 22.3(c) to request suspension of concessions or other obligations under another agreement than those where violations were found (i.e. under the TRIPS Agreement). We find contextual guidance for defining the "seriousness" of circumstances in the factors which subparagraph (d) requires the complaining party to take into account when considering in which sector(s) or under which agreement(s) to seek the DSB's authorization for suspension.

122. We thus review Ecuador's consideration of whether circumstances are serious enough within the meaning of subparagraph (c) for Ecuador to seek suspension under the TRIPS Agreement in the context of the factors set forth in subparagraphs (i) and (ii) of Article 22.3(d). According to subparagraph (i) of Article 22.3(d), we need to examine whether the trade in the sector(s) or under the agreement(s) where violations were found and the "importance of such trade to the party" suffering nullification or impairment was taken into account by Ecuador. Furthermore, we need to analyze whether "broader economic elements" related to nullification or impairment and "broader economic consequences" of the requested suspension within the meaning of subparagraph (ii) of Article 22.3(d) were taken into account by Ecuador.

123. In this context, we note Ecuador's argument that if it were to request suspension of concessions under the GATT with respect to goods, e.g. sound recordings which obviously incorporate intellectual property rights, such a request would fall within subparagraph (a) of Article 22.3. The limited scope of review in an arbitration proceeding under Article 22.6 of such requests for suspension within one of the same sectors as those where violations were found should, in Ecuador's view, be taken into account by the Arbitrators in interpreting their scope of review of requests for suspension under another agreement than those where violations were found.

124. We agree with Ecuador that the extent of scrutiny under Article 22.3(a) is limited. But we also believe that the case of suspension of obligations under the TRIPS Agreement is different from the situation described above by Ecuador because such suspension does not only affect cross-border trade in goods involving intellectual property rights. It also involves the use of such rights in local production within a country as well as, to the extent feasible, use of such rights detached from goods or services.

125. Ecuador submitted the statistics<sup>39</sup> that display the inequality between Ecuador and the European Communities in support of its argumentation that circumstances are serious enough to justify suspension across agreements: Ecuador's population is 12 million, while the EC's population is 375 million. Ecuador's share of world merchandise trade is below 0.1 per cent, whereas the EC's world merchandise trade share is in the area of 20 per cent. In terms of world trade in services, the EC's share is 25 per cent, while no data are available for Ecuador because its share would be so small. The GDP at market prices in 1998 was US\$20 billion for Ecuador and US\$7,996 billion for the 15 EC member States. In 1998, the EC's GDP per capita is US\$22,500, whereas per capita income is US\$1,600 in the case of Ecuador.

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<sup>39</sup> These data derive from WTO Statistics, Eurostat's "The European Union Figures for the Seattle Conference" (Memo 9/99) and the "Economist Intelligence Unit Country Report" (4<sup>th</sup> Quarter 1999).

126. In our view, these figures illustrate the considerable economic differences between a developing WTO Member and the world's largest trader. We believe that these differences confirm our considerations above that it may not be practicable or effective for Ecuador to suspend concessions or other obligations under the GATS or with respect to all product categories under the GATT. However, to some extent, the same rationale could hold true also for suspension of obligations under the TRIPS Agreement by a developing country Member in a situation involving a substantial degree of economic inequality between the parties concerned.

127. In this respect, we note Ecuador's argument that it has limited its request for suspension under the TRIPS Agreement to only three areas of protection of intellectual property rights where adverse effects for Ecuador and difficulties in implementing suspension would seem to arise the least. We recall that Article 22.3(a-b) requires us to review the complaining party's considerations as to why suspension is not practicable or effective in the same sector(s) or in (an)other sector(s) under the same agreement(s) where violations were found. Article 22.3(c) requires in addition a review of whether circumstances are serious enough to justify suspension across agreements. Finally, Article 22.3(d) requires a review of whether the complaining party has taken into account certain factors in applying these principles and procedures just mentioned. None of these provisions requires the complaining party to establish that suspension with respect to another sector or under another agreement is in fact and at present practicable and effective, or will become so at some point in the future. Nor are we, as Arbitrators, in our review pursuant to subparagraphs 6 or 7 of Article 22, required to establish that the suspension of certain TRIPS obligations is effective and practicable for Ecuador in this case.

- (e) Whether "the trade in the sector(s) under the agreement(s)" under which violations were found and the "importance of such trade to the party" were taken into account

128. We next analyze whether Ecuador has taken into account the factors of trade in the sector(s) or under the agreement(s) where violations were found and the importance of such trade for the complaining party within the meaning of subparagraph (i) of Article 22.3(d). We recall our interpretation above that these factors relate primarily to the trade nullified or impaired by the WTO-inconsistent measures which have not been brought into compliance, and that trade in the goods or service sectors or under the GATT and GATS agreements in their entirety are of subsidiary importance for our review. Therefore, in this case we consider mainly whether Ecuador has taken into account in particular the importance of trade in bananas and their distribution, but also the importance of such trade in the banana sector relative to trade in the goods and service sectors on the whole.

129. More specifically, Ecuador emphasizes that the banana sector is the lifeblood of its economy. Ecuador is the largest exporter of bananas in the world and the largest exporter to the European market. Banana production is also the largest source of employment and the largest source of foreign earnings. Nearly 11 per cent of Ecuador's population is totally dependent on this sector. Banana exports (in goods only) represent 25.45 per cent of Ecuador's total merchandise exports. Banana production represents nearly 5.2 per cent of the GDP. In Ecuador's view, the banana industry is of greater importance to its economy than the whole agricultural sector in most developed countries. Ecuador concluded that it would be difficult to find an economic sector where it would be possible to hurt Ecuador more than in the banana sector.

130. This information demonstrates that Ecuador has taken into account that its economy is highly dependent upon bananas and is highly sensitive to any changes in international trade flows and conditions of competition abroad. We conclude that Ecuador has taken into account within the meaning of subparagraph (i) of Article 22.3(d) the trade in the sector(s) and agreement(s) where violations of WTO-law have been found and the importance of such trade to Ecuador.

- (f) Whether the "broader economic elements" related to nullification or impairment and the "broader economic consequences" of the requested suspension were taken into account

131. Finally, we review whether Ecuador has taken into account "broader economic elements" related to nullification or impairment and "broader economic consequences" of the requested suspension within the meaning of subparagraph (ii) of Article 22.3(d) in applying the principles and procedures of Article 22.3, and in particular in considering that "circumstances are serious enough" to justify suspension under another agreement than those where violations were found.

132. In these respects, Ecuador offered the following argumentation. On the one hand, Ecuador argued that it currently faces the worst economic crisis in its history. Ecuador pointed at the fact that its economy shrank by 7 per cent in 1999 and that total imports declined by 52 per cent. Unemployment rose to 17 per cent. We do not question the alarming nature of these economic indicators. However, the European Communities contended that Ecuador has not clearly established a causal link between the EC's failure to comply with the DSB rulings within the reasonable period of time and the economic crisis in Ecuador. In the EC's view, this crisis may be due to multiple reasons, including natural disasters and domestic political problems.

133. We note that subparagraph (ii) of Article 22.3(d) does not require the complaining party to establish a causal connection between nullification or impairment suffered and "broader economic elements" to be taken into account. It is sufficient to show that there is a relation between the "broader economic elements" considered by Ecuador and the nullification and impairment caused by the EC import regime for bananas. We consider Ecuador's argument plausible that the nullification and impairment caused by the WTO-inconsistent aspects of that EC import regime have aggravated these economic problems, especially in view of the importance of trade in bananas and related distribution services for Ecuador's economy.

134. As to "broader economic consequences" of the suspension of concessions or other obligations, Ecuador submitted that such consequences for the European Communities would be virtually non-existent. In Ecuador's view, given the economic disparity between the parties, such consequences would be felt rather by Ecuador.

135. We have addressed and accepted Ecuador's arguments that it has taken account of this factor in considering whether to seek suspension under another agreement. We are thus satisfied that Ecuador has taken into account within the meaning of subparagraph (ii) of Article 22.3(d) "broader economic elements" and "broader economic consequences" in applying the principles and procedures set forth in Article 22.3.

136. In this context, we note that our interpretation and application of the factors listed in subparagraph (d) of Article 22.3 is corroborated by the provisions of Article 21.8<sup>40</sup> which require the DSB, in considering which action might be appropriate if a case is brought by a developing country Member, to take into account not only the trade coverage of the measures complained of, but also their impact on the economy of the developing country Members concerned.

137. In the light of the foregoing discussion, we conclude that Ecuador has followed the principles and procedures set forth subparagraph (c) in considering that "circumstances are serious enough" to seek suspension under another agreement than those where violations were found and that it has taken into account the factors listed in subparagraph (d) in applying the principles and procedures set forth in Article 22.3.

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<sup>40</sup> 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."

138. Accordingly, we conclude that Ecuador has followed the principles and procedures set forth in Article 22.3 in requesting authorization from the DSB to suspend certain obligations under the TRIPS Agreement.

## V. REMARKS ON THE SUSPENSION OF TRIPS OBLIGATIONS

### A. THE SCOPE OF THE SUSPENSION TO BE AUTHORIZED UNDER THE TRIPS AGREEMENT

139. We recall that Article 19 of the DSU provides that "the panel or the Appellate Body may suggest ways in which the Member concerned could implement the recommendations". While Article 19 does not explicitly mention arbitration proceedings under Article 22, in our view, there is nothing in the DSU that would preclude Arbitrators, acting pursuant to Article 22.6, from making suggestions on how to implement their decision. Given that this case is the first one involving subparagraphs (b)-(e) of Article 22.3 and the first one concerning the suspension of TRIPS obligations, we believe that it is particularly appropriate to set out our views on the suspension of TRIPS obligations. We also note that Ecuador has expressed its interest in hearing our views on these issues.

140. We first note that Article 1.3 of the TRIPS Agreement defines in general the reach of the TRIPS Agreement:

"Members shall accord the treatment provided for in this Agreement to the *nationals* of other Members. In respect of the *relevant intellectual property right*, the nationals of other Members shall be understood as those *natural or legal persons* that would meet the criteria for eligibility for protection provided for in the Paris Convention (1967), the Berne Convention (1971), the Rome Convention and the Treaty on Intellectual Property in Respect of Integrated Circuits, were all Members of the WTO members of those conventions. ...". (emphasis added, footnotes omitted).

141. Thus, an authorization by the DSB of the request for suspension *vis-à-vis* the European Communities would permit Ecuador to suspend the treatment provided for in the TRIPS provisions in question with respect to *nationals* within the meaning of Article 1.3 of those 13 EC member States<sup>41</sup> which the request for suspension by Ecuador refers to.

142. Article 1.3 of the TRIPS Agreement further specifies that the criteria for determining which *persons* are entitled to the treatment provided for under the TRIPS Agreement are those that meet the *criteria for eligibility* for protection laid down in the main pre-existing intellectual property conventions, including the Paris Convention, the Berne Convention, the Rome Convention, and the Treaty on Intellectual Property in Respect of Integrated Circuits (IPIC Treaty).<sup>42</sup>

143. We recall that Ecuador's request for the suspension of TRIPS obligations refers to Article 14 of Section 1 of the TRIPS Agreement on "Copyright and related rights" as well as Section 3 on "Geographical indications" and Section 4 on "Industrial designs".

144. In respect of the protection of *performers, producers of phonograms* (sound recordings) and *broadcasting organisations* within the meaning of Article 14 of the TRIPS Agreement, criteria for eligibility for protection of persons are defined in the Rome Convention. In this respect, it is important to point out that, in the case of suspension of obligations under Article 14, as requested by Ecuador, there may be different right holders of the different rights related to phonograms and that

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<sup>41</sup> Ecuador's request for suspension under Article 22.2 excludes Denmark and the Netherlands.

<sup>42</sup> These eligibility criteria apply whether or not a WTO Member is a party to these pre-existing Conventions.

these right holders do not necessarily all have the nationality, within the meaning of Article 1.3 of the TRIPS Agreement, of one of those 13 member States in question, even if the phonogram concerned has been produced in one of those member States. The performer having rights to a phonogram under Article 14 may be a non-national of these 13 member States, but the producer of the phonogram may be a national of those member States. Such complicated situations will have to be carefully considered by Ecuador in implementing the suspension of TRIPS obligations, if authorized by the DSB, so as not to adversely affect right holders who cannot be regarded as nationals of those 13 EC member States.

145. In respect of the criteria for eligibility for the protection of *industrial designs*, the Paris Convention is relevant.

146. The legal protection of *geographical indications*<sup>43</sup> is enjoyed by "interested parties" within the meaning of Articles 22.2 and 23.1 of the TRIPS Agreement.<sup>44</sup> Article 22.1 of the TRIPS Agreement creates a clear link between a region, locality or territory and a protectable geographical indication. This implies that the suspension of protection of geographical indications would concern parties interested in geographical indications which identify a good as originating in the territory of one of the respective 13 EC member States, or a region or locality in that territory.

147. It should be emphasized that in its relation to all other WTO Members and the natural or legal persons that are their nationals, Ecuador continues to be bound by its obligations under the TRIPS Agreement and that all these WTO Members continue to be entitled to exercise their rights under the DSU with respect to Ecuador.

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<sup>43</sup> Geographical indications are defined in Article 22.1 of the TRIPS Agreement as indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristics of the good is essentially attributable to the geographical origin.

<sup>44</sup> Article 22.2 of the TRIPS Agreement:

"2. In respect of geographical indications, Members shall provide the legal means for interested parties to prevent:

- (a) the use of any means in the designation or presentation of a good that indicates or suggests that the good in question originates in a geographical area other than the true place of origin in a manner which misleads the public as to the geographical origin of the good;
- (b) any use which constitutes an act of unfair competition within the meaning of Article 10*bis* of the Paris Convention (1967).

3. A Member shall, *ex officio* if its legislation so permits or at the request of an interested party, refuse or invalidate the registration of a trademark which contains or consists of a geographical indication with respect to goods not originating in the territory indicated, if use of the indication in the trademark for such goods in that Member is of such a nature as to mislead the public as to the true place of origin.

4. The protection under paragraphs 1, 2 and 3 shall be applicable against a geographical indication which, although literally true as to the territory, region or locality in which the goods originate, falsely represents to the public that the goods originate in another territory."

Article 23.1 of the TRIPS Agreement: Additional Protection for Geographical Indications for Wines and Spirits: "Each Member shall provide the legal means for interested parties to prevent use of a geographical indication identifying wines for wines not originating in the place indicated by the geographical indication in question or identifying spirits for spirits not originating in the place indicated by the geographical indication in question, even where the true origin of the goods is indicated or the geographical indication is used in translation or accompanied by expressions such as 'kind', 'type', 'style', 'imitation' or the like." Footnote 4 to Article 23.1: "Notwithstanding the first sentence of Article 42, Members may, with respect to these obligations, instead provide for enforcement by administrative action."

As regards the notion of "interested parties", guidance could be sought from Article 10.2 of the Paris Convention.

B. THE SUSPENSION OF TRIPS OBLIGATIONS AND THE RELATION WITH THE CONVENTIONS ADMINISTERED BY WORLD INTELLECTUAL PROPERTY ORGANISATION (WIPO)

148. The parties disagree on whether Article 2.2 of the TRIPS Agreement prevents or permits the suspension of TRIPS obligations which have a relation to the Paris Convention, Berne Convention, the Rome Convention or the IPIC Treaty. Article 2.2 provides:

"Nothing in Parts I to IV of this Agreement shall derogate from existing obligations that Members have to each other under the Paris Convention, the Berne Convention, the Rome Convention and the Treaty on Intellectual Property Right in Respect of Integrated Circuits."

149. This provision can be understood to refer to the obligations that the contracting parties of the Paris, Berne and Rome Conventions and the IPIC Treaty, who are also WTO Members, have between themselves under these four treaties. This would mean that, by virtue of the conclusion of the WTO Agreement, e.g. Berne Union members cannot derogate from existing obligations between each other under the Berne Convention. For example, the fact that Article 9.1 of the TRIPS Agreement incorporates into that Agreement Articles 1-21 of the Berne Convention with the exception of Article 6*bis* does not mean that Berne Union members would henceforth be exonerated from this obligation to guarantee moral rights under the Berne Convention.

150. In any event, Article 2.2 only refers to Parts I to IV of the TRIPS Agreement, while the provisions on "Dispute Prevention and Settlement" are embodied in Part V. This Part of the TRIPS Agreement contains, *inter alia*, Article 64.1<sup>45</sup> which provides that the DSU applies to disputes under the TRIPS Agreement unless otherwise specifically provided therein. Examples for something "otherwise specifically provided" are paragraphs 2 and 3 of that same Article 64. These paragraphs specifically provide that so-called "non-violation" and "situation" complaints within the meaning of subparagraphs 1(b) and 1(c) of Article XXIII of GATT cannot be lodged during a transitional period and that the Council for TRIPS should examine the scope and modalities for these types of complaints under the TRIPS Agreement. However, nothing in Article 64 or other Articles of the TRIPS Agreement provides specifically that Article 22 of the DSU does not apply to the TRIPS Agreement.

151. We further note that subparagraphs (f)(iii) and (g)(iii) of Article 22.3 of the DSU<sup>46</sup> explicitly define that Sections of the TRIPS Agreement are "sectors", and that the TRIPS Agreement is an "agreement", in respect of which the suspension of TRIPS obligations may be sought, pursuant to subparagraphs (b-c) of Article 22.3, by a complaining party and authorized by the DSB. Provided that Ecuador's request for the suspension of certain TRIPS obligations is consistent with all the requirements of Article 22 of the DSU, including paragraphs 3 and 4 thereof, neither Article 2.2 read in context with Article 64 of the TRIPS Agreement, nor any other provision of the WTO agreements indicate that an authorization by the DSB of that request would in theory be prohibited under WTO law.

152. It is not within our jurisdiction as Arbitrators, acting pursuant to Article 22.6 of the DSU, to pass judgment on whether Ecuador, by suspending, once authorized by the DSB, certain TRIPS obligations, would act inconsistently with its international obligations arising from treaties other than

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<sup>45</sup> Article 64.1 of the TRIPS Agreement: "The provisions of Article XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding shall apply to consultations and the settlement of disputes under this Agreement except as otherwise specifically provided therein."

<sup>46</sup> Article 22.3(f) of the DSU: "for purposes of this paragraph, 'sector' means: ...

(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;"

Article 22.3(g) of the DSU: "for purposes of this paragraph, 'agreement' means: ...

(iii) with respect to intellectual property rights, the Agreement on TRIPS."

the agreements covered by the WTO (e.g. the Paris, Berne and Rome Conventions which Ecuador has ratified).<sup>47</sup> It is, if at all, entirely for Ecuador and the other parties to such treaties to consider whether a specific form chosen by Ecuador for implementing such suspension of certain TRIPS obligations gives rise to difficulties in legal or practical terms under such treaties.

C. THE EFFECT ON THIRD-COUNTRY WTO MEMBERS OF THE SUSPENSION OF CERTAIN TRIPS OBLIGATIONS BY ECUADOR WITH RESPECT TO THE EUROPEAN COMMUNITIES

153. It is evident that an authorization by the DSB for Ecuador to suspend certain TRIPS obligations would concern Ecuador only. Such authorization does not exonerate any other WTO Member from abiding by its WTO obligations, including those under the TRIPS Agreement.

154. The obligations of other WTO Members include those in respect of action against imports of goods which involve other infringements of intellectual property rights. In this context, Article 51<sup>48</sup> in Section 4<sup>49</sup> on "Special Requirements Related to Border Measures", contained in Part III of the TRIPS Agreement, provides that "Members shall ... adopt procedures to enable a right holder who has valid grounds for suspecting that the importation of counterfeit trade or pirated copyright goods may take place", to request customs authorities to suspend release into free circulation of such goods. According to footnote 14 to Article 51, "pirated copyright goods"<sup>50</sup> include copies made without the consent of the right holder or person duly authorized by the right holder in the country of production, where the making of that copy would have constituted an infringement of a copyright or a related right under the law of the country of importation.

155. We note that, as a result of an authorization by the DSB of Ecuador's request to suspend Article 14 of the TRIPS Agreement, phonograms would be produced in Ecuador consistent with WTO law. However, such phonograms would still be copies made without the consent of the right holder or a person duly authorized by the right holder in the country of production. Pursuant to footnote 13 to Article 51,<sup>51</sup> WTO Members are under no obligation to apply procedures concerning "special requirements related to border measures" to imports of goods put on the market in another country by or with the consent of the right holder. However, with respect to phonograms produced in Ecuador without the consent of the right holder, but consistent with an authorization by the DSB under Article 22.7 of the DSU, the obligations of Article 51 of the TRIPS Agreement to apply such procedures would remain in force for all WTO Members.

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<sup>47</sup> We also refer in this respect to our considerations in Section D on the suspension of TRIPS obligations and the interference with private rights.

<sup>48</sup> Article 51 of the TRIPS Agreement: "Members shall, in conformity with the provisions set out below, adopt procedures to enable a right holder who has valid grounds for suspecting that the importation of counterfeit trade or pirated copyright goods may take place, to lodge an application in writing with competent authorities, administrative or judicial, for the suspension by the customs authorities of the release into free circulation of such goods. Members may enable such an application to be made in respect of goods which involve other infringements of intellectual property rights, provided that the requirements of this Section are met. Members may also provide for corresponding procedures concerning the suspension by the customs authorities of the release of infringing goods destined for exportation from their territories." (footnotes omitted).

<sup>49</sup> Members are obliged to provide border measures in respect of goods embodying related rights, but may apply them also in respect of goods which involve infringements of geographical indications or industrial designs.

<sup>50</sup> Footnote 14 to Article 51 of the TRIPS Agreement: "For the purposes of this Agreement: ...

(b) "pirated copyright goods" shall mean any goods which are copies made without the consent of the right holder or person duly authorized by the right holder in the country of production and which are made directly or indirectly from an article where the making of that copy would have constituted an infringement of a copyright or a related right under the law of the country of importation."

<sup>51</sup> Footnote 13 to Article 51 of the TRIPS Agreement: "It is understood that there shall be no obligation to apply such procedures to imports of goods put on the market in another country by or with the consent of the right holder, or to goods in transit."

156. Distortions in third-country markets could be avoided if Ecuador would suspend the intellectual property rights in question only for the purposes of supply destined for the domestic market. An authorization of a suspension requested by Ecuador does of course not entitle other WTO Members to derogate from any of their obligations under the TRIPS Agreement. Consequently, such DSB authorization to Ecuador cannot be construed by other WTO Members to reduce their obligations under Part III of the TRIPS Agreement in regard to imports entering their customs territories.

#### D. THE SUSPENSION OF TRIPS OBLIGATIONS AND INTERFERENCE WITH PRIVATE RIGHTS

157. We are conscious that the requested suspension of certain TRIPS obligations ultimately interferes with private rights owned by natural or legal persons. These persons are highly unlikely to have any connection with the ongoing failure of the European Communities to fully comply with the DSB rulings in the proceeding under Article 21.5 of the DSU in *Bananas III* between Ecuador and the European Communities. The same logic holds true for the suspension of concessions or other obligations under the GATT (or other agreements in Annex 1A) and the GATS as well. However, the interference with private property rights of individuals or companies may be perceived as more far-reaching under the TRIPS Agreement, given the potentially unlimited possibility to copy phonograms or use other intellectual property rights. In contrast, producers of goods and service suppliers which are affected by the suspension of concessions or other obligations under the GATT or the GATS may stop exporting to the Member imposing such suspension.

158. We are aware that the implementation of the suspension of certain TRIPS obligations may give rise to legal difficulties or conflicts within the domestic legal system of the Member so authorized (and perhaps even of the Member(s) affected by such suspension). The resolution of such difficulties is of course a matter entirely within the prerogatives of the Member requesting authorization. Obviously, the degree of such difficulties is likely to depend on the means chosen by Ecuador for implementing the suspension of certain TRIPS obligations in relation to the 13 EC member States.

#### E. CONCLUDING OBSERVATIONS ON THE SUSPENSION OF TRIPS OBLIGATIONS

159. As far as the examination of the equivalence between the level of nullification or impairment suffered and the level of the proposed suspension of concessions or other obligations is concerned, the mandate of the Arbitrators under paragraphs 6 and 7 of Article 22 of the DSU is in our view limited to estimating Ecuador's losses in actual and potential trade and trade opportunities in the relevant goods and service sectors (i.e. trade in Ecuadorian bananas and distribution services by suppliers of Ecuadorian origin). However, in the light of the provisions of Article 19.1 of the DSU referred to above, we wish to make some remarks on Ecuador's intentions on how to implement the suspension of certain TRIPS obligations, if authorized by the DSB.

160. We note with approval that, in implementing the suspension of certain TRIPS obligations at a level not exceeding the level authorized by the DSB, Ecuador intends to account not only for the actual impact of the suspension of intellectual property rights currently used subject to the authorization by the right holder and subject to the payment of remuneration.<sup>52</sup> The mechanisms described in detail below reflect Ecuador's intention to consider also the potential impact of such

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<sup>52</sup> We also wish to emphasise that in calculating the level of nullification and impairment suffered by Ecuador, we considered the entire value of losses of actual trade and of potential trade opportunities in bananas and the loss of actual and potential distribution service supply. We have not based our calculations on the losses in profits incurred by banana producers or companies supplying distribution services. It would facilitate implementing an equivalent level of suspension of TRIPS obligations if actual and potential effects of such suspension of the protection of the intellectual property rights at issue would be taken into account.

suspension in terms of the additional use of the intellectual property rights in question. Such use may be expected to increase as a result of the fact that the DSB's authorization would allow using such intellectual property rights without payment of remuneration to EC right holders and without their authorization, provided that prices for the products incorporating the intellectual property rights concerned decrease.

161. More specifically, we note that in its response to questions by the Arbitrators, Ecuador submits that it never had the intention to simply abolish all rules on "related rights" and to put all EC produced phonograms in the public domain which it could arguably do only if it had requested suspension of Article 9 of the TRIPS Agreement, too. If Ecuador were authorized by the DSB to suspend the application of "related rights" under Article 14 *vis-à-vis* the European Communities, it would consider installing a system whereby companies or individuals established in Ecuador could obtain an authorization from the Ecuadorian government to apply the suspension of concessions derived from Article 14 of the TRIPS Agreement within the Ecuadorian territory. This authorization would be granted through a licensing system which limits the suspension of concessions in terms of quantity, value and time. The Ecuadorian government would reserve its right to revoke these licences at any time. Each reproduction of a sound recording under this licensing scheme would correspond to a "suspension value" equivalent to the "related right value" of a new, commercially most interesting sound recording. For that purpose, Ecuador would use the average "related right value" of sound recordings in Europe as estimated by the International Federation of the Phonographic Industry (IFPI). A certain proportion of this value would represent the performer's share and another, larger part would represent the producer's share. If the level of suspension thus calculated were to risk reaching (together with authorized suspension in other sectors and/or under other agreements, if any) the level of nullification and impairment suffered by Ecuador, the authorization scheme would be stopped. Ecuador believes that the chances that this would happen are very close to nil.

162. Regarding geographical indications, Ecuador notes that the analysis should be different from the analysis with regard to Article 14 of the TRIPS Agreement. The non-respect of "related rights" on a sound recording results in a product that is identical in all respects to the product that is put on the market with the authorization of the "related rights" holder. The CD that would be produced under Ecuador's licensing scheme would be cheaper than a CD produced with the authorization and remuneration of the "related rights" holder, and the former would become a substitute for the latter. For products identified by a geographical indication that would be clearly different. For these products it is only possible to make use of the geographical indication, which is different from reproducing the original product. However, the use of geographical indications could be licensed in similar terms as explained for sound recordings above. Licences could be granted for a determined product and a determined value, quantity and time. The licences would be granted for the exclusive use of the holder of the licence and the Ecuadorian government would reserve its rights to revoke these licences at any time. The test for determining the level of suspension would be the extent to which protected EC products would be replaced by non-protected products from other sources.

163. With respect to industrial designs, Ecuador envisages a similar licensing system as described above even though it considers that the economic effect of suspending the protection of industrial designs would be limited.

164. In our view, the mechanisms envisaged by Ecuador for implementing the suspension of certain sections of the TRIPS Agreement, if authorized by the DSB, would take account of many of our remarks made in the preceding sections.

165. Finally, we recall that, according to Article 22.8 of the DSU,<sup>53</sup> an authorization by the DSB of a request for the suspension of concessions or other obligations is in principle a temporary action, pending the removal of the WTO-inconsistent measure at issue, a solution remedying the nullification or impairment of benefits, or a mutually satisfactory solution. Given this temporary nature of the suspension of concessions or other obligations, economic actors in Ecuador should be fully aware of the temporary nature of the suspension of certain TRIPS obligations so as to minimise the risk of them entering into investments and activities which might not prove viable in the longer term.

## VI. THE CALCULATION OF THE LEVEL OF NULLIFICATION AND IMPAIRMENT

166. There are various counterfactual regimes that would be WTO-consistent. We have evaluated the various counterfactuals and we have decided to choose the same counterfactual as in the US/EC *Bananas III* arbitration<sup>54</sup> to ensure that there is consistency and in particular no double-counting with respect to the nullification and impairment borne by the United States.

167. The counterfactual we have chosen is a global tariff quota equal to 2.553 million tonnes (subject to a 75 Euro per tonne tariff) and unlimited access for ACP bananas at a zero tariff (assuming the ACP tariff preference would be covered by a waiver<sup>55</sup>). Since the current quota on tariff-free imports of traditional ACP bananas is in practice non-restraining, this counterfactual regime would have a similar impact on prices and quantities as the current EC regime. However, import licences would be allocated differently in order to remedy the GATS violations.

168. We calculated the effect on relevant Ecuadorian imports of the revised EC banana regime, compared with the counterfactual described in the previous paragraph, based on the assumption that the aggregate volume of EC banana imports is the same in the two scenarios. This implies that EC banana production and consumption, and the f.o.b., c.i.f., wholesale and retail prices of bananas, also are the same in the two scenarios. This in turn implies that the aggregate value of wholesale banana trade services after the f.o.b. point, and the aggregate value of banana import quota rents, are the same in the two scenarios. Both of those values are readily calculated from the price and quantity data made available to us. The only difference between the scenarios is in the shares of those aggregates that are enjoyed by Ecuador and other goods and service suppliers.

169. We assume the volume of Ecuador's banana exports to the EC would increase (at the expense of other suppliers) to the level of its best-ever exports<sup>56</sup> during the past decade, that the share of those bananas distributed in the EC by Ecuadorian service suppliers would rise to 60 per cent, and that the proportion of those distributed bananas for which Ecuadorian service suppliers are given import licences would rise to 92 per cent (assuming that the remaining 8 per cent of the available import licences are those reserved for newcomers, consistent with the assumption used in the US/EC *Bananas III* arbitration).

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<sup>53</sup> Article 22.8 of the DSU: "The suspension of concessions or other obligations shall be temporary and shall only be applied until such time as the measure found to be inconsistent with a covered agreement has been removed, or the Member that must implement recommendations or rulings provides a solution to the nullification or impairment of benefits, or a mutually satisfactory solution is reached. ..."

<sup>54</sup> *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, Decision by the Arbitrators* (WT/DS27/ARB), dated 9 April 1999; suspension of concessions by the United States in an amount of US\$191.4 million authorized by the DSB at its meeting on 19 April 1999.

<sup>55</sup> We note the Request for a WTO Waiver from the European Commission on behalf of the European Communities and from Tanzania on behalf of the African, Caribbean and Pacific States concluding negotiations on a New ACP-EC Partnership Agreement, dated 29 February 2000 (WTO document G/C/W/187 of 2 March 2000).

<sup>56</sup> Ecuador's exports to the European Communities peaked at 745,058 tonnes in 1992.

170. Using the various data provided and our knowledge of the current quota allocation and what it would be under the WTO-consistent counterfactual chosen by us, we determine that the level of Ecuador's nullification and impairment is US\$201.6 million per year.

## VII. CONCLUSIONS AND SUGGESTIONS

171. For the reasons explained in detail in the preceding sections, we have concluded above that Ecuador's request under Article 22.2, dated 9 November 1999,<sup>57</sup> has not followed, albeit to a limited extent, the principles and procedures set forth in Article 22.3, especially regarding the suspension of concessions under the GATT with respect to goods destined for final consumption. Moreover, our calculations have led us to conclude that the level of suspension requested by Ecuador exceeds the level of nullification and impairment suffered by it as a result of the EC's failure to bring the EC banana import regime into compliance with WTO law within the reasonable period of time foreseen for that purpose.

172. In this context, we recall that the relevant part of Article 22.7 provides:

"... 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."

173. Consequently, and consistent with past practice in arbitration proceedings under Article 22,<sup>58</sup> we suggest to Ecuador to submit another request to the DSB for authorization of suspension of concessions or other obligations consistent with our conclusions set out in the following paragraphs:

- (a) Ecuador may request, pursuant to paragraph 7 of Article 22, and obtain authorization by the DSB to suspend concessions or other obligations of a level not exceeding US\$201.6 million per year which we have estimated to be equivalent within the meaning of Article 22.4 to the level of nullification and impairment suffered by Ecuador as a result of the WTO-inconsistent aspects of the EC import regime for bananas.
- (b) Ecuador may request, pursuant to subparagraph (a) of Article 22.3, and obtain authorization by the DSB to suspend concessions or other obligations under the GATT concerning certain categories of goods in respect of which we have been persuaded that suspension of concessions is effective and practicable. Notwithstanding the requirement set forth in Article 22.7 that arbitrators "shall not examine the nature of the concessions or other obligations to be suspended", we note that in our view these categories of goods do not include investment goods or primary goods used as inputs in Ecuadorian manufacturing and processing industries, whereas these categories of goods do include goods destined for final consumption by end-

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<sup>57</sup> WT/DS27/52.

<sup>58</sup> Recourse by the United States to Article 22.7 of the DSU in reaction to the Arbitrators' Decision in the US/EC *Bananas III* arbitration proceeding, dated 9 April 1999 (WT/DS27/49). Recourse by the United States to Article 22.7 of the DSU in reaction to the Arbitrators' Decision in the US/EC *Hormones* arbitration proceeding, dated 15 July 1999 (WT/DS26/21). Recourse by Canada to Article 22.7 of the DSU in reaction to the Arbitrators' Decision in the Canada/EC *Hormones* arbitration proceeding, dated 15 July 1999 (WT/DS48/19).

consumers in Ecuador.<sup>59</sup> In making its request for suspension of concessions with respect to certain product categories, we note that, consistent with past practice in arbitration proceedings under Article 22,<sup>60</sup> Ecuador should submit to the DSB a list identifying the products with respect to which it intends to implement such suspension once it is authorized.

- (c) Ecuador may request, pursuant to subparagraph (a) of Article 22.3, and obtain authorization by the DSB to suspend commitments under the GATS with respect to "wholesale trade services" (CPC 622) in the principal sector of distribution services.
- (d) To the extent that suspension requested under the GATT and the GATS, in accordance with subparagraphs (b) and (c) above, is insufficient to reach the level of nullification and impairment indicated in subparagraph (a) of this paragraph, Ecuador may request, pursuant to subparagraph (c) of Article 22.3, and obtain authorization by the DSB to suspend its obligations under the TRIPS Agreement with respect to the following sectors of that Agreement:
  - (i) Section 1: Copyright and related rights, Article 14 on "Protection of performers, producers of phonograms (sound recordings) and broadcasting organisations";
  - (ii) Section 3: Geographical indications;
  - (iii) Section 4: Industrial designs.

174. We recall the general principle set forth in subparagraph (a) of Article 22.3 that the complaining party should first seek to suspend concessions or other obligations with respect to the same sectors as those in which the panel or Appellate Body has found a violation or other nullification or impairment. In this respect, we recall that, according to the report in the proceeding between Ecuador and the European Communities under Article 21.5, the GATT and the sector of distribution services under the GATS are those sectors within the meaning of subparagraph (f) of Article 22.3 in which violations were found by the reconvened panel.

175. More specifically, we recall that the reconvened panel in the above-mentioned proceeding under Article 21.5 found the revised EC banana regime, *inter alia*, to be inconsistent with Articles I and XIII of GATT. Therefore, our reasoning and conclusions in respect of "wholesale trade services" in the above section entitled "Ecuador's request for suspension of concessions or other obligations in the same sector where violations were found" would apply *mutatis mutandis* to a request, pursuant to subparagraph (a) of Article 22.3, for suspension of concessions or other obligations under the GATT.

176. We emphasize that it is obviously impossible to suspend concessions or other obligations for a particular amount of nullification or impairment under one sector or agreement and simultaneously for that same amount under another sector or a different agreement. However, once a certain level of nullification or impairment has been determined by the Arbitrators, suspension may be practicable

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<sup>59</sup> We would expect that a request by Ecuador under subparagraph (a) of Article 22.3 for suspension of concessions under the GATT with respect to the product categories just mentioned would be at least of the amount identified in paragraph 99 above.

<sup>60</sup> 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* (WT/DS26/ARB, dated 12 July 1999), paras. 18-23. 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), paras. 18-21.

and effective under the same sector(s) and/or agreement(s) where violations have been found only for part of that amount. In such a situation, suspension for the residual amount of nullification or impairment may be practicable or effective in another sector under the same agreement or possible only under another agreement as is the case in this dispute.

177. We have made extensive remarks above on the suspension of obligations under the TRIPS Agreement and in particular concerning the legal and practical difficulties arising in this context. Given the difficulties and the specific circumstances of this case which involves a developing country Member, it could be that Ecuador may find itself in a situation where it is not realistic or possible for it to implement the suspension authorized by the DSB for the full amount of the level of nullification and impairment estimated by us in all of the sectors and/or under all agreements mentioned above combined. The present text of the DSU does not offer a solution for such an eventuality. Article 22.8 of the DSU merely provides that the suspension of concession or other obligations is temporary and shall only be applied until the WTO-inconsistent measure in question has been removed, or the Member that must implement recommendations or rulings provides a solution to the nullification or impairment of benefits, or a mutually satisfactory solution is reached. We trust that in this eventuality the parties to this dispute will find a mutually satisfactory solution.

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