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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 9 April 1999 pursuant to the Procedures for the Circulation and Derestriction of WTO Documents (WT/L/160/Rev.1).

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I. INTRODUCTION

1.1 On 14 January 1999, the United States (US), pursuant to Article 22.2 of the DSU, requested the Dispute Settlement Body (DSB) to authorize suspension of the application to the European Communities (EC) and its member States of tariff concessions and related obligations under GATT 1994 covering trade in an amount of US$520 million (WT/DS27/43). At the DSB meeting held on 25 January-1 February 1999, the European Communities objected to the level of suspension proposed by the United States on the ground that it was not equivalent to the level of nullification or impairment of benefits suffered by the United States and claimed that the principles and procedures set out in Article 22.3 of the DSU had not been followed. Pursuant to Article 22.6 of the DSU, the European Communities requested that the original panel carry out the arbitration on the foregoing matters (WT/DS27/46). In response, the DSB decided on 29 January 1999 to submit the matter to arbitration of the original panel in accordance with Article 22.6 of the DSU (WT/DSB/M/54).

1.2 The Arbitrators are:

Chairman: Mr. Stuart Harbinson

Mr. Kym Anderson
Mr. Christian Häberli

1.3 The tasks of Arbitrators under Article 22 of the DSU are described in paragraphs 6 and 7 of that Article:

> "… 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. …"

> "The arbitrator[s] … shall determine whether the level of such suspension is *equivalent* to the level of nullification or impairment. The arbitrator[s] may also determine if the proposed suspension of concessions or other obligations is allowed under the covered agreement. 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. …"

1.4 Accordingly, our tasks encompass an examination of the equivalence of the level of proposed suspension to the nullification or impairment caused, and of whether the principles and procedures set forth in Article 22.3 of the DSU have been followed.[1] In this decision, we address the following issues: (i) certain preliminary issues; (ii) the procedures and principles to be followed under Article 22.3 of the DSU, including (a) the scope of review by Arbitrators under Article 22.3 and (b) the application of Article 22.3 to this case; (iii) the concept of equivalence and the scope of this arbitration procedure under Article 22 of the DSU; (iv) whether there is continuing nullification or impairment of US benefits under the new EC banana import regime; (v) the parameters for the calculation of the level of nullification or impairment, including (a) the issue of "indirect" benefits and (b) specific issues concerning the calculation of nullification or impairment in services; and (vi) the level of suspension.

[1] We note that our task is not to examine the relationship of Articles 21.5 and 22 of the DSU. We do, however, respond to certain EC arguments related to this issue at the end of Part IV.

II. PRELIMINARY ISSUES

A. WORKING PROCEDURES AND BUSINESS CONFIDENTIAL INFORMATION

2.1 We met with the parties on 5 February 1999 to establish our working procedures and timetable. Prior to that date, we invited the United States to submit a communication, if possible by 5 February 1999, explaining the methodology it applied in calculating its proposed level of suspension.[2] Pursuant to the timetable (as later modified), the parties made their initial submissions on 11 February 1999 and their rebuttal submissions on 18 February 1999. We held a meeting with the parties on 22 February 1999.

2.2 On 5 February 1999, the United States indicated that it would request the Arbitrators to establish procedures for the handling of business confidential information ("BCI") similar to those established in several pending panel procedures.[3] In response, the European Communities indicated that any such procedures must allow the European Communities to have access to the BCI.

2.3 On 10 February 1999, the United States requested the Arbitrators to establish specific procedures for BCI. Under the US proposal, there would be two levels of BCI: regular BCI and super BCI. Regular BCI was described as company-specific information that was non-public and sensitive, but that could be extrapolated from other public and non-public information available to governments and the company's competitors. Super BCI was described as non-public, sensitive company-specific information that could not be so extrapolated. As to regular BCI, one copy would be deposited with the Secretariat and one copy with the Geneva mission of the receiving party. As to Super BCI, one copy would be deposited with the Secretariat. Both types of BCI would also be available in the missions in the respective capitals of the parties (e.g. BCI submitted by the United States would be available for inspection by the European Communities at any time in the US mission to the EC in Brussels). For both types of BCI, there would be provisions related to non-disclosure, storage and return or destruction, and recipients of BCI would be required to sign a non-disclosure form. These provisions and the treatment of regular BCI were based on the procedures used in pending panel proceedings.[4] The concept of super BCI was additional to those procedures, as were the US proposals that certain sanctions should be applied for violating the procedures and that only certain categories of representatives of a party should have access to BCI.

2.4 Later on 10 February 1999, the chairman of the Arbitrators met with the parties to hear their views on the US request. The European Communities objected to it on the grounds that working procedures on confidentiality should not be adopted on a case-by-case basis, but rather by WTO Members as a whole. It noted that it had successfully opposed the adoption of such procedures in another case involving the United States. Second, the European Communities argued that special procedures were unnecessary because its officials were bound by confidentiality obligations contained in Article 214 of the EC Treaty. Third, the European Communities objected that such procedures would limit its rights because of practical problems that would be created if the information were not available in its Brussels headquarters. The United States responded that the extent of the BCI was limited, that it was in fact highly sensitive information because it was company-specific and that it was essential for the Arbitrators to have the information in order to perform their functions.

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[2] In response to a question from the European Communities, we indicated that we considered the request to the United States to be of an informative nature only, aimed at saving time.

[3] Panel on *Brazil – Export Financing Programme for Aircraft*, WT/DS46; Panel on *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70; Panel on *Australia – Subsidies Provided to Producers and Exporters of Automotive Leather*, WT/DS126.

[4] *Ibid*.

2.5 On 11 February 1999, we adopted BCI procedures. While we agreed with the United States that special rules were justified in light of the type of information involved, we did not accept the need for special treatment of super BCI, for specific sanctions or for limitations on the identity of those permitted to view the information (so long as a non-disclosure form was signed). On 15 February 1999, the European Communities raised further objections concerning practicality, the impossibility of limiting reporting obligations to superiors within the European Communities and concerns that the inviolability of the EC Mission in Geneva had been put into question. On 16 February 1999, we modified the BCI procedures to address the latter point.

2.6 On 17 February 1999, the European Communities indicated that it could not accept the BCI procedures and that the Arbitrators should not consider any BCI as to do so would violate Article 18.1 of the DSU, which prohibits *ex parte* contacts between parties and panelists. Since we are of the view that the procedures are reasonable in the circumstances[5], we do not accept the EC argument that its decision not to receive information under the rules we have established means that the United States may not submit the information. Acceptance of the EC argument would mean that a party's refusal to participate in a proceeding would effectively prevent the proceeding from going forward.

2.7 In any event, we note that we did not find it necessary to rely on the BCI submitted by the United States in setting the level of suspension. As explained below (Part VII), we used an alternative calculation method, not relying on company-specific cost and profit information but instead on non-business confidential information supplied in the parties' submissions. We did, however, examine non-company-specific BCI simply to compare it with the assumptions we had made. Our calculations would have been no different had that BCI not been examined.

B. REQUEST FOR THIRD-PARTY RIGHTS

2.8 On 4 February 1999, Ecuador requested the Arbitrators to accord it third-party status in light of its special interest in the proceedings. However, in light of the absence of provisions for third-party status under Article 22 of the DSU and given that we do not believe that Ecuador's rights will be affected by this proceeding, we declined Ecuador's request. In this regard, we note that our Initial and Final Decisions in this arbitration fully respect Ecuador's rights under the DSU, and, in particular, Article 22 thereof.

C. REQUEST FOR SUSPENSION

2.9 In a letter dated 22 February 1999, the European Communities requested that we suspend this arbitration proceeding until 23 April 1999, i.e. until 10 days or so after the date set for the completion of the pending proceedings brought by Ecuador and the European Communities pursuant to Article 21.5 of the DSU in respect of the revised EC banana import regime.[6] However, in light of Article 22.6 of the DSU, which requires that an arbitration thereunder "shall be completed within 60 days after the date of expiry of the reasonable period of time", or 2 March 1999, we decided that we were obligated to complete our work in as timely a fashion as possible and that a suspension of our work would accordingly be inappropriate.

[5] As noted above, similar procedures had previously been adopted by three different panels in cases involving export subsidies. In one of those cases, a Member refused to supply BCI on the grounds that the procedures were inadequate and that super BCI procedures were necessary. If anything, this suggests that the BCI procedures adopted in this arbitration are not excessively restrictive.

[6] See WT/DSB/M/43.

D. INITIAL DECISION

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

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

2.11 The Initial Decision discussed issues related to Article 22.3, the concept of equivalence and the scope of this arbitration procedure under Article 22 and parameters for the calculation of the level of nullification or impairment. Our discussion of these issues appears *verbatim* (except as indicated otherwise) in Parts III, IV and VI of this Decision. As indicated above, in the Initial Decision, we also requested the parties to submit by 15 March 1999 answers in writing to certain questions, the answers to which were necessary for us to complete our task. In the case of the European Communities, we asked them to respond to certain arguments made in the US submissions concerning the consistency of the new EC regime for banana imports with the WTO Agreement (see Part V). In the case of the United States, we asked them to analyze two additional counterfactuals and to re-consider their calculations in respect of two of their original counterfactuals in light of our Initial Decision (see Part VII).

2.12 We noted in our concluding remarks to the Initial Decision, that we were aware of the fact that, pursuant to Article 22.6 of the DSU, Arbitrators "shall" complete their work within 60 days after the expiry of the reasonable period of time for implementation. However, given that our own decisions cannot be appealed, we considered it imperative to achieve the greatest degree of clarity possible with a view to avoiding future disagreements between the parties. Reaching this objective required the parties to have more time to submit to us the information necessary for us to complete our tasks.[7]

2.13 We emphasized that the number, scope and complexity of the tasks before us in our capacity as Arbitrators under Article 22.6 of the DSU required the continuing cooperation of the parties, acting in good faith in accordance with Article 3.10 of the DSU. In this regard, we encouraged the parties to continue in their efforts to reach a mutually acceptable solution to this matter promptly, as the suspension of concessions is not in the economic interest of either of them.

[7] On the face of it, the 60-day period specified in Article 22.6 does not limit or define the jurisdiction of the Arbitrators *ratione temporis*. It imposes a *procedural* obligation on the Arbitrators in respect of the conduct of their work, not a *substantive* obligation in respect of the validity thereof. In our view, if the time-periods of Article 17.5 and Article 22.6 of the DSU were to cause the lapse of the authority of the Appellate Body or the Arbitrators, the DSU would have explicitly provided so. Such lapse of jurisdiction is explicitly foreseen, e.g. in Article 12.12 of the DSU which provides that "if the work of the panel has been suspended for more than 12 months, the authority for establishment of the panel shall lapse".

III. PROCEDURES AND PRINCIPLES TO BE FOLLOWED UNDER ARTICLE 22.3 OF THE DSU

3.1 In its request for arbitration pursuant to Article 22.6 of the DSU, the European Communities maintains that the United States has not followed the procedures and principles set out in paragraph 3 of Article 22 in its request for the authorization to suspend concessions or other obligations pursuant to Article 22.6. The United States contends that the Arbitrators shall not examine the principles and procedures set forth in Article 22.3 in this arbitration proceeding because the United States has requested authorization to suspend concessions only pursuant to paragraph (a) of Article 22.3 of the DSU. In the view of the United States, the European Communities could only make such a claim if the United States had requested authorization to suspend concessions pursuant to paragraphs (b) or (c) of Article 22.3 of the DSU.

3.2 The relevant parts of Article 22.3 of the DSU provide:

> "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; …
> >
> > (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." (emphasis added, footnotes omitted).

3.3 Before addressing the EC's challenge under Article 22.3 of the DSU, we recall the mandate of Arbitrators in this respect. Article 22.6 of the DSU provides in the relevant part:

> "[I]f a 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. …"
>
> Article 22.7 of the DSU specifies:
>
> "[I]f 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. …"

A. THE SCOPE OF REVIEW BY ARBITRATORS UNDER ARTICLE 22.3

3.4 In view of the United States defense to the EC's challenge, we first have to define the scope of the discretion granted under Article 22.3 of the DSU to a Member seeking authorization to suspend, and to distinguish it from the scope of the authority of Arbitrators to review, pursuant to paragraphs 6 and 7 of Article 22 of the DSU, the choice made by that Member.

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 in 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 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 subparagraphs (b) or (c) of that Article have been followed must imply the Arbitrators' competence to examine whether a request made under subparagraph (a) should have been made - in full or in part - under subparagraphs (b) or (c). If the Arbitrators were deprived of such an implied authority, the

principles and procedures of Article 22.3 of the DSU could easily be circumvented. If there were no review whatsoever with respect to requests for authorization to suspend concessions made under subparagraph (a), Members might be tempted to always invoke that subparagraph in order to escape multilateral surveillance of cross-sectoral suspension of concessions or other obligations, and the disciplines of the other subparagraphs of Article 22.3 of the DSU might fall into disuse altogether.

B. APPLICATION OF ARTICLE 22.3 OF THE DSU IN THIS CASE

3.8 The European Communities alleges that in cases where findings of violations or other nullification have been made in more than one sector, or under more than one agreement, requests for the suspension of concessions have to be made commensurate with the number or the degree of violations, i.e. with the amount of nullification or impairment suffered, in each of those sectors or under each of those agreements taken separately. Given the EC's position that the United States has not suffered any nullification or impairment in the area of trade in goods even under the previous regime, the European Communities contends that the United States should have considered seeking authorization to suspend concessions, in the first place, in the distribution service sector, or in the second place, in any other service sector for nullification suffered as a result of GATS violations, provided that such violations would continue under the revised regime. In view of the fact that the United States has requested the suspension of concessions on trade in goods, the European Communities claims that the US request is in reality a cross-sectoral request and should have been made under Article 22.3(b) or (c). Moreover, the United States is alleged not to have fulfilled the procedural requirements foreseen in subparagraphs (d) and (e) of Article 22.3.

3.9 We do not share the EC's view. The scenario developed by the European Communities and the obligations contained in subparagraphs (b)-(e) of Article 22.3 would only apply if the dispute at issue concerned violations exclusively under the GATS. In that case, the US request would also in our view concern the suspension of concessions across sectors and across agreements. 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.

IV. THE CONCEPT OF EQUIVALENCE AND THE SCOPE OF THIS ARBITRATION PROCEDURE UNDER ARTICLE 22

4.1 Article 22.7 of the DSU provides that "[t]he arbitrator[s] … shall determine whether the level of such suspension is *equivalent* to the level of nullification or impairment" (emphasis added). In addition, Article 22.4 of the DSU provides:

> "The level of the suspension of concessions or other obligations authorized by the DSB shall be *equivalent* to the level of the nullification or impairment." (emphasis added).

We note that the ordinary meaning of the word "*equivalence*" is "equal in value, significance or meaning", "having the same effect", "having the same relative position or function", "corresponding to", "something equal in value or worth", also "something tantamount or virtually identical".[8] Obviously, this meaning connotes a correspondence, identity or balance between two related levels, i.e. between the level of the concessions to be suspended, on the one hand, and the level of the nullification or impairment, on the other.

4.2 The former level, i.e. the proposed suspension of concessions, is clearly discernible in respect of the overall amount (US$520 million) suggested by the United States as well as in terms of the product coverage envisaged.[9] However, the same degree of clarity is lacking with respect to the latter, i.e. the level of nullification or impairment suffered. It is impossible to ensure correspondence or identity between two levels if one of the two is not clearly defined. Therefore, as a prerequisite for ensuring equivalence between the two levels at issue we have to determine the level of nullification or impairment.

4.3 In the original *Bananas III* dispute, the findings of nullification and impairment were based on the conclusion that several parts of the EC measures at issue were inconsistent with its WTO obligations. Therefore, any assessment of the level of nullification or impairment presupposes an evaluation of consistency or inconsistency with WTO rules of the implementation measures taken by the European Communities, i.e. the revised banana regime, in relation to the panel and Appellate Body findings concerning the previous regime.

4.4 The immediate context of paragraphs 4 and 7 of Article 22, which spell out the requirement of "*equivalence*", confirms our conclusion. The introductory sentence of paragraph 6 of Article 22 refers back to the situation described in paragraph 2. The provision cross-referred to provides:

> "If the Member concerned *fails to bring the measure found to be inconsistent with a covered agreement into compliance therewith or otherwise comply* with the recommendations and rulings within the reasonable period of time determined pursuant to paragraph 3 of Article 21.3, such Member shall, if so requested, and no later than the expiry of the reasonable period of time, enter into negotiations with any party having invoked the dispute settlement procedures, with a view to developing mutually acceptable compensation. If no satisfactory compensation has been agreed within 20 days after the date of expiry of the reasonable period of time, any party having invoked the dispute settlement procedures may request authorization from the DSB to suspend the application to the Member concerned of concessions or other obligations under the covered agreements."

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[8] The New Shorter Oxford English Dictionary on Historic Principles (1993), page 843.
[9] WT/DS27/43.

Thus, authorization by the DSB of the suspension of concessions or other obligations presupposes the existence of a failure to comply with the recommendations or rulings contained in panel and/or Appellate Body reports as adopted by the DSB.

4.5 We also note that both parties accept that it is the consistency or inconsistency with WTO rules of the new EC regime - and not of the previous regime - that has to be the basis for the assessment of the equivalence between the level of nullification suffered and the level of the proposed suspension. In fact, in this arbitration procedure the United States has dedicated a significant part of its written submissions and oral statements to the Arbitrators to the question why it considers the new regime to continue most of the WTO-inconsistencies of the previous regime.

4.6 By the same token, the European Communities has repeatedly emphasized that any determination of the amount of concessions to be suspended would have to be based exclusively on the amount of the nullification or impairment caused by its revised regime if it were found to be WTO-inconsistent - albeit in another procedure before us, i.e. in our capacity as reconvened panelists under Article 21.5. However, we also note that the European Communities has to some extent responded to the US allegations concerning the alleged WTO-inconsistency of the revised regime in its written submissions or oral statements to the Arbitrators. Finally, the European Communities has pointed out several times that the consistency or inconsistency with WTO rules of its revised banana regime cannot be determined unilaterally by the United States, and that it considers any such determination outside the WTO dispute settlement mechanism as inconsistent with the unambiguous requirements of Article 23 of the DSU.

4.7 In view of these considerations, it is our opinion that the concept of *equivalence* between the two levels (i.e. of the proposed suspension and the nullification or impairment) remains a concept devoid of any meaning if either of the two variables in our comparison between the proposed suspension and the nullification or impairment would remain unknown. In essence, we would be left with the option to declare the level of nullification or impairment to be tantamount to the proposed level of suspension, i.e. to equate one variable in the equation with the other. To do that would mean that any proposed level of suspension would necessarily be deemed equivalent to the level of nullification or impairment so equated. Or, we could resort to the option of measuring the level of nullification or impairment on the basis of our findings in the original dispute, as modified by the Appellate Body and adopted by the DSB. To do that would mean to ignore altogether the undisputed fact that the European Communities has taken measures to revise its banana import regime. That is certainly not the mandate that the DSB has entrusted to us.

4.8 Consequently, we cannot fulfil our task to assess the *equivalence* between the two levels before we have reached a view on whether the revised EC regime is, in light of our and the Appellate Body's findings in the original dispute, fully WTO-consistent. It would be the WTO-inconsistency of the revised EC regime that would be the root cause of any nullification or impairment suffered by the United States. Since the level of the proposed suspension of concessions is to be equivalent to the level of nullification or impairment, logic dictates that our examination as Arbitrators focuses on that latter level before we will be in a position to ascertain its equivalence to the level of the suspension of concessions proposed by the United States.[10]

4.9 In arriving at this conclusion, we are mindful of the DSB Chairman's statement at the meeting of 29 January 1999 when the DSB decided to refer this matter to us in our capacity as Arbitrators:

[10] In this connection, we note that Article 23.2(a) of the DSU provides that Members shall make any determination to the effect that a violation has occurred or that benefits have been nullified or impaired "consistent with the findings contained in the panel or Appellate Body report adopted by the DSB *or an arbitration award* rendered under this Understanding" (emphasis added). This by implication suggests that issues of violation and nullification or impairment can be determined by arbitration.

> "… There remains the problem of how the Panel and the Arbitrators would coordinate their work, but as they will be the same individuals, the reality is that they will find a logical way forward, in consultation with the parties. In this way, the dispute settlement mechanisms of the DSU can be employed to resolve all of the remaining issues in this dispute, while recognizing the right of both parties and respecting the integrity of the DSU. …"

We are convinced that our chosen "way forward" in tackling the tasks before us is the most "logical way forward". It is the one that gives full weight and meaning to all of the dispute settlement mechanisms provided for under the DSU that parties to the original *Bananas III* dispute have chosen to invoke.

4.10 In response to the foregoing paragraphs of Part IV, which appeared in our Initial Decision, the European Communities argues that we should not consider the consistency of its new banana regime. First, it argues that to do so would go beyond our terms of reference, which it suggests are limited to determining the level of suspension and its equivalence to the level of nullification or impairment. As noted above, however, setting the level of nullification or impairment may require consideration of whether there is nullification or impairment flowing from a WTO-inconsistency of the new banana regime.

4.11 Second, the European Communities argues that if we consider the WTO consistency of its banana regime in an arbitration proceeding under Article 22, we will deprive Article 21.5 of its *raison d'être*. We disagree. For those Members that for whatever reasons do not wish to suspend concessions, Article 21.5 will remain the prime vehicle for challenging implementation measures. However, if we accepted the EC's argument, we would in fact read the time-limit foreseen in Article 22.6 out of the DSU since an Article 21.5 proceeding, which in the EC view includes consultations and an appeal, would seldom, if ever, be completed before the end of the time-limit specified within Article 22.6 (i.e. thirty days of the expiry of the reasonable period of time).[11] In this regard it is useful to recall the arbitration award in the *Hormones* case, in which it is stated "Read in context, it is clear that the reasonable period of time, as determined under Article 21.3(c), should be the *shortest* period possible within the legal system of the Member to implement the recommendations and rulings of the DSB."[12] We note that in the US view, if it cannot make a request for authorization to suspend concessions within the Article 22.6 time-period, it loses its right to do so, at least under circumstances where the negative-consensus rule of Article 22.6 applies.

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[11] As we noted in our Initial Decision, Arbitrators pursuant to Article 22 of the DSU are neither in a position to influence the point in time when parties to the original dispute initiate such a procedure, nor when original parties initiate a procedure under Article 21.5 of the DSU, nor when the DSB is in a position to deal with such requests, nor when the DSB establishes a reconvened panel, nor when the DSB refers a matter to arbitration. We recall, on the one hand, that Article 21.5 of the DSU requires reconvened panels to complete their work in principle within 90 days as of the referral of the matter to them, but without specifying when such a proceeding should be initiated. The express wording of Article 21.5 of the DSU does not exclude the possibility of initiating such a proceeding *before* or *after* the expiry of the reasonable period of time for implementation of panel and/or Appellate Body reports adopted by the DSB. On the other hand, we recall that, pursuant to Article 22.6 of the DSU, Arbitrators shall complete their work within 60 days as of the expiry of the reasonable period of time. If a proceeding under Article 21.5 of the DSU is initiated close to the end of the reasonable period, or after it has expired, the 90 day period of Article 21.5 and the 60 day period of Article 22.6 become irreconcilable. In any event, our terms of reference as Arbitrators are limited to those foreseen in paragraphs 6 and 7 of Article 22 of the DSU. We note that the relationship of Articles 21.5 and 22 is now under discussion in the ongoing review of the DSU.

[12] Arbitration Award under Article 21.3(c) in *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/15 & WT/DS48/13, paragraph 26 (29 May 1998) (emphasis added).

4.12 Third, the European Communities argues that the reference to arbitration in Article 23.2(a) should not be read as meaning that an Article 22 arbitration can determine whether WTO agreements have been violated or whether there is nullification or impairment. In our view, while the reference to arbitration in Article 23.2(a) may be inconclusive, it is clear that the goal of Article 23 – multilateral determination – is achieved if the issue of nullification or impairment is considered in an arbitration before the original panel.

4.13 Fourth, the European Communities argues that it is inappropriate to consider inconsistency in an arbitration proceeding because such matters as burden of proof are not clear. In this regard it stresses that it is also not clear that the United States is challenging the WTO consistency of the new EC regime. In our view, the 30-plus pages of the first US submission devoted to establishing the continuing nullification and impairment caused by the new EC regime demonstrate how the United States is arguing that the new regime is WTO inconsistent. As to burden of proof, if the United States has not convinced us that there is a positive level of nullification or impairment, then we will set the level of suspension of concessions at zero.

4.14 Fifth, the European Communities argues that our consideration of the consistency issue deprives third parties and the DSB of their rights to participate in the determination of nullification or impairment. However, we note that we are not called upon and do not intend to make a formal determination of nullification or impairment, but to ensure that the level of suspension of concessions is equivalent to the level of nullification or impairment. In this regard, we note that the DSB has the same ability to reject our decision on the level of suspension as it does to reject panel and Appellate Body reports. Thus, we are not depriving the DSB of its supervisory function. If the DSB were to conclude that there is no nullification or impairment, it presumably would reject any level of suspension of concessions above zero.

4.15 Finally, we emphasize again our view recorded in paragraph 4.9 above. In the special circumstances of this case, and in the absence of agreement of WTO Members over the proper interpretation of Article 21 and 22, it is necessary to find a logical way forward that ensures a multilateral decision, subject to DSB scrutiny, of the level of suspension of concessions. In our view, we have accomplished this task.

V. IS THERE NULLIFICATION OR IMPAIRMENT OF US BENEFITS UNDER THE REVISED EC BANANA IMPORT REGIME?

5.1 The United States argues that in terms of Article 22.2, the European Communities has failed to bring its banana import regime, which was found in the original proceeding in this case to be inconsistent with its obligations under several covered agreements[13], into compliance with those agreements. In its initial submission, the United States develops this contention as outlined below. At our request, the European Communities responded to the US arguments.

5.2 Because it is necessary to have a view on the WTO-consistency of the revised EC banana regime, we examine whether there is nullification or impairment of US benefits under that regime in the following paragraphs.

A. ARTICLE XIII OF GATT 1994

5.3 The United States argues that Regulations 1637/98 and 2362/98, in the way in which they (i) establish a tariff quota providing duty-free treatment for 857,700 tonnes of traditional banana imports from 12 ACP States and (ii) assign country-specific shares of the EC's MFN tariff quota for bananas, are inconsistent with the EC's obligations under Article XIII of GATT 1994.

5.4 In this regard, we note that Regulation 1637/98 confirms the tariff quota of 2,200,000 tonnes bound in the EC Schedule and an additional autonomous tariff quota of 353,000 tonnes.[14] These are at the same levels as in the prior regime. Given that an agreement on the allocation of country-specific allocations could not be achieved with the substantial suppliers, in Regulation 2362/98 the European Communities assigned the following country shares to each of the substantial suppliers pursuant to Article XIII:2(d) (i.e. Colombia, Costa Rica, Ecuador and Panama):

Table 1 – EC tariff quota allocations for third-country and non-traditional ACP banana suppliers

Country	Share (%)[15]	Volume ('000 tonnes)[16]
Colombia	23.03	588.0
Costa Rica	25.61	653.8
Ecuador	26.17	668.1
Panama	15.76	402.4
Others	9.43	240.7
Total of the above	100.00	2,553.0

5.5 The Annex to Regulation 1637/98 provides for an aggregate quantity of 857,700 tonnes for traditional imports from ACP States. Under the revised EC regime, there are no longer any country-specific allocations to the 12 traditional ACP States (i.e. Belize, Cameroon, Cape Verde,

[13] Panel reports on *Bananas III*, as modified by the Appellate Body report.
[14] Article 18, paragraphs 1 and 2 of Regulation 1637/98.
[15] Annex I to Regulation 2362/98.
[16] Calculation of absolute shares based on the 2,553,000 tonne tariff quota and the shares of substantial suppliers according to Annex I to Regulation 2362/98.

Côte d'Ivoire, Dominica, Grenada, Jamaica, Madagascar, Somalia, St. Lucia, St. Vincent & the Grenadines, and Suriname).[17]

5.6 In examining the revised EC banana regime and its consistency with Article XIII, we recall that in *Bananas III* the Appellate Body overruled the Panel's interpretation of the scope of the Lomé waiver and held that the Lomé waiver does not cover inconsistencies with Article XIII. Accordingly, in considering Article XIII issues, we do not consider what is or is not required by the Lomé Convention.

1. The 857,700 tonnes reserved for traditional imports from ACP States

5.7 The United States alleges that the division of the revised EC import regime for bananas into (i) an MFN tariff quota of 2,553,000 tonnes, in combination with (ii) an amount of 857,700 tonnes reserved for traditional imports from ACP States at a zero-duty level fails to conform to the non-discrimination requirements of Article XIII and amounts to a continued application of "separate regimes" of the sort found to be inconsistent with Article XIII by the original panel and the Appellate Body in *Bananas III*.

5.8 The European Communities responds that a single import regime exists under Regulations 1637/98 and 2362/98. It is the EC's position that for purposes of Article XIII the quantity of 857,700 tonnes for traditional ACP imports is outside the MFN tariff quota of 2,553,000 tonnes. In the EC's view, the amount of 857,700 tonnes constitutes an upper limit for the zero-tariff preference for traditional ACP imports. It notes that the tariff preference is required by the Lomé Convention and is covered by the Lomé waiver as to any inconsistency with Article I:1 of GATT. In addition, the European Communities relies on the panel report on *EEC - Imports of Newsprint*[18] in arguing that imports under preferential arrangements should not be counted against an MFN tariff quota. The European Communities also argues that its collective allocation of an amount of 857,700 tonnes for traditional imports from ACP States is effectively required by the Appellate Body report in *Bananas III*.

(a) The Applicability of Article XIII

5.9 Article XIII:5 provides that the provisions of Article XIII apply to "tariff quotas". The European Communities essentially argues that the amount of 857,700 tonnes for traditional imports from ACP States constitutes an upper limit on a tariff preference and is not a tariff quota subject to Article XIII. However, by definition, a tariff quota is a quantitative limit on the availability of a specific tariff rate. Thus, Article XIII applies to the 857,700 tonne limit.

5.10 In our view, the *Newsprint* case does not affect the applicability of Article XIII to the tariff quota for traditional imports from ACP States. In that case, the European Communities had unilaterally reduced a 1.5 million tonne tariff quota for newsprint to 500,000 tonnes on the grounds that certain past supplying countries under the tariff quota had entered into free-trade agreements with the European Communities and that the tariff quota should be reduced to reflect that fact. The panel held that the European Communities could not unilaterally make such a change. In passing, the *Newsprint* panel stated: "Imports which are already duty-free, due to a preferential agreement, cannot by their very nature participate in an MFN duty-free quota."[19] The *Newsprint* panel did not deal with the applicability of Article XIII to a case such as this one. Moreover, our conclusions do not imply that the European Communities must count ACP imports against its MFN tariff quota.

[17] Annex to Regulation 1637/98 and Annex I to Regulation 2362/98.

[18] Panel report on *EEC - Imports of Newsprint*, adopted on 20 November 1984, BISD 31S/114, 130-133.

[19] *Ibid.*, paragraph 55.

5.11 Thus, in our view, the 857,700 tonne limit on traditional ACP imports is a tariff quota and therefore Article XIII applies to it.

(b) The Requirements of Article XIII and the 857,700 Tonne Tariff Quota for Traditional ACP Imports

5.12 The United States challenges the 857,700 tonne tariff quota under both paragraphs 1 and 2 of Article XIII. We address its arguments in that order. In assessing the 857,700 tonne tariff quota for traditional ACP imports in light of the requirements of Article XIII, we recall the Appellate Body's findings in *Bananas III* concerning "separate regimes":

> "The issue here is not whether the EC is correct in stating that two separate regimes exist for bananas, but whether the existence of two, or more, separate EC import regimes is of any relevance for the application of the non-discrimination provisions of the GATT 1994 and the other Annex 1A agreements. The essence of the non-discrimination obligations is that like products should be treated equally, irrespective of their origin. As no participant disputes that all bananas are like products, the non-discrimination provisions apply to all imports of bananas, irrespective of whether and how a Member categorises or subdivides these imports for administrative or other reasons. If, by choosing a different legal basis for imposing import restrictions, or by applying different tariff rates, a Member could avoid the application of the non-discrimination provisions to the imports of like products from different Members, the object and purpose of the non-discrimination provisions would be defeated. It would be very easy for a Member to circumvent the non-discrimination provisions of the GATT 1994 and the other Annex 1A agreements, if these provisions apply only within regulatory regimes established by that Member." [20]

5.13 We also recall the Appellate Body finding that the Lomé waiver does not justify inconsistencies with Article XIII. As stated by the Appellate Body:

> "In view of the truly exceptional nature of waivers from the non-discrimination obligations under Article XIII, it is all the more difficult to accept the proposition that a waiver that does not explicitly refer to Article XIII would nevertheless waive the obligations of that Article. If the CONTRACTING PARTIES had intended to waive the obligations of the European Communities under Article XIII in the Lomé Waiver, they would have said so explicitly." [21]

We, therefore, in our examination of the WTO-consistency of the EC's revised regime, have to apply fully the non-discrimination and other requirements of Article XIII to all "like" imported bananas irrespective of their origin, i.e. regardless of whether imports occur under the MFN tariff quota of 2,553,000 tonnes or under the tariff quota of 857,700 tonnes reserved for traditional ACP imports.

(i) Article XIII:1

5.14 In this regard, we note that under the revised regime, on the one hand, bananas may be imported under the MFN tariff quota on the basis of past trade performance during a previous representative period (i.e. the three-year period from 1994 to 1996). On the other hand, bananas from traditional ACP supplier countries may be imported up to a collective amount of 857,700 tonnes, which was originally set to reflect the overall amount of the pre-1991 best-ever imports by individual

[20] Appellate Body report on *Bananas III*, paragraph 190.
[21] Appellate Body report on *Bananas III*, paragraph 187.

traditional ACP suppliers, with allowance made for certain investments.[22] We further note that imports under the tariff quota by some non-substantial suppliers (i.e. third-country and non-traditional ACP suppliers) are restricted, in aggregate, to 240,748 tonnes (i.e. the "other" category of the MFN tariff quota), whereas imports of other non-substantial sources of supply (i.e. traditional ACP suppliers) are restricted, in aggregate, to 857,700 tonnes. Moreover, some non-substantial suppliers, namely the ACP suppliers, could benefit from access to the "other" category of the MFN tariff quota once the 857,700 tonne tariff quota was exhausted. On the other hand, non-substantial suppliers from third countries have no access to the 857,700 tonne tariff quota once the "other" category of the MFN tariff quota is exhausted. Individual Members in these two groups – traditional ACP suppliers and the other non-substantial suppliers – are accordingly not similarly restricted. This disparate treatment is inconsistent with the provisions of Article XIII:1, which require that "[n]o … restriction shall be applied by any Member on the importation of any product of the territory of any other Member … unless the importation of the like product of all third countries … is similarly prohibited or restricted".

(ii) Article XIII:2

5.15 The general rule laid down in Article XIII:2 of GATT requires Members to "aim at a distribution of trade … approaching as closely as possible the shares which the various Members might be expected to obtain in the absence of such restrictions". To this end, where the option of allocating a tariff quota among supplying countries is chosen, Article XIII:2(d) provides that allocations of shares (i.e. country-specific allocations for *substantial* suppliers; and a global allotment in an "other" category for *non-substantial* suppliers unless country-specific allocations are allotted to each and every non-substantial supplier) should be based upon the proportions supplied during a previous representative period. The European Communities explains that it chose the three-year period from 1994 to 1996 as the most recent three-year period for which reliable import data were available.

5.16 According to the information available to us, for traditional ACP supplier countries the average imports during the three-year period from 1994 to 1996 were collectively at a level of approximately 685,000 tonnes, which is only about 80 per cent of the 857,700 tonnes reserved for traditional ACP imports under the previous as well as under the revised regime. In contrast, the MFN tariff quota of 2.2 million tonnes (autonomously increased by 353,000 tonnes) has been virtually filled since its creation (over 95 per cent). Thus, the allocation of an 857,700 tonne tariff quota for traditional banana imports from ACP States is inconsistent with the requirements of Article XIII:2(d) because the EC regime clearly does not aim at a distribution of trade approaching as closely as possible the shares which various Members might be expected to obtain in the absence of restrictions.

5.17 In light of the foregoing, and in light of the Appellate Body findings that the Lomé waiver does not cover inconsistencies with Article XIII, we are of the view that imports from different *non-substantial* supplier countries are not similarly restricted in the meaning of Article XIII:1 of GATT. Moreover, the allocation of a collective tariff quota for traditional ACP States does not approach as closely as possible the share which these countries might be expected to obtain in the absence of the restrictions as required by the chapeau to Article XIII:2 of GATT. Therefore, the reservation of the quantity of 857,700 tonnes for traditional ACP imports under the revised regime is inconsistent with paragraphs 1 and 2 of Article XIII of GATT.

(c) The Requirements of the Appellate Body Report in Bananas III

5.18 The European Communities recalls that the panel and the Appellate Body held in *Bananas III* that it is required by the Lomé Convention to provide duty-free access to traditional exports from

[22] The country-specific allocations for, e.g. Belize, Cameroon, Côte d'Ivoire and Jamaica seem to include allowances for investment made.

ACP suppliers in an amount of their pre-1991 best-ever exports (i.e. 857,700 tonnes) and that the Appellate Body held that it could not assign country-specific allocations to those suppliers inconsistently with Article XIII. It argues that in consequence the Appellate Body report in *Bananas III* requires it to provide a collective allocation of 857,700 tonnes to those suppliers.

5.19 We note, however, that the panel and Appellate Body reports made it clear that what was required by the Lomé Convention was not necessarily covered by the Lomé waiver. And, as the Appellate Body found in *Bananas III*, the European Communities is not authorized by the Lomé waiver to act inconsistently with its obligations under Article XIII. The Appellate Body also upheld the panel finding that the European Communities could not allocate country-specific shares to some non-substantial suppliers (e.g. traditional and non-traditional ACP countries and BFA signatories) unless country-specific allocations were also given to all non-substantial suppliers.

2. The MFN Tariff Quota Shares

5.20 Article XIII:2(d) provides that if a Member decides to allocate a tariff quota it may seek agreement on the allocation of shares in the quota with those Members having a substantial interest in supplying the product concerned. In the absence of such an agreement, the Member

> "shall allot to Members having a substantial interest in supplying the product shares based upon the proportions, supplied by such Members during a *previous representative period*, of the total quantity or value of imports of the product, due account being taken of any *special factors* which may have affected or may be affecting the trade in the product" (emphasis added).

5.21 The United States argues that the EC's allocation of the MFN tariff quota to shares to substantial suppliers does not approximate the shares that they might expect to obtain in the absence of restrictions. It also argues that since the 1994-1996 period was "restricted", it is unrepresentative for purposes of Article XIII.

5.22 The European Communities notes that it based its calculation of country allocations under the MFN tariff quota of the revised regime on the three-year period from 1994 to 1996. In the EC's view, this was the most recent three-year period for which reliable data were available at the time.

(a) The Requirements of Article XIII

5.23 In considering the US arguments regarding tariff quota shares under Article XIII, we recall our findings in *Bananas III*:

> "The wording of Article XIII is clear. If quantitative restrictions are used (as an exception to the general ban on this use in Article XI), they are to be used in the least trade-distorting manner possible. In the terms of the general rule of the chapeau of Article XIII:2:
>
> 'In applying import restrictions to any product, Members shall aim at a distribution of trade in such product approaching as closely as possible the shares which the various Members might be expected to obtain in the absence of such restrictions …'
>
> In this case we are concerned with tariff quotas, which are permitted under GATT rules, and not quantitative restrictions *per se*. However, Article XIII:5 makes it clear, and the parties agree, that Article XIII applies to the administration of tariff quotas. In light of the terms of Article XIII, it can be said that the object and purpose of Article XIII is to minimize the impact of a quota or tariff quota regime on trade

> flows by attempting to approximate under such measures the trade shares that would have occurred in the absence of the regime."[23]

5.24 We also noted the following:

> "[I]n order to bring its banana import regulations into line with Article XIII, the EC would have to take account of Article XIII:1 and XIII:2(d). In order to allocate country-specific tariff quota shares consistently with the requirements of Article XIII, the EC would have to base such shares on an appropriate previous representative period[375] and any special factors would have to be applied on a non-discriminatory basis."

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[375]"In this regard, we note with approval the statement by the 1980 *Chilean Apples* panel:

'[I]n keeping with normal GATT practice the Panel considered it appropriate to use as a 'representative period' a three-year period previous to 1979, the year in which the EC measures were in effect. Due to the existence of restrictions in 1976, the Panel held that that year could not be considered as representative, and that the year immediately preceding 1976 should be used instead. The Panel thus chose the years 1965, 1977, 1978 as a 'representative period'.'

[Citation omitted.] In the report of the 'Panel on Poultry' issued on 21 November 1963, GATT Doc. L/2088, para. 10, the panel stated: '[T]he shares in the reference period of the various exporting countries in the Swiss market, which was free and competitive, afforded a fair guide as to the proportion of the increased German poultry consumption likely to be taken up by United States exports'. See also Panel report in 'Japan – Restrictions on Imports of Certain Agricultural Products, para. 5.1.3.7 [citation omitted]'."

5.25 It is to accomplish the chapeau's requirement that a "Member shall aim at a distribution of trade … approaching as closely as possible the shares which the various Members might be expected to obtain in the absence of restrictions", that Article XIII:2(d) requires, as one alternative, the allocation of shares on the basis of a previous representative period (adjusted for special factors if and to the extent appropriate).

5.26 If data from a period are out-of-date or imports distorted because the relevant market is restricted, then using that period as a representative period cannot achieve the aim of the chapeau. Thus, under GATT practice it is necessary that the "previous representative period" for purposes of Article XIII:2(d) be the most recent period not distorted by restrictions. As noted above, the panel on *EEC - Restrictions on Imports of Apples from Chile*[24], dealt with the question whether import restrictions reflected the proportion of imports to the European Communities "prevailing during a previous representative period" in the context of Article XI:2(c). That panel excluded the year 1976 from the most recent three-year period previous to 1979, the year when the EC restriction in dispute was in effect, and chose 1978, 1977 and 1975 instead. It held that 1976 could not be considered representative due to the existence of restrictions during that year.

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[23] Panel reports on *Bananas III*, paragraph 7.68.

[24] Panel report on *EEC - Restrictions on Imports of Apples from Chile*, adopted on 10 November 1980, BISD 27S/98, paragraph 4.8.

5.27 The panel on *Japan - Restrictions of Imports of Certain Agricultural Products*[25] addressed the question of the absence of a "previous representative period" in the context of Article XI:2(c). It noted that:

> "in the case before it the import restrictions maintained by Japan had been in place for decades and there was, therefore, no previous period free of restrictions in which the shares of imports and domestic supplies could reasonably be assumed to resemble those which would prevail today. … The Panel realized that a strict application of this burden of proof rule had the consequence that Article XI:2(c) could in practice not be invoked in cases in which restrictions had been maintained for such a long time that the proportion between imports and domestic supplies that would prevail in the absence of restrictions could no longer be determined on the basis of a previous representative period. … The Panel considered for these reasons that the burden of providing evidence that all requirements of Article XI:2(c)(i), including the proportionality requirement, had been met must remain fully with the contracting party invoking that provision."

5.28 We note that Article XI:2(c), which stipulates that quotas must be such as not to reduce the total of imports relative to domestic production which might reasonably be expected to rule between the two in the absence of restrictions, is an exception from the prohibition of quantitative restriction in Article XI:1. Article XIII regulates the non-discriminatory administration of quantitative restrictions, including, where applied, the allocation of shares among Members. The determination of a previous representative period under Article XIII raises similar problems as under Article XI:2. Thus we deem the above considerations pertinent to the case before us. The effect of a lack of a representative period under Article XIII is much less far-reaching than the lack of such a period under Article XI:2(c). In the *Japan – Restrictions* case, the lack of a suitable previous representative period precluded the use of the Article XI:2(c) exception. Under Article XIII, the lack of a suitable previous representative period would only preclude allocation of a tariff quota unilaterally. It would not preclude the use of a global tariff quota nor of country-specific allocations by agreement.

(b) The Representative Period

5.29 With regard to the selection of a "previous representative period" for applying the tariff-quota regime for imports of bananas to the European Communities, we recall that prior to 1993, EC member States applied different national import regimes. Some member States applied import restrictions or prohibitions, while imports to other member States were subject to a tariff-only regime or could enter duty-free.[26] Thus, that period could not serve as a previous representative period (see paragraph 5.24).

5.30 With the introduction of the common market organization for bananas in mid-1993, we note traditional ACP supplier countries were guaranteed country-specific allocations at pre-1991 best-ever import levels, which were far beyond their actual trade performance in the recent past. As of 1995, the Banana Framework Agreement (BFA) allocated shares of the 2,200,000 tonne tariff quota established by Regulation 404/93 to the substantial suppliers Colombia and Costa Rica. Given the distortions in the EC market prior to the BFA, the shares assigned to Colombia and Costa Rica could not have been based on a previous representative period. Moreover, the BFA contained WTO-inconsistent rules concerning the export certificate requirements and re-allocations of unused portions of country-specific allocations exclusively among BFA signatories, which further aggravated such

[25] Panel report on *Japan - Restrictions on Imports of Certain Agricultural Products*, adopted on 22 March 1988, BISD 35S/163, paragraph 5.1.3.7.

[26] For a description of the market, see panel report on *EEC – Member States' Import Regime for Bananas*, issued on 3 June 1993 (not adopted), GATT Doc. DS32/R, pages 3-7.

distortions. The shares of non-traditional ACP supplier countries were also distorted because of the country-specific allocations within the quantity of 90,000 tonnes that were reserved for non-traditional ACP suppliers.

5.31 It could be argued that within the "other" category of the 2,200,000 tonne tariff quota (autonomously enlarged by 353,000 tonnes as of 1995 for the EC-15), Ecuador and Panama and the non-substantial third-country suppliers without allocated shares were competing on a relatively undistorted basis during the period when the previous regime was in force (although less so after the BFA entered into force). However, given that, for purposes of applying the requirements of Article XIII, it does not matter whether imports from some suppliers countries were relatively less distorted than others since distortions with respect to one (group of) supplier countries will have repercussions on the import performance of other substantial or non-substantial supplier countries within a single product market.

5.32 Accordingly, in our view, the 1994-1996 period could not serve as a previous representative period because of the presence in the market of the foregoing distortions.

5.33 Thus, while Members have a degree of discretion in choosing a previous representative period, it is clear in this case that the period 1994-1996 is not a "representative period". Accordingly, it is our view that the country-specific allocations assigned by the European Communities to the substantial suppliers are not consistent with the requirements of Article XIII:2.

B. GATS ISSUES

5.34 The United States alleges that Regulations 1637/98 and 2362/98 perpetuate nullification and impairment caused by the previous EC regime which was found to be inconsistent with the EC's obligations under Articles II and XVII of GATS. More specifically, the United States alleges (1.) that the revised licensing procedures perpetuate the violations of Articles II and XVII of GATS (i.e. GATS' most-favoured nation and national treatment clauses) found by the original panel and the Appellate Body in *Bananas III* and (2.) that the enlargement of the licence quantity reserved for "newcomers" to 8 per cent and the criteria for acquiring "newcomer" status under the revised licensing procedures are inconsistent with Article XVII of GATS.

1. Licence Allocation Procedures

5.35 The United States alleges that the revised EC licensing regime is inconsistent with Articles II and XVII of GATS and continues nullification and impairment because it perpetuates or carries on the discriminatory elements of the previous licensing system in that licenses are allocated to those who used licenses to import, and paid customs duties on, bananas during the 1994-1996 period. Moreover, it claims that the new, so-called "single pot" licensing allocation rules, under which, *inter alia*, past importers of ACP bananas may apply for import licenses to import non-ACP third-country bananas on the basis of reference quantities derived from their ACP banana imports, exacerbates the discriminatory elements of the past regime.[27]

5.36 The EC contends that it has abolished the previous licensing system including operator categories, activity functions, export certificates and hurricane licences. The new criterion for the allocation of licences to "traditional operators", i.e. proof of payment of customs duties, eliminates

[27] The United States refers in this regard to the reservation of 30 per cent of the licences required for in-quota imports of third-country and non-traditional ACP bananas to Category B operators, the reservation of 28 per cent of such import licences to ripeners under the activity function rules, and the allocation of hurricane licences exclusively to certain Category B operators.

any "carry-on effects" from the previous to the revised license allocation system and to ensure that "true and real" importers in the past obtain licence entitlements for the future.

5.37 The consideration of alleged inconsistencies under the GATS' national treatment and MFN clauses usually presupposes a two-step examination. For purposes of Article XVII, it is necessary to examine (i) whether the domestic and foreign services or service suppliers at issue are "like" and (ii) whether services or service suppliers of the complainant's origin are treated less favourably than those of domestic origin. For purposes of Article II, it is necessary to examine (i) whether services or service suppliers originating in different foreign countries are "like" and (ii) whether services or service suppliers of the complainant's origin are subject to less favourable treatment than those of other Members' origin.

5.38 In this context, we recall that issues such as the origin of services and service suppliers and the "likeness" of services or service suppliers of the complainant's origin and of those of EC or other third-country origin, as the case may be, were resolved in the original case. We also note that the panel and the Appellate Body - albeit on different legal grounds - found that the national treatment obligation as well as the MFN treatment obligation under the GATS prohibit *de iure* and *de facto* discrimination. For purposes of resolving the issues before us, we need, therefore, not discuss whether the notion of *de facto* discrimination under Article II is similar to or narrower than the notion of *de facto* discrimination under Article XVII, and in particular under paragraphs 2 and 3 of that Article. We only need to recall that the original panel, but also the Appellate Body found that Article II of GATS, too, covers *de facto* discrimination: "… For these reasons we conclude that 'treatment no less favourable' in Article II:1 of the GATS should be interpreted to include *de facto* as well as *de iure*, discrimination …".[28] Therefore, we consider it appropriate to examine jointly the question whether or not the revised licence allocation procedures accord less favourable treatment in the meanings of Articles II and XVII of GATS to services or service suppliers of the United States.

(a) The Findings in Bananas III on Articles II and XVII of GATS

5.39 We recall our findings with respect to particular aspects of the licence allocation procedures which applied under the previous regime to third-country and non-traditional ACP imports within the tariff quota, to the extent they are relevant here, i.e.:

> "… that the allocation to Category B operators of 30 per cent of the licences allowing the importation of third-country and non-traditional ACP bananas at in-quota tariff rates created less favourable conditions of competition for like service suppliers of Complainants' origin and was therefore inconsistent with the requirements of Articles II and XVII of GATS." [29]
>
> "… that the allocation to ripeners of 28 per cent of Category A and B licences allowing the importation of third-country and non-traditional ACP bananas at in-quota tariff rates created less favourable conditions of competition for like service suppliers of Complainants' origin and was therefore inconsistent with the requirements of Article XVII of GATS." [30]
>
> "… that the allocation of hurricane licences exclusively to operators who included or directly represented EC (or ACP) producers created less favourable

[28] Appellate Body report on *Bananas III*, paragraph 234.
[29] Panel reports on *Bananas III*, paragraphs 7.341 and 7.353.
[30] Panel reports on *Bananas III*, paragraph 7.368.

> conditions of competition for like service suppliers of Complainants' origin and was therefore inconsistent with the requirements of Article XVII (or II) of GATS." [31]

These findings were upheld by the Appellate Body.

(b) The Revised EC Licensing Regime

5.40 Under the revised EC licensing regime, licences are allocated to importers on the basis of their reference quantities. These reference quantities are allocated to "traditional operators" (defined below) to the extent that they are able to show that they actually imported bananas in the 1994-1996 period. More particularly, Article 3 of Regulation 2362/98 provides:

> "'*[T]raditional operators*' shall mean economic agents established in the European Community during the period for determining their reference quantity … who have actually imported a minimum quantity of third-country and/or ACP-country bananas on their own account for subsequent marketing in the Community during a set reference period. The minimum quantity … shall be 100 tonnes imported in any one year of the reference period … [or] … 20 tonnes where the imports entirely consist of bananas with a length of 10 centimetres or less."

5.41 Article 5 of Regulation 2362/98 provides:

> "3. Actual import shall be attested by both of the following:
>
> (a) by presenting *copies of the import licences used* either by the *holder* or, in the case of a transfer … duly endorsed by the competent authorities, by the *transferee*, in order to release the relevant quantities for free circulation; and
>
> (b) by presenting *proof of payment of the customs duties* due on the day on which customs import formalities were completed. The payment shall be made either *direct* to the competent authorities or via a *customs agent* or *representative*.
>
> Operators furnishing *proof of payment of customs duties*, either direct to the competent authorities or via a customs agent or representative, for the release into free circulation of a given quantity of *bananas without being the holder or transferee holder of the relevant import licence … shall be deemed to have actually imported the said quantity provided that they have been registered in a Member State under Regulation No. 1442/93* and/or that they fulfil the requirements of *this Regulation* for registration as a *traditional operator*. Customs agents or representatives may not call for the application of this subparagraph." (emphasis added).

5.42 Article 31 of Regulation 2362/98 repeals Regulations 1442/93 and 478/95, which were the basis of the previous licensing regime. We note, however, that according to Article 5(3) of Regulation 2362/98, operators that have been registered under Regulation 1442/93 may acquire the status of a "traditional operator" under the revised licensing procedures.

[31] Panel reports on *Bananas III*, paragraph 7.393 (and paragraph 7.397).

(c) The Requirements of Articles XVII and II of GATS

5.43 We recall our decision in *Bananas III* on the elements necessary to establish an inconsistency under Articles XVII and II of GATS and on certain preliminary issues.[32] These are not controverted in this proceeding, so we turn to the main issues.

5.44 For purposes of Article XVII, we have to ascertain whether, by applying its revised licensing regime, the European Communities accords less favourable treatment to services and service suppliers of the United States than it accords to it own like service and service suppliers. For purposes of Article II, we also have to ascertain whether, under the revised regime, less favourable treatment is being accorded to services and service suppliers of the United States than to services and service suppliers of other Members. In this context, we recall our consideration above that we deem it appropriate to examine jointly whether the EC's revised regime accords less favourable treatment in the meanings of both Article II and XVII to services or service suppliers of the United States. The crucial issue in respect of these claims against the EC's revised licensing procedures is whether the allocation of licences based on the criterion of "*actual payment*" of customs duties by "*traditional operators*" under the revised regime prolongs the allocation of licences on the basis of those aspects of the previous licensing system which were found to be inconsistent with the GATS in *Bananas III*.

5.45 In framing this issue for consideration, we do not imply that the EC is under an obligation to remedy past discrimination. Article 3.7 of the DSU provides that "… the first objective of the dispute settlement is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements." This principle requires compliance *ex nunc* as of the expiry of the reasonable period of time for compliance with the recommendations and rulings adopted by the DSB. If we were to rule that the licence allocation to service suppliers of third-country origin were to be "corrected" for the years 1994 to 1996, we would create a retroactive effect of remedies *ex tunc*. However, in our view, what the EC is required to ensure is to terminate discriminatory patterns of licence allocation with *prospective* effect as of the beginning of the year 1999.

5.46 At the outset of our analysis, we note that the United States does not allege that the new EC regime is *de iure* discriminatory. The issue, as in *Bananas III*, is whether it is *de facto* discriminatory in a way that is inconsistent with Articles XVII and II of GATS. In this regard, we recall that, pursuant to Article XVII:2, a Member may ensure no less favourable treatment for foreign services or service suppliers by according formally identical treatment or formally different treatment to that it accords to its own like service suppliers. Moreover, according to Article XVII:3, formally identical treatment may, nevertheless be considered to be less favourable treatment if it adversely modifies conditions of competition for services or service suppliers of other Members. We also recall the panel and Appellate Body findings in the original dispute that the MFN clause of GATS includes prohibitions of both *de iure* and *de facto* discrimination.

(d) The parties' arguments

(i) European Communities

5.47 The European Communities argues at the outset that the facts on which the original panel had based its conclusions had so changed by 1994-1996 that the panel would not have made the same findings had it disposed of the 1994-1996 facts.

5.48 With respect to the major third-country operators (e.g. Chiquita, Dole, Del Monte and Noboa), the European Communities contends that the allocations of licences for the importation of

[32] Panel reports on *Bananas III*, paragraphs 7.314, 7.317, 7.344, 7.277 et seq., 7.298.

third-country and non-traditional ACP bananas to these operators increased by an average of 35 per cent between 1994 under the previous regime and 1999 under the revised regime.[33] Specifically, the European Communities reports increases in licence allocations to Chiquita and Dole of 34 and 44 per cent, respectively, between 1994 and 1999. Moreover, licence allocations for Chiquita and Dole were higher in 1999 than in 1998. According to the European Communities, this occurred because of two reasons: investments and licence transfers.

5.49 First, there were investments by third-country operators in EC/ACP operators. The European Communities mentions investments in Compagnie Fruitière and CDB/Durand by Dole and Chiquita, respectively, and concludes that reference quantities for major third-country operators doubled between 1993 and 1996[34], when the overall reference quantities of third-country operators amounted to 272,822 tonnes. The European Communities further points out that the original panel found that there was no *de iure* discrimination, based on an operator's origin, with respect to the access to the activity of ripening which entitled operators to licence allocations and thus to reap quota rents under the previous regime. However, the panel found that *de facto* less favourable conditions of competition existed for third-country suppliers of wholesale services because ripeners in the European Communities were predominantly EC owned or controlled[35] and thus licence allocations and quota rents accrued largely to service suppliers of EC origin. Before this Panel, the European Communities emphasizes that, based on 1994 to 1996 statistics, three out of the four biggest ripeners are now non-EC owned and that these alone represent around 20 per cent of the total ripening capacity of the European Communities.[36]

5.50 The second reason why licence allocations to third-country operators has apparently increased is that there have been licence transfers under conditions that allow these operators to claim reference quantities under the revised regime. In the EC's view, this could explain why there has been a decline in the number of operators receiving licences. According to the European Communities, under the previous regime 1568 Category A and B operators were registered, whereas under the revised regime the number of traditional operators has decreased to 629 operators. For the European Communities this shows that the mainly EC-owned operators that received licences in the past without being engaged in actual importation were *ipso facto* excluded from the allocation of licences by the introduction of the revised regime, i.e. mainly ripeners and EC producer organizations.

5.51 The European Communities submits that it is reasonable to assume that under the previous regime non-EC operators received an amount of 50.35 per cent of all available reference quantities that entitle operators to licence allocations in the future.[37] The European Communities then increases

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[33] The European Communities also submits that licence allocations to these major third-country operators were as follows: 1994: 598,857 tonnes; 1995: 651,266 tonnes; 1996: 726,782 tonnes; changes: 1994-1995: 8.8 per cent; 1995-1996: 11.6 per cent; 1994-1996: 201.4 per cent.

[34] EC figures: 1989: 21,305 (reference quantities in tonnes); 1990: 30,514; 1991: 45,532; 1992: 72,592; 1993: 132,614; 1994: 267,511; 1995: 276,804; 1996: 272,822.

[35] In the original dispute, the panel drew this conclusion on the basis that the average estimated volume ripened by EC owned ripeners was, according to the complainants to 83.7 per cent of the overall ripening volume in the European Communities. The European Communities stated that between 20 and 26 per cent of the ripening capacity in the European Communities were foreign-owned, i.e. mainly by Chiquita, Dole and Del Monte. Panel reports on *Bananas III*, footnote 514.

[36] The EC submits the following data on volumes ripened by major third-country operators:

Chiquita: 1994: 214,037; 1995: 232,544; 1996: 241,386;
Atlanta: 1994: 425,147; 1995: 449,969; 1996: 360,179;
Dole Group: 1994: 146,530; 1995: 139,257; 1996: 121,617.

[37] In estimating reference quantities which non-ACP third-country service suppliers could obtain in their entirety under the previous regime, the European Communities considers it appropriate to assume that Category A primary importers obtained 37.905 per cent of the reference quantities (i.e. 57 per cent of 66.5 per cent). With respect to customs clearers, the European Communities does not object to the assumption that two-

the base figure by 35 per cent (see paragraph 5.48) to conclude that non-EC operators are now getting some 68 per cent of licence allocations. Since 8 per cent of allocations go to newcomers, only 24 per cent go to EC/ACP service suppliers. The European Communities suggests that the licences have been legitimately allocated to EC/ACP service suppliers under the revised regime since these operators actually imported Latin American bananas.

5.52 The European Communities also makes two more general arguments. In the first instance, the European Communities insists that the GATS does not guarantee any particular market shares over time, i.e. there are no provisions for grandfather rights. Second, the European Communities argues that it has a right to choose "actual imports" as a basis for licence allocation. In particular, the European Communities refers to Article 3.5(j) of the Agreement on Import Licensing Procedures[38], pursuant to which consideration should be given to "full utilisation of licenses" as a criterion for future allocations. In the EC's view, the only objective and indisputable way of proving the "effective" importation is the payment of duties, either directly or through a customs agent on a fee or contract basis, i.e. the system chosen by Regulation 2362/98.

(ii) United States

5.53 The United States argues that the *de facto* discrimination in the EC's previous licensing regime persists because of the EC's choice of criteria for allocating licences. By basing licence allocation on the "actual importer" criteria, the EC ensures that the predominantly EC/ACP service suppliers to whom Category B, ripener and hurricane licences were issued in the previous regime will retain rights to most of those licences in the new regime.

5.54 The United States contests as inaccurate the EC information that, *inter alia*, because of investments in Compagnie Fruitière and CBD/Durand by Dole and Chiquita, respectively, licence allocations to major third-country operators doubled between 1993 and 1996. Even if this data were accurate, in the US view, given that total EC imports from traditional ACP countries amounted to 734,000 tonnes in 1996, the 272,822 tonne figure would still indicate that, while non-EC firms have in fact been forced under the previous regime to increase ACP purchases, the clear majority of that Category B/ACP volume continues to be in the hands of EC-owned operators.

5.55 The United States argues that the EC figures about an increase in the foreign ownership of ripeners are inaccurate because the data includes volumes ripened under customer contracts such that the economic benefits of the licence flow to EC-owned ripeners, not to third-country operators.

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thirds of the customs clearers were of non-ACP third-country origin, whereas one-third was of EC/ACP origin. Accordingly, 6.65 per cent of customs clearance reference quantities (i.e. 10 per cent of 66.5 per cent) may be presumed to accrue to third-country operators. For purposes of breaking down ripening activities by third-country and EC/ACP origin, the ripening activities of both Category A and B operators were subdivided by using a ratio of 78.5 per cent for EC/ACP operators and 21.5 per cent for non-ACP third-country operators. This results for Category A operators in 4 per cent for third-country operators and in 14.6 per cent for EC/ACP operators of the 18.6 per cent which represent the licence allocation for Category A ripening activities (i.e. 28 per cent of 66.5 per cent). For Category B operators this results in 1.8 per cent for third-country operators and in 6.6 per cent for EC/ACP operators of the 8.4 per cent which represent the licence allocation for Category B ripening activities (i.e. 28 per cent of 30 per cent). As a result, in estimating the total share of reference quantities for non-ACP third-country suppliers, the European Communities adds up 37.905 per cent (for Category A primary importers), 6.65 per cent (for customs clearers of non-ACP third-country origin), 4 per cent and 1.8 per cent (for ripening activities effectuated by Category A and B operators of non-ACP third-country origin). This results in an estimate for the overall share of licence entitlements of 50.35 per cent of all reference quantities for non-ACP third-country service suppliers.

[38] Article 3.5(j) of the Agreement on Import Licensing Procedures provides that: "… consideration should be given as to whether licences issued to applicants in the past have been fully utilised during a recent representative period."

Moreover, even if the figures were accurate they would only confirm that approximately 80 per cent of the EC's total ripening capacity is still EC-owned, thereby reinforcing the "drag-on effect" from the previous regime.

5.56 The United States emphasizes that Chiquita's licence allocation for 1999 under the revised regime was less than in 1998 when the previous regime was in force.[39] In the US view, Dole coped better with the EC banana regime than Chiquita as the result of licence purchases and investment in operators that had access to licences, in particular Category B licences. The United States also refers to Odeadom data[40] (i.e. Office de Développement de l'économie agricole des Départements d'Outre-Mer, the French authority responsible for accepting licence applications and registering licence transfers) according to which significant Category B licence sales for those years occurred in only two countries, i.e. in France and in Spain, whereas these data show no sales in the United Kingdom.[41] In addition, the United States also mentions industry information indicating that during the 1994-1996 period, the EC/ACP firms Fyffes, Geest and Jamaican Producers imported on average over 300,000 tonnes of Latin American bananas per year.[42] The United States concludes that this factual information supports its position that under the revised regime US suppliers of wholesale services continue to be subject to less favourable conditions of competition than suppliers of such services of EC/ACP origin.

5.57 Overall, the United States argues that under the revised regime, non-EC/ACP operators can be expected to receive only 43.7 per cent of the licences they should receive because, in its view, the EC estimate according to which third-country operators receive 68 per cent of licence allocations is flawed. First, it stresses that there is no basis for assuming that under the previous regime two-thirds of customs clearers were third-country owned and only one third was EC/ACP owned. Accordingly, the EC estimate of 50.35 per cent of licence allocations for third-country operators under the previous regime would be reduced by 6.65 per cent to 43.7 per cent, which means that less than half of the licences used to administer the third-country tariff quota were in the hands of non-EC/ACP operators. Second, it points out that it refers only to the tariff quota of overall 2,553,000 tonnes but not to the entire import quantity (including traditional ACP imports) of 3.4 million tonnes. Third, the United States argues that the average growth increase of 35 per cent in licence allocations to third-country operators between 1994 and 1996 is distorted given that the 1994 figures relate to the EC-12 (excluding Austria, Finland and Sweden), while the 1996 figures include also the new EC member States.

5.58 Therefore, the United States alleges that the revised system perpetuates the underallocation of licences to its service suppliers, who cannot obtain licences to import their bananas on terms as favourable as those EC/ACP suppliers who continue to benefit under the revised regime from the carry-on of GATS-inconsistent licence allocation criteria under the previous regime. The United States points out that under the previous regime those initial licence holders who usually did not import third-country bananas themselves learned not to sell their licences outright. On the contrary, initial holders of Category B and ripener licences devised contractual arrangements under which service suppliers of US origin were obliged to pay for the ability to get bananas into the European Communities without actually obtaining the licence (e.g. licence leases, buy-back arrangements, licence 'pooling', sales of bananas landed in the European Communities but not yet cleared in customs). The United States submits that its service suppliers were forced to enter into unfavourable contractual arrangements also today with initial licence holders under the previous regime. Under

[39] US responses to EC questions concerning licensing of 22 February 1999.

[40] The European Communities contests that information and presents a letter in which Odeadom emphasizes that it never published the chart about licence transfers which had been submitted by the United States.

[41] US Exhibit 6 to the US First Submission.

[42] US Exhibit 7 to the US First Submission.

many of those arrangements, according to the United States, original licence holders, whether or not they physically imported, may prove payment of customs duties which makes them "actual importers" for purposes of licence allocations under the revised regime.

(e) The Arbitrators' Analysis of the Allegations

5.59 In analyzing whether the new EC regime is *de facto* discriminatory, we will first consider the two general EC arguments set out in paragraph 5.52. Thereafter we evaluate the evidence presented by the parties on actual licence allocations and consider its relevance to the allegations by the United States. We will then consider the regime's structure and the extent to which it is based on or related to the previous regime found to be inconsistent with Articles XVII and II in *Bananas III*.

(i) General Arguments by the European Communities

5.60 As to the EC argument that there are no grandfather rights in the GATS or guarantees of market shares, we agree, but note that does not rule out the possibility that *de facto* less favourable conditions of competition may be found and prolonged in violation of GATS rules.

5.61 As to the EC's claimed right to choose "actual imports" as a basis for licence allocation, here again, we agree that the European Communities is not precluded from basing licence allocation on past usage. However, we note that the Import Licensing Agreement's provision that "consideration should be given" to full utilization of licenses does not rule out the possibility that the choice of how to assure that may be limited where *de facto* discrimination has been found in the past, and where reliance on licence usage may result in a prolongation of the results of a violation of GATS rules. The availability of the past performance allocation method, which is an option and not required by the Import Licensing Agreement, would not justify such a violation. In other words, even if Members are normally free to base licence allocation on past usage, that does not mean they are free to do so without regard to their GATS obligations. Moreover, we note that proof of payment of customs duties, directly or through a representative or customs agent, does not necessarily prove licence usage by a particular operator.

(ii) Licence Allocations Under the Revised Regime

5.62 In examining the evidence on licence allocations under the revised regime, we note that we based our original findings on the facts available at the time. Our findings explicitly foresaw that one of the effects of the previous regime would be to encourage service suppliers of non EC/ACP origin to invest in EC/ACP banana production and marketing and to acquire licenses from EC/ACP service suppliers. Although these effects were anticipated, our findings were based on the fact that the previous EC regime modified the conditions of competition in violation of Article XVII and II.

5.63 As regards licence allocations to major third-country suppliers of wholesale services under the revised regime, we note that the European Communities has submitted only limited information. This information would not permit us to recalculate whether licence allocations to third-country service suppliers increased between 1994 and 1999 by an average of 35 per cent overall, by 34 per cent for Chiquita, and by 44 per cent for Dole in particular.

5.64 As to the evidence presented by the European Communities concerning the increase in licence allocations to non-EC suppliers as a result of their investments in ACP operators, we note that the European Communities did not submit evidence on the precise extent of non-ACP third-country shareholdings in Compagnie Fruitiére and CBD/Durand. Therefore, it is unclear whether these investments are large enough to cause a change in the attributability of these service suppliers at issue from EC/ACP origin to the origin of other WTO Members. In this regard, we recall that, according to Article XXVIII(n) of GATS, a service supplier in the form of a legal person has the origin of a WTO

Member if it is owned by more than 50 per cent by natural or juridical persons of that Member, or if is controlled by those persons in the sense that they have the power to name the majority of directors. Moreover, in respect to investments in ripeners and licence transfers, we note that the EC's evidence was not comprehensive, which means that we not in a position to ascertain the extent to which these factors have led to a change in licence allocations compared to the previous regime.

5.65 As to the EC argument that there were 1,568 Category A and B operators registered under the previous regime, but that there are only 629 traditional operators under the revised regime, we note that the European Communities did not include information on ownership or control of these remaining traditional operators. Therefore, we are not in a position to ascertain whether the decline in the number of registered operators had an impact on the competitive conditions of non-ACP third-country service suppliers.

5.66 Even if the precise extent is uncertain, however, it is clear to us that an increase in licence allocations to non-EC/ACP operators has occurred. Indeed, such an increase would be in line with our considerations in the original dispute, that increase in licence allocations to non-ACP third-country suppliers during the period when the previous regime was in force could be the result of the "cross-subsidization" effect that induced such service suppliers who were previously engaged in the non-ACP third-country market segment into entering the EC/ACP market segment, or to engage in ripening and customs clearance activities in order to qualify for licence allocations in the future.

5.67 As regards the Odeadom data submitted by the United States and the EC contention[43] to that evidence, we agree with the European Communities as far as data on licence transfers with respect to other member States than France are concerned. However, with respect to France we consider the Odeadom data reliable because, according to Article 5.2(a) of Regulation 2362/98, a licence transferee is not recognized as "actual importers" unless such a licence transfer is duly endorsed by the competent authorities of member States, and given that Odeadom is, according to Annex II of Regulation 2362/98, the competent authority for France. We thus note that the data concerning Category B licence allocations in France in the chart submitted by the United States and the data mentioned in the Odeadom letter submitted by the European Communities correspond.[44]

5.68 As regards the industry information submitted by the US concerning imports of Latin American bananas by EC/ACP operators, on the one hand, we are not in a position to assess to what extent this information is representative and reliable as an adequate description of the pattern of participation by EC/ACP operators in non-ACP third-country imports as developed under the previous regime. On the other hand, we note that the trend of an increasing involvement of EC/ACP operators in the non-ACP third-country market segment points in the direction which the cross-subsidization approach of the previous regime would suggest.

5.69 In our view, it is not particularly relevant for the purposes of this case to what extent precisely licence allocations to US suppliers (i.e. Chiquita, Dole or their subsidiaries) or to other third-country suppliers of wholesale services increased under the revised system in comparison to the previous, low

[43] The European Communities submitted a letter in which Odeadom stresses that it never published data on licence sales, and in particular not with respect to other EC member States than France.

[44] The letter by Odeadom to the EC Commission, DG on Agriculture, states that the following amounts of Category B licences were issued in France: 1994: 230,531 tonnes; 1995: 252,740 tonnes; 1996: 294,410 tonnes.

The Odeadom chart submitted by the United States as Exhibit 6 showed the volumes of Category B licences that were issued (essentially only in France, Spain and the United Kingdom and to a much lesser extent in Italy and Portugal). For France, the US chart recorded practically identical figures about the issuance of Category B licences: 1994: 230,476 tonnes; 1995: 252,531 tonnes; 1996: 295,359 tonnes. The Odeadom chart submitted by the US further records that most of the B licences issued in Spain were sold, approximately half of those issued in France, and that none of those issued in the United Kingdom were sold.

level. An increase only indicates that the carry-on effect of the revised regime is less than 100 per cent. What is relevant for purposes of GATS, however, is that the information submitted shows that US companies in their attempts to supply wholesale trade services in the European Communities, with respect of part of their business, must purchase or lease licences from or otherwise enter into contractual arrangements with those who have access to licences.. Given the structure of the previous regime, those licence holders would be in the group of service suppliers in favour of which the previous EC regime altered competitive conditions. Thus, United States and other third-country service suppliers are faced with a competitive disadvantage that is not equally inflicted on service suppliers of EC/ACP origin. While we cannot ascertain the precise extent of this carry-on effect, it appears to be not unsubstantial, particularly in respect of US service suppliers. Therefore, an increase, even if it is within the order of the EC estimates, may not be considered as evidence that conditions of competition for non-ACP third-country suppliers are not less favourable than for EC/ACP suppliers under the revised regime.

5.70 Therefore we conclude that the EC/ACP operators who continue to get licences on the basis of the revised regime, remain in a competitively advantaged position compared to non-EC operators and that advantage comes from the "carry on" effects of the GATS-inconsistent aspects of the previous regime. Even if such EC/ACP operators do deal in Latin American bananas and do not simply sell or lease their licences, they are able to compete on more favourable conditions in the market for distribution of bananas than their non-EC competitors because of the licences allocations that are derived from the previous discriminatory regime. In this way, the revised regimes carries forward the *de facto* discrimination of the previous regime.

(iii) The Structure of the Revised Regime

5.71 We also examine structure of the revised regime because the Appellate Body has noted in the past, in *Japan - Alcoholic Beverages*[45], that a measure's "protective application can most often be discerned from the design, the architecture and the revealing structure of a measure". Although the dispute on *Japan - Alcoholic Beverages* concerned claims under the GATT, we believe that the Appellate Body's description of *de facto* discrimination under the GATT may also give some guidance in analyzing whether there is *de facto* discrimination under the GATS.

5.72 In our examination of the structure of Regulation 2362/98, we start from the proposition that if, in its new licensing regime, the European Communities had simply provided that licenses would be issued to those to whom licenses had been issued in the 1994-1996 period when those aspects of the previous licence allocation procedures which were found to be WTO-inconsistent in the original dispute by the Panel and the Appellate Body, were in force, we would find that such a revised regime did not remove the GATS inconsistencies of the old regime, even if technically different rules for licence allocation had been implemented. This would be so because the less favourable conditions of competition for service suppliers of the United States (or other WTO Members) would continue to exist. The revised regime is not, however, based on licence issuance during the 1994-1996 period, but rather on licence usage and payment of customs duties during that period. According to Article 4 of Regulation 2362/98, the reference quantities for 1999 of "traditional operators" under the revised regime are calculated on the basis of the average quantity of bananas actually imported during the 1994-1996 period.[46]

5.73 The choice of the years from 1994 to 1996 as the reference period is explained in Recital 3 of Regulation 2362/98 as follows:

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[45] Appellate Body report on *Japan - Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted on 1 November 1996, page 29.

[46] Paragraphs 1 and 2 of Article 4 of Regulation 2363/98.

> "[W]hereas, for the purpose of implementing the new arrangements in 1999, it is advisable, in the light of *available knowledge on the de facto patterns of importation*, to determine the rights of traditional operators in accordance with their actual imports during the three-year period 1994 – 1996". (emphasis added).

5.74 We note that officials in certain EC member States raised concerns about the Commission's choice of the 1994-1996 reference period.[47] A legal analysis of the Commission Proposal done in an EC member State also raised doubts about this approach.[48]

5.75 In this context, we also note that the Commission Working Document "Determination of Reference Quantities from 1995 Onwards"[49] acknowledges that licence allocation on the basis of the 'licence usage method' would "maintain the same pattern of licence allocation between different types of operators as is seen at present" and "fossilize licence allocation in its current form. Traders could not obtain more quota by expanding their business; the only way to do so would be by buying licences from another operator, or by taking over another company".[50]

5.76 We acknowledge, however, that where US service suppliers entered into contractual arrangements with initial licence holders under conditions where they are able to present proof of actual payment of customs duties and of licence usage there is no carry-on effect. In contrast, in cases where the contractual arrangements between initial licence holders and US service suppliers do not allow them to prove actual payment of customs duties and licence usage during the 1994-1996 reference period (licence buy-back arrangements or licence "pooling"), they cannot claim reference quantities as "traditional operator" for licence allocations from 1999 onwards.

5.77 In the latter case, the revised licensing regime facilitates the continuance of past patterns of licence allocation based on WTO-inconsistent elements of the previous allocation. In particular, e.g. where former Category B operators and/or ripeners are able to prove licence usage and payment of customs duties for imports made with such licences during the 1994-1996 period, such operators are able to claim reference quantities for 1999 under the revised regime, regardless of whether they imported in fact.

5.78 In conclusion, in our examination of the structure of the revised regime, we note that licence allocations under the revised regime are based on license usage (and payment of customs duties), which according to the cited Commission Document is likely to freeze or at least to continue in part past licence allocations. We further note that the base period (1994-1996) is one in which the rules for licence allocation had been in certain aspects found to be WTO-inconsistent in *Bananas III*. On its face, the choice of the 1994-1996 reference period in combination with the licence usage/actual tariff payment criteria would seem to continue at least in part the less favourable conditions of competition for foreign service suppliers found under the previous licensing regime.

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[47] US Exhibit 9 to the First US Submission.

[48] "Using import performance results in a recent period, i.e. the years 1993-1998, would in effect perpetuate the (de facto) discriminatory treatment by rewarding the recipients of the WTO denounced category B and ripeners licences, contrary to GATS Articles XVII and II." in: Amending the EC banana Regulation 404/93 and making it WTO compatible: A legal analysis of Commission Proposal COM(1998) 4 final (98/0013(CNS)), paragraph 22; US Exhibit 8 to US First Submission.

[49] Exhibit 5 to the First Submission by the United States.

[50] Commission Working Document "Determination of Reference Quantities from 1995 Onwards" of 6 October 1993". The document further notes"… *Obviously the licence usage method can only be used for the years when the common market organization was in place*. Thus if it is decided to adopt this method there would be three years (1995-97) when both methods [i.e. licence usage and operator categories/activity functions] would have to be applied. ..." (emphasis added).

(iv) Overall evaluation

5.79 In light of all these considerations, we are of the view that the United States has shown that the revised licence allocation system prolongs - at least in part - less favourable treatment in the meanings of Articles II and XVII for wholesale service suppliers of US origin. The United States has also shown that its service suppliers do not have opportunities to obtain access to import licences on terms equal to those and enjoyed by service suppliers of EC/ACP origin under the revised regime and carried on from the previous regime.

5.80 Therefore, we are of the view that the revised licence allocation system reflecting past performance and licence usage during the 1994-1996 period displays *de facto* discriminatory structure. It is also our view that under the revised regime wholesale service suppliers of the United States are accorded less favourable treatment than EC/ACP suppliers of those services in violation of Articles II and XVII of GATS.

(f) The "Single Pot" Licence Allocation

5.81 Regulation 1637/98 introduced a so-called "single pot" licence allocation system under which reference quantities claimed under the tariff quota of 2,553,000 tonnes are pooled with those claimed under the quantity of 857,700 tonnes reserved for traditional ACP imports. Thus, under the revised regime, a traditional operator may use its reference quantities based on past imports of traditional ACP bananas to apply for licences to import third-country bananas and *vice versa*.

5.82 The United States alleges that this "single pot" solution for calculating reference quantities aggravates the carry-on *de facto* discrimination from the previous regime and further erodes the licence allocations to US service suppliers. Specifically, the United States submits that licence applications by US service suppliers are significantly cut in the quarterly licence allocation procedures due to oversubscription and the application of reduction coefficients with respect to the country allocations for substantial suppliers and the allocation for "other" non-substantial suppliers from which US service suppliers traditionally source their banana imports to the EC. In the US view, these results are due to the "single pot" licence allocation under the revised regime.

5.83 The European Communities contends that, in compliance with the DSB rulings, it has abolished the different licensing procedures of the previous regime for traditional ACP imports, on the one hand, and for third-country and non-traditional ACP imports, on the other. It has introduced a single licensing regime for banana imports from all sources of supply and has created a "single pot" or "pool" for purposes of calculating reference quantities under the revised regime. The European Communities emphasizes that there cannot be a protection of "grandfather" rights as to licence entitlements, especially not in the transition from the previous to the revised regime.

5.84 We note the results of the quarterly two-round licence allocation procedures for the first and the second quarter of 1999. Due to the oversubscription of available licence quantities during the first round of the licence allocation procedures for the first quarter of 1999,[51] reduction coefficients of 0.5793, 0.6740 and 0.7080 were applied to applications for licences for imports from Colombia, Costa Rica and Ecuador, respectively. While licence quantities of 77,536.711 tonnes and 41,473.846 tonnes for imports from Panama and "other" (i.e. non-substantial third-country and non-traditional ACP supplier countries) were transferred to the second round, these quantities were exhausted in the second round, when reduction coefficients of 0.9701 and 0.7198 were applied to applications for licences allowing imports from Panama and "other", respectively.[52] Licence quantities for 148,128.046 tonnes of traditional ACP imports were not applied for in the first round, and apparently also not exhausted

[51] Regulation (EC) No. 2806/98 of 23 December 1998, O.J. L 349/32 of 24 December 1998.
[52] Regulation (EC) No. 102/1999 of 15 January 1999, O.J. L 11/16 of 16 January 1999.

in the second round. In the first round of the allocation procedure for the second quarter of 1999[53], reduction coefficients of 0.5403, 0.6743 and 0.5934 were applied to applications for licences allowing imports from Colombia, Costa Rica and Ecuador, respectively. However, licence quantities for 120,626.234 tonnes and 7,934.461 tonnes of imports from Panama and from other third-country and non-traditional ACP sources, respectively, were transferred to the second round of the allocation procedure for the second quarter of 1999.

5.85 The parties agree that a so-called "single pot" solution is not *de iure* discriminatory. We agree also. The pooling of reference quantities claimed under the tariff quota of 2,553,000 with those under the quantity of 857,700 tonnes reserved for traditional ACP imports in a single licensing regime can be expected to intensify competition between the operators who apply for licences in the quarterly allocation procedures. Given that it is more profitable to market Latin American bananas than ACP bananas, it is evident that profit-maximizing operators have an incentive to apply in the two-round quarterly licence allocation procedures first for low-cost Latin American sources of supply. This obvious effect is confirmed by the fact that in the first two quarterly licence allocation procedures under the revised regime, available licences for most Latin American sources were oversubscribed in the first round (i.e. country-allocations for the substantial suppliers Ecuador, Colombia and Costa Rica), and the remaining licences for imports from Latin America (i.e. Panama and "other" non-substantial suppliers) were exhausted in the second round. However, licence applications for imports within the quantity of 857,700 tonnes reserved for traditional ACP suppliers were generally made in the second round and this quantity was not exhausted.

5.86 We next examine whether the alleged *de facto* discriminatory effects of pooling third-country and traditional ACP licences in a "single pot" derive from the fact that under the revised regime reference quantities are calculated based on the 1994-1996 period when those allocation criteria that were found to be GATS-inconsistent were in force. We recall that the previous regime provided for two separate sets of licensing procedures for traditional ACP imports, on the one hand, and for third-country and non-traditional ACP imports, on the other. Under the latter licensing system, Category B operators, based on reference quantities for marketing traditional ACP or EC bananas, were allocated 30 per cent of the licences required for the importation of third-country and non-traditional ACP bananas reserved for those B operators *in addition* to the right to continue importing traditional ACP bananas. Likewise, ripeners were allocated 28 per cent of the third-country import licences. Under the revised, single licensing regime, there is no comparable reservation of licence quantities for former Category B operators or for ripeners.

5.87 However, to the extent that former Category B operators and ripeners may prove licence usage and payment of customs duties with respect to imports carried out during the 1994-1996 reference period with licences obtained from the GATS-inconsistent quantities reserved for those operators under the previous regime, these operators are able to claim reference quantities under the revised regime for licence allocations from 1999 onwards. Therefore, former Category A service suppliers of US origin who have not benefitted from licence allocations based on GATS-inconsistent criteria under the previous regime enjoy *de facto* less favourable opportunities to obtain access to import licences under the revised regime than those EC/ACP service suppliers who, as former Category B operators or ripeners, may prove payment of customs duties and licence usage for licences obtained on the basis of GATS-inconsistent allocation rules.

5.88 We note that the so-called single pot solution does not in itself raise problems of WTO inconsistency. On the contrary, it would seem at least in theory to provide for equal conditions of competition between wholesale service suppliers, against a background of varying degrees of economic incentive to import bananas from varying sources. However, it may well be that, when a single pot solution relies on a skewed reference period (i.e. 1994-1996), combined with certain criteria

[53] Regulation (EC) No. 608/1999 of 19 March 1999, O.J. L 75/18 of 20 March 1999.

for licence allocation (such as actual importer/payment of customs duties), the *de facto* less favourable conditions of competition for US service suppliers are aggravated through the carry-on effects of the previous regime.

2. The Rules for "Newcomer" Licences

5.89 The United States alleges that (i) the enlargement of the licence quantity reserved for "newcomers" from 3.5 per cent in the previous regime to 8 per cent in the revised regime (i.e. licences for up to 272,856 tonnes of imports) and (ii) the criteria for demonstrating competence in order to acquire "newcomer" status under the revised regime result in *de facto* less favourable treatment for US wholesale service suppliers and thus are inconsistent with the EC's obligations under Article XVII of GATS. According to the United States, for 1999 there were 997 applicants for "newcomer" status, but only 13 of them were non-EC-owned companies.[54]

5.90 The European Communities responds that the enlargement of the licence quantity reserved for "newcomers" is *de iure* and *de facto* non-discriminatory for foreign service suppliers. It indicates that EC licence allocation procedures for other EC products have set aside quantities as high as 20 per cent for "newcomers". As regards the criteria for demonstrating competence in order to acquire "newcomer" status, the European Communities argues that there is no distinction in Regulation 2362/98 between EC and non-EC service suppliers, on the one hand, and between non-EC service suppliers of different origins, on the other hand. It points out that importers of fruits and vegetables established in the European Communities are not necessarily EC-owned or EC-controlled service suppliers, nor does Regulation 2362/98 preclude companies newly established in the European Communities in, e.g. 1998, from applying as a "newcomer". The European Communities also submits that the figure of 400,000 Euro of declared customs value was chosen because it represented the size of a company which would have sufficient capacity to be viable in the sector. It adds that there are third country-owned companies which have qualified as "newcomers" under the revised regime.

5.91 We recall that Article 7 of Regulation 2362/98 provides:

> "…'*newcomers*' shall mean economic agents established in the European Community who, at the time of registration:
>
> (a) have been *engaged independently* and *on their own account* in *the commercial activity of importing fresh fruit and vegetables* falling within chapters 7 and 8, of the Tariff and Statistical Nomenclature and the Common Customs Tariff, or products under Chapter 9 thereof if they have also imported products falling within Chapters 7 and 8 *in one of the three years immediately preceding the year in respect of which registration is sought*; and
>
> (b) by virtue of this activity, have undertaken imports to a *declared customs value of ECU 400 000* or more during the period referred to in point (a)."

5.92 We do not see how the enlargement of the licence quantity to 8 per cent of the tariff quotas and the traditional ACP quantities[55] in itself could create less favourable conditions of competition for service suppliers of third-country origin.

5.93 In respect of the criteria for acquiring "newcomer" status, we note that the parties agree that Article 7 of Regulation 2362/98 does not contain conditions which discriminate *de iure* against

[54] Exhibit 16 to the US First Submission.
[55] Article 2.1(b) of Regulation 2362/98.

service suppliers on the basis of their foreign as opposed to EC origin. However, we note that potential "newcomers" must have a certain degree of ongoing relationship to the European Communities because they need to be established within the European Communities and they must have been engaged in the commercial activity of importing fruits or vegetables in one of the three years immediately preceding the year for which registration as "newcomer" is sought. More importantly, service suppliers of other Members may prove expertise with respect to the commercial activity of importing fresh fruit and vegetables only through imports carried out to the European Communities but not through the same type of commercial activity of trading in fruits or vegetables with other countries. If it is indeed the level of experience that this criterion is designed to ensure, in our view, experience with trade in fruits or vegetables in or to other countries should equally be deemed sufficient to ensure a requisite level of expertise. If it is the commercial viability of the enterprise in question that is at issue, we believe that it should also be possible to establish that viability on the basis of commercial activity outside the European Communities.

5.94 Thus, while any potential service supplier originating in third countries is not *de iure* precluded from acquiring "newcomer" status, in our view, the criteria for demonstrating the requisite expertise in order to qualify as an importer of bananas as "newcomer" create in their overall impact less favourable conditions of competition for service suppliers of the United States or other Members than for like service suppliers of EC origin. In this respect, we recall the Appellate Body's statement in *Japan - Alcoholic Beverages*[56] that a measure's "protective application can most often be discerned from the design, the architecture and the revealing structure of a measure".

5.95 In light of these considerations, we are of the view that the criteria for acquiring "newcomer" status under the revised licensing procedures accord to service suppliers of the United States *de facto* less favourable conditions of competition in the meaning of Article XVII than to like EC service suppliers.

3. Summary

5.96 In respect of Article XIII of GATT, in our view the 857,700 tonne limit on traditional ACP imports is a tariff quota and therefore Article XIII applies to it. Further, the reservation of the quantity of 857,700 tonnes for traditional ACP imports under the revised regime is inconsistent with paragraphs 1 and 2 of Article XIII of GATT.

5.97 In respect of GATS, we are of the view that (i) under the revised regime US suppliers of wholesale services are accorded *de facto* less favourable treatment in respect of licence allocation than EC/ACP suppliers of those services in violation of Articles II and XVII of GATS and (ii) the criteria for acquiring "newcomer" status under the revised licensing procedures accord to service suppliers of the United States *de facto* less favourable conditions of competition than to like EC service suppliers in violation of Article XVII of GATS.

5.98 Thus, it is our view that there is a continuation of nullification or impairment of US benefits under the revised EC regime.

[56] Appellate Body report on *Japan - Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted on 1 November 1996, page 29.

VI. PARAMETERS FOR THE CALCULATION OF THE LEVEL OF NULLIFICATION OR IMPAIRMENT

6.1 In its initial submission, the United States recalls that Article XXIII of GATT 1994 provides for a level of suspension that is "appropriate in the circumstances". It also argues that the evaluation of equivalence should be reasonable and take into account that suspension is an incentive for prompt compliance, that precision in measuring trade damage is not required and that both direct and indirect trade damage should be taken into account.

6.2 In this section we address from a general perspective the parameters and criteria that, in our view, should apply when matching the level of the suspension of concessions to be authorized by the DSB with the level of nullification or impairment resulting from WTO-inconsistent measures.

A. GENERAL CONSIDERATIONS

6.3 In this regard, we first recall the overall objective of compensation or the suspension of concessions or other obligations as described in Article 22.1:

> "Compensation and the suspension of concession or other obligations are temporary measures available in the event that the recommendations or rulings are not implemented within a reasonable period of time. However, neither compensation nor the suspension of concessions or other obligations is preferred to full implementation of a recommendation to bring a measure into conformity with the covered agreements. Compensation is voluntary and, if granted, shall be consistent with the covered agreements."

Accordingly, the authorization to suspend concessions or other obligations is a temporary measure pending full implementation by the Member concerned. We agree with the United States that this *temporary* nature indicates that it is the purpose of countermeasures to *induce compliance*. But this purpose does not mean that the DSB should grant authorization to suspend concessions beyond what is *equivalent* to the level of nullification or impairment. In our view, there is nothing in Article 22.1 of the DSU, let alone in paragraphs 4 and 7 of Article 22, that could be read as a justification for counter-measures of a *punitive* nature.

6.4 We are mindful of the fact that the working party on *Netherlands Action under Article XXIII:2 to Suspend Obligations to the United States*[57] considered whether the proposed action was "*appropriate*" and that the Working Party only had "*regard"* to the *equivalence* of the impairment suffered:

> "2. The Working Party was instructed by the CONTRACTING PARTIES to investigate the *appropriateness of the measure* which the Netherlands Government proposed to take, having regard to the *equivalence to the impairment* suffered by the Netherlands as a result of the United States restrictions.
>
> 3. The Working Party felt that the appropriateness of the measure envisaged by the Netherlands Government should be considered from two points of view: in the first place, whether in the circumstances, the measure proposed was *appropriate* in character, and secondly, whether the extent of the quantitative restriction proposed by the Netherlands Government was *reasonable*, having regard to the impairment suffered." (emphasis added).

[57] Report of the working party on *Netherlands Action under Article XXIII:2 to Suspend Obligations to the United States*, adopted on 8 November 1952, BISD 1S/62.

In our view, in light of the explicit reference in paragraphs 4 and 7 of Article 22 of the DSU to the need to ensure the *equivalence* between the level of proposed suspension and the level of the nullification or impairment suffered, the standard of *appropriateness* applied by the 1952 working party has lost its significance as a benchmark for the authorization of the suspension of concessions under the DSU.

6.5 However, we note that the ordinary meaning of "*appropriate"*, connoting "specially suitable, proper, fitting, attached or belonging to"[58], suggests a certain degree of relation between the level of the proposed suspension and the level of nullification or impairment, where as we stated above, the ordinary meaning of *"equivalent"* implies a higher degree of correspondence, identity or stricter balance between the level of the proposed suspension and the level of nullification or impairment. Therefore, we conclude that the benchmark of *equivalence* reflects a stricter standard of review for Arbitrators acting pursuant to Article 22.7 of the WTO's DSU than the degree of scrutiny that the standard of *appropriateness*, as applied under the GATT of 1947 would have suggested.

B. THE ISSUE OF "INDIRECT" BENEFITS

6.6 The next question we address is the notion of *direct or indirect benefits* accruing under the agreements covered by the WTO whose nullification or impairment may give rise to an entitlement to obtain compensation or the authorization to suspend concessions or other obligations. This is of particular relevance in this case as the United States argues, *inter alia*, that US exports to Latin America (e.g. fertilizers) used in the production of bananas that would be exported to the European Communities under a WTO-consistent regime should be counted in setting the level of suspension.

6.7 The relevant part of Article XXIII:1 of GATT 1994 reads:

> "If a Member should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired …" (emphasis added).

While Article XXIII:1 of GATS does not contain analogous language, Article 3.3 of the DSU provides:

> "The prompt settlement of situations in which *a Member considers that any benefit accruing to it directly or indirectly under the covered agreements are being impaired* by measures taken by another Member is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members." (emphasis added).

6.8 We note that, *inter alia*, from the wording of Article XXIII:1 of GATT and Article 3.3 of the DSU, the United States assumes that any nullification or impairment of any benefit that it considers to directly or indirectly accrue to it under the GATT or the GATS may be taken into account in calculating the level of nullification or impairment for purposes of paragraphs 6 and 7 of Article 22 of the DSU. The European Communities contends that especially with respect to trade in goods the nullification or impairment suffered by the United States can only be negligible or *nil* since there is no *actual* trade and little prospect for *potential* trade in bananas between the United States and the European Communities. The United States substantiates its reasoning at least in part with our findings in the original dispute concerning the question whether the United States had a "legal interest" to launch a complaint against the EC's previous regime based on the EC's obligations under the GATT. Therefore, we first recall our findings on this issue and then discuss what inferences may be drawn therefrom for the notion of *direct or indirect benefits* accruing under the GATT and the GATS.

[58] The New Shorter Oxford English Dictionary on Historic Principles (1993), page 103.

6.9 In the original panel proceeding we held "that under the DSU the United States has a right to advance the claims that it had raised in this case." [59] We recall the EC's argument in the original dispute that if a Member not suffering nullification or impairment of WTO benefits in respect of bananas were allowed to raise a claim under the GATT, that Member would not have an effective remedy under Article 22 of the DSU.[60] We also note the complainants' argument[61] in the original dispute that Article 3.8 of the DSU presupposes a finding of infringement prior to a consideration of the nullification or impairment issue, suggesting that even if no compensation were due, an infringement finding could be made. We agree. Article XXIII:1 of GATT 1994 and Article 3.3 of the DSU do not establish a procedural requirement. These provisions concern the initiation of a WTO dispute settlement proceeding where a Member considers benefits directly or indirectly accruing to it have been nullified or impaired. Such an initial decision on whether or not to raise a complaint is necessarily the result of a subjective and strategic consideration from the individual perspective of a Member. However, a decision on whether the assertion of nullification or impairment by an individual Member was warranted and justified in light of WTO law is a different decision, taken by a panel or the Appellate Body from the objective benchmark of the agreements covered by the WTO.

6.10 The *presumption* of nullification or impairment in the case of an infringement of a GATT provision as set forth by Article 3.8 of the DSU cannot in and of itself be taken simultaneously as *evidence* proving a particular level of nullification or impairment allegedly suffered by a Member requesting authorization to suspend concessions under Article 22 of the DSU at a much later stage of the WTO dispute settlement system. The review of the level of nullification or impairment by Arbitrators from the objective benchmark foreseen by Article 22 of the DSU, is a separate process that is independent from the finding of infringements of WTO rules by a panel or the Appellate Body. As a result, a Member's potential interests in trade in goods or services and its interest in a determination of rights and obligations under the WTO Agreements are each sufficient to establish a right to pursue a WTO dispute settlement proceeding. However, a Member's legal interest in compliance by other Members does not, in our view, automatically imply that it is entitled to obtain authorization to suspend concessions under Article 22 of the DSU.

6.11 Over the last decades of GATT dispute settlement practice, it has become a truism of GATT law that lack of *actual* trade cannot be determinative for a finding that no violation of a provision occurred because it cannot be excluded that the absence of trade is the result of an illegal measure. As discussed by the original panel reports[62], in past dispute settlement practice the non-discrimination provisions have been interpreted to protect "competitive opportunities"[63] or the "effective equality of opportunities"[64] for foreign products which may be undermined by "any laws or regulations which might adversely modify the conditions of competition between domestic and imported products".[65] All these past panel reports concerned the alleged nullification or impairment of potential trade opportunities under the national treatment clause. Also the *US - Superfund* case[66], from which the wording of Article 3.8 of the DSU establishing the presumption of nullification or impairment in case of an infringement of GATT is drawn, concerned the alleged violation of Article III of GATT. Therefore, the notion underlying the protection of *potential* trade opportunities is *potential* trade

[59] Panel reports on *Bananas III*, paragraph 7.52.
[60] Panel reports on *Bananas III*, paragraph 7.47.
[61] Panel reports on *Bananas III*, paragraph 7.48.
[62] Panel reports on *Bananas III*, paragraph 7.50.
[63] Report of the working party on *Brazilian Internal Taxes*, adopted on 30 June 1949, BISD II/181, 185, paragraph 16.
[64] Panel report on *United States - Section 337 of the Tariff Act of 1930*, adopted on 7 November 1989, BISD 36S/345, 386-387, paragraph 5.11.
[65] Panel report on *Italian Discrimination Against Imported Agricultural Machinery*, adopted on 23 October 1958, BISD 7S/60, 64, paragraph 12.
[66] Panel report on *United States - Taxes on Petroleum and Certain Imported Substances*, adopted on 17 June 1987, BISD 34S/136, 158, paragraph 5.1.9.

between the complaining and the respondent party. Likewise, in the case of an alleged violation of the MFN treatment clause, a dispute would involve trade between the complaining party or a third country, on the one hand, and the respondent party, on the other.

6.12 We are of the view that the benchmark for the calculation of nullification or impairment of US trade flows should be losses in US exports of goods to the European Communities and losses by US service suppliers in services supply in or to the European Communities. However, we are of the opinion that losses of US exports in goods or services *between the US and third countries* do not constitute nullification or impairment of even *indirect* benefits accruing to the United States under the GATT or the GATS for which the European Communities could face suspension of concessions. To the extent the US assessment of nullification or impairment includes *lost US exports* defined as *US content incorporated in Latin American bananas* (e.g. US fertilizer, pesticides and machinery shipped to Latin America and US capital or management services used in banana cultivation), we do not consider such lost US exports for calculating nullification or impairment in the present arbitration proceeding between the European Communities and the United States.

6.13 As for goods used as inputs, this conclusion is also consistent with the rules of origin for goods. The WTO Agreement on Rules of Origin contains some disciplines, but otherwise leaves discretion to WTO Members to devise rules for the determination of the country of origin of goods during a transitional period until the work programme for the harmonization of non-preferential rules of origin is completed. WTO Members typically determine the origin of agricultural products based on the place of production. In principle, every banana has the origin of the country where it was grown. For purposes of WTO rules it is irrelevant whether goods or services (e.g. fertilizer, machinery, pesticides, capital and management services) used as intermediate inputs in the cultivation of bananas and their delivery up to the f.o.b. stage are of US origin even if US content should amount to a significant part of the end-product's value. Also under US rules of origin bananas grown in Puerto Rico or Hawaii are US products regardless of the percentage of foreign input incorporated in them or used for their cultivation. Our conclusion also reflects the fact that the requirements of Articles I and XIII of GATT are tied to the origin of goods.

6.14 It would be wrong to assume that there is no further recourse within the framework of the WTO dispute settlement system to claim compensation or to request authorization to suspend concessions equivalent to the level of the nullification or impairment caused with respect to bananas of Latin American origin, including incorporated inputs of whatever kind or origin. A right to seek redress for that amount of nullification or impairment does exist under the DSU for the WTO Members which are the countries of origin for these bananas, but not for the United States. In fact, a number of these WTO Members have been in the recent past, or are currently, in the process of exercising their rights under the DSU. Moreover, our concern with the protection of rights of other WTO Members is in conformity with public international law principles of sovereign equality of states and the non-interference with the rights of other states. Consequently, there is no right and no need under the DSU for one WTO Member to claim compensation or request authorization to suspend concessions for the nullification or impairment suffered by another WTO Member with respect to goods bearing the latter's origin or service suppliers owned or controlled by it.

6.15 Moreover, if *overlapping* claims by different WTO Members as to nullification or impairment suffered because of the same lost trade in goods (and goods and service inputs used in their production or incorporated therein) or the same lost trade in services were permissible under the DSU, the problem of "*double-counting*" of nullification or impairment would arise. Due to the difference in origin of goods or services used as *inputs* in the banana production, on the one hand, and the origin of the bananas as *end-products*, on the other, *cumulative* requests for compensation or suspension of concessions could be made for the *same* amount of nullification or impairment caused by a Member.

6.16 If we were to allow for such "*double-counting*" of the same nullification or impairment in arbitration proceedings under Article 22.6 of the DSU with different WTO Members, incompatibilities with the standard of "*equivalence*" as embodied in paragraphs 4 and 7 of Article 22 of the DSU could arise. Given that the *same* amount of nullification or impairment inflicted on *one* Member cannot simultaneously be inflicted on *another*, the authorizations to suspend concessions granted by the DSB to different WTO Members could exceed the overall amount of nullification or impairment caused by the Member that has failed to bring a WTO-inconsistent measure into compliance with WTO law. Moreover, such *cumulative* compensation or *cumulative* suspension of concessions by different WTO Members for the *same* amount of nullification or impairment would run counter to the general international law principle of proportionality of countermeasures.[67]

6.17 In view of the fact that initially five WTO Members participated in the original *Bananas III* dispute, the problem of "*double-counting*" nullification or impairment is more than a theoretical possibility. Despite the ambiguity in the wording of Article 22.6 of the DSU, we as Arbitrators in this arbitration proceeding involving only the United States do not exclude the possibility that other original complainants may request authorization from the DSB to suspend concessions towards the European Communities at a later point in time (assuming that the revised regime should prove to be WTO-inconsistent). Therefore, in addition to the need to preserve the rights of other WTO Members under Article 22.6 of the DSU, we also believe that the calculation of the level of nullification or impairment suffered by other original complainants in the *Bananas III* dispute is not within our terms of reference in this arbitration proceeding between the European Communities and the United States only.

6.18 We consider that not only goods or service inputs in banana cultivation but also services that add value to bananas after harvesting up to the f.o.b. stage should be excluded from the calculation of nullification or impairment that the United States is entitled to claim in the present arbitration proceeding. We realize that the use of this f.o.b. cut-off point as well as of origin rules is somewhat arbitrary. The globalization of the world economy means that products increasingly "incorporate" as intermediate inputs many goods and services of different origins. While it may be necessary to develop more sophisticated rules in this regard in the future, we believe that the line we have drawn is appropriate in this particular case, which involves the suspension of concessions. We imply no limitations on the extent of WTO obligations for this or other cases by this decision.

6.19 In response to the foregoing section B, which was contained in our Initial Decision, the United States argues that the export of packaging materials should be treated differently because such materials are not an input to banana production *per se*. However, in our view, to the extent that the packaging is part of the value of the exported bananas as of the f.o.b. stage, the reasoning set out above clearly applies.

C. SERVICES CALCULATION ISSUES[68]

6.20 The European Communities raises one preliminary issue in respect of the scope of service transactions that may be included in the calculation of nullification or impairment in light of the reach of the specific commitments bound in the EC's GATS Schedule. It contends that the revision of the UN Central Product Classification system affects the interpretation of the scope of its market access and national treatment commitments on "wholesale trade services" which the European Communities

[67] Draft Articles on State Responsibility with Commentaries Thereto Adopted by the International Law Commission on First Reading, January 1997, Article 49 on Proportionality: "Countermeasures taken by an injured State shall not be out of proportion to the degree of gravity of the international wrongful act and the effects thereof on the injured State." See also: I. Brownlie, International Law and the Use of Force by States, Oxford (1983), page 219; H. Kelsen, Principles of International Law, New York (1966), page 21.

[68] This is a modified version of the Initial Decision, reaching the same result.

has bound in its GATS Schedule. The European Communities submits that the Provisional CPC has been replaced in the meantime by the Central Product Classification (CPC) - Version 1.0 ("Revised CPC"), and that the Revised CPC seeks to create a system of service categories that are both exhaustive and mutually exclusive. Therefore, in the EC's view, any services related to wholesale trade transactions which at the same time fall into another CPC category should be assessed on the basis of this new reality, i.e. should not be considered to be covered by the EC's commitments on "wholesale trade services".[69] The European Communities adds that the specific commitments bound in its GATS Schedule are still valid.

6.21 The United States contends that the scope of the EC's specific commitments under the GATS, which were bound in the EC GATS Schedule, cannot be affected by the subsequent modification of the Central Product Classification by the UN. Consequently, it is still the Provisional CPC that matters for purposes of interpreting the scope of the EC's commitments on "wholesale trade services".

6.22 We note that the specific commitments bound by the European Communities in its GATS Schedule with respect to the service sectors[70] or sub-sectors at issue in the original case were categorized according to the Services Sectoral Classification List which refers to the more detailed Provisional CPC. We also recall that in *Bananas III*, the parties disagreed as to whether the panel's terms of reference comprised the narrower sub-sector of "wholesale trade services", or encompass the broader sector of "distributive trade services" as described in a headnote to section 6 of the provisional CPC. The relevant definition of the Provisional CPC for "*wholesale trade services*" reads:

> "Specialized wholesale services of fresh, dried, frozen or canned fruits and vegetables (Goods classified in CPC 012,013,213, 215)"

The description for "*distributive trade services*", in turn, provides:

> "Distributive trade services consisting in selling merchandise to retailers, to industrial, commercial, institutional or other professional business users, or to other wholesalers, or acting as agent or broker (wholesaling services) or selling merchandise for personal or household consumption including services incidental to the sale of the goods (retailing services). The principal services rendered by wholesalers and retailers may be characterized as reselling merchandise, accompanied by a variety of related, subordinated services, such as: maintaining inventories of goods, physically assembling, sorting and grading goods in large lots; breaking bulk and redistribution in smaller lots; delivery services; refrigeration services; sales promotion services rendered by wholesalers …"

6.23 We recall that with respect to both wholesale and distributive trade services, the European Communities had bound specific commitments on liberalization of market access and national treatment without specific conditions or limitations, and without scheduling any MFN exemptions. The original panel limited its findings to the narrower sub-sector of "wholesale trade services".

6.24 It is not entirely clear to us in which way, in the EC's view, the new categorization of service sectors according to the Revised CPC should affect the classification of service sectors on the basis of

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[69] The European Communities notes that, according to the "Correspondence Tables between the CPC Version 1.0 and Provisional CPC", item 62221 "Wholesale trade services of fruit and vegetables" corresponds in the CPC Version 1.0 to 61121 "Wholesale trade services, except on a fee and contract basis, fruit and vegetables."

[70] Article XXVIII (e) of GATS: "'sector' of a service means,

(i) with reference to a specific commitment, one or more, or all, subsectors of that service, as specified in a Member's Schedule,

(ii) otherwise, the whole of that service sector, including all of its subsectors;".

which the European Communities bound its specific commitments on market access and national treatment in its GATS Schedule. Therefore, it is not clear how the principle of the mutually exclusive categorization of service sectors could affect the reach of the EC's "wholesale trade services" commitments to those service transactions that do not fall into any other category of the Revised CPC. In any event, we do not see how the revision of the CPC could retroactively change the specific commitments listed and bound in the EC GATS Schedule on the basis of the Provisional CPC. Indeed, at the hearing, the European Communities stated that such a change in the EC's specific commitments bound in its GATS Schedule could only be made consistently with the requirements of Article XXI of GATS on the "Modification of Schedules".

6.25 In our view, what matters for purposes of the calculation of nullification or impairment under the GATS, in light of the EC's commitments on "wholesale trade services", is that, according to the UN CPC descriptions quoted above, the *principal* services rendered by *wholesalers* relate to reselling merchandise, accompanied by a variety of related, *subordinated* services, such as, maintaining inventories of goods; physically assembling, sorting and grading goods in large lots; breaking bulk and redistribution in smaller lots; delivery services; refrigeration services; sales promotion services. We consider that this rather broad variety of *principal* and *subordinated* services should constitute the benchmark against which the United States could possibly claim nullification or impairment for losses in its actual or potential trade with the European Communities.

6.26 We would also emphasize that, according to Article XXVIII(b) of the GATS, the "supply of a service" (e.g. wholesaling) includes "the production, distribution, marketing, sale and delivery of a service". We also recall that, pursuant to Articles XXVIII(d,f,g,l,m,n) of the GATS, the origin of a service supplier is defined on the basis of its ownership and control. Therefore, for the calculation of nullification or impairment by reference to losses of actual or potential service supply, it does not matter whether the lost services relate to trade in bananas from the United States, or from third countries, to the European Communities, or to bananas wholesaled within the European Communities, provided that the service suppliers harmed are commercially present in the European Communities and US-owned or US-controlled. These considerations are subject to our conclusion above that it is the right of those WTO Members which are the countries of origin of bananas to claim nullification or impairment for actual or potential losses in the supply of service transactions that add value to bananas up to the f.o.b. stage, and that such claims cannot be made by the United States under Article 22.6 of the DSU.

D. COMPANY-SPECIFIC EFFECTS VS. OVERALL EFFECT ON THE US

6.27 We note that the initial US request for the authorization to suspend concessions or other obligations involved only losses incurred by one US company. In order to calculate the level of nullification and impairment for the United States, it is our view that it is necessary to calculate the aggregate net effects on all US suppliers of wholesale services to bananas wholesaled in the European Communities.

VII. CALCULATIONS OF THE LEVELS

7.1 To estimate the level of nullification or impairment, the same basis needs to be used for measuring the level of suspension of concessions. Since the latter is the gross value of US imports from the European Communities, the comparable basis for estimating nullification and impairment in our view is the impact on the value of relevant EC imports from the United States (rather than US firms' costs and profits, as used in the US submission). More specifically, we compare the value of relevant EC imports from the United States under the present banana import regime (the actual situation) with their value under a WTO-consistent regime (a "counterfactual" situation).

7.2 In its initial submission, the United States based its proposed level of suspension of concessions on a "base" counterfactual that assumed that the European Communities would maintain a quota of 857,700 tonnes for traditional ACP imports and would expand the tariff quota for third-country and non-traditional ACP imports to 3.7 million tonnes, which the United States argues would be required in order to make the 857,700 tonne quota WTO-consistent. The United States also submitted four other counterfactuals, including one based on no increase in the overall tariff quota.

7.3 In response, the European Communities criticized some of the specific assumptions used in the US base counterfactual. It also argued that there were many possible WTO-consistent counterfactuals under which there would be varying effects on US suppliers. Two examples cited were a tariff-only regime and the current tariff quota regime with a first-come, first-served licensing system.

7.4 In our Initial Decision, we requested the United States to provide us with new calculations with respect to the following four "counterfactuals" to the actual EC revised regime:

> (1) a tariff-only regime, without tariff quotas, but including an ACP tariff preference (with effects calculated for a range of tariff rates from 75 Euro per tonne to the out-of-quota bound rate);
>
> (2) a tariff-quota system with licence allocations based on the first-come, first-served method;
>
> (3) the complete allocation of a tariff-quota system (with traditional ACP quotas reduced to actual past trade performance) with country-specific allocations to all substantial and non-substantial ACP and non-ACP suppliers; and
>
> (4) the base US counterfactual, which, as noted above, assumed a continuation of a 857,700 tonne quantity for ACP imports and an expansion of the MFN tariff quota to 3.7 million tonnes.

7.5 In its response, the United States did so and came up with a range of levels as follows (excluding packaging):

(1)	Tariff-only regime at 75 Euro per tonne:	US$326.9 million;
(2)	First-come, first-served licensing system:	US$619.8 million;
(3)	Fully allocated tariff quota:	US$558.6 million; and
(4)	Base US counterfactual:	US$362.4 million.

7.6 In commenting in general on the four counterfactuals, the European Communities notes that in a tariff-only regime, the profits of US suppliers would be lower than at present because of the absence of quota rents. Moreover, according to the European Communities, the market share of those suppliers would not likely change as they would be competing with each other and other non-US suppliers as they do at present. As to a first-come, first-served licence regime, the European Communities notes that prices and volumes would stay the same and only the licence allocations would change. The European Communities asserts that given the large number of traditional importers who would be eligible to apply for licences, the share of licences held by US suppliers would drop and they would obtain less quota rent (and have lower profits) than at present. In the case of the third counterfactual – complete allocation of the tariff quota – the European Communities argues that it is likely that supplies and prices would remain the same, with US suppliers having profits comparable to the present regime. Finally, as to the base US counterfactual, the European Communities argues that the expansion of the tariff quota in the amount suggested by the United States would be sufficiently large so that the result in economic terms would be equivalent to a tariff-only regime (i.e. the first counterfactual). In short, the European Communities believes none of these counterfactuals would involve higher profits for US suppliers than the current revised regime. As already noted above, however, in our view the relevant effect is not on US suppliers' profits but rather on the value of relevant imports from the United States.

7.7 There are various counterfactual regimes that would be WTO-consistent. We have evaluated the various counterfactuals and we have decided to choose, as a reasonable counterfactual, 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 (with the ACP tariff preference being covered as now by a waiver). 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 licenses would be allocated differently in order to remedy the GATS violations.

7.8 We calculated the effect on relevant US 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 *ceteris paribus*. 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 US and other service suppliers. Hence with this particular methodology and counterfactual we do not need to make assumptions about the volume responsiveness of producers, consumers and importers to EC domestic price differences, since there are none. Rather, the task is reduced to working out the differences between the two scenarios in (a) the US share of wholesale trade services in bananas sold in the European Communities and (b) the US share of allocated banana import licences from which quota rents accrue. Using the various data provided on US market shares, and our knowledge of the current quota allocation and what we estimate it would be under the WTO-consistent counterfactual chosen by us, we determine that the level of nullification and impairment is US$191.4 million per year.

VIII. AWARD AND DECISION OF THE ARBITRATORS

8.1 In light of the foregoing considerations, the Arbitrators determine that the level of nullification or impairment suffered by the United States in the matter *European Communities – Regime for the Importation, Sale and Distribution of Bananas* is US$191.4 million per year. Accordingly, the Arbitrators decide that the suspension by the United States of the application to the European Communities and its member States of tariff concessions and related obligations under GATT 1994 covering trade in a maximum amount of US$191.4 million per year would be consistent with Article 22.4 of the DSU.

IX. CONCLUDING REMARKS

9.1 As suggested by the Chairman of the DSB as quoted above (paragraph 4.9), we have found a logical way forward to consider the issues raised in this Arbitration, as well as in the Article 21.5 Panel proceedings. Our findings in all three proceedings are consistent. It is not known whether the Appellate Body will accept jurisdiction of an appeal in an Article 21.5 proceeding. If it does so, the above level of suspension of concessions may need to be modified following adoption of the Appellate Body report. In such a case we would be able, if requested, to advise the parties of our view of the effect of that report on the level of suspension of concessions.

9.2 Finally, we emphasize that Article 22.8 of the DSU provides that:

> "[t]he 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 …".

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