

circumstances are "serious enough" within the meaning of Article 22.3(c) of the DSU.⁷¹¹ Therefore, the United States requested authorization to impose countermeasures consisting of one or more of the following:

- a. suspension of tariff concessions and related obligations (including most-favoured-nation obligations) under the GATT 1994 on a list of products of the European Union and certain member States to be drawn from the United States' Harmonized Tariff Schedule; and
- b. suspension of horizontal or sectoral commitments and obligations contained in the United States' Schedule of Specific Commitments with regard to all services defined in the Services Sectoral Classification List, except for financial services (sector 7).⁷¹²

7.2. As also noted, in having recourse to arbitration under Article 22.6, the European Union claimed that the United States did not follow the principles and procedures set forth in Article 22.3 in considering what countermeasures to take.⁷¹³

7.3. The European Union thus reserved the right to raise a claim before the Arbitrator that the United States had not followed the principles and procedures set forth in Article 22.3. As explained, it is for the European Union to make out a *prima facie* case that the United States did not follow the principles and procedures in Article 22.3.⁷¹⁴

7.4. However, the European Union did not put forward any claim under Article 22.3 in its written submission or oral statement. The only reference to Article 22.3 by the European Union is contained in the "procedural history" section of its written submission where it recalls that it had "claimed that the principles and procedures set forth in Article 22.3 of the DSU had not been followed" when it had recourse to Article 22.6 at the DSB meeting on 22 December 2011.⁷¹⁵

7.5. Since the European Union did not pursue its claim before the Arbitrator, we cannot examine this issue further in the present Decision. We note that in WTO dispute settlement practice, a Member's measure is treated as WTO-consistent until it has been proven otherwise.⁷¹⁶ We consider that, likewise, a complaining party's request under Article 22.3(c) must be treated as DSU-consistent until proven otherwise. Consequently, in the circumstances of the present arbitration, it must be presumed that the United States' request for cross-retaliation is not inconsistent with Article 22.3(c) of the DSU.

8 THE EUROPEAN UNION'S CLAIM THAT THE PROPOSED COUNTERMEASURES ARE NOT ALLOWED UNDER THE COVERED AGREEMENTS

8.1. As noted in section 1.2, in having recourse to arbitration under Article 22.6 of the DSU, the European Union also claimed that the United States' proposal is not allowed under the covered agreements.⁷¹⁷ We note in this respect that Article 22.5 of the DSU provides that "[t]he DSB shall not authorize suspension of concessions or other obligations if a covered agreement prohibits suspensions" and recall that in accordance with Article 22.7 of the DSU "[t]he arbitrator may ...

⁷¹¹ Article 22.3(c) provides that:

In considering what concessions or other obligations to suspend, the complaining party shall apply the following principles and procedures:

...

(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.

⁷¹² Recourse to Article 7.9 of the SCM Agreement and Article 22.2 of the DSU by the United States, WT/DS316/18.

⁷¹³ DSB, Minutes of the meeting held on 22 December 2011, WT/DSB/M/309, para. 4.

⁷¹⁴ Decisions by the Arbitrators, *US – Upland Cotton (Article 22.6 – US II)*, para. 5.55; *US – Gambling (Article 22.6 – US)*, para. 2.27; and *EC – Bananas III (Ecuador) (Article 22.6 – EC)*, para. 59.

⁷¹⁵ European Union's written submission, para. 17.

⁷¹⁶ Appellate Body Report, *US – Carbon Steel*, para. 157.

⁷¹⁷ DSB, Minutes of the meeting held on 22 December 2011, WT/DSB/M/309, para. 4.

determine if the proposed suspension of concessions or other obligations is allowed under the covered agreement".

8.2. Thus, the European Union reserved the right to raise a claim before the Arbitrator that the United States' proposal is not allowed under the covered agreements. The onus is on the European Union to make a *prima facie* case in this regard.

8.3. However, the European Union did not put forward any such claim in either its written submission or its oral statement. Since the European Union did not pursue its claim before the Arbitrator, we do not examine this issue further in the present Decision. As no inconsistency has been proven, for purposes of the present proceeding it is to be presumed that the covered agreements at issue, i.e. the GATT 1994 and the GATS, do not prohibit the suspension contemplated by the United States' request for authorization to impose countermeasures (i.e. the suspension of United States' tariff concessions and related obligations under the GATT 1994 on a list of products of the European Union and certain member States, or the suspension of horizontal or sectoral commitments and obligations contained in the United States' GATS schedule with regard to all services defined in the Services Sectoral Classification List, except for financial services).⁷¹⁸

9 CONCLUSIONS

9.1. For the reasons set out above, the Arbitrator concludes as follows:

- a. with reference to Articles 7.10 of the SCM Agreement and 22.6 of the DSU, the level of countermeasures "commensurate with the degree and nature of the adverse effects determined to exist" during the 2011-2013 Reference Period amounts to USD 7,496.623 million per annum;
- b. with reference to Article 22.3 of the DSU, the European Union has not demonstrated that the United States failed to follow the principles and procedures set forth in Article 22.3 of the DSU in determining that it is not practicable or effective to suspend concessions or other obligations in trade in goods and that the circumstances are serious enough; and
- c. with reference to Article 22.5 of the DSU, the European Union has not demonstrated that the countermeasures proposed by the United States are not allowed under the covered agreements at issue, i.e. the GATT 1994 and the GATS.

9.2. The United States may therefore request authorization from the DSB to take countermeasures with respect to the European Union and certain member States, as indicated in document WT/DS316/18, at a level not exceeding, in total, USD 7,496.623 million annually. These countermeasures may take the form of (a) suspension of tariff concessions and related obligations under the GATT 1994, and/or (b) suspension of horizontal or sectoral commitments and obligations contained in the United States' services schedule with regard to all services defined in the Services Sectoral Classification List, except for financial services.

⁷¹⁸ Recourse to Article 7.9 of the SCM Agreement and Article 22.2 of the DSU by the United States, WT/DS316/18.