EUROPEAN UNION – MEASURES AFFECTING TARIFF CONCESSIONS

ON CERTAIN POULTRY MEAT PRODUCTS

(DS492)

RESPONSES OF THE UNITED STATES OF AMERICA TO THE PANEL'S QUESTIONS FOR THE THIRD PARTIES

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TABLE OF REPORTS

SHORT TITLE	FULL CITATION
EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US) (AB)	Appellate Body Reports, *European Communities – Regime for the Importation, Sale and Distribution of Bananas* – Second Recourse to Article 21.5 of the DSU by Ecuador, WT/DS27/AB/RW2/ECU, adopted 11 December 2008, and Corr.1 / European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 of the DSU by the United States, WT/DS27/AB/RW/USA and Corr.1, adopted 22 December 2008
EC – Bananas (Panel)	Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas,* Complaint by the United States, WT/DS27/R/USA, adopted 25 September 1997, as modified by Appellate Body Report WT/DS27/AB/R.

QUESTIONS FROM THE PANEL

1 GENERAL ISSUES

1. ***<u>To all third parties</u>: Please provide your views on the legal status of (i) the 10 percent market share rule that has been applied to determine "substantial supplying interest" status in the context of Article XXVIII:1, (ii) the Procedures for Negotiations under Article XXVIII, and (iii) the Procedures for Modification and Rectification of Schedules of Tariff Concessions. Do any or all of these constitute:***

(a) "other decisions of the CONTRACTING PARTIES to the GATT 1947" within the meaning of paragraph 1(b)(iv) of the GATT 1994;

(b) "decisions, procedures [or] customary practices" within the meaning of Article XVI:1 of the WTO Agreement; or

(c) a "subsequent agreement" or "subsequent practice" within the meaning of Article 31(3)(a) or (b) of the Vienna Convention on the Law of Treaties?

1. In relation to the Panel's question on the "10 percent market share rule", the Procedures for Negotiations under Article XXVIII, and the Procedures for Modification and Rectification under Article XXVIII, the United States begins with comments applicable to all three items.

2. As elaborated in the U.S. third-party oral statement, the United States does not view the interpretation of Article XXVIII and, therefore, the status of these three items for purposes of interpreting and applying Article XXVIII as an issue for the Panel to resolve.[1]

3. China has not established or even alleged that it was "determined by the CONTRACTING PARTIES" (to be understood as a reference to Ministerial Conference or General Council, or as delegated) to have a principal supplying interest or a substantial interest in any such concession. If China were dissatisfied with the EU's non-recognition of its status under Article XXVIII, its proper recourse was to the Ministerial Conference or the General Council. It would not be for the Panel to determine whether those bodies had failed to make the proper

[1] U.S. Third-Party Oral Statement, paras. 8-12; *see* GATT 1994 Article XXVIII:1 (establishing that a Member proposing to modify or withdraw a concession may do so "by negotiation and agreement" with any Member having an initial negotiating right "and with any other [Member] *determined by the CONTRACTING PARTIES* to have a principal supplying interest" and "subject to consultation with any other [Member] *determined by the CONTRACTING PARTIES* to have a substantial interest in such concession") (italics added).

determination,[2] even aside from the fact that China has not even asked those bodies to make such a determination.

4. Although not necessary for the Panel to resolve this claim by China, in case of use for the Panel's understanding, the United States presents briefly its views on the three items identified.

(i) The 10 percent market share rule

5. While Members have used "a 10 percent rule" for purposes of determining "substantial interest" in the context of Article XXVIII,[3] the Members have not agreed to a "10 percent market share rule" *per se*. Paragraph 7 of the Note Ad to Article XXVIII provides that "the expression 'substantial interest' is not capable of a precise definition … [but is] intended to be construed to cover only those Members which have … a significant share in the market." The *Understanding on the Interpretation of Article XXVIII* makes clear that whether a Member has a "substantial interest" is to be determined through a factor-based test, not the application of a hard market share rule.[4] Indeed, when interpreting Article XXVIII, past WTO panels have declined to use the "10 percent rule" as a minimum threshold for having "substantial interest" within the meaning of Article XXVIII.[5]

6. With respect to the sources of law identified in the Panel's question, the United States is not aware of the 10 percent rule being adopted through a "decision" of the contracting parties to the GATT 1947. The 10 percent rule therefore does not constitute a "decision" of the

[2] *See Analytical Index of the GATT*, Article XXVIII, pp. 940 ("The original text of Article XXVIII referred only to "any contracting party determined by the CONTRACTING PARTIES to have a substantial interest". During the Geneva session of the Preparatory Committee in 1947, in the discussion by the Tariff Agreement Committee of this provision, it was stated that the purpose of including this phrase was "to limit the right of other countries to hold up or delay or prevent the withdrawal or modification of the Schedule … any country can claim that it has an interest in any item in a Schedule, and if they wish to be difficult, it would be possible for them to hold up a modification of the Schedule by claiming an interest in a commodity, their interest in which was exceedingly remote. … *the obvious thing to do was to give the right of decision to the CONTRACTING PARTIES, so that if a country claimed an interest and the country which had granted the concession did not think that that interest was sufficiently significant to give the country the right to be consulted, then it could be settled by majority vote … and you could get on with the business"*.) (emphasis added).

[3] In a meeting of the Committee on Tariff Concessions, for example, Canada noted that supplier rights with respect to MFN trade "took into account the definition of substantial supplier and the '10 per cent share' rule which had generally been applied". *Analytical Index: Guide to GATT Law and Practice*, 6th rev. ed. 1995, p. 941, citing to Committee on Tariff Concessions, Minutes of the Meeting held in the Centre William Rappard on 19 July 1985, TAR/M/16, p. 10.

[4] Paragraph 4 of the *Understanding* provides in relevant part that

> The determination of principal supplying and substantial interests and the calculation of compensation shall take into account, *inter alia*, production capacity and investment in the affected product in the exporting Member and estimates of export growth, as well as forecasts of demand for the product in the importing Member.

[5] *See, e.g., EC – Bananas (Panel),* para. 7.84 ("We do not find it necessary to set a precise import share for determination of whether a Member has a substantial interest in supplying a product. *A determination of substantial interest might well vary somewhat based on the structure of the market*.") (emphasis added).

Contracting Parties of the GATT 1947 for purposes of paragraph 1(b)(iv) of the GATT 1994 or within the meaning of Article XVI:1 of the WTO Agreement.

7. Nor does the "10 percent rule" constitute a "subsequent agreement" within the meaning of Article 31(3)(a) of the Vienna Convention. The Appellate Body has observed that a "subsequent agreement" within the meaning of Article 31(3)(a) refers to an agreement that bears "specifically upon the interpretation of a treaty."[6] As noted above, however, the Members have not specifically agreed to interpret "substantial interest" to mean a 10 percent market share.

8. To the extent that sufficient evidence were adduced to find that application of the "10 percent rule" constitutes a "customary practice" of the WTO, the Panel may look to this practice as guidance under Article XVI:1 of the WTO Agreement. However, based on the text of Note 7 to Ad Article XXVIII and paragraph 4 of the *Understanding*, the 10 percent rule could not be viewed as a bright-line test. As noted above, moreover, this is not an issue for the Panel to resolve.

(ii) The Procedures for Negotiations under Article XXVIII

9. The Procedures for Negotiations Under Article XXVIII were adopted as Decision of the GATT Council on November 10, 1980, and thus constitute a "decision" of the Contracting Parties to the GATT 1947 within the meaning of paragraph 1(b)(iv) of the GATT 1994. Accordingly, the Procedures form part of the GATT 1994. We also note, however, that that the term "should" is used throughout the provisions of the Procedures for Negotiations under Article XXVIII (14 times precisely). This suggests that the character the Procedures is more in the nature of "guidelines" than a binding legal document. [7]

(iii) Procedures for Modification and Rectification of Schedules of Tariff Concessions

10. The Procedures for Modification and Rectification of Schedules of Tariff Concessions were formally adopted as a Decision of the GATT contracting parties on March 26, 1980 (L/4662). As such, the United States understands that the Procedures to constitute a "decision of the Contracting Parties to the GATT 1947" within the meaning of paragraph 1(b)(iv) of the GATT 1994. As such, the Procedures form part of the GATT 1994.

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[6] Appellate Body Report, *EC - Bananas III (Article 21.5 - Ecuador II) / EC - Bananas III (Article 21.5 - US)*, para. 390.

[7] In discussion of these Procedures during the 3 November 1980 meeting of the Committee on Tariff Concessions, "the Chairman took up the question of the character of the document and recalled the comments made by the representative of Finland that the terms used in the text and particularly the word 'should' meant that the document should be interpreted as guidelines and that contracting parties entering into Article XXVIII negotiations were invited to follow those guidelines but should not consider them as binding obligations." 9TAR/M/3, p. 9-10, para. 4.7.

2. ***To all third parties: Paragraph 4 of the Procedures for Negotiations under Article XXVIII provides that "claims of interest should be made within ninety days following the circulation of the import statistics". Is a Member entitled to disregard a claim of interest made after the ninety days following the circulation of the import statistics?***

11. Yes. The United States understands that a Member modifying concessions may properly disregard claims of interest that are made after the 90-day time period specified in paragraph 4.[8] However, the United States considers that this would not necessarily settle the matter. First, the use of the term "should" (*i.e.*, "Claims of interest *should* be made within ninety days…)" suggests that the 90-day time period is not a binding legal requirement that must be adhered to in all instances, but more of a general procedural guideline. Second, paragraph 4 also provides that "[i]f a claim of interest is not recognized, the contracting party making the claim may refer the matter to the Council" (now to be understood as a reference to the WTO General Council).

12. Thus, while a Member modifying concessions would be within its rights to disregard or reject a claim of interest on grounds that the claim was not made within the 90-day time period, the modifying Member may nonetheless be compelled to recognize the claim of interest if (1) the Member making the claim refers the matter to the General Council and (2) the General Council recognizes the Member as having an interest in the concessions at issue. By the same token, if the General Council declines to recognize the Member's claim of interest, "the matter would be considered closed."[9] In this dispute, it appears that China did not avail itself of the appropriate procedure under Article XXVIII to seek to have its claim of interest recognized.

2 CLAIMS UNDER ARTICLE XXVIII

2.1 Article XXVIII:1

3. ***To all third parties: Does the term "discriminatory" in paragraphs 4 and 7 of the Ad Note to Article XXVIII:1 cover situations "where imports from a WTO Member are treated***

[8] Paragraph 4 of the Procedures provides in full that

> Any contracting party which considers that it has a principal or a substantial supplying interest in a concession which is to be the subject of negotiation and consultation under Article XXVIII should communicate its claim in writing to the contracting party referred to in paragraph 1 above and at the same time inform the secretariat. If the contracting party referred to in paragraph 1 above recognizes the claim, the recognition will constitute a determination by the CONTRACTING PARTIES of interest in the sense of Article XXVIII:1. If a claim of interest is not recognized, the contracting party making the claim may refer the matter to the Council.

[9] *See Analytical Index of the GATT*, Article XXVIII, pp. 941-42 (reviewing statements by EC, Argentina, United States, and Director-General and quoting statement by Argentina: "If the latter contracting party -- the Community in the present case – recognized such a claim, that recognition would constitute a determination by the CONTRACTING PARTIES of an interest in the sense of Article XXVIII:1. If the claim was not recognized, the contracting party having made it could refer the matter to the Council. … Clearly, if the Community and the Council did not recognize such a claim, the matter would be considered closed.").

differently from imports from other WTO Members, irrespective of the ground of such disparate treatment and, in particular, whether such difference in treatment was justified or not" (China's FWS, para. 65)?

13. It would appear to the United States that there could be a basis to consider that "discriminatory quantitative restrictions" under paragraphs 4 and 7 to the Note Ad Article XXVIII may encompass measures that are justified under the GATT 1994. However, as noted in the U.S. third-party oral statement, this would again be an issue that is not for the Panel to resolve.

14. As also noted in response to Question 1, Article XXVIII confers certain negotiating rights on Members whose status has been recognized by the Ministerial Conference or General Council. The Note Ad Article XXVIII, logically, elaborates procedures for application of Article XXVIII that respect that competence of the Ministerial Conference and General Council. For example, paragraph 4 of the Ad Note states, in part:

> Accordingly, the CONTRACTING PARTIES should only determine that a contracting party has a principal supplying interest if that contracting party has had, over a reasonable period of time prior to the negotiations, a larger share in the market of the applicant contracting party than a contracting party with which the concession was initially negotiated *or would, in the judgement of the CONTRACTING PARTIES*, have had such a share *in the absence of discriminatory quantitative restrictions* maintained by the applicant contracting party. [italics added]

15. Similarly, paragraph 7 to the Ad Note provides:

> The expression "substantial interest" is not capable of a precise definition and accordingly *may present difficulties for the CONTRACTING PARTIES*. It is, however, intended *to be construed* to cover only those contracting parties which have, or *in the absence of discriminatory quantitative restrictions* affecting their exports could reasonably be expected to have, a significant share in the market of the contracting party seeking to modify or withdraw the concession. [italics added]

16. This text establishes that the concept of "discriminatory quantitative restrictions" is one that the then-CONTRACTING PARTIES agreed for purposes of guiding *their own* "judgement" on whether a Member would merit the status of having a "principal supplying interest" or a "substantial interest". In this, the Ad Note corresponds to the language of Article XXVIII previously reviewed, which establishes that a Member's status for purposes of negotiations or consultations on proposed modifications of concessions is a matter reserved to the decision of the Ministerial Conference or General Council.

17. Again, as elaborated in the U.S. third-party oral statement, this is not an interpretive issue for the Panel to resolve. China has not established or even alleged that it was "determined by the CONTRACTING PARTIES" (to be understood as a reference to Ministerial Conference or General Council, or as delegated) to have a principal supplying interest or a substantial interest in

any such concession. If China were dissatisfied with the EU's non-recognition of its status under Article XXVIII, its proper recourse was to the Ministerial Conference or the General Council. It would not be for the Panel to determine that those bodies had failed to make a determination, even aside from the fact that China has not even asked those bodies to make that determination.[10]

4. ***To all third parties: Regarding the reference period for determining which Members hold PSI or SSI status under Article XXVIII:***

(b) Do the third parties consider that in the event of prolonged negotiations, a Member is permitted, or indeed required, to re-determine which Members hold PSI or SSI status on the basis of more recent import data?

18. Article XXVIII does not impose a requirement to re-determine PSI or SSI status in the event of a prolonged negotiation. As described above, Article XXVIII allows a Member to modify or withdraw a scheduled commitment as long as it negotiates and consults with the appropriate WTO Members. According to the text of Article XXVIII and the *Procedures for Negotiations under Article XXVIII*, the Members having a right to participate in these negotiations and consultations as determined by the Contracting Parties at the start of the negotiations.[11] If the Contracting Parties did not make such a determination with respect to a Member, that Member does not have recourse to the remedy provided for in paragraph 3 of Article XXVIII.[12]

19. However, separate from the negotiation of a TRQ or other tariff measure in the context of Article XXVIII, all Members have rights with respect to the non-discriminatory administration of quantitative restrictions such as TRQs under Article XIII of the GATT 1994. Articles XXVIII and XIII each impose *independent* obligations on Members with respect to the other Members with whom that Member must negotiate or consult for purposes of modifying or withdrawing a concession or allocating a TRQ, respectively.[13]

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[10] U.S. Third-Party Oral Statement, paras. 8-12; see GATT 1994 Article XXVIII:1 (establishing that a Member proposing to modify or withdraw a concession may do so "by negotiation and agreement" with any Member having an initial negotiating right "and with any other [Member] *determined by the CONTRACTING PARTIES* to have a principal supplying interest" and "subject to consultation with any other [Member] *determined by the CONTRACTING PARTIES* to have a substantial interest in such concession") (italics added).

[11] *Procedures for Negotiations under Article XXVIII* (C/113), para. 4 ("If the contracting party referred to in paragraph 1 recognizes the claim [of principal or substantial supplying interest], the recognition will constitute a determination by the CONTRACTING PARTIES of interest in the sense of Article XXVIII:1.").

[12] *See Analytical Index of the GATT*, Article XXVIII, pp. 941-42 (reviewing statements by EC, Argentina, United States, and Director-General and quoting statement by Argentina: "If the latter contracting party -- the Community in the present case -- recognized such a claim, that recognition would constitute a determination by the CONTRACTING PARTIES of an interest in the sense of Article XXVIII:1. If the claim was not recognized, the contracting party having made it could refer the matter to the Council. … Clearly, if the Community and the Council did not recognize such a claim, the matter would be considered closed.").

[13] For example, under Article XXVIII:1 a Member modifying concessions is only required to negotiate with Members that have an initial negotiating right or a principal supply interest, while they are only required to *consult*

20. Therefore, while certain Members may negotiate a TRQ under Article XXVIII such that the modifying Member's schedule reflects a new tariff binding, the *application* and *allocation* of that TRQ remains subject to the requirements of Article XIII:2(d). To the extent that an exporting Member determines at a given point in time that it has established rights to a portion of another Member's TRQ as a substantial supplier, that Member may – at any time – pursue those rights under Article XIII:2(d) of the GATT 1994. The Member does not lose these rights merely because the Member did not have such an interest at the time the schedule modification was negotiated under Article XXVIII.

3 CLAIMS UNDER ARTICLE XIII

3.1 Claims under the chapeau of Article XIII:2 and XIII:2(d)

8. ***To all third parties: The EU submits that compliance with the first method in Article XIII:2(d) provides a "safe harbour" (EU FWS, paras. 6, 184, 218, 221) with respect to the chapeau of Article XIII:2. If the importing Member reaches agreement with those Members that have a substantial interest within the meaning of Article XIII:2(d), does this establish the consistency of the TRQ allocation with the chapeau of Article XIII:2?***

21. The United States does not understand the chapeau of Article XIII:2 to constitute an independent legal obligation. Rather, the United States understands Article XIII:2 as setting forth a legal end that is achieved through Members' compliance with paragraphs (a)-(d) of that provision. This understanding is supported by the text of the chapeau to Article XIII:2, which provides that:

> In applying import restrictions to any product, contracting parties shall aim at a distribution of trade in such product approaching as closely as possible the shares which the various contracting parties might be expected to obtain in the absence of such restrictions *and to this end shall observe the following provisions*

The inclusion of the phrase "*and to this end shall observe the following provisions*" indicates that the compliance with paragraphs (a)-(d) of Article XIII:2 is meant to *achieve* the "distribution of trade" referred to in the chapeau of Article XIII:2.

9. ***To all third parties: Please elaborate your views on whether there needs to be a parallel between the determination of claims of supplying interest under Article XXVIII:1 and XIII:2(d) and the import statistics used for this purpose, or whether these can or should differ depending on the circumstances and the differences between these provisions.***

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with Members having a substantial supplying interest. Under Article XIII:2(d), however, a Member must enter into negotiations with all Members that have a substantial supplying interest.

22. As discussed in the U.S. Oral Statement[14] and in response to Question 4 above, Articles XXVIII:1 and XIII:2(d) address different situations and impose different obligations on Members. That is, Article XXVIII addresses the procedures for modification or withdrawal of a scheduled concession, while Article XIII imposes obligations on the administration of a quantitative restrictions such as a TRQ. Therefore, the determination of claims of supplying interest and the import statistics used for this purpose may differ based on the terms of those provisions.

23. Several important differences exist. First, Article XXVIII applies only at the time a scheduled concession is being modified or withdrawn and relates to the tariff bindings contained in a Member's WTO schedule. Article XIII, on the other hand, applies at all times and with respect to the *application* of any TRQ in a Member's domestic laws, irrespective of the tariff binding contained in the Member's schedule.

24. Second, whereas under Article XXVIII:1 a modifying Member must "consult" with Members having a substantial supplying interest (and "negotiate" only with Members having a principal supplying interest), a Member allocating a TRQ by agreement under Article XIII:2(d) must do so with "all other Members having a substantial interest".

25. Finally, in the context of an Article XXVIII negotiation, Article XXVIII:1 provides that it is for the Contracting Members to determine which Members have a principal or substantial supplying interest. And Paragraph 2 of the Article XXVIII Procedures provides that the trade data upon which such a decision may be made includes "statistics of imports of the products involved… for the last three years for which statistics are available".

26. By contrast, Article XIII does not indicate how Members having a substantial supplying interest will be identified; nor does it indicate a time period for which trade data should be referenced when shares of a TRQ are being allocated by agreement. If an agreement among Members is not practicable, Article XIII:2(d) permits a Member to allot shares of the quota to "Members having a substantial interest… based upon the proportions, supplied by such Members during a previous representative period."

27. Based on these and other differences between the two provisions, it is clear that compliance with one will not result necessarily in compliance with the other. Indeed, as a practical matter, it may be difficult to comply with the requirements of both provisions simultaneously. However, if the requirements of each provision are complied with, as a factual matter, the same body of import statistics and trade data potentially could be used for purposes of determining Members' substantial interest status under Article XXVIII and Article XIII, resulting in identification of the same group of Members having a substantial interest in supplying the good in question in both contexts.

[14] *See*, U.S. Third-Party Oral Statement, paras. 13-19.

4 CLAIMS UNDER ARTICLE II:1

10. ***<u>To all third parties</u>: Paragraph 7 of the Procedures for Negotiations under Article XXVIII provides that Contracting Parties "will be free to give effect to the changes agreed upon in the negotiations" as from the time referred to in that provision, whereas paragraph 8 of those Procedures states that "Formal effect will be given to the changes in the schedules by means of Certifications in accordance with the Decision of the CONTRACTING PARTIES of 19 November 1968 (BISD 16S/16)". If the changes agreed upon in Article XXVIII negotiations include tariff rates in excess of a Member's bound rates, can it implement those changes prior to modified schedule being certified?***

28. At the outset, the United States would clarify that the decision referenced by the Panel in Question 6 – the Decision of the CONTRACTING PARTIES of 19 November 1968 (BISD 16S/16) – was formally superseded by a the Decision of the CONTRACTING PARTIES of 26 March 1980, *i.e.*, the Procedures for Modification and Rectification of Schedules of Tariff Concessions (L/4962).[15] This is also reflected in paragraph 8 of the Procedures for Negotiations under Article XXVIII (adopted 10 November 1980, BISD 27S/26-28), which states:

> Formal effect will be given to the changes in the schedules by means of Certifications in accordance with the Decision of the CONTRACTING PARTIES of 26 March 1980.

29. Based on these instruments, the United States understands that if the Member modifying or withdrawing concessions and the Members that have negotiating rights with respect to such concessions agree to changes that include tariff rates in excess of the Member's bound rates, the Member modifying concessions may give effect to those agreed upon changes as of the date(s) specified in paragraph 7 of the Procedures for Negotiations under Article XXVIII. That is, the Member may "give effect to" such changes *before* they are formally certified pursuant to paragraph 8 of the Procedures for Modification and Rectification of Schedules of Tariff Concessions.

30. However, "formal effect" will only be given to those changes after the modified schedule is certified. Therefore, so long as the modified schedule remains uncertified, the prior, certified schedule would continue to constitute the formal legal basis for the Member's rights and obligations under the WTO Agreements.

[15] *See*, L/4962, Paragraph 6 ("This Decision supersedes the Decision of 19 November 1968.")