EUROPEAN UNION – MEASURES AFFECTING TARIFF CONCESSIONS

ON CERTAIN POULTRY MEAT PRODUCTS

(DS492)

THIRD PARTY ORAL STATEMENT

OF THE UNITED STATES OF AMERICA

March 23, 2016

Mr. Chairman, members of the Panel:

1. The United States appreciates the opportunity to provide our views as a third party in this dispute.

2. At the outset, we wish to note that certain of the claims and arguments in this dispute involve the procedures for modification or withdrawal of concessions and for certification of those changes that have long been applied by WTO Members, and before them, the Contracting Parties. Historically, there have been numerous discussions by Members to amend those procedures or introduce further refinements.

3. In 1980, the CONTRACTING PARTIES approved the procedures for modification[1] and the procedures for rectification[2]. In 1995, WTO Members brought into effect the *Understanding on the Interpretation of Article XXVIII of the General Agreement on Tariffs and Trade 1994*. Despite the limited agreement on refinement to these procedures achieved by Members over time, they nonetheless have served Members well.

4. In the view of the United States, further elaboration of those procedures, therefore, should be undertaken by Members through *negotiation*, to the extent they find areas in which improvements are desirable. We would invite the Panel to consider carefully in its report whether findings are necessary on all of the issues raised by the parties to the dispute and to tailor its findings to those issues that will assist the parties in securing a positive solution to the dispute.

[1] Procedures for Negotiations under Article XXVIII, adopted 10 November 1980 (C/113).
[2] Procedures for Modification and Rectification of Schedules of Tariff Concession, adopted, 29 March 1980 (L/4962).

I. The Panel May Dispose of China's Claim under GATT 1994 Article XXVIII:1 Relating to a "Substantial Interest" Without Reaching the Legal Issue

5. China claims that the EU acted inconsistently with Article XXVIII:1 of the GATT 1994 by failing to recognize China as having a "principal supplying interest" or a "substantial interest" in tariff concessions for certain poultry and meat products and rejecting China's request to participate in negotiations on the EU's modification of such concessions.[3] These negotiations took place in 2006 and 2009 to 2012, respectively. The United States wishes to comment on one legal issue and one key fact in relation to this claim.

6. First, from a legal perspective, it is not clear that an alleged failure to follow the procedures in GATT 1994 Article XXVIII necessarily gives rise to a breach of that provision cognizable under the DSU. Article XXVIII:1 establishes that a WTO Member "may" modify or withdraw a concession following certain actions. Those actions are "negotiation and agreement" with certain Members, "subject to consultation" with certain other Members. Article XXVIII:3 then establishes that, if agreement with the first set of Members cannot be reached, the Member proposing "to modify or withdraw the concession shall, nevertheless, be free to do so." If the proposing Member chooses to so act, the first and second set of Members "shall then be free" to withdraw "substantially equivalent concessions" initially negotiated with that Member.

7. This procedure, then, would appear to provide its own remedy for the withdrawal or modification of the concession by that proposing Member. That is, the first and second set of Members can rebalance their own concessions in light of the withdrawal or modification. It

[3] *See, e.g.,* China's First Written Submission, para. 3 ("The EU nevertheless refused to recognize China's substantial supplying interest under the guise that China's share in trade affected by concessions was insufficient."); *id.,* para. 6 ("[T[he provisions of Article XXVIII of the GATT 1994 are violated because China was denied substantial supplying interest which it had or would have had in the impact of the import ban to SPS measures had been taken into account.").

could be viewed as incongruous to both permit a self-judging rebalancing of concessions under the Article XXVIII procedures and a claim for breach of the Article XXVIII procedures. And it is not clear how an alleged failure to follow a procedure resulting in a change to a Member's WTO *Schedule* would constitute a "measure affecting the operation of any covered agreement taken within the territory of" the proposing Member.[4] In substance, of course, a Member may potentially challenge the treatment accorded to imports, following a modification or withdrawal, pursuant to numerous Articles of GATT 1994, including Articles I, II, XI, and XIII.

8. Even were a claim for a procedural breach of Article XXVIII susceptible to action under the DSU, however, from the U.S. review of the parties' submissions it is not clear that China has set out a necessary fact to advance its claim under Article XXVIII:1.

9. Specifically, the United States understands that China asserts the inconsistency arises from the EU's failure to recognize China as having a "principal supplying interest" or a "substantial interest" in the relevant tariff concession. Under the text of Article XXVIII:1, however, this assertion would not be enough.

10. As mentioned, Article XXVIII:1 establishes 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." Thus, by the very terms of Article XXVIII:1, a Member entitled to negotiate and

[4] DSU, Art. 4.2 ("Each Member undertakes to accord sympathetic consideration to and afford adequate opportunity for consultation regarding any representations made by another Member concerning measures affecting the operation of any covered agreement taken within the territory of the former.") (footnote omitted); *id.,* Art. 4.4 (consultation request to identify "measures at issue"); *id.*, Art. 6.2 (panel request to identify "specific measures at issue").

agree is that "determined by the CONTRACTING PARTIES to have a principal supplying interest". Likewise, the Member entitled to "consultation" on the proposed modification or withdrawal is that "determined by the CONTRACTING PARTIES to have a substantial interest."

11. 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. Nor does China allege that the EU accepted China's assertion of a substantial interest, which under the Procedures for Negotiations under Article XXVIII[5], could be deemed to constitute such a determination.[6] Therefore, the United States does not understand the basis on which China considers that it could make a claim under Article XXVIII:1 in relation to a status that it does not even allege it had.

12. As noted above, China's claim under Article XXVIII:1 raises a novel legal issue, one which has been discussed by the GATT Contracting Parties and which, pragmatically, did not result in review by a GATT panel.[7] As the United States understands the facts in this dispute, the Panel may similarly decline to make a finding on this legal issue. China has not asserted or

[5] C/113.
[6] *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.").
[7] *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.").

established a fact that is a necessary element of its claim, even assuming, for the limited purposes of this analysis, that such a claim can be considered under the DSU.

II. The Relationship between Article XIII and Article XXVIII

13. The parties differ significantly in their approach to the obligations in Articles XIII and XXVIII and the relationship between the two. The United States considers that these provisions address different situations and impose different requirements for a Member. We would like to highlight certain key differences between Articles XXVIII and XIII.

14. As discussed, Article XXVIII sets forth the procedural steps a Member must take to "modify or withdraw a concession" set out in its Schedule to GATT 1994. Once a Member completes the process specified in Article XXVIII, it is "free to" modify or withdraw the concession at issue – that is, to affect the legal obligation to which it commits in its Schedule, apart from whatever treatment it may actually accord to imports into its territory.

15. If a proposing Member has modified or withdrawn the concessions without "agreement" of any Member with an initial negotiating right or that has been determined to have a principal supplying interest, the Member may be subject to a compensatory withdrawal of "substantially equivalent concessions" initially negotiated with that Member. This compensatory withdrawal too occurs in relation to the aggrieved Member's concessions set out in its GATT 1994 Schedule. There is no WTO obligation that requires any particular distribution or structure to the tariff commitments set out in a Member's Schedule, including any that may be expressed as a tariff rate quota.

16. Article XIII:2 differs in important respects. First, it applies not to the concessions in a Member's *Schedule* but to the *application* of restrictions *to imports*, including tariff-rate quotas. Article XIII:2 refers to a Member "applying import restrictions to any product";[8] the title of Article XIII refers to "Non-Discriminatory Administration of Quantitative Restrictions"; and Article XIII:1 refers to any "restriction … applied by any contracting party on the importation of any product".

17. Second, as the obligations in Article XIII apply to the application or administration of restrictions on imports, they apply whenever a Member seeks to apply or administer such a restriction. That is, while the procedure in Article XXVIII comes to a close with the possible modification or withdrawal of concessions in the relevant Members' Schedules, the treatment of imports by a Member at any given time must comply with Article XIII, and other provisions that govern "treatment" of imports, such as Articles I, II, III, or XI.[9]

18. Accordingly, the United States considers that the existence of a tariff concession in the form of a tariff-rate quota in a Schedule does not determine the WTO-consistency of the treatment of imports under a tariff-rate quota that is applied by a Member through a domestic tariff measure. As noted, a concession in a Member's GATT 1994 Schedule is not – at the level of the concession – subject to an ongoing WTO obligation. Rather, a failure to accord to imports the treatment set out in the Schedule – such as concession for a particular Member expressed as a

[8] GATT 1994, Art. XIII:2 ("In applying import restrictions to any product …"); *id.*, Art. XIII:2(d) ("the contracting party applying the restrictions may seek agreement").
[9] *See, e.g.*, GATT 1994 Art. I ("General Most-Favoured-Nation *Treatment*"); *id.*, Art. II:1(a) ("Each contracting party shall accord to the commerce of the other contracting parties *treatment no less favourable* than that provided for in the appropriate Part of the appropriate Schedule annexed to this Agreement."); *id.*, Art. III ("National Treatment on Internal Taxation and Regulation"); *id.*, Art. XI(a) ("No prohibitions or restrictions … shall be *instituted or maintained* by any contracting party *on the importation of any product* of the territory of any other contracting party . . . . ").

tariff-rate quota – would give rise to a claim under GATT 1994 Article II:1(b). If a tariff-rate quota is imposed by a Member through a domestic tariff measure, the treatment given to imports through that import restriction must conform to the requirements of Article XIII.

19. A Member may then have to adjust its treatment of imports to ensure that it meets *both* its obligations under Article XIII (on non-discrimination) *and* Article II (treatment no less favorable than that set out in its Schedule).[10] Because they are addressed to different situations, a Member could not justify its treatment of imports inconsistently with Article XIII by pointing to completion of the procedures under Article XXVIII applicable to modifying tariff concessions in a GATT 1994 Schedule. Logically, nor would satisfying the obligation to treat imports in a non-discriminatory manner under Article XIII have relevance for the concessions in a Member's Schedule resulting from the procedures pursuant to Article XXVIII.

III. Conclusion

20. This concludes our third-party oral statement. The United States thanks the Panel for its consideration of our views.

[10] Appellate Body Report, *EC – Poultry*, para. 99 ("We see nothing in Article XXVII to suggest that compensation negotiated within its framework may be exempt from compliance with the non-discrimination principle inscribed in Articles I and XIII of the GATT 1994.").