

1 ARTICLE XXVIII	1
1.1 Text of Article XXVIII	1
1.2 Text of note <i>ad</i> Article XXVIII.....	3
1.3 Text of the Understanding on the Interpretation of Article XXVIII of the GATT 1994	4
1.4 Article XXVIII:1: determination of Members with a "principal" or "substantial" supplying interest.....	6
1.4.1 "determined by the CONTRACTING PARTIES" to have a principal/substantial supplying interest.....	6
1.4.2 Threshold for "substantial supplying interest"	6
1.4.3 Reference period to determine which Members hold a principal or substantial supplying interest.....	7
1.4.4 "discriminatory quantitative restrictions"	8
1.5 Article XXVIII:2: "general level of ... concessions not less favourable to trade".....	9
1.5.1 "shall endeavour to maintain"	9
1.5.2 "general level"	9
1.5.3 Relationship between Article XXVIII:2 and Paragraph 6 of the Understanding	9
1.5.4 "the most recent three-year period" (paragraph 6 of the Understanding)	10
1.6 Article XXVIII:3	10
1.6.1 "shall be free ... to modify or withdraw"	10
1.6.2 Relationship with other GATT provisions	11
1.6.3 Article XIII	11

1 ARTICLE XXVIII

1.1 Text of Article XXVIII

Article XXVIII*

Modification of Schedules

1. On the first day of each three-year period, the first period beginning on 1 January 1958 (or on the first day of any other period* that may be specified by the CONTRACTING PARTIES by two-thirds of the votes cast) a contracting party (hereafter in this Article referred to as the "applicant contracting party") may, by negotiation and agreement with any contracting party with which such concession was initially negotiated and with any other contracting party determined by the CONTRACTING PARTIES to have a principal supplying interest* (which two preceding categories of contracting parties, together with the applicant contracting party, are in this Article hereinafter referred to as the "contracting parties primarily concerned"), and subject to consultation with any other contracting party determined by the CONTRACTING PARTIES to have a substantial interest* in such concession, modify or withdraw a concession* included in the appropriate schedule annexed to this Agreement.

2. In such negotiations and agreement, which may include provision for compensatory adjustment with respect to other products, the contracting parties concerned shall endeavour to maintain a general level of reciprocal and mutually advantageous concessions not less favourable to trade than that provided for in this Agreement prior to such negotiations.

3. (a) If agreement between the contracting parties primarily concerned cannot be reached before 1 January 1958 or before the expiration of a period envisaged in paragraph

1 of this Article, the contracting party which proposes to modify or withdraw the concession shall, nevertheless, be free to do so and if such action is taken any contracting party with which such concession was initially negotiated, any contracting party determined under paragraph 1 to have a principal supplying interest and any contracting party determined under paragraph 1 to have a substantial interest shall then be free not later than six months after such action is taken, to withdraw, upon the expiration of thirty days from the day on which written notice of such withdrawal is received by the CONTRACTING PARTIES, substantially equivalent concessions initially negotiated with the applicant contracting party.

(b) If agreement between the contracting parties primarily concerned is reached but any other contracting party determined under paragraph 1 of this Article to have a substantial interest is not satisfied, such other contracting party shall be free, not later than six months after action under such agreement is taken, to withdraw, upon the expiration of thirty days from the day on which written notice of such withdrawal is received by the CONTRACTING PARTIES, substantially equivalent concessions initially negotiated with the applicant contracting party.

4. The CONTRACTING PARTIES may, at any time, in special circumstances, authorize* a contracting party to enter into negotiations for modification or withdrawal of a concession included in the appropriate Schedule annexed to this Agreement subject to the following procedures and conditions:

- (a) Such negotiations* and any related consultations shall be conducted in accordance with the provisions of paragraph 1 and 2 of this Article.
- (b) If agreement between the contracting parties primarily concerned is reached in the negotiations, the provisions of paragraph 3 (b) of this Article shall apply.
- (c) If agreement between the contracting parties primarily concerned is not reached within a period of sixty days* after negotiations have been authorized, or within such longer period as the CONTRACTING PARTIES may have prescribed, the applicant contracting party may refer the matter to the CONTRACTING PARTIES.
- (d) Upon such reference, the CONTRACTING PARTIES shall promptly examine the matter and submit their views to the contracting parties primarily concerned with the aim of achieving a settlement. If a settlement is reached, the provisions of paragraph 3 (b) shall apply as if agreement between the contracting parties primarily concerned had been reached. If no settlement is reached between the contracting parties primarily concerned, the applicant contracting party shall be free to modify or withdraw the concession, unless the CONTRACTING PARTIES determine that the applicant contracting party has unreasonably failed to offer adequate compensation.* If such action is taken, any contracting party with which the concession was initially negotiated, any contracting party determined under paragraph 4 (a) to have a principal supplying interest and any contracting party determined under paragraph 4 (a) to have a substantial interest, shall be free, not later than six months after such action is taken, to modify or withdraw, upon the expiration of thirty days from the day on which written notice of such withdrawal is received by the CONTRACTING PARTIES, substantially equivalent concessions initially negotiated with applicant contracting party.

5. Before 1 January 1958 and before the end of any period envisaged in paragraph 1 a contracting party may elect by notifying the CONTRACTING PARTIES to reserve the right, for the duration of the next period, to modify the appropriate Schedule in accordance with the procedures of paragraph 1 to 3. If a contracting party so elects, other contracting parties shall have the right, during the same period, to modify or withdraw, in accordance with the same procedures, concessions initially negotiated with that contracting party.

1.2 Text of note *ad* Article XXVIII

Ad Article XXVIII

The CONTRACTING PARTIES and each contracting party concerned should arrange to conduct the negotiations and consultations with the greatest possible secrecy in order to avoid premature disclosure of details of prospective tariff changes. The CONTRACTING PARTIES shall be informed immediately of all changes in national tariffs resulting from recourse to this Article.

Paragraph 1

1. If the CONTRACTING PARTIES specify a period other than a three-year period, a contracting party may act pursuant to paragraph 1 or paragraph 3 of Article XXVIII on the first day following the expiration of such other period and, unless the CONTRACTING PARTIES have again specified another period, subsequent periods will be three-year periods following the expiration of such specified period.

2. The provision that on 1 January 1958, and on other days determined pursuant to paragraph 1, a contracting party "may ... modify or withdraw a concession" means that on such day, and on the first day after the end of each period, the legal obligation of such contracting party under Article II is altered; it does not mean that the changes in its customs tariff should necessarily be made effective on that day. If a tariff change resulting from negotiations undertaken pursuant to this Article is delayed, the entry into force of any compensatory concessions may be similarly delayed.

3. Not earlier than six months, nor later than three months, prior to 1 January 1958, or to the termination date of any subsequent period, a contracting party wishing to modify or withdraw any concession embodied in the appropriate Schedule, should notify the CONTRACTING PARTIES to this effect. The CONTRACTING PARTIES shall then determine the contracting party or contracting parties with which the negotiations or consultations referred to in paragraph 1 shall take place. Any contracting party so determined shall participate in such negotiations or consultations with the applicant contracting party with the aim of reaching agreement before the end of the period. Any extension of the assured life of the Schedules shall relate to the Schedules as modified after such negotiations, in accordance with paragraphs 1, 2, and 3 of Article XXVIII. If the CONTRACTING PARTIES are arranging for multilateral tariff negotiations to take place within the period of six months before 1 January 1958, or before any other day determined pursuant to paragraph 1, they shall include in the arrangements for such negotiations suitable procedures for carrying out the negotiations referred to in this paragraph.

4. The object of providing for the participation in the negotiation of any contracting party with a principle supplying interest, in addition to any contracting party with which the concession was originally negotiated, is to ensure that a contracting party with a larger share in the trade affected by the concession than a contracting party with which the concession was originally negotiated shall have an effective opportunity to protect the contractual right which it enjoys under this Agreement. On the other hand, it is not intended that the scope of the negotiations should be such as to make negotiations and agreement under Article XXVIII unduly difficult nor to create complications in the application of this Article in the future to concessions which result from negotiations thereunder. 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. It would therefore not be appropriate for the CONTRACTING PARTIES to determine that more than one contracting party, or in those exceptional cases where there is near equality more than two contracting parties, had a principal supplying interest.

5. Notwithstanding the definition of a principal supplying interest in note 4 to paragraph 1, the CONTRACTING PARTIES may exceptionally determine that a contracting party has a

principal supplying interest if the concession in question affects trade which constitutes a major part of the total exports of such contracting party.

6. It is not intended that provision for participation in the negotiations of any contracting party with a principal supplying interest, and for consultation with any contracting party having a substantial interest in the concession which the applicant contracting party is seeking to modify or withdraw, should have the effect that it should have to pay compensation or suffer retaliation greater than the withdrawal or modification sought, judged in the light of the conditions of trade at the time of the proposed withdrawal or modification, making allowance for any discriminatory quantitative restrictions maintained by the applicant contracting party.

7. 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.

Paragraph 4

1. Any request for authorization to enter into negotiations shall be accompanied by all relevant statistical and other data. A decision on such request shall be made within thirty days of its submission.

2. It is recognized that to permit certain contracting parties, depending in large measure on a relatively small number of primary commodities and relying on the tariff as an important aid for furthering diversification of their economies or as an important source of revenue, normally to negotiate for the modification or withdrawal of concessions only under paragraph 1 of Article XXVIII, might cause them at such time to make modifications or withdrawals which in the long run would prove unnecessary. To avoid such a situation the CONTRACTING PARTIES shall authorize any such contracting party, under paragraph 4, to enter into negotiations unless they consider this would result in, or contribute substantially towards, such an increase in tariff levels as to threaten the stability of the Schedules to this Agreement or lead to undue disturbance of international trade.

3. It is expected that negotiations authorized under paragraph 4 for modification or withdrawal of a single item, or a very small group of items, could normally be brought to a conclusion in sixty days. It is recognized, however, that such a period will be inadequate for cases involving negotiations for the modification or withdrawal of a larger number of items and in such cases, therefore, it would be appropriate for the CONTRACTING PARTIES to prescribe a longer period.

4. The determination referred to in paragraph 4 (*d*) shall be made by the CONTRACTING PARTIES within thirty days of the submission of the matter to them unless the applicant contracting party agrees to a longer period.

5. In determining under paragraph 4 (*d*) whether an applicant contracting party has unreasonably failed to offer adequate compensation, it is understood that the CONTRACTING PARTIES will take due account of the special position of a contracting party which has bound a high proportion of its tariffs at very low rates of duty and to this extent has less scope than other contracting parties to make compensatory adjustment.

1.3 Text of the Understanding on the Interpretation of Article XXVIII of the GATT 1994

Members hereby agree as follows:

1. For the purposes of modification or withdrawal of a concession, the Member which has the highest ratio of exports affected by the concession (i.e. exports of the product to the market of the Member modifying or withdrawing the concession) to its total exports shall be deemed to have a principal supplying interest if it does not already have an initial negotiating right or a principal supplying interest as provided for in paragraph 1 of

Article XXVIII. It is however agreed that this paragraph will be reviewed by the Council for Trade in Goods five years from the date of entry into force of the WTO Agreement with a view to deciding whether this criterion has worked satisfactorily in securing a redistribution of negotiating rights in favour of small and medium-sized exporting Members. If this is not the case, consideration will be given to possible improvements, including, in the light of the availability of adequate data, the adoption of a criterion based on the ratio of exports affected by the concession to exports to all markets of the product in question.

2. Where a Member considers that it has a principal supplying interest in terms of paragraph 1, it should communicate its claim in writing, with supporting evidence, to the Member proposing to modify or withdraw a concession, and at the same time inform the Secretariat. Paragraph 4 of the "Procedures for Negotiations under Article XXVIII" adopted on 10 November 1980 (BISD 27S/26-28) shall apply in these cases.

3. In the determination of which Members have a principal supplying interest (whether as provided for in paragraph 1 above or in paragraph 1 of Article XXVIII) or substantial interest, only trade in the affected product which has taken place on an MFN basis shall be taken into consideration. However, trade in the affected product which has taken place under non-contractual preferences shall also be taken into account if the trade in question has ceased to benefit from such preferential treatment, thus becoming MFN trade, at the time of the negotiation for the modification or withdrawal of the concession, or will do so by the conclusion of that negotiation.

4. When a tariff concession is modified or withdrawn on a new product (i.e. a product for which three years' trade statistics are not available) the Member possessing initial negotiating rights on the tariff line where the product is or was formerly classified shall be deemed to have an initial negotiating right in the concession in question. 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. For the purposes of this paragraph, "new product" is understood to include a tariff item created by means of a breakout from an existing tariff line.

5. Where a Member considers that it has a principal supplying or a substantial interest in terms of paragraph 4, it should communicate its claim in writing, with supporting evidence, to the Member proposing to modify or withdraw a concession, and at the same time inform the Secretariat. Paragraph 4 of the above-mentioned "Procedures for Negotiations under Article XXVIII" shall apply in these cases.

6. When an unlimited tariff concession is replaced by a tariff rate quota, the amount of compensation provided should exceed the amount of the trade actually affected by the modification of the concession. The basis for the calculation of compensation should be the amount by which future trade prospects exceed the level of the quota. It is understood that the calculation of future trade prospects should be based on the greater of:

- (a) the average annual trade in the most recent representative three-year period, increased by the average annual growth rate of imports in that same period, or by 10 per cent, whichever is the greater; or
- (b) trade in the most recent year increased by 10 per cent.

In no case shall a Member's liability for compensation exceed that which would be entailed by complete withdrawal of the concession.

7. Any Member having a principal supplying interest, whether as provided for in paragraph 1 above or in paragraph 1 of Article XXVIII, in a concession which is modified or withdrawn shall be accorded an initial negotiating right in the compensatory concessions, unless another form of compensation is agreed by the Members concerned.

1.4 Article XXVIII:1: determination of Members with a "principal" or "substantial" supplying interest

1.4.1 "determined by the CONTRACTING PARTIES" to have a principal/substantial supplying interest

1. In *EU – Poultry (China)*, the Panel reviewed two distinct tariff renegotiation exercises under Article XXVIII, in the context of which the European Union had determined that Brazil and Thailand were the only WTO Members that held a "principal" or "substantial" supplying interest in the tariff concessions at issue. In that case, there was no determination by the Council for Trade in Goods or the General Council that China had a principal or substantial supplying interest in the concessions at issue because China never referred the matter to the Council. The Panel stated that:

"[W]hile the original text of Article XXVIII:1 of the GATT 1947 (and its related Ad Note) as incorporated by reference into the GATT 1994 refers to a determination by the CONTRACTING PARTIES as to which Members hold a principal or substantial supplying interest, the text of paragraph 4 of the Procedures for Negotiations under Article XXVIII blurs the distinction between determinations by the CONTRACTING PARTIES and determinations by the applicant Member. We further note that the Understanding on the Interpretation of Article XXVIII, negotiated in the Uruguay Round, makes no reference to determinations of a principal or substantial supplying interest being made by the CONTRACTING PARTIES (today, the General Council or the Council for Trade in Goods). In the absence of any disagreement between the disputing parties on this issue, we proceed on the premise that we have jurisdiction to review China's claims that the European Union violated Article XXVIII:1 by refusing to recognize its claims of principal or substantial supplying interest."¹

1.4.2 Threshold for "substantial supplying interest"

2. In a number of Article XXVIII negotiations, GATT Contracting Parties and WTO Members have applied a 10 per cent rule to determine the existence of a "substantial supplying interest". In this regard, the Panel in *EU – Poultry (China)* observed that:

"Regarding the meaning of the term 'substantial interest', paragraph 7 of the Ad Note to Article XXVIII:1 states that:

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 Members 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 Member seeking to modify or withdraw the concession. (emphasis added)

Thus, as a general rule, a Member should be determined to have a substantial supplying interest only where it has, or would expect to have in the absence of discriminatory quantitative restrictions affecting its exports, a significant share of the market. The notion of a significant share of the market is not further clarified in the text of paragraph 7.

The ordinary meaning of the word significant is '[i]mportant, notable; consequential'. Thus, the general standard seems to be whether a Member has, or in the absence of discriminatory quantitative restrictions could reasonably be expected to have, an important share in the market of the importing Member. In the context of Article XXVIII:1, a 10% import share benchmark has been applied for the purpose of determining which Members hold a substantial supplying interest. In this case, China argues that the 10% import share benchmark cannot be invoked to exclude a Member whose import share is below the 10% benchmark, insofar as that Member

¹ Panel Report, *EU – Poultry (China)*, para. 7.183.

demonstrates a substantial supplying interest taking into account the existence of discriminatory quantitative restrictions in the context of Article XXVIII, and taking into account any 'special factors' in the context of determining which Members hold a substantial supplying interest under Article XIII:2. However, subject to this understanding, China states that it 'does not consider that it is an *ipso facto* violation of Articles XXVIII and XIII for a member to use the 10 percent threshold to determine SSI status'. Thus, based on its submissions in these proceedings that the use of the 10% import share threshold is not an *ipso facto* violation of Article XXVIII or Article XIII, our understanding is that China does not claim that the European Union violated Article XXVIII:1 by applying a 10% import share benchmark to determine which Members held a 'substantial interest'. For its part, the European Union does not argue that the 10% import share benchmark can be applied without taking account of discriminatory quantitative restrictions or special factors. Accordingly, there is no issue regarding the 10% benchmark *per se* that we are called upon to resolve in the present dispute."²

1.4.3 Reference period to determine which Members hold a principal or substantial supplying interest

3. In *EU – Poultry (China)*, the Panel rejected China's argument that an importing Member is under a legal obligation to reappraise which WTO Members hold a principal or substantial supplying interest for the purpose of Article XXVIII:1 to reflect changes in import shares that have taken place following the initiation of the negotiations (however, the Panel reached a different interpretation of the legal standard under Article XIII:2(d) pertaining to the allocation of TRQs resulting from such negotiations). In the course of its analysis, the Panel stated that:

"The Procedures for Negotiations under Article XXVIII set forth guidelines for determining which Members hold a principal or supplying interest. They specify when such a determination is to be made, and on what basis. Paragraph 1 of these Procedures provides that the Member intending to negotiate the modification or withdrawal of concessions should transmit a notification to that effect for circulation to all Members. Paragraph 2 provides that the notification should be accompanied 'by statistics of imports of the products involved, by country of origin, *for the last three years* for which statistics are available'. Furthermore, paragraph 4 of these Procedures provides that any Member which considers that it has a principal or substantial supplying interest in the concessions that have been identified in the notification should communicate its claim in writing to the applicant Member, and that the claim should be made '*within ninety days* following the circulation of *the import statistics* referred to in paragraph 2'. The Understanding on the Interpretation of Article XXVIII provides that the guidelines provided in paragraph 4 of the Procedures for Negotiations under Article XXVIII are equally applicable when determining the existence of a principal or substantial supplying interest in the particular situations identified in paragraph 1 (highest ratio of exports) and paragraph 4 (new products) of the Understanding.

What emerges from the foregoing is that the determination of which Members hold a principal or substantial supplying interest in the concessions subject to renegotiations is to be made on the basis of the data preceding the initiation of the negotiations, and more specifically, the data for the last three years accompanying the notification which the importing Member circulates to initiate the process. These provisions do not directly speak to the separate issue of whether, having made this initial determination, a Member may then be required to subsequently reappraise that determination, at a later stage, to reflect any changes in import shares that have taken place following the initiation of the negotiations. The absence of any guidance on that issue is notable for the following reasons.

...

We consider that there would be circumstances in which it would not be 'unduly difficult' or complicated to reappraise which Members hold a substantial supplying

² Panel Report, *EU – Poultry (China)*, paras. 7.176-7.178.

interest. For example, it could be the case that for some reason, and shortly after the start of the negotiations, a Member that had previously been determined to hold a principal supplying interest is rendered unable to supply that product at all in the long term. On the other hand, we consider that there would be other circumstances in which the balance between these competing objectives would tilt the other way, and mitigate against re-determining which WTO Members hold a principal or substantial supplying interest in the midst of ongoing negotiations. For example, it could be the case that long after the initiation of negotiations, a relatively minor change in the import shares leads to one Member temporarily overtaking another as the supplier with a principal interest, such that a re-determination would lead to negotiations that have reached an advanced stage having to be restarted again, with a different Member."³

1.4.4 "discriminatory quantitative restrictions"

4. In *EU – Poultry (China)*, the Panel found that certain SPS measures maintained by the European Union against poultry imports did not constitute "discriminatory quantitative restrictions" within the meaning of paragraph 7 of the Ad Note to Article XXVIII:1. In that case, the European Union had determined which Members held a principal or substantial supplying interest based on their share of imports into the European Union that different Members held over the three years preceding the initiation of each of the two negotiation exercises. For most of this period, imports of poultry products from China into the European Union were prohibited as a consequence of several SPS measures (the WTO-consistency of which was not at issue in this dispute). China argued that the SPS measures were "discriminatory quantitative restrictions", on the grounds that any import prohibition that applied to some but not all WTO Members is properly characterized as a "discriminatory quantitative restriction" for purposes of Article XXVIII:1. In rejecting China's interpretation, the Panel stated that:

"Having examined the ordinary meaning of the term 'discriminatory', and having further examined the context and object and purpose of paragraphs 4 and 7 of the Ad Note to Article XXVIII:1, we conclude that the terms 'discriminatory quantitative restrictions' only cover situations in which differential treatment is accorded to imports from Members that are similarly situated. Applying this general concept of discrimination to the SPS measures, we consider that restrictions applied to imports based on sanitary grounds are 'discriminatory', within the meaning of paragraphs 4 and 7 of the Ad Note to Article XXVIII:1, only if imports from different countries that are similarly situated in terms of the sanitary situation or sanitary risks are not similarly restricted. Thus, we do not agree with China's view that China and other countries are 'similarly situated' by virtue of the fact that Chinese poultry meat products and poultry meat products originating in other countries are 'like products'.

In this case, in response to the European Union's argument that its import restrictions depend on the sanitary situation or sanitary risks of different countries, China has not attempted to argue that imports from any other similarly situated country were not subject to the same restrictions. Accordingly, we find, on the basis of our interpretation of the term 'discriminatory', that China has not demonstrated that the SPS measures at issue are 'discriminatory quantitative restrictions'. Therefore, we reject China's claim that the European Union violated Article XXVIII:1 by determining which Members held a principal or substantial supplying interest on the basis of actual import levels over the three years preceding the notification of its intention to modify its concessions (2003-2005 and 2006-2008), rather than on the basis of an estimate of what Members' shares would have been in the absence of the SPS measures restricting poultry imports from China."⁴

³ Panel Report, *EU – Poultry (China)*, paras. 7.212-7.217.

⁴ Panel Report, *EU – Poultry (China)*, paras. 7.204-7.205.

1.5 Article XXVIII:2: "general level of ... concessions not less favourable to trade"

1.5.1 "shall endeavour to maintain"

5. In *EU – Poultry (China)*, the Panel discussed the nature of the obligation in Article XXVIII:2:

"Article XXVIII:2 provides that Members 'shall endeavour to maintain' a general level of reciprocal and mutually advantageous concessions not less favourable to trade than that provided for in this Agreement prior to such negotiations. The European Union refers to Article XXVIII:2 as a 'best efforts' obligation and considers that in assessing the level of compensation the 'negotiating Members must be accorded a wide margin of discretion'. China responds that Members are not accorded 'a wide margin of discretion' in determining the appropriate level of compensation, and notes that the word 'endeavour' used in Article XXVIII:2 is accompanied by the verb 'shall', meaning that Members are compelled to work towards the maintenance of the general level of reciprocal concessions. However, it does not appear to us that the parties' disagreement on how best to characterize Article XXVIII:2, to the extent that there is such a difference, raises any issue for the Panel to resolve. For its part, the European Union has not argued that China's claims of violation under Article XXVIII:2 read in conjunction with paragraph 6 of the Understanding should be dismissed on the basis that Article XXVIII:2 reflects a 'best efforts' obligation. In addition, China appears to accept that the meaning of Article XXVIII:2 and paragraph 6 of the Understanding is that 'it may be difficult to have a compensation that is mathematically the exact counterfactual of the concession being withdrawn', and that what is required is that Members 'do all in their power to reach that goal'.

Furthermore, the European Union does not contest that Article XXVIII:2 'establishes a mandatory obligation which is cognizable under the DSU'. The European Union also agrees with China that, regardless of which Members are involved in the negotiations under Article XXVIII, any WTO Member has the right to challenge the compensation agreed pursuant to Article XXVIII under the DSU, if they consider that it is not adequate in view of Article XXVIII:2 and paragraph 6 of the Understanding. In sum, whatever the differences between the parties' respective positions on certain aspects relating to the contours of this obligation, there is no disagreement that Article XXVIII:2 establishes a legally enforceable obligation."⁵

1.5.2 "general level"

6. In *EU – Poultry (China)*, the Panel stated that:

"Article XXVIII:2 states that the Member concerned must endeavour to maintain a 'general level' of reciprocal and mutually advantageous concessions not less favourable to trade than that provided for prior to the modification. In calling for an examination of whether the 'general level' of concessions has been maintained, the text of Article XXVIII:2 suggests that the overall value of the compensation for all Members should be equivalent to the overall value for all Members of the modified concession."⁶

1.5.3 Relationship between Article XXVIII:2 and Paragraph 6 of the Understanding

7. In *EU – Poultry (China)*, the Panel discussed the relationship between Article XXVIII:2 and Paragraph 6 of the Understanding:

"The parties agree that if compensation is calculated in accordance with paragraph 6 of the Understanding, it would normally be presumed to be compliant with Article XXVIII:2. We see no reason to disagree. Article XXVIII:2 is a generally worded provision. Article XXVIII:2 does not include any specific rules in order to determine

⁵ Panel Report, *EU – Poultry (China)*, paras. 7.242-7.243.

⁶ Panel Report, *EU – Poultry (China)*, para. 7.295.

the amount of compensation to be accorded by the Member seeking the modification of a concession, and in practice assessments of the 'level of concessions' may be a very complex and difficult task, which can be approached by the negotiating Members in very different ways. The Understanding is an integral part of the GATT 1994, the purpose of which is to set forth an agreed interpretation among Members on the meaning to be given to certain aspects of Article XXVIII, including Article XXVIII:2. Moreover, paragraph 6 specifically addresses the question of the level of compensation to be provided when, as in the present case, an unlimited tariff concession is replaced with a TRQ."⁷

1.5.4 "the most recent three-year period" (paragraph 6 of the Understanding)

8. In *EU – Poultry (China)*, the Panel found that the terms "the most recent three-year period" or "most recent year" in paragraph 6 should be interpreted to mean the most recent period or year preceding the initiation of the negotiations, not the most recent period or year preceding the conclusion of the negotiations. In the course of its analysis of this issue, the Panel stated that:

"[W]e consider that, in order to achieve the purpose of facilitating the negotiations under Article XXVIII:2 by providing a benchmark that the negotiating Members can use as a basis for the calculation of compensation, it cannot be the case that the Members engaged in the negotiations would be legally obliged to change the benchmark defined in that provision from year to year until the negotiations have been concluded. We note that to adjust the benchmark year-to-year would not be complicated as such, insofar as it would be the result of a simple mathematical formula applied to import statistics. The difficulty that would arise is that the benchmark is meant to serve as the basis for negotiations and the calculation of compensation. To require the negotiating Members to use of a continually moving benchmark as the basis for negotiations could perpetuate negotiations indefinitely."⁸

1.6 Article XXVIII:3

1.6.1 "shall be free ... to modify or withdraw"

9. In *EU – Poultry (China)*, the Panel found that certification is not a legal prerequisite that must be completed before a Member modifying its concessions can proceed to implement the changes agreed upon in Article XXVIII negotiations at the national level. The Panel found support for its interpretation in the wording of Article XXVIII:3:

"Paragraph 3(a) of Article XXVIII provides that where agreement with the Members concerned cannot be reached, the Member proposing to modify or withdraw the concession 'shall, nevertheless, be free to do so'. Paragraph 3(a) then stipulates that if such action is taken, the Members concerned shall then be free 'not later than six months after such action is taken, to withdraw, upon the expiration of thirty days from the day on which written notice of such withdrawal is received by the Members, substantially equivalent concessions initially negotiated with the applicant Member'. Article XXVIII:3(b) further provides that if agreement with Members concerned is reached, but the agreement reached is not satisfactory to Members having a substantial supplying interest, those Members 'shall be free, not later than six months after the action under such agreement is taken, to withdraw, up the expiration of thirty days from the day on which written notice of such withdrawal is received by the Members, substantially equivalent concessions initially negotiated with the applicant Member'.

China considers that the prior incorporation of such changes into the Schedule through certification is a legal prerequisite for giving effect to the changes in the context of Article XXVIII:3. We have difficulty reconciling such an interpretation with the ordinary meaning of this provision. The specification of a timeframe for the modification or withdrawal of concessions, by reference to the point in time when 'such action is taken' by the applicant Member or when 'action under such agreement is taken',

⁷ Panel Report, *EU – Poultry (China)*, para. 7.244.

⁸ Panel Report, *EU – Poultry (China)*, para. 7.272.

implies that this may be undertaken prior to the changes being introduced into the Schedule through the certification process. Article XXVIII:3 addresses situations in which agreement cannot be reached with the Members engaged in the negotiations, or where the agreement reached is not satisfactory to Members with a substantial supplying interest. Insofar as the terms of Article XXVIII:3 imply that Members concerned are 'free' to withdraw or modify concessions prior to certification of the changes to the Schedule in those situations, then we consider that such a right must exist *a fortiori* where, as in the present case, the modification has been agreed by the Members holding initial negotiating rights, a principal supplying interest, and a substantial supplying interest.

The Procedures for Modification and Rectification of Schedules, which we examine in greater detail below, provide that changes in the authentic texts of Schedules annexed to the General Agreement 'which reflect modifications resulting from action under Article II, Article XVIII, Article XXIV, Article XXVII or Article XXVIII' shall be certified by means of certifications. The Articles specified in paragraph 1 of the Procedures all provide for actions that may be taken to modify concessions, which are then submitted for certification under the Procedures. Articles XVIII, XXIV and XXVII each use a similar phrase to that used in paragraph 3 of Article XXVIII, namely that the Member concerned 'shall be free to modify or withdraw' the concession, and affected Members that do not agree to the modification of concession 'shall be free to withdraw substantially equivalent concessions'. These provisions specify the conditions, including the timeframes, when the Members concerned 'shall be free to modify or withdraw' the concession. In our view, the argument that prior incorporation of such changes into the Schedule through certification is a legal prerequisite for giving effect to the changes in the context of Article XXVIII:3 is also difficult to reconcile with the terms of these other provisions of the GATT 1994."⁹

1.6.2 Relationship with other GATT provisions

1.6.3 Article XIII

10. In *EC – Poultry*, Brazil claimed that the MFN principle in Articles I and XIII did not apply to tariff-rate quotas resulting from compensation negotiations under Article XXVIII of the GATT. The Panel rejected this argument and held:

"[I]f a preferential treatment of a particular trading partner not elsewhere justified is permitted under the pretext of 'compensatory adjustment' under Article XXVIII:2, it would create a serious loophole in the multilateral trading system. Such a result would fundamentally alter the overall balance of concessions Article XXVIII is designed to achieve."¹⁰

11. The Panel concluded that a tariff-rate quota which resulted from negotiations under Article XXVIII of the GATT 1947, and which was incorporated into a Member's Uruguay Round Schedule, must be administered in a non-discriminatory manner consistent with Article XIII of the GATT 1994.¹¹ The Appellate Body agreed:

"We see nothing in Article XXVIII 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. As the Panel observed, this interpretation is, furthermore, supported by the negotiating history of Article XXVIII. Regarding the provision which eventually became Article XXVIII:3, the Chairman of the Tariff Agreements Committee at Geneva in 1947, concluded:

'It was agreed that there was no intention to interfere in any way with the operation of the most-favoured-nation clause. This Article is headed 'Modification of Schedules'. It refers throughout to concessions negotiated under paragraph 1 of Article II, the Schedules, and there is no

⁹ Panel Report *EU – Poultry (China)*, paras. 7.517-7.519.

¹⁰ Panel Report, *EC – Poultry*, para. 215.

¹¹ Appellate Body Report, *EC – Poultry*, para. 102.

reference to Article I, which is the Most-Favoured-Nation Clause. Therefore, I think the intent is clear: that in no way should this Article interfere with the operation of the Most-Favoured-Nation Clause.¹²

Although this statement refers specifically to the MFN clause in Article I of the GATT, logic requires that it applies equally to the non-discriminatory administration of quotas and tariff-rate quotas under Article XIII of the *GATT 1994*.¹³

12. In *EU – Poultry (China)*, the Panel found that the allocation of tariff rate quotas among supplying countries is governed by Article XIII:2 of the GATT, not by Article XXVIII:2 or paragraph 6 of the Understanding. In the course of its analysis, the Panel stated that:

"[I]f the allocation of TRQ shares among supplying countries is not regulated by Article XXVIII:2 and paragraph 6 of the Understanding, it does not follow that the allocation of TRQ shares among supplying countries is unregulated, or 'would result in over-compensation for some and under-compensation for others, thereby creating discrimination'. Rather, it would mean that the allocation of TRQs shares among supplying countries is regulated only by the relevant obligations in Article XIII. Interpreting Article XXVIII:2 and paragraph 6 of the Understanding as also regulating the allocation of TRQs among supplying countries would thus mean that there are two sets of requirements in the GATT 1994 regulating the allocation of TRQ shares among supplying countries. To the extent that the requirements of paragraph 6 of the Understanding would be interpreted differently from the TRQ allocation requirements found in Article XIII:2, this would mean that there are different and potentially conflicting requirements regulating the allocation of TRQ shares among supplying countries.

According to China, paragraph 6 of the Understanding applies 'at the level of the share allocation of each tariff rate quota as well as at the level of the global tariff rate quota'. However, we recall that paragraph 6 contains three different formulae for calculating future trade prospects, and the importing Member is required to select the formula that yields the greatest amount. Therefore, if paragraph 6 of the Understanding applies at the level of the share allocation, the importing Member would have to apply different formulae to different Members insofar as that would yield a greater amount in any case. Based on the text of paragraph 6 of the Understanding, we consider that the application of the formulae set forth in paragraph 6(a) and 6(b) at the level of TRQ allocation would not only lead to results that conflict with the allocation rules set forth in Article XIII:2, but which would also be unworkable."¹⁴

Current as of: December 2020

¹² (footnote original) EPCT/TAC/PV/18, p. 46; see Panel Report, para. 217.

¹³ Appellate Body Report, *EC – Poultry*, para. 100.

¹⁴ Panel Report, *EU – Poultry (China)*, paras. 7.299-7.230.