

PONTIFICIA UNIVERSIDAD JAVERIANA

***De Facto* Quantitative Restrictions and their Application under GATT**

Article XIII: 5

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ABSTRACT

Tariff rate quotas are measures that have a double nature since these are integrated by both, a tariff component and a non-tariff component (an in-quota and an out-quota). Their imposition is regulated in GATT Article XIII, which is an article drafted to avoid a discriminatory administration of quantitative restrictions. Since, as mentioned, tariff rate quotas also have a tariff component, and the non-discriminatory administration of tariffs is regulated under GATT Article I, it seems like a WTO consistent tariff (for example, because the country imposing them has a waiver under GATT Article I) within a tariff rate quota could affect the participation that some suppliers would be expected to have in the quota, if for instance they have to pay for a higher tariff than other countries, but there would be no proper manner to find this measure as non-compliant when the quotas are being set (at least numerically) equally for every Member. It is the purpose of this document to address this issue and to propose a solution to the actual inexistence of a provision within the GATT exclusively addressing tariff rate quotas.

Key words: WTO, GATT, Tariff Rate Quotas, International Trade.

TABLE OF CONTENTS

- 1. INTRODUCTION 1**

- 2. LEVYING TARIFF RATE QUOTAS UNDER THE RULES OF THE GATT
..... 3**
 - 2.1. Tariff Rate Quotas and their Special Nature 3
 - 2.1.1. Price Based Measures and Quantitative Restrictions..... 3
 - 2.1.2. TRQs: The Hybrid 3
 - 2.2. Scope of Article XIII of the GATT 4
 - 2.2.1. Non-discriminatory Application of Quantitative Restrictions..... 4
 - 2.2.2. Difference with Article’s I MFN..... 7
 - 2.3. The Problematic Application of Tariff Rate Quotas under Article XIII..... 8

- 3. DE FACTO MEASURES 13**
 - 3.1. *De Facto* Discrimination in the WTO: case law analysis 13
 - 3.1.1. EC- Bananas -Report of the Appellate Body (1997).....13
 - 3.1.2. Canada- Autos -Report of the Appellate Body (2000)..... 14
 - 3.2. *De Facto* Quantitative Restrictions in the WTO: case law analysis..... 15
 - 3.2.1. Japan- Semiconductors -Report of the Panel (1998)..... 15
 - 3.2.2. India- Autos -Report of the Panel (2001)..... 16
 - 3.3. The Rule in Force: *de facto* Discriminatory Measures are Prohibited, Including *de facto* QRs..... 17

- 4. DE FACTO QUANTITATIVE RESTRICTIONS UNDER ARTICLE
XIII..... 18**
 - 4.1. The Difference in Wording (Article XI vs. Article XIII)..... 18
 - 4.2. The Proposal: *De Facto* Quantitative Restrictions fall into the Scope of Article
XIII..... 20

5. BURDEN OF PROOF OF THE COMPLAINANT WHEN CLAIMING A <i>DE FACTO</i> QUANTITATIVE RESTRICTION	21
5.1. Case Law.....	21
5.1.1. EC - Poultry -Report of the Appellate Body (1998)	21
5.1.2. Argentina - Hides and Leather -Report of the Panel (2000).....	22
5.1.3. Colombia - Ports of Entry -Report of the Panel (2009)	23
5.1.4. China - Raw Materials -Report of the Panel (2011)	24
5.2. The Rule in Force: Burden of Proof depending on the <i>De Facto</i> or the <i>De Jure</i> nature of the measure.	25
6. CONCLUSIONS.	26

ANNEX: EC BANANAS: THE LANDMARK CASE.....	28
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LIST OF ABBREVIATIONS

AB	Appellate Body
ABR	Appellate Body Report
EC	European Communities
GATT	General Agreement on Tariffs and Trade
Members	Members of the WTO
MFN	Most Favored Nation
PR	Panel Report
QR	Quantitative Restriction
TRQ	Tariff Rate Quotas
U.S.	United States
WTO	World Trade Organization

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<i>Colombia - Ports of Entry</i>	Panel Report, <i>Colombia - Indicative Prices and Restrictions on Ports of Entry</i> , WT/DS366/R, adopted 20 May 2009
<i>EC - Bananas III</i>	Panel Report, <i>European Communities - Regime for the Importation, Sale and Distribution of Bananas</i> , WT/DS27/R/ECU, adopted 22 May 1997
<i>EEC - Restrictions On Imports Of Apples From Chile</i>	Panel Report, <i>EEC - Restrictions On Imports Of Apples From Chile</i> , L/5047 - 27S/98, adopted 10 November 1980
<i>India - Autos</i>	Panel Report, <i>India - Measures Affecting the Automotive Sector</i> , WT/DS146/R, WT/DS175/R, adopted 21 December 2001

<i>Japan - Semiconductors</i>	Panel Report, <i>Japan - Trade In Semi-Conductors</i> , L/6309 - 35S/116, adopted 4 May 1988
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1. INTRODUCTION

In WTO law, as in any other legal system, Members create rules, as well as exceptions to those rules. However, a reasonable interpreter would arrive to the conclusion that “parties intend their consensus not to be undermined by a liberal interpretation of exceptions”¹. In other words, in order for exceptions to work properly, these shall operate under the very same parameters as rules do. For instance, GATT Article XIII serves as an exception to the general ban of QRs set out in GATT Article XI. Hence its scope shall be interpreted to be as broad as to encompass any situation that might undermine its purpose, i.e. the non-discriminatory administration of QRs.

The objective of this document is to conduct a critical analysis of how, through the imposition of discriminatory tariffs within TRQs, the MFN duty of GATT Article XIII, regarding the non-discriminatory administration of QRs, may be violated by the creation of *de facto* QRs. This object of analysis emerges from the special nature of TRQs –since they are composed of both, a price based measure (a tariff) and a non-price measure (a QR: an in-quota and an out-quota) –which are regulated under two different provisions of the GATT. These are, GATT Article I for their tariff component and GATT Article XIII for the non-tariff component.

Furthermore, the AB established –in the landmark case EC-Bananas III–the difference in the approach to the MFN duty of Articles I and XIII, which are both involved in TRQs, thus setting the bases for the proposed analysis. In that occasion, the AB stated that “if a Member imposes differential in-quota duties on imports of like products from different supplier countries under a tariff quota, Article I:1 would be implicated; if that Member fails to give access to or allocate tariff quota shares on a non-discriminatory basis among supplier countries, the requirements of Articles XIII:1 and XIII:2 would apply.”²

¹ Qureshi, A., *Interpreting WTO Agreements: problems and Perspectives*, Cambridge University Press, 2nd edition (2015), pg. 175.

² AB Report, *EC — Bananas III (Second Recourse to Article 21.5 - Ecuador)*, para.343.

A narrow interpretation of this finding would lead to believe that the imposition of tariffs must be analyzed solely under the MFN duty of GATT Article I, but since the AB stated in that occasion that GATT Article XIII becomes involved when the allocation of shares turns discriminatory, if a Member fails to give access or to allocate quotas in a non-discriminatory basis due to a discriminatory application of tariffs, the MFN duty of Article XIII and its requirements should become applicable. In other words, regarding discriminatory tariffs within TRQs, the MFN duty of GATT Article XIII should be applied, due to the fact that the tariff component can have a direct incidence on the availability of the market in-quota, thus possibly generating *de facto* QRs, which would fall into the scope of GATT Article XIII through the term *restriction*, as incorporated in its wording.

In order to proceed –and following an explanation on the hybrid nature of TRQs– the issue will be developed through a case law analysis regarding: (i) the different approach to the MFN obligation through both, GATT Articles I and XIII; (ii) *de facto* measures and *de facto* QRs, and (iii) *de facto* QRs under GATT Article XIII through tariffs within TRQs. Lastly, this document will explain the burden of proof that would rely upon a Member when presenting a claim regarding *de facto* QRs, according to the existing case law.

2. LEVYING TARIFF RATE QUOTAS UNDER THE RULES OF THE GATT

2.1 Tariff Rate Quotas and their Special Nature

In order to understand the problematic application of TRQs under GATT Article XIII, one must first understand the very nature of this type of measures. Therefore, both price based measures and QRs will be addressed, in order to develop how TRQs are a combination of both.

2.1.1 Price Based Measures and Quantitative Restrictions

In the WTO terms, QRs are measures which “limit the quantity of a good that may be imported or exported”³. GATT Article XI⁴, titled General Elimination of QRs, prohibits the use of this type of measures. However, this basic definition does not encompass every possible measure classified as a QR, although it clearly defines the effect that all these have on trade, as will be addressed in chapter 3. On the other hand, a price based measure, specifically a tariff, is “a financial charge levied at the time of importation on a particular good”⁵, and as opposed to QRs, these are permitted by WTO law –subject to their own disciplines, and the core principles of non-discrimination due to the fact that tariffs can also create barriers on trade.

2.1.2 TRQs: The Hybrid

TRQs appear as a hybrid, since these are import measures “whereby a lower tariff will be applied for a certain volume of imports, and a higher tariff will be applied to any

³ Mavroidis, Petros C.; Wu, Mark., *The Law of the World Trade Organization (WTO) Documents, Cases & Analysis*, West Academic Publishing, 2nd edition (2013), pg. 59.

⁴ GATT Article XI reads: “No prohibition or restriction other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party or on the exportation or sale for export of any product destined for the territory of any contracting party.”

⁵ Mavroidis, Petros C. ; Wu, Mark., *The Law of the World Trade Organization (WTO) Documents, Cases & Analysis*, West Academic Publishing, 2nd edition (2013), pg.87.

quota above and beyond the set quota”⁶. Due to the fact that these measures combine both tariffs and QRs⁷, they are subject to both sets of rules. Consequently, while the MFN obligation contained in GATT Article I:1⁸ regulates customs duties, the one in GATT Article XIII concerns QRs. It is exactly for this reason that their regulation and control can be problematic, especially because (i) Article XIII contains a specific paragraph stating that the provisions of the Non-discriminatory Administration of QRs Article apply also to any TRQ, and (ii) both provisions –GATT Article I and XIII– address the non-discrimination principle in different ways.

2.2 Scope of Article XIII of the GATT

2.2.1 Non- discriminatory Administration of Quantitative Restrictions

GATT Article XIII was drafted as an exception to the general ban of QRs established in WTO law, specifically in GATT Article XI. However, any Member wishing to benefit from this exception must impose the QRs in the less discriminatory manner possible. In other words: (i) the like products of all third countries must be similarly prohibited or restricted, and (ii) the Member imposing the QR must aim at a distribution of trade approaching the shares that Members might be expected to obtain in the absence of the restriction⁹. Additionally, as mentioned before, TRQs fall into the scope of GATT

⁶ Ibid, pg. 83.

⁷ Mavroidis, Petros C. ; Wu, Mark., *The Law of the World Trade Organization (WTO) Documents, Cases & Analysis*, West Academic Publishing, 2nd edition (2013), pg.123.

⁸ GATT Article I:1 reads: “With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III,* any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.”.

⁹ Indeed, paragraphs 1 and 2 of GATT Article XIII state as follows: “1. No prohibition or restriction shall be applied by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation of any product destined for the territory of any other contracting party, unless the importation of the like product of all third countries or the exportation of the like product to all third countries is similarly prohibited or restricted. 2. In applying import restrictions to any product, contracting parties shall aim at a distribution of trade in such product approaching as closely as

Article XIII, as stated specifically in its paragraph 5¹⁰. Consequently, the requirements embodied in paragraphs 1 and 2¹¹ of GATT Article XIII shall apply when analyzing the consistency of a TRQ with WTO law.

The Panel in *EC-Bananas III* interpreted the first requirement contained in GATT Article XIII, i.e. that like products from every third country must be similarly prohibited or restricted. On that occasion, it stated:

“Article XIII:1 establishes the basic principle that no import restriction shall be applied to one Member’s products unless the importation of like products from other Members is similarly restricted. Thus, a Member may not limit the quantity of imports from some Members but not from others. But as indicated by the terms of Article XIII (and even its title, ‘Non-discriminatory Administration of Quantitative Restrictions’), the non-discrimination obligation extends further. The imported products at issue must be ‘similarly’ restricted. A Member may not restrict imports from some Members using one means and restrict them from another Member using another means. (...)”¹²

This first requirement is clear when demanding a similar treatment for the like products of all third countries, i.e products that share a number of identical or similar characteristics¹³, with the aim of respecting their competitive opportunities¹⁴. The AB in *EC-Bananas III* supported this interpretation:

possible the shares which the various contracting parties might be expected to obtain in the absence of such restrictions (...)”.

¹⁰ Paragraph 5 of GATT Article XIII reads: “The provisions of this Article shall apply to any tariff quota instituted or maintained by any contracting party, and, in so far as applicable, the principles of this Article shall also extend to export restrictions.”.

¹¹ PR, *US -Line pipe*, paras. 7.58.

¹² PR, *EC -Bananas III*, paras. 7.68–7.69.

¹³ ABR, *EC -Asbestos*, para.91. It is important to state, as the AB recognized in that very occasion, that this dictionary meaning leaves out several interpretations, and that it had already explained how “The accordion of ‘likeness’ stretches and squeezes in different places as different provisions of the WTO Agreement are applied.”. ABR, *Japan-Alcoholic Beverages*, pg. 21. However, for the purposes of this paper, a deeper analysis on this topic is not needed.

¹⁴ AB Report, *EC -Bananas III (Second Recourse to Article 21.5 - Ecuador)*, para. 337.

“The essence of the non-discrimination obligations is that like products should be treated equally, irrespective of their origin. As no participant disputes that all bananas are like products, the non-discrimination provisions apply to all imports of bananas, irrespective of whether and how a Member categorizes or subdivides these imports for administrative or other reasons. If, by choosing a different legal basis for imposing import restrictions, or by applying different tariff rates, a Member could avoid the application of the non-discrimination provisions to the imports of like products from different Members, the object and purpose of the non-discrimination provisions would be defeated.”¹⁵

In that same occasion, the AB concisely stated that:

“A Member cannot restrict the importation of any product from another Member unless the importation of the like product from all third countries is ‘similarly’ restricted.”¹⁶

The second requirement, contained in paragraph 2 of GATT Article XIII¹⁷ demands the Member to aim at a distribution of trade approaching the shares that Members might be expected to obtain in the absence of the restriction at issue. Hence, the TRQ must respect their competitive opportunities in a manner that mirrors their comparative advantage vis-à-vis other Members who would participate in the quota¹⁸. The objective of this requirement is therefore to minimize the impact of QRs on trade flows, and set out how the provisions of Article XIII work together¹⁹.

¹⁵ ABR, *EC-Bananas III*, para. 190.

¹⁶ *Ibid*, para. 161.

¹⁷ This reading of GATT Article XIII derives from a holistic interpretation, since “the chapeau of Article XIII:2 contains a general rule, and not merely a statement of principle.” PR, *US- Line Pipe*, fn. 64. This general rule sets out how the provisions of Article XIII work together. Therefore, the requirement embodied paragraph 1 of GATT Article XIII must be read along with the one contained in paragraph 2, and an inconsistency with either will lead to an inconsistency with GATT Article XIII.

¹⁸ ABR, *EC-Bananas III (Second Recourse to Article 21.5 - Ecuador)*, para. 338.

¹⁹ “It can be said that the object and purpose of Article XIII:2 is to minimize the impact of a quota or tariff quota regime on trade flows by attempting to approximate under such measures the trade shares that would have occurred in the absence of the regime.” PR, *EC - Bananas III*, para. 7.68.

In conclusion, if a Member wants to impose a QR or a TRQ, it must follow paragraphs 1 and 2 of GATT Article XIII. Thus, Members must respect the competitive opportunities of the like products competing in the same market through a similar restriction, always aiming at a distribution of trade respectful of the historical trade flows.

2.2.2 Difference with the MFN in GATT Article I

The non-discrimination duty is of mayor significance when it comes to WTO law and policy. For this reason, its relevance is highlighted in the preamble of the Marrakesh Agreement, when it states that the elimination of discrimination amongst countries when it comes to their trade relations²⁰ is one of the means to attain the WTO's main objectives. Its importance relies upon the fact that, among other effects that it can cause, "...discrimination makes scant economic sense as, generally speaking, it distorts the market in favour of goods and services that are more expensive and/or of lower quality."²¹

The general non-discrimination duty is itself composed by two main obligations: MFN and NT. For the purposes of this document, the MFN obligation must be the main focus. This obligation relates to the prohibition of discrimination of one country between the others. Even though both GATT Articles I and XIII refer to it, their approach is different. This difference was explained by the AB in EC-Bananas III, as follows:

"We consider that the notion of "non-discrimination" in the application of tariffs under Article I:1 and the notion of non-discriminatory application of a "prohibition or restriction" under Article XIII are distinct, and that Article

Also, it is relevant to mention that the trade flows are determined through the historical trade patterns, based on the records of the transactions between the Members. A three years lapse has been used by some Panels to determine the allocation of quotas according to the historical trade patterns in Article XIII. See for instance PR, *EEC - Restrictions On Imports Of Apples From Chile*.

²⁰ Paragraph 3 of the Marrakesh Agreement's preamble reads: "Being desirous of contributing to these objectives by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international trade relations..."

²¹ Van den Bossche, P; Zdouc, W., *The Law and Policy of the World Trade Organization: Text, Cases and Materials*, Cambridge University Press, 3rd edition (2013), pg. 315.

XIII ensures that a Member applying a restriction or prohibition does not discriminate among all other Members. Article I:1, which applies to tariffs, and Article XIII:1, which applies to quantitative restrictions and tariff quotas, may apply to different elements of a measure or import regime. Article XIII adapts the MFN-treatment principle to specific types of measures, that is, quantitative restrictions, and, by virtue of Article XIII:5, tariff quotas. Tariff quotas must comply with the requirements of both Article I:1 and Article XIII of the GATT 1994. This, in our view, does not make Article XIII redundant in respect of tariff quotas: if a Member imposes differential in-quota duties on imports of like products from different supplier countries under a tariff quota, Article I:1 would be implicated; if that Member fails to give access to or allocate tariff quota shares on a non-discriminatory basis among supplier countries, the requirements of Articles XIII:1 and XIII:2 would apply. In the absence of Article XIII, Article I would not provide specific guidance on how to administer tariff quotas in a manner that avoids discrimination in the allocation of shares.”²²

In this sense, the AB stated that the MFN contained in GATT Article I applies to in-quota duties within a TRQ imposed on like products from different supplier countries, while GATT Article XIII would apply if a Member fails to allocate shares on a non-discriminatory basis when imposing a TRQ. In other words, according to the AB, the imposition of the tariff duties must be analyzed under GATT Article I, while GATT Article XIII is used to determine and avoid discrimination in the allocation of market shares.

2.3 The Problematic Application of Tariff Rate Quotas under Article XIII

Even though the AB established how GATT Articles XI and XIII approach the MFN duty from different perspectives, this interpretation leaves out specific situations that could permit a discriminatory administration of TRQs. One possibility, for instance, could

²² ABR, *EC-Bananas III (Second Recourse to Article 21.5 - Ecuador)*, para. 343.

be that tariffs are being correctly levied within a TRQ according to GATT Article I, but their ultimate effect is that of a *de facto* QR. If one were to interpret the AB's decision narrowly, there would be no tools to find such a measure as WTO inconsistent, since a superficial reading leads to believe that tariffs are subject exclusively to GATT Article I.

To illustrate this problem via an example, we consider Member X imposing the TRQ. Member X has a waiver under GATT Article I as well. The measure gives the Members access to the quotas on a first-come-first-served basis, but defines higher tariff for some of them. For example, countries A, B and C have to pay for an in-quota tariff of 15% ad valorem while countries D, E and F are subject to an in-quota of 45% ad valorem. Due to the fact that Member X has a waiver under Article I, at first sight the TRQ is WTO-compliant. However, this result would ignore the effect of this measure, i.e. a discriminatory *de facto* QR through the obstruction imposed on countries D, E and F. This creates a disincentive for these countries to participate in the market, due to the dissimilar conditions that countries D, E and F face.

However, in order to elaborate on the example, further discussion on the landmark case EC-Bananas III (Article 21.5-Ecuador) is needed. The following AB report fragments approach the discussion in a very illustrative manner:

“The European Communities contends that the Panel "developed a theory pursuant to which a lower tariff offered to one Member becomes automatically a 'quantitative restriction' on all other Members, provided that it is offered to only some, and not all, quantities exported by the beneficiary”²³

“The Panel concluded that, under the terms of Article XIII:1, MFN imports are not similarly restricted because ACP suppliers have access to the duty-free tariff quota, while non-ACP suppliers are denied access to that quota, and that, for the same reasons, the duty-

²³ Ibid, para. 329.

free tariff quota fails to comply with the allocation rules set out in Article XIII:2 of the GATT 1994.”²⁴

“The application of the tariff quota is thus on a product-wide basis. The principle of non-discriminatory application captured by Article XIII:1 requires that, if a tariff quota is applied to one Member, it must be applied to all; and, consequently, the term "similarly restricted" means, in the case of tariff quotas, that imports of like products of all third countries must have access to, and be given an opportunity of, participation. If a Member is excluded from access to, and participation in, the tariff quota, then imports of like products from all third countries are not "similarly restricted". ”²⁵

“Article XIII:2 regulates the distribution of the tariff quota among Members. The chapeau of Article XIII:2 requires that the tariff quota be distributed so as to serve the aim of a distribution of trade approaching as closely as possible the shares that various Members may be expected to obtain in the absence of the tariff quota. In this way, all Members producing the like product are afforded access to, and competitive opportunities under, the tariff quota in a manner that mimics their comparative advantage vis-à-vis other Members who would participate under the quota. Thus, while Article XIII:1 establishes a principle of non-discriminatory access to and participation in the overall tariff quota, the chapeau of Article XIII:2 stipulates a principle regarding the distribution of the tariff quota in the least trade-distorting manner.”²⁶

“It follows from this analysis that a tariff quota is not *per se* unlawful because it fails to adhere to the disciplines of Article XIII. Rather, the administration of the tariff quota is unlawful if it is applied in a manner that does not comply with the requirements of Article XIII.”²⁷

²⁴ Ibid, para. 330.

²⁵ Ibid, para. 337.

²⁶ Ibid, para. 338.

²⁷ Ibid, para. 338.

Applying this AB's pronouncement, together with article XIII as such, demands the analysis of the following steps –which were mentioned and explained previously-: (i) whether country X in our example "similarly restricted" every Member by respecting their access to the market and their participation in it; and (ii) whether the distribution of the tariff quota among Members, served the aim at a distribution of trade approaching as closely as possible the shares that Members may have expected to obtain in the absence of the tariff quota.

Firstly, one must keep in mind that when the quota is administered in a first-come-first-served basis, the products to be imported sooner are the ones to benefit from the privileged tariff, while products to be imported after the in-quota has been surpassed are subject to a more burdensome tariff.

In our example, the conditions to access the quota are not the same to all countries -A, B, C, D, E and F- due to the privileged tariff of 15% ad valorem that only some of them are entitled to enjoy. All the rest face a 45% ad valorem tariff and therefore do not have as much incentives to participate.

The picture becomes even clearer when imagining countries in the example as contenders competing in a race where the finishing line is Member X's in-quota. However, some of them have to compete while carrying weight three times heavier than the others. As a result, countries or competitors in the noticeable disadvantaged situation are not, whatsoever, racing fairly to get part in the privileged quota. In other words, countries D, E and F are strictly allowed to compete, but their restriction is not similar in any way to the one that A,B and C are subject to, amounting to a violation of GATT Article XIII:1.

Also, this situation leads to a breach of GATT Article XIII:2 since the allocation of quotas does not follow the aim at a distribution of trade that respects the shares that countries would have expected in the absence of the higher tariffs on the quota. In other words, the difference in the tariff treatment is not aiming to a distribution of trade that

affords access to, and competitive opportunities under the tariff quota to all supplying Members reflecting their comparative advantage²⁸.

Since Member X failed to give access to or allocate tariff quota shares on a non-discriminatory basis among supplier countries, the requirements of Articles XIII:1 and XIII:2 become applicable, and the Panel shall find its measures to be inconsistent with the mentioned Article. Note that it is precisely for this reason that this document proposes that Article XIII is not restricted only to non-tariff measures, since tariff measures can create the effect that the very object and purpose of GATT Article XIII tries to avoid.

²⁸ Ibid, para. 340.

3. DE FACTO MEASURES

3.1 *De Facto* Discrimination in the WTO Law: case law analysis

The non-discrimination duty, as referred in chapter 2.2.2 of this document, is implemented in more than one provision of the covered agreements; for instance, GATT Article I:1 and GATS Article II:1²⁹, which refer to goods and services, respectively. However, the core issue is to understand and define the scope of the obligation, developed in two landmark cases. The analysis will reveal the conclusion that, in order to fully implement the MFN obligation, both *de jure* and *de facto* discrimination are covered.

3.1.1 EC- Bananas-Report of the Appellate Body (1997)

Specifically regarding GATS Article II, Ecuador, the U.S. and Mexico complained about the EC regime for the importation, sale and distribution of bananas since it allegedly discriminated against Latin American and non-traditional distributors of ACP bananas, in favor of EC and traditional distributors of ACP bananas. The Panel found the specific measures to be inconsistent with GATS Article II and the EC appealed the Panel's finding as follows: "... that the obligation contained in Article II:1 of GATS to extend "treatment no less favourable" should be interpreted *in casu* to require providing no less favourable conditions of competition."³⁰ It was for this reason that afterwards, the AB ruled:

"The ordinary meaning of this provision does not exclude *de facto* discrimination. Moreover, if Article II was not applicable to *de facto* discrimination, it would not be difficult -- and, indeed, it would be a good deal easier in the case of trade in services, than in the case of trade in goods - - to devise discriminatory measures aimed at circumventing the basic purpose of that Article.

²⁹ GATS Article II:1 reads: "With respect to any measure covered by this Agreement, each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country."

³⁰ ABR, *EC-Bananas*, para. 229.

For these reasons, we conclude that "treatment no less favourable" in Article II:1 of the GATS should be interpreted to include *de facto*, as well as *de jure*, discrimination. We should make it clear that we do not limit our conclusion to this case."³¹

Even though this case does not interpret the GATT, but the GATS, it is crucial to note how the AB shows concern in both, trade in goods and in services, about the possibility of circumventing the purpose of avoiding discrimination in international trade. In other words, *de facto* discrimination constitutes an issue that is not limited whatsoever to services, but that is widely recognized, as this case shows.

3.1.2 Canada- Autos -Report of the Appellate Body (2000)

In this particular case the appellees were the EC and Japan, who complained about a duty exemption provided by Canada to some countries who met particular requirements. One of the core issues in appeal, which the AB materialized in a question, concerned whether "the import duty exemption, accorded by the measure to motor vehicles originating in some countries, in which affiliates of certain designated manufacturers under the measure are present, also been accorded to like motor vehicles from all other Members, in accordance with Article I:1 of the GATT 1994?".³² Accordingly, the AB started answering the question with the following statement:

"In approaching this question, we observe first that the words of Article I:1 do not restrict its scope only to cases in which the failure to accord an "advantage" to like products of all other Members appears *on the face* of the measure, or can be demonstrated on the basis of the words of the measure. Neither the words "*de jure*" nor "*de facto*" appear in Article I:1. Nevertheless, we observe that Article I:1 does not cover only "in law", or *de*

³¹ Ibid. paras. 233 y 234.

³² ABR, *Canada-Autos*, para. 77.

jure, discrimination. As several GATT PRs confirmed, Article I:1 covers also "in fact", or *de facto*, discrimination."³³

Concisely, the AB stated therefore that both, *de jure* and *de facto* measures fall into the scope of the non-discrimination obligation as one of the core duties in WTO law. This interpretation has been supported, even from the GATT era³⁴.

3.2 De Facto Quantitative Restrictions in the WTO Law: case law analysis

As pointed out in section 2.1.1, when assessing QRs, one must take into account various situations that may not fit squarely into the definition that was suggested. In fact, all QRs will, as their ultimate effect, limit the quantity of a product when destined for importation or exportation, but the essential objective is to answer whether this effect must be achieved by a strict numerical limit. Indeed, this is not the case, which is why the following case law analysis shows the desire of several Panels to provide for further protection against the discrimination that may arise from *de facto* QRs as opposed to the *de jure* ones.

3.2.1 Japan- Semiconductors -Report of the Panel (1998)

This case arose when the EC complained about a particular arrangement between the U.S. and Japan, challenging the Japanese measures that implemented it. In brief, the agreement aimed at facilitating the U.S. participation in the Japanese semiconductors market, and avoiding unfairly low prices on these products when being imported to the U.S. Consequently, the Japanese Ministry of International trade and Industry instituted a series of mechanisms to influence the behavior of their exporters, in order to control their pricing policies.

³³ Ibid, para.78.

³⁴ See PR, *EC-Imports of Beef from Canada*, paras. 4.2 -4.3.

The EC argued that this mechanism, through the facilitation of higher export prices, also caused a lower amount of exports, therefore contravening Article XI of the GATT. In other words, its claim regarding this measures radiated in the assertion that:

“In the case under consideration, the question of whether the administrative guidance by MITI were measures designed to reduce production for exports or measures to reduce exports directly was immaterial. Measures were contrary to Article XI if they were intended to reduce exports in order to increase prices at which goods were exported. It was irrelevant whether this result was achieved directly by restrictions on the quantities exported or on the prices at which the goods were exported, or by restrictions on the quantities produced which were available for export.”³⁵

In this case, the Panel finally agreed with the EC, and found the Japanese measures to be inconsistent with Article XI of the GATT, as far as the mechanism worked, when applied, as an export control.

3.2.2 India- Autos -Report of the Panel (2001)

This report concerns a controversy between the U.S. and the EC, as claimants, and India, as the respondent. In this occasion, the former complained about an Indian government measure that demanded automobile manufacturers in the country who wished to import parts, to sign a Memorandum of Understanding that stipulated that its exports and imports be equivalent in value over a period of time. Consequently, the Panel in this case found that:

“With regard to the trade balancing condition, the Panel finds that as at the date of its establishment, there would necessarily have been a practical threshold to the amount of exports that each manufacturer could expect to make, which in turn would determine the amount of imports that could be

³⁵ PR, *Japan- Semiconductors*, para. 53.

made. This amounts to an import restriction. The degree of effective restriction which would result from this condition may vary from signatory to signatory depending on its own projections, its output, or specific market conditions, but a manufacturer is in no instance free to import, without commercial constraint, as many kits and components as it wishes without regard to its export opportunities and obligations.”³⁶

It was therefore the Panel’s conclusion that there is no need for the existence of a precise numerical limit in order to impose a restriction contrary to the terms of the GATT, that is, a *de facto* QR³⁷. It is important to clarify that, regardless of the fact that this case concerned GATT Article XI and not particularly GATT Article XIII, it was key to determining that *de facto* QRs have a place in WTO law, and as such they must be covered under the requirements of GATT Article XIII, as the provision that sets up the conditions under which QRs –including *de facto* QRs- may be imposed.

3.3 The Rule in Force: *de facto* Discriminatory Measures are Prohibited, Including *de facto* QRs

What this extensive case law analysis on *de facto* measures shows is that clearly *de facto* discrimination has been recognized in WTO law. Every cited PR evidences how generally the non-discrimination obligation includes this type of trade restrictive mechanisms, and particularly, how the general QR prohibition is not limited whatsoever to *de jure* ones. It is appropriate to clarify that this are only some of the occasions in which Panels have recognized this statement, since there are other cases, for instance Argentina-Hides and Leather or China raw materials –which will be addressed further on-in which the Panels pointed in that same direction.

³⁶ PR, *India-Autos*, para. 7.277.

³⁷ *Ibid*, para.7.270.

4. DE FACTO QUANTITATIVE RESTRICTIONS UNDER ARTICLE XIII

7.1 The Difference in Wording (Article XI vs. Article XIII)

As mentioned, GATT Article XI sets forth a general ban of QRs. On the other hand, GATT Article XIII serves as an exception to this general prohibition, provided that they are imposed on a non-discriminatory basis³⁸. However, the core issue lies at the uncertainty of whether their scopes are equally broad, since the difference in their wording might lead to believe otherwise. Indeed, Article XI states that:

“No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.”

Recognized scholars, such as Peter Van den Bossche and Werner Zdouc, explain how Article XI differs from other Articles of the GATT, since it refers not only to prohibitions or restrictions but to a broader scope of measures³⁹. The term *measure* was interpreted by the Panel in Japan- Semiconductors as follows:

“This wording indicated clearly that any measure instituted or maintained by a contracting party which restricted the exportation or sale for export of products was covered by this provision, irrespective of the legal status of the measure.”⁴⁰

³⁸ PR, *Turkey-Textiles*, para. 9.62.

³⁹ Van den Bossche, P; Zdouc, W., *The Law and Policy of the World Trade Organization: Text, Cases and Materials*, Cambridge University Press, 3rd edition (2013), pg.483.

⁴⁰ PR, *Japan-Semiconductors*, para. 106. It is also useful to recall one definition of the AB, as follows: “...any act or omission attributable to a WTO Member...”. ABR, *US -Corrosion-Resistant Steel Sunset Review*, para. 81.

This scope includes imports as well⁴¹.

On the other hand, Article XIII reads as follows:

“No prohibition or restriction shall be applied by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation of any product destined for the territory of any other contracting party, unless the importation of the like product of all third countries or the exportation of the like product to all third countries is similarly prohibited or restricted.”

Clearly, the wording of Article XIII does not include *other measures* but is limited to *any prohibition or restriction*. Consequently, a plain reading of both Articles would lead to the conclusion that, since *de facto* measures appear to fall into the scope of GATT Article XI via the term *other measures*, Article XIII does not encompass them.

However, this interpretation was revised –as pointed out in section 3.2 above– by the Panel in *India-Autos*, where it gave a broader scope to the term *restriction* contained in Article XIII:

“On a plain reading, it is clear that a "restriction" need not be a blanket prohibition or a precise numerical limit. Indeed, the term "restriction" cannot mean merely "prohibitions" on importation, since Article XI:1 expressly covers both "prohibition or restriction".⁴²

In this sense, the Panel interpreted that the scope of the term *restriction* –specially when accompanied by the term *prohibition*, as happens also in the case of GATT Article XIII- is broad enough to cover any limiting condition, therefore leaving without effect the

⁴¹ PR, *India-Autos*, para. 7.272.

⁴² *Ibid*, para. 7.270.

aforementioned difference in the wording of these two provisions, and permitting the inclusion of *de facto* measures into the scope of both. .

7.2 The Proposal: *De Facto* Quantitative Restrictions fall into the Scope of Article XIII

In view of the above, one can conclude that, as the scope of GATT Article XIII is not limited to a certain kind of restriction or prohibition, but is comprehensive of any affectation to the access to an import quota, if a tariff measure within a TRQ impedes a non-discriminatory access, the tariff measure would fall into the scope of GATT Article XIII.

Moreover, one should consider the practical effect of this finding, as was clearly emphasized by that Panel, that it is not necessary to prove the existence of a precise numerical limit to find a QR. Clearly, *de facto* QRs have been recognized by WTO law. Moreover, tariff measures imposed within TRQs must be subject to review under GATT Article XIII in order to determine the existence of a discriminatory prohibition or restriction between Members and/or the disregard to the aim at a distribution of trade between third countries, which would lead to a violation of the MFN duty under GATT Article XIII.

5. BURDEN OF PROOF OF THE COMPLAINANT WHEN CLAIMING A *DE FACTO* QUANTITATIVE RESTRICTION

Claims regarding measures that violate GATT Article XI through the restriction of the exportation of a product, will require a different type of proof depending on whether the measure constitutes a *de jure* or a *de facto* QR. A review of some case law regarding this matter reinforces this conclusion.

5.1 Case Law Analysis

5.1.1 EC - Poultry -Report of the Appellate Body (1998)

Even though this is the only ABR that will be included, it deserves less importance in this final proposal than any of the PRs that will be subsequently exposed. The reason relies upon the fact that the reference made to the element of causation in this report concerns the *Licensing Agreement*, but still remains useful since the causal link is set between the licensing procedure and the effect of market distortion, taking into account the total trade over the relevant period of the preceding three years. Consequently, there is no reason to believe that the application shall be any different regarding QRs.

In this particular case, Brazil complained against the EC's regime for the importation of certain poultry products, and the licensing procedure for the TRQ for the products at issue. One of the appealed matters was whether the Panel had erred when examining if Brazil's falling market share in the EC poultry market was caused by the implemented licensing procedure. The AB, taking into account the Panel's previous findings based on the total trade over the relevant period, stated as follows:

“Brazil argues that the Panel did not consider a number of other arguments in its examination of the existence of trade distortion: that licenses have been apportioned in non-economic quantities; that there have been frequent changes to the licensing rules; that license entitlement has been based on export performance; and that there has been speculation in licenses. These

arguments, however, do not address the problem of establishing a causal relationship between imposition of the EC licensing procedure and the claimed trade distortion. Even if conceded *arguendo*, these arguments do not provide proof of the essential element of causation.”⁴³

Even if for this particular case the factual background does not keep a direct relationship as is the case with the remaining reports to be analyzed, the AB in EC-Poultry inclined towards the stricter rule; that is, the need for the demonstration of causal link between the measure at issue and the market share distortion.

5.1.2 Argentina - Hides and Leather -Report of the Panel (2000)

This case took place due to a claim brought by the EC regarding the maintenance of an alleged *de facto* export prohibition on raw and semi-tanned bovine hides through the authorization granted by the Argentinean authorities to the leather industry to participate in the customs control before the export of the products at issue. In this opportunity, the Panel stated the following:

“Even if it emerges from trade statistics that the level of exports is unusually low, this does not prove, in and of itself, that that level is attributable, in whole or in part, to the measure alleged to constitute an export restriction. Particularly in the context of an alleged *de facto* restriction and where, as here, there are possibly multiple restrictions, it is necessary for a complaining party to establish a causal link between the contested measure and the low level of exports. In our view, whatever else it may involve, a demonstration of causation must consist of a persuasive explanation of precisely how the measure at issue causes or contributes to the low level of exports.”⁴⁴

It is this particular ruling of the Panel that draws the attention towards the stricter

⁴³ ABR, *EC-Poultry*, para. 127.

⁴⁴ PR, *Argentina- Hides and Leather*, para. 11.21.

position, which assigns the complainant the burden of proving the actual contribution of the measure to the generation of the undesired effect. It was for this reason that the Panel determined that the presence of the downstream industry in the customs control did not suffice to support the claim of a *de facto* restriction.

5.1.3 Colombia - Ports of Entry -Report of the Panel (2009)

This controversy arose due to certain measures imposed by Colombia regarding indicative prices in customs procedures and restrictions on ports of entry available to subject textiles, apparel and footwear. For the purposes of the actual analysis, the limitation on the ports of entry is the main focus. On this grounds, Colombia limited the products at issue by restricting their entry into the country only through the Bogota airport or the Barranquilla seaport, when coming from or transiting through Panama. When examining the violation of GATT Article XI through the ports of entry measure, the Panel stated:

“The Panel believes a thorough examination of trade effects would be unnecessary and unwarranted due to the inherent difficulty in interpreting trade statistics, in which a wide variety of economic and other factors complicate the picture. Accordingly, the Panel will determine whether the ports of entry measure is a restriction on importation within the meaning of Article XI:1, based on whether the measure has a limiting effect on importation by negatively affecting the competitive opportunities available to textile, apparel and footwear products arriving from Panama. The Panel will base its assessment on the terms of the measure as opposed to any previous or ongoing effect on the level of imports, in terms of volume or value. In light of this approach, Colombia cannot rely on evidence of an increase in imports to rebut arguments of a restriction on importation. Similarly, Panama cannot point solely to evidence demonstrating a decline in the level of imports to establish the existence of a restriction on importation or exportation.”⁴⁵

Even when the Panel did not classify the measure strictly as a *de facto* nor as a *de*

⁴⁵ PR, *Colombia- Ports of Entry*, para. 7.256.

jure QR, it did remark that Panama characterized its claim as a *de jure* measure and that there were several additional factors that complicated the picture, other than the ones concerning the ports of entry. Due to these considerations, it stood by the opposite position or the wider interpretation of the burden of proof corresponding to the complainant party. Consequently, its decision on the conformity of the restriction with the GATT rested upon the terms of the measure or the potentiality of the measure to affect the Panama's competitive opportunities.

5.1.4 China - Raw Materials -Report of the Panel (2011)

The factual background in this final case can be summarized in the imposition of export duties, export quotas, export licensing and minimum export price requirements on certain products like coke, fluorspar and magnesium, among others (the "raw materials") by China. In this occasion, regarding specifically the requirement to export the products at issue at a coordinated export price, not lower than the minimum established price, the Panel considered:

"The Panel considers the very *potential* to limit trade is sufficient to constitute a "restriction [] ... on the exportation or sale for export of any product" within the meaning of Article XI:1 of the GATT 1994. The Panel considers this view is consistent with the conclusion by the Panel on *Colombia -Ports of Entry* that any measure that creates uncertainty as to the ability to import/export, and otherwise "compete" in the marketplace, violates Article XI:1."⁴⁶

Once again, and as was literally referenced in the previous quote, the Panel agreed with the decision on the Colombia-Ports of entry issue, by pointing out that the potential of the measure to limit trade suffices to argue its inconsistency with Article XI:1.

⁴⁶ PR, *China- Raw Materials*, para. 7.1081.

5.2 The Rule in Force: Burden of Proof depending on the *De Facto* or the *De Jure* nature of the measure

The previous analysis reveals how some Panels' rulings have shown a tendency to require the demonstration of an actual QR effect of the measure at issue, while some other Panels have decided that the potentiality of the measure to create this type of effect suffices to fulfill the burden of proof. The particular issue has not been raised in appeal, and therefore has not been reviewed by the AB; but so far, Panels have established that claims regarding measures that violate GATT Article XI through the restriction of the exportation of a product, will require a different type of proof depending on whether the measure constitutes a QR *de jure*, or a *de facto* one: the former would require the sole proof of the potentiality of the measure to create a QR effect, while the latter implies a stricter demonstration of the nexus of the measure at issue and its QR effect. This general rule shall therefore apply to any *de facto* QR under GATT Article XIII as well.

6. CONCLUSIONS

As has been repeatedly established, TRQs have a hybrid or dual nature due to the fact that these measures are composed of both, a tariff and a non-tariff measure. Their structure leads, as a consequence, to a fragmented regulation that implies analysis under GATT Article I concerning the non-discriminatory administration of their tariff component, and GATT Article XIII regarding a non-discriminatory administration of QRs.

WTO law lacks a provision that encompasses TRQs as a whole. Consequently, the Panels and the AB have been addressing this matter in a fragmented manner, as can be seen through their reports. However, a unified approach would be proper since these measures are, ultimately, a single one composed by two different elements.

A first solution to the problematic would be to include a provision in the GATT exclusively for TRQs, in order to get rid of the difficulties that come with its interpretation. However, since this solution is not feasible, one should adequate the current instruments that the WTO provides for, regarding this matter –i.e. existing WTO law and case law.

A complete case law analysis leads to the conclusion that tariff measures can create *de facto* QRs if they cause a discriminatory administration of the quota within a TRQ. The previous statement is based on two pillars that were developed throughout this document, i.e. (i) that the scope of GATT Articles is not restricted to formal situations, but encompasses all discriminatory measures through the figure of *de facto* discrimination, with the aim of encouraging the basic objectives of WTO law, and (ii) particularly Article XIII permits the inclusion of this *de facto* measures, since its wording includes the term *restrictions*, which according to the Panel in the India-Autos case encompasses any limiting condition.

When read together, these two pillars hold the conclusion that a tariff measure can cause a *de facto* QR within TRQ if it violates Article's XIII purpose, i.e. to ensure a non-discriminatory administration of the quota, regarding its access or allocation, as this Article is not limited to QRs only.

Finally, one should take into account the rule that has been set through case law on the burden of proof that relies upon the complainant party regarding *de facto* QRs. As was explained, two tendencies have divided the various PRs. Accordingly, some Panels rulings have shown a tendency to require the demonstration of an actual QR effect of the measure at issue, while some other Panels have decided that the potentiality of the measure to create this type of effect suffices to fulfill the burden of proof.

A unified interpretation of all these findings showed that it is when it comes to claims regarding *de jure* measures that the Panels find the sole demonstration of the potentiality of the measure to create QR effects to suffice, while regarding claims on *de facto* measures the Panels demand proof of the actual QR consequence. Accordingly, one can conclude that complains regarding tariff measures that lead to *de facto* QRs within TRQs would require the demonstration of the QR effect, according to the actual rule set through case law.

ANNEX: EC-BANANAS: THE LANDMARK CASE

The EC-Bananas case was, without a doubt, a landmark case. Its importance relies upon the analysis that it made on various articles of the Covered Agreements, and the noticeable length it gained over the years. This last brief chapter is destined for those readers who wish to learn more about the so many times quoted EC-Bananas case. For this purpose, a historical review, and its most important facts will be provided, preceded by a short analysis on the practical effects that this decision brings to countries like Colombia.

Regarding the historical review, and due to the fact that the large extension this case achieved over the years turns it into a relatively complex one, the following excerpts of an American Society of International Law work become useful to briefly address this matter, as follows:

“The dispute involves the EU's regulatory regime for imported bananas, enacted in 1993. Prior to 1992 each of the 12 EU member states had its own banana import regime. Germany operated on a free market system and had no import restrictions. The other 11 members imposed a 20% tariff, and 6 members (France, Italy, Portugal, Spain, Greece, and the UK) also applied quotas on bananas produced in Central and South America. These latter restrictions were designed to protect the EU market for bananas produced in former EU territories and in the ACP countries (developing countries in Africa, the Caribbean and the Pacific) that entered duty free under the Lomé Convention. As part of its 1992 integration program the EU established, effective July 1, 1993, an EU-wide banana trade regime.”

“Under this complex system banana imports were subject to one of two two-tier tariff rate quota systems based on their country of origin. ACP bananas received duty-free entry up to a ceiling of 857,7000 metric tons, allocated to each of the banana-producing countries on the basis of their historic exports to the EU. ACP imports in excess of this amount paid 750 ECUs per metric ton. Non-ACP bananas were subject to a duty of ECU 100 per metric ton on imports up to 2 million metric tons, and ECU 850 on imports above that

amount. Thirty-three and a half percent of the 2 million tons of non-ACP bananas subject to the lower duty of ECU 100 was reserved for European marketing firms, most of which historically had marketed only ACP bananas.”⁴⁷

On the second hand, and once the relevant facts of the factual background have been cleared out, one must go back to the very origin of TRQs to understand how deeply connected these are to agricultural products and how –as a consequence– these have mayor importance on economies which are strongly based on banana trade, such as the Colombian one.⁴⁸

For this matter, one must go back to the Uruguay Round, and particularly to a concept that emerged from this round of negotiations, i.e. *tariffication*.⁴⁹ As a fact, in that opportunity countries were required to convert all non-tariff measures on agricultural products into their equivalent tariff measure. However, this conversion process resulted, in many opportunities, in even higher barriers than the ones imposed prior to the *tariffication*. Due to this outcome, minimum-participation measures had to be implemented, in order to ensure that a certain amount of a countries’ products were still imported. This initiative’s final results were the establishment of TRQs.⁵⁰

Even though this work does not concern the Agreement on Agricultural Goods, the previous explanation on the origin of TRQs shows just how important it is for countries to take into account the fact that the Agreement on Agricultural Products is not excepted of

⁴⁷Patterson, *The US-EU Banana Dispute.*, (2001), Retrieved from: <https://www.asil.org/insights/volume/6/issue/4/us-eu-banana-dispute>

⁴⁸ GRECO (Grupo de Estudios del Crecimiento Económico Colombiano), *Comercio Exterior Y Actividad Económica De Colombia En El Siglo XX: Exportaciones Totales Y Tradicionales*, (1999), pgs. 4,37, 51-57, Retrieved from: <http://www.banrep.gov.co/docum/ftp/borra163.pdf>. Proof of the impact and the interest of Colombia in the issue is the fact that the very first legal challenge on this measure –i.e., the difference in treatment between ACP countries and non ACP countries- brought before the Dispute Settlement Body was brought by Colombia and four more Latin American countries –those are Costa Rica, Guatemala, Nicaragua and Venezuela-.

⁴⁹ “Tariffication is the process of conversion of all non-tariff market protection measures into the tariff equivalent. The tariff equivalent to a non-tariff barrier is the difference between the average domestic price and the average world market price.”. United Nations, *United Nations Conference on Trade and Development: Dispute Settlement*, World Trade Organization (2003), pg. 6 Retrieved from: http://unctad.org/en/docs/edmmisc232add32_en.pdf

⁵⁰ *Ibid*, pg. 14.

the obligations under GATT Article XIII⁵¹. Consequently, what this ultimately means is that, no matter the field in which TRQs are being analyzed, the obligation to administer them in a non-discriminatory manner persists.

The EC-Bananas III case, as important as it was, did not address the impact that tariffs can have on the access and allocation of quotas within a TRQ. It was for this reason that, by taking this case as a basis for the whole work, and updating it through more recent case law, the purpose was to obtain as a result the most efficient proposal to protect international trade –and particularly countries like Colombia– from the unwanted uses that can be given to TRQS, i.e. *de facto* QRs in future cases.

⁵¹ *Ibid*, pg. 48